

S. 951: Regulatory Accountability Act of 2017

Promoting transparency, accountability, and common sense in the regulatory process

Sponsored by Senators Rob Portman and Heidi Heitkamp

Key Differences Between the Senate RAA and H.R. 5

1. Composition of Bill

The Senate RAA is a standalone bill that codifies longstanding, bipartisan executive orders that have governed the regulatory process for decades. It is the result of significant bipartisan negotiations that have focused on ensuring that the regulatory process produces smart rules that reduce burdens on businesses while protecting public health, safety, the environment.

The House version of the RAA, H.R. 5, incorporates six separate bills and one House Resolution.

2. Selection of Final Rule

The Senate RAA requires agencies to consider reasonable alternatives to the most expensive rules, with the consideration of three such alternatives presumed to be a reasonable number. It then requires agencies select the “most cost-effective rule,” unless the agency provides a detailed explanation of why it chose a less cost-effective rule.

H.R. 5 requires agencies to consider all reasonable alternatives to a rule and to choose the “least costly” alternative, unless the agency can explain how the additional benefits of a more expensive rule justify the additional costs, and those benefits must fall within the scope of the statutory authorization for the rule.

3. Judicial Review

The Senate RAA allows courts to review agencies’ compliance with rulewriting procedural requirements. It also allows courts to remand rules to agencies where appropriate. It requires courts to review factual determinations underlying high-impact rules (\$1b+ annually) using the substantial evidence standard. It replaces *Auer* deference with *Skidmore* deference, but it does not affect *Chevron* deference.

H.R. 5 also allows courts to review agencies’ compliance with rulewriting procedural requirements, but does not include a provision explicitly allowing courts to remand rules to agencies. It requires courts to decide all terms of an agency action and all relevant questions of law de novo, including agencies’ interpretations of constitutional and statutory provisions, overriding *Chevron*.

4. Savings Clause

The Senate RAA preserves specific authorizing laws that include rulemaking requirements or procedures that conflict with the RAA’s provisions.

The House RAA overrides those specific authorizing laws with regard to rulemaking requirements that conflict with the RAA’s provisions.

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Composition of Bill¹

- The Senate RAA is a stand-alone bill.

Composition of Bill

- H.R. 5 is comprised of six separate bills and one House Resolution.²
 - **Title I: H.R. 45, Regulatory Accountability Act of 2017**
 - Title II: H.R. 76, Separation of Powers Restoration Act
 - Title III: H.R. 33, Small Business Regulatory Flexibility Improvements Act
 - Title IV: H.R. 74, Require Evaluation before Implementing Executive Wishlists (REVIEW) Act
 - Title V: H.R. 75, All Economic Regulations are Transparent (ALERT)
 - Title VI: H.R. 77, Providing Accountability through Transparency Act
 - H. Res. 33, Providing for consideration of H.R. 5, to clarify the nature of judicial review of agency interpretations, to ensure complete analysis of potential impacts on small entities of rules, and for other purposes, and providing for consideration of the procedurally-related H.R. 79, Helping Angels Lead Our Startups (HALOS) Act to clarify the definition of general solicitation under Federal securities law

Definitions [Sec. 2]

- Guidance: An agency statement of general applicability that is not intended to have the force and effect of law and sets forth a policy on a statutory, regulatory, or technical issue or interprets a statutory or regulatory issue.
- Major guidance: Guidance OIRA determines will have an annual effect on the economy of \$100 million or more adjusted every five years for inflation; will have a major increase in costs or prices for consumers, industries, governments or geographic regions; or will have significant adverse effects on competition, employment, investment, productivity, innovation, public health and safety, or the country's ability to compete internationally.
- High-impact rule: A rule OIRA determines is likely to have an annual effect on the economy of \$1 billion or more adjusted every five years for inflation.

Definitions [Sec. 102]

- Guidance: Substantially the same.
- Major guidance: Guidance OIRA determines will have an annual cost on the economy of \$100 million or more adjusted annually for inflation; will have a major increase in costs or prices for consumers, industries, governments or geographic regions; will have significant adverse effects on competition, employment, investment, productivity, innovation, or the country's ability to compete internationally; or will have significant impacts on multiple sectors of the economy.
- Major rule: A rule OIRA determines will have an annual cost on the economy of \$100 million or more adjusted annually for inflation; will have a major increase in costs or prices for consumers, industries, governments or geographic regions; will have significant adverse effects on competition, employment, investment, productivity, innovation, or the country's ability

¹ This comparison of the Senate and House version of the RAA generally tracks the order of the Senate bill. If an entire section is substantially different between versions, that section heading is underlined. Otherwise, differences in sections are underlined within the descriptions.

² This comparison is limited to the Senate bill in its entirety and the first two titles of H.R. 5.

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- Major rule: A rule OIRA determines will have an annual effect on the economy of \$100 million or more adjusted every five years for inflation; will have a major increase in costs or prices for consumers, industries, governments or geographic regions; or will have significant adverse effects on competition, employment, investment, productivity, innovation, public health and safety, or the country's ability to compete internationally.

Rulemaking Considerations [Sec. 3]

In rulemaking, an agency shall consider in addition to other applicable considerations:

- The legal authority under which the rule may be proposed
- Nature and significance of the problem
- Whether existing laws or rules have created or contributed to the problem, and, if so, whether they may be amended or rescinded to address the problem
- A reasonable number of alternatives for a new rule that meet the statutory objective, including substantial alternatives or other responses identified by interested persons, with the consideration of 3 alternatives presumed to be reasonable
- For any major or high-impact rule, the potential costs and benefits associated with those alternatives and responses, including quantitative and qualitative analysis of:
 - The direct costs and benefits
 - The nature and degree of risks addressed by the rule and countervailing risks that might be posed by agency action; and
 - To the extent practicable, the cumulative and indirect costs and benefits

[Note: Text later includes a savings clause that provides that if an authorizing law requires an agency to use considerations or a process that conflicts with the

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to compete internationally; or will have significant impacts on multiple sectors of the economy.

- High impact rule: A rule OIRA determines is likely to have an annual cost on the economy of \$1 billion or more adjusted annually.
- Negative impact on jobs and wages rule: A rule OIRA determines is likely to reduce employment in a ZIP code by 1 percent or more annually; reduces average weekly wages in a ZIP code by 1 percent or more annually; reduce employment in any industry in which the most recent unemployment rate is greater than 5 percent; or further reduce unemployment in any industry area in which Bureau of Labor Statistics projects employment will decrease by 1 percent or more.

Rulemaking Considerations [Sec. 103]

In rulemaking, an agency shall make all preliminary and final factual determinations based on evidence and consider, in addition to other applicable considerations:

- The legal authority under which a rule may be proposed
- Other statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action
- Nature and significance of the problem, including the degree and nature of the risks the problem poses and priority of addressing those risks compared to other matters within the agency's jurisdiction, whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action
- Whether existing laws or rules have created or contributed to the problem and whether those rules could be amended or rescinded to address the problem
- Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including responses that mandate particular conduct, specific performance objectives, economic incentives, or incorporate other innovative alternatives; and the alternative of no federal response, amending or rescinding existing rules, potential state or local action that could be taken in lieu of agency action.
- Notwithstanding any other provision of law, agencies must consider the potential costs and benefits associated with potential alternative rules and

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RAA, the agency should follow the specific federal law rather than the general.]

other responses, including direct, indirect, and cumulative costs and benefits and estimated impact on jobs, wages, economic growth, innovation, and economic competitiveness; means to increase the cost-effectiveness of any federal response; and incentives for innovation, consistency, predictability, lower costs of enforcement and compliance, and flexibility

Notice of Proposed Rulemaking [Sec. 3]

For all rules, if an agency determines that the agency's objectives require the agency to issue a rule, the agency must notify the OIRA Administrator and publish a notice of proposed rulemaking (NPRM) in the Federal Register that includes:

- A statement of the time, place, and nature of rulemaking proceedings
- Reference to the legal authority for the rule
- The text of the proposed rule
- Summary of rulemaking considerations

For major and high-impact rules:

- A reasoned preliminary explanation regarding how the proposed rule meets statutory objectives
- How the proposal's benefits justify the costs
- A discussion of the potential alternatives' costs and benefits; whether the alternatives meet the statutory objectives; and the reasons why the agency did not propose the alternatives it considered

Notice of Proposed Rulemaking [Sec. 103]

For all rules, before an agency determines to propose a rule and following the advance notice of proposed rulemaking for high-impact and major rules, the agency shall consult with the OIRA Administrator. If the agency determines to publish a rule, the agency shall publish a notice of proposed rulemaking that includes:

- A statement of the time, place, and nature of rulemaking proceedings
- Reference to the legal authority for the rule
- Terms of the proposed rule
- A description of information known to the agency on the subject and issues of the proposed rule, including information about:
 - The rulemaking considerations
 - Summary of additional information the agency provided to and obtained from interested persons
 - Summary of any preliminary risk assessment or regulatory impact analysis performed by the agency
 - An additional statement of whether a rule is required by statute
 - An achievable objective for the rule and metrics for measurement
 - Information identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination of need for the rule
 - A reasoned preliminary determination that the benefits of the proposed rule meet the relevant statutory objectives and justify the costs of the proposed rule
 - A discussion of the alternatives to the proposed rule and other alternative responses, the costs and benefits of those alternatives; whether those alternatives meet the statutory objectives; and the reasons why the agency did not propose those alternatives
- A statement of whether existing rules have created or contributed to the

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	<u>problem the agency seeks to address, and if so, whether the agency proposes to amend or rescind any such rules, and why</u>
<p>NPRM Accessibility [Sec. 3]</p> <ul style="list-style-type: none"> The agency must publish on the docket all studies, models, scientific literature, and other information developed or relied upon by the agency, and actions taken by the agency to obtain that information, in connection with the agency's determination to propose the rule. <u>Exempts information that is exempt from disclosure under FOIA.</u> 	<p>NPRM Accessibility [Sec. 103]</p> <ul style="list-style-type: none"> The agency must publish all information provided to or considered by the agency, and steps to obtain that information, in connection with its determination to propose a rule, <u>including any preliminary risk assessment or regulatory impact analysis prepared by the agency, and at the President or OIRA Administrator's discretion, all information provided by OIRA in consultations with the agency.</u>
<p>Information Quality [Sec. 3]</p> <ul style="list-style-type: none"> If a proposed rule rests on scientific, technical, or economic information, the agency must propose the rule on the basis of the best reasonably available scientific, technical, or economic information. 	<i>No comparable provision for NPRMs</i>
<p>Public Comment [Sec. 3]</p> <ul style="list-style-type: none"> After publishing an NPRM, the agency shall provide interested persons an opportunity to participate in rulemaking through the submission of written material, data, views, or arguments, with or without the opportunity for oral presentation (except there must be opportunity for oral presentation in an agency factual hearing on a high-impact or major rule as set out below). For major and high-impact rules, the public comment period must be <u>at least 90 days</u>; for other rules, at least 60 days. If a rule is required by statute to be made on the record after opportunity for an agency hearing (except for the factual hearings on high-impact and major rules set out below), the formal rulemaking procedures of 5 USC §§ 556 and 557 will apply. <u>If an agency determines a rulemaking is likely to be a major or high-impact rule after issuing a notice of proposed rulemaking, the agency must publish a notice in the Federal Register regarding the change in classification and allow interested persons at least an additional 30 days to comment on the rule and the change in classification.</u> 	<p>Public Comment [Sec. 103]</p> <ul style="list-style-type: none"> After publishing an NPRM, the agency shall provide interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments, with or without the opportunity for oral presentation (except there must be opportunity for oral presentation in an agency factual hearing on a high-impact or major rule as set out below). If a rule is required by statute to be made on the record after opportunity for an agency hearing (except for the factual hearings on high-impact and major rules set out below), <u>or at the agency's discretion</u>, the formal rulemaking procedures of 5 USC §§ 556 and 557 will apply. For major or high-impact rules, the public comment period must be <u>at least 120 days</u>; for other rules, at least 60 days.
<i>No comparable provision</i>	<p>Information Quality Act Hearing [Sec. 103]</p> <ul style="list-style-type: none"> Within 30 days of publication of an NPRM, a member of the public may petition for a hearing in accordance with section 556 to determine

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- whether any evidence or other information upon which the agency bases the proposed rule fails to comply with the Information Quality Act.
- The agency may determine without further process to exclude that evidence from the rulemaking, and, if appropriate, withdraw the proposed rule. The agency shall promptly publish any such determination, and there is no judicial review of that decision.
 - The agency must grant any petition that presents a prima facie case that evidence or other information fails to comply with the Information Quality Act and hold the hearing not later than 30 days after receipt of the petition. The agency must provide reasonable opportunity for cross-examination and decide the issues presented not later than 60 days after receipt of the petition.
 - Prohibits judicial review of the agency's disposition of the issues until judicial review of the agency's final action.
 - Failure to petition for an Information Quality Act hearing does not preclude judicial review of any claim based on the Information Quality Act.

Limitation on Agency Advocacy [Sec. 3]

- After publishing a Notice of Initiation of Rulemaking or an NPRM, the agency and its officials may not communicate, and any person who receives federal funds from the agency may not use those funds to communicate, about a proposed rule in a manner that directly advocates for the submission of information to form part of the record of review for the proposed rule that supports or opposes the rule; appeals to the public to undertake advocacy in support of or against the proposed rule; or is directly or indirectly for publicity propaganda purposes.
- The prohibition does not apply to communication requesting comments or that provides information in an impartial manner.

Initiation of Rulemaking for Major and High-Impact Rules [Sec. 3]

- When an agency determines to initiate a rulemaking that may result in a major or high-impact rule, the agency shall:
 - Establish an electronic docket for that rulemaking
 - Publish an initiation of rulemaking in the Federal Register describing the subject and problem to be solved by the rule, referencing the legal authority under which the rule would be proposed and invite interested persons to propose alternatives and other ideas regarding how best to accomplish the agency's

Limitation on Agency Advocacy [Sec. 103]

- After publishing an NPRM or Advance NPRM, the agency and its officials may not communicate, and any person who receives federal funds from the agency may not use those funds to communicate, about a proposed rule in a manner that directly advocates for the submission of information to form part of the record of review for the proposed rule that supports or opposes the rule; appeals to the public to undertake advocacy in support of or against the proposed rule; or is directly or indirectly for publicity propaganda purposes.
- The prohibition does not apply to communication requesting comments or that provides information in an impartial manner.

Advance Notice of Proposed Rulemaking for Major, High-Impact, Negative-Impact on Jobs and Wages Rules, and Rules Involving Novel Legal or Policy Issues [Sec. 103]

- Not later than 90 days before a notice of proposed rulemaking is published in the Federal Register, an agency shall publish an advance notice of proposed rulemaking, including a written statement identifying:
 - The nature and significance of the problem, including data and other evidence the agency expects to rely on
 - The legal authority under which the rule may be proposed

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objectives

- All information provided to the agency shall be published on the docket.
- The alternatives and other ideas proposed in response to the initiation are for the benefit of the agency and the public. The agency may respond to the alternatives and other ideas.
- The agency must establish and publish a timetable for the rulemaking that includes intermediate and final completion dates for agency action, considering:
 - The size and complexity of the rulemaking
 - The agency's resources
 - The national significance of the rulemaking
 - Statutory requirements governing the timing of the rulemaking
- The intermediate dates must include anticipated deadlines for publication of the NPRM and the comment period.
- If the agency fails to meet its intermediate deadlines, it must provide a new timetable. If it fails to meet its final deadline, it must submit a report to Congress and OMB regarding why the agency failed to meet the deadline and amending the timetable. The report also must be published on the Federal Register.

[Note: The initiation of rulemaking procedure is intended to give stakeholders opportunity to comment on potential high-impact and major rules before the agency determines that it will in fact proceed with a rulemaking.]

Determination Not To Propose Rule [Sec. 3]

- If an agency undertakes the Initiation of Rulemaking procedures for a high-impact or major rule and determines not to propose a rule, the agency shall consult with OIRA and publish a notice of determination of other agency course.

Petitions for Agency Hearings for High-Impact and Certain Major Rules [Sec. 3]

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- Preliminary information available to the agency
- For rules involving a novel legal or policy issue, the nature of and potential reasons to adopt the novel legal or policy position
- An achievable objective for the rule and metrics by which the agency will measure progress toward that objective
- The agency must solicit data, views, or arguments from interested persons and provide at least 60 days for comment.

Determination Not To Propose Rule [Sec. 103]

- If an agency undertakes the Advance Notice of Proposed Rulemaking procedures for a high-impact or major rule and determines not to propose a rule, the agency shall consult with OIRA and publish a notice of determination of other agency course.
- The agency must publish all information provided to or considered by the agency and steps to obtain that information, including any preliminary risk assessment or regulatory impact analysis, and, at the discretion of the President or OIRA Administrator, information provided by OIRA, in its determination of other agency course.

Agency Hearings for High-Impact Rules [Sec. 103]

- After receipt of comments and any Information Quality Act hearing, but

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- Before the comment period closes on an NPRM for a high-impact rule or a major rule that qualifies as such because it will have an annual effect of \$100 million or more, an interested person may petition the agency to hold a public hearing.
- For a high-impact rule, the agency shall grant the petition within 30 days of receipt if the petition shows that the proposed rule is:
 - Based on conclusions with respect to one or more specific factual issues that are genuinely disputed, and
 - The resolution of the disputed factual issues would likely have an effect on the costs and benefits of the proposed rule or whether the proposed rule achieves the statutory purpose.
- If an agency denies the petition, the agency must include an explanation in the rulemaking record sufficient for judicial review.
- For a major rule, the agency may deny the petition if the agency reasonably determines that a hearing would not advance the consideration of the proposed rule by the agency or would unreasonably delay completion of the rulemaking.
- The agency must publish a notice of the hearing, the proposed rule, and the factual issues to be considered at least 45 days prior to the hearing.
- For rules that must be re-issued every three years or more frequently, stakeholders are precluded from raising issues for five years that they could have raised previously [thus preventing the agency from having to re-litigate the same issues during every rulemaking cycle].

Hearing Issues [Sec. 3]

- The hearing shall be limited to:
 - Issues raised in a petition granted in whole or in part
 - Any other factual determinations the resolution of which the agency determines will advance consideration of the proposed rule

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before adoption of a high-impact rule, the agency shall hold a hearing in accordance with sections 556 and 557 unless such hearing is waived by all participants in the rulemaking other than the agency.

- The agency must publish a notice of the hearing no later than 45 days before the hearing, including the rule, the issues to be considered, and the time and place of the hearing.
- The agency shall provide a reasonable opportunity for cross-examination.

Right to Petition for Hearing on Major Rules [Sec. 105]

- Upon receipt of a petition for a hearing regarding a major rule, an agency shall grant the petition unless the agency reasonably determines that a hearing would not advance consideration of the rule or would unreasonably delay completion of the rulemaking.

Hearing Issues [Sec. 103]

- The hearing shall be limited to the following issues of fact (which may be waived by the hearing participants):
 - Whether the agency's asserted factual predicate for the rule is supported by the evidence
 - Whether there is an alternative to the proposed rule that would achieve the relevant statutory objective at a lower cost
 - If there is more than one alternative that would achieve the objectives at a lower cost than the proposed rule, which alternative would achieve the objectives at the lowest cost

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- If the agency proposes to adopt a rule more costly than the least costly alternative, whether the additional benefits exceed the additional costs
- Whether the evidence meets the requirements of the Information Quality Act
- Other issues relevant to the rulemaking, upon petition by an interested person who participated in the rulemaking, unless the agency determines that consideration at the hearing would not advance consideration of the rule or would unreasonably delay completion of the rulemaking. The agency must grant or deny such a petition within 30 days of receipt.

Hearing Procedures [Sec. 3]

- Except as otherwise provided by statute, a proponent of the rule has the burden of proof.
- Any documentary or oral evidence may be received, but the agency may exclude immaterial or unduly repetitious evidence.
- Each agency shall adopt rules that provide for:
 - Appointment of agency official or administrative law judge to preside at hearing
 - Presentation of relevant documentary or oral evidence, unless it is immaterial or unduly repetitious
 - Reasonable and adequate opportunity for cross-examination by interested parties concerning genuinely disputed factual issues raised by the petition. In the case of multiple interested parties with the same or similar interests, agency may require use of common counsel where common counsel may adequately represent interests that will be significantly affected by proposed rule
 - When appropriate and to the extent practicable, if there are multiple petitions, the consolidation of proceedings
- Transcript of testimony and exhibits and all papers and requests filed in the hearing shall constitute exclusive record for decision of factual issues in the hearing.

Hearing Procedures [Sec. 103]

- Procedures governed by §§ 556 and 557.

Amendments to Agency Hearing Procedures [Sec. 105]

- Amends 5 U.S.C. § 556, which sets out the procedures for hearings required by 5 U.S.C. §§ 553 or 554. It strikes the current 5 U.S.C. § 556(e) regarding transcript and testimony of the hearings and provides:
 - The transcript and exhibits and all papers filed shall constitute the exclusive record for decision and shall be made available to the parties and the public by electronic means.
 - Provides that for a high-impact rule hearing, the record of decision shall also include any information that is part of the record of proceedings under 5 U.S.C § 553.
- Upon receipt of a petition for a hearing regarding a major rule, an agency shall grant the petition unless the agency reasonably determines that a hearing would not advance consideration of the rule or would unreasonably delay completion of the rulemaking.

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- Failure to petition for a hearing shall not preclude judicial review of any claim that could have been raised in a hearing petition or at a hearing.
- No judicial review of the disposition of a petition by an agency until judicial review of the agency's final action.

Most Cost Effective High-Impact/Major Rule [Sec. 3]

- An agency shall adopt the most cost-effective rule of the alternatives considered and that meets the relevant statutory objectives.
- An agency may adopt a rule that is more costly than the most cost-effective alternative only if the additional benefits justify the additional costs; the agency identifies each additional benefit and its cost; and the agency explains why it adopted a more costly rule.

Notice of Final Rulemaking [Sec. 3]

- When an agency adopts a final rule, the agency shall publish a notice of final rulemaking, including:
 - Statement of the basis and purpose of the rule
 - Reasoned determination regarding the rulemaking considerations
 - For high-impact and major rules, a reasoned determination that the benefits of the rule advance the relevant statutory objective and justify the costs of the rule, and no alternative would achieve the objectives in a more cost-effective manner than the rule or that the adoption of a more costly rule complies with the requirements for the agency to explain why it did so
 - A response to each significant issue raised in the comments on the proposed rule

[Note that the Senate RAA includes a retrospective review section similar to the requirements in the House RAA to review rules regularly; for ease of comparison, the House's provisions are included here because they fall under the final rulemaking provisions in the text; a direct comparison to the Senate's retrospective review provisions is below.]

Least Costly Rule [Sec. 103]

- An agency shall adopt the least costly rule considered during the rulemaking that meets the relevant statutory objectives.
- An agency may adopt a more costly rule only if the additional benefits of the more costly rule justify its additional costs and only if the agency explains its reasons 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.

Notice of Final Rulemaking [Sec. 103]

- When an agency adopts a final rule, the agency shall publish a notice of final rulemaking, including:
 - Statement of the basis and purpose of the rule
 - Reasoned determination of need for a rule to address the problem, including whether a rule is required by statute and summary of any final risk assessment or regulatory impact analysis prepared by the agency
 - Reasoned determination that the benefits of the rule meet the statutory objectives and justify the rule's costs
 - Reasoned determination not to adopt any of the alternatives to the proposed rule, including that no alternative considered would achieve the objectives with lower costs or the adoption of a more costly rule justifies the additional costs and the agency explains its reasons within the scope of the authorizing statute
 - Reasoned determination that existing rules have not created or contributed to the problem, or that they have created or contributed to the problem and why amendment or rescission of the rule is not sufficient and the agency's process to amend or rescind the existing rule
 - Reasoned determination that the evidence underlying the rule complies with the Information Quality Act
 - Reasoned determination that the rule meets agency's objectives

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set out in the NPRM or that other objectives are more appropriate in light of the full administrative record and the rule meets those objectives

- Reasoned determination that the agency did not deviate from the metrics in the NPRM or that other metrics are more appropriate based on the administrative record and the agency did not deviate from those metrics
- For any high-impact, major, or negative impact on jobs and wages rule, the agency’s plan to review the rule at least every ten years to determine whether there remains a need for the rule, whether the rule is achieving statutory objectives, and whether the rule’s benefits continue to justify its costs. Such a review shall take into account the factors and criteria established in this title.
- For major rules, a report on the costs and benefits of the rule on entities regulated by the rule, to be revised every five years while rule remains in effect, including:
 - Assessment of rule’s impacts, including costs, on regulated entities
 - Determination about how actual benefits and costs of the rule have varied from those anticipated at time of issuance
 - Assessment of effectiveness and benefits of rule in producing regulatory objectives
 - OIRA review when required under executive order
- For negative-impact on jobs and wages rule, a statement that the agency head that made the rule approved the rule knowing about the findings and determination of the agency or OIRA that qualified the rule as a negative impact on jobs and wages rule.

No comparable provision

Consultation with OIRA [Sec. 103]

- The agency must consult with OIRA to facilitate compliance with applicable rulemaking requirements before adopting a final rule.

Final Rule Information Quality [Sec. 3]

- If a rulemaking rests upon scientific, technical, or economic information, the agency shall adopt a rule on the best reasonably available information.

Final Rule Information Quality [Sec. 103]

- The agency shall adopt a rule only 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.

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<p>Final Rule Accessibility [Sec. 3]</p> <ul style="list-style-type: none"> The agency must publish all studies, models, scientific literature, and other information developed or relied upon by the agency, <u>and actions taken by the agency to obtain that information</u>, in connection with the agency's determination to finalize the rule no later than when the rule is adopted. <u>Exempts information exempt from disclosure under FOIA.</u> 	<p>Final Rule Accessibility [Sec. 103]</p> <ul style="list-style-type: none"> All information considered by an agency in connection with its adoption of a rule, <u>and information provided by OIRA (at OIRA or the President's discretion)</u>, shall be placed on the docket no later than when the rule is adopted.
<p>Rules Issued at the End of an Administration [Sec. 3]</p> <ul style="list-style-type: none"> For any final rule published but not effective by the date of inauguration of a new president, within the 60 days following inauguration, the agency issuing the rule may delay the effective date of the rule for not more than 90 days in order to obtain public comment on whether the rule should be amended or rescinded or the effective date should be further delayed. In such case, the agency shall give the public no less than 30 days to submit comments. 	<p><i>No comparable provision</i></p>
<p>Savings Clause [Sec. 3]</p> <ul style="list-style-type: none"> If a rulemaking is authorized under a federal law that requires an agency to consider, or prohibits an agency from considering, a factor in a manner that is inconsistent with or conflicts with these rulemaking requirements, the requirements of the authorizing statute shall apply. If a rulemaking is authorized under a federal law that requires an agency to follow or use, or prohibits an agency from following or using, a procedure in a manner that is duplicative of, or conflicts with these rulemaking procedures the authorizing statute shall apply. 	<p><i>No comparable provision</i></p>
<p>Exception for Guidance and Rules of Organization [Sec. 3]</p> <ul style="list-style-type: none"> Except as otherwise provided by law, the procedural requirements shall not apply to guidance or rules of agency organization, procedure, or practice. 	<p>Exception for Interpretative Rules, Policy Statements, Agency Internal Rules [Sec. 103]</p> <ul style="list-style-type: none"> Except when notice or hearing is required by statute, the following procedures do not apply <u>to interpretive rules, general statements of policy</u>, or rules of agency organization, procedure, or practice: <ul style="list-style-type: none"> - ANPRM requirements - NPRM requirement - High-impact rule hearings - Final rule requirements including OIRA consultation, requirement that a rule be based on best reasonably obtainable information, and least costly rule requirement - Notice of final rulemaking requirements including all

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determinations the agency usually has to make, although agency still has to provide a concise, general statement of rule's basis and purpose

Direct Final Rules [Sec. 3]

- If an agency finds for good cause that compliance with NPRM, initiation of rulemaking for high-impact/major rules, hearings for high-impact/major rules, or the requirement to make a reasoned determination of final rulemaking regarding rulemaking considerations before issuing a final rule is unnecessary, impracticable, or contrary to public interest, the agency may publish a final rule. The agency must:
 - Include the good cause finding and a brief statement with reasons for the finding in the final rule
 - Publish the text of the rule and notice of opportunity for public comment in the Federal Register
 - Establish a comment period of at least 30 days
 - Provide notice of the date on which the rule will take effect
- If an agency makes a good cause finding, it may choose not to follow the direct final procedures if the agency determines that those procedures would not expedite the issuance of the rule.
- If an agency receives significant adverse comments during the 30-day comment period, the agency shall withdraw the notice of final rulemaking and complete the rulemaking through standard procedures.

Interim Final Rules [Sec. 3]

- If an agency finds for good cause that compliance with NPRM, initiation of rulemaking for high-impact/major rules, hearings for high-impact/major rules, or the requirement to make a reasoned determination of final rulemaking regarding rulemaking considerations before issuing a final rule is unnecessary, impracticable, or contrary to public interest, the agency shall issue an interim final rule by:
 - Publishing the interim final rule and request for public comment in the Federal Register, including a brief statement explaining the reason for the good cause finding
 - Request public comment within 60 days of after publication of the rule
- Within 180 days after date of publication of an interim final rule, the

Direct Final Rules [Sec. 103]

- If an agency finds for good cause that notice and public procedure are unnecessary, including because agency rulemaking is undertaken only to correct a de minimis technical or clerical error in a previously issued rule or for other noncontroversial purposes, the agency may publish the rule without following the standard rulemaking procedures. The agency must incorporate the good cause findings and a statement of reasons therefor in the rules issued.
- If the agency receives significant adverse comment within 60 days of publication, it shall treat the notice of the rule as a notice of proposed rulemaking and must complete rulemaking through standard procedures.

Interim Rules [Sec. 103]

- If an agency finds for good cause that compliance with the ANPRM, NPRM, or hearing procedures or requirements to render final determinations before issuance of an interim rule is impracticable or contrary to public interest, those requirements shall not apply to adoption of interim rule. The agency must incorporate the finding and brief statement of reasons therefor in the rules issued.
- If the agency adopts an interim rule, it shall commence proceedings that comply fully with the rulemaking requirements and shall treat the publication of the interim rule as publication of an NPRM with no requirement to issue a supplemental notice.
- For high-impact and major rules, the agency must complete rulemaking within 18 months and take final action to adopt a rule or rescind the

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<p><u>agency shall:</u></p> <ul style="list-style-type: none"> - <u>Rescind the interim rule</u> - <u>Initiate rulemaking procedures or</u> - <u>Take final action to adopt a final rule</u> <ul style="list-style-type: none"> • If the agency fails to take timely action, the interim rule shall have no force or effect. 	<p><u>interim rule; it must do so within 270 days for all other rules.</u></p> <ul style="list-style-type: none"> • If the agency fails to take timely action, the interim rule will cease to have the effect of law. • <u>Other than in cases of national security, if an agency publishes an interim rule, an interested party may seek immediate judicial review. The record on review shall include all documents and information considered by the agency and any additional information presented by a party that the court determines is necessary to consider to assure justice.</u>
<p>Exemption for Monetary Policy [Sec. 3]</p> <ul style="list-style-type: none"> • This section shall not apply to a rulemaking or guidance that concerns monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee. 	<p>Exemption for Monetary Policy [Sec. 103]</p> <ul style="list-style-type: none"> • The following requirements shall not apply to rulemakings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee: <ul style="list-style-type: none"> - Cost-benefit analysis requirement - Requirement to make a reasoned preliminary determination that the benefits of the proposed rule meet the statutory objectives and justify the costs of the rule - Requirement to discuss in an NPRM the alternatives to a rule and the cost-benefit analysis of those alternatives - Hearings for high-impact rules - Requirement to adopt the least costly rule
<p>Date of Publication of Rule [Sec. 3]</p> <ul style="list-style-type: none"> • <u>A high-impact or major final rule, direct final rule, or interim rule shall be published not later than 60 days before its effective date;</u> for all other rules, it must be published not later than 30 days before its effective date, except for: <ul style="list-style-type: none"> - Guidance - Otherwise provided by agency for good cause found and published with rule. 	<p>Date of Publication of Rule [Sec. 103]</p> <ul style="list-style-type: none"> • A substantive final or interim rule shall be published not less than <u>30 days</u> before the effective date of the rule, except: <ul style="list-style-type: none"> - <u>A substantive rule granting or recognizing an exemption or relieving a restriction</u> - <u>Interpretative rules and statements of policy</u> • Otherwise provided by the agency for good cause found and published with the rule.
<p>Right to Petition [Sec. 3]</p> <ul style="list-style-type: none"> • Each agency shall give interested persons the right to petition for issuance, amendment, or repeal of a rule. • <u>On a continuing basis, invite interested persons to submit suggestion for rules that warrant retrospective review and possible modification or repeal.</u> 	<p>Right to Petition [Sec. 103]</p> <ul style="list-style-type: none"> • Each agency shall give interested persons the right to petition for issuance, amendment, or repeal of a rule.
<p>Rulemaking Guidelines [Sec. 3]</p>	<p>Rulemaking Guidelines [Sec. 103]</p>

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- The OIRA Administrator shall establish guidelines for the assessment, including quantitative and qualitative assessment, of:
 - Costs and benefits of proposed and final rules
 - Cost effectiveness of rules
 - Other economic issues relevant to rulemaking
 - Risk assessments relevant to rulemaking
- The rigor of the cost-benefit analysis shall be commensurate with the economic impact of a rule
- Guidelines for risk assessments shall include criteria for:
 - Selecting studies and models
 - Evaluating and weighing evidence
 - Conducting peer reviews
- The OIRA Administrator must update the guidelines at least every 10 years.
- The OIRA Administrator shall issue guidelines to promote coordination, simplification, and harmonization of agency rules during the rulemaking process advising each agency to:
 - Avoid regulations that are inconsistent, incompatible, or duplicative with its own regulations or the regulations of other federal agencies
 - Draft regulations to be simple and easy to understand with goal of minimizing potential for uncertainty and litigation arising from uncertainty
- The OIRA Administrator shall issue guidelines:
 - To ensure rulemaking conducted in whole or in part with procedures specified in other provisions of law conform with the procedures set forth here to fullest extent allowed by law
 - For the conduct of hearings for high-impact and major rules, which shall provide a reasonable opportunity for cross-examination
- Each agency shall adopt regulations for the conduct of hearings consistent with those guidelines.

Agency Guidance [Sec. 3]

- Agency guidance shall:
 - Not be used by an agency to foreclose consideration of issues as to which the guidance expresses a conclusion
 - State that the guidance is not legally binding

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- The OIRA Administrator shall establish guidelines for the assessment, including quantitative and qualitative assessment, of:
 - Costs and benefits of proposed and final rules
 - Other economic issues
 - Issues related to risk that are relevant to rulemaking
- The rigor of cost-benefit analysis shall be commensurate with the economic impact of a rule.
- The OIRA Administrator shall regularly update these guidelines.
- The OIRA Administrator shall issues guidelines to promote coordination, simplification, and harmonization of agency rules during rulemaking process to ensure that each agency avoids inconsistent, incompatible, or duplicative regulations with its own regulations or those of other federal agencies and drafts its regulations to be simple and easy to understand with goal of minimizing potential for uncertainty and litigation arising from uncertainty.
- The OIRA Administrator shall:
 - Issue guidelines and otherwise take action to ensure rulemakings conducted in whole or in part under other procedures conform to the fullest extent allowed by law with the procedures set forth here
 - Issue guidelines for the conduct of high-impact rule hearings including to ensure a reasonable opportunity for cross-examination. Each agency shall adopt regulations for the conduct of hearings consistent with the guidelines
- The OIRA Administrator shall issue guidelines pursuant to the Information Quality Act to apply in rulemaking proceedings. Those guidelines and the Administrator's determinations regarding agency compliance with those guidelines shall be entitled to judicial deference.

Agency Guidance [Sec. 104]

- Agency guidance:
 - Is not legally binding and may not be relied upon by an agency as legal grounds for agency action
 - Shall state in a plain, prominent, and permanent manner that it is

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- At time of issuance or upon request, be made available by the issuing agency to interested persons and the public
- Before issuing any major guidance, an agency shall:
 - Make and document a reasoned determination that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions, and identifies costs and benefits
 - Confer with the OIRA Administrator on the issuance of major guidance to ensure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions, does not produce unjustified costs, and is otherwise appropriate
- The OIRA Administrator shall issue updated guidelines for agencies regarding the issuance of guidance documents advising each agency:
 - Not to issue guidance documents that are inconsistent or incompatible with or duplicative other regulations of the agency or other agencies
 - To draft guidance documents to be simple and easy to understand to minimize the potential for uncertainty and litigation arising from uncertainty
- How to develop and implement a strategy to ensure the proper use of guidance by the agency

Retrospective Review [Sec. 3]

- When an agency publishes a proposed high-impact or major rule, the agency shall include a potential framework for assessing the rule, which

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- not legally binding
- Shall be made at time of issuance or upon request to interested persons and the public
- Agencies shall avoid issuing guidance that is inconsistent with, or duplicative of, the agency's governing statutes or regulations, with the goal of minimizing uncertainty and litigation arising from such uncertainty.
- Before issuing any major guidance or guidance involving a novel legal or policy issue arising out of statutory mandates, an agency shall:
 - Make and document a reasoned determination that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions; summarizes the evidence and data on which the agency will base the guidance; identifies costs and benefits; describes alternatives to such guidance and their costs and benefits and explains why the agency rejected those alternatives.
 - Confer with the OIRA Administrator on the issuance of major guidance to ensure that the guidance is reasonable, understandable, consistent with relevant statutory and regulatory provisions, does not produce unjustified costs, and is otherwise appropriate.
- Upon issuing such guidance, the agency shall publish the documentation described above by electronic means.
- The OIRA Administrator shall have authority to issue guidelines for agency use in the issuance of guidance. The guidelines shall ensure that each agency:
 - Avoids issuing guidance documents that are inconsistent or incompatible with, or duplicative of, the law, its other regulations, or the regulations of other federal agencies
 - Drafts its guidance documents to be simple and easy to understand
 - Issues guidance in a manner sufficient to provide at least 90 days for affected entities to take steps to comply with such guidance, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty

Retrospective Review

Notice of Final Rulemaking [Sec. 103]

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shall include a general statement of how the agency intends to measure the effectiveness of the rule.

- When an agency publishes a final high-impact or major rule, the agency shall include a framework for assessing the rule, including:
 - A clear statement of the regulatory objectives, including a summary of the benefit and cost of the rule
 - The methodology by which the agency plans to analyze the rule, including metrics by which the agency can measure the rule's effectiveness and benefits in producing the regulatory objectives and the impacts, including any costs, of the rule on regulated and other impacted entities
 - A plan for gathering data regarding the metrics on an ongoing basis or at periodic times, including a method by which the agency will invite public input
 - A specific time frame not more than 10 years after the rule's effective date, under which the agency shall conduct assessment of the rule
- Each agency shall assess each final high-impact and major rule according to the plan above to analyze how the costs and benefits may have varied from those anticipated at the time the rule was issued and to determine:
 - Whether the rule is accomplishing the regulatory objectives
 - Whether the rule has been rendered unnecessary, taking in to consideration changes in the subject area and whether the rule overlaps, duplicates, or conflicts with other rules or state/local regulations
 - Whether the rule needs to be amended in order to accomplish the regulatory objective
 - Alternatives to the rule or modifications that could better achieve the regulatory objective while imposing a smaller societal burden
- If an agency uses a different methodology than the one it originally set out, it must provide a written explanation for the change.
- If an agency determines after an assessment that the rule will remain in effect, the agency shall determine a specific time not more than ten years later for another assessment, and thereafter provide for periodic reviews.
- The OIRA Administrator may exempt an agency from subsequent assessments if the Administrator determines there is a foreseeable need

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- Among the other requirements discussed above that must be addressed in a notice of final rulemaking, the notice must include:
 - For any high-impact, major, or negative impact on jobs and wages rule, the agency's plan to review the rule at least every ten years to determine whether there remains a need for the rule, whether the rule is achieving statutory objectives, whether the rule's benefits continue to justify its costs. Such a review shall take into account the factors and criteria established in this title.
 - For major rules, a report on the costs and benefits of the rule on entities regulated by the rule, to be revised every five years while rule remains in effect, including:
 - Assessment of rule's impacts, including costs, on regulated entities
 - Determination about how actual benefits and costs of the rule have varied from those anticipated at time of issuance
 - Assessment of effectiveness and benefits of rule in producing regulatory objectives
 - OIRA review when required under executive order

Agency Report to Congress [Sec. 103]

- Agency must report to Congress not later than 90 days after it makes a determination during a review of a major/high-impact/negative-impact on jobs and wages rule that the cost to the regulated entities has exceeded the anticipated cost at the time the final rule was issued. The report must address:
 - Whether the rule is accomplishing its regulatory objective
 - Whether the rule has been rendered unnecessary
 - Changes in the subject area
 - Whether the rule overlaps, duplicates, or conflicts with other rules, or state/local regulations
 - Alternatives to the rule or modifications to it that might achieve better results while imposing a smaller societal burden or at a lower cost
- Upon delivery of report, agency must reopen the public docket for 60 days and consider modifications or alternatives that reduce costs and increase

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for the rule.

- Not later than 180 days after completion of an assessment, the agency must publish a notice of availability in the Federal Register of the assessment results.
- The OIRA Administrator shall:
 - Issue guidance for development of the assessment framework
 - Oversee compliance of agencies
 - Ensure results are published promptly and noticed in the Federal Register
 - Encourage and assist agencies to streamline and coordinate the assessments with similar/related regulatory objectives
 - Exempt an agency from the assessment if the Administrator determines compliance is unnecessary, impracticable, or contrary to public interest
 - Extend the deadline for an assessment for not more than 90 days if the agency justifies its need for the extension
- The retrospective review requirement shall not apply to:
 - A rule OIRA reviewed before date of enactment of this subsection
 - A rule for which the agency already is required to conduct a retrospective review that meets or exceeds these requirements
 - A rule for which the authorizing statute is subject to periodic reauthorization at least every 10 years
 - Interpretative rules, policy statements, rules of agency organization, procedure, or practice
 - Routine/administrative rules
- For direct and interim final high-impact/major rules, the agency shall publish the assessment framework in the Federal Register not later than 180 days after the date on which the agency publishes the rule.
- If the agency determines a rule should be modified or repealed but cannot do so because of a provision of law, the agency may submit recommendations to Congress for legislation to amend the law.
- Judicial review of compliance with these provisions is limited to whether an agency published a frame work for assessment and completed and published the required assessment. The only available relief a court may order is to remand the rule to the agency to comply with the assessment requirements.

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benefits to regulated entities or individuals.

- Rule of construction that nothing in this subsection may be construed to affect any other provision of law regarding retrospective reviews of rules

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<p><u>Judicial Review: Vacatur and Remand [Sec. 4]</u></p> <ul style="list-style-type: none"> Amends 5 U.S.C. § 706 to allow courts to vacate rules, or, where appropriate, remand them without vacatur, to the agency. <p><i>[Note: 5 U.S.C. § 706 currently only provides for vacatur, although in practice, courts often remand rules to agencies.]</i></p>	<p><i>No comparable provision</i></p>
<p><u>Judicial Review: High-Impact Rules, Guidance, Agency Interpretation of Rules [Sec. 4]</u></p> <ul style="list-style-type: none"> When courts review high-impact rules, they must review whether the agency’s factual findings are supported by substantial evidence. <ul style="list-style-type: none"> Substantial evidence is 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. When courts review agency guidance that does not interpret a statute or rule, it may be reviewed only for its observance of procedure required by law. The weight a reviewing court gives an agency’s interpretation of its own rule shall depend on the thoroughness evident in the consideration of the rule by the agency, the validity of the agency’s reasoning, and the consistency of the interpretation with earlier and later pronouncements. <p><i>[Note: This replaces Auer deference with Skidmore deference; the Senate bill does not affect Chevron deference.]</i></p>	<p><u>Judicial Review: Agency Interpretation of Statutes and Rules [Sec. 202]</u></p> <ul style="list-style-type: none"> Courts shall decide all terms of an agency action and decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. If the reviewing court determines that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency’s interpretation on the question of law. No law may exempt a civil action from application of this section except by specific reference to this section. <p><i>[Note: This eliminates Chevron and Auer deference and authorizes courts reviewing agency actions to decide de novo all relevant questions of law.]</i></p>
<p><u>Judicial Review: Preclusion of Review [Sec. 4]</u></p> <ul style="list-style-type: none"> The determination of whether a rule is a major rule based on its increase to costs or prices for consumers, individual industries, governments, or geographic regions, or because of its significant adverse effects on competition, employment, investment, productivity, innovation, public health and safety, or foreign competition is not subject to judicial review. <p><i>[Note: an agency’s decision regarding whether a rule is a major rule based on its annual economic effect is subject to judicial review.]</i></p>	<p><i>No comparable provision</i></p>
<p><i>No comparable provision</i></p>	<p><u>Judicial Review: Denials of Petitions for Agency Hearings [Sec. 107]</u></p> <ul style="list-style-type: none"> Courts shall review agency denials of petitions for agency hearings for

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abuse of agency discretion.

No comparable provision

Actions Reviewable [Sec. 106]

- Amends 5 U.S.C. § 704, which provides that courts may review final agency actions. Adds that denial by an agency of a correction request, or denial of an administrative appeal related to the Information Quality Act, or the failure of an agency to act within 90 days to grant or deny such a request, shall be final agency action.
- Provides that other than in cases involving national security interests, upon the agency's publication of an interim rule, an interested party may seek immediate judicial review.