Calendar No. 614

114TH CONGRESS *2d Session*	SENATE	REPORT 114–343

EARLY PARTICIPATION IN REGULATIONS 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. 1820

TO REQUIRE AGENCIES TO PUBLISH AN ADVANCE NOTICE OF PROPOSED RULEMAKING FOR MAJOR RULES

SEPTEMBER 6, 2016.—Ordered to be printed

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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. 1820]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1820) to require agencies to publish an advance notice of proposed rulemaking for major rules, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The Early Participation in Regulations Act of 2015 requires Federal agencies to solicit and consider public comment early in the rulemaking process through an advanced notice of proposed rulemaking (ANPRM). Considering alternative solutions, articulated by or flowing from public comment at an earlier stage, ensures that agencies will consider a broader range of policies before they give

preference to a particular position to the exclusion of others. The bill requires that for certain major rules, agencies must publish an ANPRM in the Federal Register at least 90 days before publishing a notice of proposed rulemaking (NPRM).

The ANPRM must identify the nature and significance of the problem the agency seeks to address and the legal authority under which the agency may do so, generally describe regulatory alternatives under consideration, and describe an achievable objective and metrics by which the agency will measure progress on that objective. The agency must then allow at least 60 days for public comment. The bill provides an exemption, upon the determination of the Administrator of the Office of Information and Regulatory Affairs (OIRA), for rules in which complying with the requirements of the legislation would not serve the public interest, or would be both unduly burdensome and duplicative of processes otherwise required by law. The bill also exempts those rules that do not require a notice of proposed rulemaking, and those otherwise exempted by law. The bill does not require nor preclude agencies from responding to comments submitted under the ANPRM.

II. Background and the Need for Legislation

The Administrative Procedure Act (APA), enacted nearly 70 years ago, establishes the basic procedures for agency rulemaking—the guidelines governing the administrative state.[1] As one scholar put it, it is "the bill of rights for the new regulatory state . . . establish[ing] the fundamental relationship between regulatory agencies and those whom they regulate—between government, on the one hand, and private citizens, business, and the economy, on the other hand."[2] The APA codified "patterns of good behavior" by administrative agencies, patterns that had become "general, though not universal" in practice.[3]

The APA, however, does not contemplate the use of an ANPRM. Instead, it only requires that agencies, where applicable, issue a NPRM in the Federal Register before formulating a final rule. NPRMs, which articulate the agency's proposed rule on a certain policy issue, require much more specificity than their ANPRM counterparts. Part of this specificity arises from the fact that at the NPRM stage, the agency has already chosen a policy trajectory, and so must detail the specifics of that policy, including "the terms or substance of the proposed rule or a description of the subjects and issues involved."[4] More starkly, "[b]ecause of the incentives they face, agencies make decisions to regulate before any evidence that might suggest regulations are not needed. They do so purposely with little—if any—input from stakeholders or internal analysis."[5] Because the agency has to dedicate time and resources to the contents of an NPRM later in the rulemaking process than

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[1] Administrative Procedure Act, 5 U.S.C. § 553; *see also* 5 U.S.C. § 551(4) (defining the parameters of rulemaking: it can include "formulating, amending, or repealing a rule").

[2] George B. Shepherd, *Fierce Compromise: the Administrative Procedure Act Emerges from New Deal Politics,* 1996 Northwestern U. L. Rev. 90, 1558.

[3] Walter Gellhorn, *The Administrative Procedure Act: The Beginnings,* 1986 Va. L. Rev. 72, 232.

[4] Administrative Procedure Act, 5 U.S.C. § 553(b)(3).

[5] *Raising the Agencies' Grades: Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need: Hearing Before the H. Comm. on the Judiciary Subcomm. on the Courts, Commercial and Administrative Law,* 111th Cong. (2011) (focusing on the statement of Richard Williams).

would be required of an ANPRM, while both provide notice and opportunity to comment, the public's ability to persuade the agency of alternatives may be less effective by the NPRM phase. Put another way, "[a]gencies often write regulations before they do the basic homework that would help them design the best possible regulation," resulting in the "'[r]eady-fire-aim' rulemaking" problem.[6]

In a recent hearing, former OIRA Administrator John Graham echoed this sentiment:

> One of the things I think members should be aware of is that agencies take public comment and public participation after they have proposed a solution. And like all human beings, once we think we know what the solution is, we put it on the table, it is not that easy to move people off that original proposal. . . . In some of these rules it is probably better if the agency says, 'Hey we are thinking about regulating in this area. We are going to do this advance notice where we are going to lay out some of the data, what we think the problems are, look at a range of ideas,' and not lock themselves into anything. Take comment at that stage, and then once they have that, then they go to a proposal.[7]

ANPRMs would give notice of and invite public comment on a much more generalized policy proposal before it reaches the proposed rule stage. Comments responsive to ANPRMs can be as diverse as to include underlying information the agency should weigh, or the benefits of alternative policy proposals the agency should consider.

While the APA does not require ANPRMs as part of the rulemaking process, some agencies, such as the National Oceanic and Atmospheric Administration, the Department of Transportation, and Consumer Product Safety Commission, routinely issue ANPRMs for rules promulgated under their authority.[8] However, the majority of agencies do so for significant rules only infrequently.[9]

A recent report concludes that "[i]f regulatory reform proposals seek to increase opportunities for the public to influence important regulatory decisions, agency use of advance notices has room for improvement."[10] As another former OIRA Administrator, Susan Dudley, stated, the use of ANPRMs "could be valuable for soliciting input from knowledgeable parties on a range of possible ap-

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[6] Jerry Ellig, *Ready-fire-aim Rulemaking,* The Hill, Sep. 27, 2013.

[7] *Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs Subcomm. on Regulatory Affairs & Fed. Mgmt.,* 114th Cong. (2015) 27–28 (focusing on the statement of Hon. John Graham).

[8] Sofie E. Miller & Saayee Arumugam, *Notice & Comment: How Agencies Use Advance Notices of Proposed Rulemaking,* 2015 Geo. Wash. Univ. Reg. Studies Ctr. 6 (Jan. 23, 2015).

[9] *Id.* For example, from 2005 through 2014, 59 percent of ANPRMs were for "Nonsignificant" and "Substantive, but not 'Significant'" rules. Only eight percent were for "Economically Significant" or "Major" rules. More generally, during that same period, all agencies combined issued an average of less than 50 ANPRMs per year, whereas the number of final rules is in the thousands.

[10] *Id.* at 6.

proaches, data, models, etc., before particular policy options have been selected."[11]

Worries that adding additional statutory requirements requiring time for public comment will inhibit or otherwise delay agency efforts to promulgate necessary regulations—the so-called "ossification theory"—has been questioned.[12] A 2012 report noted that "statutory and executive order analytical requirements, while potentially time consuming, were not the major factor in determining the amount of time that it took for the agencies to issue these rules . . . [instead] they said most of the time is taken up with doing the basic science and other preparations for the rule, not the cross-cutting analytical requirements."[13] Additionally, whereas "economically significant" rules do trigger additional analytical requirements on agencies—notably a "require[ment] to complete a detailed cost-benefit analysis"[14]—the OIRA review for such rules is on average shorter than rules that do not entail such requirements.[15]

S. 1820 would require agencies to publish an ANPRM in the Federal Register for certain major rules at least 90 days before publishing a NPRM. Building ANPRMs into the rulemaking process for major rules would allow public participation at a crucial time in the rulemaking process, just as—but not after—policy proposals are formulated. The value of public comment, both for the public to be heard, and for the agency to gather useful input, is highest at this earlier stage. Here, public comment can help inform the rulemaking process, instead of merely corroborating or justifying inceptive preferences.

III. LEGISLATIVE HISTORY

Senator James Lankford (R–OK) introduced S. 1820 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), Joni Ernst (R–IA), and Mark Kirk (R–IL) later joined as co-sponsors of the bill. The Committee considered S. 1820 at an October 7, 2015 business meeting.

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 an amendment during the business meeting that proposed to replace the requirement to employ an "advance notice of proposed rulemaking" with a broader "notice" re-

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[11] *A Review of Regulatory Reform Proposals: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs,* 114th Cong. (2015) (offering the prepared statement of Hon. Susan Dudley) (Sept. 16, 2015).

[12] Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed from 1950–1990,* 2012 Geo. Wash. L. Rev. 80, 1414; *see also* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005, 2008* ENVIRONMENTAL L. REV. 38, 101.

[13] Curtis Copeland, Regulatory Analysis Requirements: A Review and Recommendations for Reform, Report for the Administrative Conference of the United States (2012) at 67 (citing internal Government Accountability Office interviews).

[14] Maeve P. Carey, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register,* Report R43056, Cong. Research Serv. (2015) at 11.

[15] *Id.* at 13. The author notes there are potentially pre-review reasons why this is the case. Nevertheless, it belies the intuition that adding rulemaking requirements necessarily results in delays.

quirement that would provide the public with information on how they could weigh in on the rule that is being developed at this earlier stage in the process. The amendment was not adopted by 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 Johnson, Portman, Lankford, Enzi, Ernst, Sasse, and Heitkamp, and Senators McCain, Paul and Ayotte by proxy.

The Committee ordered S. 1820, as amended, reported favorably on October 7, 2015, by a roll call vote of 8 yeas to 4 nays. Senators voting in the affirmative were Senators Johnson, Portman, Lankford, Enzi, Ernst, Sasse, McCaskill, and Heitkamp. For the record only, Senators McCain, Paul, and Ayotte voted yea by proxy. Senators voting in the negative were Senators Carper, 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 "Early Participation in Regulations Act of 2015."

Section 2. Advance notice of proposed rulemaking

This section defines the term "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose annual economic effects of $100,000,000 or more, or cause similar deleterious economic effects. The section also defines "Office of Information and Regulatory Affairs" as that established under 44 U.S.C. § 3503.

Subsection (1) provides that ANPRMs must be published in the Federal Register at least 90 days prior to publication of a NPRM.

Subsection (2) lays out the required contents of any ANPRM. The ANPRM must identify the nature and significance of the problem the agency seeks to address with the major rule; any regulatory alternatives under consideration; the legal authority under which the major rule may be proposed; and an achievable objective for the major rule and metrics by which the agency can measure progress. The agency must solicit comment from interested persons, leaving the comment period open for at least 60 days.

Subsection (3) lists four circumstances in which an agency is excepted from having to issue the ANPRM required by the bill: (1) If the agency is not required to publish a notice of proposed rulemaking for the major rule; (2) if the OIRA Administrator determines that complying with the bill's requirements for the major rule would not be in the public interest, or would be both unduly burdensome and duplicative of processes already required by existing statutory requirements; or (3) if the agency is otherwise specifically exempted by law.

Subsection (4) exempts the OIRA Administrator's determinations pursuant to subsection (3) from judicial review. This subsection additionally provides that any deviation between the policies set forth in the agency's ANPRM under section (2) and any final agency action shall not be considered by a reviewing court to be arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with the law under the APA.

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 31, 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. 1820, the Early Participation in Regulations 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. 1820—Early Participation in Regulations Act of 2015

S. 1820 would amend the Administrative Procedures Act to require agencies to publish an Advance Notice of Proposed Rulemaking (ANPRM) for major rules in the Federal Register at least 90 days before it publishes a Notice of Proposed Rulemaking (NPRM). Under the bill, major rules would include all regulations that are likely to result in an annual effect on the economy of $100 million or more; a major increase in prices or costs for consumers, industry, government agencies or individual regions; or a significant impact on U.S. companies that compete with foreign companies.

Based on an analysis of information provided by the Congressional Research Service and selected agencies on the current regulatory process, CBO estimates that the executive branch usually issues between 3,000 and 4,000 final rules each year, of which approximately 70 would be defined as major under the bill. Agencies seldom issue an ANPRM; however, CBO expects that most of the information needed to publish one also is needed for the NPRM. Based on the costs of printing such notices and the necessary work to publish one additional notice, CBO estimates that preparing and publishing approximately 70 ANPRMs would cost about $1 million a year government wide. Such spending would be subject to the availability of appropriated funds. Additionally, CBO expects that adding the requirement to publish an ANPRM would not significantly delay the implementation of final regulations.

CBO expects that any change to the regulatory process, including more public involvement, could lead to changes in proposed and final rules. However, CBO has no basis to estimate any budgetary effects from such changes.

Enacting 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. 1820 would not affect revenues.

CBO estimates that enacting S. 1820 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 1820 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 tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VII. ADDITIONAL VIEWS OF SENATORS THOMAS R. CARPER AND GARY C. PETERS

While we agree that it is important that agencies solicit and consider public input early in the process when contemplating a new rule, we have serious concerns with the requirement in this bill that agencies file a formal Advanced Notice of Rulemaking (ANPRM) for all major rules. First, not all rules will benefit from adding a formal ANPRM to the process. Agencies are in the best position to determine if an ANPRM will be helpful in a given situation. Second, limiting agencies to the very specific ANPRM process instead of allowing them the flexibility to use their resources to engage stakeholders in other ways may provide the agency with less diverse viewpoints and, therefore, limit the benefits to the final rule being proposed. And finally, this bill's requirement that all major rules be required to go through this additional step will only serve to further slow down the regulatory process, causing even more regulatory delays without necessarily gaining significant benefits.

Agencies are in the Best Position to Determine if an ANPRM will be Beneficial to the Particular Rulemaking

An Advanced Notice of Proposed Rulemaking is not required under the Administrative Procedures Act (APA),[1] though some agencies are required under other statutes to issue ANPRMs for at least some rules.[2] Under current law, when contemplating a new regulation, an agency is often required to issue a Notice of Proposed Rulemaking (NPRM) which provides opportunity for public comment prior to issuing the final rule.[3] Though not required, an agency may use an ANPRM when the agency determines the benefits of doing so exceed the drawbacks that may come from any delay that adding this extra step may cause. While this extra step could be very useful in some cases, it may not be in others. For example, when an agency is regulating in an area that is new, it may be helpful to solicit formal comments earlier in the process through an ANPRM. However, when an agency is regulating in an area where it is already very familiar with the subject matter and the issues surrounding the proposed regulation, going through the formal ANPRM process may not be necessary or helpful.

The American Bar Association's (ABA) Section of Administrative Law and Regulatory Practice has said that while it believes that it is important to encourage the use of ANPRMs, their use should be voluntary, saying it "continues to believe that an amended APA should not make ANPRMs mandatory, even in proceedings to issue

[1] 5 U.S.C. § 553.
[2] *See, e.g.,* 15 U.S.C. § 57a(b)(2), which requires the Federal Trade Commission to issue ANPRMs for many of their rules.
[3] 5 U.S.C. § 553(b).

expensive rules."[4] The ABA's statement also said that "[a]gencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs . . ."[5]

Sidney A. Shapiro, the Frank U. Fletcher Chair of Administrative Law at Wake Forest University School of Law and Vice President of the Center for Progressive Reform, testified before the Committee in September 2015 that agencies find ANPRMs useful at times. His testimony listed a number of agencies, including the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Consumer Product Safety Commission (CPSC), that frequently use advanced notices for rulemakings.[6] However, in other cases Congress has actually eliminated requirements in certain laws that required an ANPRM for regulations authorized by those laws in order to allow agencies to act more quickly to protect public health, safety, and the environment. For example, the CPSC used to be statutorily required to use ANPRMs, but in 2008, in response to public concerns about the inability of the CPSC to ensure the safety of toys and children's products, Congress passed the Consumer Product Safety Improvement Act.[7] This law, among other things, took steps to expedite the rulemaking process by eliminating the requirement that the agency begin every rulemaking with an ANPRM, instead making it voluntary.[8]

S. 1820 could Limit Public Engagement and Input that could Benefit the Final Rule

Limiting agencies to the specific and formal ANPRM process could limit the type of input the agency receives. An ANPRM is just one tool agencies can use to gain early input from stakeholders and the public. Other tools at their disposal for gaining early input from the public include public hearings, focus groups and public meetings. Some of these other forms of public outreach may provide an agency with more diverse opinions and may provide the general public with more opportunities to participate in developing the regulation early in the process.

Howard Shelanski, the current Administrator of the Office of Information and Regulatory Affairs, questioned the wisdom of requiring agencies to use a particular process to solicit early stakeholder input when he testified before the Regulatory Affairs and Federal Management Subcommittee. While he agreed that it is important for agencies to have a development process in which they gather stakeholder input, and that they are encouraged to do so, the particular procedural vehicle for gaining that evidence and understanding could vary.[9]

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[4] Amer. Bar Assoc. (ABA) Section of Admin. L. and Reg. Practice, Comments on H.R. 3010, The Regulatory Accountability Act of 2011 15 (2011).

[5] Id. at 16.

[6] 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.

[7] P.L. 110–314.

[8] P.L. 110–314, Section 204 (amending 15 U.S.C. §2058); (For another example, see P.L. 110–140, Sec. 307, removing from 42 U.S.C. §6295(p) a requirement for the Secretary of Energy to publish an ANPRM when issuing certain energy efficiency standards).

[9] Testimony of Howard Shelanski, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, "Re-

Continued

A number of studies have shown that the notice and comment period already required by the Notice of Proposed Rulemaking (NPRM) can be biased toward industry or industrial associations and fail to give the general public any real say in the final regulation.[10] In addition to showing that parties that would be regulated under a proposed rule submitted the large majority of comments, studies have found that these entities had more influence over the changes made by the agency in final rules since changes made after the notice and comment period were more likely to benefit them than the public interest generally.[11] Given the limited resources agencies are working with, requiring an ANPRM could make agencies less likely to be proactive in reaching out to a wider range of stakeholders and using other methods of soliciting early input that may be more appropriate for a given rule because they would have to focus those limited resources on this particular requirement.

S. 1820 would Create Additional Regulatory Delays and Opportunities for Judicial Review

In his testimony before the Committee, Professor Shapiro estimated that significant rules can take anywhere between four and eight years to complete.[12] Adding an ANPRM to the already slow regulatory process for every major rule will just exacerbate the regulatory delays that already plague our regulatory system without gaining much benefit. As the ABA has said, "ANPRMs can significantly extend the time involved in rulemaking, and often the costs of the delay will be greater than the benefits associated with an improved final regulation, which may be nil." [13]

A recent report released by Public Citizen, which analyzed over 20 years of data in the Unified Agenda on federal regulations, found that when an ANPRM was used, significant rules took between 59 and 100 percent longer to complete than when the agency did not issue an ANPRM.[14] Even conservative estimates by some who support a requirement for an ANPRM anticipate that it would add at least another three to six months to the regulatory process.[15] But even more extreme delays can result from the use of an ANPRM. For example, as Pamela Gilbert discussed in her testimony before the Regulatory Affairs and Federal Management Subcommittee last year, the CSPC's use of an ANPRM on a potential regulation on safety technology that has been proven to prevent serious injuries, including amputations, from table saws has contrib-

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viewing the Office of Information and Regulatory Affairs' Role in the Regulatory Process," July 16, 2015.

[10] *See e.g.* Wendy Wagner, Katherine Barnes & Lisa Peters, Rulemaking in the Shade: Empirical Study of EPA's Toxic Emissions Standards, 63 Admin. L. Rev. 99, 128–29 (2011); Jason Webb Yackee & Susan Webb Yackee, A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy, The Journal of Politics Vol. 68, No. 1 (Feb., 2006), 128–139.

[11] Yakee & Yakee at 133–35.

[12] 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.

[13] ABA at 16.

[14] Public Citizen, Unsafe Delays: An Empirical Analysis Shows That Federal Rulemakings To Protect the Public Are Taking Longer Than Ever, retrieved at: http://www.citizen.org/unsafedelaysreport.

[15] *See e.g.,* Testimony of John Graham, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, "Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process," March 19, 2015.

uted to over four years of delays that have prevented the agency from even issuing a NPRM to address this significant safety issue.[16]

In addition, many agencies are under statutory or judicial deadlines for promulgating regulations that may not give the agency time to add an extra step to the regulatory process. Agencies already routinely miss statutory deadlines for rulemaking. In fact, according to an August 2015 report by the libertarian think tank J Street, in the past 20 years, agencies have met only half of the regulatory deadlines set by Congress in statutes.[17]

To try to address these concerns, we offered an amendment during the Committee's consideration of this bill that still would have required agencies to provide notice to the public prior to a notice of proposed rulemaking, but allow agencies more flexibility to decide the particular procedure for soliciting feedback for the development of the regulation. We believe this amendment was a commonsense compromise that still achieved the objective of the bill's sponsors while still allowing agencies to determine which process would help agencies the achieve the best regulatory outcome. Unfortunately, this amendment was not adopted.

Regulatory delays are not only frustrating to those who follow these issues closely, but can also have real and lasting impacts on public health, safety, the environment and the economy. Adding requirements that will lead to additional delays should not be done without careful consideration and clear evidence that these new requirements would significantly improve the process and the resulting regulations. That case has not been made here. Agencies are in the best position to decide if this particular process will improve the regulation or just lead to unnecessary delays and they should be able to continue to make this determination. Therefore, we oppose this measure.

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[16] Testimony of Pamela Gilbert, hearing before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Financial Management, "Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process," March 19, 2015.

[17] Scott Atherly, *Federal Agency Compliance with Congressional Regulatory Deadlines,* R Street Policy Study No. 30 (August 2015).

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. 1820 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

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TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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Subchapter II—Administrative Procedure

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SEC. 551. DEFINITIONS

(1) * * *

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(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; [and]

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter[.]*;*

(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 effect on the economy of $100,000,000 or more;

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

(C) significant effects on competition, employment, investment, productivity, innovation, or on the ability of United

States-based enterprises to compete with foreign-based enterprises in domestic and export markets; and

(16) 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.

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SEC. 553. RULE MAKING

*(a) * * **

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(f) ADVANCE NOTICE OF PROPOSED RULE MAKING FOR MAJOR RULES.—

(1) IN GENERAL.—Except as provided in paragraph (3), not later than 90 days before the date on which an agency publishes a notice of proposed rule making for a major rule in the Federal Register, the agency shall publish an advance notice of proposed rule making for the major rule in the Federal Register.

(2) REQUIREMENTS.—An advance notice of proposed rule making published under paragraph (1) shall—

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

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

(ii) a general description of regulatory alternatives under consideration;

(iii) the legal authority under which a major 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

(iv) an achievable objective for the major rule and metrics by which the agency expects to measure progress toward that objective;

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

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

(3) EXCEPTIONS.—This subsection shall not apply to a major rule if—

(A) the agency proposing the major rule is not required to publish a notice of proposed rulemaking in the Federal Register for the major rule under subsection (b)(3)(B);

(B) the Administrator of the Office of Information and Regulatory Affairs determines that complying with the requirements described in this subsection—

(i) would not serve the public interest; or

(ii) would be unduly burdensome and duplicative of processes required by specific statutory requirements as rigorous as those prescribed in paragraph (2); or

(C) the agency proposing the major rule is otherwise specifically exempted by law from the notice and comment rule making procedures under this section.

(4) JUDICIAL REVIEW.—

(A) IN GENERAL.—A determination made by the Administrator of the Office of Information and Regulatory Affairs in accordance with paragraph (3)(B) shall not be subject to judicial review.

(B) ARBITRARY AND CAPRICIOUS.—Any deviation between policies set forth in the written statement of an agency under paragraph (2)(A) and any final agency action shall not be considered arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law under section 706(2)(A).

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