

REGULATORY ACCOUNTABILITY ACT OF 2011

Senator Rob Portman
Senator Mark Pryor

Rep. Lamar Smith
Rep. Collin Peterson

Key Provisions

1. Greater Transparency.

- *Early public outreach.* This legislation heeds President Obama's recent call for "public participation and open exchange" *before* a rule is proposed. (Exec. Order 13,563). Prior to proposing any major rule (\$100M+/year), agencies would be required to issue an advance public notice that explains the problem they intend to address and calls for public comment on the need for a new rule and potential options the agencies should consider.
- *Better scientific and technical data.* To improve the quality of new rules, agencies would be required to use scientific and technical evidence that meets the standards of the Information Quality Act — consistent with the President's call for regulating "based on the best available science." (Exec. Order 13,563)
- *Less closed-door regulating.* This legislation would cut back on the misuse of guidance documents — agency directives written outside the normal public process — while allowing their legitimate use to continue. Specifically, it would adopt the good-guidance practices issued by OMB in 2007 (under then-Director Portman) and ensure that agencies do not use guidance to skirt the public input required to write new rules.

2. Cost-Benefit Scrutiny.

- *Cost-Benefit Analysis.* This legislation builds basic cost-benefit analysis principles into each step of the rulemaking process — proposed rule, final rule, and (for major rules) judicial review. These principles are drawn from the longstanding, bipartisan Executive Order framework created by the Reagan and Clinton Administrations and reaffirmed by President Obama in January 2011. Those principles would be made permanent, enforceable and applicable to independent agencies. In the Smith-Peterson bill, compliance with these new requirements would be subject to judicial review for all rules.

- *Least Burdensome Option.* This legislation requires agencies to adopt the “least costly” regulatory alternative that would achieve the policy goals set out by Congress. It permits agencies to adopt a more costly approach only if the agency demonstrates that it is more cost-effective and serves interests clearly within the scope of the statute. This is consistent with the White House’s recent instruction to federal agencies to “minimize regulatory costs”¹ and the President’s directive to “tailor regulations to impose the least burden on society.” (Exec. Order 13,563)

3. More Rigorous Process for High-Impact Rules (\$1 Billion+ cost/year).

- *Formal Hearings for High-Impact Rules.* Parties affected by billion-dollar rules will have access to a fair and open forum to question the accuracy of the views, evidence, and assumptions underlying the agency’s proposal. The hearing would focus on (1) whether there is a lower-cost alternative that would achieve the policy goals set out by Congress (or a need that justifies an higher cost than otherwise necessary); (2) whether the agency’s evidence is backed by sound scientific, technical and economic data, consistent with the Information Quality Act; (3) any issues that the agency believes would advance the process. Parties affected by major rules (\$100M+) would also have access to hearings, unless the agency concludes that the hearing would not advance the process or would unreasonably delay the rulemaking.
- *Substantial Evidence Review of High-Impact Rules.* As a consequence of the formal hearing, high-impact rules would be reviewed under a slightly higher standard in court — substantial evidence review. This standard is still highly deferential, but it allows a court reviewing major rules to ensure that an agency’s justifications are supported by “evidence that a reasonable mind could accept as adequate to support a conclusion based on the record as a whole.” This standard would also apply to major rules that undergo the formal hearing procedure.

¹ Cass Sunstein, *Washington Is Eliminating Red Tape*, The Wall Street Journal (Aug. 23, 2011).