

New Federal Initiatives Project

**Key Provisions of the Regulatory
Accountability Act**

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Key Provisions of the Regulatory Accountability Act

Background

On December 2, 2011, the United States House of Representatives passed the Regulatory Accountability Act of 2011 (H.R. 3010). This legislation would amend the Administrative Procedure Act (APA), which governs the federal rulemaking process. It would codify existing rulemaking requirements contained in executive orders and create new rulemaking requirements.

Key Provisions

Specifically, the bill would:

1) Require Agencies to Conduct Cost-Benefit Analysis of Their Regulations

Agencies already are required to conduct cost-benefit analysis under existing executive orders. The proposed legislation would codify this requirement in the APA.

When considering the potential costs and benefits, agencies shall consider "direct, indirect, and cumulative costs and benefits and estimated impacts on jobs (including an estimate of the net gain or loss in domestic jobs), economic growth, innovation, and economic competitiveness."

2) Generally Require Agencies to Adopt the Least Costly Alternative

A cost-benefit analysis requirement would have little meaning if the analysis were simply an academic exercise. The legislation requires that agencies "shall adopt the least costly rule considered during the rule making...that meets relevant statutory objectives."

This last provision is important because it clarifies that the objectives of the statute are not to be compromised simply because a proposed rule may be less costly.

But, an agency may adopt a more costly alternative that achieves statutory objectives "only if the additional benefits of the more costly rule justify its additional costs and only if the agency explains its reason for doing so based on interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule."

3) Expand Requirements to Independent Agencies

The new rulemaking requirements also would be imposed on independent agencies. Since executive orders may not dictate the process that these independent bodies must follow, a statutory change would be required to cover their rulemaking.

On July 11, 2011, President Obama issued Executive Order 13579 that *requested* that independent agencies meet regulatory requirements applicable to executive agencies. Any President would no longer need to make such a request—critical rulemaking procedures would be mandated for all agencies including independent agencies that often promulgate major rules.

4) Require Advance Notice of Proposed Rulemaking for Major Rules, High Impact Rules, and Rules Involving Novel Legal or Policy Issues

Agencies must publish an advanced notice of proposed rulemaking (ANPRM) in the Federal Register at least 90 before publishing a notice of proposed rulemaking (NPRM).

In the advanced notice, the agency must detail several things, including the legal authority for the rule and "solicit written data, views or argument from interested persons concerning the information and issues addressed in the advance notice." Interested parties would have at least 60 days to provide their submissions to the agency.

The following definitions would apply:

Major Rule

"Any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose--

- an annual cost on the economy of \$100,000,000 or more, adjusted annually for inflation;
- 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."

High-Impact Rule

"Any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose an annual cost on the economy of \$1,000,000,000 or more, adjusted annually for inflation."

There is no definition of a "novel legal or policy issue."

5) Require New Hearings

Major Rules

A hearing for major rules would be available to affected parties "unless the agency reasonably determines that a hearing would not advance consideration of the rule or would, in light of the need for agency action, unreasonably delay completion of the rule making."

High-Impact Rules

Agencies would be required to hold hearings on high-impact rules unless all affected parties waive the hearings. It is unclear how it could be determined that in a rulemaking proceeding, as opposed to an adversarial process, all parties have waived the right to a hearing.

The hearing would provide parties, through a public forum, an opportunity to cross-examine witnesses and to create a written record regarding key assumptions and conclusions made by the agency. This would include challenging whether the agency has selected the least costly alternative and whether the evidence and information relied upon meet the requirements of the Information Quality Act (which requires agencies to use sound data).

6) Require Best Scientific Evidence Available

Agencies may only adopt rules "on the basis of the best reasonably obtainable scientific, technical, economic, and other evidence and information concerning the need for, consequences of, and alternatives to the rule."

7) Provide For Judicial Review

Courts would be able to review whether agencies properly met the new requirements of this law. The judiciary historically has given significant deference to agency decision-making, approving agency decisions unless they are "arbitrary, capricious, or manifestly contrary to statute." *See Chevron v. Natural Resources Defense Council.*

The legislation would create a higher standard of review called "substantial evidence" review when examining rules that go through a hearing process. According to the bill, "'substantial evidence' means 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."

Courts may not defer to an agency when certain requirements are not met, such as any cost-benefit analysis requirement. They also shall not defer to agencies when it comes to "determinations made in the adoption of an interim rule" and agency guidance.

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Related Links:

Executive Order 12044

<http://www.presidency.ucsb.edu/ws/index.php?pid=30539#axzz1gtjVJZwz>

Executive Order 12291

<http://www.archives.gov/federal-register/codification/executive-order/12291.html>

Executive Order 12866
<http://www.epa.gov/fedrgstr/eo/eo12866.htm>

Executive Order 13563
<http://www.sba.gov/advocacy/808/13797>

Executive Order 13579
<http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies>

Chevron v. Natural Resources Defense Council
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0467_0837_ZO.html

Regulatory Accountability Act of 2011
[http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03010:](http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.03010)

House Report 112-294
[http://thomas.loc.gov/cgi-bin/cpquery/R?cp112:FLD010:@1\(hr294\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp112:FLD010:@1(hr294))

Congressional Budget Office Cost Estimate
<http://www.cbo.gov/ftpdocs/125xx/doc12565/hr3010.pdf>