



**Section-by-Section Analysis**  
**S. 951**  
**The Regulatory Accountability Act of 2017**

Section 1. Short Title

Section 2. Definitions

- The bill incorporates the APA’s existing definition of “agency,” which includes independent agencies. As such, all of the bill’s requirements apply to independent agencies.
- The bill adopts a standard definition of “guidance” documents.
- The bill defines “high-impact” rules as those with an annual economic “effect” of \$1 billion or more.
  - o *Comments.* Note that previous versions of the bill defined the term based on annual economic “cost,” which implies that the bill’s more burdensome provisions might not apply to “deregulatory” actions. A very troubling aspect of this definition is that the power of determining whether a rule meets the definition of being “high-impact” is committed solely to the OIRA Administrator’s discretion.
- The bill adopts a standard definition of “major guidance.”
  - o *Comments.* Significantly, this definition specifically includes guidance with an annual economic “effect” of \$100 million or more. Note that previous versions of the bill defined the term based on annual economic “cost,” which implies that the bill’s more burdensome provisions might not apply to “deregulatory” actions. A very troubling aspect of this definition is that the power of determining whether a guidance document meets the definition of being “major” is committed solely to the OIRA Administrator’s discretion.
- The bill adopts a standard definition of “major rule.”
  - o *Comments.* Significantly, this definition specifically includes rules with an annual economic “effect” of \$100 million or more. Note that previous versions of the bill defined the term based on annual economic “cost,” which implies that the bill’s more burdensome provisions might not apply to “deregulatory” actions. A very troubling aspect of this definition is that the power of determining whether a rule meets the definition of being “major” is committed solely to the OIRA Administrator’s discretion.
- The bill adopts a standard definition of “Office of Information and Regulatory Affairs” and “Administrator”

### Section 3. Rulemaking

- Overview: This section of the bill includes:
  - o The rulemaking considerations that agencies must account for when developing new rules.
  - o The analytical and procedural requirements that agencies must undertake for notices of proposed rulemaking.
  - o The analytical and procedural requirements that agencies must undertake when initiating a rulemaking for a “major” or “high-impact” rule. Note that these requirements essentially function as an advanced notice of proposed rulemaking.
  - o The requirements for formal, on-the-record rulemaking hearings for “high-impact” rules.
  - o The analytical and procedural requirements that agencies must undertake before adopting final rules.
  - o Limitations on the applicability of the APA’s rulemaking requirements, as amended by the Senate RAA.
  - o Requirements for setting the date of publication of final rulemakings.
  - o Provisions for public petitions for rulemakings and to review existing rules.
  - o Authorization for OIRA to establish various kinds of rulemaking guidelines.
  - o The analytical and procedural requirements that agencies must undertake before issuing guidance documents.
  - o The analytical and procedural requirements must undertake to periodically review their “major” and “high-impact” rules.
  
- **Rulemaking considerations**
  - o For all rules, this subsection directs agencies to demonstrate that they have accounted for up to 12 rulemaking considerations when developing the rules. The more troubling rulemaking considerations include the following:
    - A mandate to consider a “reasonable number of alternatives” for a new rule (with three alternatives presumed to be a reasonable number) (subsection (b)(4))
    - For “major” and “high-impact” rules, a mandate to carry out various economic and other analyses of the rule and each of the alternative considered, unless specifically prohibited by law.
      - *Comments.* Many of these analyses would be burdensome and expensive to carry out and would delay pending rulemakings. In many cases, these analyses are inherently one-sided in that they are either narrowly focused on the impacts that the rules will have on regulated industries or are designed to force agencies to prioritize concerns for those impacts ahead protecting the public in their decision-making. As such, and because they are judicially reviewable, these analyses will also give corporate special interests powerful new avenues for demanding changes that would weaken the rule’s provisions to make them less protective of the public.
      - Examples:

- The subsection directs agencies to conduct a quantitative analysis of “direct” costs and benefits (subsection (b)(5)(A)); “cumulative” costs and benefits (subsection (b)(5)(C)); and “indirect” costs and benefits (subsection (b)(5)(C))
  - The subsection further changes agencies with analyzing “the nature and degree of risks addressed by the rule” as well as any “countervailing risks that might be posed by agency action” (subsection (b)(5)(B))
- **Notice of proposed rulemaking**
  - For all rules, this subsection requires agencies to take the following steps before publishing a notice of proposed rulemaking:
    - Determine that the objectives of the agency “require” the agency to issue a rule (subsection (c)(1)).
      - *Comments.* This requirement is problematic, because read literally it could constrain agencies ability to issue rules that advance an agency’s statutory mission even if the particular action is not strictly speaking necessary for the achievement of the agency’s statutory mission.
    - Notify the OIRA Administrator of its intention to issue a proposed rulemaking (subsection (c)(1)).
      - *Comments.* This requirement is problematic because it invites politicized interference into agencies’ pending rulemaking as currently occurs through OIRA’s centralized review of rules under Executive Orders 12866 and 13563.
  - For all rules, this subsection further directs agencies to ensure that each notice of proposed rulemaking they publish satisfies up to 11 requirements, of which 7 requirements would be mandated for the first time under the Senate RAA. The most troubling of these requirements include the following:
    - For “major” and “high-impact” rules, a mandate to carry out various procedural requirements regarding the proposed rule and each of the alternative considered, to the extent these processes can be carried out consistent with applicable law.
      - *Comments.* Many of these procedural requirements would be burdensome and expensive to carry out and would serve to delay pending agency rulemakings. In many cases, these procedural requirements are inherently one-sided in that they would force agencies to narrowly focus on the impacts that the proposed rule would potentially have on regulated industries, or they are designed to force agencies to prioritize concerns for those impacts ahead protecting the public in their decision-making. As such, and because they are judicially reviewable, the satisfaction of these procedural requirements will also give corporate special interests powerful new avenues for demanding changes that would weaken the rule’s provisions to make them less protective of the public.

- Examples:
  - The subsection directs agencies to discuss how the agency evaluated the costs and benefits of all the alternatives it considered (subsection (c)(1)(E)(ii)(I)) and then explain how the agency’s determination that the benefits of the proposed rule “justify” the costs (subsection (c)(1)(E)(i)(II))
  - The subsection further directs agencies to discuss why it did not choose one of the alternatives it considered for its proposal (subsection (c)(1)(E)(ii)(III))
- This subsection also includes several other requirements agencies must satisfy in connection with proposing a rule.
  - The subsection directs agencies to place in the rulemaking docket of all information developed or relied upon by the agency and any actions taken by the agency to obtain that information in connection with its decision to propose the rule (subsection (c)(2)(A))
    - *Comments.* Satisfying this requirement could be very burdensome and expensive for agencies. The expense might discourage agencies from relying on certain kinds of information that would have helped justify a more protective rule.
  - The subsection requires agencies to ensure that their proposals are based on the “best reasonably available scientific, technical, or economic information” (subsection (c)(3))
    - *Comments.* This requirement invites OIRA and judicial interference in agency use of science and wasteful litigation
  - The subsection would empower the OIRA Administrator to newly determine that any rule is “major” or “high-impact,” after it has been proposed. In the event that the OIRA Administrator makes this new determination, the agency must publish a public notice of the change in determination and provide an additional opportunity for public comment of at least 30 days (subsection (c)(5)).
    - *Comments.* This provision could potentially disrupt and delay pending rulemakings. OIRA might be induced to exercise this authority in response to intense lobbying from corporate special interests that would be inconvenienced by the proposed rule
  - The subsection prohibits agency officials, as well as on other individuals associated with the agency, from advocating for or against a proposed rule (subsection (c)(6))
    - *Comments.* The subsection’s attempts to delineate between acceptable and unacceptable forms of communication are far from clear. This provision is likely to result in wasteful litigation or, even worse, could have a chilling effect that discourages agency officials from engaging in otherwise proper communications with the public meant to encourage their participation in the rulemaking process

- **Initiation of rulemaking for “major” and “high-impact” rules**
  - This subsection directs agencies to take the following actions when initiating a rulemaking that “may result” in a “major” or “high-impact” rule:
    - Establish an electronic rulemaking docket (subsection (d)(1)(A))
    - Publish a notice of initiation of rulemaking, which is meant to function similarly to an advanced notice of proposed rulemaking (subsection (d)(1)(B))
  - This subsection further directs agencies to ensure that each notice of initiation of rulemaking they publish satisfies up to 6 requirements.
    - *Comments.* The most troubling requirement for the notice of initiation of rulemaking mandates that agencies invite member of the public to “propose alternatives and other ideas” for how the agency can accomplish its objectives (subsection (d)(1)(B)(iii). This provision threatens to invite well-resourced special interests to inundate agencies with irrelevant, specious, or otherwise unhelpful proposed alternatives.
  - This subsection further directs agencies to include in the rulemaking docket any information it receives from the public in response to its notice of initiation of rulemaking (subsection (d)(2)), but it places limitations on how that information must be used by the agency (subsection (d)(3))
  - This subsection further directs agencies to establish rulemaking “timetables” for the rule (subsection (d)(4))
    - The agency must include the rulemaking timetable as part of the rulemaking docket, and the rulemaking timetable must include anticipated deadlines for issuing the final rule along with any relevant intermediate rulemaking steps (subsection (d)(4)(A))
    - If the agency fails to meet any of the deadlines in its timetable, it must submit a report to Congress and the OMB Director that explains the failure and provides a new timetable. The agency must also publish the report in the Federal Register and in the rulemaking docket (subsection (d)(4)(C))
  - This subsection further directs agencies to publish a “notice of determination of other agency course” if the agency elects not to issue a “major” or “high-impact” rule in response to a notice of initiation of rulemaking that includes a description of the alternative agency response (subsection (d)(5))
  
- **Public hearing for “high-impact” and certain “major” rules**
  - This subsection authorizes members of the public to petition for a “public hearing” for rules that the OIRA Administrator has determined are “high-impact” or are “major” as a result of having an annual economic effect of \$100 million or more (subsection (e)(1)(A)).
    - *Comments.* The increased use of what are essentially formal, on-the-record rulemaking hearings that this subsection would yield is extremely troubling. These types of hearings were all but dispensed with several decades ago because they were impracticable, wasteful, burdensome, and resulted in lengthy delays of pending rules. Ordinary Americans and small businesses will lack the resources to participate meaningfully in these “public hearings.” Instead, they will be dominated by well-resourced

corporate special interests. The highly skewed participation rates in these “public hearings” is especially concerning because their outcomes are intended to significantly influence the substance of pending rulemakings. The expense of conducting these “public hearings” will limit agencies’ ability to carry out their statutory missions, especially at a time when agencies face severe resource shortfalls. The delays these “public hearings” will cause in the implementation of public interest laws means that the public will continue to be left unprotected against the very risks of harm that the rulemaking is intended to address, while regulated industry will continue avoiding responsibility for imposing that risk through their dangerous products or behavior.

- This subsection generally directs agencies to hold a “public hearing” regarding their proposed “high-impact” rules whenever a member of the public petitions for one (subsection (e)(1)(B)(i))
  - *Comments.* The “public hearings” that would be required are so burdensome that agencies are likely to forego any rulemakings that would involve their use. Since the Senate RAA would amend the APA to make it nearly impossible to avoid “public hearings” for “high-impact” rules, the pursuit of these rules is likely to be abandoned. While this provision provides agencies with limited discretion to reject petitions for “public hearings” on their “high-impact rules,” the agency’s determination to deny a petition is subject to judicial review (subsections (e)(1)(B)(ii) and (e)(4)(B)). Rather than taking the risk of getting remanded on a procedural misstep, agencies will likely either grant the petition for a “public hearing” or forego the rulemaking altogether.
- This subsection also generally permits agencies to deny a petition for “public hearing” regarding their proposed rules that are “major” as a result of having an annual economic effect of \$100 million or more if the agency determines that the hearing would not advance its consideration of the proposed rule, the hearing would cause undue delay, or if the factual issues raised in the petition could have been addressed during certain kinds of earlier rulemakings (subsection (e)(1)(C))
- This subsection further directs agencies to publish a notice of “public hearing” that specifies the proposed rule that is the subject of the “public hearing” and the factual issues to be considered at the hearing (subsection (e)(2))
- This subsection also establishes the general requirements for “public hearings,” including the limited scope of their subject matter, the allocation of the burden of proof, and limitations on the admissibility of evidence.
  - This subsection further directs agencies to adopt their own rules governing the conduct of “public hearings,” including for the appointment of presiding judges, the basic rules of evidence, the use of cross-examination, and the consolidation of separate proceedings into a single hearing (subsection (e)(3)(A)-(B)).
  - This subsection further provides that the transcript for the “public hearing” constitutes the exclusive record any decisions on issues addressed at the “public hearing” (subsection (e)(3)(C))

- This subsection clarifies that failure to petition for a “public hearing” on a given factual issue does not preclude consideration of that issue as part of judicial review for the final rule (subsection (e)(4)(A))
  - This subsection further clarifies that an agency’s denial of petition for a “public hearing” is judicially reviewable, but that such judicial review must take place as part of the judicial review of the final agency rule that would have been the subject of the “public hearing” (subsection (e)(4)(B))
- **Final rules**
- For “major” and “high-impact” rules, this subsection directs agencies to adopt for its final rule the most “cost-effective” alternative it considered as part of its general rulemaking considerations that meets relevant statutory objectives. This subsection permits an agency to adopt a more costly alternative than the most cost-effective that it considered, provided that the agency (1) can demonstrate that the additional benefits justify the additional costs, (2) can specifically identify each additional benefit of the more costly alternative and the cost of that additional benefit, and (3) can explain why it adopted a more costly rule than the most cost-effective alternative (subsection (f)(1)).
    - *Comments.* This requirement is problematic because it places a statutory “ceiling” on the public protections agencies may seek to provide with their rulemakings. The effect of this ceiling is to force agencies to prioritize industry profits ahead of the public interest. While this provision would permit agencies to adopt a more costly rule, this exception from its general “cost-effectiveness” requirement is essentially meaningless. Agencies would never be able to satisfy the provision’s requirements for adopting a more costly rule. The requirements are so daunting agencies would likely not even attempt to take them, particularly given the limited resources they have at their disposal and given the risk averse approach many agencies take to developing pending rules.
  - For all rules, this subsection further directs agencies to ensure that each notice of final rulemaking they publish satisfies up to 6 requirements, of which 5 requirements would be mandated for the first time under the Senate RAA. The most troubling of these requirements include the following:
    - For “major” and “high-impact” rules, a mandate to carry out various procedural requirements regarding the final rule and each of the alternatives considered.
      - *Comments.* Many of these procedural requirements would be burdensome and expensive to carry out and would serve to delay pending agency rulemakings. In many cases, these procedural requirements are inherently one-sided in that they would force agencies to narrowly focus on the impacts that the final rule would potentially have on regulated industries, or they are designed to force agencies to prioritize concerns for those impacts ahead protecting the public in their decision-making. As such, and because they are judicially reviewable, the satisfaction of these procedural requirements will also give corporate special interests

powerful new avenues for demanding changes that would weaken the rule's provisions to make them less protective of the public.

- Examples:
    - The subsection directs agencies to document that the final rule's benefits "justify" its costs (subsection (f)(2)(D)(i))
    - The subsection directs agencies to document either that none of the alternatives the agency considered would achieve relevant statutory objectives in a more cost-effective manner or that the agency's adoption of a more costly alternative meets the relevant requirements under the APA, as amended by the Senate RAA (subsection (f)(2)(D)(ii))
  - This subsection also includes several other requirements agencies must satisfy in connection with publishing a final rule.
    - The subsection requires agencies to ensure that their final rules are based on the "best reasonably available scientific, technical, or economic information" (subsection (f)(3))
      - *Comments.* This requirement invites judicial interference in agency use of science and wasteful litigation
    - The subsection directs agencies to place in the rulemaking docket of all information developed or relied upon by the agency and any actions taken by the agency to obtain that information in connection with its decision to publish the final rule (subsection (f)(4)(A))
      - *Comments.* Satisfying this requirement could be very burdensome and expensive for agencies. The expense might discourage agencies from relying on certain kinds of information that would have helped justify a more protective rule.
    - The subsection authorizes agencies to delay the effective date by up to 90 days of certain final rules during the 60-day period beginning on the presidential inauguration day. The rules that can be delayed are those final rules submitted to the Federal Register for publication or those that have been published in the Federal Register but that had not become effective by the presidential inauguration (subsection (f)(5)).
      - *Comments.* This provision would invite unnecessary delays in rulemakings at the beginning of presidential administrations, leaving the public inadequately protected against the harms the rules were meant to address. This provision might also have the perverse effect of encouraging outgoing presidents to rush rules through end of the rulemaking process, which could result in lower quality rules.
- **Applicability**
- This subsection includes what is meant to serve as a savings clause aimed at preventing the various analytical and procedural requirements the Senate RAA would impose from operating as "supermandates" that serve to override existing laws, many of which different kinds of procedures or that regulatory decision-

making be based on different kinds of analyses. In particular, this provision clarifies that the mandated analytical and procedural requirements do not apply to rulemakings where the authorizing statute would prohibit those requirements or for which the requirements would conflict with any relevant provisions in the authorizing statute (subsection (g)(1)).

- *Comments.* In practice, this savings clause will likely have little effect. In many cases, this provision will lead to expensive and burdensome litigation, as industry opponents of particular rules will likely argue that the various procedural and analytical requirements are consistent with the underlying authorizing statutes and thus do not implicate the Senate RAA's vague savings clause. In other cases, risk averse agencies will likely seek to avoid such litigation by undertaking these procedural and analytical requirements in situations where it is unclear if the savings clause would apply. Even in situations where an agency is clearly not obliged to carry out an analytical and procedural requirement, that requirement still can subtly influence agency decision-making. For example, existing executive orders requiring cost-benefit analysis – even though not legally binding – still compel agencies to issue weaker rules under statutes that specifically prohibit the use of cost-benefit analysis to guide decision-making.
- This subsection maintains the APA's general exemption of certain kinds of guidance documents from the APA's rulemaking requirements, as amended by the Senate RAA (subsection (g)(2))
- This subsection overhauls the APA's existing provision that exempts agencies from complying with applicable rulemaking requirements based on a "good cause" finding that compliance with such requirements would be impracticable, unnecessary or contrary to the public interest.
  - The subsection provides that where good cause exists the agencies need not comply with the APA's rulemaking requirements, as amended by the Senate RAA, including those analytical and procedural requirements for notices of proposed rulemakings, initiations of rulemakings for "major" or "high-impact" rules, "public hearing" for "high-impact" and certain "major" rules, and certain requirements for the notice of final rulemaking. Instead, the agency can proceed with a "direct final rule" or "interim final rule" depending on the circumstances (subsection (g)(3)(A)).
  - The subsection outlines the procedures an agency must follow if it proceeds with a "direct final rule" based on its good cause finding that compliance with the APA's rulemaking requirements, as amended by the Senate RAA, would be unnecessary. In general, the subsection requires the agency to publish a notice of final rulemaking and solicit public comment. If the agency receives significant adverse comment on the final rule, it must withdraw it and initiate a new rulemaking for the rule that complies with the APA's applicable rulemaking requirements, as amended by the Senate RAA (subsection (g)(3)(B)).
  - The subsection outlines the procedures an agency must follow if it proceeds with an "interim final rule" based on its good cause finding that

compliance with the APA's rulemaking requirements, as amended by the Senate RAA, would be impracticable or contrary to the public interest. In general, the subsection requires the agency to publish a notice of final rulemaking and solicit public comment on it. Within 180 days after the notice of final rulemaking is published, the agency must rescind the "interim final rule," initiate a new rulemaking for a rule that complies with the APA's applicable rulemaking requirements, as amended by the Senate RAA, or adopt a final rule. When the 180-day period expires, the "interim final rule" no longer has the force of law. (subsection (g)(3)(C)).

- The subsection generally exempts rulemakings related to monetary policy from the APA's rulemaking requirements, as amended by the Senate RAA (subsection (g)(4))

- **Date of publication**

- This subsection requires, with certain exceptions, that agencies publish the notice of final rulemaking at least 30 days before the final rule is set to take effect, and in the case of "major" or "high-impact" rules, the agency must publish the notice of final rulemaking at least 60 days before the final rule is set to take effect (subsection (h))

- **Right to petition and review of rules**

- This subsection maintains the APA's existing process for allowing the public to petition for the issuance, amendment, or repeal of a rule (subsection (i)(1))
- This subsection adds a new process by which the public suggest to agencies those of their existing rules that should be reviewed for potential repeal or modification (subsection (i)(2))
  - *Comments:* This provision threatens to invite well-resourced special interests to inundate agencies with suggestions for existing rules to review. Responding to all of these suggestions could become a burdensome and expensive undertaking that would prevent agencies from carrying out affirmative actions to advance their statutory mission, and this threat is particularly grave given the severe resource constraints agencies are likely to face in coming years.

- **Rulemaking guidelines**

- This subsection directs the OIRA Administrator to establish guidelines that govern how agencies would carry out many of the analytical and procedural requirements mandated by the APA, as amended by the Senate RAA. These guidelines would address how agencies analyze the rule's costs and benefits, carry out their cost-effectiveness determinations, and conduct risk assessments (subsection (j)(1)(A)).
  - *Comments:* This provision would endow the OIRA Administrator with a lot of troubling power over the substance of agency decision-making. The analytical and procedural requirements covered by these guidelines are intended to have a significant influence over how agencies develop rules. By carefully shaping these guidelines to systematically privilege or

- discount certain kinds of regulatory impacts, the OIRA Administrator can thus seek to dictate the substance of agency rules. The set of guidelines concerning how agencies conduct risk assessments is particularly troubling. This would invite the OIRA Administrator to interfere in how agencies incorporate scientific matters into their regulatory decision-making, even though OIRA has little institutional expertise on these issues, particularly compared to expert agencies. Instead, these guidelines will likely serve as a conduit for industry to second-guess agency science in order to defeat or undermine the protections that rules offer.
- This subsection further authorizes the OIRA Administrator to determine how rigorous agencies' cost-benefit analyses need to be (subsection (j)(1)(B)(i))
    - *Comments:* This provision would endow the OIRA Administrator with troubling powers to force agencies to conduct ever more complex and burdensome cost-benefit analysis at the risk of delaying pending safeguards and wasting scarce agency resources. In the worst case scenario, the OIRA Administrator would force agencies to conduct more burdensome cost-benefit analyses on behalf of politically powerful corporate special interests.
  - This subsection further specifies what elements the OIRA Administrator can include in its risk assessment guidelines, which include the selection of studies and models, the evaluation and weighing of evidence, and the conduct of peer reviews (subsection (j)(1)(B)(ii))
    - *Comments:* This provision would invite the OIRA Administrator to interfere in how agencies incorporate scientific matters into their regulatory decision-making. OIRA has little, if any, institutional expertise on such complex science matters as the selection of studies and models, the evaluation and weighing of evidence, and the conduct of peer reviews – particularly when compared to expert agencies. Instead, these guidelines will likely serve as a conduit for industry to second-guess agencies on the critical issues in order to defeat or undermine the protections that rules offer.
  - This subsection further directs the OIRA Administrator to update the guidelines for conducting economic and other analyses that are required by the APA, as amended by the Senate RAA, at least once every 10 years (subsection (j)(1)(C))
  - This subsection further directs the OIRA Administrator to issue guidelines that would push agencies to design their rules to promote “coordination” with other relevant rules, “simplification” of the rule’s provisions, and “harmonization” with other relevant rules (subsection (j)(2))
    - *Comments:* In general, the goals of greater coordination, simplification, and harmonization in regulatory design are good. To the extent that these concepts are vague, however, these guidelines could potentially grant the OIRA Administrator significant power to dictate the substance of agency rules. In the worst case scenario, the OIRA Administrator would use these guidelines as a means for weakening regulatory protections on behalf of politically powerful corporate special interests.

- This subsection further directs the OIRA Administrator to issue guidelines that would push agencies to design their rules to maximize consistency with the analytical and procedural requirements mandated by the APA, as amended by the Senate RAA. One purpose of these guidelines is to ensure that agency use of other statutes' analytical and procedural requirements conform as much as possible with those mandated by the APA, as amended by the Senate RAA. Another purpose is to push agencies to follow uniform procedures in how they conduct the “public hearings” that would be required by the Senate RAA (subsection (j)(3))
  - *Comments:* This provision is troubling because it would further undermine the effectiveness of the Senate RAA’s so-called savings clause. These guidelines would in effect task OIRA with ensuring that agencies do not take more than that savings clause gives them.
- **Agency guidance; procedures to issue major guidance; authority to issue guidelines for issuance of guidance**
  - This subsection outlines the basic requirements agencies must follow with respect to issuing guidance documents (subsection (k)(1))
  - This subsection directs agencies to ensure that major guidance document they issue satisfies up to 6 requirements. The most troubling of these requirements include the following:
    - A mandate to carry out various analytical and procedural requirements regarding the major guidance document.
      - *Comments.* Many of these analyses and procedures would be burdensome and expensive to carry out and would unduly delay the issuance of guidance documents. These delays would harm regulated business the most, since the purpose of guidance documents is to alleviate regulatory uncertainty by clarifying applicable compliance responsibilities for relevant regulations. Indeed, these guidance documents are often produced in response to industry requests. In many cases, these analyses are inherently one-sided in that they are either narrowly focused on the impacts that the major guidance documents will have on regulated industries or are designed to force agencies to prioritize concerns for those impacts ahead protecting the public in how these major guidance documents are drafted.
      - Examples:
        - Identification of the direct costs and benefits the major guidance document would impose (subsection (k)(2)(A)(ii))
        - Identification of the indirect costs and benefits the major guidance document would impose (subsection (k)(2)(A)(ii))
        - Identification of the cumulative costs and benefits the major guidance document would impose (subsection (k)(2)(A)(ii))
    - Review of the major guidance document by the OIRA Administrator. Among other things, this review is intended to ensure, among other things,

that the guidance document does not produce costs that are unjustified by its benefits (subsection (k)(2)(B))

- *Comments.* This provision would further delay the issuance of major guidance documents. It would invite politicized interference in how major guidance documents are drafted. It would put further pressure on agencies to narrowly focus on the impacts that their major guidance documents might have on regulated industries or to prioritize concerns for those impacts ahead protecting the public in how these major guidance documents are drafted.
- This subsection directs the OIRA Administrator to establish guidelines that govern how agencies develop guidance documents (subsection (k)(3))
  - *Comments.* In general, the issues that the OIRA Administrator is directed to cover in these guidelines are not objectionable on their face. However, they are sufficiently vague to invite politicized interference by the OIRA Administrator in agency development of guidance documents.

- **Major rule and high-impact rule frameworks**

- This subsection directs agencies to develop a “framework” for retroactively reviewing their “major” and “high-impact” rules while those rules are under development. Agencies must outline a “potential framework” at the time that they publish the proposal. Agencies must establish the final “framework” at the time they issue the final rule (subsection (l)(1)).
  - *Comments.* As a general matter, the concept of periodically reviewing existing rules makes good sense. The overall approach taken by the Senate RAA is problematic, however. The establishment of regulatory review procedures should be accompanied by a reduction of *ex ante* rulemaking procedural and analytical requirements (*i.e.*, procedural and analytical requirements agencies must satisfy while developing a new rule). The Senate RAA instead adds dozens of new *ex ante* rulemaking procedural and analytical requirements. The net result of all of these requirements – both *ex ante* and regulatory review – is to significantly increase the burden on agencies that accompanies the issuance of any new rules. Fulfilling all of these requirements will prevent agencies from taking other affirmative steps to advance their statutory missions. This threat is particularly grave given the resource constraints agencies appear likely to face in the coming years.
- This subsection further directs agencies to ensure that their regulatory review “framework” satisfies up to 8 analytical and procedural requirements (subsection (l)(1)(B)). The review must be completed within 10 years after the final rule becomes effective (subsection (l)(1)(B)(iv)).
  - *Comments.* To function effectively and to maximize utility for agencies, the regulatory review process should be flexible and avoid undue overreliance on quantitative assessments. The Senate RAA’s regulatory review process would be inordinately complex to implement and would impose a burdensome set of one-size-fits-all requirements, many of which require quantitative assessment. The procedural and analytical

requirements are inherently one-sided in that they would force agencies to narrowly focus on the impacts that the existing rule is having on regulated industries, or they are designed to force agencies to prioritize concerns for those impacts ahead protecting the public in their decision-making. As such, and because they are judicially reviewable, the satisfaction of these analytical and procedural requirements would also give corporate special interests powerful new avenues for pushing for the elimination of the existing rule or for demanding changes that would weaken the existing rule's provisions to make them less protective of the public.

- Examples:
  - The subsection directs agencies to provide a summary of the existing rule's costs and benefits (subsection (1)(1)(B)(i))
  - The subsection directs agencies to establish metrics that it will use to measure the existing rule's benefits in producing its regulatory objectives (subsection (1)(1)(B)(ii)(I))
  - The subsection directs agencies to establish metrics that it will use to measure the existing rule's impacts on regulated industries (subsection (1)(1)(B)(ii)(II))
  - The subsection directs agencies to establish a plan for gathering data regarding the metrics it will use to measure the existing rule's costs and benefits (subsection (1)(1)(B)(iii))
- This subsection further directs agencies to use the regulatory review "framework" they developed to carry out a regulatory review for a given "major" or "high-impact" rule and to ensure that the regulatory review addresses up to 5 issues.
  - *Comments.* To function effectively and to maximize utility for agencies, the regulatory review process should be flexible and avoid undue overreliance on quantitative assessments. The Senate RAA's regulatory review process would force agencies to focus their reviews primarily on assessing in quantitative terms the impacts of their existing rules. The objectives of the assessment are inherently one-sided in that they are primarily focused on the impacts the existing rules have had on regulated industries or they are designed to force agencies to prioritize concerns for those impacts ahead protecting the public in their review. As such, and because they are judicially reviewable, agency efforts to carry out these regulatory reviews would give corporate special interests powerful new avenues for pushing for the elimination of existing rules or for demanding changes that would weaken the provisions of existing rules to make them less protective of the public.
  - Examples:
    - The subsection directs agencies to analysis how the actual costs and benefits of an existing rule varied from what was anticipated at the time the rule was issued (subsection (1)(2)(A)(i))
    - The subsection directs agencies to determine whether the existing rule should be modified or replaced with an alternative to reduce the burden on regulated industries or to increase its cost-effectiveness (subsection (1)(2)(A)(ii)(IV))

- This subsection further directs agencies to conduct subsequent regulatory reviews of their existing rules, at least once every 10 years, when applicable and subject to certain limited exceptions. In carrying out each subsequent regulatory review, the agency must employ the same framework it developed as part of the first regulatory review and address the same issues that were addressed as part of the first regulatory review (subsection (1)(2)(C)).
- This subsection directs the OIRA Administrator to supervise agency compliance with the regulatory review process that the Senate RAA would establish, which would include, issuing guidelines that govern how agencies should carry out the regulatory review process, ensuring timely compliance with applicable regulatory review process requirements, ensuring that agencies properly publicize the results of their regulatory reviews, assist agencies in finding opportunities to streamline their regulatory reviews, and grant exemptions from or deadline extensions for complying with various regulatory review requirements (subsection (1)(3))
  - *Comment:* This provision is troubling because it gives the OIRA Administrator such extensive supervisory authority over the Senate RAA’s regulatory review process. This supervisory authority risks inviting politicized interference by the OIRA Administrator in how agencies carry out their regulatory reviews. In the worst case scenario, the OIRA Administrator would exercise this authority to force agencies to out their regulatory reviews in ways that benefit politically powerful corporate special interests.
- This subsection clarifies agencies’ responsibilities for carrying out the Senate RAA’s regulatory review process requirements for “major” or “high-impact” rules that are issued as “direct final rules” or “interim final rules” (subsection (1)(5)(B))
- This subsection authorizes agencies to submit to Congress recommendations for legislative changes that may be necessary to enable them to modify or repeal in response to a regulatory review (subsection (1)(6))
- This subsection outlines the process for judicial review of agency compliance with the Senate RAA’s regulatory review process requirements. This provision limits judicial review to questions of (1) whether an agency published the “framework” for conducting a regulatory review of a given rule or (2) whether the agency adequately completed an assessment of all the required issues as part of that regulatory review. The provision authorizes the review court to remand any rule for which compliance with regulatory review process requirement was deficient to the agency so that the agency can take the necessary steps to come into compliance (subsection (1)(7)).
  - *Comments.* Though somewhat limited, these judicial review provisions would likely invite wasteful and time-consuming litigation that distracts agencies from taking affirmative actions to carry out their statutory missions.

#### Section 4. Scope of Review

- This subsection would direct courts to apply a “substantial evidence” standard of review when reviewing the factual findings related to “high-impact” rules (subsection (a)(3))
  - o *Comments.* Under the current version of the APA, courts generally apply the “substantial evidence” standard of review when review rules that are developed through the APA’s formal, on-the-record rulemaking hearings. The “public hearings” that the Senate RAA would mandate for most “high-impact” rules are meant to be at least similar to the APA’s formal, on-the-record rulemaking hearings. This provision seems aimed at further reinforcing the functional similarities between the two types of hearings by subjecting the rules they produce to the same standard of court review. Most, but not all, administrative law experts consider the “substantial evidence” standard of review to be more stringent, which means that it risks inviting greater judicial interference with agencies’ decision-making processes. The authors of the Senate RAA evidently view the “substantial evidence” standard of review to be more stringent, since they went to the trouble of specifically providing for its use in judicial review of “high-impact” rules. Given that agencies have considerably greater expertise on the factual issues that undergird their rulemaking, the risk of increased judicial interference in these rulemakings is troubling. It could lead to improper second-guessing by more generalist judges, which in turn can contribute to delays in rulemakings, a waste of scarce agency resources, and suboptimal regulatory outcomes.
- This subsection precludes judicial review of any determinations by the OIRA Administration that particular rule meets the criteria for being a “major” rule (subsection (c))
  - o *Comments.* This provision is problematic because the Senate RAA would give the OIRA Administrator wide latitude to determine that a rule meets the criteria for being a “major” rule, which would thus subject the rule to the additional burdensome requirements that would be established under the Senate RAA. In the worst case scenario, the OIRA Administrator an agency might inappropriately determine that a rule to be a “major” rule at the behest of politically powerful corporate special interests.
- This subsection authorizes reviewing courts to determine the weight they could give to an agency’s interpretation of its own rule based on a list of specified factors (subsection (e))
  - o *Comments.* This provision replaces what is known as *Auer/Seminole Rock* deference, which courts now apply when reviewing agency interpretations of their own rules, with *Skidmore* deference, which is used other judicial review situations. The practical effect of this provision is to replace a deferential standard of review with a less deferential standard of review. In turn, this less deferential standard of review would invite greater judicial interference in agency decision-making. Such interference is problematic because agencies tend to have much greater expertise on the technical issues implicated by their rules than do generalist judges.

### Section 5. Added Definitions

- The bill adds a definition for the term “substantial evidence,” which it defines 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” (subsection (b)(4))
  - o *Comments.* This is the standard of review courts must apply when reviewing agency factual findings related “high-impact” rules. Many administrative law experts consider the “substantial evidence” standard of review to be more stringent than the “arbitrary and capricious” standard of review that applies in most situations for judicial review of agency rulemakings. As such, the use of the “substantial evidence” standard of review in these risks inviting greater judicial interference in agency decision-making for these rules.

### Section 6. Application

- This section clarifies that the Senate RAA’s provisions would not apply to any rulemakings that are pending or completed as of the date the Senate RAA would be enacted

### Section 7. Technical and Conforming Amendments

For further information, please contact James Goodwin at (202) 747-0698, ex. 5, or [jgoodwin@progressivereform.org](mailto:jgoodwin@progressivereform.org); Rena Steinzor at (301) 717-2405 or [rsteinzor@law.umaryland.edu](mailto:rsteinzor@law.umaryland.edu); Thomas McGarity at (512) 232-1384 or [tmcgarity@law.utexas.edu](mailto:tmcgarity@law.utexas.edu); or Sidney Shapiro at (336) 758-7320 or [shapirsa@wfu.edu](mailto:shapirsa@wfu.edu).