

Calendar No. 672

117TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 117-273

SMART ACT OF 2021

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 2801

TO AMEND TITLE 5, UNITED STATES CODE, TO IMPROVE
THE EFFECTIVENESS OF MAJOR RULES IN ACCOMPLISHING
THEIR REGULATORY OBJECTIVES BY PROMOTING
RETROSPECTIVE REVIEW, AND FOR OTHER PURPOSES



DECEMBER 19, 2022.—Ordered to be printed

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

R E P O R T

[To accompany S. 2801]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 2801) to amend title 5, United States Code, to improve the effectiveness of major rules in accomplishing their regulatory objectives by promoting retrospective review, and for other purposes, having considered the same, reports favorably thereon with an amendment, in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 2801, the *Setting Manageable Analysis Requirements in Text Act of 2021* (SMART Act) requires agencies, when publishing a proposed or final major rule, to include a framework for assessing whether the rule achieves its regulatory objective. An agency must assess a rule in the time frame included in the framework. The assessment must compare the rule’s anticipated and actual benefits and costs.

The bill defines a major rule as a rule likely to cause (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, health,

safety, the environment, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

The SMART Act requires that all major rules incorporate, within their preamble, a framework for retrospectively reviewing whether the rule is effectively meeting its regulatory objective. The framework will include a clear statement of the regulatory objective, the methodology by which the agency will measure the regulation's effectiveness, a plan for gathering appropriate data, and a specific timeframe for the review, which is not to exceed 10 years. Using the data collected under the framework, the agency must determine whether the rule should remain in its current form, be expanded, streamlined or otherwise modified to accomplish the regulatory objective. Once an agency makes its determination, the agency will publish the details of the assessments online.

II. BACKGROUND AND THE NEED FOR LEGISLATION

For more than four decades, Presidents have used Executive Orders to require agencies to assess their regulatory impacts before issuing proposed and final rules.¹ Jimmy Carter was the first president to direct agencies to review existing regulations, and each subsequent president has issued their own similar review requirements.² However, many of these review requirements were vague, and agencies have more often used them to justify existing regulations, rather than to inform or change those regulations.³ In some cases, agencies have failed to include required plans to assess the intended and actual impacts of their major rules. For example, in 2014, the Regulatory Studies Center at George Washington University (Center) found that none of the Obama Administration's major rules included their required plans for retrospective reviews to assess their impacts.⁴ As Center Director Susan Dudley noted in her testimony, it is unclear that this trend has changed since 2014.⁵

Ex post review requirements for agencies to assess the impact of their major rules could help ensure that major rules accomplish their intended regulatory objectives. The SMART Act would help to do just that, by requiring agencies to proactively determine a framework and timeline to measure regulatory effectiveness of their most significant regulations.

The bill would apply to major rules likely to cause an annual effect on the economy of \$100 million or more. This qualification ensures that agencies create frameworks for the most influential rules and are not overburdened by reporting requirements for smaller, less economically significant regulations. According to the Center, which relies on records kept by the Government Accountability Office (GAO), agencies across government issued less than

¹ Senate Committee on Homeland Security and Governmental Affairs Regulatory Affairs and Financial Management Subcommittee, Testimony Submitted for the Record of Susan E. Dudley, *Hearing on From Beginning to End: AN Examination of Agencies' Early Public Engagement and Retrospective Review*, 116th Cong. (May 7, 2019) (S. Hrg. 116-37) (hereinafter "Dudley Testimony").

² Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, at 10 (GAO-07-791) (July 2007); See Exec. Order No. 12033, 43 Fed. Reg. 1915 (Jan. 13, 1978).

³ *Id.*

⁴ George Washington University Regulatory Studies Center, *Evaluating Retrospective Review of Regulations in 2014* (Nov. 5, 2015) (www.regulatorystudies.columbian.gwu.edu/evaluating-retrospective-review-regulations-2014); See Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁵ Dudley Testimony at 6.

50 major rules annually, on average, between 1981 and 2021.⁶ Even in 2020, which saw the highest number of major rules in almost four decades, less than 140 of those rules across government qualified as ‘economically significant’. This Act codifies common sense retrospective analysis in agency rulemaking, ensuring transparency and accountability into agencies’ most important rules and improving regulatory protections for the American public.

III. LEGISLATIVE HISTORY

Senator Kyrsten Sinema (D–AZ) introduced S. 2801, the Setting Manageable Analysis Requirements in Text Act of 2021, on September 22, 2022, with Senator James Lankford (R–OK). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 2801 at a business meeting on February 2, 2022. During the business meeting, a substitute amendment was offered by Senator Sinema and Senator Lankford and was adopted by voice vote *en bloc*. The substitute amendment gives agencies flexibility in developing their methodology for conducting the retrospective review assessments. In addition, it strengthens the protections against litigation if agencies choose to modify or reassess their methodology over the course of the rulemaking and its impacts. Finally, the substitute amendment updated the short title of the bill. The Sinema-Lankford substitute amendment was ordered reported favorably by voice vote *en bloc* by the Sinema-Lankford Substitute Amendment. Senators Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Lankford, Scott, and Hawley were present. The bill, as amended, was ordered reported favorably by voice vote *en bloc* as amended by the Sinema-Lankford Substitute Amendment. Senators Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Lankford, Scott, and Hawley were present.

Consistent with Committee Rule 11, the Committee reports the bill with a technical amendment by mutual agreement of the Chairman and Ranking Member.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the ‘Setting Manageable Analysis Requirements in Text Act of 2022’ or the ‘SMART Act of 2022’.

Sec. 2. Incorporating retrospective review into new major rules

This section amends Subchapter II of chapter 5 of title 5 in United States Code.

Subsection (a) of Sec. 2 amends 5. U.S.C. 551, providing definitions for ‘Administrator’ and ‘major rule.’

Subsection (f) of Sec. 2 amends 5. U.S.C. 553 by adding a ‘major rule frameworks’ provision. Subsection (f)(1) of Sec. 2 directs agencies to include a potential framework for measuring the effectiveness of a rule when that rule meets the definition of a ‘major rule.’

⁶Economically Significant Final Rules Published by Presidential Year (<https://regulatorystudies.columbian.gwu.edu/reg-stats>) (accessed December 11, 2022).

When publishing a final major rule in the Federal Register, an agency must publish a framework that includes (1) a statement of regulatory objective, (2) planning methodology to assess the outcomes of the rule, (3) a plan for gathering data that includes public input, and (4) a timeline, no longer than 10 years, under which to assess the effectiveness of the rule.

Subsection (f)(2) of Sec. 2 requires each agency to use the methodology outlined in their framework to assess whether (1) the major rule is accomplishing its objective, (2) the major rule has been rendered unnecessary, (3) the major rule needs to be expanded, streamlined, or modified, or (4) an alternative to the major rule could better achieve the regulatory objective. If an agency uses an alternative methodology, they should include a notification of the revised methodology.

Subsection (f)(2)(D) of Sec. 2 requires agencies to publish the results of their assessment of the major rule to their websites within 180 days of completion. Subsection (f)(3) requires agency heads to oversee the timely publishing to their agencies' websites.

Subsection (f)(4) of Sec. 2 requires the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) to (1) issue guidance to agencies regarding compliance with the Act; (2) encourage and assist with streamlining and interagency coordination of assessments; (3) determine whether certain agencies may be exempt from with the Act for specific circumstance; and (4) extend the deadline to comply with the assessment by no more than 90 days for an agency that can justify its inability to meet the deadline put forth in its framework.

Subsection (f)(5) and Subsection (f)(6) of Sec. 2 exempts agencies from compliance with this Act for a specific set of circumstances.

Subsection (f)(7) of Sec. 2 specifies that judicial review is limited to the publication of the framework with the final major rule and the publication of the assessment or subsequent assessment. The standard for this subsection of 5 U.S.C. 553 is remand without vacatur. At such a time when an agency does not comply with the actions required under the subsection, the courts may remand the rule to the agency to comply with the Act. However, the major rule shall take, or remain in, effect notwithstanding any order issued by the court.

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. 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 the bill, 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) ‘Administrator’ means the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget established under section 3503 of title 44 and any successor to that office; and

(16) ‘major rule’ means any rule that the Administrator finds has resulted in or is likely to result in—

(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, or local government agencies, or geographic regions; or

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

* * * * *

SEC. 553. RULE MAKING

- (a) * * *
- (b) * * *
- (c) * * *
- (d) * * *
- (e) * * *

(f) MAJOR RULE FRAMEWORKS.—

(1) IN GENERAL.—*On and after the date that is 1 year after the date of enactment of this subsection—*

(A) *with respect to a proposed rule published by an agency in the Federal Register that the agency reasonably expects would meet the definition of a major rule, the agency shall include a potential framework for assessing the implemented rule, which shall include a general statement of how the agency intends to measure the effectiveness of the rule; and*

(B) *with respect to a final major rule published by an agency in the Federal Register, including a major rule that the agency did not initially reasonably expect would meet the definition of a major rule under subparagraph (A), the agency shall include a framework for assessing the major rule under paragraph (2), which shall include—*

(i) *a statement of the regulatory objectives of the major rule, including a summary of the societal benefit and cost of the major rule;*

(ii) *the methodology by which the agency plans to analyze the qualitative and quantitative outcomes of the major rule so that the agency can assess—*

(I) *the effectiveness and benefits of the major rule in producing the regulatory objectives of the major rule; and*

(II) *the effects and costs of the major rule on regulated and other affected entities;*

(iii) *a plan for gathering data, including public input, regarding the methodology described in clause (ii) on an ongoing basis or at periodic times; and*

(iv) *a time frame, as appropriate to the major rule and not more than 10 years after the effective date of the major rule, under which the agency shall conduct the assessment of the major rule in accordance with paragraph (2)(A).*

(2) ASSESSMENT.—

(A) IN GENERAL.—*Each agency shall assess the data gathered under paragraph (1)(B)(iii), using the methodology set forth in paragraph (1)(B)(ii) or any other appropriate methodology developed after the issuance of a final major rule—*

(i) *to analyze how the actual benefits and costs of the major rule may have varied from those anticipated at the time the major rule was issued; and*

(ii) *to determine whether—*

(I) *the major rule is accomplishing the regulatory objective of the major rule;*

(II) *the major rule has been rendered unnecessary, taking into consideration—*

(aa) changes in the subject area affected by the major rule; and

(bb) whether the major rule overlaps, duplicates, or conflicts with other rules or, to the extent feasible, State and local government regulations;

(III) the major rule needs to be expanded, streamlined, or otherwise modified in order to accomplish the regulatory objective of the major rule; and

(IV) other alternatives to the major rule or a modification of the major rule could better achieve the regulatory objective of the major rule by increasing the benefits of the major rule or imposing a smaller burden on society, or both, taking into consideration any changes in the regulatory environment that may have made the major rule more or less necessary or effective, and any cost already incurred.

(B) *DIFFERENT METHODOLOGY.*—If an agency uses a methodology other than the methodology set forth in paragraph (1)(B)(ii) to assess data under subparagraph (A), the agency shall include notification of the revised methodology and an explanation of the changes in circumstances that necessitated the use of that other methodology as part of the notice required under subparagraph (D).

(C) *SUBSEQUENT ASSESSMENTS.*—If, after an assessment of a major rule under subparagraph (A), an agency determines that the major rule will remain in effect with or without modification, the agency shall, in consultation with the Administrator, include with the assessment produced under subparagraph (A) a list of circumstances or events that would necessitate a subsequent review in accordance with subparagraph (A) to ensure that the major rule continues to meet the regulatory objective of the major rule.

(D) *PUBLICATION.*—Not later than 180 days after the date on which an agency completes an assessment of a major rule under subparagraph (A), the agency shall publish prominently on the website of the agency the results of the assessment, including the circumstances or events that would necessitate a subsequent assessment of the major rule under subparagraph (C).

(3) *AGENCY HEAD RESPONSIBILITIES.*—The head of each agency shall—

(A) oversee the timely compliance of the agency with this subsection; and

(B) ensure that the results of each assessment conducted under paragraph (2) are published promptly in accordance with paragraph (2)(D).

(4) *OMB OVERSIGHT.*—The Administrator shall—

(A) issue guidance for agencies regarding the development of the framework under paragraph (1) and the conduct of the assessments under paragraph (2)(A);

(B) encourage and assist agencies to streamline and coordinate the assessment of major rules with similar or related regulatory objectives;

(C) exempt an agency from including the framework required under paragraph (1)(B) when publishing a final major rule, if—

(i) the agency did not issue a notice of proposed rule making for the major rule in order to provide a timely response to an emergency or comply with a statutorily imposed deadline, in accordance with paragraph (6)(B); or

(ii) the Administrator determines that—

(I) the final major rule falls within a category of major rules that are routine or periodic in nature, including those issued on an annual basis in order to put in place annual spending programs; or

(II) for any other reason, the conduct of an assessment would be impracticable, unnecessary, or contrary to the public interest; and

(D) extend the deadline specified by an agency for an assessment of a major rule under paragraph (1)(B)(iv) or paragraph (2)(C) for a period of not more than 90 days if the agency justifies why the agency is unable to complete the assessment by that deadline.

(5) *RULE OF CONSTRUCTION.*—Nothing in this subsection may be construed to affect—

(A) the authority of an agency to assess or modify a major rule of the agency earlier than the end of the time frame specified for the major rule under paragraph (1)(B)(iv); or

(B) any other provision of law that requires an agency to conduct retrospective reviews of rules issued by the agency.

(6) *APPLICABILITY.*—

(A) *IN GENERAL.*—This subsection shall not apply to—

(i) a major rule of an agency—

(I) that the Administrator reviewed before the date of enactment of this subsection;

(II) for which the agency is required to conduct a retrospective review under—

(aa) section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (12 U.S.C. 3311);

(bb) section 170(d) of the Financial Stability Act of 2010 (12 U.S.C. 5370(d)); or

(cc) any other provision of law with requirements that the Administrator determines—

(AA) include robust public participation;

(BB) include significant agency consideration and analysis of whether the rule is achieving the regulatory objective of the rule; and

(CC) meet, are substantially similar to, or exceed the requirements of this subsection;

(III) for which the authorizing statute of the rule is subject to periodic authorization by Congress not less frequently than once every 10 years; or

(IV) for which the authorizing statute of the rule requires the promulgation of a new or revised rule not less frequently than once every 10 years; or

(ii) interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.

(B) *GOOD CAUSE EXEMPTION.*—In the case of a major rule for which the agency has not issued a notice of proposed rule making, the agency shall publish the framework required under paragraph (1)(B) in the Federal Register not later than 6 months after the date on which the agency publishes the final major rule.

(7) *JUDICIAL REVIEW.*—

(A) *IN GENERAL.*—Judicial review of agency compliance with this subsection—

(i) shall be strictly limited to—

(I) whether an agency published the framework for assessment of a major rule described in paragraph (1); or

(II) whether an agency published the assessment or subsequent assessment of a major rule described in subparagraphs (A), (C), and (D) of paragraph (2); and

(ii) shall not include a substantive review of the framework, assessment, or action of an agency under this subsection.

(B) *REMEDY AVAILABLE.*—In granting relief in an action brought under subparagraph (A), a court may only issue an order remanding the major rule to the agency to comply with paragraph (1) or subparagraph (A), (C), or (D) of paragraph (2), as applicable.

(C) *EFFECTIVE DATE OF MAJOR RULE.*—If, in an action brought under subparagraph (A)(i), a court determines that the agency did not comply, the major rule shall take effect not withstanding any order issued by the court.

(D) *ADMINISTRATOR.*—Any determination, action, or inaction of the Administrator shall not be subject to judicial review.