



**Legislative Bulletin.....December 2, 2011**

**Contents:**

**H.R. 3010**—Regulatory Accountability Act of 2011

---

**H.R. 3010 — Regulatory Accountability Act of 2011  
(Smith, R-TX)**

**Order of Business:** The bill is scheduled to be considered on Friday, December 2, 2011, under a structured rule ([H.Res. 477](#)). The rule provides one hour of general debate equally divided and controlled by the chair and ranking member of the Committee on the Judiciary. It makes seven amendments in order described within this legislative bulletin and provides for one motion to recommit.

**Summary:** H.R. 3010 reforms the federal agency rulemaking process by amending the current law accountability and judicial review procedures included in the Administrative Procedures Act—a 1946 law commonly referred to as the “constitution” of federal agency rulemaking that has not been updated since its enactment. This bill is the second of two featured components of the [House Republican Plan for America’s Job Creators](#) scheduled for floor votes this week. The first, the Regulatory Flexibility Improvement Act of 2011 (H.R. 527), passed the House yesterday by a [263-159](#) vote. A section-by-section of H.R. 3010 summary is below:

➤ *Section 2. Definitions*

- Defines the following significant rulemaking terms:
  - **Major Rule**—a rule that the Administrator of the [Office of Information and Regulatory Affairs \(OIRA\)](#) determines is likely to impose:
    - an annual cost of \$100 million or more on the economy;
    - a major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;
    - significant adverse 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; or

- significant impacts on multiple sectors of the economy.
- This definition differs from the “major rule” definition provided in the Congressional Review Act of 1996 that measures rules that have a \$100 million annual “effect” on the economy;
- **High Impact Rule**—guidance that the OIRA determines is likely to impose an annual cost of \$1 billion or more on the economy;
- **Guidance**—a federal agency statement that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue; and
- **Major Guidance**—based on the same criteria for a major rule

➤ *Section 3. Rulemaking*

- Codifies the rulemaking principles of Executive Orders 12291, 12866, 13422, and 13563 which requires the rulemaking federal agency to consider:
  - the legal authority for the rule and other relevant statutory considerations;
  - the specific nature of the problem, whether it genuinely warrants new regulations, and countervailing risk that may be posed by alternatives for new agency action;
  - whether the problem could be adequately addressed by repealing or modifying existing regulations;
  - potential alternatives to adopting a new regulation including no federal response or a regional, state, local, or tribal government response; and
  - the potential costs and benefits—direct, indirect, and cumulative—associated with each alternative, as well as estimated impacts on jobs, economic growth, innovation, and economic competitiveness.<sup>1</sup>
- Requires Advance Notices of Proposed Rulemaking (ANPRs) 90 days before an agency may propose any major rule, high impact rule, or a rule involving novel legal or policy issues that arise from statutory mandates. These ANPRs must include the legal basis for potential rulemaking and information already known to the agency as well as the nature of and reasons to adopt the novel legal or policy position;
- Improves the Notice of Proposed Rulemaking (NPRM) requirements to ensure major and high impact proposed rules are based upon the ANPRs process. Before proposing a rule, the federal agency must consult with OIRA with the goal of determining:
  - whether a federal regulation is needed;
  - whether a rule’s benefits meet statutory objectives to justify its costs;

---

<sup>1</sup> This requirement does not require federal agencies to base their final rulemaking decisions in those settings on cost considerations, irrespective of other statutory considerations.

- whether the federal agency has conducted a preliminary risk assessment or regulatory impact analysis;
  - whether alternatives exist that could achieve statutory objectives at lower costs;
  - whether and why the agency has not proposed a lower-cost alternatives;
  - whether existing regulations or other laws have produced or contributed to the problem the federal agency seeks to correct; and
  - whether modification or repeal of other regulations or laws could resolve the problem more effectively than a new rule
- If the federal agency proceeds with the rulemaking after the ANPRs process, interested parties must receive 60 days to submit written comments related to the proposed rule. With any high impact proposed rule, there are additional requirements for a federal agency to proceed;
- Additional requirements are placed on federal agencies with regard to the final rulemaking stage as well including:
  - consulting with the OIRA Administrator;
  - relying solely on the best reasonably obtainable scientific, technical, and economic information;
  - adopting *only* the least-cost alternative considered during rulemaking that accomplishes the statutory goals unless the federal agency justifies why a more costly rule is needed;
  - publishing a notice of final rulemaking that provides a “concise, general statement of the rule’s basis and purpose,” and explanation of the need for the rule, the costs and benefits, any final risk assessment or regulatory impact analysis, and why the federal agency did not adopt an alternative rule or amend or rescind an existing rule.
  - publishing plans for periodic review of high impact and major rules to determine whether the federal agency’s final rule still is needed, achieves statutory objectives, and produces benefits that justify its costs or whether the rule could be modified or rescinded.
- Revises the interim final rule process to allow for publication of these during times of public urgency. However, this section requires a federal agency to conduct normal notice-and-comment rulemaking if it receives significant adverse comments on the interim final rule within 60 days.
- Requires OIRA to issue guidelines for agencies to follow as they assess scientific and economic issues in rulemaking including cost-benefit analysis and assessment of risks;
- Requires that federal agencies include in the rulemaking record “all documents and information prepared or considered by the agency during the proceeding” including, at the discretion of the President or the OIRA Administrator, communications from OIRA to the federal agency.

➤ *Section 4. Agency Guidance*

- Requires a federal agency to consult with the OIRA when issuing major guidance to ensure that the guidance:
  - is “understandable and complies with relevant statutory objectives and regulatory provisions”;
  - summarizes the underlying evidence;
  - identifies the costs and benefits of the guidance; and
  - describes alternatives to the guidance, their costs and benefits, and why the federal agency rejected them.
- Specifies that the federal agency guidance is not legally binding.

➤ *Section 5. Hearings*

- Adopts technical changes to existing law requirements for formal, on-the-record rulemaking hearings that support hearing-based reforms.

➤ *Section 6. Actions Reviewable*

- Clarifies that a federal agency’s denial of an Information Quality Act<sup>2</sup> correction petition or failure to grant or deny such petition within 90 days is reviewable by a court as a final action;
- Provides for immediate judicial review of federal agency decisions to establish interim final rules before complying with normal rulemaking requirements.

➤ *Section 7. Scope of Review*

- Clarifies the scope and standards of judicial review by:
  - allowing courts to review federal agency action for Information Quality Act violations;
  - prohibiting judicial deference to federal agency guidance and other interpretive statements made outside of the official rulemaking process as well as federal agency determinations of law and fact to support interim final rules; and
- Preserves traditional principles of judicial review and deference.

➤ *Section 8. Added Definition*

- Codifies the definition of the term “substantial evidence” provided by the Supreme Court decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).<sup>3</sup>

---

<sup>2</sup> The Information Quality Act requires federal agencies to issue guidelines assuring the quality of data used in decision-making and to provide opportunities for affected persons to correct the record.

<sup>3</sup> Defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of the record considered as a whole, taking into account whatever in the record fairly detracts from the weight of the evidence relied upon by the agency to support its decision.”

➤ *Section 9. Effective Date*

- The bill becomes effective immediately after enactment except for any pending rules and rules completed on the date of enactment..

**Amendments Made in Order:** The following seven amendments ruled in order by the Committee on Rules will each be debatable for 10 minutes equally divided by a proponent and opponent of the amendment:

1. ***Moore (D-WI)*** – This amendment requires that an agency shall take into account whether a problem the agency may address through regulatory action disproportionately impacts individual income earners below 200% of the federal poverty level, individuals over the age of 65 years of age, and veterans. Also, the agency must determine whether such an impact would be mitigated by new agency action.
2. ***Olson (R-TX)*** – This amendment requires that when a federal agency is analyzing a proposed rule, in addition to considering the rule’s direct, indirect, and cumulative costs on jobs, it must consider an estimate of the net gain or loss in domestic jobs.
3. ***Jackson Lee (D-TX)*** – This amendment removes a requirement that federal agencies provide advanced notice, not later than 90 days, of a proposed rule prior to it being published in the *Federal Register* and leaves it to federal agencies’ discretion to provide advanced notice.
4. ***Jackson Lee (D-TX)*** – This amendment strikes a section of the bill which allows any member of the public to petition for a federal agency hearing to determine whether the proposed rule fails to comply with the Information Quality Act.
5. ***Connolly (D-VA)*** – This amendment exempts from the bill any proposed rule, final rule, or agency guidance that relates to the safety of food, the safety of the workplace, air quality, the safety of consumer products, or water quality.
6. ***Nadler (D-NY)*** – This amendment exempts from the bill any proposed rule, final rule, or guidance made by the Nuclear Regulatory Commission under the Atomic Energy Act (42 U.S.C. 2011, et seq.). This amendment failed in the Committee markup of the bill by a vote of [13 to 16](#).
7. ***Jackson Lee (D-TX)*** – This amendment exempts from the bill all rules promulgated by the Homeland Security Department (DHS). **Note:** DHS is one of four federal agencies that promulgate most of the 3,000 to 4,000 final rules each year (according to the Congressional Research Service).

**Additional Background:** According to former Food and Drug Administration (FDA) regulatory development officer, Richard A. Williams, federal agencies’ only incentive is to regulate—there is no incentive *not* to issue a new regulation:

“...there is no discussion [within agencies] of whether or not a regulation is required. There is also no discussion as to whether there is a failure of the market or some other reason for regulatory intervention; whether the market will solve the problem in the near future without intervention (baseline analysis); or if there is a need for federal, as opposed to some other level of government, intervention...the regulatory analysis analyzes a decision, not a problem.”<sup>4</sup>

**Outside Organizations “Key Voting” Passage:** Associated Builders and Contractors, Inc., National Association of Home Builders, National Association of Manufacturers, National Federation of Independent Business, and the U.S. Chamber of Commerce.

**Committee Action:** Judiciary Chairman Lamar Smith (R-TX) introduced H.R. 3010 on September 22, 2011, which was then referred to the Committee on the Judiciary. The Judiciary Subcommittee on Courts, Commercial and Administrative Law held four legislative hearing on reforming the Administrative Procedures Act on February 28<sup>th</sup>, March 29<sup>th</sup>, May 4<sup>th</sup>, and May 31, 2011. The full Committee held a legislative hearing on the bill on October 25, 2011. On November 3, 2011, the full Committee reported the amended bill favorably by a roll call vote of [16-6](#).

**Administration Position:** The Administration released a Statement of Administration Policy (SAP) on November 29, 2011 “strongly” opposing the bill.

**Cost to Taxpayers:** The Congressional Budget Office (CBO) released a cost [estimate](#) on November 21, 2011 stating that implementing the bill would cost \$70 million subject to appropriations over the 2012-2016 period due to increased “...governmental costs of additional personnel, contractor costs, and other administrative expenses associated with meeting the new requirements...” Reports indicate that the deficit reduction saving’s estimate for [H.R. 3463](#)—that the House [passed](#) yesterday—will be used as an offset for H.R. 3010.

**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?:** CBO expects that the bill would not impose any intergovernmental or private-sector mandates. .

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?:** According to the Committee report, H.R. 3010 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

**Constitutional Authority:** The Constitutional Authority Statement accompanying the bill upon introduction states:

---

<sup>4</sup> pg. 24 of the Committee [report](#).

“Congress has the power to enact this legislation pursuant to the following:  
Article I, Section 1 of the United States Constitution, and Article I, Section 8 of  
the United States Constitution, including, but not limited to, Clauses 1, 3 and 18.

**RSC Staff Contact:** Joe Murray, [joe.murray@mail.house.gov](mailto:joe.murray@mail.house.gov), (202) 226-0678

###