



**Legislative Bulletin.....July 9, 2008**

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**H.R. 5811**—Electronic Message Preservation Act

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**H.R. 5811— Electronic Message Preservation Act (*Waxman, D-CA*)**

**Order of Business:** The bill is scheduled to be considered on Wednesday, July 9, 2008, subject to a closed rule ([H.Res. 1318](#)), allowing no amendments. The rule provides one hour of debate equally divided by the chairman and ranking minority member of the Committee on Oversight and Government Reform. The rule waives all points of order against consideration of the bill (except those for PAYGO and earmarks). The rule provides for one motion to recommit the bill, with or without instructions, and allows the Chair to postpone consideration at any time.

**Summary:** H.R. 5811 amends the Federal Records Act (FRA) and the Presidential Records Act (PRA) to increase regulations regarding the collection, storage, and preservation of electronic messages generated by federal agencies and the White House. Specifically, the bill would require the National Archives and Records Administration (NARA) to promulgate new regulations regarding the capture and preservation of e-mail and other electronic records. The bill would also require federal agencies to preserve all electronic records and emails electronically within four years. The specific provisions of the bill are below.

***Preservation of Federal Agencies' Electronic Messages:*** H.R 5811 would require NARA, within 18 months of the bill's enactment, to issue new regulations regarding federal agencies' preservation of electronic messages. The bill would stipulate that the regulations, at a minimum, require the following:

- That the capture, management, and preservation of agencies' electronic message records meet the requirements of the FRA;
- That agency electronic message records are readily searchable through electronic searches;
- The establishment of mandatory functional requirements for agency "electronic management systems" in order to ensure that agencies meet the collection and searchability standards;

- The establishment of a process to certify that the agencies' electronic management systems meet their functionality requirements;
- The agencies to establish a timeline to meet the new regulations within four years.

H.R 5811 would require every federal agency to comply with the regulations issued by NARA. The bill would also stipulate that the Archivist would make periodic reviews of the regulations and amend them "as necessary."

*Presidential Records:* H.R. 5811 would require NARA to issue regulations regarding presidential records for the purpose of establishing "standards necessary for the economical and efficient management of presidential records during the president's term of office." The bill would require that these standards, at a minimum, include:

- Records management controls necessary to capture, manage, and preserve electronic messages;
- Records management controls necessary to ensure that electronic messages are readily accessible for retrieval through electronic searches;
- A process to certify that the president complies with the previous two requirements.

H.R 5811 would require the Archivist to annually certify whether the president's electronic management controls meet the standards required by the bill. In addition, the Archivist would be directed to report to Congress annually on the status of the president's records management standards and controls.

Finally, the measure would require the Archivist to report to Congress one year following a president's final term in office concerning the volume and format of presidential records that were handed over to NARA. The report would also include a determination by NARA as to whether the president met the preservation standards established by NARA under this legislation.

**Additional Background:** The [Federal Records Act of 1950](#) (FRA) establishes the legal structure for how federal agency records are collected, stored and managed. The law, as amended over the past 58 years, places regulatory and oversight authority of agency records preservation and management in the hands of the National Archives and Records Administration (NARA). NARA, which is administered by the Archivist of the United States, has the power to assess the importance of agency records, regulate how agency records are deposited, and preserve all federal agencies' records via the Federal Records Centers. Under the law, NARA issues a "records schedule" that describes common federal records and stipulates how agencies treat each different kind of record. Federal agencies may not destroy any records, unless it is stipulated by NARA's [General Record Schedule](#).

The Presidential Records Act of 1978 (PRA) established the procedures to be used by the president and vice president when dealing with official presidential records. Most notably, the law changed legal ownership of presidential records. Prior to PRA, a president's records were legally considered private, however, the law was changed to make all official presidential documents public. As such, presidential documents, with various exceptions, are now subject to the Freedom of Information Act. Under the law, the president is responsible for the collection,

preservation, and management of their records while they are in office and they may limit public access to official records for up to 12 years after their term for security reasons.

Currently, electronic records produced by agencies and the Administration are subject to two separate regulatory statutes—the FRA and the PRA respectively. H.R. 5811 amends both laws in order to address perceived records preservation deficiencies. According to the Government Accountability Office, many of the electronic files that are required to be saved by agencies under the FRA are saved as printed, hard copies rather than being stored in an electronic database. H.R. 5811 would require all federal agencies to store all of their electronic records, including messages, in a searchable, electronic manner. The bill would require each federal agency to establish a plan to switch from their print and file system to a fully electronic storage system within four years.

H.R. 5811 also fundamentally changes the regulatory requirements placed on the White House, under the PRA. According to the Committee on Oversight and Government Reform, in [House Report 110-709](#), recent investigations have indicated that, during the Bush Administration, there have been “significant deficiencies in the preservation of e-mail by the White House and federal agencies.” According to the report, top White House officials (namely, Karl Rove) used email accounts that were operated by the Republican National Committee (RNC) to conduct official Administration business. As the RNC is not subject to the PRA, their emails are not considered public and may be deleted at any time. In addition, the Committee states that the White House lost “hundreds of days’ worth of e-mails sent and received between 2003 and 2005.” The Committee also says that a former Bush Administration technology officer described the White House’s e-mail archiving and preservation system at the time as “primitive.” In an effort to address these accusations, H.R. 5811 would subject the White House to standards imposed by the Archivist.

In a [Statement of Administration Policy](#) (SAP) regarding H.R. 5811, the White House argues that current laws offer a sufficient avenue for collecting and preserving government records and that this legislation would “unwisely overturn the longstanding framework governing the management of an incumbent President’s records.” The bill would alter the current structure of presidential record preservation from the statutes established by the PRA by requiring the White House to be subject to the regulation and oversight of the Archivist and the NARA. Essentially, the bill would require the Administration to be subject to the same standards as federal agencies are under the FRA. In addition, H.R. 5811 would require the NARA to submit annual reports to Congress certifying that the Administration is adhering to electronic record collection and preservation standards established by the Archivist. According to the SAP, “Such authority is unprecedented and would mark a significant departure from accepted and longstanding practice.”

The Administration also expressed concerns with provisions in H.R. 5811 that amend the FRA to require federal agencies to preserve all of their e-mail and records electronically. According to the SAP, the requirement “could impose enormous unfunded costs on agencies.” The Administration also questions the Congressional Budget Office’s (CBO) estimate of the cost of the bill. According to CBO, the bill would cost a total \$13 million in FY 2009 and \$155 million over the FY 2009—FY 2013 period, subject to appropriation. However, the SAP cites testimony by NARA in which they estimate that the cost of complying with the new regulations would be

in the billions. In addition, the White House argues that the language of the bill “does not provide sufficient clarity” and, as a result, may give the NARA broad freedom to encroach on the activities of an incumbent president.

In additional views included in [House Report 110-709](#), Rep. Bill Sali (R-ID) expressed his concern that without “enforceable repercussion language,” H.R. 5811 does not give Congress or the NARA the authority to force agencies to comply with preservation standards. As a result, regulations issued by the Archivist would be toothless and the bill would do little to preserve important historical government records. Rep. Sali goes on to quote testimony citing the fact that no one has ever been prosecuted for failing to preserve federal records. Rep. Sali’s additional views conclude by suggesting that without enforceable consequences for destroying federal documents this legislation is tantamount to “political gamesmanship” aimed at “a small number of staffers, who allegedly deleted private e-mail accounts years ago.”

**Committee Action:** On April 15, 2008, H.R. 5811 was introduced and referred to the Committee on Oversight and Government Reform, which, on May 1, 2008, marked up the bill and ordered it reported to the full House by voice vote.

**Possible Conservative Concerns:** Some conservatives may be concerned that H.R. 5811 would require the National Archives and Records Administration (NARA) to issue regulations, and conduct oversight, concerning presidential e-mails and electronic records. Under the Presidential Records Act of 1978 (PRA), presidential records (which are considered public) are collected, preserved, and managed by the incumbent president. Some conservatives may be concerned that H.R. 5811 could alter the balance between the Legislative and Executive branches that was established by the PRA, by requiring outside regulation and Congressional review of the White House’s records management systems.

Some conservatives may be concerned that H.R. 5811 has no provision that allows federal agencies to enforce new electronic record preservation regulations with any legal or professional repercussions. As such, some conservatives may be concerned that H.R. 5811 is unenforceable, and thus, merely a costly way to reprimand the Bush Administration for its part in a politically charged dispute regarding the public availability of White House e-mails.

Finally, some conservatives may be concerned that there is no agreement on the actual cost of requiring federal agencies to record and store all electronic messages and documents in a searchable, electronic manner. Though CBO estimates that the legislation would cost \$13 million in FY 2009 and \$155 million over the FY 2009—FY 2013 period, their estimate readily admits that, “CBO is unaware of any comprehensive information on the current status of the electronic recordkeeping capabilities of the federal government or the costs to create an e-mail records system.” In a [Statement of Administration Policy](#) (SAP) regarding H.R. 5811, the White House cites NARA testimony that estimates the cost would more likely be in the billions. Some conservatives may be concerned that H.R. 5811 may result in unfunded and unenforceable requirements for federal agencies at an undetermined cost.

**Administration Position:** According to a [Statement of Administration Policy](#) (SAP) regarding H.R. 5811, if presented to the President in its current form, the President’s senior advisors would recommend he veto the bill.

**Cost to Taxpayers:** According to CBO, H.R. 5811 would cost \$13 million in FY 2009 and \$155 million over the FY 2009—FY 2013 period. However, in its estimate of the cost of the bill CBO states that it “is unaware of any comprehensive information on the current status of the electronic recordkeeping capabilities of the federal government or the costs to create an e-mail records system.”

**Does the Bill Expand the Size and Scope of the Federal Government?** No.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?** No.

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** According to the Committee on Oversight and Government Reform, in [House Report 110-709](#), “H.R. 5811 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.”

**Constitutional Authority:** The Committee on Oversight and Government Reform, in [House Report 110-709](#), cites constitutional authority in Article I, Section 8, Clause 18 (the “necessary and proper” clause).

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