REGULATORY ACCOUNTABILITY ACT OF 2011

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 3010

OCTOBER 25, 2011

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REGULATORY ACCOUNTABILITY ACT OF 2011

TUESDAY, OCTOBER 25, 2011

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:24 a.m., in room 2141, Rayburn Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Sensenbrenner, Coble, Gallegly, Lungren, Chabot, Issa, Franks, Gohmert, Jordan, Poe, Griffin, Gowdy, Ross, Adams, Quayle, Conyers, Scott, Watt, Jackson Lee, Waters, Johnson, and Quigley.

Mr. SMITH. The Judiciary Committee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone here, particularly our witnesses.

I am going to recognize myself for an opening statement, then the Ranking Member, then the Chairman and Ranking Member of the relevant Subcommittee.

The American people urgently need jobs that only economic growth can give. Standing in the way of growth and job creation is a wall of Federal regulation. As of 2008, Federal regulations costs our economy $1.75 trillion each year.

The Obama administration seeks to add billions more with a host of new major regulations. Its 2011 regulatory agenda calls for over 200 new major rules, each of which will affect the economy by $100 million or more each year. And the Administration has proposed four times the number of major regulations than the previous Administration over a similar period of time.

New regulatory burdens and uncertainty about the economy have helped to keep trillions of dollars of private sector capital on the sidelines. Companies cannot safely invest if they cannot tell whether tomorrow's regulations will make their investments unprofitable. Without new investment, we cannot expect new jobs.

The Administrative Procedure Act is out of date and encourages regulatory overreach and excessive regulatory cost. Enacted in 1946, it places only a handful of light restrictions on the Federal rulemaking process. Congress wrote it long before anyone imagined the reach and expense of the modern regulatory state.

The APA does not require agencies to identify the cost of their regulations before they impose them. It does not require agencies to consider reasonable, lower cost alternatives. The APA does not

even require agencies to rely on the best reasonably obtainable evidence.

While the APA does require agencies to give notice of proposed rulemaking and receive public comment on its proposals, too often that is an after-the-fact exercise. Frequently agencies predetermine the outcome of rulemakings, and notice and comment serves only to paper over the record.

The Regulatory Accountability Act fixes this problem by bringing the APA up-to-date. Under its provisions, agencies are required to assess the costs and benefits of regulatory alternatives. Unless interests of public health, safety, or welfare require otherwise, agencies must adopt the least costly alternative that achieves the regulatory objectives Congress has established.

The Regulatory Accountability Act contains common sense reforms that have bipartisan support in both the House and the Senate. In large part, that is because so many of its provisions are modeled on the terms of executive orders that Presidents Reagan, Clinton, Bush, and Obama have issued to compensate for the APA's weaknesses. Over the past 3 decades, these bipartisan executive orders have proved that the principles of the Regulatory Accountability Act work, but the executive orders are not permanent, are not judiciously enforceable, and do not bind independent agencies.

Congress should pass the Regulatory Accountability Act to make cost justification and other common sense practices permanent and enforceable fixtures of the regulatory landscape. If America's economy is to grow, produce jobs, and remain globally competitive, Washington must change.

The Obama administration itself has made concessions to this view. Executive Order 13563 acknowledges that new regulations, quote, must taken into account benefits and costs. In September 2011, the Administration said no to a new multibillion regulation, at least for now. That regulation was the Environmental Protection Agency's new ozone national ambient air quality standards.

Under the Regulatory Accountability Act, principles of Executive Order 13563 and its predecessors would, at last, become binding law. Sound decisions that meet statutory objectives, while they respect the economy's needs, would be the order of the day, not the rare occurrence. American jobs, American growth, and American competitiveness would all be the better for it.

That concludes my opening statement, and the gentleman from Michigan, the Ranking Member of the full Committee, Mr. Conyers, is recognized for his.

[The bill, H.R. 3010, follows:]

112TH CONGRESS
1ST SESSION

H. R. 3010

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

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2011

Mr. SMITH of Texas (for himself, Mr. COBLE, and Mr. PETERSON) introduced the following bill; which was referred to the Committee on the Judiciary

---

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 2011".

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

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

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

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

"(D) significant costs on multiple sectors of the economy;

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

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

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

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

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

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

"(D) significant costs for multiple sectors of the economy;

"(19) the 'Information Quality Act' means section 515 of Public Law 106–554, the Treasury and General Government Appropriations Act for Fiscal

Year 2001, and guidelines issued by the Administrator of the Office of Information and Regulatory Affairs or other agencies pursuant to the Act; and

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

SEC. 3. RULEMAKING.

(a) Section 553(a) of title 5, United States Code, is amended by striking "(a) This section applies" and inserting "(a) APPLICABILITY.—This section applies".

(b) Section 553 of title 5, United States Code, is amended by striking subsections (b) through (e) and inserting the following:

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

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

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

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

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

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

"(A) the alternative of no Federal response;

"(B) amending or rescinding existing rules;

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

"(D) potential responses that—

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

"(ii) establish economic incentives to encourage desired behavior;

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

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

"(6) Notwithstanding any other provision of law—

"(A) the potential costs and benefits associated with potential alternative rules and other responses considered under section 553(b)(5), including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness;

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

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

"(c) ADVANCE NOTICE OF PROPOSED RULE MAKING FOR MAJOR RULES AND HIGH-IMPACT RULES.—

"(1) In the case of a rule making for a major rule or high-impact rule, not later than 90 days before a notice of proposed rule making is published in the Federal Register, an agency shall publish advance notice of proposed rule making in the Federal Register. In publishing such advance notice, the agency shall—

"(A) include a written statement identifying, at a minimum—

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

"(ii) the legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether

the agency has discretion to commence a rule making; and

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

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

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

"(d) NOTICES OF PROPOSED RULE MAKING; DETERMINATIONS OF OTHER AGENCY COURSE.—Following completion of procedures under subsection (c), if applicable, and consultation with the Administrator of the Office of Information and Regulatory Affairs, the agency shall publish either a notice of proposed rule making or a determination of other agency course, in accordance with the following:

"(1) A notice of proposed rule making shall include—

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

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

"(C) the terms of the proposed rule;

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

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

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

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

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

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

"(F) a reasoned preliminary determination that the benefits of the proposed rule meet the

1 relevant statutory objectives and justify the
2 costs of the proposed rule (including all costs to
3 be considered under subsection (b)(6)), based
4 on the information described under subpara-
5 graph (D);
6 "(G) a discussion of—
7 "(i) the alternatives to the proposed
8 rule, and other alternative responses, con-
9 sidered by the agency under subsection (b);
10 "(ii) the costs and benefits of those
11 alternatives (including all costs to be con-
12 sidered under subsection (b)(6));
13 "(iii) whether those alternatives meet
14 relevant statutory objectives; and
15 "(iv) why the agency did not propose
16 any of those alternatives; and
17 "(H)(i) a statement of whether existing
18 rules have created or contributed to the prob-
19 lem the agency seeks to address with the pro-
20 posed rule; and
21 "(ii) if so, whether or not the agency pro-
22 poses to amend or rescind any such rules, and
23 why.
24 All information considered by the agency, and
25 steps to obtain information by the agency, in

1 connection with its determination to propose
2 the rule, including all information described by
3 the agency under subparagraph (D) and, at the
4 discretion of the President or the Administrator
5 of the Office of Information and Regulatory Af-
6 fairs, information provided by that Office in
7 consultations with the agency, shall be placed in
8 the docket for the proposed rule and made ac-
9 cessible to the public for the public's use when
10 the notice of proposed rule making is published.
11 "(2)(A) A notice of determination of other
12 agency course shall include a description of the al-
13 ternative response the agency determined to adopt.
14 "(B) If in its determination of other agency
15 course the agency makes a determination to amend
16 or rescind an existing rule, the agency need not un-
17 dertake additional proceedings under subsection (c)
18 before it publishes a notice of proposed rule making
19 to amend or rescind the existing rule.
20 All information considered by the agency, and steps
21 to obtain information by the agency, in connection
22 with its determination of other agency course, in-
23 cluding but not limited to all information that would
24 be required to be described by the agency under
25 paragraph (1)(D) if the agency had determined to

publish a notice of proposed rule making and, at the discretion of the President or the Administrator of the Office of Information and Regulatory Affairs, information provided by that Office in consultations with the agency, shall be placed in the docket for the determination and made accessible to the public for the public's use when the notice of determination is published.

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

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

"(B) when other than under subsection (e) of this section rules are required by statute or at the discretion of the agency to be made on the record after opportunity for an agency hearing, sections 556 and 557 shall apply, and paragraph (4), requirements of subsection (e) to receive comment outside of the procedures of

1 sections 556 and 557, and the petition proce-
2 dures of subsection (e)(6) shall not apply.
3 The agency shall provide not fewer than 90 days for
4 interested persons to submit written data, views, or
5 argument (or 120 days in the case of a proposed
6 major or high-impact rule).
7 "(4)(A) Within 30 days of publication of notice
8 of proposed rulemaking, a member of the public may
9 petition for a hearing in accordance with section 556
10 to determine whether any evidence or other informa-
11 tion upon which the agency bases the proposed rule
12 fails to comply with of the Information Quality Act.
13 "(B)(i) The agency may, upon review of the pe-
14 tition, determine without further process to exclude
15 from the rule making the evidence or other informa-
16 tion that is the subject of the petition and, if appro-
17 priate, withdraw the proposed rule. The agency shall
18 promptly publish any such determination.
19 "(ii) If the agency does not resolve the petition
20 under the procedures of clause (i), it shall grant any
21 such petition that presents a prima facie case that
22 evidence or other information upon which the agency
23 bases the proposed rule fails to comply with the In-
24 formation Quality Act, hold the requested hearing
25 not later than 30 days after receipt of the petition,

1 provide a reasonable opportunity for cross-examina-
2 tion at the hearing, and decide the issues presented
3 by the petition not later than 60 days after receipt
4 of the petition. The agency may deny any petition
5 that it determines does not present such a prima
6 facie case.

7 "(C) There shall be no judicial review of the
8 agency's disposition of issues considered and decided
9 or determined under subparagraph (B)(ii) until judi-
10 cial review of the agency's final action. There shall
11 be no judicial review of an agency's determination to
12 withdraw a proposed rule under subparagraph
13 (B)(i).

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

18 "(e) HEARINGS FOR HIGH-IMPACT RULES.—Fol-
19 lowing notice of a proposed rule making, receipt of com-
20 ments on the proposed rule, and any hearing held under
21 subsection (d)(4), and before adoption of any high-impact
22 rule, the agency shall hold a hearing in accordance with
23 sections 556 and 557, unless such hearing is waived by
24 all participants in the rulemaking other than the agency.
25 The agency shall provide a reasonable opportunity for

1 cross-examination at such hearing. The hearing shall be
2 limited to the following issues of fact, except that partici-
3 pants at the hearing other than the agency may waive de-
4 termination of any such issue:

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

7 "(2) Whether there is an alternative to the pro-
8 posed rule that would achieve the relevant statutory
9 objectives at a lower cost (including all costs to be
10 considered under subsection (b)(6)) than the pro-
11 posed rule.

12 "(3) If there is more than one alternative to the
13 proposed rule that would achieve the relevant statu-
14 tory objectives at a lower cost than the proposed
15 rule, which alternative would achieve the relevant
16 statutory objectives at the lowest cost.

17 "(4) Whether, if the agency proposes to adopt
18 a rule that is more costly than the least costly alter-
19 native that would achieve the relevant statutory ob-
20 jectives (including all costs to be considered under
21 subsection (b)(6)), the additional benefits of the
22 more costly rule exceed the additional costs of the
23 more costly rule.

24 "(5) Whether the evidence and other informa-
25 tion upon which the agency bases the proposed rule

1 meets the requirements of the Information Quality
2 Act.
3 "(6) Upon petition by an interested person who
4 has participated in the rulemaking, other issues rel-
5 evant to the rule making, unless the agency deter-
6 mines that consideration of the issues at the hearing
7 would not advance consideration of the rule or
8 would, in light of the nature of the need for agency
9 action, unreasonably delay completion of the rule
10 making. An agency shall grant or deny a petition
11 under this paragraph within 30 days of its receipt
12 of the petition.
13 No later than 45 days before any hearing held under this
14 subsection or sections 556 and 557, the agency shall pub-
15 lish in the Federal Register a notice specifying the pro-
16 posed rule to be considered at such hearing, the issues
17 to be considered at the hearing, and the time and place
18 for such hearing, except that such notice may be issued
19 not later than 15 days before a hearing held under sub-
20 section (d)(4)(B).
21 "(f) FINAL RULES.—(1) The agency shall adopt a
22 rule only following consultation with the Administrator of
23 the Office of Information and Regulatory Affairs to facili-
24 tate compliance with applicable rule making requirements.

1 "(2) The agency shall adopt a rule only on the basis
2 of the best reasonably obtainable scientific, technical, eco-
3 nomic, and other evidence and information concerning the
4 need for, consequences of, and alternatives to the rule.
5 "(3)(A) Except as provided in subparagraph (B), the
6 agency shall adopt the least costly rule considered during
7 the rule making (including all costs to be considered under
8 subsection (b)(6)) that meets relevant statutory objectives.
9 "(B) The agency may adopt a rule that is more costly
10 than the least costly alternative that would achieve the rel-
11 evant statutory objectives only if the additional benefits
12 of the more costly rule justify its additional costs and only
13 if the agency explains its reason for doing so based on
14 interests of public health, safety or welfare that are clearly
15 within the scope of the statutory provision authorizing the
16 rule.
17 "(4) When it adopts a final rule, the agency shall
18 publish a notice of final rule making. The notice shall in-
19 clude—
20 "(A) a concise, general statement of the rule's
21 basis and purpose;
22 "(B) the agency's reasoned final determination
23 of need for a rule to address the problem the agency
24 seeks to address with the rule, including a statement
25 of whether a rule is required by statute;

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

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

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

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

"(E) the agency's reasoned final determination—

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

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

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

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

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

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

"(ii) review of a rule under a plan required by clause (i) of this subparagraph shall take into account the factors and criteria set forth in subsections (b) through (f) of section 553 of this title. All information considered by the agency in connection with its adoption of the rule, and, at the discre-

1 tion of the President or the Administrator of the Of-
2 fice of Information and Regulatory Affairs, informa-
3 tion provided by that Office in consultations with the
4 agency, shall be placed in the docket for the rule and
5 made accessible to the public for the public's use no
6 later than when the rule is adopted.

7 "(g) EXCEPTIONS FROM NOTICE AND HEARING RE-
8 QUIREMENTS.—(1) Except when notice or hearing is re-
9 quired by statute, subsections (c) through (e) of this sec-
10 tion do not apply to interpretive rules, general statements
11 of policy, or rules of agency organization, procedure, or
12 practice.

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

23 "(B) If, following compliance with subparagraph (A)
24 of this paragraph, the agency adopts an interim rule, it
25 shall commence proceedings that comply fully with sub-

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

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

21 "(h) ADDITIONAL REQUIREMENTS FOR HEARINGS.—
22 When a hearing is required under subsection (e) or is oth-
23 erwise required by statute or at the agency's discretion
24 before adoption of a rule, the agency shall comply with
25 the requirements of sections 556 and 557 in addition to

1 the requirements of subsection (f) in adopting the rule and
2 in providing notice of the rule's adoption.
3 "(i) DATE OF PUBLICATION OF RULE.—The required
4 publication or service of a substantive final or interim rule
5 shall be made not less than 30 days before the effective
6 date of the rule, except—
7 "(1) a substantive rule which grants or recog-
8 nizes an exemption or relieves a restriction;
9 "(2) interpretive rules and statements of policy;
10 or
11 "(3) as otherwise provided by the agency for
12 good cause found and published with the rule.
13 "(j) RIGHT TO PETITION.—Each agency shall give
14 an interested person the right to petition for the issuance,
15 amendment, or repeal of a rule.
16 "(k) RULE MAKING GUIDELINES.—(1)(A) The Ad-
17 ministrator of the Office of Information and Regulatory
18 Affairs shall have authority to establish guidelines for the
19 assessment, including quantitative and qualitative assess-
20 ment, of the costs and benefits of potential, proposed, and
21 final rules and other economic issues or issues related to
22 risk that are relevant to rule making under this section
23 and other sections of this title. The rigor of cost-benefit
24 analysis required by such guidelines shall be commensu-

1 rate, in the Administrator's determination, with the eco-
2 nomic impact of the rule.
3 "(B) To ensure that agencies use the best available
4 techniques to quantify and evaluate anticipated present
5 and future benefits, costs, other economic issues, and risks
6 as accurately as possible, the Administrator of the Office
7 of Information and Regulatory Affairs shall regularly up-
8 date guidelines established under paragraph (1)(A) of this
9 subsection.
10 "(2) The Administrator of the Office of Information
11 and Regulatory Affairs shall also have authority to issue
12 guidelines to promote coordination, simplification and har-
13 monization of agency rules during the rule making process
14 and otherwise. Such guidelines shall assure that each
15 agency avoids regulations that are inconsistent or incom-
16 patible with, or duplicative of, its other regulations and
17 those of other Federal agencies and drafts its regulations
18 to be simple and easy to understand, with the goal of mini-
19 mizing the potential for uncertainty and litigation arising
20 from such uncertainty.
21 "(3) To ensure consistency in Federal rule making,
22 the Administrator of the Office of Information and Regu-
23 latory Affairs shall—
24 "(A) issue guidelines and otherwise take action
25 to ensure that rule makings conducted in whole or

in part under procedures specified in provisions of law other than those of subchapter II of this title conform to the fullest extent allowed by law with the procedures set forth in section 553 of this title; and

"(B) issue guidelines for the conduct of hearings under subsections 553(d)(4) and 553(e) of this section, including to assure a reasonable opportunity for cross-examination. Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines issued under this subparagraph.

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

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

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

SEC. 4. AGENCY GUIDANCE; PROCEDURES TO ISSUE MAJOR GUIDANCE; PRESIDENTIAL AUTHORITY TO ISSUE GUIDELINES FOR ISSUANCE OF GUIDANCE.

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

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

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

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

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

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

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

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

"(b) Agency guidance—

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

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

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

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

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

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

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

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

1 "(e)(1) The transcript of testimony and exhibits, to-
2 gether with all papers and requests filed in the proceeding,
3 constitutes the exclusive record for decision in accordance
4 with section 557 and, on payment of lawfully prescribed
5 costs, shall be made available to the parties. When an
6 agency decision rests on official notice of a material fact
7 not appearing in the evidence in the record, a party is
8 entitled, on timely request, to an opportunity to show the
9 contrary.

10 "(2) Notwithstanding paragraph (1) of this sub-
11 section, in a proceeding held under this section pursuant
12 to section 553(d)(4) or 553(e), the record for decision
13 shall include any information that is part of the record
14 of proceedings under section 553.

15 "(f) When an agency conducts rule making under this
16 section and section 557 directly after concluding pro-
17 ceedings upon an advance notice of proposed rulemaking
18 under section 553(c), the matters to be considered and
19 determinations to be made shall include, among other rel-
20 evant matters and determinations, the matters and deter-
21 minations described in subsections (b) and (f) of section
22 553.

23 "(g) Upon receipt of a petition for a hearing under
24 this section, the agency shall grant the petition in the case
25 of any major rule, unless the agency reasonably deter-

1 mines that a hearing would not advance consideration of
2 the rule or would, in light of the need for agency action,
3 unreasonably delay completion of the rule making. The
4 agency shall publish its decision to grant or deny the peti-
5 tion when it renders the decision, including an explanation
6 of the grounds for decision. The information contained in
7 the petition shall in all cases be included in the adminis-
8 trative record. This subsection shall not apply to rule mak-
9 ings that concern monetary policy proposed or imple-
10 mented by the Board of Governors of the Federal Reserve
11 System or the Federal Open Market Committee.".

12 **SEC. 6. ACTIONS REVIEWABLE.**

13 Section 704 of title 5, United States Code, is amend-
14 ed—

15 (1) by striking "Agency action made" and in-
16 serting "(a) Agency action made"; and

17 (2) by adding at the end the following:

18 "(b) Other than in cases involving interests of na-
19 tional security, notwithstanding subsection (a) of this sec-
20 tion, upon the agency's publication of an interim rule with-
21 out compliance with section 553 (c), (d), or (e) or require-
22 ments to render final determinations under subsection (f)
23 of section 553, an interested party may seek immediate
24 judicial review under this chapter of the agency's deter-
25 mination to adopt such rule on an interim basis. Review

shall be limited to whether the agency abused its discretion to adopt the interim rule without compliance with section 553 (c), (d), or (e) or without rendering final determinations under subsection (f) of section 553.''.

SEC. 7. SCOPE OF REVIEW.

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

(1) by striking ''To the extent necessary'' and inserting ''(a) To the extent necessary'';

(2) in paragraph (2)(A) of subsection (a) (as redesignated by paragraph (1) of this section), by inserting after ''in accordance with law'' the following: ''(including the Information Quality Act)''; and

(3) by adding at the end the following:

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

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

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

"(3) determinations under interlocutory review pursuant to sections 553(g)(2)(C) and 704(b).

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

SEC. 8. ADDED DEFINITION.

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

(1) in paragraph (1), by striking "and";

(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. 9. EFFECTIVE DATE.

The amendments made by this Act to—

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

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

1 (3) paragraphs (2) and (3) of section 706(b) of
2 such title; and
3 (4) subsection (c) of section 706 of such title;
4 shall not apply to any rule makings pending or completed
5 on the date of enactment of this Act.

○

Mr. CONYERS. Thank you, Chairman Smith and Members of the Committee.

I welcome all of the witnesses and look forward to what they say about this very important proposal.

In numerous ways, if 3010 is to be taken seriously, it would effectively halt agency rulemaking, undermine critical public health and safety rules. Now, I want to say that again because I would invite discussion around from my colleagues. H.R. 3010 would amend the Administrative Procedure Act in ways that would effectively halt agency rulemaking, undermine critical public health and safety rules. And I would also invite all of the witnesses to comment on that statement as well.

I am particularly concerned because the former chief of law enforcement of California, my good friend, Dan Lungren, has four law schools out of the 62 law professors that have sent a very thorough description of the problems that they see in this bill before us. And one of the professors at my law school in Detroit, whom I have not gotten in touch with yet or haven't succeeded in getting in touch with her yet, is also a signatory.

So let's look at what the problem is. The bill would substitute, they say, for the current Administrative Procedure Act section 553 a new version that is approximately 10 times longer. That is the first sentence.

The second sentence says it would add over 60 new procedural and analytical requirements to the agency rulemaking process, many of which would apply to all nonexempt rulemaking however ordinary and however far removed from the major health, environmental, and safety regulations that we sense animate current concerns.

In the second paragraph, we seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted. Instead, it would likely lead to rulemaking avoidance by agencies, increasing the use of underground rules, case-by-case adjudication, or even prosecutorial actions to achieve policies without having to surmount the additional hurdles presented by the new section 553. Executive officials would find it practically impossible to use rulemaking either to create new regulations or to undue old regulations.

And so they conclude, we therefore oppose the bill in its current form and, more importantly, oppose its basic approach. While we share many of the views expressed in the comprehensive comments of the ABA Section on Administrative Law and Regulatory Practice, we wish here to emphasize our conviction that the positive aspects of the bill identified by the section are greatly outweighed by the damage this bill would cause to administrative agencies and the public welfare they promote if it were enacted.

And so I am going to follow this discussion very carefully. It is extremely important, and I hope that all of my colleagues will as well.

I conclude with this observation, Mr. Chairman. H.R. 3010 would require the agencies consider regulatory costs and benefits of proposed and final rules, quote, notwithstanding any other provision of law establishing a—again in quotations—super mandate. This

overrides provisions in certain laws such as the Clean Air Act that prohibit agencies from considering costs when issuing public health or safety rules.

And so I will put the rest of my statement in the record and welcome the witnesses' testimony. Thank you.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

H.R. 3010, the "Regulatory Accountability Act," would amend the Administrative Procedure Act in numerous ways that would effectively halt agency rulemaking, undermining critical public health and safety rules.

For instance, H.R. 3010 codifies and expands cost-benefit analysis requirements and overrides current law that, in some cases, prohibits agencies from considering cost when public health and safety are at stake.

Currently, under Executive Orders 12866 and 13563, every economically significant rule must undergo a cost-benefit analysis. While proponents of H.R. 3010 claim that it merely codifies the existing analytical requirements contained in those executive orders, H.R. 3010 in fact adds numerous additional analytical requirements to the already substantial analytical process, which threatens "paralysis by analysis."

Moreover, it appears to expand the cost-benefit analysis requirement to include all rules, not just those that are economically significant. Also, H.R. 3010 expands the cost-benefit analysis requirement to include "major guidance" documents. The bill also would require agencies to identify the costs and benefits of alternatives to rules that are ultimately proposed.

Additionally, H.R. 3010 would force agencies to adopt the least costly rule absent a compelling need to protect public health and safety. Under EO 12866, in contrast, agencies must simply determine that the benefits of a proposed rule—including nonquantifiable benefits—justify their costs and that benefits are maximized.

Also, there is concern with the very act of not only statutorily requiring cost-benefit analysis, but with specifying the factors to be considered in that analysis.

Sally Katzen, a former Administrator of the Office of Information and Regulatory Affairs during the Clinton Administration, testified before the Courts, Commercial and Administrative Law Subcommittee that, while both Democratic and Republican administrations have agreed on the basic principle that agencies should engage in cost-benefit analysis of proposed and final rules, codification is problematic because each administration has chosen to place different emphases and nuances into its cost-benefit analysis requirements. Codifying a single, stringent standard would deny such flexibility.

Finally, H.R. 3010 requires that agencies consider regulatory costs and benefits of proposed and final rules "notwithstanding any other provision of law," establishing a "supermandate." This overrides provisions in certain statutes, such as the Clean Air Act, that prohibit agencies from considering costs when issuing public health or safety rules.

And these are just three of many other concerns with H.R. 3010, including the expanded the use of formal rulemaking procedures, which will effectively prevent needed public health and safety rules from being promulgated by requiring them to undergo through a burdensome trial-like process.

Also, H.R. 3010's expanded use of judicial review and a less deferential judicial review standard risks undermining agency rulemaking and reducing political accountability for policy decisions without enhancing due process by allowing generalist judges to second guess agency experts.

I hope that we can have a fulsome discussion about these concerns.

Mr. SMITH. Thank you, Mr. Conyers.

I am sure that some of our witnesses will be happy to respond to your question about whether this eliminates regulations or not, and we can get into that subject on our questions and answers.

The Chairman of the Courts, Commercial and Administrative Law Subcommittee, the gentleman from North Carolina, Mr. Coble, is recognized for an opening statement.

Mr. COBLE. Thank you, Mr. Chairman. I thank you as well for scheduling today's hearing.

Mr. Chairman, often times when one endorses or supports deregulation, he is accused of being insensitive to safety. He is accused to be willing to compromise safety. This is unfortunate because it is inaccurate.

As I meet with representatives from my district, both large and small industries, one message is eminently clear. Our regulatory process is out of control. There is enormous uncertainty about what actions agencies will take. There is uncertainty over which agencies have jurisdiction, and there is a very serious concern that many independent agencies are being politicized. It is important to notice that these perceptions are not part of a larger campaign to discredit the Republican or Democratic agendas. They highlight a growing perception that our Government is completely out of touch.

The Courts, Commercial and Administrative Law Subcommittee conducted several oversight hearings earlier this year to examine the efficacy of the Administrative Procedures Act. The hearings were enlightening in many respects, and although the subject matter is complicated at times, it was clear to me that in most cases there are few options for stakeholders to partake in the regulatory process with any substantial consequence. The process is missing checks and balances which are the cornerstone of our democracy, while regulators have virtually limitless resources and powers. The result is it enables special interests to impose their will on certain areas of our regulatory system after clearing few hooks and low hurdles. This has undermined our national interest and compromises the Administrative Procedure Act in my opinion.

Meanwhile, the combined budget of regulatory agencies has ballooned 16 percent since 2008, topping $54 billion. During the same time, our economy has grown 5 percent. Employment at the agencies has grown 13 percent, while the number of private sector jobs has shrunk by 5.6 percent.

The costs of ineffective regulations are enormous. Some are enough to drive businesses to other countries. Others are passed on to consumers, employees, and affected communities. Some argue that regulations have created an overall savings, and in some instances, I agree, but where regulations do not serve a legitimate purpose or impose a requirement that is unnecessary, the cost is obvious and wasteful. Regulations of this sort are becoming far too prevalent.

The solution is not more regulations. It is better and more effective regulation, which is exactly what H.R. 3010 is intended to create. When the APA was implemented, few imagined that our Government would issue a regulation that would threaten the viability of an entire industry. Today, unfortunately, many would say this has become routine practice. H.R. 3010 addresses the situation by implementing new requirements that will give stakeholders a legitimate opportunity to improve regulations as they are proposed, promulgated, and ultimately implemented.

Furthermore, H.R. 3010, Mr. Chairman and colleagues, will not restrict the ability of any agency to issue regulations. In fact, most of the bill emulates the executive orders that were issued by Presidents Bush, Clinton, and Obama.

Finally, the bill will not change any existing regulatory standard or requirement.

The overwhelming view from my congressional district is that Federal regulations are driving American ingenuity and opportunity to other countries. Improving our regulatory process may be one of the most significant legislative contributions that we can provide to help preserve our safety and provide economic opportunity for future generations.

Mr. Chairman, as you and my colleagues know, we have an experienced and distinguished panel of witnesses before us today, and I appreciate their willingness to help us review and improve H.R. 3010 and yield back the balance of my time.

Mr. SMITH. Thank you, Mr. Coble.

Mr. CONYERS. Mr. Chairman, may I ask that the statement of Ranking Member Steve Cohen for this hearing be entered into the record at this time?

Mr. SMITH. Without objection, the statement of Mr. Cohen will be made a part of the record.

[The prepared statement of Mr. Cohen follows:]

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Member, Committee on the Judiciary

The Administrative Procedure Act has been described as an "administrative Constitution" that attempts to strike a balance between the need for due process and fairness, on the one hand, and the need for agencies to be able effectively to carry out their policymaking responsibilities, on the other.

As with the Constitution itself, we must approach proposals that would make dramatic changes to the APA with caution, if not some considerable skepticism.

The proponents of H.R. 3010, the "Regulatory Accountability Act," have a high burden to meet in that regard. Based on what I have heard thus far in four hearings before the Subcommittee on Courts, Commercial and Administrative Law, I do not believe that they have done so.

As an initial matter, whatever the merits of any of the individual proposals contained in H.R. 3010, I am concerned that the cumulative weight of all of these changes would simply serve to stifle agency rulemaking, threatening to hamper the promulgation important public health and safety rules.

In addition, several provisions in particular raise concern. First, H.R. 3010's expanded use of formal rulemaking procedures for major and "high-impact" rules strikes me as an unnecessary procedural expansion that would not serve to improve the quality of rulemaking while at the same time adding major costs to the process and would effectively grind agency rulemaking to a halt.

Formal rulemaking largely fell out of favor more than a generation ago as its costs became more evident. A consensus developed that the notice-and-comment rulemaking procedures of Section 553 of the APA—which themselves are fairly heavily proceduralized, especially when combined with non-APA analytical requirements—struck a better balance between assuring a fair and accurate rulemaking process while maintaining agency effectiveness.

H.R. 3010's proponents offer no study or other data indicating that the use of cross-examination and other facets of the formal rulemaking process are the more effective tools for making scientific and policy judgments than the current process.

If anything, history may suggest the opposite. In an infamous example, one formal rulemaking proceeding before the Food and Drug Administration took more than 10 years to determine whether the FDA should require that peanut butter contain at least 90% peanuts as opposed to 87% peanuts. A government witness was examined and cross-examined for an entire day about a survey of cookbook and patented peanut butter formulas, missing recipes, and his personal preferences in peanut butter.

While I make no judgments about personal preferences for how many peanuts should be in peanut butter, I do think that government could better spend its resources spending more than 10 years to decide that question. We ought to be wary of returning to those days.

Another concern with H.R. 3010 is its codification of some overly burdensome cost-benefit analysis requirements. I do not oppose the use of cost-benefit analysis for economically significant rules. It can be a useful tool in helping agencies to do their jobs and in ensuring the best quality rules. Indeed, every Administration from Reagan's to Obama's has required through executive orders that agencies conduct cost-benefit analysis.

Nonetheless, the particular agency determinations required by H.R. 3010, and the requirement that all of these determinations be made for all rules, would cause unnecessary delay and cost tremendous taxpayer resources. I do not see the net benefit in expanding cost-benefit analysis requirements to non-major rules or to guidance documents, which do not have the force of law. Perhaps we should have a cost-benefit analysis done of H.R. 3010.

There are other concerns that I will not get into in these brief remarks, including the expansion of judicial review under which judges would second-guess agencies' cost-benefit analyses, the establishment of a less deferential judicial review standard, and expanded opportunities to challenge agency compliance with the Information Quality Act.

I hope we can explore all of these concerns today.

Mr. SMITH. Our first witness is C. Boyden Gray, former legal counsel to Vice President Bush and White House counsel for President George H.W. Bush. During the Reagan administration, Mr. Gray served as counsel to the Presidential Task Force on Regulatory Relief. More importantly, Mr. Gray served—excuse me. That is more recently, not more importantly. More recently Mr. Gray served as U.S. Ambassador to the European Union. Mr. Gray practiced law for many years as a partner at the Wilmer, Cutler, Pickering, Hale, and Dorr law firm in Washington, D.C. where he focused on regulatory matters related to environment, energy, antitrust, public health, and information technology. Currently he is a founding partner of the D.C.-based law firm, Boyden Gray & Associates.

Mr. Gray graduated from Harvard University and the Law School of the University of North Carolina. Following his college graduation, Mr. Gray served in the U.S. Marine Corps. After law school, he clerked for Earl Warren, Chief Justice of the United States Supreme Court.

Our second witness is Christopher DeMuth, Senior Fellow at the American Enterprise Institute (AEI). Mr. DeMuth served as president of AEI from 1986 to 2008. Before he joined AEI, Mr. DeMuth was the managing director of Lexicon, Inc.; administrator for the Office of Information and Regulatory Affairs in the Office of Management and Budget; and executive director of the Presidential Task Force on Regulatory Relief during the Reagan administration.

Mr. DeMuth received his bachelor's degree from Harvard University and his juris doctor from the University of Chicago. He is the former editor and publisher of "Regulation" magazine and the author of four books.

Arnold Baker, our third witness, is founder and chief executive officer of Baker Ready-Mix and Building Materials in New Orleans, Louisiana. Mr. Baker has been honored by the National Black Chamber of Commerce as Entrepreneur of the Year. Mr. Baker also has been inducted into the Louisiana Business Hall of Fame.

He currently serves as chairman of the National Black Chamber of Commerce, vice chairman of the New Orleans Business Council, and as a director on several local boards, including the New Orle-

ans Board of Trade and the Greater New Orleans Construction Task Force.

Mr. Baker is a former member of the mayor's cabinet for the City of New Orleans and served as assistant to the mayor for policy, planning, and development.

Mr. Baker is a graduate of Texas State University, which I used to represent.

Our final witness is Sidney Shapiro. Professor Shapiro is the University Distinguished Chair in Law at Wake Forest University School of Law. He has written six books, contributed chapters to seven additional books, authored or co-authored over 50 articles, and is working on a book on administrative accountability.

Mr. Shapiro is the vice president of the Center for Progressive regulation, a nonprofit research and educational organization of university-affiliated academics.

Before he joined the Wake Forest faculty, Mr. Shapiro taught at the University of Kansas. Prior to teaching, Mr. Shapiro was a trial attorney at the Federal Trade Commission and deputy legal counsel of the Secretary's Review Panel at the U.S. Department of Health, Education, and Welfare.

We welcome you all, appreciate your time and your expertise and knowledge. And, Mr. Gray, may we start with you?

Mr. COBLE. Mr. Chairman, may I ask a question of the Chair before Mr. Gray speaks?

Mr. SMITH. The gentleman from North Carolina is recognized.

Mr. COBLE. You justifiably gave a mention to Texas. I need to remind you that two of our four witnesses have definite North Carolina ties as well. Thank you, sir.

Mr. SMITH. We should have known you weren't going to overlook that, Mr. Coble. Thank you for those comments.

Mr. Gray?

TESTIMONY OF C. BOYDEN GRAY,
BOYDEN GRAY & ASSOCIATES

Mr. GRAY. Mr. Chairman, thank you very much for the opportunity to appear here and thank you for taking up this issue which I think all of us up here think is fairly important, very important given our job situation.

I feel as though this is 1980 again when we had an overwhelming inundation of regulatory overkill and there were serious concerns about our job creation and economic difficulties in the early 1980's. There is some question now, well, do regulations really hurt business development, job creation, or is it lack of demand? And all I can say is again it feels like the early 1980's, and what Chris and I and others did we hope in the public interest to make more sense out of regulation in the early Reagan years I think helped stimulate one of the biggest growth periods in U.S. history. And I think the same thing can happen again.

I want to focus on two areas where things have changed since the original system was set up to review regulations under White House review, which Chris led on in the early 1980's. Two issues: independent agency coverage and judicial review of cost/benefit analysis.

We did not cover independent agencies with regulatory review in the beginning mostly for political reasons, but also because these agencies didn't have that much impact over the general economy. Now, in the last 30 years, things have dramatically changed and you have to just look at Dodd-Frank or Sarbanes-Oxley or the Internet, high tech, the world of finance to understand that the CFTC and the FCC and the Fed and the SEC and the other independent agencies really do now maybe impact more of the economy than the so-called executive branch agencies.

I want to give just a couple of examples. It is in my testimony. I do not want to belabor the point, but if you take a look just at banking, you take a look at the Commodities Future Trading Corporation, they are proposing to cover a thing called end-use derivatives, which will lock up a couple of trillion dollars in collateral for no good reason. There is no cost justification for this. The Inspector General has scored the CFTC for relying on its lawyers to do the cost/benefit analysis. I am a lawyer. I would not rely on myself to do it. That doesn't mean I can't question it, but I would really rather have an economist take the first crack at it. This is very badly needed to underscore that the costs and the business inhibition that will be posed by the CFTC regulations far outweigh any possible benefits.

If you turn to the Federal Reserve Board, which has enormous regulatory powers preexisting Dodd-Frank but even more since, he was asked by the chairman of one of the big banks will Dodd-Frank do more harm than good, and Chairman Bernanke answered nobody has looked at it. Nobody knows, he said, quote/unquote. Nobody has looked at it at all in detail. And then he said only after imposing the new regulations would they, quote, be able to figure out where the costs exceed the benefits and make appropriate adjustments. Well, that is a little backwards. They should do this before they issue the regulations.

Later he was asked, what is the cumulative effect on the availability of credit from Dodd-Frank? And Chairman Bernanke answered, quote, you know, it's just too complicated. We don't really have quantitative tools to do that. Close quote. Well, they should get the quantitative tools to do that because this is at the heart of our current economic difficulties in my opinion, but my opinion doesn't count. Look at experts far better versed in this than I in terms of the economic fallout.

If you look at telecom, the Internet, the net neutrality rules, which were hugely important, the FCC is badly split on whether costs exceed benefits. There shouldn't be such a split on the commission. There should be a requirement that the FCC hew to the same rules that executive branch agencies have understood and learned over the last 2 or 3 decades.

Take a look at energy. EPA and the Department of Energy are probably the two most important agencies that affect energy, which is a huge component or our economy, but they are followed pretty closely by FERC, the Federal Energy Regulatory Commission; the Nuclear Regulatory Commission, NRC; and the CFTC, which I have said already will lock up hundreds of billions of dollars in collateral for just the utilities alone for doing ordinary, garden variety hedging that they have been doing for decades.

It is important that all these agencies operate off the same sheet of music in terms of how they assess costs and benefits, and there is no reason why one set of agencies should be exempt from all this positive analysis and another set subjected to it. It is really sort of, I think, unsustainable.

There was a comment earlier about changing the rules of the Clean Air Act. I believe actually most of the Clean Air Act provisions, regulatory provisions, actually do have a cost/benefit requirement. It is only setting the national ambient air quality standards at the standard-setting stage where costs can't be brought into the equation, but the Supreme Court made clear that when these standards are implemented at the State level, costs and benefits are highly relevant.

I think this bill would do a great service with respect to the Clear Air Act, because it would regularize and systematize the cost/benefit provisions that do exist and aren't actually as consistent as they should be.

On the question of judicial review, just two quick points. One just needs to read Judge Ginsburg's opinion in *Business Roundtable v. the SEC*, recently decided, where he goes into the SEC's failure to do cost/benefit analysis properly. It is something which judges are perfectly capable of doing. That is one of the great objections that judges can't do this. Read the opinion. Decide for yourself, but I think it is pretty clear they can do it.

And there isn't going to be an overburden on the courts. The D.C. Circuit, which is expert at this, has probably the lowest caseload of any circuit in the country and can well adapt to whatever increase is required by your legislation. I think they would actually welcome the guidance on that circuit. It is well equipped to handle this bill, and it would welcome, I think, the opportunity to do so.

Thank you.

[The prepared statement of Mr. Gray follows:]

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

H.R. 3010: THE "REGULATORY ACCOUNTABILITY ACT OF 2011"

October 25, 2011

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the "Regulatory Accountability Act of 2011." I have previously testified before this committee on matters of administrative law, including the reauthorization of the Administrative Conference of the United States (ACUS).

At the ACUS hearing seven years ago, I testified that "the U.S. administrative law system, I believe, is the best in the world. It is the most transparent, the fairest and the most economically productive." I still believe that. But as I went on to say at that hearing, our administrative law system has retained its prized status only because of the government's commitment to maintaining and improving the system over time.

"The Administrative Procedure Act," I said then, "is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of congressional intent, but to flesh out what the words mean." Or, to adapt Justice Holmes's famous words, the life of administrative law has been both logic and experience.

The bill before this committee, the "Regulatory Accountability Act of 2011," is a welcome next step in the continued improvement of administrative law. The Act applies the lessons of both logic and experience to solve some of the stark problems raised by the regulatory state's sudden, exponential new growth. On matters of public finance, energy and the environment, telecommunications, and health care, regulatory agencies are taking broadly worded statutory grants of power and applying them in ways that threaten to undermine America's competitive standing in the world, and American liberty at home.

Against that backdrop, the Act has many provisions that I welcome, including new formal-hearing requirements for major rules and high-impact rules, and an ongoing duty to revisit previously promulgated major rules and high-impact rules. But I would like to focus my testimony today on two subjects: First, and most importantly, the Act codifies cost-benefit requirements that have governed the Executive agencies for three decades, but which have not governed "independent" agencies, such as the Commodities Futures Trading Commission (CFTC). And second, the Act prudently reinforces the courts' important oversight role through judicial review.

Cost-Benefit Analysis and the Independent Agencies

Since President Reagan signed Executive Order 12291, and continuing through its successors, including Executive Order 12866, the President has required Executive agencies to subject newly proposed regulations to cost-benefit analysis, under the guidance of the Office of Information and Regulatory Affairs (OIRA).

That centralized review has substantially improved the regulatory process, promoting efficiency while simultaneously ensuring democratic accountability.

Those Executive Orders did not reach the "independent" agencies, however; instead, the Orders exempted those agencies from their coverage. But as those "independent" agencies—the CFTC, NLRB, and Federal Reserve, for example—have come to exert exponentially greater weight on the economy, their exemption has become utterly untenable.

Regardless of the extent to which "independent" agencies are subject to presidential control, Congress *clearly* controls them through its legislative power, and it may subject those agencies to procedural requirements—such as cost-benefit analysis and the opportunity for formal on-the-record hearings—and other forms of Administration oversight and judicial review.

And that is what the Committee proposes to do here. By incorporating the provisions of the Regulatory Accountability Act of 2011 into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis.

To illustrate the critical importance of this improved oversight, let me offer three recent examples of "independent" agency regulatory efforts that would be improved by OIRA oversight, cost-benefit analysis, and alternatives analysis.

1. Financial Regulation

The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed just last year, created an astonishing plethora of rulemaking requirements by a variety of agencies. According to the Davis Polk law firm's widely read legislative analysis, Dodd-Frank will require at least two hundred and forty-three rulemakings. The vast majority of those rules will be issued by "independent" agencies: the CFTC, SEC, and Federal Reserve, and the newly created Financial Stability Oversight Council and Consumer Financial Protection Bureau.

So far, the result has not been encouraging; in fact, it is cause for serious concern. The CFTC's Inspector General issued a report on April 15, 2011, detailing the flaws that have pervaded the CFTC's proposal of derivatives rules. Most significantly, the IG found that the CFTC's cost-benefit analysis for the new rules was directed not by economists, but by lawyers: "it is clear that the Commission staff viewed [cost-benefit analysis] to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist." The Regulatory Accountability Act, by contrast, would commit economic analysis to the economists. Better still, where the CFTC treated cost-benefit analysis as a "caboose," the Regulatory Accountability Act places it firmly near the front of the procedural train, in the required notice of proposed rulemaking.

The Federal Reserve's own regulatory work under Dodd-Frank raises similar red flags. Last month, JP Morgan Chase's CEO, Jamie Dimon, publicly

questioned Fed Chairman Bernanke whether the myriad Dodd-Frank regulatory initiatives would together do more harm than good. Chairman Bernanke answered, "nobody's looked at it in all detail," and that only after imposing these onerous new regulations would they "figure out where the cost exceeds the benefit and ... make the appropriate adjustments." Chairman Bernanke's reasoning puts the cart before the horse—or, to borrow the CFTC's terms, the caboose before the locomotive. Regulators should ascertain the costs and benefits of their regulations *before* deciding whether to impose those regulations on American people and industry, as the Regulatory Accountability Act's proposed framework recognizes.

Even more worrisome, in those same comments Chairman Bernanke disclaimed even the Fed's ability to calculate whether the cumulative effect of new regulations would have a positive or negative impact on credit: "You know, it's just too complicated. We don't really have quantitative tools to do that."

Those are unsatisfactory answers, especially when the apparent cost of new regulations—in terms of both compliance and substantive effect—may be so great. No one argues that cost-benefit questions can always be resolved to the nearest dollar, but in all cases the rigor of cost-benefit review must at least ascertain generally whether regulations do more harm than good. This is particularly important in cases of landmark regulatory reform, which overturns many long-settled arrangements and imposes new burdens on people and businesses. Our independent regulatory agencies can and must do better, and the reforms proposed in this Act will help to ensure that they do.

2. Telecommunications Policy

As the Nation's dependence upon communications technology and the Internet increases, so does the FCC's role in the Nation's economy. Most significantly, a majority of FCC commissioners have committed to establishing "net neutrality" rules governing current and future Internet infrastructure, culminating with the promulgation of net neutrality rules in December 2010. That policy is surrounded by uncertainty, both with respect to whether the policy is lawful (in light of the D.C. Circuit's decision last year in *Comcast v. FCC*), and with respect to whether those rules are justified as a matter of policy. While I would not currently offer conclusions on either of those points, I will note that the Commissioners are deeply divided on the question of whether the net neutrality policy's costs outweigh its benefits. The FCC's majority asserts that "the costs associated with these open Internet rules are likely small," but the dissenting commissioners urge that the policy will result in "less investment," "less innovation," "increased business costs," "increased prices for consumers," and "jobs lost." These are precisely the questions that should be—and, under the proposed Act, would be—resolved through rigorous cost-benefit analysis undertaken under OIRA oversight.

3. Energy and Environmental Policy

Let me end with one more brief example. The Nation's energy and environmental policies implicate not just one agency, but many. Spreading responsibility for these issues across many agencies is an invitation for substantial inefficiency, perhaps even cases of agencies working at cross-purposes. And so

inter-agency coordination is critically important. While the agencies with greatest influence over U.S. energy policy probably are the Department of Energy and the Environmental Protection Agency (EPA), three other important regulatory bodies—the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and (because of its derivatives jurisdiction) the CFTC—are "independent" agencies, and thus exempt from the current OIRA review process. Going forward, the FERC's jurisdiction over natural gas pipelines will help to shape the Nation's development of newly abundant natural gas supplies; the NRC, meanwhile, largely controls the future of our electric power supply through its regulation of nuclear power generators, and the proposed Yucca Mountain site. The proposed Act would help to ensure that those agencies' rules promote the public interest in a coordinated procedure that includes the Energy Department and EPA.

Judicial Review

Let me note one other salutary feature of the Act: it strengthens judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements. Judicial review of agency action requires a delicate balance—the applicable standards of review are deferential, but those standards must be firmly enforced. The Act strikes that balance well.

And the courts are clearly able to maintain that balance of deference and critical scrutiny, as the D.C. Circuit demonstrated most recently deciding the case of *Business Roundtable v. SEC*. There, the court struck down the SEC's "proxy

access rule" upon narrow but firm review of the SEC's failure to satisfy an SEC-specific statute requiring the agency to consider costs and benefits. As the court explained in that case:

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

The SEC's failings in that case exemplify some of the regulatory failings that the Regulatory Accountability Act would work to prevent; the court's analysis exemplifies the well-tailored solution that courts would provide under the Act.

I would stress, however, that Congress must not dilute those generally applicable standards of judicial review by enacting separate statutes that tighten the scope of judicial review and thus effectively immunize certain agency decisions. The best recent example of this troubling trend is the Dodd-Frank Act, which prohibits the Supreme Court and other federal courts from considering, among other things, whether the Treasury Secretary's "resolution determination" (*i.e.*, forced liquidation) of a financial company was lawful; instead, the courts may only review whether his factual determinations and analysis was reasonable.

After I criticized Dodd-Frank's troubling features in a *Washington Post* op-ed last December, the Treasury Department's General Counsel replied in a letter to the editor, asserting that Dodd-Frank "explicitly provides for judicial review" of such draconian agency determinations, but neglecting to admit that judicial review

would be strictly limited in terms of both scope and time, thus nullifying the protections that judicial review ordinarily provides.

Congress should not insulate those types of agency actions from judicial review. The Regulatory Accountability Act is a welcome sign that this Committee values the courts' oversight role, and I hope that it signals Congress's continued commitment going forward.

* * *

The White House recently claimed that "the annual cost of regulations has not increased during the Obama administration"; that the last two years of President Bush's administration "imposed far higher regulatory costs than did the Obama administration in its first two years"; and that "there has been no increase in rulemaking in [the Obama] administration." Those are very broad—and, to put it gently, counterintuitive—claims. Only by requiring the federal agencies to calculate the costs and benefits of their regulations, and then subjecting those projections to the scrutiny of public comment, can we know with greater certainty whether new regulatory initiatives, especially landmark initiatives affecting economic growth and energy infrastructure development, do more good than harm.

Again, I am grateful for the opportunity to testify in favor of the Regulatory Accountability Act of 2011. It draws on, and improves upon, the foundation laid in the Administrative Procedure Act and the Executive Orders on regulatory review.

Mr. SMITH. Thank you, Mr. Gray.
Mr. DeMuth?

TESTIMONY OF CHRISTOPHER DeMUTH, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH

Mr. DEMUTH. Thank you, Mr. Chairman, Members of the Committee. Thank you for inviting me to testify.

The nature and scope of Federal regulation has changed fundamentally in the two-thirds of a century since the Administrative Procedure Act first made law, especially since 1970. We have many, many more agencies. They operate primarily through rulemaking rather than adjudication. Their rules apply to very wide sectors of the economy. They cover society-wide issues. They result in costs and benefits often of very, very large proportion. And they operate under very broad grants of authority from the Congress that often amount to de facto lawmaking power.

These developments set the stage for the regulatory controversies of the past 5 years where we have had an unusually large number of highly consequential, highly controversial policy proceedings going on in Washington, in all of which Members of Congress have been essentially bystanders.

The Regulatory Accountability Act would bring the Administrative Procedure Act up to code. Most important, it would take the cost/benefit standard that has been the standard for rulemaking in the executive branch agencies from President Reagan through President Obama and make it a statutory standard subject to judicial review. This would be a big step forward for regulatory practice and policies. I would like to mention five.

First, the cost/benefit standard is the regulatory equivalent to a budget constraint on spending programs. Single-purpose agencies, regulatory or spending, pursue their goals single-mindedly with too little regard for alternative worthy purposes of the resources that they command. There is nothing wrong with that at all. Congress expects single-purpose agencies to pursue their goals energetically, but in the case of regulation, it needs institutional adjustments. Spending agencies have a budget that they have to live within. Regulatory agencies command resources that are largely realized entirely in the private sector. They never go through any of the mechanisms of public finance, taxation, appropriation, authorization, budgeting, and so forth. We need some analog, and the cost/benefit standard is the best analog we have come up with where for each policy, one does not have a budget constraint, but one has to impose costs with a view not toward that budget but toward the benefits that one is trying to produce.

Secondly, the cost/benefit standard is an excellent standard of statutory construction, how regulators should apply very broad regulatory mandates in pursuing the goods that they are asked to pursue, that is, that they should attempt to achieve the maximum benefits for the minimum costs. How is the faithful regulator vested with wide lawmaking power to exercise his or her discretion consistent with our constitutional and democratic values? You can't ask an individual legislator. Some will want more aggressive, some will want less aggressive pursuit of one purpose or the other. But if you ask how should representative politicians in the House and

Senate as a whole want all regulatory statutes to be enforced, the best answer you can come up with is that each agency should pursue their statutory goals as cost-effectively as possible.

Third, the cost/benefit standard promotes transparency and accountability. Regulation is a stream of narrow, complex issues often comprehensible only to insiders. Cost/benefit analysis is not a prescription for rule by economists and technocrats. It is just the opposite. It is the best procedure anyone has come up with for summarizing, systematizing the myriad details of any regulatory controversy and making the rule, the issues accessible to outsiders, to the White House, to the Congress, to the courts, to journalists, editorial writers, and to the general public.

The cost/benefit analysis is not turning a crank. There are many uncertainties. There are many lively arguments in the estimation of benefits and costs in any rulemaking. The point is that those are the serious debates. Those are the debates where we should be focusing our attention. The debates should be known to much wider parts of the public and to Washington than just the rulemaking insiders.

Fourth, as has been noted previously, the cost/benefit standard builds on 30 years of agency practice under Presidents of both parties. That we have had such constancy in regulatory policy across Administrations of widely differing political philosophies shows that the cost/benefit standard is not anti-regulation. Instead, it is a reasonable response to the institutional problems of regulation that I have mentioned. After 30 years, the cost/benefit standard is sufficiently established in agency practice to merit statutory codification.

Fifth and finally, there are many flaws in the executive order programs across the last 30 years. There is much too much variation in the quality and seriousness of cost/benefit analyses from agency to agency, within agencies. OIRA sometimes gives very sloppy cost/benefit standards a pass. Sometimes it sends pretty good ones back to the agencies for review. These difficulties are all the result of the standards being internal, private, and voluntary. By making the standards subject to judicial review, the Regulatory Accountability Act would transform incentives and behavior within Administrations fundamentally. It would change the dynamics. People would be much more serious. There would be fewer attempts to game the system. Everybody would know that the final decision they made was going to be subject to a second, independent look by courts operating under conventional standards of deference.

The court decisions would produce over time a common law such as we have under the Administrative Procedure Act today, but it would be more pointed, empirical, factual. It would lead to criticism in law reviews and newspaper editorials. It would result in a much greater degree of professionalism in regulatory policymaking in the Administration.

One last point on the criticism that the act would undermine regulatory protections and lead to delays and the scuttling of many important rules.

The criticism is a difficult one to get very far with because the act essentially takes what is going on today and what has been

going on for 30 years and simply adds the important discipline that the final rule's costs and benefits be subject to independent, that is, to judicial review.

The history of our regulatory——

Mr. SMITH. Mr. DeMuth, I am afraid we need to call time.

Mr. DEMUTH. Okay.

Mr. SMITH. You have gotten through your five points, and I especially appreciated the latter point you made as well.

Mr. DEMUTH. Thank you, sir.

Mr. SMITH. Thank you.

[The prepared statement of Mr. DeMuth follows:]

Statement of

Christopher DeMuth
D.C. Searle Senior Fellow
American Enterprise Institute for Public Policy Research

Before the
Committee on the Judiciary
United States House of Representatives

At a hearing on
The Regulatory Accountability Act of 2011

October 25, 2011

Chairman Smith, Ranking Member Conyers, thank you for the opportunity to testify on the proposed "Regulatory Accountability Act of 2011" (H.R. 3010), which would amend the Administrative Procedure Act of 1946.

The APA was enacted as Congress returned to domestic business following the conclusion of World War II. It was a war-delayed response to the proliferation of regulatory agencies during the New Deal. Agencies such as the Securities and Exchange Commission, Federal Communications Commission, and Civil Aeronautics Board combined legislative, executive, and judicial functions. That raised serious separation-of-power questions under the Constitution. The APA's standards and procedures for administrative decision-making and judicial review resolved the constitutional questions to the satisfaction of the courts, and have served as the statutory backbone of federal regulation for the past sixty-five years.

The Regulatory Accountability Act would be the first major revision of the APA's core regulatory procedures. It is a response to the dramatic growth of regulation and unusual number of controversial regulatory proceedings of recent years. Prominent examples are the Treasury Department's and Federal Reserve Board's aggressive regulatory responses to the 2008 financial crisis and, more recently, the Environmental Protection Agency's highly ambitious rulemaking initiatives, the Federal Communications Commission's efforts to regulate the Internet, and the hundreds of high-stakes rulemakings pursuant to the Energy Independence and Security Act of 2007, the Patient Protection and Affordable Care Act of 2010, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Many of the agency proposals would be very costly—at a time when the economy is in the doldrums, business investment is anemic, and unemployment is high. Many of them involve statutes that give the agencies enormous policy latitude—contributing to the pervasive business uncertainty that seems to be weighing on the economy. And all of them cast Congress more as a kibitzer than lawmaker—Members can hold hearings, give speeches, and write letters, but the ultimate policy decisions are made downtown rather than on Capitol Hill.

Yet the current controversies reflect developments that have been underway for forty years: the migration of lawmaking authority from Congress to the Executive Branch, and the problems of policy substance and political accountability that have arisen from Executive lawmaking. These problems, like those that led to the original APA, are of constitutional

dimension. Regulation has grown in scope and impact far beyond anything the framers of the APA (or for that matter the New Deal) could have anticipated. The APA has not kept up, and special-purpose administrative agencies have acquired an unsettling degree of power over our economy and society. The Regulatory Accountability Act is an effort to channel the discretion and improve the performance of the modern administrative state.

A BIT OF BACKGROUND

Two historical developments have set the stage for today's regulatory debates and are directly relevant to your deliberations. The first came in the early 1970s, when Congress created numerous regulatory agencies such as the Environmental Protection Agency, Occupational Safety and Health Administration, and National Highway Traffic Safety Administration. These agencies differed from their 1930s predecessors in important respects. The New Deal agencies were headed by commissions that included members from both political parties serving statutory terms; the new ones were generally headed by a single administrator serving at the President's pleasure. While most of the older agencies regulated single industries, the new ones regulated wide sectors of the economy. And while the older agencies were generally concerned with prices, terms of service, and other business decisions of individual firms, the new ones were concerned with economy-wide issues such as product and workplace safety, environmental pollution, and employment discrimination.

The second development was a change in the form of regulatory policymaking. Before the 1970s, regulatory agencies acted primarily through "adjudication"—deciding discrete cases involving one or a few parties through trial-like procedures. Thereafter, they acted primarily through "rulemaking"—issuing rules that, like statutes, imposed requirements on hundreds or thousands of firms throughout entire industries or economic sectors. The APA established procedures for both adjudication and rulemaking, but those governing rulemaking were more general and flexible. APA rulemaking consists of a simple "notice and comment" procedure: An agency first issues a Notice of Proposed Rulemaking setting forth a regulatory proposal and its statutory authority, then collects public comments on the proposal, and then issues a Final Rule accompanied by "a concise general statement of [its] basis and purpose." Final rules are subject to judicial review on a number of grounds—they must conform to the requirements of agencies' authorizing statutes and also to the procedures and standards of the APA itself, including the famous catch-all requirement that

rules not be "arbitrary, capricious, [or] an abuse of discretion."

Rulemaking was the characteristic method of the new 1970s regulatory agencies, such as the EPA and NHTSA, vested as they were with broad standard-setting responsibilities. But its advantages to the regulator—providing much greater flexibility, discretion, and economic leverage than case-by-case adjudication—led the older commissions such as the SEC and FCC to rely increasingly on rulemaking. Rulemaking typically, and increasingly over time, dispensed with the direct confrontation of opposing views that typifies adjudication—live testimony, cross-examination, and the give-and-take of argument over issues of fact and law. Today, rulemaking is largely a paper exercise. Agency officials may meet with interested parties in the course of rulemaking and, in the case of highly consequential or controversial proposals, they often hold informal hearings where parties may make brief oral presentations summarizing their positions; but even in these cases, rulemaking has an extemporaneous quality that is much more akin to legislative process than judicial process.

To be sure, rulemaking is not legislating. Regulatory agencies must provide reasoned explanations of their decisions and "do not have quite the prerogative of obscurantism reserved to legislatures" (as a reviewing court put it in a 1977 opinion). The demands of judicial review, and the increasing ambition and complexity of many rules, have led agencies to provide much more than the APA's "concise general statement" of their decisions. When an agency publishes a final rule in the *Federal Register*, it typically provides summaries of and responses to submitted comments, explanations of changes from proposed to final rules, and, for major rules, evaluations of scientific and economic data. Nevertheless, rulemaking is far more expeditious than legislating. Hierarchical agencies can make decisions much faster than our bicameral Congress with its complex committee structure, and single-purpose agencies are free of the innumerable conflicting interests and political views that characterize a representative legislature.

By the late 1970s, scores of federal agencies were issuing rules generating billions of dollars of costs and benefits throughout the economy, through statutory standards and rulemaking procedures that afforded the agencies tremendous discretion. This state of affairs was bound to produce a political reaction from elected officials. From the White House, the reaction was specific and sustained. Presidents Nixon, Ford, and Carter all asserted their

authority over agency rulemaking through informal review procedures that focused on the economic impact of proposed rules. These initial efforts led to President Reagan's Executive Order 12291 at the beginning of his administration, setting forth regulatory decision-making criteria—based on the cost-benefit standard discussed below—and requiring that proposed and final rules be reviewed for conformity with the criteria by the Office of Information and Regulatory Affairs in the Office of Management and Budget (I was administrator of OIRA from 1981–1984). The decision criteria and White House review procedures were continued, with refinements based on accumulated experience, in President Reagan's Executive Order 12498 in 1985, President Clinton's Executive Order 12866 in 1994, and President Obama's Executive Order 13563 earlier this year.

To date, the congressional response has been much less forceful. Congress enacted the Regulatory Flexibility Act and Paperwork Reduction Act in 1980 and the Information Quality Act in 1991, and it has considered enacting elements of the executive order programs on a few occasions. The Regulatory Accountability Act (along with a similar bill introduced in the Senate) would go beyond these earlier laws and bills in reforming regulatory standards and procedures. Notable provisions would provide for increased use of hearings with cross-examination for "high impact" and "major" rulemakings; require that new major rules be reviewed every decade; and limit agencies' ability to circumvent rulemaking requirements through interim rules and guidance documents. The most important requirements, however, are those establishing a cost-benefit standard for all agency rules including those of the "independent" agencies such as the SEC and FCC, subject to OIRA guidance and judicial review (although the standard would be reviewable only for major rules in the current Senate version of your bill).

My testimony will focus on the requirement of a cost-benefit standard. Your bill says, essentially, that agencies must adopt the least costly approach to achieving statutory objectives unless they demonstrate that the additional benefits of more costly rules justify the additional costs (Section 553(f)(3)(b)). This is one of many possible formulations of a cost-benefit standard. The nuances of different approaches are important, but I will skip over them in the interest of focusing on broader issues. I will consider a simple statutory requirement, subject to judicial review, that agencies rigorously evaluate the benefits and costs of their regulatory proposals and adopt rules whose benefits exceed their costs.

Such a requirement would be a substantial improvement in administrative law and lead to substantial improvements in regulatory practices and policies. In what follows, I will offer five arguments for the cost-benefit standard, then respond to two prominent criticisms of the standard.

FIVE ARGUMENTS FOR A COST-BENEFIT STANDARD

Federal regulation today presents a political problem and an economic problem. The political problem is that regulatory agencies often operate under extremely broad grants of authority from Congress. Elected representatives vote foursquarely for clean air, safe products, and fair financial practices, then leave the hard decisions—the real lawmaking—to the agencies. The Executive Branch is, of course, responsible for the faithful execution of the laws, and that requires the exercise of discretion. But rulemaking proceedings are more than execution. They often involve the formulation of large, complex, economy-wide policies costing scores or hundreds of millions of dollars and involving numerous trade-offs among competing interests and values. It is anomalous—democratically and constitutionally—to leave such policies to the discretion of the Executive Branch.

The economic problem is that regulatory agencies are single-purpose organizations operating with scant restraint on the resources their decisions command. The costs and benefits of regulation are realized almost entirely in the private sector—through the installation of pollution controls, the design of automobiles, the composition of gasoline formulas, the presentation of financial records, the design and marketing of medical insurance contracts, and much else, in compliance with government mandates. The required expenditures are not constrained by the mechanisms of public finance that apply to spending programs—taxation, authorization, appropriation, and budgeting. As a result, regulatory agencies have inadequate incentives to take account of the costs of their policies: they do not operate within budget constraints that balance each agency's purposes against innumerable other public and private purposes.

The cost-benefit standard addresses these problems by imposing a resource constraint that is the regulatory analogue of the budget constraint on spending programs; by applying a decision rule that is the best approximation of how a representative legislature should want otherwise unspecified lawmaking discretion to be exercised; and by promoting transparency

and accountability. These advantages explain the consistent application of the cost-benefit standard over more than thirty years of White House regulatory oversight by Presidents of both parties. But the executive order programs have also proven deficient in many respects, and a statutory cost-benefit standard would improve considerably on existing practice.

First, a cost-benefit standard is the regulatory equivalent of the budget on spending programs.

This elementary point is often overlooked by critics of a cost-benefit standard, who focus on the health, safety, and other benefits of regulatory programs and ask why the pursuit of such worthy goals should be constrained. But spending programs, too, pursue health, safety, and other worthy public goals, yet no one seriously contends that spending levels should be determined by the agencies themselves, independently or in collaboration with their appropriating committees. Budgeting is the device by which the President and Congress—elected officials whose perspectives are broader than those of individual spending programs—size the government's total expenditures in relation to available revenues and set priorities within the total. The establishment of the White House regulatory review programs in the 1970s and 1980s was a natural and necessary response to the growth of government regulation, just as, in an earlier era, the Budget and Accounting Act of 1921 was a natural and necessary response to the growth of government spending.

The cost-benefit standard is admittedly only a rough analogue to the spending budget. Spending on Regulatory Project A is constrained not in relation to other projects within a ceiling for all projects, but rather in relation to Project A's demonstrable benefits. A more direct analogue would be a "regulatory budget," an idea that has attracted some attention over the years and that Senator Mark Warner has recently proposed in the simplified form of a "regulatory pay-go" procedure. Under a full regulatory budget, each agency would receive an annual budget of the expenditures its new rules could impose. This sum—along with the savings from established rules the agency reformed or eliminated—would set the limits on new rules for the budget year.

The regulatory budget has considerable appeal in theory, especially in inducing agencies to continually cull older rules (something the Regulatory Accountability Act would address by other means). But in practice it would encounter enormous, and probably

insurmountable, institutional barriers. The calculation of aggregate regulatory expenditure figures for the entire government would be a herculean task. While spending budgets deal in hard dollars, a regulatory budget would deal in expenditure estimates subject to legitimate disagreement as well as deliberate gaming. So if agencies had the final say on expenditure estimates, the budget would accomplish nothing, but if a central authority such as OMB had the final say, that authority would exercise de facto control over agency decisions far beyond anything in budget controls. Difficulties such as these are presumably what led Senator Warner to his pay-go proposal, under which agencies would have to eliminate one existing rule every time they imposed one new rule. This approach has merit, but it would not address the problem of agency incentives with anything like the scope and thoroughness of a cost-benefit standard.

The cost-benefit standard, as a device for correcting parochial agency incentives, has two important advantages over the regulatory budget. First, it summons the apparatus of cost (and benefit) estimation—which is itself costly—only when new rules are proposed. It focuses on the critical problem of regulatory *growth,* while leaving the problem of aged and obsolete rules to other, less strenuous procedures. Second, it keeps the inherent problem of contentiousness over cost (and benefit) estimates within manageable bounds. At the time an agency is considering a major new rule, it will have assembled considerable data pertinent to the costs and benefits of alternate approaches to the problem at hand, and it will then receive much additional information in the course of rulemaking. This live, current information has the effect of narrowing disagreements (as between agencies and OIRA) and highlighting areas of irreducible uncertainty. Moreover, many rules (based on my experience at OIRA, which I think was typical) are clearly cost-justified or not cost-justified, so that disagreements over the precise levels of costs and benefits are unimportant. That means that the problem of imprecision in cost and benefit estimates is important only in a subset of hard cases—which is exactly where arguments over benefits and costs ought to be focused. Finally, the cost-benefit standard has the advantage of fitting comfortably into the established practices of administrative law—requiring that rulemaking and judicial review become more informed and disciplined in doing what they have always done, rather than supplementing them with a separate, independent set of procedures.

Second, a cost-benefit standard is an appealing rule of statutory construction.

The standard would be a directive from elected political representatives to unelected agencies and appointed officials for exercising discretion in pursuing broad statutory goals. Congress sometimes prescribes regulatory policies with specificity; examples are the minimum wage, the CAFE fuel economy standards, and the lighting efficiency standards designed to abolish the incandescent light bulb. But in many cases statutory standards are very general and aspirational. A recent example is Congress's mandate to the Consumer Financial Protection Bureau created by the Dodd-Frank Act: "ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive" (and this to an agency to which Congress was also surrendering its power of the purse!). Such cases, which are legion, arise when regulation presents technical questions that legislators cannot be expected to master, and/or when legislators are unable to compromise their differences sufficiently to pass a statute with more than broad, uncontroversial goals. In such cases, how should agencies make policy in a manner faithful to the values of representative democracy?

One cannot answer this question by asking individual legislators how to implement individual statutes. In every case of broad statutory goals, some legislators will prefer more aggressive regulation and others less. And for all broadly worded statutes taken together, individual legislators will differ over which programs should be pursued more or less aggressively and whether there should be more or less regulation on the whole. But if one imagines a consensus of *all* legislators toward *all* regulatory programs, it is hard to conceive of a better common-denominator rule than that each program should be pursued as cost-effectively as possible.

Put the other way around, the faithful regulatory official should aim for policies that achieve statutory goals as economically as possible, and that impose added costs at the margin only when doing so would produce commensurate statutory benefits. That will not be easy to do. The natural incentive of the single-purpose regulatory official is to pursue that purpose single-mindedly—without regard to cost and the competing claims of other agencies and other purposes. And every policy decision will be surrounded by a cacophony of interest groups pressing for one or another decision that would bend statutory purposes to their own special interests. These problems are inherent to the regulatory process; the cost-benefit

standard is a corrective to them. To be effective, the standard needs to be more than a good-government velleity or best-practices exhortation. It needs to be enforced—as it has been internally, by OMB/OIRA within the Executive Branch, since 1981, and as it would be independently, by the courts, under the Regulatory Accountability Act.

An important virtue of the cost-benefit standard is that it is capacious and disinterested. It asks us to consider all of the costs and all of the benefits of a policy initiative in circumstances where some will want to focus on just the costs and others on just the benefits, and others will be concerned with only certain kinds of costs or benefits. A durable feature of EPA rulemaking is environmental groups seeking to ignore or downplay costs and business groups seeking to ignore or downplay benefits. Another, subtler problem is the heavy emphasis on employment effects in wider political debate. This tendency is worth pausing over.

Among practicing politicians, employment—jobs "created" or "destroyed"—is a favorite metric of regulatory policy, especially during hard economic times such as the present. This is natural and admirable. Political representatives—unlike regulatory officials or economists!—spend a great deal of time talking with average citizens and listening to their problems, in district offices and town halls, in barbershops and on street corners. There is no more painful, socially destructive symptom of a poor economy than large numbers of people looking for jobs that aren't there. Improving this dimension of economic performance is a high political calling.

The focus on jobs can, however, lead to confusion in regulatory debates. Regulation redirects economic activity. The new set of activities may involve more or fewer jobs than would have been the case without regulation. Many EPA regulations, for instance, require large capital expenditures for pollution control equipment (such as scrubbers on power plant exhaust stacks); these rules, by shifting the composition of inputs toward capital stock, and by increasing prices and reducing output, will reduce employment in many cases. Academic research showing substantial job losses from Clean Air Act regulations documents this tendency.[1] At the same time, many OSHA regulations require firms to hire additional

[1] See Michael Greenstone, "The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufacturers," 110 *Journal of Political Economy* 1175 (2002).

workers to engage in safety tasks, such as frequent sweeping up of industrial and agricultural dust; these rules also increase product prices and reduce measured output, but their heavy focus on added manpower and staffing surely results in net increases in employment.

Yet no sensible person thinks that EPA and OSHA rules should be judged solely by their employment effects. Rules should instead be judged by whether their benefits—reduced pollution and workplace hazards, translating into better health and other benefits—are worth their total costs. Let me offer two examples from my time in the Reagan administration, far removed from the current regulatory frays:

- In the late 1970s and early 1980s, EPA required the phased elimination of lead additives in gasoline. The result was to reduce employment: sales and employment in the tetraethyl lead industry fell substantially, while the substitute method for boosting gasoline octane was to refine gasoline more thoroughly at existing refineries. Yet the elimination of lead in gasoline—and thereby in the atmosphere, where its poisonous effects were very serious and well documented—was highly beneficial on the whole.
- At about the same time, EPA considered requiring schools with fraying asbestos on heating ducts, pipes, and furnaces to remove and replace the asbestos. That would have created many jobs—the jobs of the asbestos removers (indeed the rule was proposed by a labor union). But it would have been a public health disaster—generating a great deal of airborne asbestos in and around many school buildings. Thankfully, EPA eventually settled on the right policy: to leave fraying asbestos in place but contain it through sealants and other means.

The lesson of these examples is that the employment effects of regulation, while important, are indeterminate. In the current debates, opponents of EPA rules have pointed to the jobs that would be lost in plants that were closed or phased down, while proponents (including EPA itself) have pointed to jobs that would be created in providing pollution-control equipment. These exchanges are understandable in the current economic environment, but they are not going to lead to conclusions on the merits of the rules in question. One wants to know the total employment effects, direct and indirect; and one also wants to know the other costs such as higher prices; and, most of all, one wants to know the benefits and whether they seem reasonably worth the total costs. The cost-benefit standard would encourage all concerned to move their arguments to a more productive plane.

Finally, it is useful to compare the cost-benefit standard with a very different approach to the problems of delegated lawmaking, that of the REINS (Regulations from the Executive in Need of Scrutiny) Act currently being considered in the House and Senate. REINS would require that major new rules be approved by joint resolutions of Congress and signed by the President—that is, be approved by statute—with expedited procedures guaranteeing up-or-down floor votes promptly after final rules were issued. In place of the Regulatory Accountability Act's legal standard for applying broad regulatory statutes, REINS would go back to the political source for every regulation of major importance. It would also put precisely worded regulatory statutes to a second legislative test at the time of implementation, which will often be before a subsequent Congress and President. For example, the incandescent light bulb ban, enacted by the 110th Congress and President Bush in 2007, would need to be approved by the 112th Congress and President Obama before it could be implemented. This would be the regulatory equivalent of initial authorization and subsequent appropriation in spending programs.

I think the REINS Act is an admirable initiative, and I think the criticism that it would systematically block worthwhile regulations is mistaken.[2] It is, however, an effort to counter one of the most powerful and durable trends in American government and throughout the advanced democracies: the delegation of policy-making authority from legislatures to executive agencies. The trend has deep political, economic, and institutional causes and will not easily be diverted. Is Congress prepared to add 50–100 new pieces of procedurally privileged legislative business to its annual docket? I myself would be delighted to see Congress spending more time deciding on major policies derived from existing statutes and less time passing yet additional statutes and creating yet additional agencies. If Congress is willing to do this, REINS and the Regulatory Accountability Act may be considered complementary. But if it is not, a judicially enforceable cost-benefit standard is a reasonable alternative. Lawmakers should consider the two approaches side-by-side.

Here is a start: The cost-benefit standard would go with rather than against the trend of legislative delegation. It would discipline rulemaking with an economic test enforced by courts rather than a political test enforced by Congress. The standard would continue to

[2] See my testimony before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, Feb. 15, 2011.

excuse major rules from the need to attract contemporary legislative majorities; instead it would subject those rules to a new statutory directive, one that would yield substantial economic benefits with much less institutional burden on Congress. The two approaches would have similar results in clear-cut cases: under both, clearly beneficial regulations would generally pass while clearly harmful regulations would generally fail (not only through judicial or congressional action but also, and perhaps more importantly, through the deterrent effect of the new procedures). The approaches would be more likely to diverge in intermediate cases—where the balance of costs and benefits was close, or where rules involved political and social considerations beyond the scope of a cost-benefit calculation. Those cases might go one way under a cost-benefit test and another way under a REINS test—but no one could say in advance which would be which.

Congressional sentiment can, however, change the course of rulemaking proceedings without a REINS procedure. We saw this recently, when EPA postponed its "Boiler MACT" rulemaking, and its proposal to tighten the national air standards for ozone, in response to political opposition from Congress and elsewhere. I was a skeptic of both rules, but let's assume that both actions would have produced benefits commensurate with their substantial costs. Nevertheless, in both cases the costs would have been realized years in advance of their benefits—a pattern characteristic of many EPA rules. So it would not have been unreasonable to defer the rules at a time of serious economic malaise and high unemployment. That is a political judgment, not a judgment on the rules' ultimate merits on their own terms. So these cases would fall into my intermediate category—where a single-mission agency is pursuing its mission oblivious to wider political and economic concerns, where cost-benefit analysis alone does not provide an effective counterweight, and where a blunt, REINS-like political correction could be effective. But it is also a case where the political correction was administered informally, without REINS. EPA did not postpone the rules because it recognized their weaknesses on the cost-benefit merits, but rather because political representatives were up in arms over the rules' employment effects. Those effects were not the whole story of the rules' merits, as I emphasized earlier. They were, however, a good proxy for the exercise of prudence in deferring consideration of two expensive regulatory projects at a time when other economic problems were paramount.

Third, a cost-benefit standard promotes transparency and accountability.

Agency rulemaking is a parade of narrow, discrete, complex, and sometimes highly technical policy proposals. Each one is of intense importance to a small number of people but unknown to the rest of the world except through occasional, usually sensationalized news reporting, and many of them are shot through with interest-group lobbying and rent-seeking. These circumstances insulate regulation from the level of informed debate and oversight, accessible to the attentive non-expert, that characterize taxing and spending policies. (For such policies, aggregate dollar figures at least provide a common language for considering individual decisions and policy trends.) That is why regulatory policy, despite the APA's requirements for public notice and comment, concise statements, and reasoned explanations, is largely an insider's game, unusually prone to special-interest favoritism and "agency capture."

The cost-benefit *standard* is a corrective to this problem because it requires the preparation of a cost-benefit *analysis* that translates all (or at least most) of the details to a common metric. Compliance expenses, reduced employment, higher prices, and opportunity costs are estimated, translated into cost figures, and summed. Improved public health, reduced accident rates, increased employment, lower prices, and recreational and aesthetic improvements are estimated, translated into benefit figures, and summed. Although cost-benefit analysis is often regarded as an arcane, technocratic exercise, its purpose is to transcend arcanery. It is best regarded as a means of summarizing a complex decision for higher-level decision-makers and outside observers. If you examine the evolution of the regulatory cost-benefit standard within the Executive Branch, you will find that it did not arise because economists seized control of the West Wing. Rather, regular White House staffers needed to know about a pending decision at the EPA, or the Agriculture Department, or the Federal Aviation Administration that had attracted political attention. Working in a hectic, high-pressure environment, they needed an efficient, informative briefing. Why, briefly, was this a good idea? How much would it cost?

This is not to say that cost-benefit analysis is turning a crank. The estimation of component benefits and costs often involves large ranges of uncertainty. The procedure itself involves many arguable issues—such as how to discount future costs and benefits for comparison, and how to value non-market benefits such as improved visibility and "years of

life saved." These, however, are precisely the issues that serious regulatory debate *should* plumb. The generality of the APA's current rulemaking standards, combined with the generality of the goals of many regulatory statutes, means that *Federal Register* explanations of final rules are often murky and defensive—written not to illuminate but rather to protect agency prerogatives and be "review proof" when they arrive in court. A cost-benefit standard would leave less room for maneuver.

When I was administering OIRA, I emphasized that cost-benefit analysis had a political purpose as important as its economic purpose: to widen the audience of people who could understand the stakes in a given regulatory proposal and come to an informed judgment of its merits. That is also the mantra of President Obama's OIRA administrator, Cass Sunstein. The audience is not only OIRA and the White House: it is Members of Congress, judges, reporters, editorial writers, executives, academics, and interested laymen. Accountability to Congress is not the only means of improving regulatory policy. Accountability to the general public—beyond the immediate participants in each proceeding—is equally important.

Fourth, a cost-benefit standard builds on thirty years of agency practice.

From Ronald Reagan in 1981 to Barack Obama in 2011, White House regulatory review, while varying in details and emphases, has followed the same essential policy: a regulation's benefits should exceed its costs, and the margin of benefits over costs should be the greatest among the alternatives considered. The executive orders have included several ancillary policies as well. Most have been extensions of the cost-benefit standard and axioms of regulatory economics—agencies should identify a market failure justifying regulation, should use performance standards rather than input controls, and should choose the most cost-effective means of achieving a given goal. Others have underscored the accountability function of cost-benefit analysis—agencies should use clear language, be transparent, and promote public access and participation.

It is remarkable to find this degree of policy constancy across Republican and Democratic administrations. (If the same Presidents had issued executive orders on administering health care, Social Security disability, or wage-and-hour programs, the documents would have been dissimilar.) This suggests that the cost-benefit standard is

addressed to the essentially nonpartisan institutional problems I have described. The growth of the volume, scope, and impact of regulation, and the extreme delegation of legislative authority inherent in the profusion of broadly worded regulatory statutes, are incontestable facts of modern government. They have created a need for (1) some equivalent to a budget constraint for regulatory agencies, (2) a standard for applying broad statutory mandates that is at once more pointed than the APA's current standards and capable of winning wide political assent, and (3) a method of summarizing and communicating complex regulatory issues and highlighting areas of uncertainty and dispute. Of course, the executive order programs employed the cost-benefit standard for the specific purpose of strengthening presidential oversight of the sprawling regulatory establishment. But it can serve equally well as a statutory standard for strengthening congressional and judicial oversight. And it has broader benefits as well, such as more focused rulemaking submissions and more productive media scrutiny and public debate. Although the cost-benefit standard and White House review procedures were highly controversial at first, they have become radically less so over time. After thirty years of bipartisan endorsement and agency practice, the cost-benefit standard is sufficiently established to merit statutory codification.

Fifth, a statutory cost-benefit standard would significantly improve the executive order programs.

The executive order programs have proven durable and useful and are sure to be continued by future Presidents of both parties. But they have suffered from several serious weaknesses that are well documented in academic research.[3] There is great variation in the quality and thoroughness of cost-benefit analyses, both among and within agencies. Many analyses are perfunctory, and many are clearly prepared to justify a decision that has already been made. They are almost always undertaken after a Notice of Proposed Rulemaking has been issued. OIRA sometimes returns fairly thorough analyses to agencies for further work, and other times lets sloppy or highly incomplete analyses pass.

[3] An excellent example is Ted Gayer, *A Better Approach to Environmental Regulation: Getting the Costs and Benefits Right*, The Hamilton Project, Brookings Institution, Discussion Paper 2011-06, May 2011, and the further research cited and discussed therein.

Two stark features of regulatory activity in the Obama and Bush administrations illustrate the malleability of the cost-benefit standard under the executive order programs:

- First, EPA has touted benefits from its pollution-control rules of many hundreds of billions of dollars per year, vastly exceeding its estimates of the costs of those rules. But the huge majority of the benefits come from just one source: EPA's calculations of enormous health benefits of reducing airborne particulate matter from already low levels to still lower levels. These calculations are based on a few studies that assume that the benefits of a given reduction from today's low levels of particulates produces identical health benefits as those from the far higher levels of decades ago. That is much too thin and contestable a basis for the fabulous benefits EPA is claiming.
- Second, EPA, NHTSA, and the Department of Energy similarly claim hundreds of billions of dollars of benefits from energy-efficiency standards—for motor vehicles, dishwashers, stoves, light bulbs, and other appliances—greatly exceeding the costs. But, again, the huge majority of the benefits is from a single source, and one that is highly debatable to put it mildly. They are not public benefits, such as reduced emissions, at all. Instead they are the presumed benefits of forcing consumers to spend more on energy-using products today in exchange for lower energy expenses in the future. The presumption is that when citizens are left to make decisions for themselves, they will care too much about actual lower prices today and too little about estimated lower prices in the future. As Energy Secretary Steven Chu has put it, "We are taking away a choice that continues to let people waste their own money." This is pure paternalism. If it is accepted, the government might as well order everyone to buy galoshes.

These two propositions account for a very large share of the advertised net benefits of federal regulation today. Whatever one's view on their ultimate merits, they are certainly propositions from the executive in need of more scrutiny than they are currently receiving.

The deficiencies of the executive order cost-benefit standard are the result of its being internal, informal, and private within the Executive Branch, and therefore ultimately voluntary. A statutory standard—especially one girded by the other procedural refinements of the Regulatory Accountability Act, such as the requirements for preliminary cost-benefit estimates at the NPRM stage and for hearings for high-impact rulemakings—would go a long way to correcting them. The prospect of judicial review would transform the dynamics of the cost-benefit standard within the agencies and between the agencies and OIRA. Today, the agencies and OIRA often disagree strenuously over the merits of individual rules. But once a decision is made, they naturally lock arms and present a united front to the outside

world—they are, after all, administration colleagues and subordinates to the same President. And the agencies' final cost-benefit analyses and underlying studies are often omitted from the formal, judicially reviewable rulemaking records. Under the Regulatory Accountability Act, final cost-benefit analyses would receive independent judicial scrutiny; that would lead to much greater care and honesty in the preparation of those analyses.

The Act's provisions encouraging agency compliance with OIRA guidance on cost-benefit methods, and providing OIRA the discretion to place its own analyses in rulemaking records, would further strengthen intra-administration incentives for preparing analyses that were disinterested and illuminating of the merits of final rules. Over time, a new common law of regulatory review would come into being; this, along with the academic and political debate it would inspire, would introduce a degree of professionalism into regulatory policy-making that is lacking today.

Finally, the Regulatory Accountability Act's application of the cost-benefit standard to the decisions of the "independent" commissions such as the FCC and SEC would be a major step forward. These are among the most powerful regulatory agencies in Washington, with some of the most sweeping statutory mandates—as in my instance of the CFPB. And their policies often overlap with those of the executive agencies, which has frustrated policy coordination under the executive order programs. It is time for these agencies to catch up.

TWO CRITICISMS OF A COST-BENEFIT STANDARD

My arguments in favor of a statutory cost-benefit standard have addressed many of the criticisms that have been leveled at the proposal. But two criticisms, which have been prominent in initial commentary on the Regulatory Accountability Act, call for separate attention.

The first is that a cost-benefit standard would be inherently biased against regulation because regulatory benefits are often more difficult to quantify than costs. The premise of the criticism is not a strong one. Regulatory interventions often have "unintended consequences" that make them more costly and less beneficial than projected; this is because people and business firms adjust to the interventions in unpredictable ways, and the adjustments often have costs of their own even as they compromise regulatory goals. But it is certainly true that many regulations aim to provide "public goods" that are difficult to price because they are

not traded on any market—a classic case is the aesthetic and amenity benefits of clean air and water. In these cases, it will typically be relatively easier to estimate the immediate compliance costs for reducing pollution for the sake of the benefits.

The cost-benefit standard is not, however, biased against regulatory action in such cases. Rather it clarifies the nature of the choice being made—the price being paid for an immeasurable (or hard to measure) public good. That the value of a public good is difficult to specify does not mean that one is indifferent to its price. A government official deciding on whether or how far to protect a natural habitat, or to improve visibility in a national park or urban area at certain times of the year, should be intent on knowing the cost of various possible decisions. And regulatory officials make such judgments all the time. A cost-benefit standard generates a useful stream of precedents of how others have decided similar cases, leading over time to standards of reasonableness (this has already begun under the executive order programs). There is no reason whatever to worry that courts will be unsympathetic to these circumstances, especially under the Regulatory Accountability Act's provision directing deference to cost-benefit determinations that follow OIRA guidelines.

The second criticism of the cost-benefit standard is that it would throw sand in the gears of rulemaking for the benefit of business interests—imposing costly and time-consuming burdens on regulatory agencies, and establishing impossibly high standards of decision-making, all with the purpose of delaying and defeating important regulatory protections. One obvious weaknesses of this line of attack is that we have already had an administrative cost-benefit standard in place for thirty years. I read a recent criticism of the Regulatory Accountability Act that claimed it would have made it impossible to ban lead in gasoline. But, as I have mentioned, we did ban lead in gasoline, and did so under a cost-benefit standard (in the Reagan administration). The lead phase-down passed the cost-benefit test with flying colors—its benefits were revealed with such clarity that its timing was accelerated significantly beyond the policy inherited from the Carter administration. Another problem with the criticism is that business interests, too, are often advocates of regulatory measures—for purposes of legal certainty, improved market performance, or competitive advantage. A statutory cost-benefit standard would not play favorites among interest groups.

But I must conclude on a note of impatience with the claim that cost-benefit analysis is too much of a burden for government regulators to bother with. Federal regulations impose enormous burdens on the American public's time, energy, and pocketbooks. Is it too much to ask of the officials responsible for these regulations that they devote careful thought and meticulous study to making $100 million decisions? If regulatory protections are indeed essential and obviously needed, why should it be so difficult to demonstrate that this is so? It is risible to suggest that it is unreasonable to ask regulators to show that the benefits of their major decisions are worth the costs.

CONCLUSION

The Administrative Procedure Act is overdue for modernization to bring it up to date with the practices and problems of contemporary regulation. The reforms set forth in the Regulatory Accountability Act would address many of those problems. It would not bring an end to heated controversies over the appropriate scope and purposes of federal regulation—that will never happen. But it would make those controversies more focused and productive. Rulemaking proceedings would become more transparent and governed by objective criteria. The policy discretion of regulatory agencies would be narrowed to a degree appropriate to their position in our constitutional system. And the agencies' decisions would become more economically sensible, cost conscious, and socially beneficial. One could not ask for more from our fundamental law of administrative procedure.

Mr. SMITH. Mr. Baker?

TESTIMONY OF ARNOLD B. BAKER, OWNER, BAKER READY-MIX AND BUILDING MATERIALS

Mr. BAKER. Chairman Smith, Ranking Member Conyers, and distinguished Members of the Committee, good morning and thank you for giving me the opportunity to come before you and to participate in this important meeting.

My name is Arnold Baker. I am chairman of the National Black Chamber of Commerce, but more importantly, I am CEO of Baker Ready-Mix and Building Materials. Although Baker Ready-Mix is a small business, we have supplied a good deal of concrete used in the rebuilding of New Orleans in the immediate aftermath of Hurricane Katrina. Since we were the first concrete plant to reopen in the City of New Orleans, it well positioned us for growth during the rebuild. We have continually reinvested all of our profits into our company, allowing us to grow from a 10-person operation to a 60-person operation since Hurricane Katrina.

Unfortunately, a new swarm of regulations coming out of Washington are actually threatening our survival and threatening our ability to be competitive. These new regulations are going to make it more difficult for us to sell concrete, more difficult for us to create jobs, more difficult for us to stay competitive.

I am extremely non-partisan. I am just a business owner who over the past few years, as I have grown, I have had to endure a continuum of regulatory changes that have impacted my daily business operations. Most are excellent, but some have greatly impeded my ability to grow even more. So even though I may use a rule as an example, I am really not here about any particular rule or agency because most of the rules and most of the agencies' work is good stuff and good for society. But sometimes we all know that that is not always the case.

This process should be improved to better ensure that the rules are needed and relevant, especially during these tough economic times. We just cannot afford job-costing mistakes. Federal agencies need to do a better job of understanding the impact that their regulations will have on businesses and jobs before they impose the new rules. Companies like mine, who have already had to fight to stay on top, fight to get back in business, and try to learn all the existing regulations, need to have certainty that the new rules are well conceived and supported by adequate data.

H.R. 3010, the Regulatory Accountability Act of 2011, will meet these needs by requiring agencies to show that new rules are necessary and present the data that supports the regulatory action. Let me give some examples of ways that H.R. 3010 would benefit businesses like mine.

Cement is a critical ingredient in the concrete that I sell. It is the glue that holds concrete together. In 2010, EPA issued the Cement MACT rule that imposes extremely stringent new emissions standards on cement plants. This caused a ripple throughout the industry. All concrete plants received notifications that your cement is going to increase anywhere from 15 to 30 percent. Our main ingredient, our livelihood. This rule is also expected to cost $3.4 billion and shut down at least 18 U.S. cement plants. On top

of this, EPA plans to make fly ash, our second most critical ingredient, a hazardous material. They have also imposed new permitting requirements for greenhouse gases, has restricted the material that can be burned in cement kilns. Together, these rules are expected to add $20 to $36 to the cost of every ton of cement that my company buys. This represents a 33 percent increase in costs for one of my company's most critical ingredients.

Because I am a small business, I certainly can't absorb this cost like larger businesses do. I can't spread this over several States or more trucks or more plants. I have to pass this cost directly to my consumer which is either a private sector business owner, the guy doing driveways, or the City of New Orleans or the State of Louisiana. This is a direct pass-through to them.

On the other side of this is that as a small business owner, I lose contracts every day by $1 per yard. Someone will come in and bid $94, and I will bid $95. One dollar per yard makes a huge difference in my industry. So now my main ingredient is increasing the price by 33 percent. This has a significant impact on my business operations. If all this comes to fruition—we are going through a very difficult assessment process as to what the future looks like for us if these regulatory actions come to fruition because our margins are tight already.

If H.R. 3010 had been law, EPA would have had to have held an on-the-record hearing to show that the data relied on is accurate and reliable. It would also have had to consider the cumulative and indirect effects of the rule, including industries such as mine that depend on cement. And the agency would have had to provide a detailed justification for the approach they took in that regulation. A better regulatory outcome would have probably resulted, one that is more balanced. We are not saying that the rules are wrong or rules are bad, but all the factors are not being considered. My business was not being considered when these rules were being brought to fruition.

Poorly conceived and poorly supported rules create uncertainty and reluctance to make future investments, including the hiring of additional employees at a time when we need more jobs. H.R. 3010 will lead to better regulatory outcomes and a greater certainty about future investments and hiring. Again, this is not about a rule or any agency. this is merely about a more informed, more inclusive and more effective process.

Thank you for allowing me this time, and I will be happy to answer any questions you might have.

[The prepared statement of Mr. Baker follows:]

Testimony of
Arnold B. Baker
Chief Executive Officer
Baker Ready-Mix and Building Materials
New Orleans, Louisiana

U.S House of Representatives
Committee on the Judiciary

Date:	**October 25, 2011**
Time:	**10:15 A.M.**
Location:	**Room 2141**
	Rayburn House Office Building
	Washington, D.C.
Title:	**Hearing on H.R. 3010, the**
	Regulatory Accountability of 2011

Chairman Smith, Ranking Member Conyers and distinguished Members of the Committee, good morning and thank you for giving me the opportunity to participate in this important hearing. My name is Arnold Baker and I am the Chief Executive Officer of Baker Ready-Mix in New Orleans, Louisiana. I am also the Chair of the National Black Chamber of Commerce. My company was started in 2003 with five employees. We now have nearly 60 employees. Although we are a small business, we are supplying a good deal of the concrete that is rebuilding New Orleans in the aftermath of Hurricane Katrina. Reconstructing the city's levees, floodwalls, roads, sidewalks, houses, and public buildings requires concrete – a lot of it. And New Orleans will need much more of it in coming years.

Unfortunately, as discussed below, a swarm of major new regulations coming out of Washington are threatening Baker Ready-Mix's ability to stay in business and keep rebuilding New Orleans. Together, these sweeping rules will make it much more difficult for me to sell concrete, to give health coverage to my employees, and to grow jobs. Federal agencies need to do a much better job of understanding the full impact their regulations will have on businesses and jobs – along with possible alternatives – **before** they impose the most costly new rules. Businesses like mine, who already fight to stay on top of the sea of **existing** regulations, need to have certainty that **new** rules are well-conceived and supported by adequate data.[1] H.R. 3010, the Regulatory Accountability Act of 2011, would accomplish these goals.

The Regulatory Accountability Act Will Restore Balance to the Regulatory Process

Federal agencies often fail to understand the full impact that their regulations – along with those of ***other agencies*** – will have on businesses and the economy as a whole. While these agencies are currently required to undertake some consideration of the impacts their

[1] Small businesses like mine do not have the time or the resources to actively participate in the rulemaking process. It is a major challenge for most businesses simply to understand how new regulations will affect them. For example, to understand the four recent EPA rules discussed below, a company would need to read over 1,350 pages of the *Federal Register* and relevant supporting documents. It is not realistic to expect a company like Baker Ready-Mix to take on such a task with the large number of new rules being written each year.

rules will have on regulated entities and the economy,[2] these reviews are limited and often conducted in a piecemeal fashion.

To address this problem, the Regulatory Accountability Act has been introduced in both the House and the Senate, with bipartisan support. The legislation would put balance and accountability back into the federal rulemaking process, without undercutting vital public safety and health protections. The bill focuses on the process of developing regulations. Better process will produce better substance. The Regulatory Accountability Act would achieve these goals by:

- Giving the public an earlier opportunity to participate in shaping the most costly regulations before they are proposed. At least 90 days prior to the time the rule is proposed, the agency must provide the public with a written statement of the problem to be addressed, as well as the data and evidence that supports the regulatory action. The agency must accept public comments on the proposal.
- Requiring agencies to select the least costly regulatory alternative unless the agency can demonstrate that the more costly alternative is necessary to protect public health, safety, or welfare.
- Requiring agencies to consider the cumulative impacts of regulations and the collateral impacts their rules will have on businesses and job creation.
- Allowing stakeholders to hold agencies accountable for complying with the Information Quality Act, which requires agencies to use data that is objective and reliable. The public would also have the opportunity to correct data that does not meet IQA standards.
- Providing for on-the-record administrative hearings for the most costly rules to verify that the agency has "done its homework" and that the proposed rule is well-conceived and well-supported.

[2] *See, e.g.*, Executive Order 12,866 (1993)(requiring interagency economic review of "major rules" that are likely to have an annual effect on the U.S. economy of $100 million or more); Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* (requiring federal agencies to consider the impact their proposed rules will have on small businesses and small governments).

- Restricting agencies' use of "interim final" regulations, where the public has no opportunity to comment before a regulation takes effect; the Act would allow expedited judicial review of the agency's decision to issue an interim final rule.

Regulations Impacting Baker Ready-Mix: How Would the Regulatory Accountability Act Have Addressed Them?

Let me give some specific examples of the impacts that new regulations are having on my company and ways that the Regulatory Accountability Act would have benefitted businesses such as mine:

EPA Rules Affecting Cement Plants. One of the most critical ingredients in concrete is cement, which is the "glue" that holds together the other ingredients of concrete: gravel, sand, crushed rock, fly ash, etc.[3] Without cement, we could not make and sell concrete. Just within the last few years, however, the U.S. Environmental Protection Agency has issued or proposed several rules that will adversely impact cement production at U.S. plants.

- ***"Cement Maximum Achievable Control Technology (MACT)" Rule***[4] - This rule imposes extremely stringent new standards for fine particles and other emissions from cement plants. This rule will require cement companies to install very costly new control equipment. By itself, this rule is expected to cost **$3.4 billion** to implement and result in the closure of at least 18 of 100 cement plants across the U.S., over and above the plants that have already closed.[5] As a result, domestic cement production is expected to fall below 50% of the cement consumed in the U.S.; within a few years, more than half of the concrete used on American projects will be made with foreign cement.[6] If the Regulatory Accountability Act had been law when EPA began the cement MACT rulemaking process, stakeholders would have been able to provide better data for the agency to use in setting the standards.

[3] The most common type of cement is Portland cement, which is a mixture of calcium, silicon, aluminum, iron, to which gypsum and fly ash are added. Lime and silica make up about 85% of the mass of the cement.
[4] National Emissions Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 75 Fed. Reg. 54,970 (September 9, 2010) (Final Rule).
[5] Portland Cement Association, 2011 estimate.
[6] *Id.*

EPA would have had to demonstrate that its data supported the standards it selected, and that the data was supported by the Information Quality Act. EPA also would have likely had to select a less costly alternative and consider the cumulative impact of multiple regulatory impacts on the cement manufacturing industry (and on ***other*** industries, like ready-mix concrete, that heavily depend on cement).

- ***Fly Ash Rule***[7] - Fly ash is added to cement to make it stronger and more durable. My company now adds fly ash to about 90% of our concrete products to improve their performance and lifespan. EPA has proposed classifying fly ash as a hazardous material, or, alternatively, as a nonhazardous solid waste with special disposal restrictions. Either action by the agency is likely to result in customers rejecting fly ash in our products, forcing us to use more costly and less suitable materials. This rule, by itself, could add 10% or more to the cost of concrete. If the Regulatory Accountability Act had been in effect, EPA would have likely been required to have on-the-record administrative hearings to show why such a dramatic regulatory change was necessary and the data that supported the change. The agency would have had to fully consider the impact that a change in solid waste classification would have on multiple industries and recycling practices.
- ***Greenhouse Gas Rule***[8] - EPA's regulatory program to limit CO_2 and other greenhouse gases hits cement plants very hard. Already, CO_2 emission limits have been proposed for several construction and modernization projects at cement plants. These limits will result in higher production costs for cement, which in turn will make concrete more expensive. Had the Regulatory Accountability Act been law, EPA would have had to hold on-the-record hearings and carefully evaluate the impact of greenhouse gas rules on businesses of all sizes, and on the economy as a whole.[9]

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[7] Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128 (June 21, 2010) (Proposed Rule). Fly ash is one type of by-product that is produced when coal is burned in boilers or other combustion units. Fly ash is currently used extensively as an ingredient in a variety of products, including gypsum, concrete, and other building materials.

[8] *See* Greenhouse Gas Emission Standards for Light-Duty Vehicles, 75 Fed. Reg. 25,324 (May 7, 2010) (Final Rule), and Prevention of Significant Deterioration and Title V GHG Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (Final Rule).

[9] To date, EPA has not conducted any thorough comprehensive evaluation of the cumulative effect of greenhouse gas rules on small businesses or the economy as a whole.

- ***Nonhazardous Solid Waste Definition Rule***[10] - EPA recently revised the definition of materials that can be burned for energy recovery in combustion units like boilers and cement kilns. Many nonhazardous materials that have traditionally been burned for energy recovery in cement kilns – such as tires, used oil, plastic, carpet, and wood waste – now have to be sent to a commercial/industrial incinerator unit. This means that cement plants will either have to replace these readily available materials with far more costly fuels or install new control equipment in order to qualify as an incinerator. Either way, their increased costs will be passed along to their customers, including Baker Ready-Mix. As a result, concrete costs will rise. Again, the Regulatory Accountability Act would have required EPA to understand how the revised definition of solid waste would impact the use/recycling of materials such as tires and used oil and how it would impact cement manufacturing.

The combination of the four EPA rules described above is anticipated to add as much as **$20 to $36** to the cost of every ton of cement that Baker Ready-Mix purchases.[11] This represents a 33% price increase for one of my company's most critical manufacturing components. Because we are a small business, we can't spread our increased costs over a large number of projects the way larger companies can. When you consider that a difference of as little as $1 per ton of concrete can determine whether my company wins or loses its bid for a particular project, a cost increase of this magnitude would be disastrous. I may be put in the position of having to shrink my workforce rather than expanding it.

The effect of these EPA rules will also ripple though the U.S. economy. Critical infrastructure projects in urban areas and communities all across the country depend heavily on concrete, and these projects could be cancelled or downsized because of sharp cost increases in cement. At a time when the country needs to put people to work, we shouldn't be cutting back on public works projects because agencies in Washington pile excessive new regulations on top of each other.

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[10] Identification of Non-Hazardous Secondary Materials That Are Solid Waste, 76 Fed. Reg. 15,456 (March 21, 2011) (Final Rule).
[11] Portland Cement Association, 2011 estimate.

Health Care and OSHA Actions

In addition to the new EPA regulations, we will also be significantly impacted by the huge number of regulations implementing the health care law enacted in March 2010. The cost of these new regulations will be so high that we've had to look at restructuring the company to stay below the 50-employee threshold so that we can still offer health care to our employees on our own terms.

The regulations being promulgated by the Departments of Labor, Treasury, and Health and Human Services to implement these laws increase the uncertainty felt by employers and businesses, both because of the substance of the regulations and the "anything-goes" process by which the Departments are issuing them.

- ***Healthcare rulemaking process*** - There are several ways in which recent health care law rulemakings would have been different if the Regulatory Accountability Act had been in place: many of the regulations, based on their economic impact, would qualify as "major rules" and thus be subject to increased public participation and on-the-record hearings. Even if their cost impact was not high enough to trigger these provisions, these regulations would likely have qualified due to their significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic and export markets. Also, the regulations being issued under this law would have to be the least costly alternative and the agencies would have to show that the costs justified the benefits and explain their reasoning. The agencies would also have to analyze alternatives that they did not choose in the same way. When considering the ultimate cost of these regulations, the agencies would have to include indirect costs, cumulative costs, and impacts on jobs and economic growth.
- ***"Grandfather Plan"-*** One of the most significant regulations promulgated to implement the health law was issued as an "interim final" rule. It implements the administration's promise that 'if you like your health care plan, you can keep it' – which was legislated into the statute under a provision referred to as "the

grandfathered plan" status provision.[12] Instead, the regulation is far more restrictive than what the health care law promised, with many more limitations and exceptions. It literally breaks one of the central promises made to pass the health care law – that employers and employees who liked their health plans would not have to change them. As a consequence, Baker Ready-Mix will be forced to find a new, less desirable plan. The Grandfather Plan Status regulation therefore triggers two key provisions of the Regulatory Accountability Act. As an interim final regulation, interested parties would have an opportunity to challenge whether this regulation should have been issued without a full rulemaking process. And the agency would have had to provide a specific statutory reference justifying the approach they took in the regulation.

- ***OSHA Noise Interpretation*** - Another agency action that highlights the need for H.R. 3010 was OSHA's use of a guidance document to reinterpret the term "feasible" as it applies to engineering and administrative controls under the noise control standard. H.R. 3010 specifies that before major guidance can be issued, the agency identifies the costs and benefits of the guidance and assures that such benefits justify such costs, just as if it were a regulation. It also directs the agency to confer with OMB's Office of Information and Regulatory Affairs (OIRA) to assure that the guidance is reasonable, understandable, and does not produce costs that are unjustified by the guidance's benefits. In the case of OSHA's noise interpretation, the agency did not do **any** cost-benefit analysis, and did not consult with OIRA. An independent economic analysis found that this guidance would have imposed more than $1 billion in costs on employers. Had the Regulatory Accountability Act been in place, this guidance would very likely not have been proposed. The planned guidance was subsequently withdrawn, but only after employers and their representatives had to make clear at every opportunity how damaging and unwarranted OSHA's interpretation was.

[12] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1251(a), 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2301(a), 124 Stat. 1029 (2010) ("[n]othing in the Act shall be construed to require that an individual terminate coverage…in which such individual was enrolled on the date of enactment.").

The Regulatory Accountability Act Will Give Businesses More Certainty

By requiring federal agencies to do a better job of explaining the data supporting their regulations, and to more fully consider the impacts and alternatives to those regulations, businesses like mine will have greater confidence that the rules are needed and have been properly designed. Well-conceived and well-supported rules enable businesses to plan for their implementation, including making capital expenditures in equipment and training. Poorly-conceived, poorly-supported rules create uncertainty, unnecessarily high burdens, and reluctance to make future investments, including the hiring of additional employees. The Regulatory Accountability Act will lead to better regulatory outcomes, and greater certainty about future business investments, including hiring.

Thank you for allowing me this time. I will be happy to answer any questions you may have.

Mr. SMITH. Thank you, Mr. Baker.
Mr. Shapiro?

TESTIMONY OF SIDNEY A. SHAPIRO, UNIVERSITY DISTINGUISHED CHAIR IN LAW, WAKE FOREST UNIVERSITY SCHOOL OF LAW

Mr. SHAPIRO. Thank you, Mr. Chairman. I appreciate the invitation to be here today to share with you my views on the Regulatory Accountability Act of 2011.

In the United States, administrative law is guided by three often competing principles that must be properly balanced: accountability, fairness, and efficient implementation. Efforts to achieve accountability and fairness must be balanced with ensuring that agencies can efficiently implement their statutory missions. I, therefore, have a number of concerns about H.R. 3010.

First of all, we already have sufficient procedures to ensure accountability and fairness. It is beyond contention that business interests have an ample opportunity to file comments and to meet with agency and OIRA officials often multiple times. If anything, the system has too many procedures. The rulemaking process is now inordinately complex, time-consuming, and resource-intensive.

As a result, it now takes 4 to 8 years for an agency to promulgate and enforce most significant rules. The proposed procedures would likely add another 2 to 4 years to the process. Under H.R. 3010, the longest rulemakings could take more than 12 years to complete which means that rulemaking could potentially span four different presidential Administrations.

Second, because of the current ossification, the real threat to our society is one of under-regulation, not of over-regulation. The long history of regulation demonstrates that when agencies fulfill their legislative mandates, it saves lives, prevents serious injuries, and protects the economic livelihood of millions of Americans. And all of this has been done at a reasonable cost. By comparison, when agencies fail to fulfill these mandates, immense harm can result. The financial collapse, the BP oil spill, and the West Virginia mine disaster are but a few examples.

Third, the arguments offered for 3010 are rebutted in academic literature. Claims of excessive regulatory costs of $1.75 trillion have been discredited. The evidence also shows that regulation is not a drag on employment. Regulation stimulates the creation of as many jobs, new jobs, as are lost, and job gains exceed job losses for some regulations.

In addition, the evidence contradicts the claim that regulatory uncertainty is deterring business investment. In any case, the proposed legislation would increase regulatory uncertainty, not decrease it by delaying regulatory initiatives by several years.

Delaying or stopping new regulations does not avoid economic costs. When the Government fails to regulate cement or anything else, we reallocate who pays the costs. When a regulation is delayed or blocked, the costs to industry of that regulation do not vanish into thin air. Instead those costs continue to be imposed on the general public in terms of lives lost, preventable cancers, and lost work days, among other harms.

Fourth, the bill would overrule more than 25 environmental, health, and safety statutes by replacing current requirements of justifying a regulation. These are substantive changes. The bill does not simply continue the existing executive orders. The current executive orders call for analysis before a regulation is completed. The bill would make a cost/benefit standard the decisional rule for promulgating a standard, which would be an enormous change in the way that we do business.

Finally, the legislation would add over 60 new procedural and analytical requirements to the agency rulemaking process. As I discuss in my testimony, there is no support in the academic literature for most of these procedures—most of these changes. Moreover, the Committee has received a letter from the Administrative Law Section of the ABA opposing most of the proposed procedures. The lack of support recognizes that the proposed procedures would, at best, lead to marginal improvements in accountability and fairness. At the same time, they would slow down an already slow regulatory process. Without new funding for agencies to do this work—and that is not expected—the reality would be agencies further bog down, blocked from their work of protecting the public.

It is simply not the case that we are stuck with a 1947 version of administrative process. Although the bill itself hasn't been substantially changed, there is a slew of executive orders which have changed administrative procedure, and Congress has legislated on several occasions to add administrative procedures such as the Regulatory Flexibility Act. So in other words, we have evolved the procedures as we have gone. We don't simply have a 1947 version of the act.

I think the most important point here is we need to achieve a reasonable balance between promoting accountability and fairness and ensuring that agencies can actually protect the American public. The system is now out of balance, imposing costs on millions of Americans who not receive the regulatory protection that Congress has specified in our health, safety, and environmental statutes.

Thank you and I will be happy to answer questions.

[The prepared statement of Mr. Shapiro follows:]

TESTIMONY
OF
SIDNEY A. SHAPIRO

UNIVERSITY DISTINGUISHED CHAIR IN LAW,
WAKE FOREST SCHOOL OF LAW
AND
MEMBER SCHOLAR, VICE-PRESIDENT
CENTER FOR PROGRESSIVE REFORM

BEFORE THE JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON H.R. 3010, REGULATORY ACCOUNTABIILTY ACT OF 2011
OCTOBER 25, 2011

Mr. Chairman and Members of the Committee, thank you for inviting me here today to share with you my views on H.R. 3010, the Regulatory Accountability Act of 2011, which would drastically overhaul the Administrative Procedure Act (APA) and introduce several imprudent changes to the process by which agencies develop regulations.

I am the University Distinguished Professor of Law at the Wake Forest School of Law. I am also a Member Scholar and Vice-President of the Center for Progressive Reform (CPR) (http://www.progressivereform.org/). Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of 60 scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary.

My work on regulation and administrative law includes six books, seven book chapters, and over fifty articles (as author or coauthor). My last book, published in 2010 by the University of Chicago Press, addressed administrative performance and accountability. I have served as consultant to government agencies and have testified before Congress previously on regulatory subjects.

I. INTRODUCTION

When agencies regulate, they are implementing the protections that Congress required in their statutory mandates. The long history of regulation—airbags, unleaded gasoline, cleaner air and water, food safety protections, and more—demonstrates that when agencies fulfill their legislative mandates, it saves lives, prevents serious injuries, and protects the economic livelihood of millions of Americans. By comparison, when agencies fail to fulfill these mandates, immense harm can result. It was too little regulation and enforcement that led to the BP Oil Spill, the Upper Big Branch Mine Disaster, and the almost yearly outbreaks of serious food poisoning that have killed many and injured thousands more.

While it is important that agencies protect the public, those protections must be achieved in an accountable and fair manner. The role of administrative procedures is to ensure sufficient accountability and fairness. But it is possible to have too much of a good thing. While it is always possible to add more procedures, we must also consider the impact of doing so on an agency's capacity to protect the public.[1] Administrative procedure must "comport with efficiency while also ensuring fairness and negating the fear of unchecked power."[2] We must achieve an appropriate balance between accountability, fairness, and the capacity of agencies to complete their statutory mission. In the design of administrative procedure, "[i]t

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[1] *See* Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 CARDOZO L. REV. 2459, 2459 (2011).

[2] Paul R. Verkuil, *The Ombudsman and the Limits of the Adversarial System*, 75 COLUM. L. REV. 845, 855 (1975).

is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs."[3]

Because it is important that we not frustrate the ability of agencies to achieve their statutory missions to achieve marginal benefits in accountability and fairness, I have several problems with H.R. 3010:

- Most fundamentally, H.R. 3010 would block or dilute the critical safeguards on which all Americans depend. The available evidence demonstrates unequivocally that regulations have benefited the United States greatly, while the failure to regulate has cost us dearly.
- The regulatory system is already too ossified, and H.R. 3010 would only exacerbate this problem. It currently takes four to eight years for an agency to promulgate and enforce most significant rules, and the proposed procedures would likely add another two to three years to the process. Under H.R. 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete. In the meantime, thousands of people would die and tens of thousands more would be injured or become ill because of the lack of regulation.
- The record of the regulatory system indicates there are sufficient procedures to ensure accountability and fairness. In fact, the system is already over-proceduralized. Since the 1990s, statutes and executive orders have added multiple layers of new rulemaking procedures and analytical requirements on top of the Administrative Procedure Act. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process. As a result, the real threat to our society is one of under-regulation, not of overregulation.
- Agencies are the subject of extensive lobbying, particularly by corporations and their trade groups. Moreover, we know that corporate and business lobbying of agencies far exceeds that by groups representing the public. These data confirm that the regulatory process already provides interested parties with fair access to agencies and OIRA to lobby concerning proposed rules.
- The asserted rationales for H.R. 3010 have no basis in reality:
  - Claims of excessive regulatory costs have been completely discredited;
  - Despite rhetoric about "job-killing regulations," the evidence shows that regulation is not a drag on employment because it stimulates the creation of as many new jobs as are lost, and job gains can more than offset job losses, leading to a net gain in employment; and
  - All of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment. Even if this claim was true,

[3] Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).

the proposed legislation would delay regulatory initiatives by several years, increasing regulatory uncertainty, rather than decreasing it.

- The legislation would add over 60 new procedural and analytical requirements to the agency rulemaking process. As communications received by the committee indicate, professors and the practicing bar support almost none of the proposed changes as necessary or appropriate. The few they do support tend to simply codify practices that agencies already carry out either voluntarily or in accordance with prevailing case law.
- The bill would overrule more than 25 environmental, health, and safety statutes by replacing current requirements for justifying a regulation with requirements that a rule must be justified as having benefits greater than its costs and must be the most cost effective available. These substantive changes would substantially weaken existing regulatory protections, enshrining the protection of corporate profit margins, rather than the protection of individuals, as the primary concern of regulatory decision-making.
- Other provisions of the bill add unnecessary analytical and procedural burdens, and give unelected, generalist federal judges with life-time tenure unprecedented new powers over the regulatory system, including the ability to second-guess expert agencies on complex policy judgments.

II. REGULATIONS BENEFIT SOCIETY GREATLY; THE FAILURE TO REGULATE HARMS SOCIETY GREATLY

All regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President. Whenever an executive or independent regulatory agency issues a rule, it is merely carrying out the instructions provided in duly enacted legislation for achieving a specified policy goal. These laws provide agencies with an important agenda to carry out, such as protecting people and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve goals such as protecting people and the environment, because these regulations have produced enormous benefits, as a recent report by the Center for Progressive Reform (CPR) documents.[4] Consider the following:

- OMB estimates that regulatory benefits exceed regulatory costs by 7 to 1 for significant regulations. The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by

[4] *See* Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

a ratio of 25 to 1. Similarly, a study of EPA rules issued during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.

- The BP Oil Spill and the Wall Street collapse have imposed billions—perhaps even trillions—of dollars in damages, far more than the cost of regulation that would have prevented these tragedies. Similarly, the failure to regulate day-to-day hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year.
- Dozens of retrospective evaluations of regulations by the EPA and the Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.

The report concludes:

> What is striking about these various strands of information is that they all point to the same conclusions: Americans have benefited greatly from government regulation; the failure to regulate has had tragic consequences for our economy and our environment; and, when evaluated retrospectively, regulation has not caused significant economic dislocations for regulated industries, or even small businesses.[5]

III. H.R. 3010 Will Greatly Ossify An Already Ossified Rulemaking Process

Clearly, the United States is better off because of the regulation it has in place, but now, more than ever, agencies are being prevented from closing new and remaining regulatory gaps by the destructive convergence of funding shortfalls and excessive procedural hurdles. The 30 pages of additional procedures proposed in H.R. 3010 would only making this bad situation worse, substantially slowing down an already slow rulemaking process and delay critical safeguards by several more years.

Studies indicate that the average time it takes to complete a rule after it is proposed is about 1.5 to 2 years, but no one thinks that any type of significant rule can be completed in such a short time frame. As Professor Richard Pierce has observed, "[I[t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later."[6] The EPA told the Carnegie Commission reports that it takes about five years to complete an informal

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[5] *Id.* at 19.

[6] Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 Geo. Wash. L. Rev. 902, 912 (2007).

rulemaking.[7] A Congressional report found that it took the FTC five years and three months to complete a rule using hybrid rulemaking.[8] These reports do not take into account additional analytical requirements that have been imposed since their publication date.

The five year or more timeframe for important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

  TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities also have the potential to delay a rule by another 6-12 months.

For the country's most important rules, the proposed legislation would add at least 21-33 months to the current delays:

- 6-12 months to complete the additional analytical requirements
- 3 months for the Advanced Notice of Proposed Rulemaking (ANPRM) process
- 6-12 months to respond to comments received after the ANPRM
- 6-12 months to complete the formal rulemaking procedures

  Total: 21-39 months (1.75-3.25 years)

It already takes four to eight years for an agency to promulgate and enforce significant rules, and the proposed procedures could potentially add another 2 to 4

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[7] CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).
[8] FEDERAL TRADE COMM'N, 98th Cong., 2nd Sess., 155-66 (Comm. Print 98-cc 1984).

years to that process. **Under H.R. 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete.** Conceivably, Congress could help to mitigate the impact of these new requirements by appropriating additional resources to the agencies. There is no indication, however, that the current Congress is considering taking this step. To that contrary, agency face shrinking budgets, which suggests the timeline for completing a rulemaking outlined above could be significantly underestimated.

IV. THE FALSE RATIONALES IN SUPPORT OF H.R. 3010

It already takes four to eight years for an agency to promulgate and enforce significant rules, and the proposed procedures would add another two to four years to the process at a minimum. While the proponents may claim it is better to take more time and get it right, we cannot forget that delay imposes real costs on real people. We must therefore be careful not to extend regulatory procedures unless they are likely to improve the administrative process. The record of the regulatory system does not reveal that more accountability is necessary. If anything, current accountability mechanisms are already too excessive, and actually inhibit agencies from effectively carrying out their statutory missions.

A. Agency Government Is Fair and Accountable

Administrative agencies are already subject to a thick web of accountability procedures. Indeed, there are already so many procedures that the most complicated and significant rules can take as long as six to eight years, or even more, to complete, as noted earlier. Agencies are also subject to extensive lobbying, particularly by corporate and business entities.

The Administrative Procedure Act (APA) requires agencies to provide persons affected by their regulations a fair opportunity to influence the rulemaking process and several mechanisms exist for holding agencies accountable for their regulatory actions. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it.

Since the 1990s, statutes and executive orders have added multiple layers of new rulemaking procedures and analytical requirements on top of the APA. As a result,

the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to a potential of as many 110 separate procedure requirements in the rulemaking process.[9] Additional procedural requirements have been added since 2000.[10]
- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.[11]

Besides procedural requirements, agencies are the subject of extensive lobbying, particularly by corporations and their trade groups. Moreover, we know that corporate and business lobbying of agencies far exceeds that by groups representing the public. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule. [12] These included meetings, phone calls, and letters. Data available on the OIRA website indicate that regulated industry participates far more frequently in meeting concerning rules undergoing OIRA review than do public interest groups.

These data unequivocally confirm that interested parties—particularly regulated industries—have fair access to agencies and OIRA to lobby concerning proposed rules. Moreover, since agencies have to justify rules by responding to every comment they receive, it is simply not plausible to contend that they are not accountable for the decisions that they make. Finally, since agencies are subject to a host of analytical requirements, it is beyond dispute that they are required to think carefully about what they do before they do it.

B. Regulations Do Not Impose Unreasonable Costs

For the past year, regulatory opponents have frequently cited a 2010 study by Nicole Crain and Mark Crain, done for the Office of Advocacy of the Small Business Administration (SBA), which stated, among other claims, that the annual cost of federal regulations in 2008 was about $1.75 trillion.[13] A CPR White Paper found

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[9] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), *available at* http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf.

[10] *See, e.g.*, Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

[11] *See* Public Citizen, The Federal Rulemaking Process, *available at* http://www.citizen.org/documents/Regulations-Flowchart.pdf.

[12] Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

[13] NICOLE V. CRAIN AND W. MARK CRAIN THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) *available at* http://www.sba.gov/sites/default/files/rs371tot.pdf.

that the methods used by Crain and Crain to arrive at their cost figure were so flawed that their estimate must be regarded as unreliable.[14] Subsequently, the nonpartisan Congressional Research Service (CRS) published its own report examining the study, which found the same flaws as identified in the CPR White Paper, and additional problems as well.[15] OIRA Administrator Cass Sunstein has characterized Crain and Crain as "deeply flawed" and referred to the study as an "urban legend."[16]

Regulatory opponents' unrelenting focus on the alleged high costs of regulation suffers from an even more fundamental problem, however. Regulations, strictly speaking, typically do not impose *new* costs on society, as Robert Adler, one of the current commissioners of the Consumer Product Safety Commission (CPSC), observed in a recent *New York Times* op-ed. Rather, they "simply re-allocate who pays the costs."[17] In other words, when a regulation is blocked, the costs to industry of that regulation do not vanish into thin air. Instead, those costs continue to be imposed on the general public, in terms of lives lost, preventable cancers, and lost work days. For example, a recent study of the environmental and public health externalities generated by different industries found that the coal-fired power plants create air pollution damages that are much larger than the value they provide to society.[18] By definition, the general public bears the costs of these externalities, and improved regulation of coal-fired power plants would shift some or all of these costs to the power plant owners.

C. Regulations Do Not Inhibit Economic Growth

Regulatory opponents contend that regulations slow economic growth and contribute to job losses, but existing studies do not support this claim. Instead, the studies find either no overall impact or, in some cases, an actual increase in

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[14] Sidney Shapiro et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Ctr. for Progressive Reform, White Paper 1103, 2011) *available at* http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

[15] Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations* (Cong. Research Serv., R41763, Apr. 6, 2011)

[16] *Unfunded Mandates, Regulatory Burdens and the Role of Office of Information and Regulatory Affairs, Hearing Before the Subcomm. on Tech., Info. Pol'y, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011) (testimony of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs), *available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1299%3A5-25-2011-qunfunded-mandates-regulatory-burdens-and-the-role-of-office-of-information-and-regulatory-affairsq&catid=14&Itemid=1; James Goodwin, *Sunstein Denounces SBA's 'Deeply Flawed' Study of Regulatory Costs*, CPRBlog, http://www.progressivereform.org/CPRBlog.cfm?idBlog=5758C6D6-AC7E-4BAF-CF1DA8672B3AB937 (last visited June 21, 2011).

[17] Robert S. Adler, Op-Ed, *Safety Regulators Don't Add Costs. They Decide Who Pays Them*, N.Y. TIMES, Oct. 16, 2011, *available at* http://www.nytimes.com/2011/10/17/opinion/safety-regulators-dont-add-costs-they-decide-who-pays-them.html?_r=2&partner=rssnyt&emc=rss.

[18] Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649 (2011), *available at* http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.101.5.1649.

employment.[19] A recent economic analysis, for example, found that the EPA's strict proposal to regulate coal ash waste would result in a net increase of 28,000 jobs.[20] Further, Department of Labor data suggest that few jobs are lost because of regulation.[21] An average of only 0.3 percent of workers lost their jobs because of government regulations or intervention during the years 2007 through 2009. This result is similar to data concerning layoffs prior to 2007.[22] By comparison, the same data find that extreme weather events have caused more extended mass layoffs.[23]

D. Regulatory Uncertainty Is Not An Obstacle to Economic Growth

A current refrain among regulatory opponents is that regulatory uncertainty is holding back the economy, preventing the United States from emerging from the current recession. All of the available evidence directly contradicts this claim:

- The sectors of the economy in which the most regulatory activity is taking place—the healthcare industry, mining, and the financial sector—have among the lowest levels of unemployment in the country, and the unemployment rate in these sectors is significantly lower than the national average.[24]

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[19] *See* Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), *available at* http://www.healthytomorrow.org/attachments/prosper.pdf.

[20] FRANK ACKERMAN, EMPLOYMENT EFFECTS OF COAL ASH REGULATION (Stockholm Environment Institute – U.S. Center, Tufts University, 2011), *available at* http://sei-us.org/Publications_PDF/Ackerman-coal-ash-jobs-Oct2011.pdf. While higher electricity prices caused by the regulation would lead to some job losses, these losses are more than offset by the job gains that would result from the expenditures by industry to come into compliance with the strict standard. In particular, coal-fired power plants would need to spend money on waste management, wastewater treatment, and construction and operation of facilities and equipment—all of which are labor-intensive activities and would generate significant increases in employment.

[21] Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* 20 (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf;.

[22] *Id. See also* EBAN GOODSTEIN, THE TRADE-OFF MYTH: FACT AND FICTION ABOUT JOBS AND THE ENVIRONMENT 35-37 (1999). (summarizing data from 1970-90 and finding similarly small numbers of workers being laid off because of environmental regulations).

[23] *Regulations Do Not Hinder U.S. Job Market, Paper Finds*, OMB WATCH, http://www.ombwatch.org/node/11615 (last visited Oct. 21, 2011).

[24] *See* Matthew Yglesias, *Where Is The Evidence That 'Regulatory Uncertainty' Has Increased? What Would Decrease It?*, THINKPROGRESS, Sept. 8, 2011, http://thinkprogress.org/yglesias/2011/09/08/314950/where-is-the-evidence-that-regulatory-uncertainty-has-increased-what-would-decrease-it/ (last visited Oct. 18, 2011).

- Surveys of business owners reveal relatively little anxiety over the current regulatory climate. Instead, many business owners cite the lack of demand as the biggest impediment to economic growth and hiring.[25]
- The experience of other countries with similar economies further calls regulatory uncertainty argument into question. Those countries that are not planning any major regulatory initiatives are experiencing the same anemic economic recovery as the United States.[26]

Even assuming the facts supported the regulatory uncertainty argument, H.R. 3010 (and other legislative proposals that would gum up the regulatory process further) would exacerbate regulatory uncertainty rather than alleviate it. As explained above, the new analytical requirements and judicial review provisions of H.R. 3010 would potentially delay significant new regulations by two to four years more, thereby prolonging regulatory uncertainty longer than it currently exists.

V. H.R. 3010 WILL IMPAIR THE REGULATORY SYSTEM, NOT IMPROVE IT

H.R. 3010 constitutes a drastic overhaul of the APA:

- The new bill makes more than 30 pages worth of changes to the current APA, which currently totals about 45 pages in length (not counting its Freedom of Information Act provisions).
- More significantly, as two letters to the committee indicate,[27] administrative law professors and the practicing bar support almost none of the proposed changes as necessary or appropriate.

A. H.R. 3010 Establishes Several New, Unnecessary Analytical Requirements

H.R. 3010 would require agencies to make a series "preliminary and final determinations" with respect to several different "rulemaking considerations." Although agencies already account for some these considerations, others are new, and would involve highly complex, resource-intensive, and time-consuming analyses by the agencies.

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[25] *See, e.g.*, Kevin G. Hall, *Regulations, Taxes Aren't Killing Small Business, Owners Say*, MCCLATCHY, Sept. 1, 2011, *available at* http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html.

[26] *See* Daniel Farber, *Ten Fatal Flaws in the "Regulatory Uncertainty" Argument*, CPRBLOG, Sept. 12, 2011, http://www.progressivereform.org/CPRBlog.cfm?idBlog=5DF93B0F-D47C-D726-57628120754ECD93 (last visited Oct. 18, 2011).

[27] *See* Draft Letter from Undersigned Administrative Law Professors, Oct. 20, 2011 (on file with author); American Bar Association, Section of Administrative Law & Regulatory Practice, Draft Comments on H.R. 3010, Oct. 20, 2011 (on file with author).

Although making these determinations would be very expensive, they would generate relatively small benefits in terms of improved quality of rulemaking. The required analyses of indirect and cumulative costs and benefits would be especially problematic in this regard.[28] Admittedly, some of the required determinations may be useful in some rulemakings. But, under the current APA process, findings for these determinations would likely take place anyway as a result of the interaction between the agency and public stakeholders through notice-and-comment procedures. There is no principled reason to require many of the determinations, and there is certainly no principled reason to require *all* of these determinations for *all* rules. The inevitable outcome would be delayed rulemakings and the waste of scarce agency resources.

Consider, for example, that the bill requires an agency to undertake a cost-benefit study for "any reasonable alternatives for a new rule or other response identified by the agency or interested persons." While the agency might identify a few reasonable alternatives, it would also be forced to consider any alternatives proposed by stakeholders. A stakeholder intent on tying up the agency with endless analysis would therefore have a strong incentive to propose several alternatives. The resources and time an agency would require to conduct cost-benefit analyses on all these alternatives could be enormous, and effectively prevent the agency from making any progress on the rulemaking.

B. H.R. 3010 Establishes a Costly and Dangerous Expansion of Federal Judiciary Authority

It is also a mistake to subject the adequacy of agency determinations of all of these rulemaking considerations to judicial review. If a court determines that an agency has failed to adequately conduct a required determination, and finds that this failure is prejudicial, it would be empowered to torpedo the entire rule, resulting in more delay and waste of agency resources.[29] As generalists, courts are ill equipped to assess the adequacy of agency determinations on highly complex policy matters. Opening up these determinations to judicial review could also conceivably increase the volume and complexity of challenges to agency rulemakings. This would place additional stress on the federal court system, which is already overstretched by increased workloads and persistent vacancies.

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[28] The bill provides no definition for "indirect" or "cumulative" costs and benefits that would clearly delineate the scope of this inquiry. An analysis of indirect costs, cumulative costs, and impacts on ancillary issues such as employment and economic growth could stretch on forever and would by necessity be based on dubious assumptions and endless speculation. The results of these inquiries would come at great costs and provide little utility to agency decision-makers.

[29] Currently, under the APA, a reviewing court may set aside a rule if it finds that the rule is "arbitrary" or "capricious"—or if some finding or conclusion that is essential to the rule is "arbitrary" or "capricious." 5 U.S.C. 706(2)(A). Under H.R. 3010, this is the standard of review that would apply to court review of agency compliance with many of the bill's new analytical and procedural requirements.

C. H.R. 3010 Overrules More Than 25 Current Regulatory Statutes

Since the Reagan Administration, a series of executive orders have directed agencies to conduct cost-benefit analyses on some of their rules. Unlike these orders, which require only cost-benefit analysis, H.R. 3010 would require agencies to justify their final rules in cost-benefit terms. It also requires agencies to choose the least-cost alternative available to it.

Most current regulatory mandates are based on the premise that the country should do "the best we can" to decrease the number of deaths and serious injuries from air pollution, unsafe foods, dangerous products, unsafe workplaces, and other risks that we cannot prevent as individuals.[30] Although the statutes vary somewhat in how they accomplish this goal, they generally require regulators to seek the greatest level of protection that is technologically available and that is affordable for regulated entities. Other statutes require an agency to set its regulatory goals on the basis on some defined level of safety or precaution, and then allow some variations based on cost and other considerations.

These commitments honor the intrinsic value of human life by taking all reasonable precautions. The sponsors of this bill apparently believe that doing the best we can to prevent deaths is wasteful because it does not consider how much (according to economists) it is worth to prevent someone from being killed from such hazards. So, they would prevent agencies from regulating at all unless the regulatory benefits justify regulatory costs, a mandate that wipes out the "do the best we can" goal of important protective laws like the Clean Air Act and the Clean Water Act. If H.R. 3010 had been the law in the 1970s, the government almost certainly would not have required the removal of most lead from gasoline until perhaps decades later.[31]

By requiring a cost-benefit justification as a matter of law, and by making that requirement judicially reviewable, H.R. 3010 invites endless litigation over the adequacy of the cost-benefit analysis of the agency. Since cost-benefit analysis is, at best, inexact and manipulable,[32] we can expect those opposed to an agency decision to find numerous ways to challenge its analysis.

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[30] *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2003); Rena Steinzor et. al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through "Pragmatic Regulatory Impact Analysis"* (Ctr. for Progressive Reform, White Paper 909, 2009), *available at* http:// www.progressivereform.org/articles/PRIA_909.pdf.

[31] Frank Ackerman, Lisa Heinzerling, & Rachel Massey, *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 160-72 (2005).

[32] *See* SHAPIRO & GLICKSMAN, *supra* note 30, at 92-120 (detailing the shortcomings of cost-benefit analysis); Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENV. L. REV. 433, 450-59 (2008) (same); Steinzor et al., *supra* note 30, at 10-23 (same; providing case studies illustrating the shorting comings of cost-benefit analysis).

D. H.R. 3010 Requires ANPRMs, Even Where Not Necessary

An Advanced Notice of Proposed Rulemaking (ANPRM) can be a useful exercise in some instances, such as when an agency is regulating in a new area for the first time. A blanket requirement for ANPRM for all "major" and "high impact" rules—as defined by H.R. 3010—is clearly unwarranted, however. ANPRMs can be helpful for refining complex issues before an agency begins development of a proposed rule. For most rules—even most controversial and expensive ones—all the relevant complex issues have been sufficiently refined in previous rulemaking exercises, rendering this step unnecessary. Instead, this requirement would only succeed in delaying rulemakings even more and making the rulemaking process even more costly and resource intensive than it is now. Agencies are in the best position to determine when an ANPRM would be useful, and in fact already voluntarily take this step when it is needed. H.R. 3010 should not force agencies to complete an ANPRM when it would otherwise not be beneficial, though it might be useful to amend the APA to explicitly recognize ANPRMs, something that it does not currently do.

E. H.R. 3010 Requires IQA Hearings That Duplicate Notice and Comment Rulemaking

As a threshold matter, hearings are not the best mechanism for resolving disputes over scientific evidence and data. Instead, hearings are better equipped for resolving questions of pure fact, as they are used in the criminal and civil law contexts. The benefits, if any, of these hearings would be small and certainly would not justify their high costs. Instead, the traditional notice-and-comment process—supervised through judicial review—provides a better method for ensuring that agencies can establish the reliability of the evidence and information upon which they rely.

In addition, responding to these IQA challenges could become a costly burden for agencies. Regulated industries would have a strong incentive to submit several IQA petitions at once, knowing that the agency's limited resources and the tight timeline for resolving these petitions would likely force the agency to exclude several pieces of information or evidence that it would have needed to justify a stronger regulation. As a result, agencies might end up adopting rules that are poorly supported, rendering them susceptible to being overturned in court, or even adopt weaker rules than what the best available science might otherwise have called for. In either case, people and the environment would be left inadequately protected.

F. H.R. 3010 Requires Formal Rulemaking Procedures Even Though These Procedures Have been Widely Rejected

H.R. 3010 greatly expands the circumstances under which agencies would be required to employ formal rulemaking hearings.[33] Almost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history. The reason that formal rulemaking procedures have been almost universally rejected is that their costs far outweigh their benefits. As noted above, hearings are not well suited for resolving complex policy questions, yet the issues that H.R. 3010 requires to be resolved during a formal rulemaking hearing all constitute these kinds of facts (*e.g.*, "Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including [indirect and cumulative costs]"). A formal rulemaking hearing on these issues would generate little, if any, benefits in terms of helping to shape better regulatory decisions. At the same time, these hearings can be extremely costly to conduct, and often delay the completion of rules by several months or even years.

G. H.R. 3010 Requires Burdensome Ongoing Look-Back Procedures

Periodic look-back procedures for existing regulations can be very useful if designed properly and if agencies are provided with the necessary budgetary and personnel resources for conducting them. H.R. 3010's look-back procedures meet neither of these criteria.

H.R. 3010 would require agencies to conduct a look-back for every major and high impact rule it issues no less than once every 10 years. H.R. 3010 would not provide for any funding increases for the agencies to conduct these reviews, however. As such, this look-back requirement would impose a huge burden on agencies, forcing them to dedicate their limited resources to looking back at old regulations at the expense of looking forward to establish new safeguards to address emerging threats to people and the environment. The better approach would be to allow agencies to decide which rules they should review and on what timeline. Agencies might find that it is better to review certain regulations more frequently than once a decade, while other regulations would not need to be reviewed at all. Under this approach,

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[33] Specifically, H.R. 3010 says it would require formal rulemaking hearings for nearly all "high impact" rules, but the bill actually expands this requirement beyond just these rules. The bill would establish a new section 553(h), which states "When a hearing is required under subsection (e) ***or is otherwise required by statute or at the agency's discretion*** before adoption of a rule, the agency shall comply with the requirements of sections 556 and 557 in addition to the requirements of subsection (f) in adopting the rule and in providing notice of the rule's adoption" (emphasis mine). By law, many agencies, including the Occupational Safety and Health Administration (OSHA) and the Mining Safety and Health Administration (MSHA) employ "hybrid" rulemaking procedures that combine elements of formal and information (*i.e.*, notice-and-comment) procedures. Critically, these hybrid procedures are less onerous, time-consuming, and costly than full-fledged formal rulemaking procedures. This section would therefore displace existing statutory requirements and mandate that these agencies engage in full-fledged formal rulemaking procedures.

the quality of the look-backs would be much higher, and agencies would be better able to revise existing regulations to increase their effectiveness and reduce regulatory burdens. In contrast, look-backs conducted pursuant to H.R. 3010's requirements would likely end up being more superficial, and, as a result, the agencies would be less likely to undertake meaningful reforms of existing regulations.

H. H.R. 3010 Establishes New Onerous Judicial Review Requirements

As noted above, H.R. 3010 establishes several complex policymaking considerations that agencies must account for in their regulatory decision-making—including detailed cost-benefit analyses for the selected regulatory option and all other alternatives the agency considered—and it subjects agencies' compliance with these requirements to judicial review. Judicial review of these requirements raises several concerns. For one thing, these considerations involve complex policy matters that are well beyond the ken of generalist judges. For another, judicial review of these considerations could further strain the already overstretched federal judiciary.

In addition, H.R. 3010 alters the APA's judicial review provisions by directing reviewing courts to *not* defer to agency determinations or interpretations under certain circumstances. Specifically, H.R. 3010 provides that a court is not supposed to defer to agency determinations or interpretations unless the agency adhered to certain prescribed procedures or guidelines in reaching those determinations or interpretations. For example, H.R. 3010 states a court "shall not defer" to an agency's determination of a rule's costs and benefits if it finds that the agency did not adhere to OIRA's cost-benefit analysis guidelines. These provisions raise several concerns. First, it is not clear how a court is supposed to make the finding that an agency has failed to follow the required procedures or guidelines. Second, by failing to give deference to agency determinations on matters such as cost-benefit analysis, courts would then be put in the position of making these determinations on their own. In comparison to the expert agencies, courts are ill equipped to make these determinations, however. Third, judicial determination of these complicated policy matters would increase the complexity of the cases that courts will hear regarding challenges to agency rules. Resolving these cases will further strain the already overstretched federal judiciary.

I. H.R. 3010 Establishes Burdensome, One-Size-Fits-All Requirements for Major Guidance Documents

H.R. 3010 requires agencies to account for several complex policy considerations and to consult with OIRA before they can issue major guidance documents. Significantly, one of the required considerations agencies must make is a determination that the guidance document's benefits justify its costs, including indirect and cumulative costs.

Some of the required considerations may be useful for the development of some guidance documents, but it is a bad idea to apply all of these requirements to all guidance documents. Instead, agencies should be provided with maximum flexibility to issue guidance documents in a timely fashion. After all, the purpose of guidance documents is to reduce regulatory uncertainty—something that is of great interest to regulated industry. In fact, regulated industries typically support the vast majority of guidance documents, and would tend to be reluctant to endorse any new procedure requirements that may inhibit their timely release. The one-size-fits-all procedures mandated in H.R. 3010, particularly the cost-benefit analysis requirement, would deny agencies the flexibility they need to issue guidance documents in a timely fashion, resulting in preventable regulatory uncertainty. In light of these complex procedural requirements, agencies may even forgo issuing guidance documents altogether.

Mr. SMITH. Thank you, Mr. Shapiro.

We will now begin our questioning, and I will recognize myself.

Mr. Gray, would you agree that the bill does not block regulations, it just requires us to go with the least costly alternative that achieves the intended goals?

Mr. GRAY. That is correct, Mr. Chairman. It does not block regulations, and for the executive branch agencies that are now subject to the various executive orders over the years, this is what they are supposed be doing anyway. So what you are doing is systematizing it, regularizing it, and making it the same across the board, which is an improvement, not an inhibition.

Mr. SMITH. Thank you, Mr. Gray.

Mr. DeMuth, you mentioned five reasons why it would be a good idea to require a cost/benefit analysis. Your third reason was transparency and accountability. Would you give us maybe examples of the practical and beneficial consequences of the transparency and accountability argument that you made?

Mr. DEMUTH. I think that several examples are to be seen in the Congress at sessions like this and several other oversight sessions of the past year. The Environmental Protection Agency, other regulatory agencies, have come up with numbers suggesting what the benefits and the costs of their rules are. Academics, people from regulated businesses have come up with their estimates. They have argued over them. These arguments are focusing on what are going to be the costs and what are we going to get for the costs. That is how we should be addressing these issues. And the data exists because of the executive orders that have gotten the agencies to prepare assessments, to publish studies, and make their assumptions open to the public for general criticism.

Mr. SMITH. Thank you, Mr. DeMuth.

Mr. Baker, you are a businessman and a successful one. Could you run your business if you did not take into consideration the cost and benefits of alternatives that you might consider?

Mr. BAKER. Well, in fact, it is a pretty standard banking process. When we go for financing, they want to make sure that as we are expanding, that we actually look at all the options that are available to us.

Mr. SMITH. Mr. Baker, do you think the Government should operate the same way?

Mr. BAKER. Well, I would hope that the same attention that this legislation is receiving now, that we would give this same attention to the rules that impact my business directly. So the answer is yes. I would hope for more attention and more input.

Mr. SMITH. Thank you, Mr. Baker.

Mr. Shapiro, do you feel that our regulatory system must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends?

Mr. SHAPIRO. Yes, and I believe the system does that now.

Mr. SMITH. That was a good answer inasmuch as that is the exact wording of President Obama's executive order on the subject. So you passed a trick question. Thank you, Mr. Shapiro.

That ends my questions, and the gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Chairman Smith.

And I want to thank all the witnesses.

Now, there is a big question overhanging this discussion. One of the witnesses says that H.R. 3010 doesn't block regulations and that it would operate smoothly, and another witness says or implies it will create far more regulations. Could we settle this this morning, if we do not do anything else?

What do you think, Mr. DeMuth? You are the former head of a think tank that I used to argue with pretty regularly. What is your idea? Is there some middle ground? Is this going to make it smoother for the regulatory process or more complicated in your view?

Mr. DEMUTH. I think it is difficult to predict the future. My hunch is that it will actually make the rulemaking process smoother and more effective, and that is because currently we have a cost/benefit standard that is informal and voluntary. If you are inside an Administration, there is a lot of gaming the system and forum shopping and so forth. If everybody inside the executive branch from the person three layers down at EPA to the people at the top of the White House understood that when you make a major regulatory decision, you have got to show that the benefits are worth the costs. And there is a good chance that a judge is going to look at that and decide whether you have done a good job.

Mr. CONYERS. But Mr. Shapiro says it is going to take longer, not just a little bit longer or just as long, but months and maybe years.

Mr. DEMUTH. I don't know where the estimate of 2 and a half years comes from. The procedures look to me very similar to what is actually happening on the ground right now.

Mr. CONYERS. But there are 10 times more rules in the bill already. That comes from the law school professors that wrote us this letter. And by the way, I am going to get that letter to all of you because the one thing I am asking that you do after the hearing is write me about what you thought of the letter.

Mr. DEMUTH. Sir, if I can make two brief points.

Mr. CONYERS. Well, no, hold it. You make them after Shapiro because we are running out of time.

Look, you got a Committee on the Judiciary. They called distinguished witnesses, and at the very initial basic point of discussion, we are told that this isn't going to make regulations any more complex. On the other hand, the same morning at the same time at the same place, we are told that this is going to screw up the process beyond anything you have ever imagined. Could you help us out here?

Mr. SHAPIRO. Well, as Mr. DeMuth pointed out, we are going to get these arguments about how to calculate these things, and the problem is there is no good way to resolve those arguments because many of these benefits are simply not quantifiable in any realistic sense.

For example, right now, EPA currently values the loss of each child's IQ point at $8,800 per IQ point. But Mr. Lutter of the AEI argues that an IQ point is only worth $1,000 to $1,900 per IQ point. And I don't understand how that argument is going to improve the administrative process, and moreover, I think the American people would be appalled to think that our decisions about

whether to protect children come down to whether it is worth $8,800 or $1,100.

Mr. CONYERS. Could I get 30 seconds more? I see my time is about to run out.

I wanted to let Mr. Baker know that as one who supported small business past and present, the whole idea of the regulation that you didn't like was to prevent tens of thousands of premature deaths, tens of thousands of cases of respiratory and cardiovascular problems, including heart attacks and acute bronchitis and over 100,000 asthma attacks. So the point I am getting at, Brother Baker, is if we don't pay this little bit more that you don't want to pay—and I can understand it is going to be hard on you—we are going to pay lots of money coming from the citizenry in terms of all these health costs if we don't clean up this cement thing. So you see the problem that we are in?

Mr. BAKER. Oh, I think we are on the same wavelength actually in that what the agencies are doing, as far as the laws or the rules themselves, that is not what this is about. I agree with you that without rules society becomes chaotic, and we don't protect the citizenry.

This is all about the process, though. I would like more input. I would like the impact that it has on my business—just as the other impacts are being considered, I would like that to also be a consideration. And so this is not——

Mr. CONYERS. Let's assume they took into consideration the impact and said that this minor cost is going to have to be borne because it will save lots and lots of lives.

Mr. BAKER. The process that I understand was taken did not consider our industry. But the rule itself I am not contesting. I am not saying these aren't good things to do. I am just saying let's go about——

Mr. CONYERS. We want to get you to the Small Business Administration for a loan to cover these costs that this imposes on you.

Mr. BAKER. I am sorry, sir? I couldn't——

Mr. CONYERS. SBA. That is where I am going to send you after this hearing to get some money. [Laughter.]

Mr. BAKER. I appreciate that. I will definitely take you up on that.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from North Carolina, Mr. Coble, is recognized.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, good to have you all with us this morning.

Mr. DeMuth, is it not true that for decades agencies have been able to promulgate sound regulations to protect public health, safety, and welfare using cost/benefit criteria? Is that not an accurate statement?

Mr. DEMUTH. Yes, sir. In the 3 years I oversaw the process, EPA, NHTSA, the FDA issued many, many regulations that passed the cost/benefit test with flying colors.

Mr. COBLE. Well, would the Regulatory Accountability Act have prevented the promulgation of these regulations?

Mr. DEMUTH. No, sir.

Mr. COBLE. Mr. Gray, how easy would it be for the Consumer Financial Protection Bureau to promulgate economically damaging

regulations under the existing APA act especially since the Consumer Financial Protection Bureau is not bound by the President's cost/benefit executive orders?

Mr. GRAY. There are no constraints on what that agency will be able to do. There are no congressional restraints because you don't provide the budget. There are no White House constraints because the White House is walled off, as is the Fed. The judicial system is basically required to defer to whatever it decides, and OMB cannot review the rules for any kind of cost/benefit equation at all. So there really are no requirements for accountability and no ability for any of the three branches to review it.

Mr. COBLE. I thank you, sir.

Mr. Baker, I am going to quote from President Obama a statement with which I am in agreement, and I want to see whether you agree with it or not. He said where relevant, feasible, and consistent with regulatory objectives and to the extent permitted by law, each agency should identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. Do you agree with that, Mr. Baker?

Mr. BAKER. You know, I couldn't hear very well, but if your statement was regarding ensuring that businesses like mine have input into the consideration process, then I do agree.

Mr. COBLE. I think the quote that I gave is pretty consistent with what your testimony indicated as well, and I concur with that as well.

Mr. Shapiro, let me ask you whether you disagree or agree with a statement—statements—actually I will use the plural—from President Clinton and President Obama that an agency must tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives. Do you concur with that?

Mr. SHAPIRO. I do but it is important to understand how the current system does that. While agencies now, although not independent agencies it is true, have to undertake a cost/benefit analysis, they don't have to prove at the end of the day that regulatory benefits exceed regulatory costs because of the difficulty of doing that with some great level of certainty. Instead, what Congress has done in all these various statutes is say where these estimates of benefits don't agree, you should favor protection of the American people as long as it doesn't impose unreasonable costs. This bill would change that substantive mandate.

Mr. COBLE. Well, I think, Mr. Chairman, it has been a good hearing, and I am not disappointed in any sense that there have been disagreements. I mean, these hearings oftentimes result in disagreements on the part of the witnesses that appear. This is the nature of the beast. So I think it has been a good hearing.

And, Mr. Chairman, I am going to yield back before my red light illuminates. Thank you, sir.

Mr. SMITH. Thank you, Mr. Coble.

The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Gray, the bill requires us to calculate for a major rule $100 million worth of, I think it says, annual cost on the economy and for a high-impact rule, $1 billion. How do you calculate those costs?

Mr. GRAY. Basically by trying to answer the question what will it cost the community that has to comply, and if it is an EPA rule that requires a certain installation of equipment, you find out how much the equipment costs and what it costs to install it. It is much more difficult, I will grant, when you get into a financial rule of the kind that Dodd-Frank requires or Sarbanes-Oxley.

But these are not meant to be precise, absolutely down to the last dollar and cent. They are meant to be approximations that allow a relative weighing of relative numbers. They are not meant to be absolutely concrete, not to—so I don't think it is difficult to do, and agencies have been doing it in the executive branch since 1981.

Mr. SCOTT. What are some of the benefits that you look to to compare to the costs?

Mr. GRAY. Well, again, when you are dealing with health and safety, perhaps it is easier. You look and see, all right, what health effects are eliminated, what harms are alleviated. When we phased out lead, it was pretty clear that lead was doing huge damage to childhood development. They didn't have to actually figure out what the costs were or what the benefits were. You knew that was huge, and it was fairly straightforward.

Again, I think it is more difficult for a credit regulation, CFTC, but it can be done. And if you look at, again, a case that I cited, the *Business Roundtable v. the SEC*, you can see a court grappling with these issues with great facility and understanding that anybody in this room can read and process.

Mr. SCOTT. Is there an effort to quantify, to the extent that Mr. Shapiro indicated, the damage, for example, for lead, or we just know it causes such damage that we are not going to try to quantify it, we are trying to end it?

Mr. GRAY. Well, if I understand your question—you know, Chris maybe ought to speak up—but we knew what we were dealing with, and I think we understood what the equations were. There was a mistake made back in those days because there was a question that we didn't know to ask that we know now to ask, which is, all right, so you take out lead. What is the substitution? What is going to be the substitute? And what is, something now understood, the so-called substitution risk? I think if we had asked that question, we would have had a better regime after lead had been phased out, but now we know to ask that question and this legislation would make sure that that question is asked across the board in a way that is understandable by the public and, equally importantly, processable by the D.C. Circuit and the courts.

Mr. SCOTT. Thank you.

Mr. Shapiro, Mr. Gray has indicated the subjective nature of these calculations. How does that translate into litigation?

Mr. SHAPIRO. Cass Sunstein once wrote an article called "The Arithmetic of Arsenic" where he counseled regulatory lawyers about the many ways that they could challenge any cost/benefit decision. So no matter what the agency comes up with, there is going to be an argument over benefits, which is going to lead to more litigation, which is going to, under this bill, put some Federal judge in charge of deciding what the right number is. And all that assumes there would be some way to determine this, but there sim-

ply isn't. As you heard, these are at best approximations. There are competing approximations, and there is really no way to resolve those. That is like Congress said when there are doubts about the regulatory benefits, then the agency should do the best it can to protect the public and stop at the point where it is going to impose unreasonable costs on industry.

Mr. SCOTT. What is the standard that the regulation is judged by?

Mr. SHAPIRO. Well, it varies, but the most common one is called "technology-based regulation." And what that asks an agency to do is go out in the marketplace and find the most protective technology which is currently available on the market and because that technology is being sold and used by industry, the general assumption is that it is an affordable one, and the agency will peg the level of regulation at the level of best available technology. That is a nice objective standard. That is something we can determine objectively.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott.

The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you much, Mr. Chairman.

Mr. GRAY AND MR. DeMuth, I have read Mr. Shapiro's testimony here, and it appears to be two points I would like you to respond to. One is we don't need this because it is unnecessary because we have the proper scheme right now in terms of the regulatory burden with these regulating agencies. This is unnecessary. They take into consideration what needs to be considered. And then on the other hand, if we pass this law, he says this will add to a longer period of non-decision and will add to the burden.

Now, I wish you would respond to both of those in terms of the frailties or infallibility—or fallibility of this particular recommended change in law that we are talking about here. Mr. Gray?

Mr. GRAY. As we have said, most of the cost/benefit requirement in this legislation is supposed to be done today by executive branch agencies. The real benefit of this legislation is twofold: to make it consistent across the executive branch where you have multiple agencies always involved in the same subject matter; and secondly, to make it enforceable in the courts by primarily the D.C. Circuit which is really quite capable of dealing with this.

Mr. LUNGREN. Well, that goes to one of the points Mr. Shapiro makes. Why would a Federal judge or Federal court be superior to the decision-makers that we have set up in the regulatory agencies right now?

Mr. GRAY. Well, under the rules of judicial review, the courts are not supposed to sit there and decide that the decision, a reasoned decision, made by an agency about the costs and benefits of a particular rule were wrong and come up with a different calculation. What the courts do and what the court did in the SEC case was to say did they actually analyze it, did they ask the right questions, and did they have a reasoned response. The judges are not going to sit there and recalculate it. They are just going to make sure that the calculation was made in good faith on the best available information and that is all. They are playing sort of a—I hate to go back to Justice Roberts, Chief Justice, but they are playing a

role of sort of traffic cop to make sure that all the questions are answered and all the T's are crossed and the I's dotted, but they are not going to sit there and recalculate it. They haven't got the capacity to do that. They don't have economists on the staff. All they can do is look at the reasoning, and that is what they will do and they will do it very, very well. There has been no harm with judicial review basically, and adding cost/benefit to it is only going to make it more understandable and more consistent.

Mr. LUNGREN. Mr. DeMuth, as one of the people who is somewhat concerned about courts trespassing on the rights of the other branches, how do you answer that concern?

Mr. DEMUTH. I think that the standard rules of deference are appropriate. We are not asking generalist judges to become economists. We are asking them to review, as judges usually do, the work of the administrative agencies.

If I can, if I could quote two sentences from the SEC decision on its proxy access rules. The D.C. Circuit was not doing a cost/benefit analysis of its own. It was looking at what the SEC had done, and this is what it said. The commission inconsistently and opportunistically framed the costs and benefits of the rule, failed adequately to quantify certain costs or to explain why they could not be quantified, neglected to support its predictive judgments, contradicted itself, and failed to respond to substantial problems raised by commentators. That is what a court does.

Mr. LUNGREN. Thank you.

Mr. Baker, one of Mr. Shapiro's lines here underscored is regulatory uncertainty is not an obstacle to economic growth. Regulatory uncertainty. That is the uncertainty imposed by you as a businessman by virtue of the fact you are not sure what the regulation is going to be. Is that a benefit to you or is that a problem with being able to do your business?

Mr. BAKER. It is extremely problematic especially as we look at expanding beyond our——

Mr. LUNGREN. So uncertainty doesn't help you.

Mr. BAKER. No, no.

Mr. LUNGREN. As I understand simple economics, uncertainty is an additional burden on someone who is involved in an economic decision or certainly someone trying to create a business or maintain a business. Don't you find that in terms of the way you operate?

Mr. BAKER. Well, let me give you one example, the latest fly ash regulation. We do not know if we are going to be able to get the fly ash even though the mix designs for some of our projects require fly ash because the fly ash distributors are trying to assess whether they want to transport it or not. And so it is impacting our ability to even bid on work. And so from across the board, from new equipment to processes and operations, the regulatory environment is critically impacting to our business.

Mr. SMITH. Thank you, Mr. Lungren.

The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman, and I thank Mr. Lungren actually for setting the table on two real concerns that I have about the legislation.

I started on page 4 of this bill, rulemaking considerations under rulemaking. An agency shall make all preliminary and final determinations based on evidence and consider, in addition to other applicable considerations, the following. That is on page 4. And then there are one, two, three, four, five, six considerations, and we get all the way over to page 6 and 7 of the bill, we are still taking into account considerations that are going to be taken into account. And then we get to this phrase, "notwithstanding any other provision of law," they are going to take into account the potential cost and benefits associated with potential alternative rules and other responses, cumulative costs and benefits, and estimated impacts on jobs, economic growth, innovation, and economic competitiveness, means to increase the cost-effectiveness of any Federal response, and incentives for innovation, consistency, predictability, lower cost of enforcement and compliance to Government entities, regulated entities and the public and flexibility.

And we are going to at some point tell a court that you are going to be the arbiter of this where now, if somebody screws this process up, it is Congress that really makes that final determination. We are putting all of that authority in a court under this process and protracting litigation for 3 and 4 years. And the exact points that Mr. Lungren raised—we may come out on different sides of this—will lead to absolute uncertainty for 6 to 8 to 10 years as we litigate any rule. And still, the court is the final arbiter rather than Congress. I don't understand how this is supposed to be consistent with what my colleagues say they want to have happen.

Number one, the biggest complaint I hear—and I sit on Financial Services. We did Dodd-Frank—is that we cannot get to a final rule now quick enough to relieve the regulatory uncertainty because we don't know what the rules are. Tell us what the rule is and we can then adjust and get on with our lives.

So how is this going to speed up the process of getting to a final determination so that people like Mr. Baker can know what rules he is operating under and get on with his life and the adjustments to it? And everybody else in his industry is going to have to make the same adjustments to it because they got to live under the same rules. But now they don't have a clue what the rule is because we are going through all of this litigation, all of this economic analysis that is adding more employees to the Federal Government, economists, innovation therapists, psychologists. All of these people have got to be taken into account. And you are telling me this is going to speed up the process. I don't understand that.

Mr. Gray, Mr. DeMuth, Mr. Shapiro, please explain that to me. I can't understand how this is going to speed up the process of getting to any rule.

Mr. GRAY. Well, let me just quickly say, Congressman, that if you take a look at the so-called Volcker Rule—it is in the media now. The agencies have come out with a rulemaking which is, I think, a proposal 300 pages long, 300 questions. They don't know what they are doing.

Mr. WATT. And a judge is supposed to know what he is doing after they don't know what they are doing? Tell me how some Federal judge is going to make that determination.

Mr. GRAY. Well, I would just proffer that if this legislation were in place, a lot of these questions would have answers. There would be guidance for the agency to say——

Mr. WATT. Who is going to give the answers? Some economist?

Mr. GRAY. Well, no, the agency.

Mr. WATT. Some innovation therapist or some psychologist? I mean, where are we getting these answers from all of a sudden that is going to expedite this process?

Mr. Shapiro, give me a shot at this. Tell me this is not going to prolong the regulatory process ad infinitum and increase the uncertainty that is out there in the economic workplace.

Mr. SHAPIRO. It is hard to see how it would not. Mark Seidenfeld, who is a law professor at Florida State about 10 years ago, counted up all the steps that are now required, assuming all the analytical requirements applied, and of course, they don't apply in every rulemaking. But if you just assume for a second they all applied, 10 years ago Mark found over 120 different steps or requirements of analysis. And then, as you were pointing out, this bill, of course, adds many more things that an agency has to consider.

If I might, I would also like to say that Mr. DeMuth and Mr. Gray have told you that the standard rules of judicial deference are appropriate, but the difficulty is the bill itself changes those rules. And if a judge decides that an agency has not done its cost/benefit analysis according to the mandate or way that OIRA says it is to be done, then all rules of deference are off, and the judge him or herself is, therefore, charged with deciding if this was correctly done. So the bill itself gets rid of the judicial deference which has been so common in our system.

Mr. COBLE [presiding]. The gentleman's time has expired.

The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

I will direct this question, if I could, to you, Professor Shapiro. President Obama said in his Executive Order 13563, section 2 that our regulatory system must, quote, take into account benefits and costs both quantitative and qualitative. Now, do you disagree or agree with that?

Mr. SHAPIRO. I agree with it. May I point out, though, the bill does not allow an agency to take into account qualitative costs. The bill itself restricts the calculation of benefits to quantitative costs.

Mr. FRANKS. All right. Well, then would you disagree with both President Obama and Mr. Clinton's perspective that agencies must, quote, propose or adopt a regulation only upon a reasonable determination that its benefits justify its costs?

Mr. SHAPIRO. Again, these are management tools used by the President, but to that extent, I agree.

Mr. FRANKS. But not in legislation. You agree that the President should put it in an executive order but that it shouldn't be in legislation.

Mr. SHAPIRO. Congress certainly could codify the current executive orders, but as I have tried to explain, I believe this legislation goes way beyond codifying the current executive orders.

There are some disadvantages to codifying the executive orders. It is now a flexible management tool that can be adjusted from

agency to agency, and this would apply a kind of one-size-fits-all rubric for all agencies.

Mr. FRANKS. Well, given the nature of the executive orders—I am just trying to be consistent with the approach of those executive orders—how could it be unreasonable to require agencies to always consider costs and to generally achieve their statutory objectives using the lowest cost alternative? How is that unreasonable?

Mr. SHAPIRO. Where I get off the train is this switch between using regulatory analysis as a way of thinking about advantages and disadvantages of a rule as you are considering it and using a cost/benefit standard as the decision standard for whether or not an agency can promulgate a regulation at all. And the difficulty I have with making it a decision rule is that the methodology itself is so imprecise that it doesn't end up being a very good decision rule, whatever its merits might be, limiting its use to mere analysis.

Mr. FRANKS. Well, again, in all due deference, it sounds like your disagreement is much with the Administration here as it is with the legislation.

But let me shift gears on you here. Do you disagree with President Obama that our regulatory system, quote, must be based on the best available science?

Mr. SHAPIRO. No.

Mr. FRANKS. We are making progress. So consistent with that approach, how can it be unreasonable to allow those affected by billion dollar regulations or more to at least be able to subject the agency's evidence to cross examination?

Mr. SHAPIRO. The trouble I have—and this is supported both in the ABA letter to you and the letter from the administrative law professors—is the assumption that cross examination is going to be useful in the determination of scientific facts. In fact, the scholarly community believes that it is not useful for that purpose, and therefore you are adding way more procedural time and burdens than would be worth the benefits of the amount of additional information it would yield.

Mr. FRANKS. Well, again, with all due deference, you know when people put forth a maximum, whether it is based on scientific perspective or otherwise, it seems like the one way to try to examine that is with some sort of adversarial cross examination. That is just my perspective as a lawyer. I think some people would probably agree with that. That has worked pretty well in our judicial system.

But, Mr. Gray, if I could ask you, sir, just in general—and it is a very general question—what do you think the most important effect of this legislation will be in terms of impacting the general productivity of the Nation?

Mr. GRAY. I think it is the coverage of the independent agencies putting them under the same regime as executive branch agencies have been operating. I think that is the most important thing that will come out of this. The new worlds of finance, of high tech, of the Internet—that should be subject to the same rules because of the overlap with what the executive branch does, and so I think that would be the best benefit.

Mr. FRANKS. Well, Mr. Chairman, I am going to yield back my time but just suggest to you that as someone coming from a business background, so oftentimes the realities that we face on the ground are so different than what the regulators' analysis really is. They just have a different idea sometimes. They may be very sincere. But unless we have some type of adversarial or some type of check and balance here, these agencies are unfortunately from the position of making regulations oftentimes completely out of balance with the realities on the ground. And that is one of the big challenges I think for productivity in the country. And so with that, I yield back.

Mr. COBLE. I thank the gentleman. The gentleman's time has expired.

The gentlelady from California, Ms. Waters, is recognized for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman. I am very pleased that you are holding this hearing. This discussion about regulations has moved to the top of my friends' agenda on the opposite side of the aisle. And I am very concerned about whether or not H.R. 3010 would rewrite the Administrative Procedure Act and change the way that all United States agency rulemaking is conducted for the sole purpose of making it nearly impossible for any agency to pass any regulation. And of course, I believe—and I think we all believe—that it is extremely important for us to have regulations that will protect the safety and security of our citizens and our communities.

Professor Shapiro, can you elaborate on the impact aggressive lobbying already has had on the regulatory process, and how would H.R. 3010 further diminish agency rulemaking?

Mr. SHAPIRO. Well, under the current process, any interested citizen is free to file comments and to meet with the agency. And there have been some empirical studies actually about who the agency ends up meeting with, and what we have found from those empirical studies is business groups and business interests basically dominate that process. Often there are 5 to 10 to 20 more times comments filed by business groups and business groups meet with the agency on average about 8 to 10 times more than any public interest group. And there are many, many hearings where there are no public interest groups present at all. Whole rulemakings go forward with no public interest representation. So I am very sympathetic to Mr. Baker's concern about the small business community being represented, but it is also the case that the American public often goes unrepresented right now in these proceedings.

Ms. WATERS. My colleagues on the other side of the aisle have spent the entire year bringing bills to the floor intended to repeal regulations they believe will kill jobs and impede investment. Can you elaborate on how regulation can actually create jobs? Can you also explain why regulations have not deterred business investment?

Mr. SHAPIRO. Well, when a company like Mr. Baker's or anyone else is asked to pay some regulatory costs, they are going to spend money. They are going to spend money buying equipment. They are going to spend money buying whatever is necessary to allow them

to comply with the regulation. And as a result of this spending, we generate economic activity. So when people have gone to study what the overall impact is of important regulations, they have found generally it is a wash, that the jobs created by this new regulatory spending offsets the loss of jobs created when Mr. Baker has to raise his prices somewhat and that might cut back slightly on demand.

Of course, it is important to remember, as was pointed out, that everyone in an industry is subject to the same level of regulation. So everyone has to comply and that does make it easier for the industry to pass on their costs a bit, but not completely perhaps.

Ms. WATERS. Thank you very much. I think it is important to put on the record that I think Members on both sides of the aisle are supportive of small business, and you will hear that time and time again. And you will see efforts in this Congress and in previous Congresses to give support to small businesses.

At the same time, I think it is important that we never forget that prior to regulations, we had people who lost limbs in the workplace. We had child labor. We had dirty water. We had all kinds of health and safety hazards in our society. We have cleaned a lot of that up, and still yet every few months or so, we will find that it is cantaloupes or spinach or something that is contaminated. We need regulation in order to provide safety and take care of the health concerns of our society. So I think that even our small business people will agree with that.

And so what we need to do is move toward making sure that there are not unreasonable requirements on small business and not try and kill regulation and at the same time have regulation that makes good sense. This bill goes too far. It goes in the wrong direction. And I think it would be wise for us not to end up simply supporting a one-size-fits-all kind of a regulatory effort through this legislation and get down to the business of doing what makes good sense both for small business and for our society.

I yield back the balance of my time.

Mr. COBLE. I thank the gentlelady from California.

The distinguished gentleman from South Carolina is recognized for 5 minutes.

Mr. GOWDY. I thank the gentleman from North Carolina.

Professor Shapiro, I may very well have misunderstood you. You are not suggesting that cross examination works for everything except science, are you?

Mr. SHAPIRO. The understanding in the administrative law literature is that administrative procedures may add some accuracy but we have to measure how much accuracy they add. And so when we are dealing with what we call adjudicative facts, who, what, when, where, or why, what color was the stoplight when you ran through the intersection, facts that are in someone's possession because they are in their head—they deal with perception—cross examination is very useful as is demeanor evidence. As we get into the interpretation of scientific studies——

Mr. GOWDY. Well, let me stop you there. So in a criminal context, we should no longer have cross examination of DNA experts? What about fingerprint experts?

Mr. SHAPIRO. Right.

Mr. GOWDY. What about ballistics?

Mr. SHAPIRO. In most adjudications, we are dealing with adjudicative facts; in most rulemakings, we are not.

Mr. GOWDY. What about ballistics experts? Should we no longer have cross examination of them in a criminal context?

Mr. SHAPIRO. Well, again, we need a balance here.

Mr. GOWDY. Well, let's switch balance. Let's switch to the civil side. What about medical malpractice cases? Should we no longer have cross examination of experts in medical malpractice cases because biology is a science?

Mr. SHAPIRO. We set the balance different because it is a different system.

Mr. GOWDY. Well, it may be a different system, but your testimony suggested to me that you don't think cross examination matters in matters of science, and whether it is medical malpractice cases, products liability cases, or at least a half dozen examples in a criminal context, we use it every single day. It is the best tool in our arsenal for getting at the truth.

Mr. SHAPIRO. Again, we need to achieve a balance here and spending days and days in a legislative hearing dealing in rulemaking allowing unlimited cross examination ends up, based on our experience, in not making us that much smarter.

Mr. GOWDY. Well, nobody is advocating for unlimited cross examination. Judges can control the scope and sphere of cross examination. They do it every day.

I was just struck—and again, I may have misunderstood your testimony. I was struck by the notion that cross examination works for everything other than science.

Mr. SHAPIRO. The difference, as I understand it, sir, is that when we are dealing with objective facts—is the light red—it is important. We want to set the balance in getting it right. When we are dealing with criminal rights, we want to get the balance right. When we are dealing with tort, we want to get the balance right. We also want to get the balance right in science but doing that through written procedures and letting people file rulemaking comments we have decided is sufficient.

Mr. GOWDY. Well, I want to get at another balance. I want to read a quote from you and you tell me why he is wrong. There are some rules and regulations that do put an unnecessary burden on businesses at a time when they can least afford it. Do you know who said that?

Mr. SHAPIRO. No.

Mr. GOWDY. President Obama.

Mr. SHAPIRO. Okay.

Mr. GOWDY. Why is he wrong? Because your theory is that increased regulations actually create jobs, and when he was laying out his jobs speech, he cited excessive regulations as an example of something we need to turn back so we can create jobs. So are you right or is the President right?

Mr. SHAPIRO. What I am saying is that—I agree with the President—these are considerations to be taken into account, but I believe the existing system does that.

Mr. GOWDY. He came up with 500 regulations that should be repealed or unpromulgated. How many can you come up with?

Mr. SHAPIRO. Well, what we did in the look-back—and I am not against look-backs—is look for additional savings in the way we regulate. But what is interesting about the look-back is in none of those cases, as I am aware, did we decide the fundamental rule was wrong, that it was unnecessary to protect the American public using that particular rule. What the Administration did find, because some of the rules are so old and we have new technologies, that it would be possible to do it in a more cost-effective manner, for example, switching from paper reports to reporting on the Internet.

Mr. GOWDY. Do you agree with the President that we should have no more regulations than necessary for the health, safety, and security of the public?

Mr. SHAPIRO. Yes.

Mr. GOWDY. So would you analyze NLRB requiring posters to be posted in the workplace by that same standard?

Mr. SHAPIRO. I would submit it to the normal rulemaking process and——

Mr. GOWDY. Health, safety——

Mr. SHAPIRO [continuing]. That will develop your information pro and con.

Mr. GOWDY. Health, safety, and security?

Mr. SHAPIRO. I am sorry, sir?

Mr. GOWDY. Health, safety, and security. Those three.

Mr. SHAPIRO. I am sorry. I don't understand the question.

Mr. GOWDY. All right. Well, my time is up, Mr. Chairman. I had one more question but the light is red.

Mr. COBLE. You may have one more question.

Mr. GOWDY. Thank you. It may be a three-part question. [Laughter.]

Would you agree with me that rules and regulations are sometimes evidence of negligence in a civil case?

Mr. SHAPIRO. Yes.

Mr. GOWDY. In fact, they are evidence of negligence per se in some civil contexts.

Mr. SHAPIRO. Yes.

Mr. GOWDY. So there was a quote from an Administration official that a proposed rule or regulation was going to be a plaintiff's attorney's dream. What do you think that Administration official meant by that?

Mr. SHAPIRO. I don't know, sir.

Mr. GOWDY. Thank you, Mr. Chairman.

Mr. COBLE. Thank you.

The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me thank all of the witnesses for being here. I am going to have some very cryptic questions.

But I do want to acknowledge Mr. Boyden Gray for his service to this country. We overlapped. My husband, Dr. Elwyn Lee, was at Wilmer, Cutler, and Pickering when you were and certainly your work with President Bush. We thank you again for your service and your service in the United States Marines.

Let me just pose a question. I am going to follow a line of reasoning. I would ask Dr. Shapiro if he has the bill in front of him,

if he would be prepared for some questions starting at page 4. And if he does not, if a clerk could provide him with the legislation. Do we have a bill that we can provide him with?

Mr. SHAPIRO. I apologize. I do not have a copy of the bill.

Ms. JACKSON LEE. I have an extra copy. Thank you so very much.

But let me just indicate—this is from the CRS, which is our congressional research. It is an independent research that is used by all parties. But this sentence says the public policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe and that the Nation's air, water, and land are not polluted and that the appropriate amount of taxes is collected.

Mr. Gray, do you adhere to that simple sentence? Did I read it clear enough for you, sir?

Mr. GRAY. Yes.

Ms. JACKSON LEE. Mr. DeMuth, do you adhere to that simple sentence?

Mr. DEMUTH. Yes.

Ms. JACKSON LEE. Mr. Baker?

Mr. BAKER. Yes, ma'am.

Ms. JACKSON LEE. All right. I would like to read a sentence from the American Bar Association. I ask unanimous consent to submit this letter into the record that was sent October 24 to Mr. Lamar Smith and Mr. John Conyers. I am not sure if it is in the record, but I want to have it in the record.

The sentence says, as they have indicated their support for this ambitious proposal, at the same time, certain provisions would harm the administrative process in unjustifiable ways. In particular, many of the new steps the bill would require for rulemaking, though wholly appropriate in some rulemakings, would, if imposed automatically and across the board, further ossify the rulemaking process with little offsetting benefits in the form of better rules. I would like this letter to be put into the record.

Mr. COBLE. Without objection.

[The information referred to follows:]

American Bar Association
Section of Administrative Law and Regulatory Practice
740 15th Street NW
Washington, DC 20005-1022
(202) 662-1690
Fax: (202) 662-1529
www.abanet.org/adminlaw

October 24, 2011

The Honorable Lamar Smith
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member , Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 3010

Gentlemen:

On behalf of the Section of Administrative Law and Regulatory Practice of the American Bar Association, I attach comments regarding H.R. 3010, the Regulatory Accountability Act of 2011. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

As you will see from the comments, there is much in this ambitious proposal that we endorse. At the same time, certain provisions would harm the administrative process in unjustifiable ways. In particular, many of the new steps the bill would require for rulemaking, though wholly appropriate in some rulemakings, would, if imposed automatically and across the board , further ossify the rulemaking process with little offsetting benefits in the form of better rules.

We hope the attached is useful to the Committee in its deliberations. Thank you very much for your consideration of our views.

Sincerely,

Michael Herz
Section Chair

cc: All members of the Committee on the Judiciary

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SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

October 24, 2011

The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

October 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

SUMMARY

The Regulatory Accountability Act of 2011, H.R. 3010, would be a sweeping and consequential revision to the Administrative Procedure Act, particularly with regard to the process of rulemaking. The bill is unusually ambitious and crammed with details that are impossible to summarize. Among its provisions are many that the Section endorses, many it would modify, and many that it opposes.

With regard to the first category, we support provisions that would

- require agencies to maintain a rulemaking record,
- require agencies to disclose data, studies, and other information underlying a proposed rule,
- recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA),
- provide for agencies to consult OIRA when issuing major guidance, and
- extend these OIRA functions to the independent agencies.

With regard to the second category, we are sympathetic toward, but suggest modifications to, the bill's provisions that would

- add an Advance Notice of Proposed Rulemaking step to certain rulemakings,
- address the problem of agencies' issuance of "interim" rules that are never superseded by regularly adopted rules,
- provide some centralized oversight of agency issuance of and reliance on guidance documents.

On the other hand, the Section has serious concerns about

- the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account at each stage of the rulemaking process,
- use of the long-discredited "formal rulemaking" for some rules,
- providing for judicial review of agencies' compliance with OIRA's guidelines, and
- effectively rewriting the substantive provisions regarding standard-setting in the enabling legislation of numerous agencies through a cost-focused "supermandate." (We take no position on the substantive question of the appropriate role of costs in setting standards; we only object to resolving that question in a single, across-the-board statute that would turn the APA into the "Administrative Substance Act.")

In general, we think many of the new steps the bill would require for rulemaking are, in numerous particular cases, valuable and appropriate. However, to impose these requirements automatically and across the board will, we fear, further ossify the rulemaking process with little offsetting benefits in the form of better rules.

The following comments track the organization of the bill itself. Readers interested only in specific provisions of the bill should consult the Table of Contents, which indicates the pages not only where particular topics, but also where specific statutory provisions, are discussed.

October 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

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* Citations in this table are to sections of the Administrative Procedure Act as it would be amended by the bill. All of these provisions are in § 3(b) of H.R. 3010, except where noted.

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA) respectfully submits these comments on H.R. 3010, the Regulatory Accountability Act of 2011. The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. Introduction

The Administrative Procedure Act (APA) has been in effect for some sixty-five years. Possible updates certainly deserve consideration. More particularly, the rulemaking process, which is a principal focus of H.R. 3010, has evolved in ways not anticipated in 1946. Important questions arise as to whether and how many of these changes should now be codified or refined.

The bill is an ambitious step in the development of APA revision legislation. As discussed below, we support some of its provisions and have suggestions for modifications in others. For example, we support codification of requirements that agencies maintain a rulemaking record and that they disclose data, studies, and other information underlying a proposed rule. We also support provisions that would recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA), provide for agencies to consult OIRA when issuing major guidance, and extend these OIRA functions to the independent agencies. Furthermore, the bill addresses some issue areas as to which we could potentially support legislation, although not the specific measures proposed in the bill. This category includes the bill's provisions regarding advance notices of proposed rulemaking and agencies' issuance of "interim" rules that are never superseded by regularly adopted rules. In addition, we have some proposals of our own that could usefully be incorporated into the bill.

On the other hand, the Section has serious concerns about the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account during the rulemaking process. The ABA has long expressed concern that existing requirements for predicate findings already unduly impede agency rulemaking. The bill would aggravate this situation. That prospect should be troubling to both regulated persons and statutory beneficiaries, regardless of their location on the political spectrum. After all, the APA's rulemaking provisions apply to deregulation and to amendment or repeal of rules just as they do to adoption of new rules. Moreover, the case for prescribing new predicate findings in rulemaking is undercut by the recognized duty of agencies to respond to significant, relevant

comments submitted during the public comment period. In this way, the rulemaking process is self-regulating.

A better approach to predicate findings would be for Congress to take on the project of refining and consolidating existing requirements for predicate findings and regulatory analysis into a single coherent and streamlined framework. Some of the considerations proposed in the bill might deserve to be included in such a framework, but a goal of this harmonization effort should be to ensure that the rulemaking process will be no more burdensome on agencies than it now is, and preferably less so.

Another area of concern is that the bill provides for regular use of the long-discredited "formal rulemaking" for high-impact rules and perhaps other major rules. This model has passed almost completely into disuse, because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues. We could support a carefully limited framework for oral proceedings where a need for cross-examination on specified narrow issues is affirmatively shown; but the bill goes far beyond that limited approach.

Finally, the bill would legislate in several areas that we believe Congress would more properly address in agencies' respective organic statutes than in the APA. These matters include evidentiary burdens and substantive decisional criteria that would override provisions in existing enabling legislation.

In connection with these and other provisions in the bill that our comments call into question, we hope that Congress will not overlook the virtues of caution and restraint. It should not undertake a sweeping revision such as this without a firm showing that there is a problem to be solved, and it should be wary of codifying minutiae in the Act. In our view, the strength of the APA derives in no small part from the fact that it confines itself to fundamentals. The general act must accommodate the government's need to tailor specific processes to the various tasks Congress assigns agencies. Solutions that work well in many or even most contexts may work poorly in others. The brevity of the APA has also permitted the growth and modernization of the administrative process over time. That much of today's administrative law takes the form of case law, regulations, and executive orders is not necessarily a matter of regret, because those prescriptions offer useful on-the-ground flexibility and can be revised to meet changing needs more easily than can statutes.

Against this background, we turn to comments on specific provisions of the bill. Because § 3 of the bill comprises twenty-four of the bill's thirty-two pages, we will usually identify specific provisions by their proposed APA section or subsection numbers.

II. Definitions

Section 2 of the bill would amend § 551 of the APA by inserting additional definitions. In general, these are well drafted and largely drawn from past legislation, executive orders, and case law. We have three suggestions.

First, "guidance" is (appropriately) defined in proposed § 551(17) to be identical to what the APA calls "interpretative rules [and] general statements of policy" in the current exemption from notice and comment in 5 U.S.C. § 553(b)(A) – yet the bill continues to use the older terminology in the exemption itself (proposed § 553(g)(1)). The bill should be revised to head off confusion over the use of two terms to mean the same thing, perhaps by eliminating the older terms altogether.

One other difficulty with the bill's definition of "guidance" is that it would apply to an agency statement "other than a regulatory action." That phrase was apparently drawn from President George W. Bush's regulatory review order,[1] but it appears nowhere in the APA, either now or under the proposed bill. This drafting error could be cured by an adaptation from the definition of "rule" in Executive Order 12,866. That definition refers to an agency statement "which the agency intends to have the force and effect of law."[2] Thus, the bill's definition of guidance could be reworded to apply to "an agency statement of general applicability that is not intended to have the force and effect of law but that sets forth a policy [etc. as in the current definition]."[3]

Second, Congress should take this opportunity to clarify the existing definition of "rule" in § 551(4) of the APA. This poorly drafted provision has been a target of criticism ever since the APA was first enacted. Briefly, the opening words of the definition – "the whole or a part of an agency statement of general or particular applicability and future effect" – are out of keeping with the manner in which administrative lawyers actually use the word "rule." The words "or particular" and "and future effect" should be deleted from the definition. The ABA has repeatedly called for the former change[4] and has also endorsed the latter in substance.[5] Thus, with minor drafting cleanup, we propose that the definition should read as follows:

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[1] E.O. 13,422, § 3(g), 72 Fed. Reg. 2763 (2007).
[2] E.O. 12,866, § 3(d), 58 Fed. Reg. 51,735 (1993).
[3] The definitions of "rule" and "guidance document" in the recently adopted Model State Administrative Procedure Act draw a similar distinction. Under these definitions, the former "has the force of law" and the latter "lacks the force of law." *See* REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 102(14), (30) (2010).
[4] *E.g.*, 106 ABA ANN. REP. 549, 783 (1981) [hereinafter 1981 ABA Recommendation]; 95 ABA ANN. REP. 548, 1025 (1970).
[5] *See* 117 ABA ANN. REP. 35-36 (1992) ("retroactive rules are and should be subject to the notice and comment requirements of [the APA]"). For a full discussion of the reasons supporting this proposal, see Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077 (2004). In this connection, we note that the bill's definition of "guidance" is appropriately limited to statements of "general applicability," but it is limited by its terms to statements of "future effect." This limitation would be ill-advised. Because interpretive rules theoretically clarify what the law has meant all along, courts routinely apply them to transactions that occurred prior to the issuance of the interpretation. *See, e.g.*, *Reno v. Koray*, 515 U.S. 50, 61 (1995); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). This is, in fact, one reason why the "future effect" language of 5 U.S.C. § 551(4) should be removed.

> (4) "rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Third, a bill to modernize the APA provides an opportunity to update obsolete terminology. The bill already does this by replacing the phrase "interpretative rules" with the more compact term "interpretive rules," which virtually all administrative lawyers prefer. In a similar vein, the APA phrase "rule making" should be replaced by "rulemaking," the variant that virtually all administrative lawyers actually use.

III. Rulemaking Considerations and Required Analyses

Revised § 553(b) would codify a new set of "rulemaking considerations." These principles would require an agency to consider a large number of specified issues as a predicate for any new or amended rule. The considerations are summarized later in this section. The bill's requirements for the notice of proposed rulemaking (NPRM) in § 553(d) incorporate the § 553(b) "considerations" by reference. Section 553(d) goes on to require the agency to discuss other matters as well. Then § 553(f) sets forth requirements for the "notice of final rulemaking" (NFRM). They include not only "a concise general statement of the rule's basis and purpose" (the traditional APA requirement), but also "reasoned final determinations" regarding the matters tentatively addressed in the NPRM.

Up to a point, the Section agrees with the bill's premise that it could be useful to codify the requisite findings for a rule in statutory form. Three decades ago, in 1981, the ABA made a specific proposal along these lines. Its resolution urged Congress to require an agency to address the following matters in a notice of proposed rulemaking:

> (i) the terms or substance of the proposed rule;
> (ii) a description of its objectives;
> (iii) an analysis of alternatives to accomplish those objectives seriously considered by the agency;
> (iv) an invitation to submit proposals for alternative ways to accomplish the rule's objectives;
> (v) a description of reporting and recordkeeping requirements and an estimate of the time and cost necessary to comply; and
> (vi) to the extent practicable after reasonable inquiry, an identification of duplicating or conflicting or overlapping Federal laws or rules.[6]

Moreover, the resolution provided that a *final* rule should be accompanied by

> (a) a statement of the reasons for the policy choices made in connection with the rule including a description of alternatives considered to accomplish the objectives of the rule, and a statement of the reasons for the selection of the alternative embodied in the rule and rejection of other alternatives;
> (b) factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file; and
> (c) a response to each significant issue raised in the comments on the proposed rule.[7]

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[6] 1981 ABA Recommendation, *supra* note 4, at 784-85.

Some of these requirements have direct counterparts in H.R. 3010. However, the bill's list is both lengthier and more adventurous in its scope, and it gives rise to serious concerns regarding both the collective impact of its requirements and the particular thrust of certain individual components. Turning first to the collective impact, we will explain our concerns about the bill's approach. Then we will discuss a variation on that approach that we could, in principle, support.

A. Background positions

For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress not to add unnecessary analytical requirements to the APA rulemaking process.

For example, in 1993 the Administrative Conference of the United States (ACUS) noted that "[i]nformed observers generally agree that the rulemaking process has become increasingly less effective and more time-consuming."[8] The Conference thus recommended, among other things, that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[9] In a similar vein, the ABA, in a 1992 resolution sponsored by this Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[10] The Section's report supporting this latter pronouncement warned:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [T]he existence of multiple requirements could have the effect of stymieing appropriate and necessary rulemaking.

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased, making the warnings of these two groups even timelier. The Section summed up the current picture in a 2008 report:

> Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued without public comment procedures but have real-world effects.[11]

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[7] *Id.* at 785.
[8] ACUS Recommendation 93-4, 59 Fed. Reg. 4670, 4670 (1993).
[9] *Id.* ¶ II.C.
[10] 117-1 ABA REP. 31 & 469 (1992).
[11] ABA Sec. of Admin. L. & Reg. Prac., *Improving the Administrative Process: A Report to the President-Elect of the United States*, 61 ADMIN. L. REV. 235, 239-40 (2008) [hereinafter 2008 Section Report to the President-Elect].

Because of these concerns, the Section has long urged that the analytical requirements that agencies must observe during the rulemaking process be *simplified*. For example, the same 2008 Section report recommended that Congress and the President should "work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure."[12]

B. Predicate analyses and their burdens

In light of these longstanding policy positions, we would be gravely concerned about a revision of § 553 that not only failed to consolidate existing analysis requirements, but greatly augmented the analysis burdens associated with completing a rulemaking proceeding. These incremental requirements would in all likelihood significantly hamper agencies' ability to respond to congressional mandates to issue rules, or to delegations of rulemaking authority. Moreover, they would likely augment the tendency of agencies to use "underground rules" (a.k.a. "regulation by guidance") or case-by-case adjudication to formulate policy without having to surmount the additional hurdles presented by § 553.

A number of items in the bill seem insufficiently attentive to the costs of investigation. For example, under § 553(b) the agency must consider "the degree and nature of risks the problem [addressed in the rule] poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction" as well as "the countervailing risks that may be posed by alternatives for new agency action." § 553(b)(3). It must also address "whether existing regulations have created or contributed to the problem the agency may address with a rule," and, if so, whether they should be changed. § 553(b)(4). In addition, the agency must address "[a]ny reasonable alternatives for a new rule or other response identified by the agency," including "potential regional, State, local, or tribal rules" and "potential responses that specify performance standards [or] establish economic incentives to encourage desired behavior," "provide information upon which choices can be made by the public," or "other innovative alternatives." § 553(b)(5). Further, the agency must consider "the potential costs and benefits associated with [the foregoing] potential alternative rules and other responses … including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness." § 553(b)(6)(A). Some of the considerations in this list (which is not exhaustive) would be germane to a wide variety of rules; others would have very tenuous relevance or no relevance to many and perhaps most rulemaking proceedings.

The operative subsections of the bill cover much of the same territory. Section 553(d) requires that an NPRM must summarize information known to the agency regarding the foregoing considerations. It also must discuss the foregoing alternatives and make a reasoned preliminary determination that the benefits of the rule would justify the costs to be considered

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[12] *Id.* at 240. *See also* Letter from Warren Belmar, Chair, Section of Admin. Law & Reg. Practice, to the Honorable Fred Thompson, Chairman, Senate Gov'tal Affairs Comm., Jan. 13, 1998, at 5 ("We urge Congress to review the collection of overlapping and potentially conflicting requirements embodied in these statutes and to consider replacing them with a single, clear set of obligations for agency rulemaking. … Such harmonization … would – in addition to simplifying the rulemaking process – enable the agencies to serve the public interest more efficiently and economically.").

under § 553(b)(6). Likewise, the agency must thereafter discuss approximately the same considerations in its notice of final rulemaking. § 553(f)(4)(C)-(E).

Collectively, these requirements would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders less able to plan effectively for the future. Not only new regulations, but also amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Thus, both affirmative regulation and deregulation may be impeded.

Of course, even great burdens may be worth bearing if they produce great benefits. But these would not.[13] Although agencies frequently do and should consider many of these factors in significant rulemakings, many of these considerations are not relevant to most routine rulemaking. As the Section stated in the 2008 report mentioned above, when Congress and the President design regulatory analysis requirements, they

> should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process--some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.[14]

The current bill accepts this principle in part, imposing more demanding procedures for "major rules" and "high-impact" rules than for other rules. But the provisions in §553(b) imposing analysis requirements ignore the need to tailor the process to the importance and impact of the rule.

The bill's blanket approach might be justified if it were the only way to ensure agencies gave consideration to critical factors in the subset of rulemakings where doing so is appropriate. But it is not. Two other mechanisms exist and are already working well. First, Congress can specify the factors that an agency should take into account when regulating pursuant to a specific provision. Enabling legislation does this all the time, and it allows for a more precise fit between the agency task and the factors to be considered.

Second, where particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. As noted, agencies often consider issues of the kind just mentioned on their own initiative. If they do not, those issues are frequently raised in comments by interested members of the public. Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a

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[13] As current OIRA Administrator Cass Sunstein, certainly a supporter of regulatory analysis, once pointed out: "[T]he costs of investigation and inquiry are never zero; to the contrary, they are often very high. We can readily imagine that agencies could spend all their time investigating ancillary risks and never do anything else—a disaster for regulatory policy." Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1552-53 (1996).
[14] 2008 Section Report to the President-Elect, *supra* note 11, at 240.

recognized duty to respond to material and significant comments.[15] Thus, these issues will generally find their way into a rulemaking proceeding where they are directly implicated. It is excessive, however, to require agencies to touch *all* of these bases in *every* rulemaking proceeding.[16] This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.

It is true that, up to a point, the inquiries prescribed in proposed § 553(b) correspond to factors that have been codified in the initial sections of the executive orders on regulatory review issued or maintained by every President since Ronald Reagan.[17] Those provisions have served for many years as a means by which the Presidents have communicated their respective regulatory philosophies to agencies that comprise arms of their administrations. Indeed, several of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of EO 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases.[18] Moreover, compliance with the order is *not judicially reviewable*. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and the Office of Information and Regulatory Affairs (OIRA), but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion.[19] The burden on the agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[20] This

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[15] *See La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (an agency must articulate a response to comments "which, if true, ... would require a change in [the] proposed rule"); *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (an agency "'need not address every comment [it receives], but it must respond in a reasoned manner to those that raise significant problems.'"); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002) (an agency must respond to "significant" comments, meaning those which "raise relevant points, and which, if adopted, would require a change in the agency's proposed rule").

[16] A puzzling issue that the bill requires an agency to address is "whether a rule is required by statute." §§ 553(d)(1)(F)(ii), 553(f)(4)(B); *see also* § 553(b)(1). Why the bill specifically requires this determination is not apparent. If an agency concludes that its view of sound policy is at least consistent with the enabling statute, it should be able to proceed on that basis without addressing the purely hypothetical question of whether the statute would have required the same result had the agency desired otherwise.

[17] E.O. 13,563, 76 Fed. Reg. 3821, § 1 (2011) (Obama); E.O. 13,422, *supra* note 1, § 1 (2007) (G.W. Bush); E.O. 12,866, *supra* note 2, § 1 (Clinton); E.O. 12,291, 46 Fed. Reg. 13,193, § 2 (1981) (Reagan, retained by G.H.W. Bush).

[18] Under EO 12,866, an agency is required to provide to OIRA an "assessment of the potential costs and benefits of the regulatory action" and other factors only if the matter is identified as a "significant regulatory action." § 6(a)(3)(B). Moreover, detailed assessments are required only for so-called "economically significant" rules, *see id.* § 6(a)(3)(C), a category similar to "major rules" as defined in § 551(15) of H.R. 3030.

[19] Justice Rehnquist made a similar point effectively in the *Vermont Yankee* decision. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 539-40 (1978).

[20] Similarly, although the criteria in § 553(b) appear to be based in part on similar prescriptions in the Unfunded Mandates Reform Act, 2 U.S.C. § 1532, the analogy is weakened by the fact that, by statute, a court cannot set aside

would be particularly true under H.R. 3010, which, unlike its Senate counterpart, would make the sufficiency of an agency's compliance with these analytical obligations judicially reviewable for *all* rules, not just major rules and high-impact rules.[21]

These predictions are founded not only on our collective judgment as specialists in administrative procedure, but also on the lessons of experience at the state level. In 1947, California adopted APA provisions for rulemaking that were modeled on the federal APA. In 1979, however, the state adopted a much more detailed set of APA rulemaking provisions.[22] The statute calls for specialized findings and explanations and for numerous impact statements. These provisions require constant fine tuning and have been amended on numerous occasions.

The intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences.[23] Specialized and experienced lawyers (rather than staff non-lawyers) must supervise every step of every rulemaking process. The state's APA generates a large amount of boilerplate findings, because agencies lack resources to perform all of the required studies. The process has become slow and cumbersome and consumes large quantities of staff resources. As a result, agencies can complete work on fewer regulations, particularly in a time of declining budgets like the present. This has adverse effects on public health and safety. The detailed provisions of the state's APA also provide many opportunities for lawyers to challenge rules on judicial review because of minor procedural infirmities. The California experience suggests that a simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

C. A suggested alternative

As indicated above, the Section is by no means opposed to any and all codification of new rulemaking requirements in the APA. We believe the proper approach is the one we recommended in 1998 and 2008: that Congress and the President should "join forces to rationalize and streamline the rulemaking process."[24] As we have said before, the ability of agencies to perform required analyses "is compromised by the complexity of the set of instructions that agencies must follow – agencies (and others) must look to so many sources to ascertain the full set of actions required in a rulemaking that they may have difficulty framing the ultimate question for decision in a coherent manner."[25] The current bill does not subtract anything from the overlapping and potentially conflicting expectations prescribed not only in the APA, but also, for example, the Regulatory Flexibility Act, Small Business Regulatory

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a rule on the basis of an agency's alleged failure to analyze a proposed rule according to the requirements of that Act or the inadequacy of the analysis it did provide. *Id.* § 1571(a)(3).

[21] *See* § 704(c) as it would be added by S. 1606, § 6.

[22] *See* Calif. Gov't Code §§11340 et seq.; MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 31-40 (2002); GREGORY L. OGDEN, CALIFORNIA PUBLIC AGENCY PRACTICE chs. 20-21 (1995); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 48-51 (1992).

[23] *See* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285-87 (1999); Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 260-62.

[24] 2008 Section Report to the President-Elect, *supra* note 11, at 239.

[25] Letter from Warren Belmar, *supra* note 12, at 5.

Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and National Environmental Policy Act, as well as agency authorizing statutes and presidential directives. Its trajectory is entirely in the direction of increases. The risk of excessive, sometimes conflicting, sometimes redundant cumulative burdens is compounded by the fact that there are many other related bills also now under consideration. In the circumstances, thoughtful harmonization and streamlining would be eminently desirable.[26]

We recommend, therefore, that Congress, working with the President, rework the overall corpus of findings and analysis requirements impinging on federal agencies, with an eye toward rationalizing these requirements while also maintaining effective political oversight and promoting sound regulatory outcomes. We would be happy to work with your subcommittee in such a reexamination. A number of the principles prescribed in § 553(b) of the present bill may well be found worthy of inclusion on such a revamped list, particularly insofar as experience with some of them under EO 12,866, UMRA, etc., has been favorable. Insulation of consideration requirements from judicial review and confinement of such requirements to the most significant rulemaking proceedings, would be important variables bearing on the acceptability of particular obligations. Conversely, some of the requirements that exist now, and some that we proposed in 1981, may be out of date. We note also that the Administrative Conference is currently engaged in a directly relevant project, the results of which should be known and may be the basis for an ACUS recommendation by the end of next year.

A baseline for this overall endeavor should be to produce *no net increase* in the collective burdens of required analyses and findings in rulemaking. Indeed, a net *decrease* would be even better, because it would respond to the overload problems that have served for too many years as impediments to the rulemaking process and incentives to agencies to rely on less transparent and participatory modes of policymaking.

D. Evidentiary burdens

The requirement in the introductory clause of § 553(b) that a rulemaking agency "shall base its preliminary and final determinations on evidence" raises related concerns. The basic point is well taken. The ABA proposal quoted above recognizes that a final rule should be accompanied by "factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file." However, the § 553(b) version of this idea sweeps too broadly. Some rules do not purport to rest on factual assertions at all; they rest on law or pure policy determinations. At the very least, this provision should refer to "*factual* determinations." In addition, some factual assertions underlying a rule do not require evidentiary support, because they are legislative facts of an inherently predictive or judgmental type.[27] When Congress has

[26] We appreciate that congressional action to alter the requirements of executive orders would present obvious problems of interbranch relations. However, it seems reasonable to suppose that if, as we recommend here, the ultimate goal of the harmonization effort would be to produce a set of clear obligations that are no more burdensome, or less burdensome, than the status quo, the executive branch would be amenable to negotiations that could lead to agreed-on rescissions of presidential directives in the interest of facilitating the ability of agencies to accomplish their missions more effectively.

[27] *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813-14 (2009). The case law was usefully summarized in *Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005).

incautiously appeared to require "evidence" for such conclusions, the judiciary has managed to read an implied limitation into the statute.[28] It would be preferable, however, to avoid forcing the courts to solve a problem that Congress does not need to create in the first place.[29] After all, the courts have developed a substantial and relatively nuanced body of case law addressing whether agencies have, in various circumstances, supplied adequate factual support for their rules. A vaguely stated evidentiary requirement in § 553 is at best unnecessary and may be harmful.

Elsewhere, the bill provides that an agency "shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule." § 553(f)(2). We recognize that EO 12,866 contains very similar language,[30] and that Congress has adopted comparable language in particular contexts, such as the requirement in the Endangered Species Act that a species designation be made on the basis of "the best scientific and commercial data available."[31] Where agency decisionmaking is required to rest on scientific determinations, the expectation that the science should be well founded is certainly legitimate.[32]

Nevertheless, we question whether this notion belongs in the rulemaking language of the APA, where it could operate as an independent basis for legal attacks apart from challenges to the substance of the agency decision. Whatever its appeal in science-dominated areas, it is inapt in relation to ordinary rulemaking, in which agencies frequently must act on the basis of general knowledge, informed opinion, and experience in the field. After all, in the age of the Internet, the range of "obtainable" information that might bear upon various agency rules is virtually boundless. A statutory obligation to seek out all information that a reviewing court might

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> [A]lthough we recognize that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA, *see National Ass'n. of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1096, 1124 (D.C. Cir. 1984) (in informal rulemaking it is "desirable" that agency "independently amass [and] verify the accuracy of" data), we are acutely aware that an agency need not -- indeed cannot -- base its every action upon empirical data; depending upon the nature of the problem, an agency may be "entitled to conduct … a general analysis based on informed conjecture." *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1124 (failure to conduct independent study not violative of APA because notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention"); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978) (FCC, in making "judgmental or predictive" factual determinations, did not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency").

Notably, the court in *Chamber of Commerce* did overturn, on grounds of factual insufficiency, a different aspect of the SEC rule challenged in that case. *Id.* at 143-44. Our point therefore is not that an agency's evidentiary burdens should be lenient, but rather that the nature of those burdens is too elusive to capture in a brief statutory formula.

[28] *See, e.g.*, *Indus. Union Dep't v. Hodgson*, 499 F.2d 467, 473-75 (D.C. Cir. 1974) (construing Occupational Safety and Health Act requirement of "substantial evidence" to support a rule).

[29] Section 553(b) is also ambiguous as to whether the term "evidence" refers to any and all factual material that the agency might cite, or only a narrower class of material such as facts that would satisfy the rules of evidence in a trial-type proceeding.

[30] EO 12,866, *supra* note 2, § 1(b)(7); *see also* EO 13,563, *supra* note 17, § 1 ("Our regulatory system … must be based on the best available science.").

[31] 16 U.S.C. § 1536(a)(2); *see also* Occupational Safety and Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (requiring OSHA to "'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health'").

[32] *See generally* James W. Conrad Jr., *The Reverse Science Charade*, 33 ENVTL. L. RPTR. 10306 (2003).

consider "reasonably obtainable" could prove unmanageable, resulting in a highly unpredictable legal regime for agencies and considerable additional litigation.[33] It may be better, therefore, for Congress to impose such obligations only in substantive statutes in which the nature of the agency's mission lends itself to such a mandate. Congress can customize the obligation to the particular nature of that mission. It has done this in, for example, the Safe Drinking Water Act, which specifies that "to the degree that an Agency action is based on science, the Administrator sball use (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."[34]

For generalized decisionmaking that may be far removed from scientific realms, however, the APA should not categorically rule out the possibility that information that appears reasonably reliable may suffice for purposes of a rule in which the stakes are small or the need for timely action is pressing, although the agency may not have engaged in a search to confirm that tbis information is the "best reasonably obtainable." Even in such contexts, after all, administrative law already imposes a duty to respond to material comments presented during the rulemaking proceeding – a duty that we believe *should* be codified in tbe APA.[35] Thus, if stakeholders actually provide information to an agency that casts serious doubt on its factual premises, the agency cannot ignore it.

E. Statutory overrides

In addition to burdening the rulemaking process with analytical requirements that appear to be out of proportion to their likely payoffs, the bill's "rulemaking considerations" are troubling because of the way in whicb they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an "Administrative Substance Act." For example, the requirement in the bill to consider, in connection with any proposed rule, the "potential costs and benefits associated witb potential alternative rules . . ., including direct, indirect, and cumulative costs and benefits," would apply "[n]otwitbstanding any otber provision of law." § 553(b)(6)(A). This "supermandate" would apparently displace numerous provisions in which Congress has previously prescribed rulemaking premised on a different basis, such as use of the best available technology. It would, for example, apparently override rulemaking provisions in laws such as tbe Occupational Safety and Health Act and the Clean Air Act, which courts have authoritatively construed as *not* allowing decisions to be based on cost-benefit analysis.[36] Much,

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[33] *Cf. Heartwood, Inc. v. USFS*, 380 F.3d 428, 436 (8th Cir. 2004) (construing the above-quoted language of the Endangered Species Act to mean that agencies are required "to seek out and consider all existing scientific evidence relevant to the decision at hand. They cannot ignore existing data."); *Ecology Ctr., Inc. v. USFS*, 451 F.3d 1183, 1194 (10th Cir. 2006) (following *Heartwood*).

[34] 42 U.S.C. § 300g-1(b)(3)(a).

[35] *See infra* Part V of these comments.

[36] *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 471 (2001) (Clean Air Act), *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 510-12 (1981) (OSHA). The Court acknowledged these interpretations in *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1508 (2009). That case explained that the Clean Water Act contains a variety of statutory formulas for different rulemaking proceedings. The Court held that one section of that Act *does* permit cost-benefit analysis but recognized that other sections may not. *Id.* at 1506-08.

perhaps most, of the safety and health legislation now on the books would seemingly be displaced.[37]

Members of our Section have widely divergent views as to the utility of cost-benefit analysis and as to the range of circumstances in which it may be fruitfully deployed. Some strongly support the technique, and others are deeply skeptical. On the whole, the Section has been supportive of cost-benefit analysis but has stated that criticisms of it in the literature should be taken seriously along with more favorable appraisals.[38] The difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs, are only two of the substantial criticisms. We take no position on the general policy question here, but we believe that Congress should make judgments about the utility of cost-benefit analysis in the context of particular programs and the specific problems that those programs respectively address. A government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that § 553(b) omits certain qualifying language that the presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable. In a context in which the underlying statute does not permit actions to be based on cost-benefit comparisons, if Congress nevertheless wishes to require such an analysis (perhaps to inform itself and members of the public as to the consequences of its prior choice to make such considerations legally irrelevant), it should impose that requirement only in particular statutes in which it deems that purpose to be apposite.

The bill also imposes other inquiries "[n]otwithstanding any other provision of law," including consideration of means to increase "cost-effectiveness" and "incentives for innovation." § 553(b)(6)(B)-(C). Those too are salutary objectives, but we do not believe that Congress should sweepingly displace all prior legislation in which earlier Congresses, carefully confronting social challenges on a much more specific level, have prescribed actions on the basis of criteria that do not include those objectives. Notably absent from § 553(b) is the disclaimer in EO 12,866 (and corresponding oversight orders issued by other Presidents) that the prescribed analyses apply only "to the extent permitted by law."[39]

Furthermore, the bill not only requires rulemaking agencies to *consider* matters that would not otherwise be relevant under their organic legislation, but also constrains them from *acting* except in compliance with additional criteria. To simplify a bit, it provides that an agency must choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule." § 553(f)(3).

This would apparently be a substantial further departure from present law, although the extent of the departure is uncertain because of the vague and undefined terms of the operative

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[37] *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 32 (2003) (surveying 22 health, safety, and environmental laws and finding that only two contain a substantive cost-benefit mandate).

[38] 2008 Section Report to the President-Elect, *supra* note 11, at 240.

[39] *See, e.g.*, E.O. 12,866, *supra* note 2, § 1(b); *see also id.* § 9: "Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law."

criteria. The words "public health, safety, or welfare" are evidently meant to limit the range of acceptable rules in some way (otherwise they would be superfluous). Possibly they mean that factors such as distributional fairness, payment of society's moral debts (for example, to veterans), or avoidance of racial, ethnic, or gender disparities could be categorically excluded, at least if a rule that would further these intangible values would cost more (even slightly more) to implement than some alternative. Also, even if the phrase "public health, safety, or welfare" is interpreted broadly, the agency would have to demonstrate that those interests were "clearly" within the statute's scope. We do not understand why "clarity" should be required in this connection. Doubts about whether the statute authorizes an agency to rely on certain interests may be a prudential factor counseling against the *commencement* of a rulemaking that presupposes such reliance, because the litigation risks involved in such a venture might not justify the expenditure of agency resources on it. However, this does not mean that the APA should require an agency to have "clear" authority for the interests on which it relies in adopting a *final* rule. It would be strange to empower a court to hold that, even though the interests on which an agency relies *actually are* within the scope of the enabling statute, the rule is invalid because such authority was uncertain prior to the court's decision.

Whatever meanings § 553(f)(3) might ultimately be held to contain, we question the proposition that cost considerations must always take priority unless the agency carries a burden of justifying a different priority. An Act that governs the entire range of federal agency rulemaking should allow greater flexibility regarding the manifold and diverse ways in which government can contribute to the general welfare. Indeed, the task of calculating or estimating *which* alternative is "least costly" could itself be difficult. Moreover, most of the laws that would be displaced were enacted after a deliberative legislative process in which affected individuals and interest groups had a meaningful opportunity to consult with Congress regarding the statute's tradeoffs among competing values. It is unlikely that these interested parties will have an equally meaningful opportunity to be heard regarding the abstract and diffuse nature of the mandates under discussion here.

Compounding the perplexities that § 553(f)(3) would generate would be the challenge of determining the "relevant statutory objectives" of a statutory scheme. The problem is that there may be no clear distinction between the "objectives" of a regulatory statute and the criteria that Congress selects to effectuate those objectives. For example, OSHA would presumably be able to rely on cost-benefit analysis if the "relevant objective" of the Occupational Safety and Health Act is interpreted as "worker safety," but not if it is interpreted as "worker safety to the extent feasible."[40]

The challenge of sorting out the ramifications of such a supermandate would be formidable and would result in substantial additional litigation. Federal judges would have much more opportunity to reshape regulatory policy according to their own judgment (and possibly their preferences). This would be especially true if Congress were to enact the bill's judicial review provision ordaining that, in the event of certain procedural omissions by the agency, a court "shall not defer" to an agency's "determination of the costs and benefits or other economic or risk assessment of the action." §§ 706(b)(2). That provision would place the courts into a

[40] *American Textile Mfrs. Inst. v. Donovan, supra.*

completely unprecedented, and constitutionally dubious,[41] position as super-regulators. However, even if that provision is not enacted, and traditional judicial review principles apply, courts would acquire broad power to ascribe meaning to phrases like "public health, safety and welfare" and "relevant statutory objectives."

Courts would also have to face questions as to how to reconcile the statutory override with the conflicting thrusts of much, or most, organic legislation. Presumably the APA override would be given *some* effect. "Notwithstanding any other provision of law" sends a strong message. Yet it is likely that courts would also pay heed to the traditional maxim that a general statute does not impliedly repeal an earlier, more specific statute.[42] Thus, the ultimate import of this legislation would not be determinable for some time.

IV. Advance Notice of Proposed Rulemaking

Section 553(c) of the bill would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. The ANPRM would have to be issued at least 90 days prior to the NPRM, and at least a 60-day comment period would have to be provided. (The stated time periods are minimums. Presumably, a meaningful appraisal of the issues that could arise in a potential major or high-impact rulemaking, as well as of the public comments, would actually take longer.)

The Section agrees that the ANPRM and like devices can be useful tools in some rulemakings, especially those involving initial forays into a regulated area. We support explicit recognition of such procedures in the APA. Indeed, the ABA House of Delegates recommended in its 1981 resolution that the use of consultative procedures prior to the notice of proposed rulemaking, including ANPRMs, should be encouraged. The report explained: "Lawyers in Government and private practice with experience in complicated rulemaking share the belief in extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal."[43]

In direct contrast to H.R. 3010, however, the ABA's 1981 resolution urged that "the decision to use or not to use [such] informal consultative procedures . . . should be within the *unreviewable discretion* of the agency."[44] The Section continues to believe that an amended APA should not make ANPRMs mandatory, even in proceedings to issue expensive rules.

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[41] *See Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 274-78 (1933).

[42] "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'" *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976) (citations omitted); *see also Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *U.S. v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004); *California v. U.S.*, 215 F.3d 1005, 1012-13 (9th Cir. 2000).

[43] 1981 ABA Recommendation, *supra* note 4, at 784, 789-90.

[44] *Id.* at 784, 790 (emphasis added).

The argument against such a requirement is straightforward: ANPRMs can significantly extend the time involved in rulemaking,[45] and often the costs of the delay will be greater than the benefits associated with an improved final regulation, which may be nil. For example, some rulemaking proceedings involve issues with which an agency is quite familiar because of prior proceedings or experience with the subject matter. In such situations, the agency may be able to propose a rule without any need for an ANPRM. In other proceedings, legal constraints limit the range of actions the agency may take. In such a case, the determination may be highly contested, but the relevant information, rationale, and conclusions can all be made sufficiently available for comment by the public in the notice of proposed rulemaking.

We can see no justification for the inflexible mandate of § 553(c).[46] Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs, and the fact that agencies do indeed use them even when not legally required confirms that they often deem them valuable. At the same time, an agency's exercise of discretion *not* to use an ANPRM in a given instance causes no prejudice to the rights or legitimate expectations of the public. As the 1981 ABA report pointed out, "Protection against abuse of this discretion lies in [judicially enforced] requirements for fairness in the rulemaking procedures subsequent to notice."[47] In other words, the traditional post-NPRM comment period provides an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. If public comments indicate that the agency has made a real error or is headed down the wrong path, the agency will have to hold another round of notice-and-comment, which turns the original NPRM into a de facto ANPRM. In short, the current regime is effectively self-policing.

Particularly dubious is the bill's explicit requirement that an agency must issue an ANPRM even where it has already issued an interim rule *without an NPRM* after determining for good cause that compliance with APA rulemaking requirements would be impracticable or contrary to the public interest. *See* § 553(g)(2) (expressly referencing § 553(c)). Since a rule would already be on the books, the agency should have the option of using that rule as the basis of any new rulemaking proceedings by proposing it in an NPRM, making the mandatory ANPRM superfluous.

A related provision provides that if an agency decides not to go forward with a rulemaking proceeding, it must publish a "determination of other agency course." § 553(d)(2). It must also place in the rulemaking docket all information it considered in making this choice, "including but not limited to" all information that it would have been obliged to describe if it had proceeded with an NPRM. *Id.*

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[45] This delay would be *in addition to* the 90 days allowed to OIRA for review of a proposed significant regulatory action prior to issuance of the NPRM. *See* EO 12,866, *supra* note 2, § 6(b)(2)(B).

[46] Delays would not be the only costs involved. Under the proposed § 553(c), in addition to requesting the public's views of the agency's potential rulemaking initiative, the ANPRM published in the Federal Register would also have to identify "preliminary information available to the agency concerning the … considerations specified in subsection (b)." This would likely be an extensive body of materials, and it should be noted that the Federal Register charges agencies hundreds of dollars per page for each Federal Register submission.

[47] 1981 ABA Recommendation, *supra* note 4, at 790.

An initial problem with this provision is that it is not limited to rulemaking proceedings in which the agency had issued an ANPRM. It hardly makes sense to require an agency to explain and document its reasons for not going forward with a venture that the public never had any reason to think would be forthcoming. Also, if the requirement to publish this determination (especially in a form that is expected to set the stage for judicial review, as the provision for docketing appears to imply) applies to situations in which the agency *voluntarily* utilized an ANPRM, that requirement would tend to discourage agencies from employing this useful consultative device. We assume, therefore, that § 553(d)(2) is intended to apply only to proceedings in which the agency issued an ANPRM as required by § 553(c), and the language should be narrowed accordingly.

Even with respect to those proceedings, we do not see why the APA should require publication of a "determination of alternate course" -- a requirement that has no foundation in current law. Probably, the agency would publish some kind of explanation on its own, because a potential "major" or "high-impact" rule would by its nature be a matter of public interest. We would not object to requiring an agency that decides against going forward after an NPRM to issue a brief notice to that effect, so that the public and potentially regulated entities will not remain in suspense indefinitely. But that does not mean the law should compel the agency to issue a formal notice with full documentation. Clearly, if someone *petitions* for a rule and the agency denies the petition, the agency must explain its denial, and the disappointed petitioner can seek judicial review.[48] The petition process (which is currently codified at 5 U.S.C. § 553(e) and would be retained without change in § 553(j) of the amended APA) directly protects private interests that might be harmed by a failure to commence rulemaking. The petition and the response frame issues effectively for judicial consideration. Given the availability of the petition route, we question the need for a formal notice in which an agency would have to explain why it declined to commence a proceeding that nobody sought in the first place, and that never progressed beyond a rudimentary stage of development.

V. Notice of Proposed Rulemaking

Proposed § 553(d) of the bill specifies the contents of the notice of proposed rulemaking (NPRM). This section contains several additional provisions that the Section strongly supports. For one thing, it provides that an NPRM must include "information specifically identifying all data, studies, models and other evidence or information considered or used by the agency in connection with its determination to propose the rule." § 553(d)(1)(D)(iii). In substance, this provision would codify the so-called *Portland Cement* doctrine,[49] a step that the ABA has favored for many years.[50] Disclosure of the factual basis for a proposed rule is essential to the effective use of the opportunity to comment and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts,[51] making codification highly desirable. We would suggest that the

[48] *Mass. v. EPA*, 549 U.S. 497, 527 (2007); *Auer v. Robbins*, 519 U.S. 452, 459 (1997).
[49] *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d (D.C. Cir. 1973).
[50] *See* 1981 ABA Recommendation, *supra* note 4, at 785-86.
[51] *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting); *AARP v. EEOC*, 489 F.3d 558, 567 (3d Cir. 2007).

agency be further required to "provide an opportunity to respond to factual material which is critical to the rule, which becomes available to the agency *after the period for comments has closed*, and on which the agency proposes to rely."[52]

Subsections 553(d)(1)(A)-(C) are almost identical to the requirements in the current APA and so do not raise difficult problems.[53] In addition, the ABA supports in principle a requirement that an NPRM must discuss alternatives to the proposed rule, although the Association's proposed language is narrower than that of the bill.[54]

The ABA has also long favored amendment of the APA to provide for the systematic development by the agency of a rulemaking file as a basis for agency factual determinations and a record for judicial review.[55] H.R. 3010 adopts the substance of this position in the concluding language of § 553(d)(1), read together with § 553(l). The necessity of maintaining a rulemaking record is firmly established in administrative practice, and codification would recognize this reality. We would also suggest that the bill explicitly provide that the record be available on-line. While that generally happens already, and is required in a qualified way by the E-Government Act, it would be worth making explicit. At present, the last sentence of §553(d)(1) states that everything in the docket "shall be . . . made accessible to the public," but it does not say how, and the provision could be read to mean that simply having hard copies at agency headquarters suffices. We recommend that this provision, as well as §553(l), be amended to expressly provide that the rulemaking docket be available on line.[56]

In addition, § 553(d) provides that issuance of an NPRM must be preceded by consultation between the agency and OIRA. Information provided by OIRA during consultations with the agency shall, at the discretion of the President or the OIRA Administrator, be placed in the rulemaking docket. The same requirements apply to the notice accompanying adoption of a final rule (§ 553(f)(1) and the concluding sentence of § 553(f)(4)).

The main significance of the consultation requirement is that it would effectively extend a degree of OIRA oversight to rulemaking by independent agencies. To date, such agencies have always been exempted from the regulatory review provisions of the executive orders, but the APA definition of "agency" applies to executive branch and independent agencies alike. The

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[52] 1981 ABA Recommendation, *supra* note 4, at 785, 791 (emphasis added).

[53] The current § 553(b)(3) differs slightly from the proposed § 553(d)(1)(A) in that the former allows an agency to include "the terms or substance of the proposed rule or a description of the subjects and issues involved," but the latter more restrictively requires the agency to provide "the terms of the proposed rule." We believe that it is generally good practice to provide the actual text of a proposed rule, but agencies sometimes omit that step, such as when they use an NPRM to solicit comment on a proposal made by a third party or invite comment on a few alternative proposals instead of proposing only one. Presumably, the effect of the revision would be to induce agencies to use an ANPRM for this purpose instead.

[54] *See supra* note 6 and accompanying text.

[55] *Id.*

[56] We note in passing that the bill does not anywhere take account of electronic rulemaking. If the sponsors truly want to modernize the APA, they should consider updating the rulemaking process to reflect the impact of the Internet. The Section has been in the forefront of debates about the development of e-rulemaking. *See* ABA COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (2008) (report of a blue-ribbon committee established under the auspices of the Section). We would be happy to engage in further dialogue on this topic with the committee.

ABA has long favored extension of the oversight orders to independent agency rulemaking,[57] and we strongly support this feature of the bill.

We do, however, have one suggestion and one objection regarding this section.

The suggestion concerns disclosure of materials received from OIRA. The ABA's position has been that a communication between a rulemaking agency and other officials in the federal government should be subject to required disclosure to the extent that it contains relevant factual material not previously placed in the rulemaking file or passes on a communication on the merits received from a source outside the federal government, but not otherwise.[58] We believe that the bill could be improved by incorporation of the affirmative aspects of that policy. Insofar as the bill contemplates broader disclosure of information than the ABA policy would require, we see no reason to object, because such disclosure would occur only at the option of the President or OIRA.

The objection is presaged by the discussion in Part III.B. of these comments. For the reasons given there, we believe that a number of the predicate recitals prescribed in § 553(d) are excessive and should be reconsidered.[59]

VI. Comment Period

Proposed § 553(d)(3) contains a minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule. It is not clear why such lengthy minimum periods are prescribed. Thirty years ago, the ABA proposed a 60-day minimum.[60] More recently, in a June 2011 recommendation, ACUS suggested that agencies should as a general matter allow comment periods of at least 60 days for "significant regulatory actions" (a category similar to "major rules" as defined in the current bill) and at least 30 days for all other rules.[61] President Obama's executive oversight order provides that "[t]o the extent feasible and permitted by law," agencies should allow "a comment period that should generally be at least 60 days."[62] Clearly there is room for reasonable disagreement about the exact minimum period that should apply; but if the goal of the present bill is to codify "best practices," we believe that the figure(s) used in the bill should fall much closer to the range of possibilities suggested by the

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[57] *See* 111-1 ABA ANN. REP. 8 & Report No. 100 (February 1986).
[58] 1981 ABA Recommendation, *supra* note 4, at 785, 791-92.
[59] Subsections 553(d)(1)(E)-(F) require an agency to make a "reasoned preliminary determination" regarding the issues described there. We can agree that the notice of *final* rulemaking should be supported by a "reasoned final determination" of various predicates, as § 553(f) does require. Cf. ACUS Recommendation 93-4, *supra* note 8, ¶ IV.D. However, although one would not want preliminary findings in the NPRM to be "unreasoned," a legal requirement in that regard seems superfluous, because the preliminary determinations will be revisited at the final rule stage before they have any operative effect. Indeed, one purpose of the comment period is to invite critiques of the agency's tentative reasoning. Moreover, this language could invite judicial invalidation of a final rule on the ground that the NPRM was inadequate because, while it put all stakeholders adequately on notice, the agency's "preliminary determination" was insufficiently "reasoned." Perhaps courts would routinely find such errors harmless, but it would be safer just to eliminate this requirement.
[60] 1981 ABA Recommendation, *supra* note 4, ¶ 5(a).
[61] ACUS Recommendation 2011-2, ¶ 2, 76 Fed. Reg. 48,789, 48,791 (2011).
[62] E.O. 13,563, *supra* note 17, at 3821-22.

position statements just mentioned, so as to avoid unnecessarily aggravating the problem of excessive delays in the regulatory process.

In the recommendation just mentioned, ACUS went on to suggest that agencies may in appropriate circumstances set shorter comment periods but should provide an appropriate explanation when they do so. The ABA's 1981 recommendation contemplated analogous flexibility. It proposed that the APA "good cause" rulemaking exemption should be rewritten to allow an agency to comply "in part" with § 553 if it makes a written finding for good cause that "full compliance" would be impracticable, unnecessary, or contrary to the public interest.[63] The sponsors of the bill should consider providing agencies with latitude to shorten the default statutory comment period in unusual circumstances.[64]

VII. Formal Rulemaking

Subsection 553(e) of the bill would confer broad rights upon private persons to force an agency to use so-called "formal rulemaking," pursuant to §§ 556-57 of the APA. The scope of these rights is unclear, due to ambiguity in the opening language of § 553(e), but at a minimum the bill appears to allow parties to invoke a trial-type hearing on any proposed "high-impact rule" (roughly speaking, a rule with a $1 billion annual cost to the economy).[65] The hearing would encompass such core issues as whether the rule is cost-justified and whether a lower-cost alternative would achieve the relevant statutory objectives— plus any other issues sought by an interested person, unless the agency determines within thirty days of the request that the hearing would be unproductive or would unreasonably delay completion of the rulemaking. The latter petitioning process would also be available in proceedings to promulgate *major* rules (unless this is a drafting error). § 556(g).

These provisions run directly contrary to a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete. This broad agreement was summed up in 1993 in ACUS Recommendation 93-4: "Statutory 'on-the-record' and 'hybrid' rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination . . . can be unnecessarily burdensome or confusing and should be repealed."[66] Indeed, in the more than three decades since the Supreme Court severely curtailed the prevalence of formal and "hybrid" rulemaking procedures in a pair of leading opinions by Justice Rehnquist, *Florida East Coast*[67] and *Vermont Yankee*,[68] Congress itself has ceased to enact new formal

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[63] 1981 ABA Recommendation, *supra* note 4, at 784, 789, 790. An earlier ACUS recommendation also advocated a "good cause" finding as a predicate for a short comment period. ACUS Recommendation 93-4, *supra* note 8, ¶ IV.B.

[64] *See Florida Power & Light Co. v. United States*, 673 F.2d 525 (D.C. Cir. 1982) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

[65] Read literally, the opening language of § 553(e) could be interpreted as triggering formal rulemaking *either* "[f]ollowing notice of a proposed rule" *or* "before adoption of any high-impact rule." The caption of the subsection indicates, however, that the intent is to treat these conditions conjunctively, so that § 553(e) applies only to proceedings to promulgate high-impact rules. We discuss the subsection on that assumption, but the language should be revised for clarity.

[66] ACUS Recommendation 93-4, *supra* note 8, ¶ II.A.

[67] *Florida East Coast Ry. v. United States*, 410 U.S. 224 (1973).

[68] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

rulemaking requirements and has rescinded some of the requirements that did exist.[69] The academic community has fully supported this development: we have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.[70]

The collective repudiation of formal rulemaking reflects widespread recognition that trial-type methods are usually unsuitable in generalized rulemaking proceedings. Cross-examination can work well in the context of adjudicative proceedings, in which sharply framed issues of fact and witness demeanor frequently loom large. It is less appropriate to administrative policymaking, which, like congressional legislation, often turns on value judgments, "legislative facts," and policy perspectives that are inherently uncertain. Even in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice and comment rulemaking.[71] Such proceedings allow for rigorous analysis, but the participants usually join issue over scores of interconnected questions through a continuing exchange of documents over a period of weeks or months. Live confrontation is largely beside the point in such proceedings.

This is not to say that live hearings can never shed light on the issues in rulemaking proceedings. *Vermont Yankee* recognized that agencies have discretion to resort to these procedures, and sometimes they do so. Indeed, § 553(b) as currently written provides for public participation "with or without opportunity for oral presentation." In 1981, the ABA adopted a proposal for a "carefully limited" statutory structure for live hearings in rulemaking. It recommended that, in proceedings of unusual complexity or with a potential for significant economic impact, an agency should be required to conduct an oral proceeding with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential to resolution by the agency of issues of specific fact critical to the rule."[72] This criterion was similar to a guideline endorsed by ACUS several years earlier.[73]

However, H.R. 3010 goes far beyond the recommendations just described. The ABA and ACUS proposals did not contemplate any reliance on formal rulemaking pursuant to §§ 556-57.

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[69] Pub. L. No. 110-85, 121 Stat. 823, 942, sec. 901(d)(6) (2007) (amending 21 U.S.C. § 352(n)) (prescription drug advertisements); Pub. L. No. 101-535, 104 Stat. 2353, 2365, sec. 8 (1990) (amending 21 U.S.C § 371(e)) (FDA food standards).

[70] In § 5(a) of EO 13,422, *supra* note 1, President Bush stated that agencies "may ... consider" the use of formal rulemaking for the resolution of complex determinations. This brief reference to the formal rulemaking process was far from a strong endorsement. As construed by OIRA, it did not require agencies *even to consider* the use of formal rulemaking; it was simply a reminder about an existing option. OMB Memorandum M-07-13 (April 25, 2007), at 13. We know of no agency that availed itself of this option during the two years in which the order was in effect.

[71] A summary of devices that amplify on simple notice and comment, but fall short of trial-type hearings, is found in ACUS Recommendation 76-3, 41 Fed. Reg. 29654, ¶ 1 (1976).

[72] 1981 ABA Recommendation, *supra* note 4, ¶ 5(b)(ii).

[73] ACUS Recommendation 72-5, 38 Fed. Reg. 19782 (1973). As explained by the Chairman of ACUS (Antonin Scalia), the term "issues of specific fact" referred to issues of fact that were "sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them." (Quoted in *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1164 (D.C. Cir. 1979).)

Moreover, they required that any need for cross-examination be *affirmatively* shown. In contrast, the proposed § 553(e) would confer a right to oral proceedings automatically as to some issues and would put the onus on the agency to justify omission of such proceedings as to other issues (and to do so within thirty days of the request, at a time when the future direction of the proceeding might be quite speculative).

Most importantly, the ABA and ACUS positions applied solely to issues of "specific fact." ACUS asserted "emphatically" that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact,"[74] and the ABA's recommendation was consistent with that view by negative implication. Yet the issues listed in § 553(e) as *automatically* qualifying for consideration at a trial-type hearing in a high-impact rulemaking proceeding are quintessential examples of "questions of policy or of broad or general fact." They include, for example, whether the factual predicate of the rule is supported by evidence, whether any alternative to the proposed rule would achieve the statutory objectives at lower cost, and whether the proposed rule's benefits would justify a failure to adopt such a lower cost alternative. § 553(e)(1)-(4).[75]

Any proposal to amend the APA in this regard must also take account of the heavy social costs that have resulted from legislation that requires agencies to use trial-type hearings to develop rules that turn on issues of "policy or broad or general fact." Studies conducted during the heyday of mandatory formal or "hybrid" rulemaking showed clearly that it slowed proceedings considerably and undermined agencies' ability to fulfill their mandates expeditiously. A leading study by Professor Hamilton found that "[i]n practice, ... the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."[76] At the FDA, for example,

> [t]he sixteen formal hearings that were held during the past decade vary from unnecessarily drawn out proceedings to virtual disasters. In not one instance did the agency complete a rulemaking proceeding involving a hearing in less than two years, and in two instances more than ten years elapsed between the first proposal and the final order. ... The hearings themselves tended to be drawn out, repetitious, and unproductive.[77]

Formal rulemaking also functioned in a number of instances as a bargaining chip with which regulated parties could extract concessions by threatening to insist on their right to trial-type proceedings, bogging down an agency in protracted proceedings.[78] These side effects are a large

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[74] ACUS Recommendation 72-5, *supra* note 73.

[75] They also include whether the information on which the rule is based meets the requirements of the IQA. § 553(e)(5). If Congress adopts proposed § 553(d)(4), which would provide a formal hearing on exactly that question early in the proceeding, a second go-round on the same issue would be unnecessary and simply a prescription for delay.

[76] Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1312-13 (1972).

[77] *Id.* at 1287.

[78] *Id.* at 1289 (FDA would "go to almost any length to avoid" formal hearings), 1303 (Interior Department), 1312. A study by Professor Stephen Williams (later a distinguished D.C. Circuit judge appointed by President Reagan) also highlighted the tactical advantages to private parties of the right to invoke formal hearings. *"Hybrid*

part of the reason why formal rulemaking was abandoned decades ago (except where already mandated by statute), and nothing that has occurred in the intervening years casts doubt on that judgment.

Over and above the broad policy questions they raise, the bill's formal rulemaking provisions present several difficulties involving their relationship to the rest of the APA. The bill provides that, in a formal rulemaking case triggered under the newly added provisions, the rulemaking record will consist of the trial-type hearing record *plus* the conventional § 553 rulemaking record generated through the notice and comment proceedings.[79] The latter record may contain memoranda, letters, emails, perhaps even tweets.[80] Yet *oral* contacts between rulemaking decisionmakers and members of the public would apparently be banned by virtue of APA § 557(d). That prohibition would be difficult to justify, and it would be at odds with the sponsors' goal of transparency. The ban on external oral contacts would apparently also extend to OIRA.[81] Indeed, formal rulemaking proceedings have always been exempt from OIRA review.[82] Yet exclusion of OIRA from consultation with the agency regarding the terms of a *major rule* would be unwise and difficult to reconcile with the emphasis elsewhere in the bill on expansion of OIRA's role.

Another APA requirement is that, after the hearing in a formal rulemaking case, the administrative law judge (ALJ) or another agency employee must write a "recommended, initial, or tentative decision" that makes findings and conclusions on "all the material issues of fact, law, or discretion presented on the record," unless the agency "finds on the record that due and timely execution of its functions imperatively and unavoidably … requires [omission of this procedure]."[83] It is unclear whether this preliminary decision would be based on the hearing record (as has been traditional) or the broader rulemaking record. Yet either of these alternatives would be problematic – the former because it would be based on a different body of information than the ultimate rule would; and the latter because it would apparently extend even to issues that the ALJ did not consider during the formal hearing phase of the proceeding. Either way, the writing of this decision would add another time-consuming step to the rulemaking process for high-impact rules.

In short, there may be a case for legislation that would institute a "carefully limited" place for trial-type methods in rulemaking, along the lines of the 1981 ABA resolution. The proposed § 553(c), however, would institute formal rulemaking with respect to issues that

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Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 433-34 (1975).

[79] *See* § 556(e)(2), to be added by § 5 of the bill.

[80] *See* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

[81] *Cf. Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (presidential staff are "interested persons" and "outside the agency" for purposes of § 557(d)).

[82] E.O. 12,866, *supra* note 2, § 3(d)(1); EO 12,291, *supra* note 17, § 1(a)(1).

[83] 5 U.S.C. §§ 557(b)-(c). Under the APA, in a formal rulemaking case, the preliminary decision need not be written by the employee who presided at the hearing. § 557(b) (last sentence). However, the hearing must be conducted by an ALJ, unless one or more agency heads preside personally (which would be an unlikely occurrence in a high-impact rulemaking proceeding). § 556(b). Presumably, a rulemaking agency that does not otherwise employ ALJs would need to hire one or more of them for this purpose.

influential voices in the administrative law community have "emphatically" deemed unsuitable for such methods. It should be either fundamentally reappraised or omitted from the bill.[84]

VIII. Information Quality Act

Proposed § 553(d)(4) of the bill would create a special procedure by which persons may challenge information upon which a proposed rule is expected to be based, if they allege that the information does not meet the requirements of the Information Quality Act (IQA). Initially, the challenger may submit a petition to exclude the information. If the petition is not immediately granted but nevertheless "presents a prima facie case," the agency must hold a trial-type hearing on the petition under § 556 of the APA, with cross-examination allowed. The hearing must be held within thirty days of the filing of the petition, and the agency must render a decision on the petition within sixty days of the initial filing, but judicial review of that decision is not available until the agency takes final action in the rulemaking proceeding.[85]

As an initial matter, the requirement to hold a trial-type hearing with cross-examination gives rise to some of the objections to formal rulemaking discussed above. It is not clear why cross-examination, which is most useful to determine the credibility of witnesses, would result in better decisions as to the reliability of specified data, an issue that frequently will turn on analysis of highly technical information. Moreover, the task of applying the open-ended terms of the IQA will not necessarily be a cut-and-dried matter. It may well implicate policy considerations and broad issues of legislative fact – the kind of issues that present the weakest case for the use of courtroom methods. The sponsors of the bill have, to be sure, commendably sought to address potential concerns about delays by requiring any petition to be filed within 30 days of the NPRM and specifying that the hearing and decision must occur within two months of when the petition for correction is filed. However, even assuming that these deadlines hold up, the need to prepare for a live hearing will require a substantial investment of staff resources on a timetable that is not of the agency's choosing, particularly since it is easy to imagine there being multiple petitions from multiple members of the public. Suppose, as seems likely, the agency simply is unable to make a firm, final determination within the 60-day period. Then it will have two unappealing options. Either it will toss the challenged study or document, despite its possible usefulness, thus undercutting the solidity of the rulemaking record, or it will keep it in, despite its possible defects, thus potentially *also* undercutting the solidity of the rulemaking record and running a risk of later problems on judicial review.

More fundamentally, it is not clear why the agency should be required to reach a decision on the merits of the petition immediately – within sixty days of when the petition is filed – as opposed to resolving the issue as part of the regular rulemaking process. Currently, if a member of the public believes that the information upon which the agency plans to rely is erroneous and

[84] Section 556(f) of the bill states that an agency must consider the matters listed in § 553(b) and § 553(f) when it "conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rule making under section 553(c)." This may well be a drafting error, as the bill does not appear to provide for formal rulemaking "directly" after ANPRM proceedings.

[85] On the other hand, the bill provides that an agency's decision to exclude information from a rulemaking proceeding, as requested in a petition, cannot be reviewed at any time. § 553(d)(4)(C). No justification for this one-sided approach to judicial review under the IQA comes readily to mind.

violates the IQA, the person may so inform the agency during the comment period.[86] Under well-settled case law, the agency would need to consider those comments and rationally respond to them in the preamble to the final rule or risk judicial invalidation of the rule.

Section 553(d)(4) would entail new procedural complexity. One should not assume that this would always work to the advantage of those who favor reducing government regulation of private activity. Environmental and public interest groups have been frequent users of the Information Quality Act to oppose what they believe to be insufficient government regulation.[87] Thus, the new procedure may sometimes drive up the costs of promulgating rules that would make regulation stricter, but at other times it may have the same effect on rules that would relieve regulatory burdens.

Experience to date indicates that these burdens are unnecessary, for IQA questions are adequately -- and perhaps best -- dealt with through the rulemaking process. The Ninth Circuit essentially accepted the sufficiency of the existing approach in a case in which the plaintiff sought correction under the IQA of statements made by the Department of Health and Human Services regarding the efficacy of marijuana for medical purposes. The Ninth Circuit upheld the Department's refusal to act immediately on the petition, because the same issue was pending before the agency in its consideration of a rulemaking petition. The court agreed with the government that OMB guidelines permitted the Department to "use existing processes that are in place to address correction requests from the public."[88] Of course, Congress can change the law to explicitly require a special procedure above and beyond the ordinary notice and comment process, but the onus should be on proponents of such legislation to explain why it is needed. Indeed, it may well make more sense to allow the agency to postpone its decision on a correction request tendered during a rulemaking proceeding until it adopts the final rule. At that time, the agency may have a much clearer idea about the materiality of the allegedly incorrect information, and the manner in which it will use that information, than it could have had within the sixty days immediately following the filing of the petition for correction. Under the bill, the challenger might be able to force the agency to hold a trial-type hearing and render a decision about a factual issue that will ultimately make little or no difference to the disposition of the final rule.

In addition, § 7(2) of the bill would amend § 706(2)(A) of the APA to provide that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "not in accordance with law *(including the Information Quality Act)*." We would be reluctant under any circumstances to see the broad language of § 706 – a constitution-like statute that is invoked in thousands of court cases every year – amended to refer explicitly to an issue that has been, and probably would continue to be, litigated only rarely. More fundamentally, the chances that such an amendment would accomplish anything are, at best, highly uncertain. The weight of judicial authority indicates that the IQA creates no rights that are capable of being

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[86] *See* OMB, Memorandum Regarding Information Quality Guidelines: Principles and Model Language (Sept. 5, 2002).

[87] *See, e.g., Ecology Ctr., Inc. v. U.S. Forest Service*, 451 F.3d 1183 (10th Cir. 2006).

[88] *Americans for Safe Access v. HHS*, 399 Fed. Appx. 314, 315 (9th Cir. 2010). *See also Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010) (upholding OIRA guidelines insofar as they exempt adjudications from their coverage).

enforced in the first place. In *Salt Institute v. Thompson*,[89] the district court held that "[n]either the IQA nor the OMB guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication."[90] That ruling was upheld on appeal to the Fourth Circuit, which agreed that the IQA "does not create a legal right to access to information or to correctness."[91] Other courts have reached the same conclusion.[92] To be sure, there are also cases holding that the OMB guidelines are legally binding,[93] but those decisions did not take issue with the just-stated proposition in the *Salt Institute* cases.

This issue has not been definitively resolved. Indeed, in recent cases the Ninth and D.C. Circuits chose not to address it when they had the chance, demonstrating that the issue remains open at the appellate level outside the Fourth Circuit. Nevertheless, it would not make sense for Congress to ignore the case law that does exist. In brief, that case law indicates that the obstacle to judicial review of agency denials of requests for correction under the IQA is not (or not solely) found in the APA; it inheres in the IQA itself. Nothing in the bill purports to change the substantive law of that Act. At some point Congress may wish to review and perhaps revise the IQA to establish substantive standards; but proposed legislation that attempts to address this issue through amendment of the APA seems misdirected.

As is well known, Congress adopted the IQA as a rider to an appropriations bill, without hearings, committee review, or floor debate. That background lends further weight to the notion that, in order to resolve questions regarding judicial review under that Act, Congress should wait until it has had an opportunity to give the IQA the full airing that the statute never received at its inception.

IX. Final Rules

Section 553(f) of the bill sets forth requirements for final rules.[94] We have commented above on most of its provisions, including the new findings and determinations that an agency would need to make in order to issue a final rule, the requirement of consultation with OIRA, and the prescription of a rulemaking record. We will not repeat that discussion here.

We note, however, that the list of predicate conditions in § 553(f)(5) omits one requirement that should be included. In line with ABA policy, that provision should be amended

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[89] 345 F. Supp. 2d 589 (E.D. Va. 2004).
[90] *Id.* at 602.
[91] *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006).
[92] *Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 316 (D.D.C. 2009), *aff'd in pertinent part on other grounds*, *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678; *Americans for Safe Access v. HHS*, 2007 U.S. Dist. Lexis 89257 (N.D. Cal. 2007), *aff'd on other grounds*, 399 Fed. Appx. 314 (9th Cir. 2009); *In re: Operation of the Mo. River System Litigation*, 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004).
[93] *Americans for Safe Access*, 399 Fed. Appx. 314; *Prime Time Int'l Co.*, 599 F.3d 678.
[94] A related provision, § 553(i), states that the "required publication or service" of a final rule should generally occur 30 days before it goes into effect. The "required service" language is a carryover from the current APA, which also refers to "personal service" in 5 U.S.C. § 553(b). However, since the latter language has been dropped from § 553(d) of the bill, the corresponding language of § 553(i) should also be removed.

to require, in substance, that a notice of final rulemaking should include "a response to each significant issue raised in the comments on the proposed rule."[95] This obligation is well recognized in the case law[96] and is essential in order to make the comment process meaningful.

Proposed § 553(f)(4)(G)(i) requires that an agency's notice accompanying any major rule or high-impact rule must include

> the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.[97]

The ABA supports legislation providing for periodic review by agencies of their existing regulations. Its resolution, adopted in 1995, stated in part:

> Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.[98]

At a general level, the proposed § 553(f)(4)(G)(i) is consistent with and would further the purposes of the ABA's policy. We also think that the substantive criteria listed in the subsection are stated with sufficient generality as to pose no conflict with the ABA's admonition against overly "detailed" requirements.

We are less convinced, however, that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate.

The usual approach to prescribing systematic reviews of existing regulations – as reflected in the ABA's resolution, a corresponding ACUS recommendation,[99] and presidential oversight orders[100] – is to ask agencies to create an *overall* plan for review of rules, separately from their promulgation of particular rules. We suggest that Congress follow this latter approach to mandating review of major rules (or a broader class of rules).

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[95] *See supra* note 7 and accompanying text; *see also* ACUS Recommendation 93-4, *supra* note 8, ¶ IV.D.
[96] *See supra* note 15.
[97] The phrase "no less than every ten years" in § 553(f)(4)(G)(i) is ambiguous. It could refer to intervals that are "ten or more years apart," or "ten or fewer years apart." This language should be clarified.
[98] 120-2 ABA ANN. REP. 48, 341 (1995).
[99] ACUS Recommendation 95-3, 60 Fed. Reg. 43,109 (1995).
[100] E.O. 13,563, *supra* note 17, § 6; E.O. 12,866, *supra* note 2, § 5(a). President Obama's order called for an immediate, comprehensive review of *all* "significant" agency rules, but we view that directive as a one-time measure, not intended as long-term policy.

Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily.[101] Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed.[102] The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.

X. Interim Rules and Rulemaking Exemptions

A. Expiration dates

Agencies frequently adopt regulations without prior notice and comment where they find for good cause that ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). However, they often designate such regulations to be "interim rules" and call for post-promulgation public comments. In theory, they will then consider the comments and revise the interim rule into final form. In some cases, however, such rules languish indefinitely in interim form. Section 553(g)(2) of the bill would require the post-promulgation process to be completed in 270 days for most rules and 18 months for major rules and high-impact rules. If the deadline is not met, the interim rule would have to be rescinded.

Agencies do sometimes abuse the flexibility afforded by the good cause exemption. Congress should, therefore, consider amending the APA to discourage or prevent agencies from leaving interim rules on the books indefinitely without ever undergoing the discipline of the notice and comment process. However, the specific remedy proposed in § 553(g)(2) gives rise to several concerns.

In the first place, the bill would repeal the existing exemption entirely. Thus, agencies would be required to utilize limited-term interim rules in all situations currently covered by the exemption. This is particularly ill-advised with respect to rules that fall within the "unnecessary" language of the current APA exemption. That language has been dropped entirely in § 553(g)(2), but that part of the exemption plays a vital role that should be preserved. Its purpose is to allow agencies to forgo notice and comment for technical corrections and other noncontroversial rules – not because there is any urgency about them, but rather because no one is likely to wish to contest them. Agencies make frequent use of this exemption, almost always without any controversy whatever.[103] When they invoke the "unnecessary" aspect of the good

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[101] Government Accountability Office, Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews, GAO-07-791, at 30-34 (2007).

[102] This idea is discussed at greater length in ACUS Recommendation 95–3, *supra* note 99.

[103] A scholar who examined every issue of the Federal Register published during a six-month period found that agencies expressly invoked the good cause exemption in twenty-five percent of the rules they issued (not counting many more in which they appeared to rely on it by implication). Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 338-

cause exemption, agencies customarily do not issue interim rules; they simply adopt the rule in final form immediately. There just is no reason to force them to seek post-promulgation comments, as ACUS has long recognized.[104] Judicial review is available to correct alleged misapplications of the "unnecessary" exemption, but if the exemption has been lawfully invoked, neither a post-promulgation comment period nor an expiration date is warranted.

With respect to rules adopted without prior notice and comment because of urgency, the deadlines written into the bill are more understandable, but we believe they are not a good idea, or, at the very least, are much too short. In its consideration of interim rules in 1995, ACUS did not recommend a uniform government-wide deadline date for finalizing the rules. We think this was the right decision.[105]

If an agency cannot meet the deadline for evaluating public comments and modifying the rule, it confronts the unpalatable choice of allowing its rule to lapse or rushing the process through to completion before the public comments have been properly analyzed and modifications to the rule have been carefully considered. Neither alternative is desirable, especially given that the rule was adopted to deal with an emergency situation.

An agency may be unable to meet the deadline for completing the post-promulgation modification process for many legitimate reasons. Often, a large set of complex interim rules are adopted at the same time to implement a new statute; these would all expire at the same time, creating a serious time crunch on limited agency staff resources. Or the agency may confront more urgent rulemaking or enforcement priorities, so staff is simply not available to deal with an expiring interim rule. Or the leadership of an agency may change just before the rule expires, and the new agency heads need to make their own decision about how to modify the interim rule.

In any event, if Congress decides to impose a deadline, we would suggest that it be at least three years, as in the case of tax regulations.[106] Consideration should also be given to allowing the agency to extend its time limit for a defined period upon showing good cause – a showing that presumably would be judicially reviewable (as the bill could specify).[107]

B. Judicial review

Proposed § 553(g)(2)(C) goes on to provide that, in general, an interested party may seek immediate judicial review of an agency's decision to adopt an interim rule. Proposed § 704(b) essentially repeats this provision and adds that review shall be limited to whether the agency

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39 & n.86 (1989). Of these, about twenty percent, or five percent of the overall total, invoked the "unnecessary" exemption alone. *Id.* at 351 n.124. He added that, although these figures may sound excessive, "an examination of the actual cases where the clause is invoked does not reveal general misuse." *Id.* at 339-40.

[104] ACUS Recommendation 83-2, 48 Fed. Reg. 31,181, ¶ 1 (1983); *see also* ACUS Recommendation 95-4, 60 Fed. Reg. 43,110, 43,113 n.15 (1995).

[105] *See* ACUS Recommendation 95-4, *supra* note104, discussed in relevant part in Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 736-40 (1999).

[106] *See* Int. Rev. Code §7805(e)(2).

[107] As written, the bill provides especially tight deadlines in the case of non-major rules, but that distinction is artificial. Whether a rule is major or non-major says little or nothing about the practical difficulties of meeting the deadline, the complexity of the regulatory problem, or the number of public comments that must be analyzed.

abused its discretion in adopting the interim rule without complying with ordinary rulemaking procedure. (Inconsistently, however, § 706(b)(3) provides that the court shall not defer to the agency's determinations during such review.)

One has to wonder why § 553(g)(2)(C) (and the repeated language in § 704(b)) is thought to be needed at all. Under existing law, interim rules are already reviewable immediately upon their issuance, if other prerequisites for judicial review are satisfied. Interim rules (also commonly called interim *final* rules) are not like an interlocutory order in an adjudicated case. They are legislative rules with the force of law and immediate operative effect. As such, they fall within the usual meaning of "final agency action" and are subject to judicial review under § 704.[108] Were there a body of case law that holds otherwise, one could make a case that Congress needs to clarify this principle, but we are aware of no such cases.

A similar point can be made about the two inconsistent standards of review. We see no reason to choose between them, because neither is needed. An agency's decision to issue an interim rule, instead of complying with ordinary rulemaking procedures, is essentially a decision to invoke an exemption to the APA. Courts already decide issues of APA compliance, such as this one,[109] without appreciable deference to agencies, because no single agency administers that Act.[110]

C. Other exemptions

The good cause provision is not the only rulemaking exemption that Congress should consider in connection with APA revision. It should take this opportunity to rescind the broad and anachronistic exemption for rules relating to "public property, loans, grants, benefits, or contracts."[111] ACUS has repeatedly called for repeal of this language, beginning in 1969,[112] and the ABA has concurred with a minor reservation relating to public property and contracts.[113] Similarly, the APA contains a sweeping exemption for matters involving "a military or foreign affairs function of the United States."[114] Both ACUS and the ABA have for decades been on record as urging that this exemption be narrowed, so that it would only apply (as does the corresponding exemption in the Freedom of Information Act) to matters that are specifically required by executive order to be kept secret in the interest of national defense or foreign

[108] *Ark. Dairy Coop. Ass'n v. USDA*, 573 F.3d 815, 827 (D.C. Cir. 2009); *Pub. Citizen v. DOT*, 316 F.3d 1002, 1019 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004); *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268-69 (D.C. Cir. 1996); *Beverly Enters. v. Herman*, 50 F. Supp. 2d 7, 17 (D.D.C. 1999) (claim was time-barred because plaintiff *failed* to seek review of interim rule when it was promulgated).
[109] *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003).
[110] *United States v. Fla. E.C. Ry.*, 410 U.S. 224, 234 n.6 (1973); *Collins v. NTSB*, 351 F.3d 1246, 1252 (D.C. Cir. 2003); *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796 (5th Cir. 2000).
[111] 5 U.S.C. § 553(a)(2).
[112] ACUS Recommendation 69-8, 38 Fed. Reg. 19782 (1969).
[113] 1981 ABA Recommendation, *supra* note 4, at 783-84, 788. The reservation was that if rulemaking procedures are followed by an agency with overall responsibility for public property or contracts, including the Administrator for Federal Procurement Policy or the Administrator of General Services, the implementing agency should not have to repeat the process on its own; moreover, the APA should not displace any rulemaking procedures specified in the applicable organic statute. *Id.*
[114] 5 U.S.C. § 553(a)(1).

policy.[115] A requirement that rules in the subject areas of both exemptions must be issued through the normal notice and comment process would harmonize well with the bill's overall emphasis on promoting public participation and agency accountability in rulemaking.

Finally, we note that § 553(g)(1) apparently seeks to carry forward without change the existing APA exemption for interpretive rules, policy statements, and procedural rules (5 U.S.C. § 553(b)(A)). It does so imperfectly, however, because it would require an agency to take account of the § 553(b) considerations in issuing an interpretive rule or policy statement and also satisfy the requirements for final rules in § 553(f). These requirements would be excessive, not only for the reasons we have already mentioned regarding those subsections, but also because it would tend to deter agencies from issuing guidance at all. This would be detrimental to the interests of those citizens who rely on agency guidance for advice as to how they can best comply with their regulatory obligations.

XI. OIRA Guidelines

Section 553(k) would authorize OIRA to "establish guidelines" regarding multiple aspects of the rulemaking process. Of course, OIRA already does issue such guidelines. Insofar as the purpose of the subsection is simply to recognize and ratify this practice, we support the provision. Presumably, one consequence of codifying this authority would be to make OIRA guidelines applicable to independent agencies' rulemaking. As stated above, the ABA does support the extension of OIRA oversight to independent agencies.

We assume that the "guidelines" authorized by the subsection would not be legally binding. At present, OIRA does have rulemaking authority in limited subject areas, such as the Paperwork Reduction Act and the Information Quality Act, but it has not claimed a general authority to regulate the rulemaking process. Indeed, the presidential oversight orders have all specifically disclaimed the intention to displace the authority granted by law to the respective agencies.[116] Our understanding is that the bill does not seek to alter that state of affairs. The sponsors should, however, reconsider certain language in the provision that may give rise to a contrary impression – e.g., that the guidelines would "ensure" that agencies use the best available techniques for cost-benefit analysis, "assure" that each agency avoids regulations that are inconsistent with those of other agencies, and "ensure" consistency in Federal rule making."

Subsection 553(k) also authorizes OIRA to issue guidelines in subject matter areas that it has not heretofore addressed. The benefits of such pronouncements may vary according to context. For example, the case for empowering OIRA to issue binding guidelines "to promote coordination, simplification, and harmonization of agency rules" is relatively strong, because problems of incompatible or duplicative regulations as between agencies are real, yet individual agencies cannot readily solve these problems on their own. The case for guidelines to ensure that rulemaking conducted outside the APA framework "conform to the fullest extent allowed by law with the procedures set forth in section 553" is less clear, because diverse approaches among

[115] 1981 ABA Recommendation, *supra* note 4, at 784, 788-89; ACUS Recommendation 73-5, 39 Fed. Reg. 4847 (1974).
[116] *See, e.g.*, E.O. 13,563, *supra* note 17, § 7(b)(i); EO 12,866, *supra* note 2, § 9.

the agencies may rest on legitimate differences in their respective missions and programs. In short, the direction in which § 553(k) appears to be headed may have merit, but its proponents will need to make a careful case for individual aspects of it.

In any event, we do not support the provision in § 706(b)(2) that would deny any judicial deference to agency cost-benefit determinations or risk assessments that fail to conform to OIRA guidelines – a purpose for which those guidelines clearly were not designed. We discuss this provision in Part XIII below.

XII. Agency Guidance

Section 4 of the bill adds to the APA a new provision, § 553a, on the subject of agency guidance. It provides that, before issuing any *major* guidance, an agency must consider certain stated issues and consult with OIRA. It also states that any guidance must be explicitly labeled as nonbinding and that OIRA may issue guidelines to agencies as to how they should use guidance documents.

Most of these provisions have counterparts in existing practice and are supportable or at least not objectionable. The factors listed in § 553a(a)(1) as threshold considerations are mostly straightforward matters that one would normally expect the agency to consider, such as whether the guidance is understandable and supported by legal authority, and whether its benefits justify its costs.[117] (However, to the extent that this subsection incorporates by reference all of the cost factors listed in § 553(b), we would object for the same reasons discussed above in relation to the latter provision.) Moreover, OIRA already consults with executive agencies about significant guidance, and OMB has already published guidelines regarding the recommended use of guidance by agencies.[118] A consequence of codification in the APA would be that the application of these oversight functions would be extended to independent agencies, but such an extension would be consistent with ABA policy.[119]

The provision's general provision on guidance could benefit from refinement, however. First, the statement in subsection (b)(1) that agency guidance "may not be relied upon by an agency as legal grounds for agency action" could prove confusing, because interpretive rules certainly "may sometimes function as precedents."[120] Perhaps the quoted language should be rephrased as "may not be used to foreclose consideration of issues as to which the document reaches a conclusion,"[121] or should simply be deleted. Second, the requirement in subsection (b)(2) that any guidance must be labeled as not legally binding in a "plain, prominent and permanent manner" may be problematic. In the abstract, such labeling represents good

[117] The reference in § 553a(a)(1)(B) to "the rule making" should say "a rule making."
[118] OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007).
[119] *See supra* note 57 and accompanying text.
[120] *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001).
[121] *See* REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 311(b) (2010) ("An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.").

Ms. JACKSON LEE. Thank you.

To the gentlemen quickly, do you accept this legislation, H.R. 3010, without amendment? Mr. Gray?

Mr. GRAY. Yes, ma'am.

Ms. JACKSON LEE. Mr. DeMuth?

Mr. DEMUTH. Yes, ma'am.

Ms. JACKSON LEE. Mr. Baker?

Mr. BAKER. I have not had a chance to fully review all aspects, but I will certainly get back to you.

Ms. JACKSON LEE. Thank you, Mr. Baker. I appreciate that comment.

And let me just say that I truly believe your concern should be addressed, and I am a strong supporter making sure that you hire people, that your doors stay open, and that you grow to be even a bigger business. I have no quarrel with you and I understand how regulations need to be overseen.

So let me go to Mr. Shapiro. Do you have page 4, Mr. Shapiro?

Mr. SHAPIRO. Yes, ma'am.

Ms. JACKSON LEE. All right. And I want to make note of the fact that section 3 in this bill, Rulemaking, goes from page 4, page 5, page 6, and finishes on page 7. And the headline of this one is "Rulemaking." So I assume what this means, Mr. Shapiro, is this is what has to be taken into account in regulatory agencies in order to get a rule in place. Is that correct?

Mr. SHAPIRO. Yes.

Ms. JACKSON LEE. All right. Before I question you, let me also submit into the record an article entitled "CDC: Cantaloupe Listeria Outbreak Deadliest in a Decade." This was dated September 28, 2011 by Christina Caron. I ask unanimous consent for this article to be put in the record.

Mr. COBLE. Without objection.

[The information referred to follows:]

CDC: Cantaloupe Listeria Outbreak Deadliest in a Decade

By CHRISTINA CARON

Sept. 28, 2011— go.com

Despite the Jensen Farms' cantaloupe recall in Colorado, the number of people diagnosed with listeriosis continues to grow. So far, 13 people have died and 72 people have been infected in 18 states according to the latest numbers released by the Centers for Disease Control and Prevention.

"This is the deadliest outbreak of a food borne disease that we've indentified in more than a decade," said Dr. Thomas Frieden, director of the CDC. "For the public, it's important to know that if you know the cantaloupe you have is not Jensen Farms, then it's OK to eat. But if you're in doubt, throw it out."

Government investigators are continuing to search for the root cause of the outbreak, examining the possibility of animal or water contamination as well as the farm's harvesting practices. In the meantime, the number of people infected is expected to rise because it can take up to two months for people infected with the bacteria to develop listeriosis.

"We do anticipate there will be a rising number of cases in the days and weeks to come," Frieden said.

The death toll may be as high as 16 if tests confirm the bacteria was responsible for three new deaths in New Mexico, Kansas and Wyoming.

So far, four people in New Mexico and one person in Kansas have died from the outbreak, as well as two people in Colorado, two in Texas and single deaths in Maryland, Missouri, Nebraska and Oklahoma, according to the CDC. The Wyoming death would be the first in that state tied to the cantaloupe contamination.

"We believe that it is connected based on patient history and presence of listeria; however we do not yet have molecular lab confirmation for the specific outbreak strains," Wyoming Department of Health spokeswoman Kim Deti told ABCNews.com.

In some states where patients have become ill, officials have not yet connected the illness to cantaloupe.

Sarah Weninger, an epidemiologist at the North Dakota Department of Health told ABCNews.com today that a Stutsman County woman in her 60s was diagnosed with listeria on Sept. 23 and has been discharged from the hospital.

"She is a match for the outbreak, but we haven't confirmed that she consumed the recalled product," Weninger said.

Families Sue Jensen Farms

Several families have filed lawsuits against Jensen Farms in Granada, Colo.

Herbert Stevens of Littleton, Colo., bought half of a Jensen Farms cantaloupe wrapped in plastic at a local grocery store on Aug. 10 and the 84-year-old developed tremors on Aug. 22.

"On the 24th, he got really weak and was in a sitting position and couldn't get up," his daughter, Jeni Exley, told ABCNews.com.

Stevens' wife called 911 and he was taken to a hospital, where doctors discovered he had a fever of 102.7. By the end of the weekend, he had been diagnosed with listeriosis.

Antibiotics destroyed the listeria in Stevens' body, but he remains weak and it's unclear when -- if ever -- he'll be able to leave the long-term care facility where he's been living for the past week.

"He is making some progress but still relies on a walker to walk and assistance with activities of daily living," Exley said.

Prior to contracting the bacteria, Stevens was able to walk without assistance and was in good health. He often took trips abroad with his family, most recently to Sweden.

Right now, however, "He sleeps for most of the day," said Exley. "This has played havoc with his whole body."

Stevens' 81-year-old wife, Elaine, tested negative for listeria. The CDC has cautioned that the amount of bacteria it takes to produce listeriosis can differ depending on the person.

There are four different listeria strains associated with the cantaloupe outbreak, something the F.D.A. considers unusual.

"The reasons for that are under investigation," said FDA senior advisor Dr. Sherri McGarry.

Today the F.D.A. said the latest outbreak is yet another reason to fully implement the Food Safety Modernization Act.

The act was signed into law on Jan. 4, but when the F.D.A.'s budget was slashed by the U.S. House of Representatives, it became unclear how the agency would pay for a new, modernized food safety inspection process.

"We're going to take these lessons learned, share that with our partners and industries, CDC and the states, and what we want to do is we want to really prevent this from happening in the future," McGarry said of the listeria investigation.

Listeria can cause fever, neck stiffness, confusion and vomiting, according to the CDC. The elderly and those with weakened immune systems are at a greater risk of developing serious symptoms. Listeria is especially dangerous during pregnancy and can infect the newborn or lead to premature delivery.

Although there have been other listeria outbreaks in recent years, this is the first one attributed to whole cantaloupes, according to the FDA.

Ms. JACKSON LEE. I don't know if this number is accurate. I thought the number had gone up to 28, but it says in this article so far 13 people have died, 72 people have been infected in 18 States.

Mr. Shapiro, this cantaloupe outbreak from your understanding or at least you know that there are regulations that deal with food. Is that correct?

Mr. SHAPIRO. Yes.

Ms. JACKSON LEE. And the cantaloupe is a food product.

Mr. SHAPIRO. Yes.

Ms. JACKSON LEE. And we have seen the most deadliest outbreak that we have seen in life.

Let us go to section 3 and B, subsection 3. I can barely understand it. The ABA has indicated there are some major problems with this legislation. I assume that you do not take this legislation on face value, meaning that you don't believe it should be passed immediately as it is written.

Mr. SHAPIRO. That is correct.

Ms. JACKSON LEE. And do you read and see what I see in section 3 that says the specific nature and significance of the problem the agency may address with a rule, then in paren, including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction? Professor Shapiro, do you see a group of people sitting in a room coming to this parenthesis and attempting to say what is going on in the third floor or the fourth floor in terms of what the agency's priorities on that task that they were given?

Mr. Chairman, I would like for Mr. Shapiro to be able to answer how much of an obstruction just this provision would be alone in the contemplative, thoughtful thinking and writing of regulations that might save lives and avoid the deaths that we had in listeria. Could you respond to just that provision alone?

Mr. SHAPIRO. Well, I appreciate the intent to tell agencies that they need to think clearly about their regulations before they are enacted. It is really hard to argue with that sentiment. But what we have done over the years is try to help them along by having a list of things they have to take into account. And as I said earlier, that list now has gotten very long and probably already involves 130-140 different things they are supposed to at least look at and see whether or not they are impacted by the bill. And then as you have pointed out, this bill alone would add numerous other very detailed, think-before-you-leap requirements.

Ms. JACKSON LEE. Mr. Chairman, could I just get a quick follow-up question? May I have a quick follow-up question to Professor Shapiro please?

Mr. COBLE. Very briefly. Your time has expired, but go ahead with one more question.

Ms. JACKSON LEE. All right. Mr. Shapiro, I do want to focus you more clearly on section 3. I appreciate the broad answer, but you listed that we have many other reviews that an agency does. In the paren, they are asking them to stop and say do I want do this over other priorities. And agency has many different subsets, and I would imagine that they have many different groups dealing with their priorities. And so you add to rulemaking a question of whether or not I have to address whether I need to deal with cantaloupes and food security or food regulation juxtaposed against worrying about—not worrying about but maybe talking about apple regulation. The point I am making is——

Mr. ISSA. Mr. Chairman, is there a question?

Ms. JACKSON LEE. Yes, there is. Is this not a redundancy and an act that is already taking place?

Mr. SHAPIRO. As I said in my opening statement, it is important to balance——

Mr. COBLE. Professor Shapiro, our time has expired. If you could be very brief.

Mr. SHAPIRO. Sure. I was just saying it is important to have a balance here, and I think you can always add procedures in an attempt to be more accurate, but at the end of the day, it is also important to protect the American people.

Mr. COBLE. The time of the gentlelady has expired.y

The distinguished gentleman from California, Mr. Issa, is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman. As we both know, "distinguished" around here generally means old. And since I see our panel is plus or minus a few years, some of you my age, let me go through a line of questions that follows up the gentlelady from Texas.

There is a point that this legislation piles on to lots of other legislation, each intended to stop legislation by rulemaking from, if you will, jamming up people like Mr. Baker. Mr. Baker, you are a few years younger than me and you only started your business in 2003, but it wasn't your first time on the merry-go-round. In 1990, were you also in a similar business?

Mr. BAKER. No. In 1990, I was redeveloping malls.

Mr. ISSA. So at that time you were watching cement operations. You were watching construction and so on?

Mr. BAKER. Correct.

Mr. ISSA. Would it surprise you that there are more than twice as many regulations that people building shopping malls today have to abide by as there were in 1990, some 20 years ago?

Mr. BAKER. It would not. I am not surprised by that. As I was researching, I found 4,000 new rules on industry just this year alone, which is what in the small business community we are becoming more and more reliant on trade industries because we just can't follow them.

Mr. ISSA. So there are so many new laws that Congress has nothing directly to do with that you have to hire, if you will, teams of people through trade associations just to keep up with the ever-new regulations.

So in your opinion, would you say it is way too easy to pass regulations after all of what Mr. Shapiro called these layers of delay?

Mr. BAKER. Well, I probably wouldn't use the word "easy," but I would say it is not——

Mr. ISSA. I mean, it is not easy on you once they pass them.

Mr. BAKER. I would state that there are many examples of where litigation could have been avoided had there been more input on the front end, where conflicting regulations could have been made more effective had there been more input on the front end. And so that is really my objective for being here today is to——

Mr. ISSA. And we appreciate a real live American job creator being here. We don't see enough of you.

Professor Shapiro, I am going to consider you an expert on regulations, but how are you on shopping malls? Have you been to some?

Mr. SHAPIRO. I try not to, but yes, I have been to some.

Mr. ISSA. So would be afraid to go to a shopping mall that was created in 1990?

Mr. SHAPIRO. No.

Mr. ISSA. So would you be afraid to have a piece of cantaloupe if the regulations around cantaloupe production were 1990 regulations?

Mr. SHAPIRO. The food safety system is something we have been unable to get up to adequate protection levels on.

Mr. ISSA. So, in other words, when the gentlelady from Texas talked about cantaloupe and the worst in a decade, we have piled on hundreds or thousands of new regulations but we haven't made food safer. Isn't that true?

Mr. SHAPIRO. The numbers for total number of regulations are a little misleading in the following sense, that many of these are technical amendments——

Mr. ISSA. Wait a second. When every single pesticide and every single chemical used in agriculture is required to go through—even if it has been on the market for decades, required to go through an all new, ground-up evaluation by this Administration, you are going to say it is small and technical? Is it small and technical? Is that what you call small and technical if you are a farmer and you find out that nothing you have used for decades in some cases can be used without a huge price increase because it is going through a set of evaluations even though it has been used for decades?

Mr. SHAPIRO. These are things of great concern to business, but they are also of great concern to consumers and we have to get an appropriate balance.

Mr. ISSA. Mr. Gray, you like me have been around a couple of days and you have been around in Washington a couple days longer than I have. Is this really just Washington talk, that we think we make everything safer by piling on regulations? And aren't we here today looking at a way to slow down the ease with which unelected, unappointed career people often are able to create laws without a cost-effective analysis, without a question of dire need, but rather 4,000 new laws a year in the name of regulations? Isn't that really just Washington talk for let's go ahead, it is easy for us to do, and it makes us seem important?

Mr. GRAY. Oh, gosh. I think the regulatory process, the administrative process does provide a lot of public goods and I think if you look past back to—I mean, maybe when I first went into the Government, you know, what President Reagan did didn't stop one of the greatest booms in American history. But I think we are at a stage now where things have gotten out of hand again.

Mr. ISSA. And as a follow-up, would you say Boiler MACT is an example of that where even the EPA knows that their standard isn't ready and yet they can't seem to figure out how to stop something they did without a real cost/benefit analysis?

Mr. GRAY. One of my problems with the Boiler MACT case is that for what it is supposed to do, which is to deal with air toxics, EPA provides no benefit analysis at all. The benefits that they claim to the rule are all from different regimes within EPA which are being handled under separate—so I have a problem. I wish EPA would calculate the actual benefits of what the rule is aimed

at, but they don't do it and the statute doesn't require it. This statute would, and I think we would all be better off if that happened.

Mr. ISSA. Thank you.

And Mr. Chairman, I would only note that I would never say that some bill is perfect, but this bill is absolutely needed, and I appreciate the Chairman of the full Committee bringing it to us and yield back.

Mr. COBLE. I thank the gentleman. The gentleman's time has expired.

The distinguished gentleman from Georgia is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. C. Boyden Gray, you are a former official of the George Herbert Walker Bush administration. Correct?

Mr. GRAY. Yes.

Mr. JOHNSON. And Mr. DeMuth, you are a former high-level Reagan administration appointee. Is that correct?

Mr. DEMUTH. I was in the Administration. Whether the level was high or not, I——

Mr. JOHNSON. Well, as former administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, it is a pretty highly responsible position, wouldn't you admit?

Mr. DEMUTH. Yes, sir.

Mr. JOHNSON. And Mr. Baker, with the Black Chamber of Commerce, that is an organization that takes subsidies from the U.S. Chamber of Commerce, isn't it?

Mr. BAKER. I'm not aware of any firsthand.

Mr. JOHNSON. You wouldn't be surprised, though, with the close working relationship that the Black Chamber of Commerce, the National Black Chamber of Commerce, has with the U.S. Chamber of Commerce.

Mr. BAKER. That and the U.S. Hispanic Chamber of Commerce and many other organizations. Yes, we do try to collaborate.

Mr. JOHNSON. Well, let me say this now. And right now, Mr. DeMuth, you are a high-level official with the American Enterprise Institute.

Mr. DEMUTH. I am a fellow at the institute.

Mr. JOHNSON. Now, the institute is what is known as a conservative or neo-conservative think tank. Correct?

Mr. DEMUTH. It is a think tank, a public policy research institute.

Mr. JOHNSON. Of conservative and neo-conservative leanings, if you will.

Mr. DEMUTH. Leanings, yes.

Mr. JOHNSON. Yes. I mean, Dick Cheney is on your board. Right?

Mr. DEMUTH. Yes, sir.

Mr. JOHNSON. And a number of others. In fact, your board—you used to have Mr. David Frum as one of your resident fellows. Correct?

Mr. DEMUTH. Yes.

Mr. JOHNSON. And Mr. Frum was terminated from the organization back in 2010 after he wrote an editorial entitled "Waterloo" in which he criticized the Republican Party's unwillingness to bargain

with Democrats on the health care legislation. Is that correct? He was terminated for writing that editorial.

Mr. DEMUTH. No, sir.

Mr. JOHNSON. That is not correct? But he was terminated, though.

Mr. DEMUTH. I don't even know if that is the case. I know that he left the institute.

Mr. JOHNSON. And I think that is the same gentleman who I saw an article from a couple of days ago that wondered whether or not Paul Krugman, the hated liberal progressive economist—whether or not he in fact is correct with all of his analysis of our current economic state. Were you aware of that?

Mr. DEMUTH. No, sir.

Mr. JOHNSON. So this is a guy who was a neo-conservative who has now seen the light, but he was dismissed from your organization. But your organization is—this American Enterprise Institute is funded by corporations and financial services industry Wall Streeters. Correct?

Mr. DEMUTH. Does it receive any contributions from businesses and people from Wall Street?

Mr. JOHNSON. Yes.

Mr. DEMUTH. Or is it funded by? Those are very different questions, sir.

Mr. JOHNSON. It is funded by, receives contributions from. Isn't that a fact? Both?

Mr. DEMUTH. It receives donations from businesses, including businesses that are located on Wall Street.

Mr. JOHNSON. Now, climate change you all have made opinions about. You all have given opinions. Some of your high-level officials have intimated that they are not convinced of this global warming being a manmade—or at least manmade actions contributing to global warming. You all don't believe that, do you?

Mr. DEMUTH. I am sorry, sir. The question is do I believe that?

Mr. JOHNSON. You don't believe in climate change—your organization.

Mr. DEMUTH. Excuse me, sir. The organization does not take positions such as that. On that and several issues, you would find people of varying opinions, just like in the United States Congress. On the question you posed, some people would agree, some people would disagree.

Mr. JOHNSON. Have you all ever studied the influence of the political process—excuse me—the influence of corporations on the political process after the Citizens United Supreme Court ruling? And I will note that you have a close connection to The Federalist Society also.

Mr. DEMUTH. It is a big organization. I do not know of any research that we have done on that subject.

Mr. JOHNSON. Well, it is no coincidence that we would be sitting here today talking about a piece of legislation that would forever paralyze the rulemaking process by the administrative agencies that are in charge of our environmental protection, workplace safety, consumer products safety, and the financial services industry misconduct. It is no coincidence that we would be seated here today in the midst of a economic downturn, if you will, a troubled econ-

omy where jobs is the issue, and the only thing that the Republicans want to do is cut regulations and cut taxes. So we are talking about a situation that I am certainly not surprised at.

Mr. COBLE. The gentleman's time has expired.

Mr. JOHNSON. Thank you.

Mr. COBLE. The distinguished gentleman from Texas is recognized for 5 minutes.

Mr. GOHMERT. When you say "distinguished gentleman," were you talking about me, Mr. Chairman?

Mr. COBLE. I was indeed.

Mr. GOHMERT. Oh, okay. I wasn't sure.

Mr. Shapiro, you referenced potential delay of 10 years, if I understood correctly, if this bill were passed, in the length of time it would take to promulgate regulations and make them effective. Is that right?

Mr. SHAPIRO. The current system is particularly ossified, so it now takes 4 to 6 years to get a regulation done. And my best estimate is if all these procedures would apply, that would lengthen the process another 2 to 4 years.

Mr. GOHMERT. Thank you.

And you say the current system takes 4 to 6 years. So I note that the regulations the EPA has come up with in the last 2 and a half years that they have announced this year that will take effect January 1st, I will be sure and let the President know those can't take effect for another 4 to 6 years. And the people in Texas will be glad to know our plants don't have to shut down on January 1st.

Mr. Gray, you had referenced earlier ways to game the system, if I understood correctly. Isn't that correct?

Mr. GRAY. Yes.

Mr. GOHMERT. And I was wondering since you mentioned that, if you had something specific in mind as the way the system is being gamed or can be.

Mr. GRAY. Well, I think—just take an example from EPA which affects your State. I should perhaps know more about this, but what EPA is doing when they include your State in one of these rules of cross-state, interstate rule, they are trying to reduce NOx emissions in two counties, one in Illinois, one in Michigan. And what EPA neglects to do when it does that is to take into account—and it should. This bill hopefully would make it do this—the fact that when you reduce NOx—it is very counter-intuitive—you actually increase pollution. So what EPA is doing by including your State in this rule is actually to increase pollution where they say they are trying to reduce it, which is in Michigan and Illinois and the Great Lakes.

So is that a gaming? Well, yes, I think it is a gaming. And I think this legislation would, I think, correct that. It would have the impact of forcing EPA to acknowledge when you do costs and benefits, that the benefits have to include negative benefits, which is what they are going to cause not only you but downwind States of Michigan and Illinois.

Mr. GOHMERT. Well, but I think you would have to admit, though, there are some positives about the new EPA regulations that will cause many Texas power plants to shut down the first of next year. Thousands of people that are working with the lignite

in other parts of the industry will be out of work. The positives that I see coming from that will be to someone who is running for reelection and is sick and tired of people pointing to Texas and saying look at all the jobs they have created and all the good things that are going on. It will be a real positive for that person to be able to say, look, they got plants closing down. They got thousands of people out of work. You know, it is not the great State people have said it was. So I think there are some positives particularly if you are running for reelection as President that you don't want to miss.

And in fact, when we talk about—you brought up this gaming the system. Some people say they are not sure if anybody but me and Congress, the House or Senate, has read the President's entire jobs bill. I really don't believe—I really don't believe, based on the things the President said, he has read his own bill.

I also know from the fact that the President's bill was filed with a Senate number instead of stripping a House number when it was known his jobs bill raises revenue, that it couldn't be passed like that. It could never become law like that. They have to strip out a House bill so that it originated in the House under Article I, section 7 that by Harry Reid doing that, he knew this will never become law. It was gaming the system here in Congress.

And now this week we have the President out there saying since Congress won't pass my jobs bill, then he is going to have to take regulatory action to get things done. He is going to have to do executive orders and take action himself to get around Congress. That appears to be gaming the system to me.

One of the reasons I support this legislation is that I know enough about our history to know that the Founders wanted it to be difficult to pass laws, and when regulators can pass them in a system that takes 4 to 6 years, as we have heard, to get done and they can get it done within 9 months in a system designed to take 4 to 6 years, then we have got some work to do.

And I appreciate all of your being here. I know it is inconvenient. I know the pay is not all that good to come testify. That is sarcasm because you don't get paid. I know. But anyway, thank you for coming and for your input.

Mr. COBLE. The time of the distinguished gentleman from Texas has expired.

Gentlemen, thank you all for being here.

This concludes our hearing, but the distinguished gentleman from Virginia has asked permission to ask a very brief question and it is granted.

Mr. SCOTT. Yes. Thank you, Mr. Chairman.

Mr. Shapiro, if a judge determines that a better rule could have been promulgated, is he subjected to a standard that the promulgator the new rule is not unreasonable by clear and convincing evidence or preponderance of the evidence? What standard is he to make that determination by?

And then if in the final analysis a better rule could have been promulgated, what happens next? Does he throw out the new rule? Can he oppose the new rule, or do you have start from scratch? What happens?

Mr. SHAPIRO. The bill changes the rules of deference for the judiciary in certain instances, and it would make it more likely that a Federal judge who, after all, is unaccountable because she or he has lifetime tenure, could decide that the agency's job was inadequate and would remand it back to the agency. So it would just add years of delay, assuming it ever got reenacted.

Mr. SCOTT. What is the standard? In administrative law, if a law is not unreasonable, it will stand. But is that the standard that the judge is held by, or is it he has to show by clear and convincing evidence that the rule is wrong?

Mr. SHAPIRO. Right now——

Mr. SCOTT. And can he impose the new rule?

Mr. SHAPIRO. No. The judge can't impose a new rule under standard administrative law practice. The agency can only do that.

Right now, the question that a judge asks is whether or not the agency's decision is either arbitrary or capricious or in certain instances lacks substantial evidence. But the important point, in reaching that decision, the courts have ruled that the agency, in order to justify a rule as being reasonable, has to respond to each and every comment in the rulemaking record. So when business interests and others file a comment saying you have miscalculated the costs, the costs are too high, there should be a different rule, you didn't understand this, the agency must reply to each and every one of those objections. And the judge must determine whether or not the agency's reply to those specific objections is a reasonable one.

Mr. COBLE. The distinguished gentleman's time has expired.

Gentlemen, thank you again. We are appreciative to you all for your contribution today.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials.

This hearing is adjourned.

[Whereupon, at 12:36 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

CUNA
Credit Union National Association
cuna.org
BILL CHENEY
President & CEO

601 Pennsylvania Ave., NW | South Building, Suite 600 | Washington, DC 20004-2601 | PHONE: 202-508-6745 | FAX: 202-638-3389

October 25, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Smith:

On behalf of the Credit Union National Association (CUNA)[1], I am writing regarding the hearing you are holding today on H.R. 3010, the Regulatory Accountability Act. CUNA supports this legislation and appreciates your holding this hearing.

H.R. 3010 would substantially revise the Administrative Procedure Act to require agencies to consider the costs and benefits of new rules and other actions (including the potential benefits from not doing anything). The bill would require agencies to conduct public hearings for most rules estimated to have an aggregate impact on industry of over $1 billion, and it sets new data quality standards for agency fact finding in the rulemaking process. Finally, the legislation would require agencies to consult with Office of Information and Regulatory Affairs (OIRA) about guidance documents before issuing them, and clarifies that guidance documents are not legally binding.

This legislation would significantly enhance the interaction between industry and federal administrative agencies. It would give credit unions and others new tools and procedures that would help protect against arbitrary regulatory burdens. We welcome the provisions of this legislation with respect to guidance documents, which are not generally issued through a notice and comment process but nevertheless treated as de facto legally binding in practice. We are also encouraged by the provisions adding cost benefit analysis requirements and the references regarding the Information Quality Act. We believe these provisions would be far more effective than the closest existing parts of the Administrative Procedure Act, the Regulatory Flexibility Act and the Paperwork Reduction Act.

On behalf of America's credit unions, thank you very much for introducing this legislation and holding today's hearing.

Best regards,

Bill Cheney
President & CEO

[1] CUNA is the largest credit union advocacy organization in the United States, representing near 90% of America's 7,500 state and federally chartered credit unions and their 93 million members.

AMERICA'S CREDIT UNIONS
PO Box 431 | Madison, WI 53701-0431 | 5710 Mineral Point Road | Madison, WI 53705-4454 | PHONE: 608-231-4000

October 24, 2011

The Honorable Lamar Smith
Chairman
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

On behalf of Associated Builders and Contractors (ABC), a national association with 75 chapters representing more than 23,000 merit shop construction and construction-related firms with nearly two million employees, I am writing regarding the full committee hearing on the Regulatory Accountability Act of 2011 (H.R. 3010). ABC supports this legislation, which would reform the Administrative Procedures Act and strengthen existing checks on federal agencies, allowing for more cost-effective regulations through a more transparent process.

As builders of our communities and infrastructure, ABC members understand the value of standards and regulations based on solid evidence, with appropriate consideration paid to implementation costs and input from affected businesses. ABC strongly supports comprehensive regulatory reform which includes across-the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess benefits of all regulations. H.R. 3010 is an excellent first step in regulatory reform because it ensures more accountability from federal agencies and greater stakeholder transparency.

Today, federal regulatory agencies wield incredible power through rulemaking. They have grown adept at using procedural loopholes in order to accomplish narrowly-focused goals. These agencies operate relatively unchecked and unsupervised, especially during the early stages of the regulatory process. They often disregard and circumvent the will of Congress and the American public by issuing regulations with poor or incomplete economic cost-benefit forecasting or other data analysis, instead of using the best and most accurate data that could have created more practical, sustainable rules and regulations.

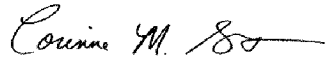
As a result, some regulations result in crippling costs for those regulated, as well as those impacted downstream, that have limited or questionable benefit and no serious consideration for more practical alternatives. For the construction industry, these regulations routinely translate into higher costs and are passed along to the consumer. Ultimately, these costs impact our industry's recovery and our businesses' ability to expand and hire more workers. It is particularly alarming that small businesses, which comprise the vast majority of the industry, are disproportionately affected by this irresponsible approach to regulation.

At a time when the construction industry faces an unemployment rate greater than 13 percent and the need to create jobs is imperative, so is the need for this legislation.

4250 North Fairfax Drive, 9th Floor • Arlington, VA 22203 • 703.812.2000 • www.abc.org

We appreciate your attention to this important matter and urge immediate passage of the Regulatory Accountability Act of 2011.

Sincerely,



Corinne M. Stevens
Senior Director, Government Affairs
Associated Builders & Contractors, Inc.

November 1, 2011

The Honorable Lamar Smith
Chairman
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

On behalf of Associated Builders and Contractors (ABC), a national association with 75 chapters representing more than 23,000 merit shop construction and construction-related firms with nearly two million employees, I am writing regarding the full committee markup of the Regulatory Accountability Act of 2011 (H.R. 3010). ABC supports this legislation, which would reform the Administrative Procedures Act and strengthen existing checks on federal agencies, allowing for more cost-effective regulations through a more transparent process.

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At a time when the construction industry faces an unemployment rate greater than 13 percent and the need to create jobs is imperative, so is the need for this legislation.

4250 North Fairfax Drive, 9th Floor • Arlington, VA 22203 • 703.812.2000 • www.abc.org

We appreciate your attention to this important matter and urge immediate passage of the Regulatory Accountability Act of 2011.

Sincerely,

Corinne M. Stevens
Senior Director, Government Affairs
Associated Builders & Contractors, Inc.

1717 Rhode Island Avenue, NW
Suite 800
Washington, DC 20036

Telephone 202.872.1260
Facsimile 202.466.3509
Website brt.org

October 28, 2011

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

W. James McNerney, Jr.
The Boeing Company
Chairman

David M. Cote
Honeywell International, Inc.
Vice Chairman

Andrew N. Liveris
The Dow Chemical Company
Vice Chairman

Robert A. McDonald
The Procter & Gamble Company
Vice Chairman

John Engler
President

Larry D. Burton
Executive Director

Johanna I. Schneider
Executive Director, External Relations

LeAnne Redick Wilson
Executive Director, Membership

Dear Mr. Chairman:

On behalf of the Business Roundtable (BRT), an association of chief executive officers of leading U.S. companies, I want to thank you for holding a legislative hearing on H.R. 3010, the Regulatory Accountability Act, which you introduced. We ask that you include this letter in the hearing record.

Federal regulation has achieved substantial benefits, but it has done so at a high cost. We believe that the country can achieve its statutory objectives at less cost through a process we call "smarter regulation," which is based on several principles:

- early engagement of regulators with the public,
- the use of quality information,
- objective analysis of regulatory impact,
- consideration of costs and benefits,
- expert oversight, and
- legislative accountability.

Each principle is described in greater detail in our document, *Achieving Smarter Regulation*, which can be found on our website (www.businessroundtable.org).

These principles of smarter regulation are reflected in your bill, and therefore we believe Congress ought to use your bill as the legislative vehicle to advance regulatory reform.

We urge the Committee to report this bill at the earliest opportunity, and to bring this bill to the floor of the House of Representatives.

Sincerely,

Andrew Liveris

Andrew N. Liveris
Chairman & CEO, The Dow Chemical Company
Chair, Business Roundtable, Regulatory Reform Committee

Hearing on H.R. 3010, the Regulatory Accountability Act of 2011
Statement of Benjamin F. Yale
Attorney, Yale Law Offices, LP
Waynesfield, Ohio

October 25, 2011

Chairman Smith, Ranking Member Conyers and distinguished Members of the Committee, my name is Benjamin F. Yale and I am an attorney whose practice for the past decades has focused on dairy and agricultural issues. This statement supports H.R. 3010, the Regulatory Accountability Act of 2011, and, in particular, supports the requirement of formal rulemaking when promulgating "high impact" rules (these are rules that will have an annual impact on the economy of a billion dollars or more). Although there are very few "high impact" rules written each year, these rules significantly affect businesses and communities across the U.S. Formal rulemaking adds the following functions to the process of promulgating rules:

- It **defines** the facts which are in support or opposition to proposed rules;
- It **refines** these facts under the force of truth testing through sworn testimony, cross examination, and confrontation of other evidence;
- It **confines** the facts upon which a rule may be based to only those within the hearing record.

These functions are all but totally absent in today's Federal informal rulemaking. Implementing them will result in better rules.

While formal rulemaking is now an atypical administrative process, it still flourishes in the Agriculture Marketing Service, AMS, of the United States Department of Agriculture, USDA. This is particularly the case in USDA's Dairy Programs, where I have practiced since 1980. Milk pricing regulations are an integral part of the dairy industry under the Federal milk marketing orders

promulgated under authority of the Agriculture Marketing and Agreement Act of 1937, as amended. I have participated in scores of formal rulemaking hearings administered by the USDA. Earlier this month I participated in such a hearing in Cincinnati, Ohio. In addition, I have participated in formal rulemaking hearings in state and local rulemakings.

I now serve as outside general counsel exclusively for the sister cooperatives Select Milk Producers, Inc. and Continental Dairy Products, Inc. and related companies. This statement is not made on their behalf; all the comments and statements are my own.

My experience with formal hearings includes representation of rule proponents and opponents, preparation of testimony and witnesses, and, in some cases being a witness. Part of the practice requires seeking judicial review before, during, and after the rulemaking proceeding. As a creature of legislation, we have been compelled at times to seek legislative assistance to force a formal rulemaking to correct errors in regulations promulgated by the USDA in a singular use of informal rulemaking in milk marketing orders.

I have also represented parties within the informal rulemaking process in other agencies and, thus, have had the opportunity to see both processes work and the results of those actions.

The Benefits of Formal Rulemaking

Formal rulemaking has two key elements—only facts in the record can be used to formulate rules, and facts only come from sources that can be shown to be reliable.

Formal rulemaking requires that all the facts and their sources be identified. As litigation and enforcement follows rulemaking, no one—neither government nor

stakeholder—can provide any other facts to undermine or support the rule. No one can fabricate numbers and statistics.

This means that when someone prepares a statement, that person must expect questions by others that are equally informed. Stream-of-consciousness statements, or wordy statements unsupported by fact, and pseudo science will be exposed.

In formal rulemaking, all of the evidence is subject to cross examination. Subjecting the presenter of the statement to vigorous cross examination helps those statements because it permits during presentation, clarification, correction, or deletion in response to the questions.

Expert testimony will require that the expert and the expert report be subject to the evidentiary standards of *Daubert*.[1]

Formal rulemaking with witness statements, cross examination, redirect, and exhibits defines the record for rulemaking and subsequent review and enforcement. There is transparency in formal rulemaking as the sorting of the testimony to find the truth is done in a public setting where stakeholders as well as the agency have the ability to verify the facts presented. This contrasts with a fact sorting entirely done internally at the agency with no outside input.

The hearing process brings together competing views and approaches to be simultaneously presented, viewed, weighed and considered. To participate in the hearing, one has to attend and to attend means that parties will come face to face with each other, including competing stakeholders as well as agency personnel. Every litigator, judge, arbitrator or mediator will agree that the first step to agreement is meeting the other side. That does not happen in informal rulemaking, but must in formal rulemaking.

[1] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

This meeting as well as sharing the experience of evidentiary presentation results in conversations and, in those conversations, differing view points compromise and consolidate positions that limit the choices and make for a better record.

Participation in the formal rulemaking process creates a greater sense of "buy in" in the final product. At the conclusion participants should have the sense that the agency had listened to what they had to say, considered it, and in some way used it to formulate the rule that resulted. This occurred even when it was less than perfect. By forcing all of the presentations through the public session, the table is made more level for all stakeholders, big and small, to fully participate in the process.

Another by-product of the formal rulemaking is a set of exhibits and testimony that provides reference in issues dealing with not only that rule, but related rules relying on the same set of facts.

One of the concerns of formal rulemaking is that it takes longer. It takes a lot more up front—almost all from stakeholders—but in the end speeds of the process by resulting in a rule that is less likely to be challenged and more likely to be complied with.

How Formal Rulemaking Would Work

A formal rulemaking begins like all rulemaking with the need or request to issue a new or revised regulation. To ensure that the process yields the best rule, the agency should request proposed rules to address the issue. This would be the first opportunity for stakeholders to propose regulatory approaches. The agency itself could propose its own approach or alternative approaches.

With some agency discretion, the scope of the hearing will be defined when the agency announces the proposals which it will consider at a public hearing. These

proposals, published in the *Federal Register*, would give notice of a hearing to take evidence on the various proposals, along with the details of the hearing itself.

Prior to the hearing, the agency should be required to disclose all information it has that is relevant to the hearing. This could include, by example, staff reports, data collections, and journals or reports the agency has relied upon. Agency rules could also provide for mandatory or voluntary advanced presentation of similar data as well as testimony from stakeholders.

The hearing itself could be held anywhere. Conference centers in hotels generally have the facilities for such an event and the flexibility to adjust depending on the size of attendance. Depending on the issue, different locations throughout the country also provide options to consider. The internet can provide a means for offsite viewing and even participation under certain circumstances.

The hearing itself is much like a trial. An administrative law judge acts as a moderator for the process but does not determine facts or the rule. A dais is set up for the ALJ and witness. A court reporter is in attendance to provide a verbatim transcript. A quality court reporter is required because a poor reporter means no reporter. Other facilities and equipment include a sound system, a lecturn from which questions are asked, and seating and work tables for active participants. Additional seating for the public could also be provided. In attendance would be representatives of the agency, including specialists in the issue at hand. An attorney from the agency's counsel's office would also attend.The proceedings thereafter are generally straightforward. A witness is sworn in, takes the stand, presents testimony and any exhibits. The testimony preferably would be in writing and submitted ahead of time to the participants. To keep the hearing time reduced, rather than read testimony into the record it would be adopted as if read. Some traditional direct examination, limited, would also be possible. An example of this would be explaining

or clarifying an exhibit. Then the witness would be subject to cross examination. Cross examination proceeds as in a courtroom though the questioning tends to be looser, leading questions permitted. There is one notable exception: the witness cannot be compelled to answer a question. The failure to answer goes to the credibility and weight of the evidence. The primary purpose of this is to encourage participation and not put individuals or organizations at risk of being forced to reveal confidential information or statements against issue in other, unrelated, litigation.

The order of the witnesses is up to the judge. It could be first come or registered, first served, proponents first, then opponents. There should always be accommodation for individuals on tight schedules. Because this is a hearing record for rulemaking, the exact order is not as important as getting the testimony presented and tested under cross examination. While attendance throughout is permitted, most participants will come for the short period in which they participate. Exhibits are offered, numbered, identified, and moved for admission. Admitted exhibits are part of the record. Additionally, participants can request that official notice be taken of other material. Generally these are government posted statistics, but official notice can be taken.anything of which judicial notice can be taken,

When completed, the transcript is posted to a website for viewing the public along with the exhibits. This is the record for purposes of the rulemaking. Participants in the hearing, and others relying on the hearing record, can file with the agency proposed findings of fact and points in support or in opposition to proposed regulations.

Upon the closing of the deadline for filing post hearing briefs, the agency can proceed to use the hearing record and the briefing to arrive at its own finding of facts and a recommended decision. Only in the most extreme cases should this step be avoided. After the recommended decision is made public, comments can be made to

that decision. While this is not unlike the same step in informal rulemaking, there is no opportunity to supplement facts. After that comment period closes, the agency can issue a Final Rule based upon the hearing record.

Judicial Review

With formal rulemaking, upon review opponents can ask the court to determine whether or not the rule is based on the hearing record. No longer will parties or the government be able to *ad hoc* supplement the argument with other facts. Otherwise judicial review would be similar to APA review today.

Conclusion

Thank you for the opportunity to present this statement. I am more than willing to clarify anything in this statement or answer questions.

November 2, 2011

The Honorable Lamar Smith, Chairman
The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3010, the Regulatory Accountability Act of 2011

Dear Mr. Chairman and Ranking Member Conyers:

The undersigned practitioners and scholars in the field of administrative law, and former regulatory officials in the White House, OMB and federal agencies, have reviewed the provisions of H.R. 3010, the Regulatory Accountability Act of 2011. H.R. 3010 would reform the Administrative Procedure Act's rulemaking provisions to enhance the quality of federal regulation, enhance democratic accountability and oversight for administrative policymaking, and improve policy outcomes for the American people. We strongly support the Committee's effort to enhance the analysis, justification, transparency of, and participation in, federal rulemaking, and we respectfully request that the Committee include this letter in the record.

In its current form, the Administrative Procedure Act (APA) does not adequately regulate the federal rulemaking process. It does not obligate agencies to rigorously define and characterize the need for regulation. It does not require agencies to identify the costs of regulations – including both compliance costs and impacts imposed on the economy and general welfare. It does not require agencies to carefully identify and assess the benefits to be achieved by new regulations, and does not compel agencies to choose the least burdensome, lowest-cost regulation that would achieve the statutory objectives. In short, the APA does not necessarily ensure that agencies justify their regulations in accordance with the highest standards the public deserves. H.R. 3010 would correct this.

H.R. 3010's critics argue that the bill would impose new burdens on agencies, by interposing additional analytic hurdles before agencies could adopt new regulations. First, it is important to understand that the bill's regulatory standards, and its analytic and justification requirements, are not fundamentally new – they have been previously developed and applied in Executive Orders issued by Presidents Reagan, Clinton and Obama. The bill would effectively codify existing principles and standards from these Executive Orders in law. Second, while

agencies would surely take the codified legal standards and requirements very seriously, and thus experience somewhat greater compliance burdens, that is not necessarily unreasonable or unwarranted. We believe the American public would view such additional safeguards as appropriate.

To be clear, we do not oppose environmental, health, safety or economic regulation. Nor do we believe that only a regulation's *costs* should be carefully tabulated and weighed. We agree that the *benefits* of many well-designed regulations can obviously be highly valuable to society, and we recognize that sound regulations can certainly reflect benefits that include intangible, non-quantifiable values (such as environmental, moral, ethical, aesthetic, social, human dignity, stewardship and other non-pecuniary or practical factors).

Taken together, we believe that *all* such costs and *all* such benefits must be rigorously analyzed, assessed, justified and scrutinized before significant new rules are imposed on the public, the economy, affected parties and regulated entities. Quite simply, that is "accountability."

The heads of regulatory agencies exercise extensive delegated policymaking authority, but are not directly accountable to the public through the democratic process. Accordingly, it is entirely reasonable, appropriate and, indeed, essential, for Congress to (i) specify in law more stringent criteria for rulemaking, (ii) facilitate substantial Presidential oversight of agency regulations (including those promulgated by "independent" agencies), (iii) enable more robust public participation in the rulemaking process, (iv) require regulations to be based on more reliable data and other relevant inputs, and (v) provide for more effective judicial scrutiny of the final regulations.

Of course, Congress often delegates its policymaking power to agencies, and it is incontrovertible that agencies' rulemaking can often be as highly consequential and important to the public as the congressionally enacted laws themselves. But for that very reason, regulation must not be undertaken without very careful consideration and observation of the most stringent procedures and analysis. The fact that the bill's requirements would embody existing regulatory review duties and obligations (based on numerous Executive Orders) in the APA itself is not objectionable. Before regulatory agencies impose new burdens on the public and the economy, the agencies should spend the time and make the effort to make sure they get the balance right for the overall benefit of society.

Accordingly, we view the Regulatory Accountability Act as serving the public well by mandating in statutory text that new regulations be thoroughly and meaningfully justified. Indeed, to the extent feasible, we would recommend that Congress avail itself of the same cost-benefit analysis prior to enacting regulatory legislation so as to avoid imposing unjustified regulatory mandates that agencies cannot fully resolve in the rulemaking process.

As noted above, far from imposing partisan or ideologically divisive requirements, H.R. 3010 embodies and implements a longstanding, bipartisan consensus on the proper principles of regulatory review and reform: Presidents Reagan, George H.W. Bush, Clinton, George W. Bush and—most recently and emphatically—President Obama, have all issued or implemented Executive Orders calling for rigorous justification of the need for regulation, careful cost-benefit analysis before imposing new regulatory requirements, reliance on sound science, and selection of the least burdensome regulatory alternatives that meet the relevant statutory objectives.[1]

H.R. 3010 would take those Executive Branch principles and codify them, thereby preserving in federal statutes the very values set forth in President Obama's recent Orders:

- Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.
- It must be based on the best available science.
- It must allow for public participation and an open exchange of ideas.
- It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.
- It must take into account benefits and costs, both quantitative and qualitative.
- each agency must, among other things:

[1] *See, e.g.*, Executive Order Nos. 12291 (Reagan), 12866 (Clinton), 13563 (Obama), 13579 (Obama).

- (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
- (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

- Regulations shall be adopted through a process that involves public participation.
- each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process.
- each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.

- Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.
- each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.
- each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.
- Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation.
- Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking.
- To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).
- Executive Order 13563 of January 18, 2011, "Improving Regulation and Regulatory Review," directed to executive agencies, was meant to produce a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."
- Independent regulatory agencies, no less than executive agencies, should promote that goal.
- Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

Indeed, the Regulatory Accountability Act would implement President Obama's recent call for "public participation and open exchange"[2] *before* a rule is proposed. Specifically, H.R. 3010 would create an Advance Notice of Proposed Rulemaking stage for major rules ($100M+). In this early notice, the agency would identify the problem it wishes to address through regulation and articulate the specific legal authority for doing so; disclose its preliminary views on the direction of the prospective regulation, and provide information concerning possible regulatory alternatives; and invite the public to submit written comments on these issues. While this adds a step in the regulatory process, it is one that allows interested parties a greater opportunity to help the agency reach a sound outcome.

The bill would also obligate agencies to rely on better scientific and technical data. While agencies must exercise their expert judgment, it is impossible to argue against the proposition that they should use the best data and other inputs available. Affected parties can invoke judicial and administrative remedies to ensure that agencies rely on scientific and technical evidence that meets the standards of the Information Quality Act. This is, of course, consistent with President Obama's call for regulating "based on the best available science."[3] This is unassailable. If agencies cannot disclose and defend the data they rely on as being the best available, they cannot possibly be confident enough in their regulatory analysis to impose new requirements on the basis of the data at their disposal.

The Committee may also wish to consider the possible application, or adaptation, of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, in the regulatory context. In *Daubert*, the Court empowered federal judges to reject irrelevant or unreliable scientific evidence, thus providing the judiciary a mandate to foster "good science" in the courtroom and to reject expert testimony not grounded in scientific methods and procedures. Some federal agencies have been criticized for lacking a commitment to sound science. Too often, federal courts have accorded great deference to uphold agency decisions that may have been based on faulty scientific evidence or unsupported assumptions and conclusions.

Daubert principles could be applied to the review of agency rulemaking under the APA because these principles are consistent with the APA requirement that agencies engage in reasoned decisionmaking, would assure better documentation

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[2] Executive Order No. 13,563.

[3] Executive Order No. 13,563.

of agencies' scientific decisions, and would enhance the rigor and predictability of judicial review of agency action based on scientific evidence. This approach would be entirely congruent with the Regulatory Accountability Act's requirement that regulations be based on the best available science. Applying the Daubert principles in judicial review of agency action would allow courts to evaluate the scientific methods and procedures employed by agencies, but must not allow judges to substitute their own policy preferences or conclusions for those chosen by the agencies. The courts' review need not be heavy-handed; it can be both deferential and probing, ensuring that agencies formulate and comply with procedures tailored to producing the best results, while not dictating what those results must be in any given case.

Incorporating, or adapting, *Daubert* principles into administrative law would improve agency decisionmaking and enhance accountability. Agencies would be compelled to identify the most reliable and relevant scientific evidence for the issue at hand and disclose the default assumptions, policy choices, and factual uncertainties therein. Applying *Daubert* in the administrative context would refine judicial review of agency science, resulting in greater consistency and rigor.[4]

We also believe that it is reasonable that H.R. 3010 would expose more agency pronouncements, such as agency guidance documents, to more rigorous standards. Specifically, the bill would adopt the good-guidance practices issued by OMB in 2007 (under then-Director, and now Senator, Portman). Such agency guidance would be clearly noted as "non-binding," and would not be entitled to substantial judicial deference.

The heart of the bill is to build cost-benefit analysis principles into each step of the rulemaking process — proposed rule, final rule, and judicial review. As noted earlier, these principles are drawn from Executive Orders issued by Presidents Reagan and Clinton and emphatically reaffirmed by President Obama. The bill would make those principles permanent, enforceable and applicable to independent agencies. Compliance with these codified requirements would be subject to judicial review.

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[4] See Raul & Zampa, "'REGULATORY DAUBERT': A PROPOSAL TO ENHANCE JUDICIAL REVIEW OF AGENCY SCIENCE BY INCORPORATING DAUBERT PRINCIPLES INTO ADMINISTRATIVE LAW," available at http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+7+(Autumn+2003).

Significantly, the bill would require agencies to adopt the "least costly alternative that will achieve the objectives of the statute authorizing the rule." It permits agencies to adopt a more costly approach only if the agency demonstrates that the added costs justify the benefits and that the more costly rule is needed to address interests of public health, safety, and welfare that are clearly within the scope of the statute. This is consistent with the White House's recent instruction to federal agencies to "minimize regulatory costs"[5] and the President's directive to "tailor regulations to impose the least burden on society." (Exec. Order 13,563)

For high impact, billion-dollar rules, additional procedures would apply – which seems entirely reasonable given the resulting consequences for the public and the economy. Most importantly, affected parties will have access to a fair and open forum to question the accuracy of the views, evidence, and assumptions underlying the agency's proposal. The hearing would focus on (1) whether there is a lower-cost alternative that would achieve the policy goals set out by Congress (or a need that justifies an higher cost than otherwise necessary); (2) whether the agency's evidence is backed by sound scientific, technical and economic data, consistent with the Information Quality Act; (3) any issues that the agency believes would advance the process. Parties affected by major rules ($100M+) would also have access to hearings, unless the agency concludes that the hearing would not advance the process or would unreasonably delay the rulemaking.

Following the hearing prescribed in the bill, high-impact rules would be reviewed under a slightly higher standard in court — so-called "substantial evidence" review. While this standard is still highly deferential to the agency's judgments, it allows a court reviewing major rules to ensure that an agency's justifications are supported by "evidence that a reasonable mind could accept as adequate to support a conclusion based on the record as a whole."

We understand that these additional review and analysis requirements are not perfunctory and may not be easy for agencies to accomplish. However, we believe that because of the extensive delegation of essentially legislative authority from Congress and policymaking discretion that agencies exercise, and the substantial deference that agencies enjoy from the courts, the public deserves more analysis and justification before agencies acts. Moreover, we believe that the public also expects the President to influence and control rulemaking by all federal agencies, and thus we support greater centralized White House review of agency regulations

[5] Cass Sunstein, *Washington Is Eliminating Red Tape,* The Wall Street Journal (Aug. 23, 2011).

– including independent agencies – on behalf of the President by the Office of Information and Regulatory Affairs at OMB (in the Executive Office of the President). We believe the bill, which clearly applies its regulatory standards to independent agencies, should also make clear that the President is responsible for, and entitled to review, the rules issued by independent agencies such as the SEC, CFTC, FCC, FTC, CPSC, CFPB, etc.

The need for such Presidential authority is manifest. For example, in a recent case before the U.S. Court of Appeals for the D.C. Circuit, *in re Aiken County*, the presidentially controlled Department of Energy and the independent Nuclear Regulatory Commission did not actually agree on the merits of how to handle nuclear waste at Yucca Mountain. This prompted Circuit Judge Brett Kavanaugh to explain why the lack of presidential authority and control is constitutionally and politically dubious. Quoting both Alexander Hamilton in the Federalist Papers and the Supreme Court in *PCAOB*, he wrote that "the issue created by *Humphrey's Executor* is that the President's decision on the Yucca Mountain issue is not the final word in the Executive Branch. In other cases, the issue created by *Humphrey's Executor* is that it allows Presidents to avoid making important decisions or to avoid taking responsibility for decisions made by independent agencies. When independent agencies make such important decisions, no elected official can be held accountable and the people "cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'"

President Obama has acknowledged the importance of Presidential review of independent agency rulemaking in recent, July 11, Executive Order. (Executive Order, 13,579) His Order requests (but does not command) that the independent agencies to submit the regulations they issue to the same principles applicable throughout the parts of the Executive Branch for which he is directly accountable. Specifically, independent agencies are now asked to scrutinize existing and future regulations in accordance with cost-benefit analysis. He also asks them to assure that regulatory policy is cost-effective and protective of innovation and job creation. Perhaps most importantly, independent agencies should also make sure that there is a real problem that needs to be solved before regulating, and then choose the least burdensome regulatory alternative that prevents or abates that harm. The bill currently before Congress should thus make clear – not only that independent agencies are subject to the salutary standards of cost-benefit analysis and rigorous policy justification – but also, that the President has the power and responsibility to review and control all such Executive Branch rulemaking.

While we endorse the bill's proposed codification of regulatory standards, analytic criteria, and accountability principles, we would also recommend that Congress consider incorporating the prospectively duplicative provisions of the Regulatory Flexibility Act (with regard to cost-benefit analysis for small business) and the Unfunded Mandates Reform Act (with regard to cost-benefit analysis and minimization of burdens on states, tribes and private sector; though UMRA does not currently apply to independent agencies). Moreover, as previously noted, we also believe the bill should specifically authorize the President to oversee rulemaking by independent agencies. The President's responsibility to oversee independent regulatory agencies, like the Consumer Financial Protection Board, for example, would ensure that the regulations adopted by such agencies are in the overall best interest of the American people.

Thank you for considering our views.

Respectfully submitted,

Alan Charles Raul
Former Vice Chairman,
White House Privacy and Civil Liberties Oversight Board
Former General Counsel, U.S. Department of Agriculture
Former General Counsel, Office of Management and Budget
Former Associate Counsel to the President

C. Boyden Gray
Boyden Gray & Associates
Former Ambassador to the European Union
Former Counsel to the President
Former Counsel to the Vice President

James C. Miller III
Former Director of the Office of
Management and Budget
Former Chairman of the Federal Trade Commission
Former Administrator of the Office of Information
And Regulatory Affairs, OMB

David L. Bernhardt
Former Solicitor, Department of the
Interior

Adam J. White
Boyden Gray & Associates

Eileen J. O'Connor
Former Assistant Attorney General, Tax Division
U. S. Department of Justice

Daren Bakst
Director of Legal and Regulatory Studies,
John Locke Foundation

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

October 13, 2011

The Honorable Lamar Smith
U.S. House of Representatives
Washington, DC 20515

Dear Representative Smith:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organization of every size, sector and region, strongly supports H.R. 3010, the "Regulatory Accountability Act of 2011," and salutes you for your leadership in crafting this important bipartisan, bicameral legislation intended to enhance and improve the quality of the rulemaking process.

As the Chamber noted in an open letter to Congress and the Administration, small and large businesses alike have cited regulatory burdens, the excessive litigation that regulations spawn, and fears about what government regulators will do to them next as among the most significant obstacles to new hiring.

H.R. 3010 is a targeted bill that would update the process by which federal agencies promulgate regulations – a process that has not been updated in more than 65 years – to improve accountability and the integrity of the rulemaking process. Among other things, the bill would help to ensure that the concerns of the regulated community and the impact of federal rules on jobs and the economy are better considered at an earlier stage of the promulgation process. It would ensure that regulators choose the least burdensome or costly option for regulation, and it would enhance the quality of scientific and technical data used to develop rules. Moreover, the bill would ensure more rigorous hearings and heightened judicial processes for the most costly regulations.

This legislation is evenhanded. It would not prevent any federal agencies from issuing regulation necessary to protect public health, safety, or welfare. Rather, H.R. 3010 would ensure that federal regulators maintain a high level of quality of data on which regulatory decisions are made, and to ensure that the regulatory process is more open and transparent.

Thank you, again, for your leadership on this important issue, and the Chamber looks forward to working with you throughout the legislative process.

Sincerely,

R. Bruce Josten

October 24, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 3010, The Regulatory Accountability Act of 2011

Dear Chairman Smith and Ranking Member Conyers:

The American Subcontractors Association, Inc. (ASA), which represents more than 5,000 subcontractors, specialty trade contractors and suppliers in the construction industry, supports H.R. 3010, "The Regulatory Accountability Act of 2011." This bi-partisan legislation would improve the regulatory environment for construction subcontractors by providing construction subcontractors and other interested parties more opportunities to tell Federal regulators how new proposed rules would affect them. Please include this letter in the hearing record.

By amending the Administrative Procedures Act (P.L. 79-404) to require Federal agencies to issue an Advanced Notice of Proposed Rulemaking (ANPRM) for all "major" and "high-impact" rules and a Notice of Proposed Rulemaking (NPRM) for rules issued by agencies covered under the APA, this would ensure that early engagement between Federal agencies and affected parties occurs. Early engagement is important because many firms have real-world experiences they would like to share before a final rule is promulgated.

The bill's requirement that agencies provides on-the-record administrative hearings on the highest-impact rulemakings — estimated to cost $1 billion or more annually — would increase transparency and accountability in the federal rulemaking process. This formal hearing process would give affected parties time to prepare and ask specific questions on "high-impact" rules, and give regulators the opportunity to explain their data collection and review process.

ASA thanks the committee for its work on this important issue.

Sincerely yours,

Franklin L. Davis
Director of Government Relations

cc: Members of the U.S. House Committee on the Judiciary

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 Duke Street, Alexandria, VA 22314-3588
Phone: (703) 684-3450 Fax: (703) 836-3482
E-mail: ASAOffice@asa-hq.com Web: www.asaonline.com

American Bar Association
Section of Administrative Law and Regulatory Practice
740 15th Street NW
Washington, DC 20005-1022
(202) 662-1690
Fax: (202) 662-1529
www.abanet.org/adminlaw

October 24, 2011

The Honorable Lamar Smith
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member , Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 3010

Gentlemen:

On behalf of the Section of Administrative Law and Regulatory Practice of the American Bar Association, I attach comments regarding H.R. 3010, the Regulatory Accountability Act of 2011. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

As you will see from the comments, there is much in this ambitious proposal that we endorse. At the same time, certain provisions would harm the administrative process in unjustifiable ways. In particular, many of the new steps the bill would require for rulemaking, though wholly appropriate in some rulemakings, would, if imposed automatically and across the board , further ossify the rulemaking process with little offsetting benefits in the form of better rules.

We hope the attached is useful to the Committee in its deliberations. Thank you very much for your consideration of our views.

Sincerely,

Michael Herz
Section Chair

cc: All members of the Committee on the Judiciary

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AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

October 24, 2011

The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

October 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

SUMMARY

The Regulatory Accountability Act of 2011, H.R. 3010, would be a sweeping and consequential revision to the Administrative Procedure Act, particularly with regard to the process of rulemaking. The bill is unusually ambitious and crammed with details that are impossible to summarize. Among its provisions are many that the Section endorses, many it would modify, and many that it opposes.

With regard to the first category, we support provisions that would

- require agencies to maintain a rulemaking record,
- require agencies to disclose data, studies, and other information underlying a proposed rule,
- recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA),
- provide for agencies to consult OIRA when issuing major guidance, and
- extend these OIRA functions to the independent agencies.

With regard to the second category, we are sympathetic toward, but suggest modifications to, the bill's provisions that would

- add an Advance Notice of Proposed Rulemaking step to certain rulemakings,
- address the problem of agencies' issuance of "interim" rules that are never superseded by regularly adopted rules,
- provide some centralized oversight of agency issuance of and reliance on guidance documents.

On the other hand, the Section has serious concerns about

- the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account at each stage of the rulemaking process,
- use of the long-discredited "formal rulemaking" for some rules,
- providing for judicial review of agencies' compliance with OIRA's guidelines, and
- effectively rewriting the substantive provisions regarding standard-setting in the enabling legislation of numerous agencies through a cost-focused "supermandate." (We take no position on the substantive question of the appropriate role of costs in setting standards; we only object to resolving that question in a single, across-the-board statute that would turn the APA into the "Administrative Substance Act.")

In general, we think many of the new steps the bill would require for rulemaking are, in numerous particular cases, valuable and appropriate. However, to impose these requirements automatically and across the board will, we fear, further ossify the rulemaking process with little offsetting benefits in the form of better rules.

The following comments track the organization of the bill itself. Readers interested only in specific provisions of the bill should consult the Table of Contents, which indicates the pages not only where particular topics, but also where specific statutory provisions, are discussed.

October 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

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* Citations in this table are to sections of the Administrative Procedure Act as it would be amended by the bill. All of these provisions are in § 3(b) of H.R. 3010, except where noted.

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA) respectfully submits these comments on H.R. 3010, the Regulatory Accountability Act of 2011. The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

I. Introduction

The Administrative Procedure Act (APA) has been in effect for some sixty-five years. Possible updates certainly deserve consideration. More particularly, the rulemaking process, which is a principal focus of H.R. 3010, has evolved in ways not anticipated in 1946. Important questions arise as to whether and how many of these changes should now be codified or refined.

The bill is an ambitious step in the development of APA revision legislation. As discussed below, we support some of its provisions and have suggestions for modifications in others. For example, we support codification of requirements that agencies maintain a rulemaking record and that they disclose data, studies, and other information underlying a proposed rule. We also support provisions that would recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA), provide for agencies to consult OIRA when issuing major guidance, and extend these OIRA functions to the independent agencies. Furthermore, the bill addresses some issue areas as to which we could potentially support legislation, although not the specific measures proposed in the bill. This category includes the bill's provisions regarding advance notices of proposed rulemaking and agencies' issuance of "interim" rules that are never superseded by regularly adopted rules. In addition, we have some proposals of our own that could usefully be incorporated into the bill.

On the other hand, the Section has serious concerns about the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account during the rulemaking process. The ABA has long expressed concern that existing requirements for predicate findings already unduly impede agency rulemaking. The bill would aggravate this situation. That prospect should be troubling to both regulated persons and statutory beneficiaries, regardless of their location on the political spectrum. After all, the APA's rulemaking provisions apply to deregulation and to amendment or repeal of rules just as they do to adoption of new rules. Moreover, the case for prescribing new predicate findings in rulemaking is undercut by the recognized duty of agencies to respond to significant, relevant

comments submitted during the public comment period. In this way, the rulemaking process is self-regulating.

A better approach to predicate findings would be for Congress to take on the project of refining and consolidating existing requirements for predicate findings and regulatory analysis into a single coherent and streamlined framework. Some of the considerations proposed in the bill might deserve to be included in such a framework, but a goal of this harmonization effort should be to ensure that the rulemaking process will be no more burdensome on agencies than it now is, and preferably less so.

Another area of concern is that the bill provides for regular use of the long-discredited "formal rulemaking" for high-impact rules and perhaps other major rules. This model has passed almost completely into disuse, because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues. We could support a carefully limited framework for oral proceedings where a need for cross-examination on specified narrow issues is affirmatively shown; but the bill goes far beyond that limited approach.

Finally, the bill would legislate in several areas that we believe Congress would more properly address in agencies' respective organic statutes than in the APA. These matters include evidentiary burdens and substantive decisional criteria that would override provisions in existing enabling legislation.

In connection with these and other provisions in the bill that our comments call into question, we hope that Congress will not overlook the virtues of caution and restraint. It should not undertake a sweeping revision such as this without a firm showing that there is a problem to be solved, and it should be wary of codifying minutiae in the Act. In our view, the strength of the APA derives in no small part from the fact that it confines itself to fundamentals. The general act must accommodate the government's need to tailor specific processes to the various tasks Congress assigns agencies. Solutions that work well in many or even most contexts may work poorly in others. The brevity of the APA has also permitted the growth and modernization of the administrative process over time. That much of today's administrative law takes the form of case law, regulations, and executive orders is not necessarily a matter of regret, because those prescriptions offer useful on-the-ground flexibility and can be revised to meet changing needs more easily than can statutes.

Against this background, we turn to comments on specific provisions of the bill. Because § 3 of the bill comprises twenty-four of the bill's thirty-two pages, we will usually identify specific provisions by their proposed APA section or subsection numbers.

II. Definitions

Section 2 of the bill would amend § 551 of the APA by inserting additional definitions. In general, these are well drafted and largely drawn from past legislation, executive orders, and case law. We have three suggestions.

First, "guidance" is (appropriately) defined in proposed § 551(17) to be identical to what the APA calls "interpretative rules [and] general statements of policy" in the current exemption from notice and comment in 5 U.S.C. § 553(b)(A) – yet the bill continues to use the older terminology in the exemption itself (proposed § 553(g)(1)). The bill should be revised to head off confusion over the use of two terms to mean the same thing, perhaps by eliminating the older terms altogether.

One other difficulty with the bill's definition of "guidance" is that it would apply to an agency statement "other than a regulatory action." That phrase was apparently drawn from President George W. Bush's regulatory review order,[1] but it appears nowhere in the APA, either now or under the proposed bill. This drafting error could be cured by an adaptation from the definition of "rule" in Executive Order 12,866. That definition refers to an agency statement "which the agency intends to have the force and effect of law."[2] Thus, the bill's definition of guidance could be reworded to apply to "an agency statement of general applicability that is not intended to have the force and effect of law but that sets forth a policy [etc. as in the current definition]."[3]

Second, Congress should take this opportunity to clarify the existing definition of "rule" in § 551(4) of the APA. This poorly drafted provision has been a target of criticism ever since the APA was first enacted. Briefly, the opening words of the definition – "the whole or a part of an agency statement of general or particular applicability and future effect" – are out of keeping with the manner in which administrative lawyers actually use the word "rule." The words "or particular" and "and future effect" should be deleted from the definition. The ABA has repeatedly called for the former change[4] and has also endorsed the latter in substance.[5] Thus, with minor drafting cleanup, we propose that the definition should read as follows:

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[1] E.O. 13,422, § 3(g), 72 Fed. Reg. 2763 (2007).

[2] E.O. 12,866, § 3(d), 58 Fed. Reg. 51,735 (1993).

[3] The definitions of "rule" and "guidance document" in the recently adopted Model State Administrative Procedure Act draw a similar distinction. Under these definitions, the former "has the force of law" and the latter "lacks the force of law." *See* REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 102(14), (30) (2010).

[4] *E.g.*, 106 ABA ANN. REP. 549, 783 (1981) [hereinafter 1981 ABA Recommendation]; 95 ABA ANN. REP. 548, 1025 (1970).

[5] *See* 117 ABA ANN. REP. 35-36 (1992) ("retroactive rules are and should be subject to the notice and comment requirements of [the APA]"). For a full discussion of the reasons supporting this proposal, see Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077 (2004). In this connection, we note that the bill's definition of "guidance" is appropriately limited to statements of "general applicability," but it is limited by its terms to statements of "future effect." This limitation would be ill-advised. Because interpretive rules theoretically clarify what the law has meant all along, courts routinely apply them to transactions that occurred prior to the issuance of the interpretation. *See, e.g., Reno v. Koray*, 515 U.S. 50, 61 (1995); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). This is, in fact, one reason why the "future effect" language of 5 U.S.C. § 551(4) should be removed.

> (4) "rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Third, a bill to modernize the APA provides an opportunity to update obsolete terminology. The bill already does this by replacing the phrase "interpretative rules" with the more compact term "interpretive rules," which virtually all administrative lawyers prefer. In a similar vein, the APA phrase "rule making" should be replaced by "rulemaking," the variant that virtually all administrative lawyers actually use.

III. Rulemaking Considerations and Required Analyses

Revised § 553(b) would codify a new set of "rulemaking considerations." These principles would require an agency to consider a large number of specified issues as a predicate for any new or amended rule. The considerations are summarized later in this section. The bill's requirements for the notice of proposed rulemaking (NPRM) in § 553(d) incorporate the § 553(b) "considerations" by reference. Section 553(d) goes on to require the agency to discuss other matters as well. Then § 553(f) sets forth requirements for the "notice of final rulemaking" (NFRM). They include not only "a concise general statement of the rule's basis and purpose" (the traditional APA requirement), but also "reasoned final determinations" regarding the matters tentatively addressed in the NPRM.

Up to a point, the Section agrees with the bill's premise that it could be useful to codify the requisite findings for a rule in statutory form. Three decades ago, in 1981, the ABA made a specific proposal along these lines. Its resolution urged Congress to require an agency to address the following matters in a notice of proposed rulemaking:

> (i) the terms or substance of the proposed rule;
> (ii) a description of its objectives;
> (iii) an analysis of alternatives to accomplish those objectives seriously considered by the agency;
> (iv) an invitation to submit proposals for alternative ways to accomplish the rule's objectives;
> (v) a description of reporting and recordkeeping requirements and an estimate of the time and cost necessary to comply; and
> (vi) to the extent practicable after reasonable inquiry, an identification of duplicating or conflicting or overlapping Federal laws or rules.[6]

Moreover, the resolution provided that a *final* rule should be accompanied by

> (a) a statement of the reasons for the policy choices made in connection with the rule including a description of alternatives considered to accomplish the objectives of the rule, and a statement of the reasons for the selection of the alternative embodied in the rule and rejection of other alternatives;
> (b) factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file; and
> (c) a response to each significant issue raised in the comments on the proposed rule.[7]

[6] 1981 ABA Recommendation, *supra* note 4, at 784-85.

Some of these requirements have direct counterparts in H.R. 3010. However, the bill's list is both lengthier and more adventurous in its scope, and it gives rise to serious concerns regarding both the collective impact of its requirements and the particular thrust of certain individual components. Turning first to the collective impact, we will explain our concerns about the bill's approach. Then we will discuss a variation on that approach that we could, in principle, support.

A. Background positions

For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress not to add unnecessary analytical requirements to the APA rulemaking process.

For example, in 1993 the Administrative Conference of the United States (ACUS) noted that "[i]nformed observers generally agree that the rulemaking process has become increasingly less effective and more time-consuming."[8] The Conference thus recommended, among other things, that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[9] In a similar vein, the ABA, in a 1992 resolution sponsored by this Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[10] The Section's report supporting this latter pronouncement warned:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [T]he existence of multiple requirements could have the effect of stymieing appropriate and necessary rulemaking.

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased, making the warnings of these two groups even timelier. The Section summed up the current picture in a 2008 report:

> Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued without public comment procedures but have real-world effects.[11]

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[7] *Id.* at 785.
[8] ACUS Recommendation 93-4, 59 Fed. Reg. 4670, 4670 (1993).
[9] *Id.* ¶ II.C.
[10] 117-1 ABA REP. 31 & 469 (1992).
[11] ABA Sec. of Admin. L. & Reg. Prac., *Improving the Administrative Process: A Report to the President-Elect of the United States*, 61 ADMIN. L. REV. 235, 239-40 (2008) [hereinafter 2008 Section Report to the President-Elect].

Because of these concerns, the Section has long urged that the analytical requirements that agencies must observe during the rulemaking process be *simplified*. For example, the same 2008 Section report recommended that Congress and the President should "work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure."[12]

B. Predicate analyses and their burdens

In light of these longstanding policy positions, we would be gravely concerned about a revision of § 553 that not only failed to consolidate existing analysis requirements, but greatly augmented the analysis burdens associated with completing a rulemaking proceeding. These incremental requirements would in all likelihood significantly hamper agencies' ability to respond to congressional mandates to issue rules, or to delegations of rulemaking authority. Moreover, they would likely augment the tendency of agencies to use "underground rules" (a.k.a. "regulation by guidance") or case-by-case adjudication to formulate policy without having to surmount the additional hurdles presented by § 553.

A number of items in the bill seem insufficiently attentive to the costs of investigation. For example, under § 553(b) the agency must consider "the degree and nature of risks the problem [addressed in the rule] poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction" as well as "the countervailing risks that may be posed by alternatives for new agency action." § 553(b)(3). It must also address "whether existing regulations have created or contributed to the problem the agency may address with a rule," and, if so, whether they should be changed. § 553(b)(4). In addition, the agency must address "[a]ny reasonable alternatives for a new rule or other response identified by the agency," including "potential regional, State, local, or tribal rules" and "potential responses that specify performance standards [or] establish economic incentives to encourage desired behavior," "provide information upon which choices can be made by the public," or "other innovative alternatives." § 553(b)(5). Further, the agency must consider "the potential costs and benefits associated with [the foregoing] potential alternative rules and other responses … including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness." § 553(b)(6)(A). Some of the considerations in this list (which is not exhaustive) would be germane to a wide variety of rules; others would have very tenuous relevance or no relevance to many and perhaps most rulemaking proceedings.

The operative subsections of the bill cover much of the same territory. Section 553(d) requires that an NPRM must summarize information known to the agency regarding the foregoing considerations. It also must discuss the foregoing alternatives and make a reasoned preliminary determination that the benefits of the rule would justify the costs to be considered

[12] *Id.* at 240. *See also* Letter from Warren Belmar, Chair, Section of Admin. Law & Reg. Practice, to the Honorable Fred Thompson, Chairman, Senate Gov'tal Affairs Comm., Jan. 13, 1998, at 5 ("We urge Congress to review the collection of overlapping and potentially conflicting requirements embodied in these statutes and to consider replacing them with a single, clear set of obligations for agency rulemaking. … Such harmonization … would – in addition to simplifying the rulemaking process – enable the agencies to serve the public interest more efficiently and economically.").

under § 553(b)(6). Likewise, the agency must thereafter discuss approximately the same considerations in its notice of final rulemaking. § 553(f)(4)(C)-(E).

Collectively, these requirements would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders less able to plan effectively for the future. Not only new regulations, but also amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Thus, both affirmative regulation and deregulation may be impeded.

Of course, even great burdens may be worth bearing if they produce great benefits. But these would not.[13] Although agencies frequently do and should consider many of these factors in significant rulemakings, many of these considerations are not relevant to most routine rulemaking. As the Section stated in the 2008 report mentioned above, when Congress and the President design regulatory analysis requirements, they

> should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process--some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.[14]

The current bill accepts this principle in part, imposing more demanding procedures for "major rules" and "high-impact" rules than for other rules. But the provisions in §553(b) imposing analysis requirements ignore the need to tailor the process to the importance and impact of the rule.

The bill's blanket approach might be justified if it were the only way to ensure agencies gave consideration to critical factors in the subset of rulemakings where doing so is appropriate. But it is not. Two other mechanisms exist and are already working well. First, Congress can specify the factors that an agency should take into account when regulating pursuant to a specific provision. Enabling legislation does this all the time, and it allows for a more precise fit between the agency task and the factors to be considered.

Second, where particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. As noted, agencies often consider issues of the kind just mentioned on their own initiative. If they do not, those issues are frequently raised in comments by interested members of the public. Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a

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[13] As current OIRA Administrator Cass Sunstein, certainly a supporter of regulatory analysis, once pointed out: "[T]he costs of investigation and inquiry are never zero; to the contrary, they are often very high. We can readily imagine that agencies could spend all their time investigating ancillary risks and never do anything else—a disaster for regulatory policy." Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1552-53 (1996).
[14] 2008 Section Report to the President-Elect, *supra* note 11, at 240.

recognized duty to respond to material and significant comments.[15] Thus, these issues will generally find their way into a rulemaking proceeding where they are directly implicated. It is excessive, however, to require agencies to touch *all* of these bases in *every* rulemaking proceeding.[16] This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.

It is true that, up to a point, the inquiries prescribed in proposed § 553(b) correspond to factors that have been codified in the initial sections of the executive orders on regulatory review issued or maintained by every President since Ronald Reagan.[17] Those provisions have served for many years as a means by which the Presidents have communicated their respective regulatory philosophies to agencies that comprise arms of their administrations. Indeed, several of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of EO 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases.[18] Moreover, compliance with the order is *not judicially reviewable*. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and the Office of Information and Regulatory Affairs (OIRA), but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion.[19] The burden on the agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[20] This

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[15] *See La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (an agency must articulate a response to comments "which, if true, … would require a change in [the] proposed rule"); *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (an agency "'need not address every comment [it receives], but it must respond in a reasoned manner to those that raise significant problems.'"); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002) (an agency must respond to "significant" comments, meaning those which "raise relevant points, and which, if adopted, would require a change in the agency's proposed rule").

[16] A puzzling issue that the bill requires an agency to address is "whether a rule is required by statute." §§ 553(d)(1)(F)(ii), 553(f)(4)(B); *see also* § 553(b)(1). Why the bill specifically requires this determination is not apparent. If an agency concludes that its view of sound policy is at least consistent with the enabling statute, it should be able to proceed on that basis without addressing the purely hypothetical question of whether the statute would have required the same result had the agency desired otherwise.

[17] E.O. 13,563, 76 Fed. Reg. 3821, § 1 (2011) (Obama); E.O. 13,422, *supra* note 1, § 1 (2007) (G.W. Bush); E.O. 12,866, *supra* note 2, § 1 (Clinton); E.O. 12,291, 46 Fed. Reg. 13,193, § 2 (1981) (Reagan, retained by G.H.W. Bush).

[18] Under EO 12,866, an agency is required to provide to OIRA an "assessment of the potential costs and benefits of the regulatory action" and other factors only if the matter is identified as a "significant regulatory action." § 6(a)(3)(B). Moreover, detailed assessments are required only for so-called "economically significant" rules, *see id.* § 6(a)(3)(C), a category similar to "major rules" as defined in § 551(15) of H.R. 3030.

[19] Justice Rehnquist made a similar point effectively in the *Vermont Yankee* decision. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 539-40 (1978).

[20] Similarly, although the criteria in § 553(b) appear to be based in part on similar prescriptions in the Unfunded Mandates Reform Act, 2 U.S.C. § 1532, the analogy is weakened by the fact that, by statute, a court cannot set aside

would be particularly true under H.R. 3010, which, unlike its Senate counterpart, would make the sufficiency of an agency's compliance with these analytical obligations judicially reviewable for *all* rules, not just major rules and high-impact rules.[21]

These predictions are founded not only on our collective judgment as specialists in administrative procedure, but also on the lessons of experience at the state level. In 1947, California adopted APA provisions for rulemaking that were modeled on the federal APA. In 1979, however, the state adopted a much more detailed set of APA rulemaking provisions.[22] The statute calls for specialized findings and explanations and for numerous impact statements. These provisions require constant fine tuning and have been amended on numerous occasions.

The intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences.[23] Specialized and experienced lawyers (rather than staff non-lawyers) must supervise every step of every rulemaking process. The state's APA generates a large amount of boilerplate findings, because agencies lack resources to perform all of the required studies. The process has become slow and cumbersome and consumes large quantities of staff resources. As a result, agencies can complete work on fewer regulations, particularly in a time of declining budgets like the present. This has adverse effects on public health and safety. The detailed provisions of the state's APA also provide many opportunities for lawyers to challenge rules on judicial review because of minor procedural infirmities. The California experience suggests that a simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

C. A suggested alternative

As indicated above, the Section is by no means opposed to any and all codification of new rulemaking requirements in the APA. We believe the proper approach is the one we recommended in 1998 and 2008: that Congress and the President should "join forces to rationalize and streamline the rulemaking process."[24] As we have said before, the ability of agencies to perform required analyses "is compromised by the complexity of the set of instructions that agencies must follow – agencies (and others) must look to so many sources to ascertain the full set of actions required in a rulemaking that they may have difficulty framing the ultimate question for decision in a coherent manner."[25] The current bill does not subtract anything from the overlapping and potentially conflicting expectations prescribed not only in the APA, but also, for example, the Regulatory Flexibility Act, Small Business Regulatory

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a rule on the basis of an agency's alleged failure to analyze a proposed rule according to the requirements of that Act or the inadequacy of the analysis it did provide. *Id.* § 1571(a)(3).

[21] *See* § 704(c) as it would be added by S. 1606, § 6.

[22] *See* Calif. Gov't Code §§11340 et seq.; MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 31-40 (2002); GREGORY L. OGDEN, CALIFORNIA PUBLIC AGENCY PRACTICE chs. 20-21 (1995); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 48-51 (1992).

[23] *See* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285-87 (1999); Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 260-62.

[24] 2008 Section Report to the President-Elect, *supra* note 11, at 239.

[25] Letter from Warren Belmar, *supra* note 12, at 5.

Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and National Environmental Policy Act, as well as agency authorizing statutes and presidential directives. Its trajectory is entirely in the direction of increases. The risk of excessive, sometimes conflicting, sometimes redundant cumulative burdens is compounded by the fact that there are many other related bills also now under consideration. In the circumstances, thoughtful harmonization and streamlining would be eminently desirable.[26]

We recommend, therefore, that Congress, working with the President, rework the overall corpus of findings and analysis requirements impinging on federal agencies, with an eye toward rationalizing these requirements while also maintaining effective political oversight and promoting sound regulatory outcomes. We would be happy to work with your subcommittee in such a reexamination. A number of the principles prescribed in § 553(b) of the present bill may well be found worthy of inclusion on such a revamped list, particularly insofar as experience with some of them under EO 12,866, UMRA, etc., has been favorable. Insulation of consideration requirements from judicial review and confinement of such requirements to the most significant rulemaking proceedings, would be important variables bearing on the acceptability of particular obligations. Conversely, some of the requirements that exist now, and some that we proposed in 1981, may be out of date. We note also that the Administrative Conference is currently engaged in a directly relevant project, the results of which should be known and may be the basis for an ACUS recommendation by the end of next year.

A baseline for this overall endeavor should be to produce *no net increase* in the collective burdens of required analyses and findings in rulemaking. Indeed, a net *decrease* would be even better, because it would respond to the overload problems that have served for too many years as impediments to the rulemaking process and incentives to agencies to rely on less transparent and participatory modes of policymaking.

D. Evidentiary burdens

The requirement in the introductory clause of § 553(b) that a rulemaking agency "shall base its preliminary and final determinations on evidence" raises related concerns. The basic point is well taken. The ABA proposal quoted above recognizes that a final rule should be accompanied by "factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file." However, the § 553(b) version of this idea sweeps too broadly. Some rules do not purport to rest on factual assertions at all; they rest on law or pure policy determinations. At the very least, this provision should refer to "*factual* determinations." In addition, some factual assertions underlying a rule do not require evidentiary support, because they are legislative facts of an inherently predictive or judgmental type.[27] When Congress has

[26] We appreciate that congressional action to alter the requirements of executive orders would present obvious problems of interbranch relations. However, it seems reasonable to suppose that if, as we recommend here, the ultimate goal of the harmonization effort would be to produce a set of clear obligations that are no more burdensome, or less burdensome, than the status quo, the executive branch would be amenable to negotiations that could lead to agreed-on rescissions of presidential directives in the interest of facilitating the ability of agencies to accomplish their missions more effectively.

[27] *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813-14 (2009). The case law was usefully summarized in *Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005):

incautiously appeared to require "evidence" for such conclusions, the judiciary has managed to read an implied limitation into the statute.[28] It would be preferable, however, to avoid forcing the courts to solve a problem that Congress does not need to create in the first place.[29] After all, the courts have developed a substantial and relatively nuanced body of case law addressing whether agencies have, in various circumstances, supplied adequate factual support for their rules. A vaguely stated evidentiary requirement in § 553 is at best unnecessary and may be harmful.

Elsewhere, the bill provides that an agency "shall adopt a rule only on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule." § 553(f)(2). We recognize that EO 12,866 contains very similar language,[30] and that Congress has adopted comparable language in particular contexts, such as the requirement in the Endangered Species Act that a species designation be made on the basis of "the best scientific and commercial data available."[31] Where agency decisionmaking is required to rest on scientific determinations, the expectation that the science should be well founded is certainly legitimate.[32]

Nevertheless, we question whether this notion belongs in the rulemaking language of the APA, where it could operate as an independent basis for legal attacks apart from challenges to the substance of the agency decision. Whatever its appeal in science-dominated areas, it is inapt in relation to ordinary rulemaking, in which agencies frequently must act on the basis of general knowledge, informed opinion, and experience in the field. After all, in the age of the Internet, the range of "obtainable" information that might bear upon various agency rules is virtually boundless. A statutory obligation to seek out all information that a reviewing court might

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> [A]lthough we recognize that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA, *see National Ass'n. of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1096, 1124 (D.C. Cir. 1984) (in informal rulemaking it is "desirable" that agency "independently amass [and] verify the accuracy of" data), we are acutely aware that an agency need not -- indeed cannot -- base its every action upon empirical data; depending upon the nature of the problem, an agency may be "entitled to conduct … a general analysis based on informed conjecture." *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1124 (failure to conduct independent study not violative of APA because notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention"); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978) (FCC, in making "judgmental or predictive" factual determinations, did not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency").

Notably, the court in *Chamber of Commerce* did overturn, on grounds of factual insufficiency, a different aspect of the SEC rule challenged in that case. *Id.* at 143-44. Our point therefore is not that an agency's evidentiary burdens should be lenient, but rather that the nature of those burdens is too elusive to capture in a brief statutory formula.

[28] *See, e.g., Indus.Union Dep't v. Hodgson*, 499 F.2d 467, 473-75 (D.C. Cir. 1974) (construing Occupational Safety and Health Act requirement of "substantial evidence" to support a rule).

[29] Section 553(b) is also ambiguous as to whether the term "evidence" refers to any and all factual material that the agency might cite, or only a narrower class of material such as facts that would satisfy the rules of evidence in a trial-type proceeding.

[30] EO 12,866, *supra* note 2, § 1(b)(7); *see also* EO 13,563, *supra* note 17, § 1 ("Our regulatory system … must be based on the best available science.").

[31] 16 U.S.C. § 1536(a)(2); *see also* Occupational Safety and Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (requiring OSHA to "'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health'").

[32] *See generally* James W. Conrad Jr., *The Reverse Science Charade*, 33 ENVTL. L. RPTR. 10306 (2003).

consider "reasonably obtainable" could prove unmanageable, resulting in a highly unpredictable legal regime for agencies and considerable additional litigation.[33] It may be better, therefore, for Congress to impose such obligations only in substantive statutes in which the nature of the agency's mission lends itself to such a mandate. Congress can customize the obligation to the particular nature of that mission. It has done this in, for example, the Safe Drinking Water Act, which specifies that "to the degree that an Agency action is based on science, the Administrator shall use (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."[34]

For generalized decisionmaking that may be far removed from scientific realms, however, the APA should not categorically rule out the possibility that information that appears reasonably reliable may suffice for purposes of a rule in which the stakes are small or the need for timely action is pressing, although the agency may not have engaged in a search to confirm that this information is the "best reasonably obtainable." Even in such contexts, after all, administrative law already imposes a duty to respond to material comments presented during the rulemaking proceeding – a duty that we believe *should* be codified in the APA.[35] Thus, if stakeholders actually provide information to an agency that casts serious doubt on its factual premises, the agency cannot ignore it.

E. Statutory overrides

In addition to burdening the rulemaking process with analytical requirements that appear to be out of proportion to their likely payoffs, the bill's "rulemaking considerations" are troubling because of the way in which they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an "Administrative Substance Act." For example, the requirement in the bill to consider, in connection with any proposed rule, the "potential costs and benefits associated with potential alternative rules . . ., including direct, indirect, and cumulative costs and benefits," would apply "[n]otwithstanding any other provision of law." § 553(b)(6)(A). This "supermandate" would apparently displace numerous provisions in which Congress has previously prescribed rulemaking premised on a different basis, such as use of the best available technology. It would, for example, apparently override rulemaking provisions in laws such as the Occupational Safety and Health Act and the Clean Air Act, which courts have authoritatively construed as *not* allowing decisions to be based on cost-benefit analysis.[36] Much,

[33] *Cf. Heartwood, Inc. v. USFS*, 380 F.3d 428, 436 (8th Cir. 2004) (construing the above-quoted language of the Endangered Species Act to mean that agencies are required "to seek out and consider all existing scientific evidence relevant to the decision at hand. They cannot ignore existing data."); *Ecology Ctr., Inc. v. USFS*, 451 F.3d 1183, 1194 (10th Cir. 2006) (following *Heartwood*).
[34] 42 U.S.C. § 300g-1(b)(3)(a).
[35] *See infra* Part V of these comments.
[36] *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 471 (2001) (Clean Air Act), *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 510-12 (1981) (OSHA). The Court acknowledged these interpretations in *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1508 (2009). That case explained that the Clean Water Act contains a variety of statutory formulas for different rulemaking proceedings. The Court held that one section of that Act *does* permit cost-benefit analysis but recognized that other sections may not. *Id.* at 1506-08.

perhaps most, of the safety and health legislation now on the books would seemingly be displaced.[37]

Members of our Section have widely divergent views as to the utility of cost-benefit analysis and as to the range of circumstances in which it may be fruitfully deployed. Some strongly support the technique, and others are deeply skeptical. On the whole, the Section has been supportive of cost-benefit analysis but has stated that criticisms of it in the literature should be taken seriously along with more favorable appraisals.[38] The difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs, are only two of the substantial criticisms. We take no position on the general policy question here, but we believe that Congress should make judgments about the utility of cost-benefit analysis in the context of particular programs and the specific problems that those programs respectively address. A government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that § 553(b) omits certain qualifying language that the presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable. In a context in which the underlying statute does not permit actions to be based on cost-benefit comparisons, if Congress nevertheless wishes to require such an analysis (perhaps to inform itself and members of the public as to the consequences of its prior choice to make such considerations legally irrelevant), it should impose that requirement only in particular statutes in which it deems that purpose to be apposite.

The bill also imposes other inquiries "[n]otwithstanding any other provision of law," including consideration of means to increase "cost-effectiveness" and "incentives for innovation." § 553(b)(6)(B)-(C). Those too are salutary objectives, but we do not believe that Congress should sweepingly displace all prior legislation in which earlier Congresses, carefully confronting social challenges on a much more specific level, have prescribed actions on the basis of criteria that do not include those objectives. Notably absent from § 553(b) is the disclaimer in EO 12,866 (and corresponding oversight orders issued by other Presidents) that the prescribed analyses apply only "to the extent permitted by law."[39]

Furthermore, the bill not only requires rulemaking agencies to *consider* matters that would not otherwise be relevant under their organic legislation, but also constrains them from *acting* except in compliance with additional criteria. To simplify a bit, it provides that an agency must choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule." § 553(f)(3).

This would apparently be a substantial further departure from present law, although the extent of the departure is uncertain because of the vague and undefined terms of the operative

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[37] *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 32 (2003) (surveying 22 health, safety, and environmental laws and finding that only two contain a substantive cost-benefit mandate).

[38] 2008 Section Report to the President-Elect, *supra* note 11, at 240.

[39] *See, e.g.*, E.O. 12,866, *supra* note 2, § 1(b); *see also id.* § 9: "Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law."

criteria. The words "public health, safety, or welfare" are evidently meant to limit the range of acceptable rules in some way (otherwise they would be superfluous). Possibly they mean that factors such as distributional fairness, payment of society's moral debts (for example, to veterans), or avoidance of racial, ethnic, or gender disparities could be categorically excluded, at least if a rule that would further these intangible values would cost more (even slightly more) to implement than some alternative. Also, even if the phrase "public health, safety, or welfare" is interpreted broadly, the agency would have to demonstrate that those interests were "clearly" within the statute's scope. We do not understand why "clarity" should be required in this connection. Doubts about whether the statute authorizes an agency to rely on certain interests may be a prudential factor counseling against the *commencement* of a rulemaking that presupposes such reliance, because the litigation risks involved in such a venture might not justify the expenditure of agency resources on it. However, this does not mean that the APA should require an agency to have "clear" authority for the interests on which it relies in adopting a *final* rule. It would be strange to empower a court to hold that, even though the interests on which an agency relies *actually are* within the scope of the enabling statute, the rule is invalid because such authority was uncertain prior to the court's decision.

Whatever meanings § 553(f)(3) might ultimately be held to contain, we question the proposition that cost considerations must always take priority unless the agency carries a burden of justifying a different priority. An Act that governs the entire range of federal agency rulemaking should allow greater flexibility regarding the manifold and diverse ways in which government can contribute to the general welfare. Indeed, the task of calculating or estimating *which* alternative is "least costly" could itself be difficult. Moreover, most of the laws that would be displaced were enacted after a deliberative legislative process in which affected individuals and interest groups had a meaningful opportunity to consult with Congress regarding the statute's tradeoffs among competing values. It is unlikely that these interested parties will have an equally meaningful opportunity to be heard regarding the abstract and diffuse nature of the mandates under discussion here.

Compounding the perplexities that § 553(f)(3) would generate would be the challenge of determining the "relevant statutory objectives" of a statutory scheme. The problem is that there may be no clear distinction between the "objectives" of a regulatory statute and the criteria that Congress selects to effectuate those objectives. For example, OSHA would presumably be able to rely on cost-benefit analysis if the "relevant objective" of the Occupational Safety and Health Act is interpreted as "worker safety," but not if it is interpreted as "worker safety to the extent feasible."[40]

The challenge of sorting out the ramifications of such a supermandate would be formidable and would result in substantial additional litigation. Federal judges would have much more opportunity to reshape regulatory policy according to their own judgment (and possibly their preferences). This would be especially true if Congress were to enact the bill's judicial review provision ordaining that, in the event of certain procedural omissions by the agency, a court "shall not defer" to an agency's "determination of the costs and benefits or other economic or risk assessment of the action." §§ 706(b)(2). That provision would place the courts into a

[40] *American Textile Mfrs. Inst. v. Donovan, supra.*

completely unprecedented, and constitutionally dubious,[41] position as super-regulators. However, even if that provision is not enacted, and traditional judicial review principles apply, courts would acquire broad power to ascribe meaning to phrases like "public health, safety and welfare" and "relevant statutory objectives."

Courts would also have to face questions as to how to reconcile the statutory override with the conflicting thrusts of much, or most, organic legislation. Presumably the APA override would be given *some* effect. "Notwithstanding any other provision of law" sends a strong message. Yet it is likely that courts would also pay heed to the traditional maxim that a general statute does not impliedly repeal an earlier, more specific statute.[42] Thus, the ultimate import of this legislation would not be determinable for some time.

IV. Advance Notice of Proposed Rulemaking

Section 553(c) of the bill would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. The ANPRM would have to be issued at least 90 days prior to the NPRM, and at least a 60-day comment period would have to be provided. (The stated time periods are minimums. Presumably, a meaningful appraisal of the issues that could arise in a potential major or high-impact rulemaking, as well as of the public comments, would actually take longer.)

The Section agrees that the ANPRM and like devices can be useful tools in some rulemakings, especially those involving initial forays into a regulated area. We support explicit recognition of such procedures in the APA. Indeed, the ABA House of Delegates recommended in its 1981 resolution that the use of consultative procedures prior to the notice of proposed rulemaking, including ANPRMs, should be encouraged. The report explained: "Lawyers in Government and private practice with experience in complicated rulemaking share the belief in extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal."[43]

In direct contrast to H.R. 3010, however, the ABA's 1981 resolution urged that "the decision to use or not to use [such] informal consultative procedures . . . should be within the *unreviewable discretion* of the agency."[44] The Section continues to believe that an amended APA should not make ANPRMs mandatory, even in proceedings to issue expensive rules.

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[41] *See Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 274-78 (1933).

[42] "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'" *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976) (citations omitted); *see also Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *U.S. v. Perry*, 360 F.3d 519, 535 (6th Cir. 2004); *California v. U.S.*, 215 F.3d 1005, 1012-13 (9th Cir. 2000).

[43] 1981 ABA Recommendation, *supra* note 4, at 784, 789-90.

[44] *Id.* at 784, 790 (emphasis added).

The argument against such a requirement is straightforward: ANPRMs can significantly extend the time involved in rulemaking,[45] and often the costs of the delay will be greater than the benefits associated with an improved final regulation, which may be nil. For example, some rulemaking proceedings involve issues with which an agency is quite familiar because of prior proceedings or experience with the subject matter. In such situations, the agency may be able to propose a rule without any need for an ANPRM. In other proceedings, legal constraints limit the range of actions the agency may take. In such a case, the determination may be highly contested, but the relevant information, rationale, and conclusions can all be made sufficiently available for comment by the public in the notice of proposed rulemaking.

We can see no justification for the inflexible mandate of § 553(c).[46] Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs, and the fact that agencies do indeed use them even when not legally required confirms that they often deem them valuable. At the same time, an agency's exercise of discretion *not* to use an ANPRM in a given instance causes no prejudice to the rights or legitimate expectations of the public. As the 1981 ABA report pointed out, "Protection against abuse of this discretion lies in [judicially enforced] requirements for fairness in the rulemaking procedures subsequent to notice."[47] In other words, the traditional post-NPRM comment period provides an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. If public comments indicate that the agency has made a real error or is headed down the wrong path, the agency will have to hold another round of notice-and-comment, which turns the original NPRM into a de facto ANPRM. In short, the current regime is effectively self-policing.

Particularly dubious is the bill's explicit requirement that an agency must issue an ANPRM even where it has already issued an interim rule *without an NPRM* after determining for good cause that compliance with APA rulemaking requirements would be impracticable or contrary to the public interest. *See* § 553(g)(2) (expressly referencing § 553(c)). Since a rule would already be on the books, the agency should have the option of using that rule as the basis of any new rulemaking proceedings by proposing it in an NPRM, making the mandatory ANPRM superfluous.

A related provision provides that if an agency decides not to go forward with a rulemaking proceeding, it must publish a "determination of other agency course." § 553(d)(2). It must also place in the rulemaking docket all information it considered in making this choice, "including but not limited to" all information that it would have been obliged to describe if it had proceeded with an NPRM. *Id.*

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[45] This delay would be *in addition to* the 90 days allowed to OIRA for review of a proposed significant regulatory action prior to issuance of the NPRM. *See* EO 12,866, *supra* note 2, § 6(b)(2)(B).

[46] Delays would not be the only costs involved. Under the proposed § 553(c), in addition to requesting the public's views of the agency's potential rulemaking initiative, the ANPRM published in the Federal Register would also have to identify "preliminary information available to the agency concerning the … considerations specified in subsection (b)." This would likely be an extensive body of materials, and it should be noted that the Federal Register charges agencies hundreds of dollars per page for each Federal Register submission.

[47] 1981 ABA Recommendation, *supra* note 4, at 790.

An initial problem with this provision is that it is not limited to rulemaking proceedings in which the agency had issued an ANPRM. It hardly makes sense to require an agency to explain and document its reasons for not going forward with a venture that the public never had any reason to think would be forthcoming. Also, if the requirement to publish this determination (especially in a form that is expected to set the stage for judicial review, as the provision for docketing appears to imply) applies to situations in which the agency *voluntarily* utilized an ANPRM, that requirement would tend to discourage agencies from employing this useful consultative device. We assume, therefore, that § 553(d)(2) is intended to apply only to proceedings in which the agency issued an ANPRM as required by § 553(c), and the language should be narrowed accordingly.

Even with respect to those proceedings, we do not see why the APA should require publication of a "determination of alternate course" – a requirement that has no foundation in current law. Probably, the agency would publish some kind of explanation on its own, because a potential "major" or "high-impact" rule would by its nature be a matter of public interest. We would not object to requiring an agency that decides against going forward after an NPRM to issue a brief notice to that effect, so that the public and potentially regulated entities will not remain in suspense indefinitely. But that does not mean the law should compel the agency to issue a formal notice with full documentation. Clearly, if someone *petitions* for a rule and the agency denies the petition, the agency must explain its denial, and the disappointed petitioner can seek judicial review.[48] The petition process (which is currently codified at 5 U.S.C. § 553(e) and would be retained without change in § 553(j) of the amended APA) directly protects private interests that might be harmed by a failure to commence rulemaking. The petition and the response frame issues effectively for judicial consideration. Given the availability of the petition route, we question the need for a formal notice in which an agency would have to explain why it declined to commence a proceeding that nobody sought in the first place, and that never progressed beyond a rudimentary stage of development.

V. Notice of Proposed Rulemaking

Proposed § 553(d) of the bill specifies the contents of the notice of proposed rulemaking (NPRM). This section contains several additional provisions that the Section strongly supports. For one thing, it provides that an NPRM must include "information specifically identifying all data, studies, models and other evidence or information considered or used by the agency in connection with its determination to propose the rule." § 553(d)(1)(D)(iii). In substance, this provision would codify the so-called *Portland Cement* doctrine,[49] a step that the ABA has favored for many years.[50] Disclosure of the factual basis for a proposed rule is essential to the effective use of the opportunity to comment and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts,[51] making codification highly desirable. We would suggest that the

[48] *Mass. v. EPA*, 549 U.S. 497, 527 (2007); *Auer v. Robbins*, 519 U.S. 452, 459 (1997).
[49] *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d (D.C. Cir. 1973).
[50] *See* 1981 ABA Recommendation, *supra* note 4, at 785-86.
[51] *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 245-47 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting); *AARP v. EEOC*, 489 F.3d 558, 567 (3d Cir. 2007).

agency be further required to "provide an opportunity to respond to factual material which is critical to the rule, which becomes available to the agency *after the period for comments has closed*, and on which the agency proposes to rely."[52]

Subsections 553(d)(1)(A)-(C) are almost identical to the requirements in the current APA and so do not raise difficult problems.[53] In addition, the ABA supports in principle a requirement that an NPRM must discuss alternatives to the proposed rule, although the Association's proposed language is narrower than that of the bill.[54]

The ABA has also long favored amendment of the APA to provide for the systematic development by the agency of a rulemaking file as a basis for agency factual determinations and a record for judicial review.[55] H.R. 3010 adopts the substance of this position in the concluding language of § 553(d)(1), read together with § 553(l). The necessity of maintaining a rulemaking record is firmly established in administrative practice, and codification would recognize this reality. We would also suggest that the bill explicitly provide that the record be available on-line. While that generally happens already, and is required in a qualified way by the E-Government Act, it would be worth making explicit. At present, the last sentence of §553(d)(1) states that everything in the docket "shall be . . . made accessible to the public," but it does not say how, and the provision could be read to mean that simply having hard copies at agency headquarters suffices. We recommend that this provision, as well as §553(l), be amended to expressly provide that the rulemaking docket be available on line.[56]

In addition, § 553(d) provides that issuance of an NPRM must be preceded by consultation between the agency and OIRA. Information provided by OIRA during consultations with the agency shall, at the discretion of the President or the OIRA Administrator, be placed in the rulemaking docket. The same requirements apply to the notice accompanying adoption of a final rule (§ 553(f)(1) and the concluding sentence of § 553(f)(4)).

The main significance of the consultation requirement is that it would effectively extend a degree of OIRA oversight to rulemaking by independent agencies. To date, such agencies have always been exempted from the regulatory review provisions of the executive orders, but the APA definition of "agency" applies to executive branch and independent agencies alike. The

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[52] 1981 ABA Recommendation, *supra* note 4, at 785, 791 (emphasis added).

[53] The current § 553(b)(3) differs slightly from the proposed § 553(d)(1)(A) in that the former allows an agency to include "the terms or substance of the proposed rule or a description of the subjects and issues involved," but the latter more restrictively requires the agency to provide "the terms of the proposed rule." We believe that it is generally good practice to provide the actual text of a proposed rule, but agencies sometimes omit that step, such as when they use an NPRM to solicit comment on a proposal made by a third party or invite comment on a few alternative proposals instead of proposing only one. Presumably, the effect of the revision would be to induce agencies to use an ANPRM for this purpose instead.

[54] *See supra* note 6 and accompanying text.

[55] *Id.*

[56] We note in passing that the bill does not anywhere take account of electronic rulemaking. If the sponsors truly want to modernize the APA, they should consider updating the rulemaking process to reflect the impact of the Internet. The Section has been in the forefront of debates about the development of e-rulemaking. *See* ABA COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (2008) (report of a blue-ribbon committee established under the auspices of the Section). We would be happy to engage in further dialogue on this topic with the committee.

ABA has long favored extension of the oversight orders to independent agency rulemaking,[57] and we strongly support this feature of the bill.

We do, however, have one suggestion and one objection regarding this section.

The suggestion concerns disclosure of materials received from OIRA. The ABA's position has been that a communication between a rulemaking agency and other officials in the federal government should be subject to required disclosure to the extent that it contains relevant factual material not previously placed in the rulemaking file or passes on a communication on the merits received from a source outside the federal government, but not otherwise.[58] We believe that the bill could be improved by incorporation of the affirmative aspects of that policy. Insofar as the bill contemplates broader disclosure of information than the ABA policy would require, we see no reason to object, because such disclosure would occur only at the option of the President or OIRA.

The objection is presaged by the discussion in Part III.B. of these comments. For the reasons given there, we believe that a number of the predicate recitals prescribed in § 553(d) are excessive and should be reconsidered.[59]

VI. Comment Period

Proposed § 553(d)(3) contains a minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule. It is not clear why such lengthy minimum periods are prescribed. Thirty years ago, the ABA proposed a 60-day minimum.[60] More recently, in a June 2011 recommendation, ACUS suggested that agencies should as a general matter allow comment periods of at least 60 days for "significant regulatory actions" (a category similar to "major rules" as defined in the current bill) and at least 30 days for all other rules.[61] President Obama's executive oversight order provides that "[t]o the extent feasible and permitted by law," agencies should allow "a comment period that should generally be at least 60 days."[62] Clearly there is room for reasonable disagreement about the exact minimum period that should apply; but if the goal of the present bill is to codify "best practices," we believe that the figure(s) used in the bill should fall much closer to the range of possibilities suggested by the

[57] *See* 111-1 ABA ANN. REP. 8 & Report No. 100 (February 1986).
[58] 1981 ABA Recommendation, *supra* note 4, at 785, 791-92.
[59] Subsections 553(d)(1)(E)-(F) require an agency to make a "reasoned preliminary determination" regarding the issues described there. We can agree that the notice of *final* rulemaking should be supported by a "reasoned final determination" of various predicates, as § 553(f) does require. Cf. ACUS Recommendation 93-4, *supra* note 8, ¶ IV.D. However, although one would not want preliminary findings in the NPRM to be "unreasoned," a legal requirement in that regard seems superfluous, because the preliminary determinations will be revisited at the final rule stage before they have any operative effect. Indeed, one purpose of the comment period is to invite critiques of the agency's tentative reasoning. Moreover, this language could invite judicial invalidation of a final rule on the ground that the NPRM was inadequate because, while it put all stakeholders adequately on notice, the agency's "preliminary determination" was insufficiently "reasoned." Perhaps courts would routinely find such errors harmless, but it would be safer just to eliminate this requirement.
[60] 1981 ABA Recommendation, *supra* note 4, ¶ 5(a).
[61] ACUS Recommendation 2011-2, ¶ 2, 76 Fed. Reg. 48,789, 48,791 (2011).
[62] E.O. 13,563, *supra* note 17, at 3821-22.

position statements just mentioned, so as to avoid unnecessarily aggravating the problem of excessive delays in the regulatory process.

In the recommendation just mentioned, ACUS went on to suggest that agencies may in appropriate circumstances set shorter comment periods but should provide an appropriate explanation when they do so. The ABA's 1981 recommendation contemplated analogous flexibility. It proposed that the APA "good cause" rulemaking exemption should be rewritten to allow an agency to comply "in part" with § 553 if it makes a written finding for good cause that "full compliance" would be impracticable, unnecessary, or contrary to the public interest.[63] The sponsors of the bill should consider providing agencies with latitude to shorten the default statutory comment period in unusual circumstances.[64]

VII. Formal Rulemaking

Subsection 553(e) of the bill would confer broad rights upon private persons to force an agency to use so-called "formal rulemaking," pursuant to §§ 556-57 of the APA. The scope of these rights is unclear, due to ambiguity in the opening language of § 553(e), but at a minimum the bill appears to allow parties to invoke a trial-type hearing on any proposed "high-impact rule" (roughly speaking, a rule with a $1 billion annual cost to the economy).[65] The hearing would encompass such core issues as whether the rule is cost-justified and whether a lower-cost alternative would achieve the relevant statutory objectives— plus any other issues sought by an interested person, unless the agency determines within thirty days of the request that the hearing would be unproductive or would unreasonably delay completion of the rulemaking. The latter petitioning process would also be available in proceedings to promulgate *major* rules (unless this is a drafting error). § 556(g).

These provisions run directly contrary to a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete. This broad agreement was summed up in 1993 in ACUS Recommendation 93-4: "Statutory 'on-the-record' and 'hybrid' rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination . . . can be unnecessarily burdensome or confusing and should be repealed."[66] Indeed, in the more than three decades since the Supreme Court severely curtailed the prevalence of formal and "hybrid" rulemaking procedures in a pair of leading opinions by Justice Rehnquist, *Florida East Coast*[67] and *Vermont Yankee*,[68] Congress itself has ceased to enact new formal

[63] 1981 ABA Recommendation, *supra* note 4, at 784, 789, 790. An earlier ACUS recommendation also advocated a "good cause" finding as a predicate for a short comment period. ACUS Recommendation 93-4, *supra* note 8, ¶ IV.B.

[64] *See Florida Power & Light Co. v. United States*, 673 F.2d 525 (D.C. Cir. 1982) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

[65] Read literally, the opening language of § 553(e) could be interpreted as triggering formal rulemaking *either* "[f]ollowing notice of a proposed rule" *or* "before adoption of any high-impact rule." The caption of the subsection indicates, however, that the intent is to treat these conditions conjunctively, so that § 553(e) applies only to proceedings to promulgate high-impact rules. We discuss the subsection on that assumption, but the language should be revised for clarity.

[66] ACUS Recommendation 93-4, *supra* note 8, ¶ II.A.

[67] *Florida East Coast Ry. v. United States*, 410 U.S. 224 (1973).

[68] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

rulemaking requirements and has rescinded some of the requirements that did exist.[69] The academic community has fully supported this development: we have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.[70]

The collective repudiation of formal rulemaking reflects widespread recognition that trial-type methods are usually unsuitable in generalized rulemaking proceedings. Cross-examination can work well in the context of adjudicative proceedings, in which sharply framed issues of fact and witness demeanor frequently loom large. It is less appropriate to administrative policymaking, which, like congressional legislation, often turns on value judgments, "legislative facts," and policy perspectives that are inherently uncertain. Even in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice and comment rulemaking.[71] Such proceedings allow for rigorous analysis, but the participants usually join issue over scores of interconnected questions through a continuing exchange of documents over a period of weeks or months. Live confrontation is largely beside the point in such proceedings.

This is not to say that live hearings can never shed light on the issues in rulemaking proceedings. *Vermont Yankee* recognized that agencies have discretion to resort to these procedures, and sometimes they do so. Indeed, § 553(b) as currently written provides for public participation "with or without opportunity for oral presentation." In 1981, the ABA adopted a proposal for a "carefully limited" statutory structure for live hearings in rulemaking. It recommended that, in proceedings of unusual complexity or with a potential for significant economic impact, an agency should be required to conduct an oral proceeding with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential to resolution by the agency of issues of specific fact critical to the rule."[72] This criterion was similar to a guideline endorsed by ACUS several years earlier.[73]

However, H.R. 3010 goes far beyond the recommendations just described. The ABA and ACUS proposals did not contemplate any reliance on formal rulemaking pursuant to §§ 556-57.

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[69] Pub. L. No. 110-85, 121 Stat. 823, 942, sec. 901(d)(6) (2007) (amending 21 U.S.C. § 352(n)) (prescription drug advertisements); Pub. L. No. 101-535, 104 Stat. 2353, 2365, sec. 8 (1990) (amending 21 U.S.C § 371(e)) (FDA food standards).

[70] In § 5(a) of EO 13,422, *supra* note 1, President Bush stated that agencies "may … consider" the use of formal rulemaking for the resolution of complex determinations. This brief reference to the formal rulemaking process was far from a strong endorsement. As construed by OIRA, it did not require agencies *even to consider* the use of formal rulemaking: it was simply a reminder about an existing option. OMB Memorandum M-07-13 (April 25, 2007), at 13. We know of no agency that availed itself of this option during the two years in which the order was in effect.

[71] A summary of devices that amplify on simple notice and comment, but fall short of trial-type hearings, is found in ACUS Recommendation 76-3, 41 Fed. Reg. 29654, ¶ 1 (1976).

[72] 1981 ABA Recommendation, *supra* note 4, ¶ 5(b)(ii).

[73] ACUS Recommendation 72-5, 38 Fed. Reg. 19782 (1973). As explained by the Chairman of ACUS (Antonin Scalia), the term "issues of specific fact" referred to issues of fact that were "sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them." (Quoted in *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1164 (D.C. Cir. 1979).)

Moreover, they required that any need for cross-examination be *affirmatively* shown. In contrast, the proposed § 553(e) would confer a right to oral proceedings automatically as to some issues and would put the onus on the agency to justify omission of such proceedings as to other issues (and to do so within thirty days of the request, at a time when the future direction of the proceeding might be quite speculative).

Most importantly, the ABA and ACUS positions applied solely to issues of "specific fact." ACUS asserted "emphatically" that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact,"[74] and the ABA's recommendation was consistent with that view by negative implication. Yet the issues listed in § 553(e) as *automatically* qualifying for consideration at a trial-type hearing in a high-impact rulemaking proceeding are quintessential examples of "questions of policy or of broad or general fact." They include, for example, whether the factual predicate of the rule is supported by evidence, whether any alternative to the proposed rule would achieve the statutory objectives at lower cost, and whether the proposed rule's benefits would justify a failure to adopt such a lower cost alternative. § 553(e)(1)-(4).[75]

Any proposal to amend the APA in this regard must also take account of the heavy social costs that have resulted from legislation that requires agencies to use trial-type hearings to develop rules that turn on issues of "policy or broad or general fact." Studies conducted during the heyday of mandatory formal or "hybrid" rulemaking showed clearly that it slowed proceedings considerably and undermined agencies' ability to fulfill their mandates expeditiously. A leading study by Professor Hamilton found that "[i]n practice, … the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."[76] At the FDA, for example,

> [t]he sixteen formal hearings that were held during the past decade vary from unnecessarily drawn out proceedings to virtual disasters. In not one instance did the agency complete a rulemaking proceeding involving a hearing in less than two years, and in two instances more than ten years elapsed between the first proposal and the final order. … The hearings themselves tended to be drawn out, repetitious, and unproductive.[77]

Formal rulemaking also functioned in a number of instances as a bargaining chip with which regulated parties could extract concessions by threatening to insist on their right to trial-type proceedings, bogging down an agency in protracted proceedings.[78] These side effects are a large

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[74] ACUS Recommendation 72-5, *supra* note 73.

[75] They also include whether the information on which the rule is based meets the requirements of the IQA. § 553(e)(5). If Congress adopts proposed § 553(d)(4), which would provide a formal hearing on exactly that question early in the proceeding, a second go-round on the same issue would be unnecessary and simply a prescription for delay.

[76] Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1312-13 (1972).

[77] *Id.* at 1287.

[78] *Id.* at 1289 (FDA would "go to almost any length to avoid" formal hearings), 1303 (Interior Department), 1312. A study by Professor Stephen Williams (later a distinguished D.C. Circuit judge appointed by President Reagan) also highlighted the tactical advantages to private parties of the right to invoke formal hearings. "*Hybrid*

part of the reason why formal rulemaking was abandoned decades ago (except where already mandated by statute), and nothing that has occurred in the intervening years casts doubt on that judgment.

Over and above the broad policy questions they raise, the bill's formal rulemaking provisions present several difficulties involving their relationship to the rest of the APA. The bill provides that, in a formal rulemaking case triggered under the newly added provisions, the rulemaking record will consist of the trial-type hearing record *plus* the conventional § 553 rulemaking record generated through the notice and comment proceedings.[79] The latter record may contain memoranda, letters, emails, perhaps even tweets.[80] Yet *oral* contacts between rulemaking decisionmakers and members of the public would apparently be banned by virtue of APA § 557(d). That prohibition would be difficult to justify, and it would be at odds with the sponsors' goal of transparency. The ban on external oral contacts would apparently also extend to OIRA.[81] Indeed, formal rulemaking proceedings have always been exempt from OIRA review.[82] Yet exclusion of OIRA from consultation with the agency regarding the terms of a *major rule* would be unwise and difficult to reconcile with the emphasis elsewhere in the bill on expansion of OIRA's role.

Another APA requirement is that, after the hearing in a formal rulemaking case, the administrative law judge (ALJ) or another agency employee must write a "recommended, initial, or tentative decision" that makes findings and conclusions on "all the material issues of fact, law, or discretion presented on the record," unless the agency "finds on the record that due and timely execution of its functions imperatively and unavoidably … requires [omission of this procedure]."[83] It is unclear whether this preliminary decision would be based on the hearing record (as has been traditional) or the broader rulemaking record. Yet either of these alternatives would be problematic – the former because it would be based on a different body of information than the ultimate rule would; and the latter because it would apparently extend even to issues that the ALJ did not consider during the formal hearing phase of the proceeding. Either way, the writing of this decision would add another time-consuming step to the rulemaking process for high-impact rules.

In short, there may be a case for legislation that would institute a "carefully limited" place for trial-type methods in rulemaking, along the lines of the 1981 ABA resolution. The proposed § 553(e), however, would institute formal rulemaking with respect to issues that

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Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 433-34 (1975).

[79] *See* § 556(e)(2), to be added by § 5 of the bill.

[80] *See* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

[81] *Cf. Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993) (presidential staff are "interested persons" and "outside the agency" for purposes of § 557(d)).

[82] E.O. 12,866, *supra* note 2, § 3(d)(1); EO 12,291, *supra* note 17, § 1(a)(1).

[83] 5 U.S.C. §§ 557(b)-(c). Under the APA, in a formal rulemaking case, the preliminary decision need not be written by the employee who presided at the hearing. § 557(b) (last sentence). However, the hearing must be conducted by an ALJ, unless one or more agency heads preside personally (which would be an unlikely occurrence in a high-impact rulemaking proceeding). § 556(b). Presumably, a rulemaking agency that does not otherwise employ ALJs would need to hire one or more of them for this purpose.

influential voices in the administrative law community have "emphatically" deemed unsuitable for such methods. It should be either fundamentally reappraised or omitted from the bill.[84]

VIII. Information Quality Act

Proposed § 553(d)(4) of the bill would create a special procedure by which persons may challenge information upon which a proposed rule is expected to be based, if they allege that the information does not meet the requirements of the Information Quality Act (IQA). Initially, the challenger may submit a petition to exclude the information. If the petition is not immediately granted but nevertheless "presents a prima facie case," the agency must hold a trial-type hearing on the petition under § 556 of the APA, with cross-examination allowed. The hearing must be held within thirty days of the filing of the petition, and the agency must render a decision on the petition within sixty days of the initial filing, but judicial review of that decision is not available until the agency takes final action in the rulemaking proceeding.[85]

As an initial matter, the requirement to hold a trial-type hearing with cross-examination gives rise to some of the objections to formal rulemaking discussed above. It is not clear why cross-examination, which is most useful to determine the credibility of witnesses, would result in better decisions as to the reliability of specified data, an issue that frequently will turn on analysis of highly technical information. Moreover, the task of applying the open-ended terms of the IQA will not necessarily be a cut-and-dried matter. It may well implicate policy considerations and broad issues of legislative fact – the kind of issues that present the weakest case for the use of courtroom methods. The sponsors of the bill have, to be sure, commendably sought to address potential concerns about delays by requiring any petition to be filed within 30 days of the NPRM and specifying that the hearing and decision must occur within two months of when the petition for correction is filed. However, even assuming that these deadlines hold up, the need to prepare for a live hearing will require a substantial investment of staff resources on a timetable that is not of the agency's choosing, particularly since it is easy to imagine there being multiple petitions from multiple members of the public. Suppose, as seems likely, the agency simply is unable to make a firm, final determination within the 60-day period. Then it will have two unappealing options. Either it will toss the challenged study or document, despite its possible usefulness, thus undercutting the solidity of the rulemaking record, or it will keep it in, despite its possible defects, thus potentially *also* undercutting the solidity of the rulemaking record and running a risk of later problems on judicial review.

More fundamentally, it is not clear why the agency should be required to reach a decision on the merits of the petition immediately – within sixty days of when the petition is filed – as opposed to resolving the issue as part of the regular rulemaking process. Currently, if a member of the public believes that the information upon which the agency plans to rely is erroneous and

[84] Section 556(f) of the bill states that an agency must consider the matters listed in § 553(b) and § 553(f) when it "conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rule making under section 553(c)." This may well be a drafting error, as the bill does not appear to provide for formal rulemaking "directly" after ANPRM proceedings.

[85] On the other hand, the bill provides that an agency's decision to exclude information from a rulemaking proceeding, as requested in a petition, cannot be reviewed at any time. § 553(d)(4)(C). No justification for this one-sided approach to judicial review under the IQA comes readily to mind.

violates the IQA, the person may so inform the agency during the comment period.[86] Under well-settled case law, the agency would need to consider those comments and rationally respond to them in the preamble to the final rule or risk judicial invalidation of the rule.

Section 553(d)(4) would entail new procedural complexity. One should not assume that this would always work to the advantage of those who favor reducing government regulation of private activity. Environmental and public interest groups have been frequent users of the Information Quality Act to oppose what they believe to be insufficient government regulation.[87] Thus, the new procedure may sometimes drive up the costs of promulgating rules that would make regulation stricter, but at other times it may have the same effect on rules that would relieve regulatory burdens.

Experience to date indicates that these burdens are unnecessary, for IQA questions are adequately -- and perhaps best -- dealt with through the rulemaking process. The Ninth Circuit essentially accepted the sufficiency of the existing approach in a case in which the plaintiff sought correction under the IQA of statements made by the Department of Health and Human Services regarding the efficacy of marijuana for medical purposes. The Ninth Circuit upheld the Department's refusal to act immediately on the petition, because the same issue was pending before the agency in its consideration of a rulemaking petition. The court agreed with the government that OMB guidelines permitted the Department to "use existing processes that are in place to address correction requests from the public."[88] Of course, Congress can change the law to explicitly require a special procedure above and beyond the ordinary notice and comment process, but the onus should be on proponents of such legislation to explain why it is needed. Indeed, it may well make more sense to allow the agency to postpone its decision on a correction request tendered during a rulemaking proceeding until it adopts the final rule. At that time, the agency may have a much clearer idea about the materiality of the allegedly incorrect information, and the manner in which it will use that information, than it could have had within the sixty days immediately following the filing of the petition for correction. Under the bill, the challenger might be able to force the agency to hold a trial-type hearing and render a decision about a factual issue that will ultimately make little or no difference to the disposition of the final rule.

In addition, § 7(2) of the bill would amend § 706(2)(A) of the APA to provide that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "not in accordance with law *(including the Information Quality Act)*." We would be reluctant under any circumstances to see the broad language of § 706 – a constitution-like statute that is invoked in thousands of court cases every year – amended to refer explicitly to an issue that has been, and probably would continue to be, litigated only rarely. More fundamentally, the chances that such an amendment would accomplish anything are, at best, highly uncertain. The weight of judicial authority indicates that the IQA creates no rights that are capable of being

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[86] *See* OMB, Memorandum Regarding Information Quality Guidelines: Principles and Model Language (Sept. 5, 2002).

[87] *See, e.g.*, *Ecology Ctr., Inc. v. U.S. Forest Service*, 451 F.3d 1183 (10th Cir. 2006).

[88] *Americans for Safe Access v. HHS*, 399 Fed. Appx. 314, 315 (9th Cir. 2010). *See also Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010) (upholding OIRA guidelines insofar as they exempt adjudications from their coverage).

enforced in the first place. In *Salt Institute v. Thompson*,[89] the district court held that "[n]either the IQA nor the OMB guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication."[90] That ruling was upheld on appeal to the Fourth Circuit, which agreed that the IQA "does not create a legal right to access to information or to correctness."[91] Other courts have reached the same conclusion.[92] To be sure, there are also cases holding that the OMB guidelines are legally binding,[93] but those decisions did not take issue with the just-stated proposition in the *Salt Institute* cases.

This issue has not been definitively resolved. Indeed, in recent cases the Ninth and D.C. Circuits chose not to address it when they had the chance, demonstrating that the issue remains open at the appellate level outside the Fourth Circuit. Nevertheless, it would not make sense for Congress to ignore the case law that does exist. In brief, that case law indicates that the obstacle to judicial review of agency denials of requests for correction under the IQA is not (or not solely) found in the APA; it inheres in the IQA itself. Nothing in the bill purports to change the substantive law of that Act. At some point Congress may wish to review and perhaps revise the IQA to establish substantive standards; but proposed legislation that attempts to address this issue through amendment of the APA seems misdirected.

As is well known, Congress adopted the IQA as a rider to an appropriations bill, without hearings, committee review, or floor debate. That background lends further weight to the notion that, in order to resolve questions regarding judicial review under that Act, Congress should wait until it has had an opportunity to give the IQA the full airing that the statute never received at its inception.

IX. Final Rules

Section 553(f) of the bill sets forth requirements for final rules.[94] We have commented above on most of its provisions, including the new findings and determinations that an agency would need to make in order to issue a final rule, the requirement of consultation with OIRA, and the prescription of a rulemaking record. We will not repeat that discussion here.

We note, however, that the list of predicate conditions in § 553(f)(5) omits one requirement that should be included. In line with ABA policy, that provision should be amended

[89] 345 F. Supp. 2d 589 (E.D. Va. 2004).
[90] *Id.* at 602.
[91] *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006).
[92] *Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 316 (D.D.C. 2009), *aff'd in pertinent part on other grounds, Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678; *Americans for Safe Access v. HHS*, 2007 U.S. Dist. Lexis 89257 (N.D. Cal. 2007), *aff'd on other grounds*, 399 Fed. Appx. 314 (9th Cir. 2009); *In re: Operation of the Mo. River System Litigation*, 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004).
[93] *Americans for Safe Access*, 399 Fed. Appx. 314; *Prime Time Int'l Co.*, 599 F.3d 678.
[94] A related provision, § 553(i), states that the "required publication or service" of a final rule should generally occur 30 days before it goes into effect. The "required service" language is a carryover from the current APA, which also refers to "personal service" in 5 U.S.C. § 553(b). However, since the latter language has been dropped from § 553(d) of the bill, the corresponding language of § 553(i) should also be removed.

to require, in substance, that a notice of final rulemaking should include "a response to each significant issue raised in the comments on the proposed rule."[95] This obligation is well recognized in the case law[96] and is essential in order to make the comment process meaningful.

Proposed § 553(f)(4)(G)(i) requires that an agency's notice accompanying any major rule or high-impact rule must include

> the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.[97]

The ABA supports legislation providing for periodic review by agencies of their existing regulations. Its resolution, adopted in 1995, stated in part:

> Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.[98]

At a general level, the proposed § 553(f)(4)(G)(i) is consistent with and would further the purposes of the ABA's policy. We also think that the substantive criteria listed in the subsection are stated with sufficient generality as to pose no conflict with the ABA's admonition against overly "detailed" requirements.

We are less convinced, however, that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate.

The usual approach to prescribing systematic reviews of existing regulations – as reflected in the ABA's resolution, a corresponding ACUS recommendation,[99] and presidential oversight orders[100] – is to ask agencies to create an *overall* plan for review of rules, separately from their promulgation of particular rules. We suggest that Congress follow this latter approach to mandating review of major rules (or a broader class of rules).

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[95] *See supra* note 7 and accompanying text; *see also* ACUS Recommendation 93-4, *supra* note 8, ¶ IV.D.
[96] *See supra* note 15.
[97] The phrase "no less than every ten years" in § 553(f)(4)(G)(i) is ambiguous. It could refer to intervals that are "ten or more years apart," or "ten or fewer years apart." This language should be clarified.
[98] 120-2 ABA ANN. REP. 48, 341 (1995).
[99] ACUS Recommendation 95–3, 60 Fed. Reg. 43,109 (1995).
[100] E.O. 13,563, *supra* note 17, § 6; E.O. 12,866, *supra* note 2, § 5(a) President Obama's order called for an immediate, comprehensive review of *all* "significant" agency rules, but we view that directive as a one-time measure, not intended as long-term policy.

Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily.[101] Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed.[102] The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.

X. Interim Rules and Rulemaking Exemptions

A. Expiration dates

Agencies frequently adopt regulations without prior notice and comment where they find for good cause that ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). However, they often designate such regulations to be "interim rules" and call for post-promulgation public comments. In theory, they will then consider the comments and revise the interim rule into final form. In some cases, however, such rules languish indefinitely in interim form. Section 553(g)(2) of the bill would require the post-promulgation process to be completed in 270 days for most rules and 18 months for major rules and high-impact rules. If the deadline is not met, the interim rule would have to be rescinded.

Agencies do sometimes abuse the flexibility afforded by the good cause exemption. Congress should, therefore, consider amending the APA to discourage or prevent agencies from leaving interim rules on the books indefinitely without ever undergoing the discipline of the notice and comment process. However, the specific remedy proposed in § 553(g)(2) gives rise to several concerns.

In the first place, the bill would repeal the existing exemption entirely. Thus, agencies would be required to utilize limited-term interim rules in all situations currently covered by the exemption. This is particularly ill-advised with respect to rules that fall within the "unnecessary" language of the current APA exemption. That language has been dropped entirely in § 553(g)(2), but that part of the exemption plays a vital role that should be preserved. Its purpose is to allow agencies to forgo notice and comment for technical corrections and other noncontroversial rules – not because there is any urgency about them, but rather because no one is likely to wish to contest them. Agencies make frequent use of this exemption, almost always without any controversy whatever.[103] When they invoke the "unnecessary" aspect of the good

[101] Government Accountability Office, Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews, GAO-07-791, at 30-34 (2007).
[102] This idea is discussed at greater length in ACUS Recommendation 95–3, *supra* note 99.
[103] A scholar who examined every issue of the Federal Register published during a six-month period found that agencies expressly invoked the good cause exemption in twenty-five percent of the rules they issued (not counting many more in which they appeared to rely on it by implication). Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 338-

cause exemption, agencies customarily do not issue interim rules; they simply adopt the rule in final form immediately. There just is no reason to force them to seek post-promulgation comments, as ACUS has long recognized.[104] Judicial review is available to correct alleged misapplications of the "unnecessary" exemption, but if the exemption has been lawfully invoked, neither a post-promulgation comment period nor an expiration date is warranted.

With respect to rules adopted without prior notice and comment because of urgency, the deadlines written into the bill are more understandable, but we believe they are not a good idea, or, at the very least, are much too short. In its consideration of interim rules in 1995, ACUS did not recommend a uniform government-wide deadline date for finalizing the rules. We think this was the right decision.[105]

If an agency cannot meet the deadline for evaluating public comments and modifying the rule, it confronts the unpalatable choice of allowing its rule to lapse or rushing the process through to completion before the public comments have been properly analyzed and modifications to the rule have been carefully considered. Neither alternative is desirable, especially given that the rule was adopted to deal with an emergency situation.

An agency may be unable to meet the deadline for completing the post-promulgation modification process for many legitimate reasons. Often, a large set of complex interim rules are adopted at the same time to implement a new statute; these would all expire at the same time, creating a serious time crunch on limited agency staff resources. Or the agency may confront more urgent rulemaking or enforcement priorities, so staff is simply not available to deal with an expiring interim rule. Or the leadership of an agency may change just before the rule expires, and the new agency heads need to make their own decision about how to modify the interim rule.

In any event, if Congress decides to impose a deadline, we would suggest that it be at least three years, as in the case of tax regulations.[106] Consideration should also be given to allowing the agency to extend its time limit for a defined period upon showing good cause – a showing that presumably would be judicially reviewable (as the bill could specify).[107]

B. Judicial review

Proposed § 553(g)(2)(C) goes on to provide that, in general, an interested party may seek immediate judicial review of an agency's decision to adopt an interim rule. Proposed § 704(b) essentially repeats this provision and adds that review shall be limited to whether the agency

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39 & n.86 (1989). Of these, about twenty percent, or five percent of the overall total, invoked the "unnecessary" exemption alone. *Id.* at 351 n.124. He added that, although these figures may sound excessive, "an examination of the actual cases where the clause is invoked does not reveal general misuse." *Id.* at 339-40.

[104] ACUS Recommendation 83-2, 48 Fed. Reg. 31,181, ¶ 1 (1983); *see also* ACUS Recommendation 95-4, 60 Fed. Reg. 43,110, 43,113 n.15 (1995).

[105] *See* ACUS Recommendation 95-4, *supra* note104, discussed in relevant part in Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 736-40 (1999).

[106] *See* Int. Rev. Code §7805(e)(2).

[107] As written, the bill provides especially tight deadlines in the case of non-major rules, but that distinction is artificial. Whether a rule is major or non-major says little or nothing about the practical difficulties of meeting the deadline, the complexity of the regulatory problem, or the number of public comments that must be analyzed.

abused its discretion in adopting the interim rule without complying with ordinary rulemaking procedure. (Inconsistently, however, § 706(b)(3) provides that the court shall not defer to the agency's determinations during such review.)

One has to wonder why § 553(g)(2)(C) (and the repeated language in § 704(b)) is thought to be needed at all. Under existing law, interim rules are already reviewable immediately upon their issuance, if other prerequisites for judicial review are satisfied. Interim rules (also commonly called interim *final* rules) are not like an interlocutory order in an adjudicated case. They are legislative rules with the force of law and immediate operative effect. As such, they fall within the usual meaning of "final agency action" and are subject to judicial review under § 704.[108] Were there a body of case law that holds otherwise, one could make a case that Congress needs to clarify this principle, but we are aware of no such cases.

A similar point can be made about the two inconsistent standards of review. We see no reason to choose between them, because neither is needed. An agency's decision to issue an interim rule, instead of complying with ordinary rulemaking procedures, is essentially a decision to invoke an exemption to the APA. Courts already decide issues of APA compliance, such as this one,[109] without appreciable deference to agencies, because no single agency administers that Act.[110]

C. Other exemptions

The good cause provision is not the only rulemaking exemption that Congress should consider in connection with APA revision. It should take this opportunity to rescind the broad and anachronistic exemption for rules relating to "public property, loans, grants, benefits, or contracts."[111] ACUS has repeatedly called for repeal of this language, beginning in 1969,[112] and the ABA has concurred with a minor reservation relating to public property and contracts.[113] Similarly, the APA contains a sweeping exemption for matters involving "a military or foreign affairs function of the United States."[114] Both ACUS and the ABA have for decades been on record as urging that this exemption be narrowed, so that it would only apply (as does the corresponding exemption in the Freedom of Information Act) to matters that are specifically required by executive order to be kept secret in the interest of national defense or foreign

[108] *Ark. Dairy Coop. Ass'n v. USDA*, 573 F.3d 815, 827 (D.C. Cir. 2009); *Pub. Citizen v. DOT*, 316 F.3d 1002, 1019 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004); *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268-69 (D.C. Cir. 1996); *Beverly Enters. v. Herman*, 50 F. Supp. 2d 7, 17 (D.D.C. 1999) (claim was time-barred because plaintiff *failed* to seek review of interim rule when it was promulgated).
[109] *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003).
[110] *United States v. Fla. E.C. Ry.*, 410 U.S. 224, 234 n.6 (1973); *Collins v. NTSB*, 351 F.3d 1246, 1252 (D.C. Cir. 2003); *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796 (5th Cir. 2000).
[111] 5 U.S.C. § 553(a)(2).
[112] ACUS Recommendation 69-8, 38 Fed. Reg. 19782 (1969).
[113] 1981 ABA Recommendation, *supra* note 4, at 783-84, 788. The reservation was that if rulemaking procedures are followed by an agency with overall responsibility for public property or contracts, including the Administrator for Federal Procurement Policy or the Administrator of General Services, the implementing agency should not have to repeat the process on its own; moreover, the APA should not displace any rulemaking procedures specified in the applicable organic statute. *Id.*
[114] 5 U.S.C. § 553(a)(1).

policy.[115] A requirement that rules in the subject areas of both exemptions must be issued through the normal notice and comment process would harmonize well with the bill's overall emphasis on promoting public participation and agency accountability in rulemaking.

Finally, we note that § 553(g)(1) apparently seeks to carry forward without change the existing APA exemption for interpretive rules, policy statements, and procedural rules (5 U.S.C. § 553(b)(A)). It does so imperfectly, however, because it would require an agency to take account of the § 553(b) considerations in issuing an interpretive rule or policy statement and also satisfy the requirements for final rules in § 553(f). These requirements would be excessive, not only for the reasons we have already mentioned regarding those subsections, but also because it would tend to deter agencies from issuing guidance at all. This would be detrimental to the interests of those citizens who rely on agency guidance for advice as to how they can best comply with their regulatory obligations.

XI. OIRA Guidelines

Section 553(k) would authorize OIRA to "establish guidelines" regarding multiple aspects of the rulemaking process. Of course, OIRA already does issue such guidelines. Insofar as the purpose of the subsection is simply to recognize and ratify this practice, we support the provision. Presumably, one consequence of codifying this authority would be to make OIRA guidelines applicable to independent agencies' rulemaking. As stated above, the ABA does support the extension of OIRA oversight to independent agencies.

We assume that the "guidelines" authorized by the subsection would not be legally binding. At present, OIRA does have rulemaking authority in limited subject areas, such as the Paperwork Reduction Act and the Information Quality Act, but it has not claimed a general authority to regulate the rulemaking process. Indeed, the presidential oversight orders have all specifically disclaimed the intention to displace the authority granted by law to the respective agencies.[116] Our understanding is that the bill does not seek to alter that state of affairs. The sponsors should, however, reconsider certain language in the provision that may give rise to a contrary impression – e.g., that the guidelines would "ensure" that agencies use the best available techniques for cost-benefit analysis, "assure" that each agency avoids regulations that are inconsistent with those of other agencies, and "ensure" consistency in Federal rule making."

Subsection 553(k) also authorizes OIRA to issue guidelines in subject matter areas that it has not heretofore addressed. The benefits of such pronouncements may vary according to context. For example, the case for empowering OIRA to issue binding guidelines "to promote coordination, simplification, and harmonization of agency rules" is relatively strong, because problems of incompatible or duplicative regulations as between agencies are real, yet individual agencies cannot readily solve these problems on their own. The case for guidelines to ensure that rulemaking conducted outside the APA framework "conform to the fullest extent allowed by law with the procedures set forth in section 553" is less clear, because diverse approaches among

[115] 1981 ABA Recommendation, *supra* note 4, at 784, 788-89; ACUS Recommendation 73-5, 39 Fed. Reg. 4847 (1974).
[116] *See, e.g.*, E.O. 13,563, *supra* note 17, § 7(b)(i); EO 12,866, *supra* note 2, § 9.

the agencies may rest on legitimate differences in their respective missions and programs. In short, the direction in which § 553(k) appears to be headed may have merit, but its proponents will need to make a careful case for individual aspects of it.

In any event, we do not support the provision in § 706(b)(2) that would deny any judicial deference to agency cost-benefit determinations or risk assessments that fail to conform to OIRA guidelines – a purpose for which those guidelines clearly were not designed. We discuss this provision in Part XIII below.

XII. Agency Guidance

Section 4 of the bill adds to the APA a new provision, § 553a, on the subject of agency guidance. It provides that, before issuing any *major* guidance, an agency must consider certain stated issues and consult with OIRA. It also states that any guidance must be explicitly labeled as nonbinding and that OIRA may issue guidelines to agencies as to how they should use guidance documents.

Most of these provisions have counterparts in existing practice and are supportable or at least not objectionable. The factors listed in § 553a(a)(1) as threshold considerations are mostly straightforward matters that one would normally expect the agency to consider, such as whether the guidance is understandable and supported by legal authority, and whether its benefits justify its costs.[117] (However, to the extent that this subsection incorporates by reference all of the cost factors listed in § 553(b), we would object for the same reasons discussed above in relation to the latter provision.) Moreover, OIRA already consults with executive agencies about significant guidance, and OMB has already published guidelines regarding the recommended use of guidance by agencies.[118] A consequence of codification in the APA would be that the application of these oversight functions would be extended to independent agencies, but such an extension would be consistent with ABA policy.[119]

The provision's general provision on guidance could benefit from refinement, however. First, the statement in subsection (b)(1) that agency guidance "may not be relied upon by an agency as legal grounds for agency action" could prove confusing, because interpretive rules certainly "may sometimes function as precedents."[120] Perhaps the quoted language should be rephrased as "may not be used to foreclose consideration of issues as to which the document reaches a conclusion,"[121] or should simply be deleted. Second, the requirement in subsection (b)(2) that any guidance must be labeled as not legally binding in a "plain, prominent and permanent manner" may be problematic. In the abstract, such labeling represents good

[117] The reference in § 553a(a)(1)(B) to "the rule making" should say "a rule making."
[118] OMB, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007).
[119] *See supra* note 57 and accompanying text.
[120] *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001).
[121] *See* REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 311(b) (2010) ("An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.").

administrative practice,[122] but conversion of this principle into a legal requirement may cause difficulties, particularly with respect to internal documents that technically meet the definition of "guidance" but are routine or casual statements, such as internal memoranda, that are prepared with little internal review.[123] Codification would also give rise to the question of what the consequences of breach would be. The ramifications of the principle of prejudicial error under § 706 could be difficult to sort out. Even OMB's Good Guidance Practices Bulletin treats the labeling practice as optional, although it suggests that agencies consider following it.[124] Thus, encouragement of labeling may be better left to advisory documents as opposed to the APA. Finally, subsection (b)(3), which identifies ways in which guidance shall be "made available," covers terrain that is already addressed in the Freedom of Information Act, which is part of the APA.[125] It does not seem to add anything to what FOIA already requires, and it could create confusion. If the sponsors deem the current requirements for making guidance available inadequate, amending that requirement seems preferable to enacting a new provision on the same subject.

XIII. Judicial Review

We have already discussed the bill's provisions on judicial review as they relate to interim rules and the Information Quality Act, so the following comments relate to other provisions.

A. Scope of review

Section 7 of the bill would add a new subsection (b) to the APA's scope of review provision, § 706, stating that a reviewing court "shall not defer" to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination.

The Section believes that this subsection is unwarranted. Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron*[126] and *State Farm*[127] (and, of course, for decades prior to their issuance), courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.

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[122] *See* ACUS Recommendation 92-2, 57 Fed. Reg. 30,103, ¶ II.A. (1992).
[123] *See* 118-2 ABA Ann. Rep. 57, 58 (1993) (making recommendations on agency use of guidance, but with the caveat that the resolution "reaches only those agency documents respecting which public reliance or conformity is intended, reasonably to be expected, or derived from the conduct of agency officials and personnel," as opposed to "enforcement manuals setting internal priorities or procedures rather than standards for conduct by the public").
[124] OMB, Final Bulletin for Agency Good Guidance Practices, *supra* note 118, at 3437.
[125] 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B).
[126] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).
[127] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

In any event, the principles proposed fall well outside the range of doctrines that can find support in the case law. For example, the bill provides in § 706(b)(2) that "the court shall not defer to" an agency's "determination of the costs and benefits of a rule or economic or risk assessment of the action" if the agency failed to conform to guidelines prescribed by OIRA. This provision is unwise.

Under standard judicial review principles, such shortcomings in reasoning normally result in a *remand for reconsideration*, so that the agency can (attempt to) provide an adequate basis for its position, or, perhaps, a proper regulatory analysis. It should not result in the court making its own findings on these issues. Such judicial overrides would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.

We would add that the innovations introduced by § 706(b)(2) would also result in substantial burdens for the courts themselves. Appellate litigation would become more complicated (and expensive for litigants), because the courts would have to make complex threshold inquiries into whether or not the agency had complied with OIRA's guidelines. These questions would not necessarily have been resolved at the agency level, because the issue of judicial deference would not have been directly germane at that level. Of course, if the reviewing court were to resolve the threshold issue adversely to the agency, it would then face even more daunting challenges, as it would be required to become a de facto administrator charged with balancing costs and benefits of a rule, assessing risks, etc., for which the judges would likely have had no training. These new judicial tasks strike us as unwarranted – and all the more so at the present time, when many of the courts are facing "judicial emergencies" because of vacancies on the bench and the pressures of heavy caseloads in criminal, immigration, and other areas.

Another troubling provision is § 706(b)(1), which provides that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures in adopting the interpretation. Under those circumstances, however, the agency would actually be issuing a new regulation – it would not be interpreting the old one. Effectively, therefore, § 706(b)(1) would abolish all judicial deference to agencies' interpretations of their own rules. Yet many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it. A prohibition on such deference would be both unwise and unsupported by case law.[128]

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[128] There is a serious debate in the cases and the law review literature as to whether an agency's interpretation of a regulation should receive *diminished* deference if the agency arrived at it without engaging in sufficient procedural formalities. *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449 (2011); Harold J. Krent, *Judicial Review of Nonstatutory Legal Issues*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 147, 151-58 (John F. Duffy & Michael Herz eds. 2005). That debate,

Courts do, of course, play an indispensable role in overseeing agency action and correcting abuses. If Congress decides to reconsider the premises of that role, the Section would be very willing to work with it on proposals to refine the judicial review provisions of the APA. The principles of § 706(b), however, are in our judgment too far removed from current judicial review practice to offer a promising start in that direction.

B. Substantial evidence

Section 8 of the bill would add a new definition of "substantial evidence" to the judicial review chapter of the APA. The definition itself is innocuous, as it is based directly on well recognized case law.[129]

We are unconvinced, however, that the amendment is necessary or will accomplish what its sponsors expect. A press release by the sponsors indicates that the bill is intended to ensure that, "[a]s a consequence of the formal hearing [mandated by the APA as amended], high-impact rules would be reviewed under a slightly higher standard in court – substantial evidence review."[130] Apart from our objections to the formal hearings themselves, discussed above, we must question some of the premises of this statement.

As an initial matter, it is not at all clear that the bill as drafted would, indeed, subject high-impact rules to substantial evidence review. The APA provides that the substantial evidence test applies to "a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(E). The first prong of this trigger may not apply because rulemakings that involved a formal hearing, i.e. were subject to sections 556 and 557," will *also* have been "subject to" notice and comment under § 553. The second prong may not be satisfied because the bill expressly states that the record for review in a case of this nature would be the record of the formal hearing *plus* the ordinary § 553 record. § 556(e)(2). However, for purposes of the following discussion we will assume that the bill may be interpreted (or revised) to make the substantial evidence standard applicable.

The main problem with the apparent goal of the bill is that the case law has generally abandoned the assumption that substantial evidence review is a "slightly higher standard" than arbitrary-capricious review. The modern view, as stated in a leading D.C. Circuit opinion by then-Judge Scalia, is that "in their application to the requirement of factual support the substantial evidence test and arbitrary or capricious test are one and the same. The former is

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however, has not generated substantial (if any) support for the proposition that such an interpretation should receive no judicial deference whatsoever, as § 706(b)(1) would provide.

[129] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), in which the Court stated:

> [We have] said that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, … it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Id, at 474 (citation omitted). Some cases quote only the middle of these three adjacent sentences for the meaning of substantial evidence, and others the last one, but we know of no case that has suggested that those two formulations have different meanings.

[130] http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc.

only a specific application of the latter."[131] Other circuits have agreed.[132] With the advent of the "hard look" doctrine in arbitrary and capricious review, older conceptions of a disparity between the two standards of review have been seen as obsolete.[133]

If the sponsors were to rewrite the bill to make the substantial evidence test squarely applicable to review of high-impact rules, it would present the courts with a need for what Judge Scalia called a "fairly convoluted" inquiry:

> Suppose, for example, that Congress clearly intended to switch to a stricter test, but was also clearly operating on the mistaken belief that the existing test ("arbitrary or capricious") was more lenient than the "substantial evidence" standard. Should one give effect to the congressional intent to adopt a stricter standard, or rather to the congressional intent to adopt the "substantial evidence" standard (which is in fact, as we have discussed, no stricter)?[134]

The limited nature of the formal hearings contemplated by the bill could make the situation even more convoluted. Some, but not all, of the factual issues would have been litigated via the formal hearing process, for which substantial evidence review is designed. Does this mean that some factual determinations underlying a high-impact rule would be reviewed for substantiality of evidence, and others for arbitrariness? Drawing that distinction could prove confusing if not unmanageable. On the other hand, the bill may be construed to mean that the entire proceeding should be reviewed for substantiality of evidence. This reading would create what the D.C. Circuit has called an "anomalous combination" of features that gives rise to difficult questions as to "whether the determinations in [the case] are of the kind to which substantial evidence review can appropriately be applied," as well as "the adequacy of the record to permit meaningful performance of the required review."[135]

In short, we believe there is great doubt that legislation to impose a substantial evidence test for review of high-impact rules would accomplish what the sponsors intend for it, and every reason to think it would lead to confusion and complexity. As the Supreme Court has recognized, "case-specific factors, such as a finding's dependence upon agency expertise or the presence of internal agency review … will often prove more influential in respect to outcome than will the applicable standard of review."[136]

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[131] *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984). The court has repeatedly reaffirmed this view. *See, e.g., Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (Randolph, J.); *Consumers Union of the U.S. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986) (expressly relating this view to the "reasonable mind" definition of substantial evidence that the bill would codify).

[132] *Ace Tel. Ass'n v. Koppendrayer*, 482 F.3d 876 (8th Cir. 2005); *Sevoran v. Ashcroft*, 290 F.3d 166, 174 (3d Cir. 2002); *Wilemon Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1374-75 (9th Cir. 1995), rev'd on other grounds, 521 U.S. 457 (1997); *Tex. World Serv. Co. v. NLRB*, 928 F.2d 1426, 1430 n.3 (5th Cir. 1991); *Cruz v. Brock*, 778 F.2d 62, 63-64 (1st Cir. 1985). The Supreme Court has cited to the *Data Processing* reasoning and expressed no qualms about it. *Dickinson v. Zurko*, 527 U.S. 150, 158 (1999).

[133] In *Data Processing*, Judge Scalia went on to say that the "distinctive function of paragraph (E) [substantial evidence] -- what it achieves that paragraph (A) [arbitrary and capricious] does not -- is to require substantial evidence to be found *within the record of closed-record proceedings* to which it exclusively applies." 745 F.2d at 684. Even this distinction would become less relevant under the amended APA, because the bill creates a defined record for review of rules subject to arbitrary-capricious review also.

[134] 745 F.2d at 686.

[135] *Indus. Union Dep't v. Hodgson*, 499 F.2d 467, 473-74 (D.C. Cir. 1974).

[136] *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999).

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Thank you in advance for your consideration of these comments. We hope they will be helpful, and we would be happy to work with the committee in its efforts to refine this bill further.

October 24, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3010, the Regulatory Accountability Act of 2011.

For inclusion into the record of the Committee's hearing, to be held on Tuesday, October 25, 2011.

Dear Mr. Chairmen and Members of the Committee:

We, the undersigned 42 teachers and practitioners in the field of administrative law, regulation, and public administration, have reviewed the provisions of H.R. 3010, the Regulatory Accountability Act of 2011—a proposed revision of the Administrative Procedure Act's informal rulemaking provisions. We strenuously urge your rejection of this proposal.

The bill would substitute for the current APA Section 553 a new version that is approximately ten times longer. It would add over 60 new procedural and analytical requirements to the agency rulemaking process—many of which would apply to all non-exempt rulemaking, however ordinary and however far removed from the major health, environmental and safety regulations that we sense animate current concerns. Most of these requirements apply in repeated fashion—during enlarged obligations of advance notice of rulemaking, at the rule proposal stage, and at the stage of final adoption. The bill greatly extends the time periods necessary to complete lawful consideration of a proposed rule. It introduces formalities inviting obstructionist tactics that agencies would be unable to defend against, tactics available to regulated entities and "public interest" participants alike. It also changes long-standing judicial review doctrines applicable to the review of agency rules.

We seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted. Instead it would likely lead to rulemaking avoidance by agencies—increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount the additional hurdles presented by the new Section 553. Executive officials would find it practically impossible to use rulemaking either to create new regulations or to undo old regulations.

We therefore oppose the bill in its current form and, more importantly, oppose its basic approach. While we share many of the views expressed in the comprehensive comments of the ABA Section on Administrative Law and Regulatory Practice, we wish here to emphasize our conviction that the positive aspects of the bill identified by the Section are greatly outweighed by the damage this bill would cause to administrative agencies and the public welfare they promote if it were enacted.

The APA has served for 65 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life. For that reason, it has been rarely, and only in a minor way, amended in all

those years. Its provisions for "notice-and-comment rulemaking," in particular, have proved a foundational part of our Administrative Law and of our modern democracy—a government technique that we are justly proud of and that we proselytize about around the world. Uncoordinated procedural and analytical requirements added by Congress, presidents, and the courts over the past few decades, although meritorious in many instances, have already made it more complex, costly and slow ("ossified") in the major rulemakings to which they generally apply. It has been widely noticed that the sheer weight of their combination has not only become an increasing drag on the process, but also has led agencies to substitute other less participatory procedures, such as adjudication, guidance instruments or interim-final rules, for ordinary rulemaking. H.R. 3010 would enormously exacerbate this problem. More than an amendment, it would make ordinary rulemaking so expensive and cumbersome as, essentially, to bring it to a halt.

Therefore, rather than try to add to the ABA Section's exhaustive analysis of the bill, we highlight and re-emphasize key objections to the bill that the Section has identified. We find them highly persuasive.

- For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress to rationalize them with attention to their costs, benefits, and likely impact on agency procedural choices. *This bill goes in the exact opposite direction*, adding complex and duplicative new requirements for essentially all notice-and-comment rulemaking, that will discourage any use of the process.

- Collectively, the procedural and analytical requirements added by this bill would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders (including businesses large and small) less able to plan effectively for the future. Not only new regulations, but amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Enforcement of these requirements on judicial review is available to regulatory proponents and regulatory opponents alike, adding to the burden of defensive lawyering agencies must carry. Thus, both affirmative regulation and deregulation may be impeded.

- A similar approach involving the intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences, as reported in Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285-87 (1999). The California experience suggests that a simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

- Although the Section has been generally supportive of cost-benefit analysis, the bill's proposal to add a government-wide edict to the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that the bill's codification omits certain qualifying language that the

presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable.

- We can see no justification for the bill's inflexible mandate that would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs.

- The bill's proposed minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule, is too long.

- The bill's conferral of broad rights upon private persons to force an agency to use so-called "formal rulemaking" runs directly contrary to the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete.

- The bill's attempts to address the reform of the hastily enacted Information Quality Act through amendment of the APA is misdirected.

- The bill's flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources, and will likely lead to cursory reviews.

- The bill's repeal of the good cause exemption for when notice and comment is "unnecessary" is a mistake because agencies make frequent use of this exemption, almost always without any controversy whatever.

- The bill's provision that would deny any judicial deference to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination is unwarranted, falls well outside the range of doctrines that can find support in the case law and would also result in substantial burdens for the courts themselves.

For these reasons, we are united in opposing this proposal.

[Please note that the names are in alphabetical order and the affiliations are given for identification purposes only.]

Respectfully submitted,

William R. Andersen
Judson Falknor Professor of Law Emeritus
University of Washington School of Law

Michael Asimow
Stanford Law School

Linda M. Beale
Associate Professor of Law
Wayne State University Law School

Jack Beerman
Professor of Law and Harry Elwood Warren Scholar
Boston University School of Law

Bryan T. Camp
George H. Mahon Professor of Law
Texas Tech University School of Law

Professor Marsha N. Cohen
University of California, Hastings College of the Law
Founding Executive Director, Lawyers for America

Nathan Cortez
Assistant Professor
SMU Dedman School of Law

Bridget J. Crawford
Professor and Associate Dean
Pace University School of Law

Jill E. Family
Associate Professor of Law
Widener University School of Law

Professor Cynthia R. Farina
Principal Researcher in the Cornell e-Rulemaking Initiative
Cornell Law School

Thomas J. Field, Jr.
Professor of Law
University of New Hampshire School of Law

William F. Funk
Robert E. Jones Professor of Law
Lewis and Clark Law School

Professor Sanford N. Greenberg
Chicago-Kent College of Law
Illinois Institute of Technology

Philip J. Harter
Earl F. Nelson Professor of Law Emeritus
University of Missouri School of Law

Professor Linda Jellum
Florida State College of Law

William S. Jordan, III
Associate Dean and C. Blake McDowell Professor of Law
University of Akron School of Law

Professor Roberta S. Karmel
Co-Director, The Dennis J. Block Center for the Study of Int'l Business Law
Brooklyn Law School

Professor Reneé M. Landers
Faculty Director, Health and Biomedical Law Concentration
Suffolk University Law School

Amanda Leiter
Associate Professor
Washington College of Law, American University

Jeffrey S. Lubbers
Professor of Practice in Administrative Law
Washington College of Law, American University

Patrick Luff
Visiting Professor of Law
Washington and Lee University School of Law

William V. Luneburg
Professor of Law
University of Pittsburgh School of Law

Neysun A. Mahboubi
Assistant Professor of Law
University of Connecticut School of Law

Thomas O. McGarity
Joe and Teresa Long Endowed Chair in Administrative Law
The University of Texas School of Law

Gillian Metzger
Vice Dean and Stanley H. Fuld Professor of Law
Columbia Law School

Eric J. Mitnick
Professor and Associate Dean for Academic Affairs
Thomas Jefferson School of Law

Seymour H. Moskowitz
Professor of Law
Valparaiso University School of Law.

Morell E. Mullins
Professor Emeritus\William H. Bowen School of Law
University of Arkansas at Little Rock

Professor Richard Murphy
Texas Tech University School of Law

Anne Joseph O'Connell
Professor of Law
University of California (Berkeley) School of Law

James T. O'Reilly
Professor of Law
College of Law, University of Cincinnati

Craig N. Oren
Rutgers (The State University of New Jersey) School of Law
Camden

Professor Andrew Pike
Director of the Law and Business Program
Washington College of Law, American University

Rich Raiders
Temple University School of Law, 2012 JD Candidate
ABA Law Student Division Liaison to the Section of Admin. Law and Regulatory Practice

Elaine S. Reiss
Adjunct Assistant Professor
Brooklyn Law School

David H. Rosenbloom
Distinguished Professor of Public Administration and Policy
American University

Reuel Schiller
Professor of Law
University of California, Hastings College of the Law

Theodore P. Seto
Professor of Law
Loyola Law School, Los Angeles

Sidney A. Shapiro
University Chair in Law, Wake Forest University
Vice-President Center for Progressive Reform

Anna Williams Shavers
Associate Dean and Professor of Citizenship Law
University of Nebraska College of Law

Peter L. Strauss
Betts Professor of Law
Columbia Law School

Lea B. Vaughn
Professor of Law
University of Washington School of Law