

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA



PATRICK MORRISEY
ATTORNEY GENERAL

January 9, 2017

Via Certified Mail

Governor Michael Pence
Vice President-Elect
Donald J. Trump Presidential Transition Team
1717 Pennsylvania Ave N.W.
Washington, DC 20006

The Honorable Charles Schumer
Minority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Nancy Pelosi
Minority Leader
United States House of Representatives
H-204, US Capitol
Washington, DC 20515

The Honorable Paul Ryan
Speaker
United States House of Representatives
H-232, US Capitol
Washington, DC 20515

Re: A communication from the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, North Dakota, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming on eliminating burdensome and illegal regulations by strengthening the Administrative Procedure Act.

Dear Vice President-Elect Pence, Majority Leader McConnell, Minority Leader-Elect Schumer, Speaker Ryan, and Minority Leader Pelosi:

As the chief legal officers of our States, we write to follow up on a July 11, 2016 letter, which provided an overview of ways in which Congress could reform the federal rulemaking process to ensure that executive agencies act within the boundaries set by federal law and take into account the interests of the States and the American public before enacting significant new rules.

This election season has demonstrated that the American people firmly reject the way in which Washington traditionally does business and the cavalier way in which the current administration has disregarded the rule of law. Millions of hardworking Americans justifiably feel that the federal government too easily ignores the impact that federal rules have on jobs and the economy. Too often, unaccountable federal agencies enact policies designed to cater to preferred interest groups without taking into account the effect these rules have on average Americans. Indeed, by one estimate, businesses and individuals have recently spent over \$2 trillion annually in regulatory compliance.¹ This regulatory burden makes it more difficult for Americans to compete for jobs in an increasingly competitive global economy and imposes costs that unnecessarily inflate the price of consumer goods, depress wages, and imperil job security. Understandably, the American people are frustrated and eager for change.

In our July 11 letter (attached hereto as **Exhibit A**) we discussed how the Administrative Procedure Act (“APA”) places important limits on federal agency action and attempts to protect against arbitrary and unlawful rulemaking. But the APA, which was initially enacted in 1946, has failed to fully protect against federal executive overreach and is in need of reform. Among other things, federal agencies have made increasingly aggressive and improper use of supposedly informal guidance documents to circumvent the notice and comment requirements of the APA. In addition, agencies have relied on implausible interpretations of federal statutes—at times hanging their hat on obscure or long-dormant legislative provisions—to make sweeping changes to the American economy. Agencies have also boldly ignored longstanding requirements of reasoned APA decision-making, such as the need to conduct a competent cost-benefit analysis and take into account the efficacy of existing state laws to address problems. Courts, in turn, have often abdicated their responsibility under the APA to determine whether agency actions are “in accordance with law,” 42 U.S.C. § 7411, and instead have accorded broad deference to agencies’ implausible constructions of federal statutes.

Congress now has a unique opportunity to adopt bipartisan legislation that will help ensure that federal agencies in the future abide by the law and carefully consider all relevant factors before imposing costly new regulations on the American economy. Therefore, as the chief legal officers in our States, we urge you to make regulatory reform a chief priority for the

¹ See W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* 1 (Sept. 10, 2014), <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

115th Congress. In particular, we urge Congress to follow the recommendations made in our July 11 letter (attached as **Exhibit A**) and to consider taking the following concrete steps toward reforming the administrative state.

1. Require Congressional Approval of Major New Rules

Many onerous and unpopular rules become law because unelected agency officials act pursuant to broad, vaguely-worded grants of authority in federal statutes without sufficient Congressional oversight. In turn, Congress has often been happy to cede the regulatory playing field to agencies rather than expend the political capital necessary to make difficult policy choices. Congress should now reassert its control over federal agency action and act as a check on significant rules that have the potential to remake the American economy.

Last week, the House of Representatives passed the Regulations from the Executive in Need of Scrutiny (“REINS”) Act, H.R. 26, 115th Cong. (attached hereto as **Exhibit B**) which would require Congress and the President to review and approve “major” federal rules—that is, rules that have an economic impact at or exceeding \$100 million. If the REINS Act were law, Congress would almost certainly never have approved such major overhauls of the economy as President Obama’s Clean Power Plan—which by one estimate would cost consumers over \$350 billion² and threatens to put fossil-fuel-fired power plants out of business.

The REINS Act would be an improvement over the existing Congressional Review Act (“CRA”), which provides Congress with the *option* to disapprove major rules, but no express obligation to review and approve them. It would also place responsibility for major economic decisions back where it belongs—with the People’s representatives in Congress.

2. Provide for Congressional Oversight of Guidance Documents

Federal agencies frequently attempt to evade the notice and comment requirements of the APA by enacting onerous new rules in the form of supposedly non-binding, informal guidance documents, interpretive rules, and policy statements. *See* 5 U.S.C. § 553(b)(A). Courts have occasionally required agencies to route such documents through notice and comment when the documents, in actual practice, impose new binding requirements on regulated entities. *See, e.g., Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) (requiring notice and comment for EPA “guidance” document regarding compliance with National Ambient Air Quality Standards for ozone); *Mendoza v. Perez*, 754 F.3d 1002, 1019–20 (D.C. Cir. 2014) (requiring notice and comment for Training and Employment Guidance Letters issued by

² *See* Timothy Cama, The Hill.com, *Industry-Backed Report Says EPA Climate Rule To Cost \$366B*, available at <http://thehill.com/policy/energy-environment/220967-industry-backed-report-says-epa-climate-rule-to-cost-366b> (Oct. 16, 2014).

Department of Labor). But judicial review is a slow and cumbersome method of curbing executive overreach in this area.

While it may be impractical for Congress to review and approve all informal agency pronouncements before issuance, it should at a minimum amend the CRA to require agencies to submit significant guidance documents to Congress prior to issuance and to provide Congress with 60 days to review and, if warranted, adopt a joint resolution disapproving the guidance. Failure to submit significant guidance to Congress in this manner would preclude an agency from relying on the guidance as support for an interpretation of a federal rule or as the basis for an enforcement action against regulated parties. In the alternative, Congress could expedite the process of judicial review by providing for immediate review of significant guidance documents on the merits.

3. Require Meaningful Cost-Benefit Analysis for All Major Rules, Including Jobs-Impact Analysis

Congress should also adopt legislation that compels federal agencies to conduct meaningful cost-benefit analysis for all major rules, including a consideration of the impact of such rules on jobs.

As the Supreme Court has discussed, “[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate,” and “[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). But agencies lack sufficient guidance on how to conduct cost-benefit analysis and not every statute that authorizes rulemaking explicitly requires such analysis. As a result, agencies frequently rely on conclusory assertions that intangible benefits suffice to justify rules that will impose millions or even billions of dollars of costs on the economy. At times, agencies disregard cost-benefit considerations altogether.

To encourage more analytical rigor in rulemaking, Congress should enact the Principled Rulemaking Act, S. 1818, 114th Cong. (attached hereto as **Exhibit C**) which sets forth detailed standards for agencies to apply when conducting cost-benefit analysis. Among other things, the Act would require federal agencies to consider reasonable alternative approaches to addressing a problem—including alternatives *other* than direct regulation—and to select the approach that maximizes net benefits. Agencies must also consider whether existing rules have contributed to the problem and should be modified or repealed in order to achieve the regulatory objective more effectively.

Relatedly, Congress should require that federal agencies consider the economic effect that their rules will have on jobs. The Clean Air Act provides a model for such a requirement.

Under the Act, the EPA has a statutory obligation to “conduct continuing evaluations of potential loss or shifts of employment which may result from the administration” of the Act. 42 U.S.C. § 7621. Recently, a federal district court in West Virginia held that the EPA violated this statutory duty by failing for years to conduct any meaningful assessment of the potential loss of employment resulting from its rulemakings. *See Murray Energy Co. v. McCarthy*, Case 5:14-cv-00039-JPB, Doc. No. 293 (N.D. W.Va. Oct. 17, 2016). The Act, the court discussed, imposed an ongoing obligation on the EPA to evaluate whether its rules would result in “plant closure[s]” or “specific layoffs.” *Id.* at 53. The court directed the agency to submit a plan and schedule to comply with the statutory mandate. *Id.* at 64.

Using the Clean Air Act as a model, Congress should consider amending the APA to require that agencies consider the effect their rules would have on job losses and dislocations. The amendment could make clear that failure to engage in a meaningful cost-benefit analysis, including an adequate analysis of the effect of each rule on jobs, could result in invalidation of a rule.

4. Curb Agency Abuse of Delegated Authority

Congress should also take a more active role in policing agency abuse of delegated authority, particularly in cases where agencies rely on strained interpretations of broad statutory delegations to enact policies that Congress would never have contemplated or approved at the time the law was enacted.

The APA already provides that agency action is invalid if it is not “in accordance with law.” 42 U.S.C. § 7411. Nevertheless, courts have often effectively accorded controlling deference to agency interpretations of statutes and rules under the aegis of the *Chevron* and *Auer* doctrines, respectively. Congress should take a close look at these doctrines and consider legislative changes that would limit the interpretive role of agencies and encourage courts to independently evaluate whether an agency’s policy is consistent with the text and structure of the enabling statute as a whole.

Congress could also consider enacting sunset provisions in connection with particular delegations of statutory authority or on a more uniform basis. Such provisions could provide that delegated authority will expire automatically after a certain number of years unless Congress and the President reauthorize it. That would provide Congress with an opportunity to review how an agency exercises its delegated authority and determine whether to continue affording it the same amount of discretion. It would also incentivize agencies to act cautiously when enacting new rules and be more responsive to elected representatives in Congress.

5. Strengthen Existing Federal Mandates That Require Agency Consideration of Regulatory Effect on States

Congress should also strengthen existing federal mandates that require agencies to consult with state authorities and consider the effect that federal regulations have on the States.

For example, executive orders issued by Presidents Clinton and Obama already instruct agencies, “in determining whether to establish uniform national standards,” to “consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority.” 64 Fed. Reg. 43,255, *Federalism*, Exec. Order No. 13132, 1999 WL 33943706 (Aug. 4, 1999); *see also* Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009). But there are no concrete consequences for agencies that decline to follow this instruction.

Similarly, the Unfunded Mandates Reform Act (“UMRA”) requires that federal agencies “prepare a written statement containing . . . a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate,” including the “costs and benefits to State, local, and tribal governments” 2 U.S.C. § 1532(a)(2). The UMRA also requires that agencies “develop an effective process to permit elected officers” of the States to participate in rulemaking and to describe and summarize that consultation in the statement in the final rule. *Id.* § 1532(a)(5); 1534. But the UMRA provides only for very limited judicial review; while a party can demand that an agency produce the required statement, its failure to do so or the “inadequacy” of the statement cannot form a basis for “staying, enjoining, invalidating or otherwise affecting such agency rule.” *Id.* § 1571(a)(2).

Congress should amend the UMRA to make the required statement part of the record for judicial review and to subject an agency’s explanation and analysis to arbitrary and capricious review under the APA. Congress should also add an additional provision to the UMRA that requires an explanation of whether any proposed rule would displace existing state law, and if so, whether and why existing state law has proved insufficient to address a particular problem. That explanation, too, would be subject to arbitrary and capricious review under the APA.

Congress should also make explicit that consultation with States is a prerequisite to issuance of a valid rule. It has already done so in other statutory contexts. For example, under the Clean Air Act, Congress required the EPA, “[b]efore promulgating any regulations under this subsection,” to “consult with appropriate representatives of the Governors and of State air pollution control agencies.” 42 U.S.C. § 7411(f)(3). Congress should make consultation with States a prerequisite for all major rules that could impact the federal-state balance. Congress should also make clear that failure to meaningfully consult would result in vacatur of a rule.

6. Create a Commission Devoted to Studying Exemptions or Waivers to Regulatory Requirements

Relatedly, Congress should consider creating a commission that could take a holistic, cross-agency approach to considering whether waivers or exemptions to particular federal rules are appropriate for particular States or other regulated entities or persons.

Under our federal system, it is imperative that States be permitted to act as laboratories of democracy and experiment with innovative policy solutions attuned to local circumstances. Most of the time, however, federal rules impose uniform requirements on all fifty States without adequate consideration of regional and local differences.

To be sure, some federal statutes empower agencies to grant waivers or exemptions to certain rules. For example, Section 1115 of the Social Security Act provides the Secretary of Health and Human Services with discretion to approve experimental projects designed by the States to improve delivery of services, increase efficiency, or reduce costs under state Medicaid programs. But others have no similar formal process in place. A new commission could help ensure that States can seek waivers on a more uniform basis from rules relating to the environment, health care, the economy, and other major areas of federal regulatory concern.

A federal-state commission could take a number of different forms. For example, it could be an informal body consisting of federal and state stakeholders that makes recommendations to Congress or the agencies on the appropriateness of waivers or exemptions. Alternatively, Congress could vest new authority within an existing body (*e.g.*, OMB) to consider and enact regulatory exemptions. Congress could also consider investing either an existing or new committee or subcommittee with authority to investigate the effect that agency rules have on the federal-state balance.

* * *

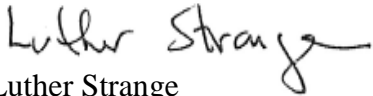
We appreciate that the new Congress has many legislative priorities and that the ideas contained in this letter may require further development and deliberation. We firmly believe, however, that regulatory reform is critical to restoring limited government in Washington that is responsive to, and protective of, the American people. Therefore, we would request a meeting at your earliest convenience to discuss how best to translate the ideas in this letter into a regulatory reform bill that the 115th Congress can consider and enact into law.

We appreciate your prompt attention to this matter.

Sincerely,



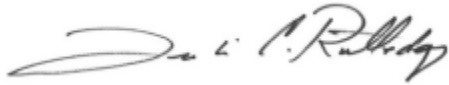
Patrick Morrisey
West Virginia Attorney General



Luther Strange
Alabama Attorney General



Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General



Cynthia H. Coffman
Colorado Attorney General



Derek Schmidt
Kansas Attorney General



Jeff Landry
Louisiana Attorney General



Bill Schuette
Michigan Attorney General



Timothy Fox
Montana Attorney General



Doug Peterson
Nebraska Attorney General



Adam Paul Laxalt
Nevada Attorney General



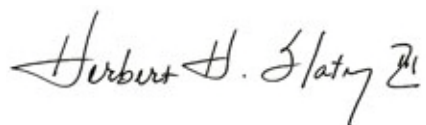
Wayne Stenehjem
North Dakota Attorney General



Alan Wilson
South Carolina Attorney General

January 9, 2017

Page 9



Herbert H. Slatery, III
Tennessee Attorney General and Reporter



Ken Paxton
Texas Attorney General



Sean D. Reyes
Utah Attorney General



Brad D. Schimel
Wisconsin Attorney General



Peter Michael
Wyoming Attorney General

Exhibit A

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA



PATRICK MORRISEY
ATTORNEY GENERAL

July 11, 2016

Via Certified Mail

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Paul Ryan
Speaker
United States House of Representatives
H-232, US Capitol
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
United States House of Representatives
H-204, US Capitol
Washington, DC 20515

Re: A communication from the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Kansas, Michigan, Montana, Nevada, North Dakota, Ohio, South Carolina, Texas, Utah, and Wisconsin on eliminating burdensome and illegal regulations by strengthening the Administrative Procedure Act.

Dear Majority Leader McConnell, Minority Leader Reid, Speaker Ryan, and Minority Leader Pelosi:

As the chief legal officers of our States, we are concerned about the mounting costs that unlawful federal regulations—advanced in violation of the Administrative Procedure Act—impose on citizens, businesses, and state and local governments. With seemingly increasing frequency, federal agencies are: (1) issuing guidance documents as a way to circumvent the notice-and-comment process; (2) regulating without statutory authority; (3) failing to consider

regulatory costs; and (4) failing to fully consider the effect of their regulations on States and state law. We are encouraged that the U.S. House of Representatives and the U.S. Senate recently have considered legislation directed toward resolving some of these concerns.¹ We write today to urge Congress to go further and take concrete action to ensure that federal agencies are in fact providing opportunity for notice and comment for all binding regulatory requirements, acting within their delegated authority, and always rigorously assessing the costs of their regulations.

The U.S. Constitution's separation of powers structure not only ensures that no branch of the federal government encroaches on another, but also protects individuals and States from overreach by the federal government. *See, e.g., Bond v. United States*, 131 S. Ct. 2355, 2365 (2011). Under the Constitution, Congress makes laws and the President, sometimes acting through agencies, "faithfully execute[s]" them. U.S. Const., Art. II, § 3. The President's power of executing the law includes the ability "to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). That separation of powers is critical to protecting the rights of individuals and the States from an overzealous federal executive.

A critical bulwark for that separation of powers is the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, enacted in 1946 to ensure transparency and reasoned decision-making in agency rulemaking. The APA requires an agency to publish a notice of proposed rulemaking in the Federal Register and "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments." 5 U.S.C. § 553. This notice-and-comment process is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). That transparency gives the public an opportunity to inform the agency when a rulemaking is contrary to statutory authority, based on unsound reasoning, or lacks factual support.

The APA also protects the separation of powers by providing for vacatur of agency actions not authorized by Congress. A reviewing court must "hold unlawful and set aside" any action found to be, among other things: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right, power, privilege, or immunity; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] . . . without observance of procedure required by law." 5 U.S.C. § 706(2). In other

¹ *See, e.g.,* Regulations from the Executive in Need of Scrutiny Act, H.R. 427, 114th Cong.; The Principled Rulemaking Act, S. 1818, 114th Cong.; Early Participation in Regulations Act, S. 1820, 114th Cong.

words, the APA is intended to ensure that “an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 468, 471 (1988).

Finally, inherent in the APA’s requirement of reasoned decision-making is the presumption that agencies will weigh the costs of regulation against its benefits. As the Supreme Court recently said, “[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). This is especially important in light of the increasing costs imposed by regulations on individuals and businesses. In 2014, executive agencies published 77,687 pages of regulations in the Federal Register.² In the Code of Federal Regulations, where all regulations binding on the public are published, 175,268 pages were included in 2014.³ Individuals must navigate these regulations whenever they seek to expand their business or build a home on their property, which impose not only the burden of determining what the law requires but also compliance costs. In 2012, individuals and businesses spent an estimated \$2.028 trillion on regulatory compliance.⁴ That same year, small business owners listed regulatory uncertainty and unreasonable regulations as their top concerns.⁵

As the chief legal officers of our States, we are concerned that agencies often avoid compliance with the protections Congress established in the APA. Three categories in particular bear mentioning.

First, agencies issue guidance documents, interpretive rules, and policy statements that effectively bind regulated parties, but that are not required to go through the APA’s notice-and-comment process, 5 U.S.C. § 553(b)(A). For truly non-binding guidance documents, the exemption from notice and comment may be appropriate. But when these documents are binding in practice and subject regulated entities to the risk of enforcement actions, lawsuits, fines, and sanctions for noncompliance, the exemption in the APA becomes a dangerous

² Federal Register Pages Published 1936-2014, Federal Register, <https://www.federalregister.gov/uploads/2015/05/Federal-Register-Pages-Published-1936-2014.pdf>.

³ Code of Federal Regulations Total Pages 1938-1949 Total Volumes and Pages 1950-2014, Federal Register, <https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf>.

⁴ W. Mark Crain & Nicole V. Crain, The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business 1 (Sept. 10, 2014), <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

⁵ Holly Wade, Small Business Problems and Priorities, 12 (August, 2012) available at <http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf> (last visited October 4, 2015).

loophole for agencies to exploit.⁶ For example, the Consumer Financial Protection Bureau (“CFPB”) issued in 2013 a guidance document defining unfair, deceptive, or abusive acts or practices for the collection of consumer debts that was never subject to the notice-and-comment process.⁷ Though it is styled as non-binding guidance, the definitions are binding requirements in practice: The CFPB entered into a consent order with ACE Cash Express requiring the company to pay civil penalties for, among other violations, disclosing the existence of a debt to a third party in violation of the guidance. *ACE Cash Express, Inc.*, 2014-CFPB-0008 (July 10, 2014). Other agencies have been called out by courts for issuing self-described guidance documents that should have gone through notice and comment. In 2010, for instance, EPA issued a guidance document requiring EPA regional directors to accept alternative state programs to comply with the National Ambient Air Quality Standards for ozone. *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 316 (D.C. Cir. 2011). EPA styled the document as non-binding guidance to avoid notice and comment, but the U.S. Court of Appeals for the D.C. Circuit disagreed, holding that the document was in practice a binding legislative rule that required notice and comment. *Id.* at 320. In 2011, the Department of Labor issued Training and Employment Guidance Letters without notice and comment, but the D.C. Circuit again disagreed because the letters were binding in practice. *Mendoza v. Perez*, 754 F.3d 1002, 1019–20 (D.C. Cir. 2014).

Second, agencies adopt regulations not authorized by Congress and in some cases directly contrary to the statute under which they are adopted. For example, in 2010 EPA sought to expand a Clean Air Act program by rewriting express numerical permitting requirements set by statute. 75 Fed. Reg. 31,514 (June 3, 2010). The Supreme Court rejected that regulation as a “patently unreasonable” and “outrageous” “seizur[e] [of] expansive power . . . the statute is not designed to grant.” *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). In 2013, the Federal Energy Regulatory Commission (“FERC”) attempted to “manufacture[] ambiguity” in the Federal Power Act. *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 589–90 (D.C. Cir. 2015). The D.C. Circuit rejected FERC’s imposition of a restriction on the definition of “municipality” that did not exist in the plain text of the statute. *Id.* at 592. Most recently, the Department of Health and Human Services sought to apply the Public Health Service Act (“PHSA”) to fixed indemnity insurance plans where the owner lacks “minimum essential coverage” under the Affordable Care Act. *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 324 (D.D.C. 2015). A federal district court rejected the rule as contrary to the PHSA, which plainly exempts “fixed indemnity insurance” without qualification. *Id.* at 327–28. All of these agencies put themselves in the position of writing laws that Congress did not approve. *See, e.g.*,

⁶ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like—Should Federal Agencies Use Them To Bind The Public?*, 41 *Duke L. J.* 1311 (1992).

⁷ CFPB Bulletin 2013-07, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

Michigan v. EPA, 135 S. Ct. 2699 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). While in many cases the courts are able to block these illegal initiatives, often it takes years for them to do so at which point regulated entities, including States, have already spent an enormous amount of money complying with the rules.⁸

Third, agencies fail to consider relevant factors, notably the costs imposed on regulated entities, when deciding on regulatory alternatives. The Supreme Court recently held that EPA unreasonably failed to consider costs when regulating power plants under the Clean Air Act. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Clean Air Act instructs EPA to regulate emissions of hazardous air pollutants from power plants if it finds regulation “appropriate and necessary.” *Id.* at 2704. The Supreme Court held that it was unreasonable for EPA to refuse to consider costs because “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Id.* at 2707. Also, the Small Business Administration has at least twice recently concluded that EPA failed to consider the costs its regulations would impose on small businesses.⁹ According to the SBA, EPA failed in 2009 to consider the effect of its greenhouse gas tailoring rule, among the first federal regulations concerning greenhouse gases, on small entities.¹⁰ Then in 2012, EPA failed to provide data demonstrating that small businesses could achieve certain hazardous air pollutant emissions standards without significant cost.¹¹

⁸ See, e.g., Janet McCabe, In Perspective: the Supreme Court’s Mercury and Air Toxics Rule Decision, EPA Connect (June 30, 2015, 10:34 AM), <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/> (noting that even though the Supreme Court rejected a portion of the agency’s rule, “the majority of power plants are already in compliance or well on their way to compliance”).

⁹ Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Dec. 23, 2009), <https://www.sba.gov/content/letter-dated-122309-environmental-protection-agency-1>; Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Mar. 12, 2012), https://www.sba.gov/sites/default/files/files/Chromium_Electroplating_Comment_Letter_FINAL_Mar_12_2012.pdf.

¹⁰ Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Dec. 23, 2009), <https://www.sba.gov/content/letter-dated-122309-environmental-protection-agency-1>.

¹¹ Letter to Lisa P. Jackson, Administrator, U.S. Evtl. Prot. Agency from Susan M. Walthall, Acting Chief Counsel for Advocacy and Keith W. Holman, Assist. Chief Counsel for Evtl. Policy, Small Business Administration (Mar. 12, 2012), https://www.sba.gov/sites/default/files/files/Chromium_Electroplating_Comment_Letter_FINAL_Mar_12_2012.pdf.

Fourth, agencies fail to fully consider the effect of their regulations on States and state law. For example, the CFPB on March 26, 2016 announced that it was considering new federal standards for credit lines, installment loans, deposit advances, automobile-title secured loans, and payday loans.¹² These federal standards may conflict with, and therefore preempt, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000), state laws concerning the size and length of payday loans, interest rates and fees, licensing systems, and record keeping.¹³ But as the Supreme Court has observed, regulatory decisions at the state level can better “allow[] local policies more sensitive to the diverse needs of a heterogeneous society, permit[] innovation and experimentation, [and] enable[] greater citizen involvement in democratic processes.” *Bond v. United States*, 564 U.S. 211, 221 (2011) (internal quotations omitted). That is why a 1999 executive order still requires agencies to “consult, to the extent practicable, with appropriate State and local officials” when they foresee conflict between their regulations and state law. Executive Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); *see also* Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009) (reaffirming “the principles outlined in Executive Order 13132”). We urge Congress to bolster this requirement by mandating that agencies consult with States when considering regulations that may preempt state law.

We urge Congress not simply to consider legislation but to take action to ensure that agencies engage in transparent rulemaking consistent with separation of powers principles and the laws enacted by Congress. The three categories we have discussed here are just examples of the significant and growing problem posed by unlawful federal regulations. We have fought, and will continue to fight, this problem on a case-by-case basis in the courts. But the time for broader action by Congress is long overdue.

We appreciate your prompt attention to this critical issue.

¹² Press Release, Consumer Financial Protection Bureau, CFPB Considers Proposal to End Payday Debt Traps (Mar. 26, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps/>.

¹³ *See, e.g.*, Ala. Code §§ 5-18A-12, § 5-18A-13; Alaska Stat. §§ 06.50.440, 06.50.460; Colo. Rev. Stat. § 5-3.1-105; Fla. Stat. § 560.404; Kan. Stat. Ann. § 16a-2-404(1)-(2); Ky. Rev. Stat. Ann. § 286.9-100; S.C. Code Ann. § 34-39-180(E).

Sincerely,



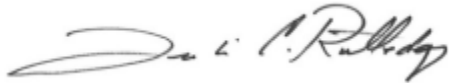
Patrick Morrissey
West Virginia Attorney General



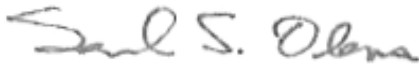
Luther Strange
Alabama Attorney General



Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General



Sam Olens
Georgia Attorney General



Derek Schmidt
Kansas Attorney General



Bill Schuette
Michigan Attorney General



Tim Fox
Montana Attorney General



Adam Paul Laxalt
Nevada Attorney General



Wayne Stenehjem
North Dakota Attorney General



Mike DeWine
Ohio Attorney General



Alan Wilson
South Carolina Attorney General



Ken Paxton
Texas Attorney General



Sean D. Reyes
Utah Attorney General

The Honorable Mitch McConnell, Harry Reid, Paul Ryan & Nancy Pelosi

July 11, 2016

Page 8

A handwritten signature in black ink, appearing to read "Brad Schimel". The signature is fluid and cursive, with the first name "Brad" and last name "Schimel" clearly distinguishable.

Brad D. Schimel

Wisconsin Attorney General

Exhibit B

115TH CONGRESS
1ST SESSION

H. R. 26

To amend chapter 8 of title 5, United States Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 2017

Mr. COLLINS of Georgia (for himself, Mr. GOODLATTE, Mr. SESSIONS, and Mr. MARINO) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Rules, and the Budget, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend chapter 8 of title 5, United States Code, to provide that major rules of the executive branch shall have no force or effect unless a joint resolution of approval is enacted into law.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Regulations from the
5 Executive in Need of Scrutiny Act of 2017”.

1 **SEC. 2. PURPOSE.**

2 The purpose of this Act is to increase accountability
 3 for and transparency in the Federal regulatory process.
 4 Section 1 of article I of the United States Constitution
 5 grants all legislative powers to Congress. Over time, Con-
 6 gress has excessively delegated its constitutional charge
 7 while failing to conduct appropriate oversight and retain
 8 accountability for the content of the laws it passes. By
 9 requiring a vote in Congress, the REINS Act will result
 10 in more carefully drafted and detailed legislation, an im-
 11 proved regulatory process, and a legislative branch that
 12 is truly accountable to the American people for the laws
 13 imposed upon them.

14 **SEC. 3. CONGRESSIONAL REVIEW OF AGENCY RULE-**
 15 **MAKING.**

16 Chapter 8 of title 5, United States Code, is amended
 17 to read as follows:

18 **“CHAPTER 8—CONGRESSIONAL REVIEW**
 19 **OF AGENCY RULEMAKING**

“Sec.

“801. Congressional review.

“802. Congressional approval procedure for major rules.

“803. Congressional disapproval procedure for nonmajor rules.

“804. Definitions.

“805. Judicial review.

“806. Exemption for monetary policy.

“807. Effective date of certain rules.

1 **“§ 801. Congressional review**

2 “(a)(1)(A) Before a rule may take effect, the Federal
3 agency promulgating such rule shall publish in the Federal
4 Register a list of information on which the rule is based,
5 including data, scientific and economic studies, and cost-
6 benefit analyses, and identify how the public can access
7 such information online, and shall submit to each House
8 of the Congress and to the Comptroller General a report
9 containing—

10 “(i) a copy of the rule;

11 “(ii) a concise general statement relating to the
12 rule;

13 “(iii) a classification of the rule as a major or
14 nonmajor rule, including an explanation of the clas-
15 sification specifically addressing each criteria for a
16 major rule contained within sections 804(2)(A),
17 804(2)(B), and 804(2)(C);

18 “(iv) a list of any other related regulatory ac-
19 tions intended to implement the same statutory pro-
20 vision or regulatory objective as well as the indi-
21 vidual and aggregate economic effects of those ac-
22 tions; and

23 “(v) the proposed effective date of the rule.

24 “(B) On the date of the submission of the report
25 under subparagraph (A), the Federal agency promulgating

1 the rule shall submit to the Comptroller General and make
2 available to each House of Congress—

3 “(i) a complete copy of the cost-benefit analysis
4 of the rule, if any, including an analysis of any jobs
5 added or lost, differentiating between public and pri-
6 vate sector jobs;

7 “(ii) the agency’s actions pursuant to sections
8 603, 604, 605, 607, and 609 of this title;

9 “(iii) the agency’s actions pursuant to sections
10 202, 203, 204, and 205 of the Unfunded Mandates
11 Reform Act of 1995; and

12 “(iv) any other relevant information or require-
13 ments under any other Act and any relevant Execu-
14 tive orders.

15 “(C) Upon receipt of a report submitted under sub-
16 paragraph (A), each House shall provide copies of the re-
17 port to the chairman and ranking member of each stand-
18 ing committee with jurisdiction under the rules of the
19 House of Representatives or the Senate to report a bill
20 to amend the provision of law under which the rule is
21 issued.

22 “(2)(A) The Comptroller General shall provide a re-
23 port on each major rule to the committees of jurisdiction
24 by the end of 15 calendar days after the submission or
25 publication date. The report of the Comptroller General

1 shall include an assessment of the agency’s compliance
2 with procedural steps required by paragraph (1)(B) and
3 an assessment of whether the major rule imposes any new
4 limits or mandates on private-sector activity.

5 “(B) Federal agencies shall cooperate with the Comp-
6 troller General by providing information relevant to the
7 Comptroller General’s report under subparagraph (A).

8 “(3) A major rule relating to a report submitted
9 under paragraph (1) shall take effect upon enactment of
10 a joint resolution of approval described in section 802 or
11 as provided for in the rule following enactment of a joint
12 resolution of approval described in section 802, whichever
13 is later.

14 “(4) A nonmajor rule shall take effect as provided
15 by section 803 after submission to Congress under para-
16 graph (1).

17 “(5) If a joint resolution of approval relating to a
18 major rule is not enacted within the period provided in
19 subsection (b)(2), then a joint resolution of approval relat-
20 ing to the same rule may not be considered under this
21 chapter in the same Congress by either the House of Rep-
22 resentatives or the Senate.

23 “(b)(1) A major rule shall not take effect unless the
24 Congress enacts a joint resolution of approval described
25 under section 802.

1 “(2) If a joint resolution described in subsection (a)
2 is not enacted into law by the end of 70 session days or
3 legislative days, as applicable, beginning on the date on
4 which the report referred to in section 801(a)(1)(A) is re-
5 ceived by Congress (excluding days either House of Con-
6 gress is adjourned for more than 3 days during a session
7 of Congress), then the rule described in that resolution
8 shall be deemed not to be approved and such rule shall
9 not take effect.

10 “(c)(1) Notwithstanding any other provision of this
11 section (except subject to paragraph (3)), a major rule
12 may take effect for one 90-calendar-day period if the
13 President makes a determination under paragraph (2) and
14 submits written notice of such determination to the Con-
15 gress.

16 “(2) Paragraph (1) applies to a determination made
17 by the President by Executive order that the major rule
18 should take effect because such rule is—

19 “(A) necessary because of an imminent threat
20 to health or safety or other emergency;

21 “(B) necessary for the enforcement of criminal
22 laws;

23 “(C) necessary for national security; or

24 “(D) issued pursuant to any statute imple-
25 menting an international trade agreement.

1 “(3) An exercise by the President of the authority
2 under this subsection shall have no effect on the proce-
3 dures under section 802.

4 “(d)(1) In addition to the opportunity for review oth-
5 erwise provided under this chapter, in the case of any rule
6 for which a report was submitted in accordance with sub-
7 section (a)(1)(A) during the period beginning on the date
8 occurring—

9 “(A) in the case of the Senate, 60 session days;
10 or

11 “(B) in the case of the House of Representa-
12 tives, 60 legislative days,
13 before the date the Congress is scheduled to adjourn a
14 session of Congress through the date on which the same
15 or succeeding Congress first convenes its next session, sec-
16 tions 802 and 803 shall apply to such rule in the suc-
17 ceeding session of Congress.

18 “(2)(A) In applying sections 802 and 803 for pur-
19 poses of such additional review, a rule described under
20 paragraph (1) shall be treated as though—

21 “(i) such rule were published in the Federal
22 Register on—

23 “(I) in the case of the Senate, the 15th
24 session day; or

1 “(II) in the case of the House of Rep-
2 resentatives, the 15th legislative day,
3 after the succeeding session of Congress first con-
4 venes; and

5 “(ii) a report on such rule were submitted to
6 Congress under subsection (a)(1) on such date.

7 “(B) Nothing in this paragraph shall be construed
8 to affect the requirement under subsection (a)(1) that a
9 report shall be submitted to Congress before a rule can
10 take effect.

11 “(3) A rule described under paragraph (1) shall take
12 effect as otherwise provided by law (including other sub-
13 sections of this section).

14 **“§ 802. Congressional approval procedure for major**
15 **rules**

16 “(a)(1) For purposes of this section, the term ‘joint
17 resolution’ means only a joint resolution addressing a re-
18 port classifying a rule as major pursuant to section
19 801(a)(1)(A)(iii) that—

20 “(A) bears no preamble;

21 “(B) bears the following title (with blanks filled
22 as appropriate): ‘Approving the rule submitted by
23 _____ relating to _____.’;

24 “(C) includes after its resolving clause only the
25 following (with blanks filled as appropriate): ‘That

1 Congress approves the rule submitted by _____ re-
2 lating to _____.’; and

3 “(D) is introduced pursuant to paragraph (2).

4 “(2) After a House of Congress receives a report
5 classifying a rule as major pursuant to section
6 801(a)(1)(A)(iii), the majority leader of that House (or
7 his or her respective designee) shall introduce (by request,
8 if appropriate) a joint resolution described in paragraph
9 (1)—

10 “(A) in the case of the House of Representa-
11 tives, within 3 legislative days; and

12 “(B) in the case of the Senate, within 3 session
13 days.

14 “(3) A joint resolution described in paragraph (1)
15 shall not be subject to amendment at any stage of pro-
16 ceeding.

17 “(b) A joint resolution described in subsection (a)
18 shall be referred in each House of Congress to the commit-
19 tees having jurisdiction over the provision of law under
20 which the rule is issued.

21 “(c) In the Senate, if the committee or committees
22 to which a joint resolution described in subsection (a) has
23 been referred have not reported it at the end of 15 session
24 days after its introduction, such committee or committees
25 shall be automatically discharged from further consider-

1 ation of the resolution and it shall be placed on the cal-
2endar. A vote on final passage of the resolution shall be
3 taken on or before the close of the 15th session day after
4 the resolution is reported by the committee or committees
5 to which it was referred, or after such committee or com-
6 mittees have been discharged from further consideration
7 of the resolution.

8 “(d)(1) In the Senate, when the committee or com-
9 mittees to which a joint resolution is referred have re-
10 ported, or when a committee or committees are discharged
11 (under subsection (c)) from further consideration of a
12 joint resolution described in subsection (a), it is at any
13 time thereafter in order (even though a previous motion
14 to the same effect has been disagreed to) for a motion
15 to proceed to the consideration of the joint resolution, and
16 all points of order against the joint resolution (and against
17 consideration of the joint resolution) are waived. The mo-
18 tion is not subject to amendment, or to a motion to post-
19 pone, or to a motion to proceed to the consideration of
20 other business. A motion to reconsider the vote by which
21 the motion is agreed to or disagreed to shall not be in
22 order. If a motion to proceed to the consideration of the
23 joint resolution is agreed to, the joint resolution shall re-
24 main the unfinished business of the Senate until disposed
25 of.

1 “(2) In the Senate, debate on the joint resolution,
2 and on all debatable motions and appeals in connection
3 therewith, shall be limited to not more than 2 hours, which
4 shall be divided equally between those favoring and those
5 opposing the joint resolution. A motion to further limit
6 debate is in order and not debatable. An amendment to,
7 or a motion to postpone, or a motion to proceed to the
8 consideration of other business, or a motion to recommit
9 the joint resolution is not in order.

10 “(3) In the Senate, immediately following the conclu-
11 sion of the debate on a joint resolution described in sub-
12 section (a), and a single quorum call at the conclusion of
13 the debate if requested in accordance with the rules of the
14 Senate, the vote on final passage of the joint resolution
15 shall occur.

16 “(4) Appeals from the decisions of the Chair relating
17 to the application of the rules of the Senate to the proce-
18 dure relating to a joint resolution described in subsection
19 (a) shall be decided without debate.

20 “(e) In the House of Representatives, if any com-
21 mittee to which a joint resolution described in subsection
22 (a) has been referred has not reported it to the House
23 at the end of 15 legislative days after its introduction,
24 such committee shall be discharged from further consider-
25 ation of the joint resolution, and it shall be placed on the

1 appropriate calendar. On the second and fourth Thursdays
2 of each month it shall be in order at any time for the
3 Speaker to recognize a Member who favors passage of a
4 joint resolution that has appeared on the calendar for at
5 least 5 legislative days to call up that joint resolution for
6 immediate consideration in the House without intervention
7 of any point of order. When so called up a joint resolution
8 shall be considered as read and shall be debatable for 1
9 hour equally divided and controlled by the proponent and
10 an opponent, and the previous question shall be considered
11 as ordered to its passage without intervening motion. It
12 shall not be in order to reconsider the vote on passage.
13 If a vote on final passage of the joint resolution has not
14 been taken by the third Thursday on which the Speaker
15 may recognize a Member under this subsection, such vote
16 shall be taken on that day.

17 “(f)(1) If, before passing a joint resolution described
18 in subsection (a), one House receives from the other a
19 joint resolution having the same text, then—

20 “(A) the joint resolution of the other House
21 shall not be referred to a committee; and

22 “(B) the procedure in the receiving House shall
23 be the same as if no joint resolution had been re-
24 ceived from the other House until the vote on pas-
25 sage, when the joint resolution received from the

1 other House shall supplant the joint resolution of
2 the receiving House.

3 “(2) This subsection shall not apply to the House of
4 Representatives if the joint resolution received from the
5 Senate is a revenue measure.

6 “(g) If either House has not taken a vote on final
7 passage of the joint resolution by the last day of the period
8 described in section 801(b)(2), then such vote shall be
9 taken on that day.

10 “(h) This section and section 803 are enacted by
11 Congress—

12 “(1) as an exercise of the rulemaking power of
13 the Senate and House of Representatives, respec-
14 tively, and as such is deemed to be part of the rules
15 of each House, respectively, but applicable only with
16 respect to the procedure to be followed in that
17 House in the case of a joint resolution described in
18 subsection (a) and superseding other rules only
19 where explicitly so; and

20 “(2) with full recognition of the Constitutional
21 right of either House to change the rules (so far as
22 they relate to the procedure of that House) at any
23 time, in the same manner and to the same extent as
24 in the case of any other rule of that House.

1 **“§ 803. Congressional disapproval procedure for**
2 **nonmajor rules**

3 “(a) For purposes of this section, the term ‘joint res-
4 olution’ means only a joint resolution introduced in the
5 period beginning on the date on which the report referred
6 to in section 801(a)(1)(A) is received by Congress and
7 ending 60 days thereafter (excluding days either House
8 of Congress is adjourned for more than 3 days during a
9 session of Congress), the matter after the resolving clause
10 of which is as follows: ‘That Congress disapproves the
11 nonmajor rule submitted by the _____ relating to
12 _____, and such rule shall have no force or effect.’ (The
13 blank spaces being appropriately filled in).

14 “(b) A joint resolution described in subsection (a)
15 shall be referred to the committees in each House of Con-
16 gress with jurisdiction.

17 “(c) In the Senate, if the committee to which is re-
18 ferred a joint resolution described in subsection (a) has
19 not reported such joint resolution (or an identical joint
20 resolution) at the end of 15 session days after the date
21 of introduction of the joint resolution, such committee may
22 be discharged from further consideration of such joint res-
23 olution upon a petition supported in writing by 30 Mem-
24 bers of the Senate, and such joint resolution shall be
25 placed on the calendar.

1 “(d)(1) In the Senate, when the committee to which
2 a joint resolution is referred has reported, or when a com-
3 mittee is discharged (under subsection (c)) from further
4 consideration of a joint resolution described in subsection
5 (a), it is at any time thereafter in order (even though a
6 previous motion to the same effect has been disagreed to)
7 for a motion to proceed to the consideration of the joint
8 resolution, and all points of order against the joint resolu-
9 tion (and against consideration of the joint resolution) are
10 waived. The motion is not subject to amendment, or to
11 a motion to postpone, or to a motion to proceed to the
12 consideration of other business. A motion to reconsider the
13 vote by which the motion is agreed to or disagreed to shall
14 not be in order. If a motion to proceed to the consideration
15 of the joint resolution is agreed to, the joint resolution
16 shall remain the unfinished business of the Senate until
17 disposed of.

18 “(2) In the Senate, debate on the joint resolution,
19 and on all debatable motions and appeals in connection
20 therewith, shall be limited to not more than 10 hours,
21 which shall be divided equally between those favoring and
22 those opposing the joint resolution. A motion to further
23 limit debate is in order and not debatable. An amendment
24 to, or a motion to postpone, or a motion to proceed to

1 the consideration of other business, or a motion to recom-
2 mit the joint resolution is not in order.

3 “(3) In the Senate, immediately following the conclu-
4 sion of the debate on a joint resolution described in sub-
5 section (a), and a single quorum call at the conclusion of
6 the debate if requested in accordance with the rules of the
7 Senate, the vote on final passage of the joint resolution
8 shall occur.

9 “(4) Appeals from the decisions of the Chair relating
10 to the application of the rules of the Senate to the proce-
11 dure relating to a joint resolution described in subsection
12 (a) shall be decided without debate.

13 “(e) In the Senate, the procedure specified in sub-
14 section (e) or (d) shall not apply to the consideration of
15 a joint resolution respecting a nonmajor rule—

16 “(1) after the expiration of the 60 session days
17 beginning with the applicable submission or publica-
18 tion date; or

19 “(2) if the report under section 801(a)(1)(A)
20 was submitted during the period referred to in sec-
21 tion 801(d)(1), after the expiration of the 60 session
22 days beginning on the 15th session day after the
23 succeeding session of Congress first convenes.

24 “(f) If, before the passage by one House of a joint
25 resolution of that House described in subsection (a), that

1 House receives from the other House a joint resolution
2 described in subsection (a), then the following procedures
3 shall apply:

4 “(1) The joint resolution of the other House
5 shall not be referred to a committee.

6 “(2) With respect to a joint resolution described
7 in subsection (a) of the House receiving the joint
8 resolution—

9 “(A) the procedure in that House shall be
10 the same as if no joint resolution had been re-
11 ceived from the other House; but

12 “(B) the vote on final passage shall be on
13 the joint resolution of the other House.

14 **“§ 804. Definitions**

15 “For purposes of this chapter:

16 “(1) The term ‘Federal agency’ means any
17 agency as that term is defined in section 551(1).

18 “(2) The term ‘major rule’ means any rule, in-
19 cluding an interim final rule, that the Administrator
20 of the Office of Information and Regulatory Affairs
21 of the Office of Management and Budget finds has
22 resulted in or is likely to result in—

23 “(A) an annual effect on the economy of
24 \$100,000,000 or more;

1 “(B) a major increase in costs or prices for
2 consumers, individual industries, Federal,
3 State, or local government agencies, or geo-
4 graphic regions; or

5 “(C) significant adverse effects on competi-
6 tion, employment, investment, productivity, in-
7 novation, or on the ability of United States-
8 based enterprises to compete with foreign-based
9 enterprises in domestic and export markets.

10 “(3) The term ‘nonmajor rule’ means any rule
11 that is not a major rule.

12 “(4) The term ‘rule’ has the meaning given
13 such term in section 551, except that such term does
14 not include—

15 “(A) any rule of particular applicability,
16 including a rule that approves or prescribes for
17 the future rates, wages, prices, services, or al-
18 lowances therefore, corporate or financial struc-
19 tures, reorganizations, mergers, or acquisitions
20 thereof, or accounting practices or disclosures
21 bearing on any of the foregoing;

22 “(B) any rule relating to agency manage-
23 ment or personnel; or

24 “(C) any rule of agency organization, pro-
25 cedure, or practice that does not substantially

1 affect the rights or obligations of non-agency
2 parties.

3 “(5) The term ‘submission date or publication
4 date’, except as otherwise provided in this chapter,
5 means—

6 “(A) in the case of a major rule, the date
7 on which the Congress receives the report sub-
8 mitted under section 801(a)(1); and

9 “(B) in the case of a nonmajor rule, the
10 later of—

11 “(i) the date on which the Congress
12 receives the report submitted under section
13 801(a)(1); and

14 “(ii) the date on which the nonmajor
15 rule is published in the Federal Register, if
16 so published.

17 **“§ 805. Judicial review**

18 “(a) No determination, finding, action, or omission
19 under this chapter shall be subject to judicial review.

20 “(b) Notwithstanding subsection (a), a court may de-
21 termine whether a Federal agency has completed the nec-
22 essary requirements under this chapter for a rule to take
23 effect.

24 “(c) The enactment of a joint resolution of approval
25 under section 802 shall not be interpreted to serve as a

1 grant or modification of statutory authority by Congress
2 for the promulgation of a rule, shall not extinguish or af-
3 fect any claim, whether substantive or procedural, against
4 any alleged defect in a rule, and shall not form part of
5 the record before the court in any judicial proceeding con-
6 cerning a rule except for purposes of determining whether
7 or not the rule is in effect.

8 **“§ 806. Exemption for monetary policy**

9 “Nothing in this chapter shall apply to rules that con-
10 cern monetary policy proposed or implemented by the
11 Board of Governors of the Federal Reserve System or the
12 Federal Open Market Committee.

13 **“§ 807. Effective date of certain rules**

14 “Notwithstanding section 801—

15 “(1) any rule that establishes, modifies, opens,
16 closes, or conducts a regulatory program for a com-
17 mercial, recreational, or subsistence activity related
18 to hunting, fishing, or camping; or

19 “(2) any rule other than a major rule which an
20 agency for good cause finds (and incorporates the
21 finding and a brief statement of reasons therefore in
22 the rule issued) that notice and public procedure
23 thereon are impracticable, unnecessary, or contrary
24 to the public interest,

1 shall take effect at such time as the Federal agency pro-
 2 mulgating the rule determines.”.

3 **SEC. 4. BUDGETARY EFFECTS OF RULES SUBJECT TO SEC-**
 4 **TION 802 OF TITLE 5, UNITED STATES CODE.**

5 Section 257(b)(2) of the Balanced Budget and Emer-
 6 gency Deficit Control Act of 1985 is amended by adding
 7 at the end the following new subparagraph:

8 “(E) BUDGETARY EFFECTS OF RULES
 9 SUBJECT TO SECTION 802 OF TITLE 5, UNITED
 10 STATES CODE.—Any rules subject to the con-
 11 gressional approval procedure set forth in sec-
 12 tion 802 of chapter 8 of title 5, United States
 13 Code, affecting budget authority, outlays, or re-
 14 ceipts shall be assumed to be effective unless it
 15 is not approved in accordance with such sec-
 16 tion.”.

17 **SEC. 5. GOVERNMENT ACCOUNTABILITY OFFICE STUDY OF**
 18 **RULES.**

19 (a) IN GENERAL.—The Comptroller General of the
 20 United States shall conduct a study to determine, as of
 21 the date of the enactment of this Act—

22 (1) how many rules (as such term is defined in
 23 section 804 of title 5, United States Code) were in
 24 effect;

1 (2) how many major rules (as such term is de-
2 fined in section 804 of title 5, United States Code)
3 were in effect; and

4 (3) the total estimated economic cost imposed
5 by all such rules.

6 (b) REPORT.—Not later than 1 year after the date
7 of the enactment of this Act, the Comptroller General of
8 the United States shall submit a report to Congress that
9 contains the findings of the study conducted under sub-
10 section (a).

11 **SEC. 6. EFFECTIVE DATE.**

12 Sections 3 and 4, and the amendments made by such
13 sections, shall take effect beginning on the date that is
14 1 year after the date of enactment of this Act.

○

Exhibit C

Calendar No. 613

114TH CONGRESS
2D SESSION

S. 1818

[Report No. 114-342]

To amend title 5, United States Code, to reform the rule making process
of agencies.

IN THE SENATE OF THE UNITED STATES

JULY 21, 2015

Mr. LANKFORD (for himself, Ms. HEITKAMP, Ms. AYOTTE, and Mrs. ERNST)
introduced the following bill; which was read twice and referred to the
Committee on Homeland Security and Governmental Affairs

SEPTEMBER 6, 2016

Reported by Mr. JOHNSON, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend title 5, United States Code, to reform the rule
making process of agencies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Principled Rulemaking
5 Act of 2015”.

1 **SEC. 2. DEFINITIONS.**

2 In this Act—

3 (1) the terms “agency”, “rule”, and “rule mak-
4 ing” have the meanings given those terms in section
5 551 of title 5, United States Code; and

6 (2) the term “regulatory action” means any
7 substantive action by an agency (normally published
8 in the Federal Register) that promulgates or is ex-
9 pected to lead to the promulgation of a final regula-
10 tion, including notices of inquiry, advance notices of
11 proposed rule making, and notices of proposed rule
12 making.

13 **SEC. 3. RULE MAKING CONSIDERATIONS.**

14 Section 553 of title 5, United States Code, is amend-
15 ed by adding at the end the following:

16 “(f) **RULE MAKING CONSIDERATIONS.**—

17 “(1) **IN GENERAL.**—An agency shall only pro-
18 mulgate a rule under this section that is—

19 “(A) required by law;

20 “(B) necessary to interpret a law; or

21 “(C) made necessary by compelling public
22 need, such as a material failure of the private
23 markets to protect or improve the health and
24 safety of the public, the environment, or the
25 wellbeing of the people of the United States.

1 “(2) CONSIDERATIONS.—Before promulgating a
2 rule under this section, an agency shall—

3 “(A) identify and assess the significance of
4 the problem that the agency intends to address
5 with the rule, including, where applicable, the
6 failures of private markets or public institutions
7 that warrant new agency action;

8 “(B) consider the legal authority under
9 which the rule may be proposed, including
10 whether a rule making is required by statute,
11 and if so, whether by a specific date, or whether
12 the agency has discretion to commence a rule
13 making;

14 “(C) examine whether existing rules or
15 other laws—

16 “(i) have created or contributed to the
17 problem identified under subparagraph
18 (A); and

19 “(ii) should be modified to achieve the
20 intended regulatory objective more effec-
21 tively;

22 “(D) identify and assess available alter-
23 natives to direct regulation, including by pro-
24 viding—

1 “(i) economic incentives to encourage
2 the desired behavior, such as user fees or
3 marketable permits; or

4 “(ii) information upon which choices
5 may be made by the public;

6 “(E) consider, to the extent reasonable, the
7 degree and nature of the risks posed by various
8 substances or activities within the jurisdiction
9 of the agency;

10 “(F) if after determining that a rule is the
11 best available method of achieving the regu-
12 latory objective, design the rule in the most
13 cost-effective manner to achieve the regulatory
14 objective;

15 “(G) in carrying out subparagraph (F),
16 consider—

17 “(i) incentives for innovation, consist-
18 ency, predictability, flexibility, distributive
19 impacts, and equity; and

20 “(ii) the costs of enforcement and
21 compliance to the Federal Government,
22 regulated entities, and the public;

23 “(H) assess the costs and the benefits of
24 the intended rule and, recognizing that some

1 costs and benefits (including quantifiable and
2 qualitative measures) are difficult to quantify—

3 “(i) propose or adopt a rule only upon
4 a reasoned determination that the benefits
5 of the intended rule justify the costs of the
6 rule; and

7 “(ii) select approaches that maximize
8 net benefits, unless a statute requires an-
9 other regulatory approach;

10 “(I) base decisions on the best reasonably
11 obtainable scientific, technical, economic, and
12 other information concerning the need for, and
13 consequences of, the intended rule;

14 “(J) identify and assess alternative forms
15 of regulation and, to the extent feasible, specify
16 performance objectives, and not the behavior or
17 manner of compliance that regulated entities
18 are required to adopt;

19 “(K) seek views of appropriate State, local,
20 and tribal officials before imposing regulatory
21 requirements that may significantly or uniquely
22 affect those governmental entities;

23 “(L) assess the effects of rules on State,
24 local, and tribal governments, including specifi-
25 cally the availability of resources to carry out

1 those mandates, and seek to minimize those
2 burdens that uniquely or significantly affect
3 those governmental entities, consistent with
4 achieving the regulatory objective of the agency;

5 “(M) as appropriate, seek to harmonize
6 agency action with related State, local, and trib-
7 al regulatory and other governmental functions;

8 “(N) avoid the promulgation of a rule that
9 is inconsistent, incompatible, or duplicative with
10 other rules of the agency or those of other
11 agencies;

12 “(O) tailor the rule—

13 “(i) to impose the least burden on so-
14 ciety, including individuals, businesses of
15 differing sizes, and other entities, including
16 small communities and governmental enti-
17 ties; and

18 “(ii) in a manner that is consistent
19 with obtaining the regulatory objective,
20 taking into account, and to the extent
21 practicable, the costs of cumulative rules;
22 and

23 “(P) in order to minimize the potential for
24 uncertainty and litigation arising from such un-

1 certainty, draft the rule in a manner that is
2 simple and easy to understand.”.

3 **SEC. 4. PUBLIC PARTICIPATION.**

4 (a) ~~IN GENERAL.~~—To promote an open exchange
5 with the public, each agency shall, consistent with section
6 ~~553~~ of title ~~5~~, United States Code, and other applicable
7 requirements, issue rules through a process that involves
8 public participation, including—

9 (1) providing the public with an opportunity to
10 participate in the regulatory process; and

11 (2) to the extent feasible—

12 (A) affording the public a meaningful op-
13 portunity to submit comments through the
14 Internet on any proposed rule for a period of
15 not less than 60 days;

16 (B) providing, for both proposed and final
17 rules, timely online access to the rule making
18 docket of the agency on an easily accessible
19 Federal website, including relevant scientific
20 and technical findings, in an open, searchable,
21 and downloadable format; and

22 (C) providing an opportunity for public
23 comment on all pertinent parts of the proposed
24 rule making docket of the agency, including rel-
25 evant scientific and technical findings.

1 (b) **COMMENTS FROM AFFECTED PARTIES.**—Before
 2 issuing a notice of proposed rule making, each agency
 3 shall, when feasible and appropriate, seek the views of
 4 those who are likely to be affected by the rule, including
 5 those who are likely to benefit from and those who are
 6 potentially subject to the rule.

7 **SEC. 5. INTEGRATION AND INNOVATION.**

8 In developing regulatory actions and identifying ap-
 9 propriate approaches, each agency shall—

10 (1) attempt to promote coordination, simplifica-
 11 tion, and harmonization; and

12 (2) seek to identify, as appropriate, means to
 13 achieve regulatory goals that are designed to pro-
 14 mote innovation.

15 **SEC. 6. FLEXIBLE APPROACHES.**

16 Where relevant, feasible, and consistent with regu-
 17 latory objectives, and to the extent permitted by law, each
 18 agency shall identify and consider regulatory approaches
 19 that—

20 (1) reduce burdens and maintain flexibility and
 21 freedom of choice for the public;

22 (2) include warnings, appropriate default rules,
 23 and disclosure requirements; and

24 (3) provide information to the public in a form
 25 that is clear and intelligible.

1 **SEC. 7. SCIENCE.**

2 Each agency shall ensure the objectivity of any sci-
3 entific and technological information and processes used
4 to support each regulatory action of the agency.

5 **SECTION 1. SHORT TITLE.**

6 *This Act may be cited as the “Principled Rulemaking*
7 *Act of 2015”.*

8 **SEC. 2. DEFINITIONS.**

9 *In this Act—*

10 (1) *the terms “agency”, “rule”, and “rule mak-*
11 *ing” have the meanings given those terms in section*
12 *551 of title 5, United States Code; and*

13 (2) *the term “regulatory action”—*

14 (A) *means any substantive action by an*
15 *agency (normally published in the Federal Reg-*
16 *ister) that promulgates or is expected to lead to*
17 *the promulgation of a final regulation, including*
18 *notices of inquiry, advance notices of proposed*
19 *rule making, and notices of proposed rule mak-*
20 *ing; and*

21 (B) *does not include an action by an agen-*
22 *cy involving—*

23 (i) *a military or foreign affairs func-*
24 *tion of the United States; or*

1 (ii) a matter relating to agency man-
2 agement or personnel or to public property,
3 loans, grants, benefits, or contracts.

4 **SEC. 3. RULE MAKING CONSIDERATIONS.**

5 Section 553 of title 5, United States Code, is amended
6 by adding at the end the following:

7 “(f) **RULE MAKING CONSIDERATIONS.**—

8 “(1) **IN GENERAL.**—An agency shall only pro-
9 mulgate a rule under this section that is—

10 “(A) required by law;

11 “(B) necessary to interpret a law; or

12 “(C) as permitted by law, made necessary
13 by public need, to protect or improve the health
14 and safety of the public, the environment, or the
15 wellbeing of the people of the United States.

16 “(2) **CONSIDERATIONS.**—Before promulgating a
17 rule under this section, an agency shall—

18 “(A) identify and assess the significance of
19 the problem that the agency intends to address
20 with the rule;

21 “(B) consider the legal authority under
22 which the rule may be proposed, including
23 whether a rule making is required by statute,
24 and if so, whether by a specific date, or whether

1 *the agency has discretion to commence a rule*
2 *making;*

3 “(C) *where practicable, examine whether ex-*
4 *isting rules or other laws, including the cumu-*
5 *lative effect of existing rules or other laws—*

6 “(i) *have created or contributed to the*
7 *problem identified under subparagraph (A);*
8 *and*

9 “(ii) *should be modified to achieve the*
10 *intended regulatory objective more effec-*
11 *tively;*

12 “(D) *as permitted by statute, identify and*
13 *assess available alternatives to direct regulation,*
14 *including by providing—*

15 “(i) *economic incentives to encourage*
16 *the desired behavior, such as user fees or*
17 *marketable permits; or*

18 “(ii) *information to the public in a*
19 *form that is clear and intelligible;*

20 “(E) *consider, to the extent reasonable, the*
21 *degree and nature of the risks posed by various*
22 *substances or activities within the jurisdiction of*
23 *the agency;*

1 “(F) after determining that a rule is the
2 best available method of achieving the regulatory
3 objective—

4 “(i) assess the costs and benefits of the
5 intended rule and, recognizing that some
6 costs and benefits (including quantifiable
7 and qualitative measures) are difficult to
8 quantify, design the rule to maximize net
9 benefits while justifying the costs, unless a
10 statute requires another regulatory ap-
11 proach; and

12 “(ii) as permitted by statute—

13 “(I) consider, when developing the
14 rule—

15 “(aa) incentives for innova-
16 tion, consistency, predictability,
17 flexibility, distributive impacts,
18 and equity on the regulated enti-
19 ties and the public; and

20 “(bb) the cost of enforcement
21 and compliance to the Federal
22 Government, regulated entities,
23 and the public; and

24 “(II) select approaches that reduce
25 burdens and maintain flexibility and

1 *freedom of choice for regulated entities*
2 *and the public;*

3 *“(G) base decisions on the best reasonably*
4 *obtainable and publically accessible scientific,*
5 *technical, economic, and other information con-*
6 *cerning the need for, and consequences of, the in-*
7 *tended rule;*

8 *“(H) identify and assess alternative forms*
9 *of regulation and, to the extent feasible, specify*
10 *performance objectives, and not the behavior or*
11 *manner of compliance that regulated entities are*
12 *required to adopt;*

13 *“(I) seek views of appropriate State, local,*
14 *and tribal officials before imposing regulatory*
15 *requirements that may significantly or uniquely*
16 *affect those governmental entities;*

17 *“(J) assess the effects of rules on State,*
18 *local, and tribal governments and the private*
19 *sector, including specifically the availability of*
20 *resources to carry out those mandates, and seek*
21 *to minimize those burdens that uniquely or sig-*
22 *nificantly affect those governmental entities, con-*
23 *sistent with achieving the regulatory objective of*
24 *the agency;*

1 “(K) as appropriate, seek to harmonize
2 agency action with related State, local, and trib-
3 al regulatory and other governmental functions;

4 “(L) avoid the promulgation of a rule that
5 is inconsistent, incompatible, or duplicative with
6 other rules of the agency or those of other agen-
7 cies;

8 “(M) tailor the rule—

9 “(i) to maximize benefits while impos-
10 ing the least possible burden on society, in-
11 cluding individuals, businesses of differing
12 sizes, and other entities, including small
13 communities and governmental entities; and

14 “(ii) in a manner that is consistent
15 with obtaining the regulatory objective, tak-
16 ing into account, and to the greatest extent
17 practicable, the costs of cumulative rules;
18 and

19 “(N) in order to minimize the potential for
20 uncertainty and litigation arising from such un-
21 certainty—

22 “(i) draft the rule in a manner that is
23 simple and easy to understand; and

24 “(ii) include information to assist with
25 compliance with the rule, such as warnings,

1 *appropriate default rules, and disclosure re-*
2 *quirements.*

3 “(3) *EXCEPTIONS.*—*This subsection shall not*
4 *apply—*

5 “(A) *to interpretative rules, general state-*
6 *ments of policy, or rules of agency organization,*
7 *procedures, or practice;*

8 “(B) *if the Administrator of the Office of*
9 *Information and Regulatory Affairs waives the*
10 *requirements of this subsection for good cause; or*

11 “(C) *if the statute on which a proposed rule*
12 *is based specifically exempts a rule from any of*
13 *the procedures under this subsection.*

14 “(4) *JUDICIAL REVIEW.*—

15 “(A) *IN GENERAL.*—*Compliance by an*
16 *agency with the provisions of this subsection*
17 *shall be subject to judicial review only—*

18 “(i) *in connection with review of final*
19 *agency action; and*

20 “(ii) *in accordance with this para-*
21 *graph.*

22 “(B) *DETERMINATIONS BY ADMINIS-*
23 *TRATOR.*—*Any determination, action, or inac-*
24 *tion of the Administrator of the Office of Infor-*

1 *mation and Regulatory Affairs under this sub-*
2 *section shall not be subject to judicial review.*

3 *“(C) REVIEW WITH FINAL RULE.—Compli-*
4 *ance by an agency with the provisions of this*
5 *subsection shall only be subject to judicial review*
6 *in connection with review of the final rule to*
7 *which an analysis, assessment, or other consider-*
8 *ation under paragraph (2) applies.*

9 *“(D) RULE MAKING RECORD.—Each consid-*
10 *eration by an agency under paragraph (2) shall*
11 *be—*

12 *“(i) included as part of the rule mak-*
13 *ing record for the rule; and*

14 *“(ii) to the extent relevant, considered*
15 *by a court only in determining whether,*
16 *under the statute granting the rule making*
17 *authority to the agency, the final rule is—*

18 *“(I) arbitrary, capricious, or an*
19 *abuse of discretion; or*

20 *“(II) unsupported by substantial*
21 *evidence where the standard is other-*
22 *wise provided by law.*

23 *“(E) SET ASIDE.—If an agency fails to*
24 *comply with the requirements under paragraph*
25 *(2), a court may, giving due account to preju-*

1 *dicial error, hold unlawful and set aside the*
2 *agency action.”.*

3 **SEC. 4. PUBLIC PARTICIPATION.**

4 *(a) IN GENERAL.—To promote an open exchange with*
5 *the public, each agency shall, consistent with section 553*
6 *of title 5, United States Code, and other applicable require-*
7 *ments, issue rules through a process that involves public*
8 *participation, including—*

9 *(1) providing the public with a meaningful op-*
10 *portunity to participate in the regulatory process;*
11 *and*

12 *(2) to the greatest extent feasible—*

13 *(A) affording the public a meaningful op-*
14 *portunity to submit comments through the Inter-*
15 *net on any proposed rule for a period of not less*
16 *than 60 days;*

17 *(B) providing, for both proposed and final*
18 *rules, timely online access to the rule making*
19 *docket of the agency on an easily accessible Fed-*
20 *eral website, including relevant scientific and*
21 *technical findings, in an open, searchable, and*
22 *downloadable format; and*

23 *(C) providing an opportunity for public*
24 *comment on all pertinent parts of the proposed*

1 *rule making docket of the agency, including rel-*
2 *evant scientific and technical findings.*

3 **(b) COMMENTS FROM AFFECTED PARTIES.**—*Before*
4 *issuing a notice of proposed rule making, each agency shall,*
5 *when feasible and appropriate, seek the views of those who*
6 *are likely to be affected by the rule, including those who*
7 *are likely to benefit from and those who are potentially sub-*
8 *ject to the rule.*

9 **SEC. 5. INTEGRATION AND INNOVATION.**

10 *In developing regulatory actions and identifying ap-*
11 *propriate approaches, each agency shall—*

12 (1) *attempt to promote coordination, simplifica-*
13 *tion, and harmonization; and*

14 (2) *seek to identify, as appropriate, means to*
15 *achieve regulatory goals that are designed to promote*
16 *innovation.*

17 **SEC. 6. SCIENCE.**

18 *When issuing a rule under section 553, each agency*
19 *shall ensure that any scientific and technological informa-*
20 *tion and processes, including models, used to support any*
21 *regulatory action of the agency is the best available, by tak-*
22 *ing into consideration whether the scientific and techno-*
23 *logical information and processes used are objective, peer-*
24 *reviewed, reproducible, and publically available.*

Calendar No. 613

114TH CONGRESS
2^D SESSION

S. 1818

[Report No. 114-342]

A BILL

To amend title 5, United States Code, to reform
the rule making process of agencies.

SEPTEMBER 6, 2016

Reported with an amendment