Calendar No. 613

114TH CONGRESS *2d Session*	SENATE	REPORT 114–342

PRINCIPLED RULEMAKING ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL VIEWS

TO ACCOMPANY

S. 1818

TO AMEND TITLE 5, UNITED STATES CODE, TO REFORM THE RULEMAKING PROCESS OF AGENCIES

SEPTEMBER 6, 2016.—Ordered to be printed

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PRINCIPLED RULEMAKING ACT OF 2015

SEPTEMBER 6, 2016.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1818]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1818) to amend title 5, United States Code, to reform the rulemaking process of agencies, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE AND SUMMARY

S. 1818, the Principled Rulemaking Act of 2015, seeks to improve the rulemaking process of Federal agencies, to increase transparency, and to ensure that all regulatory agencies complete a thorough regulatory impact analysis before issuing regulations. S. 1818 codifies the regulatory principles and requirements found in Executive Order 12866, section 1, and Executive Order 13563, sec-

tions 2 through 5, which have been endorsed by both Republican and Democratic administrations. The requirements would apply equally to all regulatory agencies, including independent regulatory agencies, and would be judicially enforceable.

II. Background and the Need for Legislation

Issued in 1993 by President Bill Clinton, Executive Order 12866 has guided agency rulemaking for more than 20 years and has been reaffirmed by both Presidents George W. Bush and Barack Obama.[1] Broadly, this executive order began "a program to reform and make more efficient the regulatory system."[2] In particular, Section 1 of the executive order establishes necessary conditions for agencies to pursue new regulations as well as criteria by which new regulations should be developed and analyzed.[3] Specifically, these provisions include (but are not limited to): identification of the problem to which regulation is a proposed solution, including any market failure where it may exist; examination of extant regulations that may be contributory to the identified problem; consideration of alternatives to regulation as a solution; design of "regulations in the most cost-effective manner"; conducting benefit-cost analysis of the rule, including both quantitative and qualitative measurements; use of best available science and information; gathering of input from affected State, local, and tribal entities; and clear and understandable drafting of rules.[4]

In 2011, President Obama issued Executive Order 13563 which was "supplemental to and reaffirm[ed] the principles . . . established in Executive Order 12866."[5] In addition to restating many of the foundational principles for when and how to pursue a rulemaking, the new executive order specifies the use of additional considerations in the rulemaking process, including Public Participation ("regulations shall be based . . . on the open exchange of information and perspectives"); Integration and Innovation ("[g]reater coordination across agencies . . . reducing costs and simplifying and harmonizing rules"); Flexible Approaches ("identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice"); and Science ("ensure the objectivity of any scientific and technological information and processes used").[6]

Despite the longstanding nature of the rulemaking principles outlined in the aforementioned executive orders, there are two structural limitations to relying solely on executive orders to guide agency rulemaking.

The first is that despite a "usual presumption of reviewability"[7] for executive orders, both executive orders include (nearly identical)

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[1] Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Subsequently, President George W. Bush did not amend or rescind this executive order and continued to operate under its rubric. Executive Order 13563, issued by President Obama, reads in part: "This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866." *Infra.*, note 4.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

[6] *Id.*

[7] Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 Duke L. Rev. 285, 330 (1982).

language specifically precluding judicial review.[8] This creates a situation in which agencies cannot be challenged in court when failing to comply with provisions of prevailing executive orders. To wit, a recent study found that Executive Branch agencies failed to complete all four of the selected key elements of cost-benefit analysis for 19 percent of economically significant rules and 81 percent of significant rules, despite an executive order requirement to do so.[9]

The second limitation is that these executive orders have been considered to have only limited application to independent regulatory agencies. For example, President Obama's Executive Order 13579—a companion to Executive Order 13563—notes that "[i]ndependent regulatory agencies . . . should promote" the same principles and aims of the earlier order, and that they "should comply with these provisions as well."[10] The language notably avoids the more prescriptive language of "must" or "shall" in applying the order to independent agencies. Moreover, President Clinton's Executive Order 12866 explicitly defines "agency" for the purpose of determining application of its requirements as an authority "other than those considered to be independent regulatory agencies."[11] This means that despite the fact that regulations promulgated by independent regulatory agencies carry the same weight and force of law as those by Executive Branch agencies, they are nonetheless not subject to the same requirements. Therefore it should come as no surprise that independent agencies include "the key elements of cost-benefit analysis" (as outlined in the current executive order) in their published analysis less often than Executive Branch agencies.[12] A different study using a different sample of rulemakings indicated that no major rule issued by an independent agency in 2012 contained a complete cost-benefit analysis.[13]

In light of both these deficiencies, legislation is needed to set a consistent standard for the regulatory process, for both Executive and independent regulatory agencies. Codifying the requirements found in these executive orders will ensure both the consistent application of analytical requirements and conditions—regardless of originating agency—as well as a meaningful incentive for agency compliance via the possibility of judicial review.

Support for the idea of subjecting all agencies to a uniform regulatory analytical program, particularly benefit-cost analysis, comes from experts from both Republican and Democratic administrations:

- Susan Dudley, former Office of Information and Regulatory Affairs (OIRA) Administrator for President George W. Bush, has argued that independent regulatory agencies should

[8] In President Clinton's 1993 executive order, this language reads, in part: the order "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States. . . ." *Supra,* note 1.

[9] Gov't Accountability Office, GAO–14–714, Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could be More Transparent 18 (2014).

[10] Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (Jul. 11, 2011).

[11] *Supra*, note 1.

[12] *Supra*, note 8, Fig 2.

[13] Curtis Copeland, Economic Analysis and Independent Regulatory Agencies, Report for the Administrative Conference of the United States 87–88 (2013).

be "doing the analysis of the kind that Presidents have required executive branch agencies to do." [14]

- Dr. Michael Greenstone, former Chief Economist for President Obama's Council of Economic Advisors, has argued that "there is no reason that a regulation, no matter where it appears from, should not be subject to a cost-benefit analysis." [15]
- Sally Katzen, former OIRA Administrator for President Clinton, has argued that Congress should act to extend the requirements found in Executive Order 12866 to independent regulatory agencies because those agencies "are not typically engaging in the analysis that has come to be expected as a form of governmental best practice[s] for regulatory agencies." [16]
- President Obama's Jobs Council has also recommended this action as it "would prompt [independent regulatory agencies] to perform better analyses and to issue better and smarter regulations." [17]

The requirements in this legislation would not place any new burden on the agency rulemaking process that has not already been required or encouraged by multiple presidents through executive order.

III. Legislative History

Senator James Lankford (R–OK) introduced S. 1818 on July 21, 2015. The bill was referred to the Committee on Homeland Security and Governmental Affairs. Senators Heidi Heitkamp (D–ND), Kelly Ayotte (R–NH), and Joni Ernst (R–IA) are cosponsors of the bill. The Committee considered S. 1818 at a business meeting on October 7, 2015.

During the business meeting, Senator Lankford offered a substitute amendment with clarifying language. The substitute amendment was adopted without objection by unanimous consent with Senators Johnson, Portman, Lankford, Enzi, Ernst, Sasse, Carper, McCaskill, Baldwin, Heitkamp, Booker, and Peters present.

Senator Carper offered two amendments during the business meeting. The first was to strike the provision that would require agencies to tailor each rule to impose the least possible burden on society when maximizing benefits. This amendment failed on a voice vote. Senators present were Johnson, Portman, Lankford, Enzi, Ernst, Sasse, Carper, McCaskill, Baldwin, Heitkamp, Booker, and Peters. The second amendment removed the judicial review component of the bill. This amendment failed on a roll call vote of 6 yeas to 10 nays. Senators voting in the affirmative were Senators Carper, McCaskill, Baldwin, Booker and Peters, and Senator Tester by proxy. Senators voting in the negative were Senators

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[14] *Examining Practical Solutions to Improve the Federal Regulatory Process: Roundtable Before the S. Comm. On Homeland Sec. & Governmental Affairs Subcomm. On Regulatory Affairs & Fed. Mgmt.*, 114th Cong. (2015) (statement of Susan Dudley).

[15] *Examining Practical Solutions to Improve the Federal Regulatory Process: Roundtable Before the S. Comm. On Homeland Sec. & Governmental Affairs Subcomm. On Regulatory Affairs &Fed. Mgmt.*, 114th Cong. (2015) (statement of Michael Greenstone).

[16] Sally Katzen, *Expand Centralized Regulatory Review to Independent Agencies*, Penn. Program on Regulation Blog (Aug. 9, 2011), *http://www.regblog.org/2011/08/09/expand-centralized-regulatory-review-to-independent-agencies/*.

[17] The President's Council on Jobs & Competitiveness, Roadmap to Renewal 45 (2012), *available at http://files.jobs-council.com/files/2012/01/JobsCouncil__2011YearEndReportWeb.pdf.*

Tester by proxy. Senators voting in the negative were Senators Johnson, Portman, Lankford, Enzi, Ernst, Sasse, and Heitkamp, and Senators McCain, Paul, and Ayotte by proxy.

The Committee ordered S. 1818, as amended, reported favorably on October 7, 2015, by a roll call vote of 7 yeas to 5 nays. Senators voting in the affirmative were Senators Johnson, Portman, Lankford, Enzi, Ernst, Sasse, and Heitkamp. For the record only, Senators McCain, Paul, and Ayotte voted yea by proxy. Senators voting in the negative were Senators Carper, McCaskill, Baldwin, Booker, and Peters. For the record only, Senator Tester voted nay by proxy.

IV. Section-by-Section Analysis of the Bill, as Reported

Section 1. Short title

This section provides the bill's short title, the "Principled Rulemaking Act of 2015."

Section 2. Definitions

This section provides several definitions, including for the following terms: "agency," "rule," "rule making," and "regulatory action."

Section 3. Rule making considerations

This section amends Section 553 of title 5, United States Code, by adding additional rulemaking principles.

New subsection (f)(1) ensures that all regulations promulgated by agencies are directly related to law by requiring that agencies only promulgate rules that are (A) "required by law;" (B) "necessary to interpret law;" or (C) "as permitted by law, made necessary by public need, to protect or improve the health and safety of the public, the environment, or the wellbeing of the people of the United States."

New subsection (f)(2) stipulates the various analyses and considerations that an agency shall complete before promulgating a rule. The first five provisions detail what an agency must do before deciding on a rule. These include: identification of the problem; consideration of the legal authority under which the agency intends to act; examination of existing rules that may be contributing to the identified problem; identification of alternatives to regulation; and consideration of "the degree and nature of the risks" associated with "substances or activities within the jurisdiction of the agency."

The last nine provisions are requirements for agencies to complete "after determining that a rule is the best available method of achieving the regulatory objective." These include: assessment of costs and benefits of the proposed rule; reliance on the best available scientific and technical information that is publicly available; identification of alternative forms of regulations such as establishment of performance standards rather than prescription of specific behaviors; consultation with and assessment of effect on State, local, or tribal governments; avoiding duplication; tailoring of the rule to maximize benefits and be least burdensome; and drafting of the rule in the clearest and simplest way.

New subsection (f)(3) lists the exceptions to the new rulemaking requirements found in (f)(2). Following the language found in 5

U.S.C. 553(b)(3)(A), it specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice," sometimes referred to as "guidance." Exceptions can also be made by the OIRA Administrator or by the rule's underlying statute.

New subsection (f)(4) sets forth the framework for judicial review of agency compliance with the requirements of this subsection. The review must be "in connection with review of final agency action" and therefore a challenge cannot be made during the rulemaking process. The agency's consideration of the provisions in subsection (f)(2) will be part of the rulemaking record and may be considered by a court to the extent relevant to determining if the rule is "arbitrary, capricious, or an abuse of discretion." If the court finds the agency did not comply with the requirements herein, it may set aside the rule.

Section 4. Public participation

Subsection (a) ensures that, consistent with the requirements of 5 U.S.C. § 553, agencies issue rules with a process that involves public participation.

This subsection also requires agencies to allow comments through the internet on any proposed rule for at least a 60-day period, provide online access to the rulemaking docket for both proposed and final rules, and allow the public the ability to comment on pertinent parts of the proposed rule.

Subsection (b) requires agencies, "when feasible and appropriate," to reach out to parties that are likely to be affected by the rule. This includes those who may benefit as well as those who may be subject to new regulations. The requirement that those who are "likely to benefit and those who are potentially to be subject to the rule" requires that comments from all affected parties should be sought.

Section 5. Integration and innovation

This section requires that agencies develop regulatory approaches that are harmonized and coordinated among agencies and designed to promote innovation among the regulated parties.

Section 6. Science

When agencies issue a rule under 5 U.S.C. § 553, each agency must ensure that the scientific and technological information, processes, and models that are used in support of any regulatory action is the best available. The information must be peer-reviewed so that other experts in the field have the opportunity to verify the findings and those findings must be reproducible to ensure accuracy. Finally, the information must be made available for public access.

V. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector

mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

AUGUST 29, 2016.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1818, the Principled Rulemaking Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL,

Enclosure.

S. 1818—Principled Rulemaking Act of 2015

CBO estimates that implementing S. 1818 would have no significant cost over the next five years. The bill could affect direct spending by agencies not funded though annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would be negligible. Enacting S. 1818 would not affect revenues.

CBO estimates that enacting S. 1818 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 1818 would amend federal law to codify portions of Executive Order 12866 and Executive Order 13563. Those orders direct regulatory agencies to only issue regulations that are necessary, provide the maximum benefit to the public, and allow public involvement in the rulemaking process. Because the legislation would put into statute current policies and practices, CBO estimates that implementing S. 1818 would have no significant cost over the next five years.

S. 1818 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or trial governments.

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

VII. ADDITIONAL VIEWS

While there has been strong bipartisan support for the principles in the Executive Orders that guide agency rulemakings through multiple administrations since at least the 1980s, codifying these principles raises a number of significant concerns and could significantly slow down the already slow regulatory process. First, this bill would make these principles legal requirements, subjecting each step of the process to judicial review, taking away agency flexibility, and overriding provisions of certain health, safety, and environmental laws that exempt regulations authorized by those laws from some of these requirements. In addition, this bill would extend these requirements to the independent agencies that often have their own statutory requirements.

S.1818 would lead to endless litigation and regulatory delay

There are a number of statutes that already provide the basic procedures that agencies must follow when promulgating regulations. Chief among them is the Administrative Procedures Act (APA), which among other things, requires all agencies to publish notice of proposed rulemaking, provide an opportunity for public comment, publish a final rule that includes a statement of basis and purpose, and wait at least 30 days after any rule's publication to make that rule effective.[1] In addition, agencies are required to comply, when applicable, with the requirements of the Regulatory Flexibility Act (RFA),[2] the Paperwork Reduction Act (PRA),[3] and the Congressional Review Act (CRA).[4] Each of these laws provides judicial review of agency compliance.

Since the 1980s, Presidents of both parties have supplemented these statutory requirements with executive orders that include additional procedures that agencies are directed to use, to the extent permitted by law, when promulgating regulations.[5] S. 1818 would take the principles found in these widely supported executive orders and codify them—making these principles legally required and agency compliance with all of these principles judicially reviewable. This goes well beyond the intent of these executive orders. All of these executive orders, including E.O. 12291 issued by President Reagan, specifically precluded judicial review of agency compliance with the principles laid out in the executive orders.[6] As each executive order has done since, the executive order issued by President Reagan made this very clear, stating that the executive order was "intended only to improve the internal management of the Federal

[1] 5 U.S.C. § 553.
[2] 5 U.S.C § 601 *et seq*.
[3] 44 U.S.C. §§ 3501–3521.
[4] 5 U.S.C.§§ 801–808.
[5] *See* E.O. 12291, 46 Fed. Reg. 13193 (Feb. 19, 1981); E.O. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); E.O. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011)
[6] *See* E.O. 12291, Sec. 9; E.O. 12866, Sec. 10; E.O. 13563, Sec. 7(d).

government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person."[7]

The additional judicial scrutiny this bill would allow is problematic for a number of reasons and would have significant consequences, including additional regulatory delays. Courts would be asked to determine whether an agency was in compliance with requirements that are not always clearly defined and very difficult to review. As Sally Katzen, a former Administrator of the Office of Information and Regulatory Affairs, said in her testimony before the Committee in March 2015, "casting [the executive orders] in statute only compounds the problems" because of a lack of agency resources and because these requirements would be hard to review, ". . . like quantifying costs, what does that mean and how would somebody say that is sufficient?"[8] This would invite endless litigation and delays since those who oppose these regulations would be able to challenge each of these requirements in court. And courts, who are not experts on the issues, would have the nearly impossible task of trying to decide in each case whether or not the agency's work was sufficient.

For example, one provision of the bill would require agencies to ensure scientific or technical data used in formulating and analyzing the rule was objective, but the provision provides no definition of "objective" and does not describe how compliance with this requirement could be demonstrated by the agency.[9] Does this mean a scientific study is not objective if it is disputed by other studies? Does this mean experts at the agency cannot make any judgements about the validity of the evidence available or make any policy judgements based on their expertise and experience? In his testimony before the Committee, Sidney Shapiro, a law professor at Wake Forest University and a leading expert in administrative procedure and regulatory policy, raised these concerns with this provision saying, "[g]eneralist judges would be empowered to second-guess the scientific judgments of agency experts on complex matters of science, medicine, and technology on the basis of the problematic concept of 'objectivity'."[10] Howard Shelanski, the current Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget, testified last year that he does not believe codification of the principles in the Executive Orders are necessary, saying "[w]e at OIRA think that we have the tools that we need under the Executive Orders to achieve what we need to achieve."[11] And that "the Executive Orders are on very

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[7] *See* E.O. 12291, Sec. 9.

[8] Testimony of Sally Katzen, hearing before the Senate Committee on Homeland Security and Governmental Affairs, "Toward a 21st-Century Regulatory System," February 25, 2015.

[9] Principled Rulemaking Act of 2015, S. 1818, Sec. 6, 114th Cong.

[10] Written testimony of Sidney A. Shapiro, hearing before the Senate Committee on Homeland Security and Governmental Affairs, "A Review of Regulatory Reform Proposals," September 16, 2015.

[11] Testimony of Howard Shelanski, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, "Reviewing the Office of Information and Regulatory Affairs' Role in the Regulatory Process," July 16, 2015.

solid ground having stayed firm and really only been reaffirmed across Administrations of both parties."[12]

We are also concerned with another requirement in the bill which would require agencies to tailor each rule so it would impose the least possible burden on society.[13] This requirement is very similar to the requirement in the Toxic Substances Control Act (TSCA) that made it nearly impossible to use that law to protect people and the environment from harmful chemicals.[14] This provision was so problematic that it was recently repealed.[15] While a very similar provision requiring tailoring a rule is included in E.O. 12866, the language of the executive order and nature of the executive orders generally provides agencies with some flexibility. This type of requirement becomes much more problematic when put into statute like it was in the Toxic Substances Control Act. Despite clear evidence of the consequences of such a provision and the fact that the Senate was at that very same time voting to remove a similar provision from TSCA, the majority of my colleagues rejected an amendment Senator Carper offered to this bill, S. 1818, that would have struck this particularly problematic provision.

S.1818 would override existing provisions of certain health, safety, and environmental laws that exempt regulations authorized by those laws from some of requirements of executive orders on rule makings

In addition to precluding judicial review, each of the executive orders this bill would codify, including E.O. 12291 issued by President Reagan, specifically stated that the requirements in the executive orders would not override statutes that aimed to exclude certain regulations from requirements in the executive orders by specifically stating that these requirements of the executive orders applied only to the extent permitted by law.[16] This bill, however, seems to require agencies to follow these same requirements for all regulations, regardless of the original intent of the authorizing statutes. A number of health, safety and environmental statutes specifically bar agencies from certain considerations or specifically provide the decision-making criteria that the agency should use in rulemakings, criteria that could differ from those spelled out in the orders. For example, courts have found that provisions of the Clean Air Act specifically bar the use of cost-benefit analysis for regulations authorized by the Act.[17] And the American Bar Association has criticized similar "supermandates" saying that "[much], perhaps most, of the safety and health legislation now on the books would seemingly be displaced.[18]

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[12] Testimony of Howard Shelanski, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, "Reviewing the Office of Information and Regulatory Affairs' Role in the Regulatory Process," July 16, 2015.

[13] Principled Rulemaking Act of 2015, S. 1818, Sec. 3, 114th Cong., new 5 U.S.C. 553(f)(1)(M)(i).

[14] 15 U.S.C. § 2605 (a) (amended in 2016).

[15] The Frank R. Lautenberg Chemical Safety for the 21st Century Act, P.L. 114–182, Sec. 6, striking "to protect adequately against such risk using the least burdensome requirements" from 15 U.S.C. § 2605(a).

[16] *See* E.O. 12291, Sec. 2; E.O. 12866, Sec. 1(b); E.O. 13563, Sec. 1(b).

[17] *Whitman* v. *Am. Trucking Ass'ns.*, Inc., 531 U.S. 457, 471 (2001).

[18] Amer. Bar Assoc. Section of Admin. L. and Reg. Practice, Comments on H.R. 3010, The Regulatory Accountability Act of 2011 12–13 (2011), citing Sidney A. Shapiro & Robert L.

S. 1818 would extend all of these requirements to independent agencies that are not currently subject to the executive orders

S. 1818 would extend the requirements in the rule making executive orders to the independent agencies that are not currently subject to the executive orders. While we appreciate the need to ensure thoughtful analysis during the regulatory process of the impacts a proposed rule could have, we have serious concerns with the impact this bill would have on independent regulatory agencies. Independent regulatory agencies already conduct regulatory analysis and have their own analytical requirements for rulemaking, some of which are required by statute. Furthermore, requiring independent regulatory agencies to submit their regulatory analysis to the Office of Information and Regulatory Affairs (OIRA) would cause additional regulatory delays and undermine the independence of the independent agencies.

In addition to the many statutes that already guide all agency rulemaking, many of the statutes that authorize the independent agencies include statutory requirements for regulatory analysis, which, while different from the executive order analysis, can be quite rigorous. If there is a certain agency that is not meeting its statutory requirements or whose authorizing statute should be updated to include additional analytical requirements, that is something the authorizing committee of that agency should consider undertaking—it does not mean we should impose these same requirements on all independent regulatory agencies.

Imposing the same analytical requirements as other executive branch agencies on all of the independent regulatory agencies, regardless of the other statutory requirements already imposed on them, would not improve the efficiency and effectiveness of the regulatory process at these agencies. Instead, it would just further slow down the already slow regulatory process and ensure delays in the promulgation of regulations and the implementation of laws that Congress passes.

Including independent agencies in these requirements would also undermine the independence of these agencies and cause delays of important regulations, including many meant to protect health and safety and promote consumer protection. Independent regulatory agencies were established by Congress to fulfill their missions, including their rulemaking authority, independent of the direct control of any administration, regardless of party.[19] Members of both parties have at times expressed frustration with a president's ability to influence rulemakings at independent regulatory agencies, even without the requirement for OIRA review of these regulations that this bill would allow.

Glicksman, *Risk Regulation at Risk: restoring a Pragmatic Approach* 32 (2003) (which surveyed 22 health, safety, and environmental laws and found that only two contain a substantive cost-benefit mandate).

[19] *See e.g.*, Testimony of Sidney A. Shapiro, hearing before the Senate Committee on Homeland Security and Governmental Affairs, "A Review of Regulatory Reform Proposals," September 16, 2015. (saying, "Congress explicitly designed independent regulatory agencies to be institutionally insulated from excessive political interference from the president."); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 Duke L.J. 257, 259–60 (1988) (saying, "The requirement that the President appoint some commissioners of the party out of power or who are politically 'independent' is designed to isolate those decisionmakers from politics.").

For example, the majority staff of this committee released a report in February 2016 alleging that the President improperly interfered in the Federal Communications Commissions' open internet rulemaking.[20] As their report concluded, "Politics should never trump policy, especially not when an agency, like the FCC, was created for the expressed purpose of being independent and above the political fray."[21] This bill would not just allow a President to have even more political influence on these independent agencies' rulemakings, but would provide the President with explicit approval from Congress to do so. It is important that we do not politicize the regulatory process at these independent regulatory agencies by giving this President or any future President the ability to interfere in these rulemakings.

Conclusion

We believe that whatever we do here in Congress and on this Committee to reform the regulatory process should encourage reducing burdens and increasing transparency while achieving the greatest public benefit. It should be our goal to have the most efficient, effective, and transparent regulatory process we can have, and to ensure that process results in common-sense regulations. We do not believe this bill would improve the regulatory process, and in fact would make the process far less efficient. Therefore, we oppose this measure.

[20] Staff Report of the Majority Office of the Senate Committee on Homeland Security and Governmental Affairs, *Regulating the Internet: How the White House Bowled over FCC Independence*, February 29, 2016.
[21] *Id.* at 29.

VIII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1818 as reported are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

* * * * * * *

PART I—THE AGENCIES GENERALLY

* * * * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

* * * * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

* * * * * * *

SEC. 553. RULE MAKING

(a) * * *

* * * * * * *

(f) RULE MAKING CONSIDERATIONS.—

(1) IN GENERAL.—An agency shall only promulgate a rule under this section that is—

(A) required by law;

(B) necessary to interpret a law; or

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

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

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

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

(C) where practicable, examine whether existing rules or other laws, including the cumulative effect of existing rules or other laws—

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

(ii) should be modified to achieve the intended regulatory objective more effectively;

(D) as permitted by statute, identify and assess available alternatives to direct regulation, including by providing—

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

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

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

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

(i) assess the costs and benefits of the intended rule and, recognizing that some costs and benefits (including quantifiable and qualitative measures) are difficult to quantify, design the rule to maximize net benefits while justifying the costs, unless a statute requires another regulatory approach; and

(ii) as permitted by statute—

(I) consider, when developing the rule—

(aa) incentives for innovation, consistency, predictability, flexibility, distributive impacts, and equity on the regulated entities and the public; and

(bb) the cost of enforcement and compliance to the Federal Government, regulated entities, and the public; and

(II) select approaches that reduce burdens and maintain flexibility and freedom of choice for regulated entities and the public;

(G) base decisions on the best reasonably obtainable and publically accessible scientific, technical, economic, and other information concerning the need for, and consequences of, the intended rule;

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

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

(J) assess the effects of rules on State, local, and tribal governments and the private sector, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect those governmental entities, consistent with achieving the regulatory objective of the agency;

(K) as appropriate, seek to harmonize agency action with related State, local, and tribal regulatory and other governmental functions;

(L) avoid the promulgation of a rule that is inconsistent, incompatible, or duplicative with other rules of the agency or those of other agencies;

(M) tailor the rule—

(i) to maximize benefits while imposing the least possible burden on society, including individuals, businesses of differing sizes, and other entities, including small communities and governmental entities; and

(ii) in a manner that is consistent with obtaining the regulatory objective, taking into account, and to the greatest extent practicable, the costs of cumulative rules; and

(N) in order to minimize the potential for uncertainty and litigation arising from such uncertainty—

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

(ii) include information to assist with compliance with the rule, such as warnings, appropriate default rules, and disclosure requirements.

(3) EXCEPTIONS.—This subsection shall not apply—

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

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

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

(4) JUDICIAL REVIEW.—

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

(i) in connection with review of final agency action; and

(ii) in accordance with this paragraph.

(B) DETERMINATIONS BY ADMINISTRATOR.—Any determination, action, or inaction of the Administrator of the Office of Information and Regulatory Affairs under this subsection shall not be subject to judicial review.

(C) REVIEW WITH FINAL RULE.—Compliance by an agency with the provisions of this subsection shall only be subject to judicial review in connection with review of the final rule to which an analysis, assessment, or other consideration under paragraph (2) applies.

(D) RULE MAKING RECORD.—Each consideration by an agency under paragraph (2) shall be—

(i) included as part of the rule making record for the rule; and

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

(I) arbitrary, capricious, or an abuse of discretion; or

(II) unsupported by substantial evidence where the standard is otherwise provided by law.

(E) SET ASIDE.—If an agency fails to comply with the requirements under paragraph (2), a court may, giving due account to prejudicial error, hold unlawful and set aside the agency action.

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