

Calendar No. 158

115TH CONGRESS }
1st Session }

SENATE

{ REPORT
115-121

EARLY PARTICIPATION IN REGULATIONS
ACT OF 2017

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 579

TO REQUIRE AGENCIES TO PUBLISH IN ADVANCE NOTICE OF
PROPOSED RULE MAKING FOR MAJOR RULES



JUNE 28, 2017.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

69-010

WASHINGTON : 2017

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EARLY PARTICIPATION IN REGULATIONS ACT OF 2017

JUNE 28, 2017.—Ordered to be printed

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

R E P O R T

[To accompany S. 579]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 579) to require agencies to publish an advance notice of proposed rule making for major rules, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The Early Participation in Regulations Act of 2017 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.¹

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.² 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.”³ The APA codified “patterns of good behavior” by administrative agencies, patterns that had become “general, though not universal” in practice.⁴

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.”⁵ More starkly, some scholars and business executives argue that, “[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.”⁶ Because the agency has to dedicate time and resources to the contents of an NPRM later in the rulemaking process than would be required of

¹ On October 7, 2015, the Committee approved S. 1820, the Early Participation in Regulations Act of 2015. That bill is substantially similar to S. 579. Accordingly, this committee report is in large part a reproduction of Chairman Johnson’s committee report for S. 1820, S. Rep. No. 114-343 (2016).

² 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”).

³ George B. Shepherd, *Fierce Compromise: the Administrative Procedure Act Emerges from New Deal Politics*, 1996 *Northwestern U. L. Rev.* 90, 1558.

⁴ Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 1986 *Va. L. Rev.* 72, 232.

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

⁶ *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).

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. As one regulatory scholar put it, "[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.⁷

In a 2015 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.⁸

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 rule-making 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.⁹ However, the majority of agencies do so for significant rules only infrequently.¹⁰

A 2015 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."¹¹ 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-

⁷ Jerry Ellig, *Ready-fire-aim Rulemaking*, The Hill, Sep. 27, 2013.

⁸ *Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing Regulatory Process: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs Subcomm. on Regulatory Affairs & Fed. Mgmt.*, 114th Cong. (2015) 27–28 (focusing on the statement of Hon. John Graham).

⁹ 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).

¹⁰ *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.

¹¹ *Id.* at 6.

proaches, data, models, etc., before particular policy options have been selected.”¹²

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”—have been questioned.¹³ 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.”¹⁴ Additionally, whereas “economically significant” rules do trigger additional analytical requirements on agencies—notably a “require[ment] to complete a detailed cost-benefit analysis”¹⁵—the OIRA review for such rules is on average shorter than rules that do not entail such requirements.¹⁶

S. 579 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. 579 on March 8, 2017, with Senator Heidi Heitkamp (D–ND). The bill was referred to the Committee on Homeland Security and Governmental Affairs. Senators Orrin Hatch (R–UT) and Pat Roberts (R–KS) later joined as co-sponsors of the bill. The Committee considered S. 579 at a May 17, 2017 business meeting.

The Committee ordered S. 579 reported favorably on May 17, 2017, by a roll call vote of 11 yeas to 3 nays. Senators voting in the affirmative were Senators Johnson, McCain, Portman, Paul, Lankford, Enzi, Hoeven, Daines, McCaskill, Heitkamp, and Peters. Senators voting in the negative were Senators Tester, Hassan, and Harris. For the record only, Senator Carper voted nay by proxy.

¹²A *Review of Regulatory Reform Proposals: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 114th Cong. (2015) (offering the prepared statement of Hon. Susan Dudley) (Sept. 16, 2015).

¹³Jason 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.

¹⁴Curtis 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).

¹⁵Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register*, Report R43056, Cong. Research Serv. 11 (2015).

¹⁶*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.

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 2017."

Section 2. Advance notice of proposed rulemaking

This section defines the term "major rule" as any rule that the OIRA Administrator determines is likely to impose annual economic effects of \$100,000,000, significantly increases costs or prices, or otherwise significantly affect competition, employment, investment or other economic conditions. 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 three circumstances in which an agency is exempted 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 and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 21, 2017.

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. 579, the Early Participation in Regulations Act of 2017.

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. 579—Early Participation in Regulations Act of 2017

S. 579 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 publishing 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 governmentwide. 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 through 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. 579 would not affect revenues.

CBO estimates that enacting S. 579 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 579 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. 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. 579 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. 551. DEFINITIONS

(1) ***

* * * * *

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

* * * * *

SEC. 553. RULE MAKING

(a) ***

* * * * *

(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)(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).