Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 2122, the "Regulatory Accountability Act of 2013"

July 9, 2013

## SUMMARY

The Administrative Procedure Act has generally been a successful statute, and proposals to amend it should be approached with caution and circumspection. In the last Congress, the House of Representatives did not display such caution when it passed H.R. 3010, the predecessor of H.R. 2122, only three months after it had been introduced. The subcommittee now has an opportunity to evaluate the bill more carefully in the current Congress, and I hope it will make good use of that opportunity.

Among notable problem areas in H.R. 2122 that deserve to be reexamined are:

• the bill's prescribed "rulemaking considerations," which would greatly burden the rulemaking process with multiple inquiries that would impede efficient policymaking and, in many instances, shed little productive light on a given pending rule;

• the bill's "supermandates," which would override much existing .law with decisional criteria that are too restrictive and would promote unproductive litigation;

• the bill's requirements for formal rulemaking, which has largely been abandoned during the past thirty years and is widely regarded as obsolete and out of tune with the modern rulemaking process; and

• the bill's judicial review provisions, which would expand the duties of reviewing courts in ways that are seriously at odds with the case law and with traditional conceptions of the judicial role.

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Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss H.R. 2122, the proposed Regulatory Accountability Act of 2013.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

## Overview

The Administrative Procedure Act (APA)[1] is generally regarded as a success story. It provides a framework for a wide variety of agency activities. Although its rulemaking language is brief, the courts, executive authorities, agencies, and the administrative law community have developed an extensive case law and practice norms that, on the whole, work quite effectively. The APA system has enough flexibility to give the executive a reasonable shot at carrying out its constitutional function of implementing congressional mandates. At the same time, it prescribes and coexists with a number of safeguards against executive abuses. These safeguards include judicial review, oversight by Congress and by Executive Branch leadership, and public opinion. Continuity in the APA has been a source of stability in our legal order, yet evolution at a nonstatutory level has allowed for adaptations to meet the changing needs of society.

It is reasonable for Congress to consider whether it can craft legislation that would codify widely accepted developments in the rulemaking process and make that process fairer and more efficient. However, I do not see H.R. 2122 as headed in the right direction. It contains some provisions that could be beneficial or at least innocuous, but they are combined with a host of

[1] 5 U.S.C. § 551 et seq.

features that would be highly burdensome to the rulemaking process, or that are simply not well thought out.

H.R. 2122 is almost identical to the former H.R. 3010, which passed the House of Representatives during the 112th Congress. This 34-page bill, which would have made numerous changes in the APA, sped through the House, from introduction to final passage, in only three months. I was dismayed to see the House rush forward with major legislation that raised so many unanswered concerns. The bill received much less vetting than it deserved. Where the subject matter is a foundational statute that will apply government-wide to agency actions of all kinds, it is important to get the details right. I hope the committee and the House will proceed more deliberatively this time around.

I cannot address all of the bill's complexities in my testimony. I am attaching to this statement the detailed comments that the ABA Administrative Law Section filed regarding H.R. 3010.[2] These comments did provide a point-by-point critique of nearly every provision of that bill, and they merit close attention from your subcommittee. To repeat, I am not speaking for the Section today. However, I did participate actively in the drafting of those comments, and I should be in a good position to respond as an individual to questions that you may have about the issues the Section raised.

In the remainder of this statement, I will highlight a few areas of particular concern about the bill. I am not convinced of the need for an APA revision bill at this time. However, if the subcommittee does decide to proceed with this initiative, I hope to persuade you of the need to pare down the bill to manageable dimensions and to analyze the remaining provisions with greater attention to problem areas than has apparently occurred to date.

## Rulemaking Considerations

A core concern about the bill is that it would greatly complicate the rulemaking process and make it difficult for agencies to carry out the missions that Congress has assigned to them. Many students of the administrative law believe that the rulemaking process is already too cumbersome, and the bill would aggravate that situation enormously. One way in which it would do so is by prescribing in § 553(b) a large number of "considerations" that an agency would have to address in *every* rulemaking proceeding (except where an exemption from all rulemaking procedure applies). Among these considerations are: the costs and benefits of the proposed rule *and* of all reasonable alternative rules (including direct, indirect, and cumulative costs and benefits); the estimated impact of the rule on economic growth, jobs, innovation, and

[2]ABA Section of Admin. Law and Reg. Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 Admin. L. Rev. 619 (2012) (hereinafter *ABA Section Comments*). These comments related to H.R. 3010 as introduced, which was similar but not identical to the version later passed by the House.

competitiveness; whether the agency thinks it is *required* to adopt the rule, or only has discretion to adopt it; whether existing rules created the problem and could be fixed; and the list goes on. Subsections 553(d) and 553(f) add to the list by specifying additional matters that the agency must address at the proposal and final rule stages, respectively.

Some of these inquiries would be perfectly appropriate for a very elaborate and costly rule, but it is overkill to apply them to virtually *every* rulemaking proceeding. The proponents of these requirements do not seem to take sufficient account of the fact that agency resources are finite – a particularly glaring problem in these days of budget-cutting. Moreover, the list of required considerations is decidedly onesided. Overwhelmingly, the listed items relate to possible objections to the rule, rather than its potential benefits.

Proponents of the Regulatory Accountability Act have minimized these concerns by arguing that most of the "considerations" that would be prescribed by the bill are already found in presidential executive orders.[3] However, this is a misleading comparison, for reasons explained by the Administrative Law Section in its comments:

> [S]everal of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of Executive Order 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases. Moreover, compliance with the order is not judicially reviewable. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and OIRA, but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill, an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion. The burden on the agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[4]

More specifically, a number of the prescribed considerations would introduce issues that would be of little relevance or no relevance to many or most rulemaking proceedings; nevertheless, a rulemaking agency would routinely have to expend additional resources in order to jump through the extra hoops. For example, I do not see why an agency should regularly be required to address "whether a rulemaking is required by statute . . . or whether the agency has

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[3] *See, e.g., Regulatory Accountability Act of 2011*, H.R. Rep. 112-294, at 22-25 (2011) (hereinafter *2011 House Report*).

[4] *ABA Section Comments* at 634.

discretion."[5] If the agency *wants* to rely on authority that the statute at least permits it to use, I see no functional justification for forcing it to discuss the counterfactual question of whether it could have declined to use that authority if it had desired otherwise.

Similarly, the question of whether "existing rules have created or contributed to the problem" and "could be amended or rescinded"[6] does not belong in across-the-board legislation such as the APA. This issue might be important in a small minority of cases, but it would be a distraction most of the time. For this reason it should be deleted. As the Section explained in its comments, the notice-and-comment system is self-policing. If the question of revising other agency regulations really were important in a particular situation, some stakeholder would be likely to raise it during the comment period; and, under the case law, the agency must respond to all material and significant comments.[7] But one simply cannot say that touching this base in *every* rulemaking proceeding is essential to rational decisionmaking. In short, although a major emphasis in the bill is encouragement of cost-benefit analysis, many of the steps that the bill would add to the rulemaking process are simply not cost-justified.

**Supermandates**

An additional problem is that some of the factors the agency would be directed to consider may be contrary to a given agency's enabling statute, but the bill says that the agency must consider them nevertheless. For example, the bill requires the agency to conduct a detailed cost-benefit analysis of every proposed rule, "notwithstanding any other provision of law."[8] This "supermandate" would override a great deal of substantive law, including portions of the Clean Air Act, Clean Water Act, Occupational Safety and Health Act, Food and Drug Act, and other protective measures. For example, some health and safety statutes direct an agency to use the "best technology available" and *not* to weigh costs against benefits, but the Act would require the agency that implements those statutes to conduct a cost-benefit analysis anyway.[9] Furthermore, the bill would require an agency, in making its final decision, to choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule."[10]

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[5]H.R. 2122, § 553(b)(1). All citations to bill sections refer to the APA as it would be amended.

[6]*Id.* § 553(b)(4).

[7]*See ABA Section Comments* at 633-34.

[8]H.R. 2122, § 553(b)(6)(A).

[9]*See ABA Section Comments* at 639-40.

[10]H.R. 2122, § 553(f)(3).

These sweeping provisions do not take sufficient account of the complexities of administrative decisionmaking. As the ABA Section wrote in its comments, "[a] government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts."[11] Cost-benefit analysis, for example, has inherent limitations, including the difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs. These limitations counsel against trying to extend the domain of such analysis too widely and indiscriminately. Consider, for example, the challenge of applying cost-benefit criteria to decisions regarding antidiscrimination policy, preservation of historical landmarks, children's education, or payment of moral debts to veterans. And, in the context of Social Security or Medicare, is the "least costly" rule a regulation that provides the stingiest possible payments to beneficiaries? I am concerned that the supermandate provisions in the bill would give rise to considerable uncertainty and litigation, potentially enabling the judicial branch to exert an unprecedented and inappropriate degree of control over administrative policymaking.

**Formal Rulemaking**

I said above that rigorous regulatory analysis requirements can be justified for the most expensive and consequential rules – "major" and "high-impact" rules, in the language of H.R. 2122. Unfortunately, the bill would go much further. It would subject virtually all high-impact rulemaking, and much major rulemaking, to the burdensome requirements of "formal rulemaking" under sections 556 and 557 of the APA.[12] This is a serious mistake.

I will briefly summarize the analysis that is set forth in detail in the Section comments.[13] As that report explained, courts, administrative agencies of both Democratic and Republican administrations, and the academic community have overwhelmingly supported the abandonment of this technique during the past thirty years, except where statutorily required. Indeed, ACUS has called for all existing formal rulemaking mandates to be repealed, and Congress has indeed repealed some of them and stopped enacting others. The committee's report on H.R. 3010 acknowledged the breadth of this repudiation,[14] but it did not draw what I would have thought was the obvious implication of this track record – that there have been solid reasons for this abandonment.

One of those reasons, administrative law authorities widely agree, is that trial-type hearings are not well designed to resolve the issues in rulemaking, especially the issues in a

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[11] *ABA Section Comments* at 640

[12] H.R. 2122, §§ 553(e) [introductory paragraph], 553(e)(6).

[13] *ABA Section Comments* at 650-54.

[14] *2011 House Report* at 34-36.

complex proceeding involving health or safety regulation. Typically, those issues turn less on witness demeanor than on whether the substance stands up to rigorous analysis. Exchanges of documents over time, in a notice and comment proceeding, is the most effective way to iron out these disputes. After all, the end product will not be a jury verdict; it will be a lengthy, dry document published in the Federal Register. Very little will turn on whether there was a "Perry Mason moment" at a live hearing. There simply is no literature indicating that the notice and comment process will not allow full development of the issues.

On the other hand, the resource costs of rulemaking increase dramatically when a trial type hearing is required. That conclusion is supported by studies conducted during the era when formal rulemaking was common. In any event, it should be self-evident that preparing for a trial is much more time-consuming than participating in a notice and comment proceeding. The classic illustration of this problem is the infamous peanut butter rulemaking proceeding, in which the Food and Drug Administration spent nine years (not counting two years for judicial review) on hearings to decide whether peanut butter should be required to have 87 or 90 percent peanuts.[15]

Against this background, I cannot see why revival of this discredited procedure should be pursued. To my knowledge, neither the committee nor other proponents of the proposed § 556(e) have pointed to a body of regulatory decisions reached during the past three decades that supposedly were not made wisely or adequately because trial-type techniques were unavailable. That very telling gap in the arguments in favor of formal rulemaking brings to mind the pointed words of one of the great administrative law jurists of the mid-twentieth century, Judge Harold Leventhal. Rejecting an argument that notice-and-comment rulemaking was insufficient to illuminate the policy issues raised in a Civil Aeronautics Board proceeding, Judge Leventhal wrote for the en banc D.C. Circuit: "[T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay."[16]

Finally, the APA structure for formal rulemaking would bring along a good deal of procedural rigidity that is incompatible with the way in which the rulemaking process has developed in the modern era. For one thing, formal rulemaking is subject to the ex parte contacts ban in the APA.[17] This means that, in such a proceeding, no interested person outside the agency may communicate ex parte with an agency decisionmaker outside the public record. This prohibition is drastically at odds with the open dialogue that is customary in the rulemaking

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[15]Corn Products Co. v. FDA, 427 F.2d 511 (3d Cir. 1970).

[16]American Airlines, Inc. v. CAB, 359 F.2d 624, 632-33 (D.C. Cir. 1966) (en banc).

[17]5 U.S.C. § 557(d)(1)(A).

process. The ban would apply not only to private persons but also to OIRA. This would be incompatible with the emphasis elsewhere in H.R. 2122 on expanding OIRA oversight. Surely OIRA should not be excluded from consulting with an agency about a rule that would entail a billion dollars in costs to the economy.

For that matter, the prohibition would also apply to Congress itself. I imagine that many members of this House, in both parties, would be unhappy to learn that the bill would make it illegal for a member to call up an agency administrator and express an opinion about the merits of a billion-dollar rule. Yet that is the clear consequence of triggering the formal rulemaking process. This is one more example of a problem that did not get the attention it deserved when H.R. 3010 was passed by the House in 2011.

**Judicial Review Provisions**

Finally, I am concerned about the judicial review provisions in § 706(b) of H.R. 2122. That section contains several provisions that would alter the scope of judicial review of administrative action. All of them fall well outside the range of doctrines that can find support in the current case law. I would urge caution in this area. The judicial review system that we have now has been decades in the making. It combines principles of judicial restrain with the careful scrutiny that goes by the nickname "hard look review." However, the courts' pronouncements in this area are often confusing, if not self-contradictory, and nuances in the doctrine are difficult to capture in statutory language. If Congress legislates too hastily in this area, the potential for unanticipated consequences is high.[18] I suspect that, indeed, these measures in § 706(b) have not gotten the careful consideration they deserve. Here I will briefly summarize and expand upon the analysis in the Section comments.[19]

First, § 706(b)(1) would, in effect, abolish all judicial deference to agencies' interpretations of their own regulations. It is true that some commentators, whose work was cited in the committee's report on H.R. 3010,[20] have argued that the degree of judicial deference accorded to such interpretations should be *reduced*. However, the bill goes much further, because it says flatly that the court "shall not defer." Many regulations are quite technical, and the relationship between a single regulation and the overall statutory scheme is often hard for a generalist judge to penetrate. I do not think it would be wise (let alone consistent with the case law) to say that when a reviewing court needs to interpret such regulations, it may not give any

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[18]I have recommended legislative restraint on the issue of scope of review for a long time. *See* Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 Wake Forest L. Rev. 647, 665-66 (1996).

[19]*ABA Section Comments* at 667-69 (discussing proposed §§ 706(b)(1)-(2)).

[20]*2011 House Report* at 30-31.

weight to the views of the agency that administers the program.

Second, the bill provides in § 706(b)(2) that "the court shall not defer to" an agency's "determination of the costs and benefits of a rule or economic or risk assessment of the action" if the agency failed to conform to guidelines prescribed by OIRA. This provision is unwise. OIRA's principal guidance document on cost-benefit analysis, called Circular A-4,[21] contains forty-eight pages of abstract, technical prose. It would not be difficult for a reasonably competent private lawyer to find some basis for claiming on appeal that an agency failed to comply with some provision in that document. This controversy would plunge the reviewing court into difficult and complex territory, considerably complicating the judicial review proceeding. But, furthermore, suppose that in a given case the court decides that the agency did not comply. Then the court apparently would be expected to weigh the costs and benefits of the rule on its own – a thoroughly inappropriate role for the judicial branch. As the ABA Section noted:

> Such judicial overrides [of the agency's conclusions] would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.[22]

Third, § 706(b)(3) states that a court "shall not defer" to an agency's "determinations made in the adoption of an interim rule." This language is, I believe, ambiguous. The drafters might simply mean to say that the court shall make a nondeferential assessment of whether the agency properly invoked the APA exemption that allows the issuance of interim rules without prior notice and comment. If that is what they intended, the provision is superfluous, because, as the Section comments noted, courts already review APA questions independently.[23] However, § 706(b)(3) can also be read as saying that, on a petition to review an interim rule, the court may freely second-guess the merits of the rule itself. In effect, this would turn the court into a super-regulator whenever it reviews a rule that an agency promulgated on an interim basis because of an emergency or other perceived urgency. I cannot discern any plausible justification for such a measure.

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[21] OMB Circular A-4, http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

[22] *ABA Section Comments* at 667-68.

[23] *Id.* at 663.

Finally, § 706(b)(4) would provide that a court "shall not defer" to an agency's "guidance." An important objection to this provision is that some guidance documents, constituting what are commonly called "policy statements," express an agency's discretionary judgments. If a court were to redecide these matters without deference – that is, "de novo" – it would be exercising the agency's discretion. On this issue I cannot improve on the critique of the late Professor Robert Anthony of George Mason University School of Law. Until his recent passing, he was considered the leading scholarly critic of agencies' real or perceived abuses of guidance documents. But even he recognized that a review standard like § 706(b)(4) would be extravagant as applied to policy statements. As he and a coauthor wrote: "De novo review seems to us to be manifestly inappropriate and impractical. It would place the court in the policy-making position of an agency, without the agency's expertise. Especially in a technical area, the court would possess no resources with which to form an independent evaluation of the agency's effort, let alone to form an independent policy of its own devising. Any effort to do so would be unbecoming to the judicial role."[24]

In short, these judicial review provisions in § 706(b) are far removed from modern judicial review practice. They are not supported by any detached assessment of how they would work or why they are needed. I believe they should be deleted from the bill.

## Conclusion

I commend the subcommittee for its continued interest in improvement of the administrative process. However, the actual bill that is before you today would, in my judgment, make a number of drastic and untested alterations in a rulemaking process that is stable and actually works fairly well. I would think that legislators who think of themselves as "conservative" should want to resist, or at the very least be cautious about, the radical experimentalism that pervades much of this bill. Because of the APA's government-wide reach, the potential for unanticipated consequences is high. I hope that this testimony has raised some red flags for your consideration, and I would encourage close engagement with the ABA Section comments and other critiques of the bill. An inclusive decisional process is essential if Congress is to produce a revised APA that will be realistic, workable, and durable.

This concludes my prepared statement, and I will be happy to respond to any questions that you may have. Thank you again for the invitation to testify.

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[24]Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 Wake Forest L. Rev. 667, 687-88 (1996). The authors added: "No case has been found in which a court expressly endorsed or applied a de novo standard." *Id.* at 688 n.90.

OCTOBER 24, 2011

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

# COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

## *SUMMARY*

The Regulatory Accountability Act of 2011, H.R. 3010, would be a sweeping and consequential revision to the Administrative Procedure Act, particularly with regard to the process of rulemaking. The bill is unusually ambitious and crammed with details that are impossible to summarize. Among its provisions are many that the Section endorses, many it would modify, and many that it opposes.

With regard to the first category, we support provisions that would

- require agencies to maintain a rulemaking record,
- require agencies to disclose data, studies, and other information underlying a proposed rule,
- recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA),
- provide for agencies to consult OIRA when issuing major guidance, and
- extend these OIRA functions to the independent agencies.

With regard to the second category, we are sympathetic toward, but suggest modifications to, the bill's provisions that would

- add an Advance Notice of Proposed Rulemaking step to certain rulemakings,
- address the problem of agencies' issuance of "interim" rules that are never superseded by regularly adopted rules, and
- provide some centralized oversight of agency issuance of and reliance on guidance documents.

On the other hand, the Section has serious concerns about

- the bill's lengthy list of "rulemaking considerations" that agencies would be required to take into account at each stage of the rulemaking process,

- use of the long-discredited "formal rulemaking" for some rules,
- providing for judicial review of agencies' compliance with OIRA's guidelines, and
- effectively rewriting the substantive provisions regarding standard-setting in the enabling legislation of numerous agencies through a cost-focused "supermandate." (We take no position on the substantive question of the appropriate role of costs in setting standards; we only object to resolving that question in a single, across-the-board statute that would turn the APA into the "Administrative Substance Act.")

In general, we think many of the new steps the bill would require for rulemaking are, in numerous particular cases, valuable and appropriate. However, to impose these requirements automatically and across the board will, we fear, further ossify the rulemaking process with little offsetting benefits in the form of better rules.

The following comments track the organization of the bill itself. Readers interested only in specific provisions of the bill should consult the Table of Contents, which indicates the pages not only where particular topics, but also where specific statutory provisions, are discussed.

# AMERICAN BAR ASSOCIATION SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

# COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011

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* Citations in this table are to sections of the Administrative Procedure Act as it would be amended by the bill. All of these provisions are in § 3(b) of H.R. 3010, except where noted.

The Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA) respectfully submits these comments on H.R. 3010, the Regulatory Accountability Act of 2011.[1] The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, and law professors. Officials from all three branches of the federal government sit on its Council.

The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

## I. INTRODUCTION

The Administrative Procedure Act (APA)[2] has been in effect for some sixty-five years. Possible updates certainly deserve consideration. More particularly, the rulemaking process, which is a principal focus of H.R. 3010, has evolved in ways not anticipated in 1946. Important questions arise as to whether and how many of these changes should now be codified or refined.

The bill is an ambitious step in the development of APA revision legislation. As discussed below, we support some of its provisions and have suggestions for modifications in others. For example, we support codification of requirements that agencies maintain a rulemaking record and that they disclose data, studies, and other information underlying a proposed rule. We also support provisions that would recognize the consultative function of the Office of Information and Regulatory Affairs (OIRA), provide for agencies to consult OIRA when issuing major guidance, and extend these OIRA functions to the independent agencies. Furthermore, the bill addresses some issue areas as to which we could potentially support legislation, although not the specific measures proposed in the bill. This category includes the bill's provisions regarding advance notices of proposed rulemaking and agencies' issuance of "interim" rules that are never superseded by regularly adopted rules. In addition, we have some proposals of our own that could usefully be incorporated into the bill.

On the other hand, the Section has serious concerns about the bill's lengthy list of "rulemaking considerations" that agencies would be required

1. H.R. 3010, 112th Cong. (2011) (as introduced in House of Representatives, Sept. 22, 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3010ih/pdf/BILLS-112hr3010ih.pdf.

2. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2006)).

to take into account during the rulemaking process. The ABA has long expressed concern that existing requirements for predicate findings already unduly impede agency rulemaking. The bill would aggravate this situation. That prospect should be troubling to both regulated persons and statutory beneficiaries, regardless of their location on the political spectrum. After all, the APA's rulemaking provisions apply to deregulation and to amendment or repeal of rules just as they do to adoption of new rules. Moreover, the case for prescribing new predicate findings in rulemaking is undercut by the recognized duty of agencies to respond to significant, relevant comments submitted during the public comment period. In this way, the rulemaking process is self-regulating.

A better approach to predicate findings would be for Congress to take on the project of refining and consolidating existing requirements for predicate findings and regulatory analysis into a single coherent and streamlined framework. Some of the considerations proposed in the bill might deserve to be included in such a framework, but a goal of this harmonization effort should be to ensure that the rulemaking process will be no more burdensome on agencies than it now is, and preferably less so.

Another area of concern is that the bill provides for regular use of the long-discredited "formal rulemaking" for high-impact rules and perhaps other major rules. This model has passed almost completely into disuse, because experience has shown that it leads to substantial delays and unproductive confrontation and because courtroom methods are not generally suited to resolution of legislative-type issues. We could support a carefully limited framework for oral proceedings where a need for cross-examination on specified narrow issues is affirmatively shown, but the bill goes far beyond that limited approach.

Finally, the bill would legislate in several areas that we believe Congress would more properly address in agencies' respective organic statutes than in the APA. These matters include evidentiary burdens and substantive decisional criteria that would override provisions in existing enabling legislation.

In connection with these and other provisions in the bill that our comments call into question, we hope that Congress will not overlook the virtues of caution and restraint. It should not undertake a sweeping revision such as this without a firm showing that there is a problem to be solved, and it should be wary of codifying minutiae in the Act. In our view, the strength of the APA derives in no small part from the fact that it confines itself to fundamentals. The general act must accommodate the government's need to tailor specific processes to the various tasks Congress assigns agencies. Solutions that work well in many or even most contexts may work poorly in others. The brevity of the APA has also permitted the

growth and modernization of the administrative process over time. That much of today's administrative law takes the form of case law, regulations, and executive orders is not necessarily a matter of regret, because those prescriptions offer useful on-the-ground flexibility and can be revised to meet changing needs more easily than can statutes.

Against this background, we turn to comments on specific provisions of the bill. Because § 3 of the bill comprises twenty-four of the bill's thirty-two pages, we will usually identify specific provisions by their proposed APA section or subsection numbers.

## II. DEFINITIONS

Section 2 of the bill would amend § 551 of the APA by inserting additional definitions. In general, these are well-drafted and largely drawn from past legislation, executive orders, and case law. We have three suggestions.

First, "guidance" is (appropriately) defined in proposed § 551(17) to be identical to what the APA calls "interpretative rules [and] general statements of policy" in the current exemption from notice and comment in § 553(b)(A)[3]—yet the bill continues to use the older terminology in the exemption itself (proposed § 553(g)(1)). The bill should be revised to head off confusion over the use of two terms to mean the same thing, perhaps by eliminating the older terms altogether.

One other difficulty with the bill's definition of "guidance" is that it would apply to an agency statement "other than a regulatory action." That phrase was apparently drawn from President George W. Bush's regulatory review order,[4] but it appears nowhere in the APA, either now or under the proposed bill. This drafting error could be cured by an adaptation from the definition of "rule" in Executive Order 12,866. That definition refers to an agency statement "which the agency intends to have the force and effect of law."[5] Thus, the bill's definition of guidance could be reworded to apply to "an agency statement of general applicability that is not intended to have the force and effect of law but that sets forth a policy [etc. as in the current definition]."[6]

Second, Congress should take this opportunity to clarify the existing

3. 5 U.S.C. § 553(b)(A) (2006).

4. Exec. Order No. 13,422, § 3(g), 3 C.F.R. 191, 192 (2007).

5. Exec. Order No. 12,866, § 3(d), 3 C.F.R. 638, 641 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

6. The definitions of "rule" and "guidance document" in the recently adopted Model State Administrative Procedure Act draw a similar distinction. Under these definitions, the former "has the force of law" and the latter "lacks the force of law." *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT §§ 102(14), (30) (2010) (HeinOnline).

definition of "rule" in § 551(4) of the APA. This poorly drafted provision has been a target of criticism ever since the APA was first enacted. Briefly, the opening words of the definition—"the whole or a part of an agency statement of general or particular applicability and future effect"—are out of keeping with the manner in which administrative lawyers actually use the word "rule." The words "or particular" and "and future effect" should be deleted from the definition. The ABA has repeatedly called for the former change[7] and has also endorsed the latter in substance.[8] Thus, with minor drafting cleanup, we propose that the definition should read as follows:

> (4) "rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Third, a bill to modernize the APA provides an opportunity to update obsolete terminology. The bill already does this by replacing the phrase "interpretative rules" with the more compact term "interpretive rules," which virtually all administrative lawyers prefer. In a similar vein, the APA phrase "rule making" should be replaced by "rulemaking," the variant that virtually all administrative lawyers actually use.

## III. RULEMAKING CONSIDERATIONS AND REQUIRED ANALYSES

Revised § 553(b) would codify a new set of "rulemaking considerations." These principles would require an agency to consider a large number of specified issues as a predicate for any new or amended rule. The considerations are summarized later in this section. The bill's requirements for the notice of proposed rulemaking (NPRM) in § 553(d) incorporate the

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7. *E.g.*, 106 A.B.A. ANN. REP. 549 & 783, at 783 (1981) [hereinafter *1981 ABA Recommendation*] (citing 5 U.S.C. § 551(4) (2006)); 95 A.B.A. ANN. REP. 548 & 1025, at 1025, 1027 (1970).

8. *See* 117 A.B.A. ANN. REP. 35–36 (1992) ("Retroactive rules are and should be subject to the notice and comment requirements of [the APA]."). For a full discussion of the reasons supporting this proposal, see Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077 (2004). In this connection, we note that the bill's definition of "guidance" is appropriately limited to statements of "general applicability," but it is limited by its terms to statements of "future effect." This limitation would be ill-advised. Because interpretive rules theoretically clarify what the law has meant all along, courts routinely apply them to transactions that occurred prior to the issuance of the interpretation. *See, e.g.*, Reno v. Koray, 515 U.S. 50, 61 (1995); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). This is, in fact, one reason why the "future effect" language of 5 U.S.C. § 551(4) should be removed.

§ 553(b) "considerations" by reference. Section 553(d) goes on to require the agency to discuss other matters as well. Then § 553(f) sets forth requirements for the "notice of final rulemaking" (NFRM). They include not only "a concise general statement of the rule's basis and purpose"—the traditional APA requirement—but also "reasoned final determinations" regarding the matters tentatively addressed in the NPRM.

Up to a point, the Section agrees with the bill's premise that it could be useful to codify the requisite findings for a rule in statutory form. Three decades ago, in 1981, the ABA made a specific proposal along these lines. Its resolution urged Congress to require an agency to address the following matters in a notice of proposed rulemaking:

> (i) the terms or substance of the proposed rule;
>
> (ii) a description of its objectives;
>
> (iii) an analysis of alternatives to accomplish those objectives seriously considered by the agency;
>
> (iv) an invitation to submit proposals for alternative ways to accomplish the rule's objectives;
>
> (v) a description of reporting and recordkeeping requirements and an estimate of the time and cost necessary to comply; and
>
> (vi) to the extent practicable after reasonable inquiry, an identification of duplicating or conflicting or overlapping Federal laws or rules.[9]

Moreover, the resolution provided that a *final* rule should be accompanied by:

> (a) a statement of the reasons for the policy choices made in connection with the rule including a description of alternatives considered to accomplish the objectives of the rule, and a statement of the reasons for the selection of the alternative embodied in the rule and rejection of other alternatives;
>
> (b) factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file; and
>
> (c) a response to each significant issue raised in the comments on the proposed rule.[10]

Some of these requirements have direct counterparts in H.R. 3010. However, the bill's list is both lengthier and more adventurous in its scope, and it gives rise to serious concerns regarding both the collective impact of its requirements and the particular thrust of certain individual components. Turning first to the collective impact, we will explain our concerns about the bill's approach. Then we will discuss a variation on that approach that

9. *1981 ABA Recommendation*, *supra* note 7, at 784.
10. *Id.* at 785.

we could, in principle, support.

### A. Background Positions

For some two decades, many administrative lawyers have voiced concerns about the increasing complexity of rulemaking and have been urging Congress not to add unnecessary analytical requirements to the APA rulemaking process.

For example, in 1993 the Administrative Conference of the United States (ACUS) noted: "Informed observers generally agree that the rulemaking process has become both increasingly less effective and more time-consuming."[11] The Conference thus recommended, among other things, that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[12] In a similar vein, the ABA, in a 1992 resolution sponsored by this Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[13] The Section's report supporting this latter pronouncement warned:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [The existence of multiple requirements] could have the effect of stymieing appropriate and necessary rulemaking.[14]

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased, making the warnings of these two groups even timelier. The Section summed up the current picture in a 2008 report:

> Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued

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11. ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4669, 4670 (Feb. 1, 1994).

12. *Id.* at 4673, ¶ II.C.

13. 117 A.B.A. ANN. REP. 32 & 469 (1992).

14. *Id.* at 470–71.

without public comment procedures but have real-world effects.[15]

Because of these concerns, the Section has long urged that the analytical requirements that agencies must observe during the rulemaking process be *simplified*. For example, the same 2008 Section report recommended that Congress and the President should "work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure."[16]

### *B. Predicate Analyses and Their Burdens*

In light of these longstanding policy positions, we would be gravely concerned about a revision of § 553 that not only failed to consolidate existing analysis requirements, but greatly augmented the analysis burdens associated with completing a rulemaking proceeding. These incremental requirements would in all likelihood significantly hamper agencies' ability to respond to congressional mandates to issue rules, or to delegations of rulemaking authority. Moreover, they would likely augment the tendency of agencies to use "underground rules" (aka "regulation by guidance") or case-by-case adjudication to formulate policy without having to surmount the additional hurdles presented by § 553.

A number of items in the bill seem insufficiently attentive to the costs of investigation. For example, under § 553(b) the agency must consider "the degree and nature of risks the problem [addressed in the rule] poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction" as well as "the countervailing risks that may be posed by alternatives for new agency action."[17] It must also address "[w]hether existing rules have created or contributed to the problem the agency may address with a rule," and, if so, whether they should be changed.[18] In addition, the agency must address "[a]ny reasonable alternatives for a new rule or other response identified by the agency," including "potential regional, State, local, or tribal actions" and "potential

15. ABA Section of Admin. Law & Regulatory Practice, *Improving the Administrative Process: A Report to the President-Elect of the United States*, 61 ADMIN. L. REV. 235, 239–40 (2009) [hereinafter *2008 Section Report to the President-Elect*].

16. *Id.* at 240. *See also* Letter from Warren Belmar, Chair, Section of Admin. Law & Regulatory Practice, to the Honorable Fred Thompson, Chairman, Senate Gov'tal Affairs Comm., Jan. 13, 1998, at 5 ("We urge Congress to review the collection of overlapping and potentially conflicting requirements embodied in these statutes and to consider replacing them with a single, clear set of obligations for agency rulemaking. . . . Such harmonization . . . would—in addition to simplifying the rulemaking process—enable the agencies to serve the public interest more efficiently and economically.").

17. H.R. 3010, 112th Cong. sec. 3(b) (2011) (proposed § 553(b)(3)).

18. *Id.* (proposed § 553(b)(4)).

responses that specify performance objectives [or] establish economic incentives to encourage desired behavior," "provide information upon which choices can be made by the public," or "other innovative alternatives."[19] Further, the agency must consider "the potential costs and benefits associated with [foregoing] potential alternative rules and other responses . . . including direct, indirect, and cumulative costs and benefits and estimated impacts on jobs, economic growth, innovation, and economic competitiveness."[20] Some of the considerations in this list—which is not exhaustive—would be germane to a wide variety of rules; others would have very tenuous relevance or no relevance to many and perhaps most rulemaking proceedings.

The operative subsections of the bill cover much of the same territory. Section 553(d) requires that an NPRM must summarize information known to the agency regarding the foregoing considerations. The NPRM also must discuss the foregoing alternatives and make a reasoned preliminary determination that the benefits of the rule would justify the costs to be considered under § 553(b).[21] Likewise, the agency must thereafter discuss approximately the same considerations in its notice of final rulemaking.[22]

Collectively, these requirements would be enormously burdensome. The task of deliberating on, seeking consensus on, and drafting the numerous recitals that would be added to the rulemaking process would draw heavily on agency resources—a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. Increasing the time needed to accomplish rulemaking would not only be costly but also would tend to leave stakeholders less able to plan effectively for the future. Not only new regulations, but also amendments or rescissions of rules could be deterred by the additional expense and complexity that would be added to the process. Thus, both affirmative regulation and deregulation may be impeded.

Of course, even great burdens may be worth bearing, if they produce great benefits. But these would not.[23] Although agencies frequently do and should consider many of these factors in significant rulemakings, many of these considerations are not relevant to most routine rulemaking. As the

19. *Id.* (proposed § 553(b)(5)).

20. *Id.* (proposed § 553(b)(6)(A)).

21. *Id.* (proposed § 553(d)(1)(F) (cross-referencing § 553(b)(6))).

22. *Id.* (proposed § 553(f)(4)(C)–(E)).

23. As current OIRA Administrator Cass Sunstein, certainly a supporter of regulatory analysis, once pointed out: "[T]he costs of investigation and inquiry are never zero; to the contrary, they are often very high. We can readily imagine that agencies could spend all their time investigating ancillary risks and never do anything else—a disaster for regulatory policy." Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1552 (1996).

Section stated in the 2008 report mentioned above, when Congress and the President design regulatory analysis requirements, they

> should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process—some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.[24]

The current bill accepts this principle in part, imposing more demanding procedures for "major rules" and "high-impact" rules than for other rules. But the provisions in § 553(b) imposing analysis requirements ignore the need to tailor the process to the importance and impact of the rule.

The bill's blanket approach might be justified if it were the only way to ensure agencies gave consideration to critical factors in the subset of rulemakings where doing so is appropriate. But it is not. Two other mechanisms exist and are already working well. First, Congress can specify the factors that an agency should take into account when regulating pursuant to a specific provision. Enabling legislation does this all the time, and it allows for a more precise fit between the agency task and the factors to be considered.

Second, where particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process. As noted, agencies often consider issues of the kind just mentioned on their own initiative. If they do not, those issues are frequently raised in comments by interested members of the public. Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a recognized duty to respond to material and significant comments.[25] Thus, these issues will generally find their way into a rulemaking proceeding where they are directly implicated. It is excessive, however, to require agencies to touch all of these bases in

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24. *2008 Section Report to the President-Elect*, *supra* note 15, at 240.

25. *See* La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003) (quoting Am. Mining Cong. v. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990)) (stating that an agency must articulate a response to comments "which, if true, . . . would require a change in [the] proposed rule"); City of Waukesha v. EPA, 320 F.3d 228, 257–58 (D.C. Cir. 2003) (quoting Reytblatt v. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997)) (stating that an agency "need not address every comment [it receives], but it must respond in a reasoned manner to those that raise significant problems."); Safari Aviation Inc. v. Garvey, 300 F.3d 1144, 1151 (9th Cir. 2002) (quoting Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992)) (stating that an agency must respond to "significant" comments, meaning those which "raise relevant points, and which, if adopted, would require a change in the agency's proposed rule").

every rulemaking proceeding.[26] This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.

It is true that, up to a point, the inquiries prescribed in proposed § 553(b) correspond to factors that have been codified in the initial sections of the executive orders on regulatory review issued or maintained by every President since Ronald Reagan.[27] Those provisions have served for many years as a means by which the presidents have communicated their respective regulatory philosophies to agencies that comprise arms of their administrations. Indeed, several of the considerations in § 553(b) appear to be modeled closely on the language of § 1 of Executive Order 12,866, the currently operative order. However, these executive order provisions are critically different from the proposed § 553(b). The former are essentially hortatory. The order requires no written determinations except in a small minority of cases.[28] Moreover, compliance with the order is not judicially reviewable. At most, therefore, § 1 of the order serves as a basis for discussions between rulemaking agencies and OIRA, but the two sides can decide in any given context how much weight, if any, to ascribe to any given factor, and a rule's legality does not turn on their decision to bypass one or more of them. In contrast, under the bill, an agency's failure to discuss the prescribed matters to the satisfaction of a reviewing court would expose the agency to reversal for procedural error (subject to the court's judgment as to whether the error was prejudicial). The unpredictability of such appellate review would put great pressure on agencies to err, if at all, on the side of full rather than limited discussion.[29] The burden on the

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26. A puzzling issue that the bill requires an agency to address is "whether a rule is required by statute." H.R. 3010, sec. 3 (proposed §§ 553(d)(1)(E)(ii), (f)(4)(B)); *see also* § 3(b) (proposed § 553(b)(1)). Why the bill specifically requires this determination is not apparent. If an agency concludes that its view of sound policy is at least consistent with the enabling statute, it should be able to proceed on that basis without addressing the purely hypothetical question of whether the statute would have required the same result had the agency desired otherwise.

27. Exec. Order No. 13,563, § 1, 76 Fed. Reg. 3821 (Jan. 21, 2011) (Obama); Exec. Order No. 13,422, *supra* note 4, § 1(a)(1) (G.W. Bush); Exec. Order No. 12,866, *supra* note 5, § 1 (Clinton); Exec. Order No. 12,291, § 2, 3 C.F.R. 127 (1981) (Reagan, retained by G.H.W. Bush).

28. Under Executive Order 12,866, an agency is required to provide to OIRA an "assessment of the potential costs and benefits of the regulatory action" and other factors only if the matter is identified as a "significant regulatory action." Exec. Order No. 12,866, *supra* note 5, § 6(a)(3)(B). Moreover, detailed assessments are required only for so-called "economically significant" rules, *see id.* § 6(a)(3)(C), a category similar to "major rules" as defined in § 551(15) of H.R. 3010.

29. Justice Rehnquist made a similar point effectively in the *Vermont Yankee* decision. Vt.

agencies and the resources demanded, therefore, would far exceed that of the corresponding language of the executive orders.[30] This would be particularly true under H.R. 3010, which, unlike its Senate counterpart, would make the sufficiency of an agency's compliance with these analytical obligations judicially reviewable for all rules, not just major rules and high-impact rules.[31]

These predictions are founded not only on our collective judgment as specialists in administrative procedure, but also on the lessons of experience at the state level. In 1947, California adopted APA provisions for rulemaking that were modeled on the federal APA. In 1979, however, the state adopted a much more detailed set of APA rulemaking provisions.[32] The statute calls for specialized findings and explanations and for numerous impact statements. These provisions require constant fine-tuning and have been amended on numerous occasions.

The intense regulation of regulatory agencies contained in the California APA has had a variety of adverse consequences.[33] Specialized and experienced lawyers (rather than staff non-lawyers) must supervise every step of every rulemaking process. The state's APA generates a large amount of boilerplate findings, because agencies lack resources to perform all of the required studies. The process has become slow and cumbersome and consumes large quantities of staff resources. As a result, agencies can complete work on fewer regulations, particularly in a time of declining budgets like the present. This has adverse effects on public health and safety. The detailed provisions of the state's APA also provide many opportunities for lawyers to challenge rules on judicial review because of minor procedural infirmities. The California experience suggests that a

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Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 539–40 (1978).

30. Similarly, although the criteria in proposed § 553(b) appear to be based in part on similar prescriptions in the Unfunded Mandates Reform Act, 2 U.S.C. § 1532(a)(2)–(4) (2006), the analogy is weakened by the fact that, by statute, a court cannot set aside a rule on the basis of an agency's alleged failure to analyze a proposed rule according to the requirements of that Act or the inadequacy of the analysis it did provide. *See id.* § 1571(a)(3).

31. *See* S. 1606, 112th Cong. § 6 (2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1606is/pdf/BILLS-112s1606is.pdf.

32. *See* CAL. GOV'T CODE §§ 11340–11342 (West 2005); MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW 29–40 (2002); Herbert F. Bolz & Michael McNamer, *Agency Rules and Rulemaking, in Cal. Public Agency Practice* ch. 20 (Gregory L. Ogden ed., 1996); Linda Stockdale Brewer & Michael McNamer, *Rulemaking Procedure, in California Public Agency Practice* ch. 21 (Gregory L. Ogden ed., 1996); Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 48–51 (1992).

33. *See* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 285–87 (1999); Marsha N. Cohen, *Regulatory Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 260–62.

simpler statutory structure like the existing federal APA, regulated sensibly and flexibly by court decisions, is better than a minutely detailed statutory prescription of rulemaking procedure.

### C. A Suggested Alternative

As indicated above, the Section is by no means opposed to any and all codification of new rulemaking requirements in the APA. We believe the proper approach is the one we recommended in 1998 and 2008: that Congress and the President should "join forces to rationalize and streamline the rulemaking process."[34] As we have said before, the ability of agencies to perform required analyses "is compromised by the complexity of the set of instructions that agencies must follow—agencies (and others) must look to so many sources to ascertain the full set of actions required in a rulemaking that they may have difficulty framing the ultimate question for decision in a coherent manner."[35] The current bill does not subtract anything from the overlapping and potentially conflicting expectations prescribed not only in the APA, but also, for example, the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, Unfunded Mandates Reform Act, Paperwork Reduction Act, and National Environmental Policy Act, as well as agency authorizing statutes and presidential directives. Its trajectory is entirely in the direction of increases. The risk of excessive, sometimes conflicting, sometimes redundant cumulative burdens is compounded by the fact that there are many other related bills also now under consideration. In the circumstances, thoughtful harmonization and streamlining would be eminently desirable.[36]

We recommend, therefore, that Congress, working with the President, rework the overall corpus of findings and analysis requirements impinging on federal agencies, with an eye toward rationalizing these requirements while also maintaining effective political oversight and promoting sound regulatory outcomes. We would be happy to work with your subcommittee in such a re-examination. A number of the principles prescribed in § 553(b) of the present bill may well be found worthy of inclusion on such a revamped list, particularly insofar as experience with some of them under

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34. *2008 Section Report to the President-Elect*, *supra* note 15, at 239.

35. Letter from Warren Belmar, *supra* note 16, at 5.

36. We appreciate that congressional action to alter the requirements of executive orders would present obvious problems of interbranch relations. However, it seems reasonable to suppose that if, as we recommend here, the ultimate goal of the harmonization effort would be to produce a set of clear obligations that are no more burdensome, or less burdensome, than the status quo, the Executive Branch would be amenable to negotiations that could lead to agreed-on rescissions of presidential directives in the interest of facilitating the ability of agencies to accomplish their missions more effectively.

Executive Order 12,866, Unfunded Mandates Reform Act, etc., has been favorable. Insulation of consideration requirements from judicial review and confinement of such requirements to the most significant rulemaking proceedings would be important variables bearing on the acceptability of particular obligations. Conversely, some of the requirements that exist now, and some that we proposed in 1981, may be out of date. We note also that the Administrative Conference is currently engaged in a directly relevant project, the results of which should be known and may be the basis for an ACUS recommendation by the end of next year.

A baseline for this overall endeavor should be to produce *no net increase* in the collective burdens of required analyses and findings in rulemaking. Indeed, a net decrease would be even better, because it would respond to the overload problems that have served for too many years as impediments to the rulemaking process and incentives to agencies to rely on less transparent and participatory modes of policymaking.

### *D. Evidentiary Burdens*

The requirement in the introductory clause of § 553(b) that a rulemaking agency "shall base its preliminary and final determinations on evidence" raises related concerns. The basic point is well-taken. The ABA proposal quoted above recognizes that a final rule should be accompanied by "factual determinations constituting an asserted or necessary basis for any policy choice made in connection with the rule, and an explanation of how such determinations are supported by the rulemaking file."[37] However, the § 553(b) version of this idea sweeps too broadly. Some rules do not purport to rest on factual assertions at all; they rest on law or pure policy determinations. At the very least, this provision should refer to "factual determinations." In addition, some factual assertions underlying a rule do not require evidentiary support, because they are legislative facts of an inherently predictive or judgmental type.[38] When Congress has

37. *See supra* note 10 and accompanying text.

38. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 518–21 (2009). The case law was usefully summarized in Chamber of Commerce of the U.S. v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005):

> [A]lthough we recognize that an agency acting upon the basis of empirical data may more readily be able to show it has satisfied its obligations under the APA, *see Nat'l Ass'n. of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (in informal rulemaking it is "desirable" that agency "independently amass [and] verify the accuracy of" data), we are acutely aware that an agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be "entitled to conduct . . . a general analysis based on informed conjecture." *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1124 (failure to conduct independent study

incautiously appeared to require "evidence" for such conclusions, the judiciary has managed to read an implied limitation into the statute.[39] It would be preferable, however, to avoid forcing the courts to solve a problem that Congress does not need to create in the first place.[40] After all, the courts have developed a substantial and relatively nuanced body of case law addressing whether agencies have, in various circumstances, supplied adequate factual support for their rules. A vaguely stated evidentiary requirement in § 553 is at best unnecessary and may be harmful.

Elsewhere, the bill provides that an 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."[41] We recognize that Executive Order 12,866 contains very similar language,[42] and that Congress has adopted comparable language in particular contexts, such as the requirement in the Endangered Species Act that a species designation be made on the basis of "the best scientific and commercial data available."[43] Where agency decisionmaking is required to rest on scientific determinations, the expectation that the science should be well-founded is certainly legitimate.[44]

Nevertheless, we question whether this notion belongs in the rulemaking language of the APA, where it could operate as an independent basis for

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not violative of APA because notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention"); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813–14 (1978) (parallel citations omitted) (FCC, in making "judgmental or predictive" factual determinations, did not need "complete factual support" because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency")).

Notably, the court in *Chamber of Commerce* did overturn, on grounds of factual insufficiency, a different aspect of the SEC rule challenged in that case. *Id.* at 143–44. Our point, therefore, is not that an agency's evidentiary burdens should be lenient, but rather that the nature of those burdens is too elusive to capture in a brief statutory formula.

39. *See, e.g.*, Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473–75 (D.C. Cir. 1974) (construing Occupational Safety and Health Act requirement of "substantial evidence" to support a rule).

40. Section 553(b) is also ambiguous as to whether the term "evidence" refers to any and all factual material that the agency might cite, or only a narrower class of material such as facts that would satisfy the rules of evidence in a trial-type proceeding.

41. H.R. 3010, sec. 3(b) (proposed § 553(f)(2)).

42. Exec. Order No. 12,866, *supra* note 5, § 1(b)(7); *see also* Exec. Order No. 13,563, *supra* note 27, § 1 ("Our regulatory system . . . must be based on the best available science.").

43. 16 U.S.C. § 1536(a)(2) (2006); *see also* Occupational Safety and Health Act § 6(b)(5), 29 U.S.C. § 655(b)(5) (2006) (requiring OSHA to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health").

44. *See generally* James W. Conrad, Jr., *The Reverse Science Charade*, 33 ENVTL. L. REP. 10306 (2003).

legal attacks apart from challenges to the substance of the agency decision. Whatever its appeal in science-dominated areas, it is inapt in relation to ordinary rulemaking, in which agencies frequently must act on the basis of general knowledge, informed opinion, and experience in the field. After all, in the age of the Internet, the range of "obtainable" information that might bear upon various agency rules is virtually boundless. A statutory obligation to seek out all information that a reviewing court might consider "reasonably obtainable" could prove unmanageable, resulting in a highly unpredictable legal regime for agencies and considerable additional litigation.[45] It may be better, therefore, for Congress to impose such obligations only in substantive statutes in which the nature of the agency's mission lends itself to such a mandate. Congress can customize the obligation to the particular nature of that mission. It has done this in, for example, the Safe Drinking Water Act, which specifies that "to the degree that an Agency action is based on science, the Administrator shall use (i) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices."[46]

For generalized decisionmaking that may be far removed from scientific realms, however, the APA should not categorically rule out the possibility that information that appears reasonably reliable may suffice for purposes of a rule in which the stakes are small or the need for timely action is pressing, although the agency may not have engaged in a search to confirm that this information is the "best reasonably obtainable." Even in such contexts, after all, administrative law already imposes a duty to respond to material comments presented during the rulemaking proceeding—a duty that we believe should be codified in the APA.[47] Thus, if stakeholders actually provide information to an agency that casts serious doubt on its factual premises, the agency cannot ignore it.

### *E. Statutory Overrides*

In addition to burdening the rulemaking process with analytical requirements that appear to be out of proportion to their likely payoffs, the bill's "rulemaking considerations" are troubling because of the way in which they would, in some cases, alter the substantive law. The APA would thus become, in several respects, an "Administrative Substance Act."

45. *Cf.* Heartwood, Inc. v. U.S. Forest Serv., 380 F.3d 428, 436 (8th Cir. 2004) (construing the above-quoted language of the Endangered Species Act to mean that agencies are required "to seek out and consider all existing scientific evidence relevant to the decision at hand. They cannot ignore existing data." (internal citations omitted)); Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183, 1194 (10th Cir. 2006) (following *Heartwood*).

46. 42 U.S.C. § 300g-1(b)(3)(A)(i) (2006).

47. *See infra* notes 120–121 and accompanying text.

For example, the requirement in the bill to consider, in connection with any proposed rule, the "potential costs and benefits associated with potential alternative rules . . . including direct, indirect, and cumulative costs and benefits," would apply "[n]otwithstanding any other provision of law."[48] This "supermandate" would apparently displace numerous provisions in which Congress has previously prescribed rulemaking premised on a different basis, such as use of the best available technology. It would, for example, apparently override rulemaking provisions in laws such as the Occupational Safety and Health Act and the Clean Air Act, which courts have authoritatively construed as not allowing decisions to be based on cost-benefit analysis.[49] Much, perhaps most, of the safety and health legislation now on the books would seemingly be displaced.[50]

Members of our Section have widely divergent views as to the utility of cost-benefit analysis and as to the range of circumstances in which it may be fruitfully deployed. Some strongly support the technique, and others are deeply skeptical. On the whole, the Section has been supportive of cost-benefit analysis but has stated that criticisms of it in the literature should be taken seriously along with more favorable appraisals.[51] The difficulty of quantifying certain types of benefits, and the inherently speculative nature of some of the costs, are only two of the substantial criticisms. We take no position on the general policy question here, but we believe that Congress should make judgments about the utility of cost-benefit analysis in the context of particular programs and the specific problems that those programs respectively address. A government-wide edict such as the APA is too blunt an instrument to permit reliable judgments about the wisdom of cost-benefit analysis in all contexts. This is all the more true in that § 553(b) omits certain qualifying language that the presidential oversight orders do contain, such as their reminders that many relevant values are nonquantifiable. In a context in which the underlying statute does not permit actions to be based on cost-benefit comparisons, if Congress nevertheless wishes to require such an analysis (perhaps to inform itself and

48. H.R. 3010, sec. 3(b) (proposed § 553(b)(6)(A)).

49. Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 471 (2001) (Clean Air Act); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510–12 (1981) (OSHA). The Court acknowledged these interpretations in Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 223 (2009). That case explained that the Clean Water Act contains a variety of statutory formulas for different rulemaking proceedings. The Court held that one section of that Act does permit cost-benefit analysis but recognized that other sections may not. *Id.* at 219–21, 223.

50. *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 32 (2003) (surveying 22 health, safety, and environmental laws and finding that only two contain a substantive cost–benefit mandate).

51. *2008 Section Report to the President-Elect*, *supra* note 15, at 240.

members of the public as to the consequences of its prior choice to make such considerations legally irrelevant), it should impose that requirement only in particular statutes in which it deems that purpose to be apposite.

The bill also imposes other inquiries "[n]otwithstanding any other provision of law," including consideration of means to increase "cost-effectiveness" and "incentives for innovation."[52] Those too are salutary objectives, but we do not believe that Congress should sweepingly displace all prior legislation in which earlier Congresses, carefully confronting social challenges on a much more specific level, have prescribed actions on the basis of criteria that do not include those objectives. Notably absent from § 553(b) is the disclaimer in Executive Order 12,866—and corresponding oversight orders issued by other Presidents—that the prescribed analyses apply only "to the extent permitted by law."[53]

Furthermore, the bill not only requires rulemaking agencies to consider matters that would not otherwise be relevant under their organic legislation, but also constrains them from acting except in compliance with additional criteria. To simplify a bit, § 553(f)(3) provides that an agency must choose the "least costly" rule that serves relevant statutory objectives unless a higher cost alternative would serve "interests of public health, safety or welfare that are clearly within the scope of the statutory provision authorizing the rule."

This would apparently be a substantial further departure from present law, although the extent of the departure is uncertain because of the vague and undefined terms of the operative criteria. The words "public health, safety, or welfare" are evidently meant to limit the range of acceptable rules in some way (otherwise they would be superfluous). Possibly they mean that factors such as distributional fairness, payment of society's moral debts (for example, to veterans), or avoidance of racial, ethnic, or gender disparities could be categorically excluded, at least if a rule that would further these intangible values would cost more (even slightly more) to implement than some alternative. Also, even if the phrase "public health, safety, or welfare" is interpreted broadly, the agency would have to demonstrate that those interests were "clearly" within the statute's scope. We do not understand why "clarity" should be required in this connection. Doubts about whether the statute authorizes an agency to rely on certain interests may be a prudential factor counseling against the commencement of a rulemaking that presupposes such reliance, because the litigation risks involved in such a venture might not justify the expenditure of agency

52. H.R. 3010, sec. 3(b) (proposed § 553(6)(B)–(C)).

53. *See, e.g.*, Exec. Order No. 12,866, *supra* note 5, § 1(b); *see also id.* § 9 ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.")

resources on it. However, this does not mean that the APA should require an agency to have "clear" authority for the interests on which it relies in adopting a final rule. It would be strange to empower a court to hold that, even though the interests on which an agency relies actually are within the scope of the enabling statute, the rule is invalid because such authority was uncertain prior to the court's decision.

Whatever meanings § 553(f)(3) might ultimately be held to contain, we question the proposition that cost considerations must always take priority unless the agency carries a burden of justifying a different priority. An Act that governs the entire range of federal agency rulemaking should allow greater flexibility regarding the manifold and diverse ways in which government can contribute to the general welfare. Indeed, the task of calculating or estimating *which* alternative is "least costly" could itself be difficult. Moreover, most of the laws that would be displaced were enacted after a deliberative legislative process in which affected individuals and interest groups had a meaningful opportunity to consult with Congress regarding the statute's tradeoffs among competing values. It is unlikely that these interested parties will have an equally meaningful opportunity to be heard regarding the abstract and diffuse nature of the mandates under discussion here.

Compounding the perplexities that § 553(f)(3) would generate would be the challenge of determining the "relevant statutory objectives" of a statutory scheme. The problem is that there may be no clear distinction between the "objectives" of a regulatory statute and the criteria that Congress selects to effectuate those objectives. For example, OSHA would presumably be able to rely on cost-benefit analysis if the "relevant objective" of the Occupational Safety and Health Act is interpreted as "worker safety," but not if it is interpreted as "worker safety to the extent feasible."[54]

The challenge of sorting out the ramifications of such a supermandate would be formidable and would result in substantial additional litigation. Federal judges would have much more opportunity to reshape regulatory policy according to their own judgment (and possibly their preferences). This would be especially true if Congress were to enact the bill's judicial review provision ordaining that, in the event of certain procedural omissions by the agency, a court "shall not defer" to an agency's "determination of the costs and benefits or other economic or risk assessment of the action."[55] That provision would place the courts into a

54. *Am. Textile Mfrs. Inst.*, 452 U.S. at 494, 540–541.

55. H.R. 3010, sec. 7 (proposed 5 U.S.C. § 706(b)(2)).

completely unprecedented, and constitutionally dubious,[56] position as super-regulators. However, even if that provision is not enacted, and traditional judicial review principles apply, courts would acquire broad power to ascribe meaning to phrases like "public health, safety and welfare" and "relevant statutory objectives."

Courts would also have to face questions as to how to reconcile the statutory override with the conflicting thrusts of much, or most, organic legislation. Presumably the APA override would be given *some* effect. "Notwithstanding any other provision of law" sends a strong message. Yet it is likely that courts would also pay heed to the traditional maxim that a general statute does not impliedly repeal an earlier, more specific statute.[57] Thus, the ultimate import of this legislation would not be determinable for some time.

## IV. ADVANCE NOTICE OF PROPOSED RULEMAKING

Section 553(c) of the bill would require an agency to issue an advance notice of proposed rulemaking (ANPRM) as part of the rulemaking proceeding for any major rule or high-impact rule. The ANPRM would have to be issued at least 90 days prior to the NPRM, and at least a 60-day comment period would have to be provided. (The stated time periods are minimums. Presumably, a meaningful appraisal of the issues that could arise in a potential major or high-impact rulemaking, as well as of the public comments, would actually take longer.)

The Section agrees that the ANPRM and like devices can be useful tools in some rulemakings, especially those involving initial forays into a regulated area. We support explicit recognition of such procedures in the APA. Indeed, the ABA House of Delegates recommended in its 1981

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56. *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266, 274–78 (1933).

57. It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (internal citations omitted); *see also* Traynor v. Turnage, 485 U.S. 535, 547–48 (1988); United States v. Perry, 360 F.3d 519, 535 (6th Cir. 2004); California v. United States, 215 F.3d 1005, 1012–13 (9th Cir. 2000).

resolution that the use of consultative procedures prior to the notice of proposed rulemaking, including ANPRMs, should be encouraged. The report explained: "Lawyers in Government and private practice with experience in complicated rulemaking share the belief in extensive pre-notice exchanges of views and information to assist the agency in the development of a realistic and workable rulemaking proposal."[58]

In direct contrast to H.R. 3010, however, the ABA's 1981 resolution urged that "the decision to use or not to use [such] informal consultative procedures . . . should be within the *unreviewable discretion* of the agency."[59] The Section continues to believe that an amended APA should not make ANPRMs mandatory, even in proceedings to issue expensive rules.

The argument against such a requirement is straightforward: ANPRMs can significantly extend the time involved in rulemaking,[60] and often the costs of the delay will be greater than the benefits associated with an improved final regulation, which may be nil. For example, some rulemaking proceedings involve issues with which an agency is quite familiar because of prior proceedings or experience with the subject matter. In such situations, the agency may be able to propose a rule without any need for an ANPRM. In other proceedings, legal constraints limit the range of actions the agency may take. In such a case, the determination may be highly contested, but the relevant information, rationale, and conclusions can all be made sufficiently available for comment by the public in the notice of proposed rulemaking.

We can see no justification for the inflexible mandate of § 553(c).[61] Agencies are in the best position to be able to determine the relative benefits and burdens of utilizing ANPRMs, and the fact that agencies do indeed use them even when not legally required confirms that they often deem them valuable. At the same time, an agency's exercise of discretion not to use an ANPRM in a given instance causes no prejudice to the rights or legitimate expectations of the public. As the 1981 ABA report pointed out, "Protection against abuse of this discretion lies in [judicially enforced]

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58. *1981 ABA Recommendation*, *supra* note 7, at 789–90.

59. *Id.* at 784, 790 (emphasis added).

60. This delay would be *in addition to* the 90 days allowed to OIRA for review of a proposed significant regulatory action prior to issuance of the NPRM. *See* Exec. Order No. 12,866, *supra* note 5, § 6(b)(2)(B).

61. Delays would not be the only costs involved. Under the proposed § 553(c), in addition to requesting the public's views of the agency's potential rulemaking initiative, the ANPRM published in the Federal Register would also have to identify "preliminary information available to the agency concerning the . . . considerations specified in subsection (b)." H.R. 3010, sec. 3 (proposed § 553(c)(1)(A)(iii)). This would likely be an extensive body of materials, and it should be noted that the Federal Register charges agencies hundreds of dollars per page for each Federal Register submission.

requirements for fairness in the rulemaking procedures subsequent to notice."[62] In other words, the traditional post-NPRM comment period provides an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. If public comments indicate that the agency has made a real error or is headed down the wrong path, the agency will have to hold another round of notice-and-comment, which turns the original NPRM into a de facto ANPRM. In short, the current regime is effectively self-policing.

Particularly dubious is the bill's explicit requirement that an agency must issue an ANPRM even where it has already issued an interim rule without an NPRM after determining for good cause that compliance with APA rulemaking requirements would be impracticable or contrary to the public interest.[63] Since a rule would already be on the books, the agency should have the option of using that rule as the basis of any new rulemaking proceedings by proposing it in an NPRM, making the mandatory ANPRM superfluous.

A related provision, § 553(d)(2), states that if an agency decides not to go forward with a rulemaking proceeding, it must publish a "determination of other agency course."[64] It must also place in the rulemaking docket all information it considered in making this choice, "including but not limited to" all information that it would have been obliged to describe if it had proceeded with an NPRM.

An initial problem with this provision is that it is not limited to rulemaking proceedings in which the agency had issued an ANPRM. It hardly makes sense to require an agency to explain and document its reasons for not going forward with a venture that the public never had any reason to think would be forthcoming. Also, if the requirement to publish this determination (especially in a form that is expected to set the stage for judicial review, as the provision for docketing appears to imply) applies to situations in which the agency voluntarily utilized an ANPRM, that requirement would tend to discourage agencies from employing this useful consultative device. We assume, therefore, that § 553(d)(2) is intended to apply only to proceedings in which the agency issued an ANPRM as required by § 553(c), and the language should be narrowed accordingly.

Even with respect to those proceedings, we do not see why the APA should require publication of a "determination of alternate course"—a requirement that has no foundation in current law. Probably, the agency would publish some kind of explanation on its own, because a potential

62. *1981 ABA Recommendation*, *supra* note 7, at 790.

63. *See* H.R. 3010, sec. 3(b) (proposed § 553(g)(2)) (expressly referencing § 553(c)).

64. *Id.* (proposed § 553(d)(2)(A)).

"major" or "high-impact" rule would by its nature be a matter of public interest. We would not object to requiring an agency that decides against going forward after an ANPRM to issue a brief notice to that effect, so that the public and potentially regulated entities will not remain in suspense indefinitely. But that does not mean the law should compel the agency to issue a formal notice with full documentation. Clearly, if someone *petitions* for a rule and the agency denies the petition, the agency must explain its denial, and the disappointed petitioner can seek judicial review.[65] The petition process—which is currently codified in § 553(e) of the APA[66] and would be retained without change in § 553(j) of the amended Act—directly protects private interests that might be harmed by a failure to commence rulemaking. The petition and the response frame issues effectively for judicial consideration. Given the availability of the petition route, we question the need for a formal notice in which an agency would have to explain why it declined to commence a proceeding that nobody sought in the first place, and that never progressed beyond a rudimentary stage of development.

## V. NOTICE OF PROPOSED RULEMAKING

Proposed § 553(d) of the bill specifies the contents of the notice of proposed rulemaking (NPRM). This subsection contains several provisions that the Section strongly supports. For one thing, it provides that an NPRM must include "information specifically identifying all data, studies, models, and other evidence or information considered or used by the agency in connection with its determination to propose the rule."[67] In substance, this provision would codify the so-called *Portland Cement* doctrine,[68] a step that the ABA has favored for many years.[69] Disclosure of the factual basis for a proposed rule is essential to the effective use of the opportunity to comment and is a standard feature of modern administrative practice. Yet the requirement is not explicit in the current APA and is still occasionally called into question in the courts,[70] making codification highly desirable. We would suggest that the agency be further required to "provide an opportunity to respond to factual material which is critical to

65. Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007); Auer v. Robbins, 519 U.S. 452, 459 (1997).

66. 5 U.S.C. § 553 (2006).

67. H.R. 3010, sec. 3(b) (proposed § 553(d)(1)(D)(iii)).

68. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

69. *See 1981 ABA Recommendation*, *supra* note 7, at 785–86.

70. *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part); AARP v. EEOC, 489 F.3d 558, 567 (3d Cir. 2007).

the rule, which becomes available to the agency *after the period for comments has closed*, and on which the agency proposes to rely."[71]

Subsections 553(d)(1)(A)-(C) are almost identical to the requirements in the current APA and so do not raise difficult problems.[72] In addition, the ABA supports, in principle, a requirement that an NPRM must discuss alternatives to the proposed rule, although the Association's proposed language is narrower than that of the bill.[73]

The ABA has also long favored amendment of the APA to provide for the systematic development by the agency of a rulemaking file as a basis for agency factual determinations and a record for judicial review.[74] H.R. 3010 adopts the substance of this position in the concluding language of § 553(d)(1), read together with § 553(l). The necessity of maintaining a rulemaking record is firmly established in administrative practice, and codification would recognize this reality. We would also suggest that the bill explicitly provide that the record be available online. While that generally happens already, and is required in a qualified way by the E-Government Act, it would be worth making explicit. At present, the last sentence of § 553(d)(1) states that everything in the docket "shall be . . . made accessible to the public," but it does not say how, and the provision could be read to mean that simply having hard copies at agency headquarters suffices. We recommend that this provision, as well as § 553(l), be amended to expressly provide that the rulemaking docket be available online.[75]

In addition, § 553(d) provides that issuance of an NPRM must be

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71. *1981 ABA Recommendation*, *supra* note 7, at 785, 791 (emphasis added).

72. The current § 553(b)(3) differs slightly from the proposed § 553(d)(1)(C) in that the former allows an agency to include "the terms or substance of the proposed rule or a description of the subjects and issues involved," but the latter more restrictively requires the agency to provide "the terms of the proposed rule." We believe that it is generally good practice to provide the actual text of a proposed rule, but agencies sometimes omit that step, such as when they use an NPRM to solicit comment on a proposal made by a third party or invite comment on a few alternative proposals instead of proposing only one. Presumably, the effect of the revision would be to induce agencies to use an ANPRM for this purpose instead.

73. *See supra* note 9 and accompanying text.

74. *Id.*

75. We note in passing that the bill does not anywhere take account of electronic rulemaking. If the sponsors truly want to modernize the APA, they should consider updating the rulemaking process to reflect the impact of the Internet. The Section has been in the forefront of debates about the development of e-rulemaking. *See* ABA COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING (2008) (report of a blue-ribbon committee established under the auspices of the Section). We would be happy to engage in further dialogue on this topic with the committee.

preceded by consultation between the agency and OIRA. Information provided by OIRA during consultations with the agency shall, at the discretion of the President or the OIRA Administrator, be placed in the rulemaking docket. The same requirements apply to the notice accompanying adoption of a final rule (§ 553(f)(1) and the concluding sentence of § 553(f)(4)).

The main significance of the consultation requirement is that it would effectively extend a degree of OIRA oversight to rulemaking by independent agencies. To date, such agencies have always been exempted from the regulatory review provisions of the executive orders, but the APA definition of "agency" applies to executive branch and independent agencies alike. The ABA has long favored extension of the oversight orders to independent agency rulemaking,[76] and we strongly support this feature of the bill.

We do, however, have one suggestion and one objection regarding this section.

The suggestion concerns disclosure of materials received from OIRA. The ABA's position has been that a communication between a rulemaking agency and other officials in the federal government should be subject to required disclosure to the extent that it contains relevant factual material not previously placed in the rulemaking file or passes on a communication on the merits received from a source outside the federal government, but not otherwise.[77] We believe that the bill could be improved by incorporation of the affirmative aspects of that policy. Insofar as the bill contemplates broader disclosure of information than the ABA policy would require, we see no reason to object, because such disclosure would occur only at the option of the President or OIRA.

The objection is presaged by the discussion in Part III.B of these comments. For the reasons given there, we believe that a number of the predicate recitals prescribed in § 553(d) are excessive and should be reconsidered.[78]

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76. *See* 111 No. 1 A.B.A. ANN. REP. 8 (Feb. 1986); *id.* Rep. 100.

77. *1981 ABA Recommendation*, *supra* note 7, at 785, 791–92.

78. Subsections 553(d)(1)(E)–(F) require an agency to make a "reasoned preliminary determination" regarding the issues described there. We can agree that the notice of *final* rulemaking should be supported by a "reasoned final determination" of various predicates, as § 553(f) does require. *Cf.* ACUS Recommendation 93-4, *supra* note 11, ¶ IV.D, at 4674. However, although one would not want preliminary findings in the NPRM to be "unreasoned," a legal requirement in that regard seems superfluous, because the preliminary determinations will be revisited at the final rule stage before they have any operative effect. Indeed, one purpose of the comment period is to invite critiques of the agency's tentative reasoning. Moreover, this language could invite judicial invalidation of a final rule on the ground that the NPRM was inadequate because, while it put all stakeholders adequately on

## VI. COMMENT PERIOD

Proposed § 553(d)(3) contains a minimum post-NPRM comment period of 90 days, or 120 days in the case of a proposed major or high-impact rule. It is not clear why such lengthy minimum periods are prescribed. Thirty years ago, the ABA proposed a 60-day minimum.[79] More recently, in a June 2011 recommendation, ACUS suggested that agencies should as a general matter allow comment periods of at least 60 days for "significant regulatory actions" (a category similar to "major rules" as defined in the current bill) and at least 30 days for all other rules.[80] President Obama's executive oversight order provides: "To the extent feasible and permitted by law," agencies should allow "a comment period that should generally be at least 60 days."[81] Clearly there is room for reasonable disagreement about the exact minimum period that should apply; but if the goal of the present bill is to codify "best practices," we believe that the figure(s) used in the bill should fall much closer to the range of possibilities suggested by the position statements just mentioned, so as to avoid unnecessarily aggravating the problem of excessive delays in the regulatory process.

In the recommendation just mentioned, ACUS went on to suggest that agencies may in appropriate circumstances set shorter comment periods but should provide an appropriate explanation when they do so. The ABA's 1981 recommendation contemplated analogous flexibility. It proposed that the APA "good cause" rulemaking exemption should be rewritten to allow an agency to comply "in part" with § 553 if it makes a written finding for good cause that "full compliance" would be "impracticable, unnecessary, or contrary to the public interest."[82] The sponsors of the bill should consider providing agencies with latitude to shorten the default statutory comment period in unusual circumstances.[83]

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notice, the agency's "preliminary determination" was insufficiently "reasoned." Perhaps courts would routinely find such errors harmless, but it would be safer just to eliminate this requirement.

79. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(a), at 785.

80. ACUS Recommendation 2011-2, Rulemaking Comments, ¶ 2, 76 Fed. Reg. 48,789, 48,791, ¶ 2 (Aug. 9, 2011).

81. Exec. Order No. 13,563, *supra* note 27, §§ 1–2, at 3821–22.

82. *1981 ABA Recommendation*, *supra* note 7, at 784, 789, 790. An earlier ACUS recommendation also advocated a "good cause" finding as a predicate for a short comment period. ACUS Recommendation 93-4, *supra* note 11, ¶ IV.B, at 4674.

83. *See* Fla. Power & Light Co. v. United States, 846 F.2d 765, 772 (D.C. Cir. 1988) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

## VII. FORMAL RULEMAKING

Subsection 553(e) of the bill would confer broad rights upon private persons to force an agency to use so-called "formal rulemaking," pursuant to §§ 556–57 of the APA.[84] The scope of these rights is unclear, due to ambiguity in the opening language of § 553(e), but at a minimum the bill appears to allow parties to invoke a trial-type hearing on any proposed "high-impact rule" (roughly speaking, a rule with a $1 billion annual cost to the economy).[85] The hearing would encompass such core issues as whether the rule is cost-justified and whether a lower-cost alternative would achieve the relevant statutory objectives—plus any other issues sought by an interested person, unless the agency determines within thirty days of the request that the hearing would be unproductive or would unreasonably delay completion of the rulemaking. The latter petitioning process would also be available in proceedings to promulgate *major* rules (unless this is a drafting error).[86]

These provisions run directly contrary to a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete. This broad agreement was summed up in 1993 in ACUS Recommendation 93-4: "Statutory 'on-the-record' and 'hybrid' rulemaking provisions that require adjudicative fact-finding techniques such as cross-examination . . . can be unnecessarily burdensome or confusing and should be repealed."[87] Indeed, in the more than three decades since the Supreme Court severely curtailed the prevalence of formal and "hybrid" rulemaking procedures in a pair of leading opinions by Justice Rehnquist, *Florida East Coast*[88] and *Vermont Yankee*,[89] Congress itself has ceased to enact new formal rulemaking requirements and has rescinded some of the requirements that did exist.[90] The academic community has fully supported this

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84. 5 U.S.C. §§ 556–57 (2006).

85. Read literally, the opening language of § 553(e) could be interpreted as triggering formal rulemaking *either* "[f]ollowing notice of a proposed rule" *or* "before adoption of any high-impact rule." The caption of the subsection indicates, however, that the intent is to treat these conditions conjunctively, so that § 553(e) applies only to proceedings to promulgate high-impact rules. We discuss the subsection on that assumption, but the language should be revised for clarity.

86. H.R. 3010, sec. 5 (proposed § 556(g)).

87. ACUS Recommendation 93-4, *supra* note 11, at 4670, ¶ II.A.

88. United States v. Fla. E. Coast Ry., 410 U.S. 224 (1973).

89. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524–25 (1978).

90. Food and Drug Administration Amendments Act, Pub. L. No. 110-85, sec. 901(d)(6), 121 Stat. 823, 942 (2007) (*codified as amended at* 21 U.S.C. § 352(n)) (2006 & Supp. II 2009) (prescription drug advertisements); Nutrition Labeling and Education Act, Pub. L. No. 101-535, sec. 8, 104 Stat. 2353, 2365 (1990) (*codified as amended at* 21 U.S.C § 371(e)

development: We have not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.[91]

The collective repudiation of formal rulemaking reflects widespread recognition that trial-type methods are usually unsuitable in generalized rulemaking proceedings. Cross-examination can work well in the context of adjudicative proceedings, in which sharply framed issues of fact and witness demeanor frequently loom large. It is less appropriate to administrative policymaking, which, like congressional legislation, often turns on value judgments, "legislative facts," and policy perspectives that are inherently uncertain. Even in proceedings in which potentially expensive rules are under consideration, issues can be ventilated effectively through more limited variations on the standard model of notice-and-comment rulemaking.[92] Such proceedings allow for rigorous analysis, but the participants usually join issue over scores of interconnected questions through a continuing exchange of documents over a period of weeks or months. Live confrontation is largely beside the point in such proceedings.

This is not to say that live hearings can never shed light on the issues in rulemaking proceedings. *Vermont Yankee* recognized that agencies have discretion to resort to these procedures, and sometimes they do so. Indeed, § 553(b), as currently written, provides for public participation "with or without opportunity for oral presentation." In 1981, the ABA adopted a proposal for a "carefully limited" statutory structure for live hearings in rulemaking. It recommended that, in proceedings of unusual complexity or with a potential for significant economic impact, an agency should be required to conduct an oral proceeding with cross-examination "only to the extent that it appears, after consideration of other available procedures . . . that such cross-examination is essential to resolution by the

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(2006)) (FDA food standards).

91. In Exec. Order No. 13,422, *supra* note 4, at 193, § 5(a), President Bush stated that agencies "may . . . consider" the use of formal rulemaking for the resolution of "complex determinations." This brief reference to the formal rulemaking process was far from a strong endorsement. As construed by OIRA, it did not require agencies *even to consider* the use of formal rulemaking; it was simply a reminder about an existing option. Memorandum from Rob Portman, Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Exec. Dep'ts & Agencies & Indep. Regulatory Agencies, M-07-13, at 13 (April 25, 2007), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-13.pdf. We know of no agency that availed itself of this option during the two years in which the order was in effect.

92. A summary of devices that amplify on simple notice and comment, but fall short of trial-type hearings, is found in ACUS Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654, ¶ 1 (July 19, 1976).

agency of issues of specific fact critical to the rule."[93] This criterion was similar to a guideline endorsed by ACUS several years earlier.[94]

However, H.R. 3010 goes far beyond the recommendations just described. The ABA and ACUS proposals did not contemplate any reliance on formal rulemaking pursuant to §§ 556–57. Moreover, they required that any need for cross-examination be *affirmatively* shown. In contrast, the proposed § 553(e) would confer a right to oral proceedings automatically as to some issues and would put the onus on the agency to justify omission of such proceedings as to other issues (and to do so within thirty days of the request, at a time when the future direction of the proceeding might be quite speculative).

Most importantly, the ABA and ACUS positions applied solely to issues of "specific fact."[95] ACUS asserted "emphatically" that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact,"[96] and the ABA's recommendation was consistent with that view by negative implication. Yet the issues listed in § 553(e) as *automatically* qualifying for consideration at a trial-type hearing in a high-impact rulemaking proceeding are quintessential examples of "questions of policy or of broad or general fact." They include, for example, whether the factual predicate of the rule is supported by evidence, whether any alternative to the proposed rule would achieve the statutory objectives at lower cost, and whether the proposed rule's benefits would justify a failure to adopt such a lower cost alternative.[97]

Any proposal to amend the APA in this regard must also take account of the heavy social costs that have resulted from legislation that requires agencies to use trial-type hearings to develop rules that turn on issues of "policy or broad or general fact." Studies conducted during the heyday of mandatory formal or "hybrid" rulemaking showed clearly that it slowed

93. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(b)(ii), at 785.

94. ACUS Recommendation 72-5, Procedures for the Adoption of Rules of General Applicability, 38 Fed. Reg. 19,792 (July 23, 1973). As explained by the Chairman of ACUS (Antonin Scalia), the term "issues of specific fact" referred to issues of fact that were "sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them." *See* Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1164 (D.C. Cir. 1979) (quoting Scalia).

95. *1981 ABA Recommendation*, *supra* note 7, ¶ 5(b)(ii); ACUS Recommendation 72-5, *supra* note 94, ¶¶ 3, 5, at 19,792.

96. ACUS Recommendation 72-5, *supra* note 94, ¶ (c), ¶ 3, at 19,792.

97. H.R. 3010, sec. 3(b) (proposed § 553(e)(1)–(4)). They also include whether the information on which the rule is based meets the requirements of the IQA. *Id.* sec. 3(b) (proposed § 553(e)(5)). If Congress adopts proposed § 553(d)(4), which would provide a formal hearing on exactly that question early in the proceeding, a second go-round on the same issue would be unnecessary and simply a prescription for delay.

proceedings considerably and undermined agencies' ability to fulfill their mandates expeditiously. A leading study by Professor Hamilton found: "In practice . . . the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."[98] At the FDA, for example:

> The sixteen formal hearings that were held during the last decade vary from unnecessarily drawn out proceedings to virtual disasters. In not one instance did the agency complete a rulemaking proceeding involving a hearing in less than two years, and in two instances more than ten years elapsed between the first proposal and the final order. . . . The hearings themselves tended to be drawn out, repetitious and unproductive.[99]

Formal rulemaking also functioned in a number of instances as a bargaining chip with which regulated parties could extract concessions by threatening to insist on their right to trial-type proceedings, bogging down an agency in protracted proceedings.[100] These side effects are a large part of the reason why formal rulemaking was abandoned decades ago (except where already mandated by statute), and nothing that has occurred in the intervening years casts doubt on that judgment.

Over and above the broad policy questions they raise, the bill's formal rulemaking provisions present several difficulties involving their relationship to the rest of the APA. The bill provides that, in a formal rulemaking case triggered under the newly added provisions, the rulemaking record will consist of the trial-type hearing record *plus* the conventional § 553 rulemaking record generated through the notice-and-comment proceedings.[101] The latter record may contain memoranda, letters, emails, perhaps even tweets.[102] Yet *oral* contacts between rulemaking decisionmakers and members of the public would apparently be banned by virtue of APA § 557(d).[103] That prohibition would be difficult to justify, and it would be at odds with the sponsors' goal of transparency. The ban on

98. Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1312–13 (1972).

99. *Id.* at 1287.

100. *Id.* at 1289 (FDA would "go to almost any length to avoid" formal hearings); *id.* at 1303 (Interior Department); *id.* at 1312 (Department of Labor). A study by Professor Stephen Williams (later a distinguished D.C. Circuit judge appointed by President Reagan) also highlighted the tactical advantages to private parties of the right to invoke formal hearings. Stephen F. Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 433–34 (1975).

101. *See* H.R. 3010, sec. 5 (proposed § 556(e)(2)).

102. *See* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011).

103. 5 U.S.C. § 557(d) (2006).

external oral contacts would apparently also extend to OIRA.[104] Indeed, formal rulemaking proceedings have always been exempt from OIRA review.[105] Yet exclusion of OIRA from consultation with the agency regarding the terms of a *major rule* would be unwise and difficult to reconcile with the emphasis elsewhere in the bill on expansion of OIRA's role.

Another APA requirement is that, after the hearing in a formal rulemaking case, the administrative law judge (ALJ) or another agency employee must write a "recommended, initial, or tentative decision" that makes findings and conclusions on "all the material issues of fact, law, or discretion presented on the record," unless the agency "finds on the record that due and timely execution of its functions imperatively and unavoidably . . . requires [omission of this procedure]."[106] It is unclear whether this preliminary decision would be based on the hearing record (as has been traditional) or the broader rulemaking record. Yet either of these alternatives would be problematic—the former because it would be based on a different body of information than the ultimate rule would; and the latter because it would apparently extend even to issues that the ALJ did not consider during the formal hearing phase of the proceeding. Either way, the writing of this decision would add another time-consuming step to the rulemaking process for high-impact rules.

In short, there may be a case for legislation that would institute a "carefully limited" place for trial-type methods in rulemaking, along the lines of the 1981 ABA resolution. The proposed § 553(e), however, would institute formal rulemaking with respect to issues that influential voices in the administrative law community have "emphatically" deemed unsuitable for such methods. It should be either fundamentally reappraised or omitted from the bill.[107]

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104. *Cf.* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1550 (9th Cir. 1993) (concluding that presidential staff are "interested persons" and "outside the agency" for purposes of § 557(d)).

105. Exec. Order No. 12,866, *supra* note 5, § 3(d)(1), at 641; Exec. Order No. 12,291, *supra* note 27, § 1(a)(1), at 127.

106. 5 U.S.C. § 557(b)–(c) (2006). Under the APA, in a formal rulemaking case, the preliminary decision need not be written by the employee who presided at the hearing. *Id.* § 557(b)(1). However, the hearing must be conducted by an ALJ, unless one or more agency heads preside personally (which would be an unlikely occurrence in a high-impact rulemaking proceeding). *Id.* § 556(b). Presumably, a rulemaking agency that does not otherwise employ ALJs would need to hire one or more of them for this purpose.

107. Section 556(f) of the bill states that an agency must consider the matters listed in § 553(b) and § 553(f) when it "conducts rule making under this section and section 557 directly after concluding proceedings upon an advance notice of proposed rulemaking under section 553(c)." This may well be a drafting error, as the bill does not appear to provide for formal rulemaking "directly" after ANPRM proceedings.

## VIII. INFORMATION QUALITY ACT

Proposed § 553(d)(4) of the bill would create a special procedure by which persons may challenge information upon which a proposed rule is expected to be based, if they allege that the information does not meet the requirements of the Information Quality Act (IQA). Initially, the challenger may submit a petition to exclude the information. If the petition is not immediately granted but nevertheless "presents a prima facie case," the agency must hold a trial-type hearing on the petition under § 556 of the APA, with cross-examination allowed. The hearing must be held within thirty days of the filing of the petition, and the agency must render a decision on the petition within sixty days of the initial filing, but judicial review of that decision is not available until the agency takes final action in the rulemaking proceeding.[108]

As an initial matter, the requirement to hold a trial-type hearing with cross-examination gives rise to some of the objections to formal rulemaking discussed above. It is not clear why cross-examination, which is most useful to determine the credibility of witnesses, would result in better decisions as to the reliability of specified data, an issue that frequently will turn on analysis of highly technical information. Moreover, the task of applying the open-ended terms of the IQA will not necessarily be a cut-and-dried matter. It may well implicate policy considerations and broad issues of legislative fact—the kind of issues that present the weakest case for the use of courtroom methods.

The sponsors of the bill have, to be sure, commendably sought to address potential concerns about delays by requiring any petition to be filed within 30 days of the NPRM and specifying that the hearing and decision must occur within two months of when the petition for correction is filed. However, even assuming that these deadlines hold up, the need to prepare for a live hearing will require a substantial investment of staff resources on a timetable that is not of the agency's choosing, particularly since it is easy to imagine there being multiple petitions from multiple members of the public. Suppose, as seems likely, the agency simply is unable to make a firm, final determination within the 60-day period. Then it will have two unappealing options. Either it will toss the challenged study or document, despite its possible usefulness, thus undercutting the solidity of the rulemaking record, or it will keep it in, despite its possible defects, thus potentially *also* undercutting the solidity of the rulemaking record and

108. On the other hand, the bill provides that an agency's decision to exclude information from a rulemaking proceeding, as requested in a petition, cannot be reviewed at any time. H.R. 3010, sec. 3(b) (proposed § 553(d)(4)(C)). No justification for this one-sided approach to judicial review under the IQA comes readily to mind.

running a risk of later problems on judicial review.

More fundamentally, it is not clear why the agency should be required to reach a decision on the merits of the petition immediately—within sixty days of when the petition is filed—as opposed to resolving the issue as part of the regular rulemaking process. Currently, if a member of the public believes that the information upon which the agency plans to rely is erroneous and violates the IQA, the person may so inform the agency during the comment period.[109] Under well-settled case law, the agency would need to consider those comments and rationally respond to them in the preamble to the final rule or risk judicial invalidation of the rule.

Section 553(d)(4) would entail new procedural complexity. One should not assume that this would always work to the advantage of those who favor reducing government regulation of private activity. Environmental and public interest groups have been frequent users of the Information Quality Act to oppose what they believe to be insufficient government regulation.[110] Thus, the new procedure may sometimes drive up the costs of promulgating rules that would make regulation stricter, but at other times it may have the same effect on rules that would relieve regulatory burdens.

Experience to date indicates that these burdens are unnecessary, for IQA questions are adequately—and perhaps best—dealt with through the rulemaking process. The Ninth Circuit essentially accepted the sufficiency of the existing approach in a case in which the plaintiff sought correction under the IQA of statements made by the Department of Health and Human Services regarding the efficacy of marijuana for medical purposes. The Ninth Circuit upheld the Department's refusal to act immediately on the petition, because the same issue was pending before the agency in its consideration of a rulemaking petition. The court agreed with the government that Office of Management & Budget (OMB) guidelines permitted the Department to "use existing processes that are in place to address correction requests from the public."[111] Of course, Congress can change the law to explicitly require a special procedure above and beyond the ordinary notice and comment process, but the onus should be on proponents of such legislation to explain why it is needed. Indeed, it may

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109. *See* Information Quality Guidelines: Principles and Model Language, *in* Memorandum for the President's Management Counsel from John D. Graham, Administrator, Office of Information & Regulatory Affairs (Sept. 5, 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmcmemo.pdf.

110. *See, e.g.*, Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1183 (10th Cir. 2006).

111. Ams. for Safe Access v. HHS, 399 Fed. Appx. 314, 315 (9th Cir. 2010). *See also* Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010) (upholding OIRA guidelines insofar as they exempt adjudications from their coverage).

well make more sense to allow the agency to postpone its decision on a correction request tendered during a rulemaking proceeding until it adopts the final rule. At that time, the agency may have a much clearer idea about the materiality of the allegedly incorrect information, and the manner in which it will use that information, than it could have had within the sixty days immediately following the filing of the petition for correction. Under the bill, the challenger might be able to force the agency to hold a trial-type hearing and render a decision about a factual issue that will ultimately make little or no difference to the disposition of the final rule.

In addition, § 7(2) of the bill would amend § 706(2)(A) of the APA to provide that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "not in accordance with law . . . (*including the Information Quality Act*)."[112] We would be reluctant under any circumstances to see the broad language of § 706—a constitution-like statute that is invoked in thousands of court cases every year—amended to refer explicitly to an issue that has been, and probably would continue to be, litigated only rarely. More fundamentally, the chances that such an amendment would accomplish anything are, at best, highly uncertain. The weight of judicial authority indicates that the IQA creates no rights that are capable of being enforced in the first place. In *Salt Institute v. Thompson*,[113] the district court held: "Neither the IQA nor the OMB Guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication."[114] That ruling was upheld on appeal to the Fourth Circuit, which agreed that the IQA "does not create a legal right to access to information or to correctness."[115] Other courts have reached the same conclusion.[116] To be sure, there are also cases holding that the OMB guidelines are legally binding,[117] but those decisions did not take issue with the just-stated proposition in the *Salt Institute* cases.

This issue has not been definitively resolved. Indeed, in recent cases the Ninth and D.C. Circuits chose not to address it when they had the chance,

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112. H.R. 3010, sec. 7(2) (proposing to amend 5 U.S.C. § 706(2)(A) (2006)) (emphasis added).

113. 345 F. Supp. 2d 589 (E.D. Va. 2004).

114. *Id.* at 602.

115. Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006).

116. Single Stick, Inc. v. Johanns, 601 F. Supp. 2d 307, 316 (D.D.C. 2009), *aff'd in pertinent part on other grounds sub nom.* Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010); Ams. for Safe Access v. HHS, 2007 U.S. Dist. Lexis 89257 (N.D. Cal. 2007), *aff'd on other grounds*, 399 Fed. Appx. 314 (9th Cir. 2010); *In re* Operation of Mo. River Sys., 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004).

117. *Ams. for Safe Access*, 399 Fed. Appx. 314; *Prime Time Int'l Co.*, 599 F.3d 678.

demonstrating that the issue remains open at the appellate level outside the Fourth Circuit. Nevertheless, it would not make sense for Congress to ignore the case law that does exist. In brief, that case law indicates that the obstacle to judicial review of agency denials of requests for correction under the IQA is not (or not solely) found in the APA; it inheres in the IQA itself. Nothing in the bill purports to change the substantive law of that Act. At some point Congress may wish to review and perhaps revise the IQA to establish substantive standards, but proposed legislation that attempts to address this issue through amendment of the APA seems misdirected.

As is well known, Congress adopted the IQA as a rider to an appropriations bill, without hearings, committee review, or floor debate. That background lends further weight to the notion that, in order to resolve questions regarding judicial review under that Act, Congress should wait until it has had an opportunity to give the IQA the full airing that the statute never received at its inception.

## IX. FINAL RULES

Section 553(f) of the bill sets forth requirements for final rules.[118] We have commented above on most of its provisions, including the new findings and determinations that an agency would need to make in order to issue a final rule, the requirement of consultation with OIRA, and the prescription of a rulemaking record.[119] We will not repeat that discussion here.

We note, however, that the list of predicate conditions in § 553(f)(5) omits one requirement that should be included. In line with ABA policy, that provision should be amended to require, in substance, that a notice of final rulemaking should include "a response to each significant issue raised in the comments on the proposed rule."[120] This obligation is well recognized in the case law[121] and is essential in order to make the comment process meaningful. Proposed § 553(f)(4)(G)(i) requires that an agency's notice accompanying any major rule or high-impact rule must include

> the agency's plan for review of the rule no less than every ten years to determine whether, based upon evidence, there remains a need for the rule,

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118. A related provision, § 553(i), states that the "required publication or service" of a final rule should generally occur 30 days before it goes into effect. The "required service" language is a carryover from the current APA, which also refers to "personal service" in 5 U.S.C. § 553(b). However, since the latter language has been dropped from § 553(d) of the bill, the corresponding language of § 553(i) should also be removed.

119. *See supra* notes 9–33, 74–76 and accompanying text.

120. *See supra* note 10 and accompanying text; *see also* ACUS Recommendation 93-4, *supra* note 11, ¶ IV.D.

121. *See supra* note 25.

> whether the rule is in fact achieving statutory objectives, whether the rule's benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.[122]

The ABA supports legislation providing for periodic review by agencies of their existing regulations. Its resolution, adopted in 1995, stated in part:

> Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.[123]

At a general level, the proposed § 553(f)(4)(G)(i) is consistent with and would further the purposes of the ABA's policy. We also think that the substantive criteria listed in the subsection are stated with sufficient generality as to pose no conflict with the ABA's admonition against overly "detailed" requirements.

We are less convinced, however, that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate.

The usual approach to prescribing systematic reviews of existing regulations—as reflected in the ABA's resolution, a corresponding ACUS recommendation,[124] and presidential oversight orders[125]—is to ask agencies to create an *overall* plan for review of rules, separately from their promulgation of particular rules. We suggest that Congress follow this latter approach to mandating review of major rules (or a broader class of rules).

Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's

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122. The phrase "no less than every ten years" in § 553(f)(4)(G)(i) is ambiguous. It could refer to intervals that are "ten or more years apart," or "ten or fewer years apart." This language should be clarified.

123. 120 No. 2 A.B.A. ANN. REP. 48 & 341, at 48 (1995).

124. ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

125. Exec. Order No. 13,563, *supra* note 27, § 6; Exec. Order No. 12,866, *supra* note 5, § 5(a). President Obama's order called for an immediate, comprehensive review of *all* "significant" agency rules, but we view that directive as a one-time measure, not intended as long-term policy.

finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily.[126] Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed.[127] The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.

## X. INTERIM RULES AND RULEMAKING EXEMPTIONS

### *A. Expiration Dates*

Agencies frequently adopt regulations without prior notice and comment where they find for good cause that ordinary rulemaking procedures would be "impracticable, unnecessary, or contrary to the public interest."[128] However, they often designate such regulations to be "interim rules" and call for post-promulgation public comments. In theory, they will then consider the comments and revise the interim rule into final form. In some cases, however, such rules languish indefinitely in interim form. Section 553(g)(2) of the bill would require the post-promulgation process to be completed in 270 days for most rules and 18 months for major rules and high-impact rules. If the deadline is not met, the interim rule would have to be rescinded.

Agencies do sometimes abuse the flexibility afforded by the good cause exemption. Congress should, therefore, consider amending the APA to discourage or prevent agencies from leaving interim rules on the books indefinitely without ever undergoing the discipline of the notice-and-comment process. However, the specific remedy proposed in § 553(g)(2) gives rise to several concerns.

In the first place, the bill would repeal the existing exemption entirely. Thus, agencies would be required to utilize limited-term interim rules in all situations currently covered by the exemption. This is particularly ill-advised with respect to rules that fall within the "unnecessary" language of the current APA exemption. That language has been dropped entirely in

126. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 30–34 (2007).

127. *See* ACUS Recommendation 95-3, *supra* note 124 (discussing this idea in greater detail).

128. 5 U.S.C. § 553(b)(3)(B) (2006).

§ 553(g)(2), but that part of the exemption plays a vital role that should be preserved. Its purpose is to allow agencies to forgo notice and comment for technical corrections and other noncontroversial rules—not because there is any urgency about them, but rather because no one is likely to wish to contest them. Agencies make frequent use of this exemption, almost always without any controversy whatever.[129] When they invoke the "unnecessary" aspect of the good cause exemption, agencies customarily do not issue interim rules; they simply adopt the rule in final form immediately. There just is no reason to force them to seek post-promulgation comments, as ACUS has long recognized.[130] Judicial review is available to correct alleged misapplications of the "unnecessary" exemption, but if the exemption has been lawfully invoked, neither a post-promulgation comment period nor an expiration date is warranted.

With respect to rules adopted without prior notice and comment because of urgency, the deadlines written into the bill are more understandable, but we believe they are not a good idea, or, at the very least, are much too short. In its consideration of interim rules in 1995, ACUS did not recommend a uniform government-wide deadline date for finalizing the rules. We think this was the right decision.[131]

If an agency cannot meet the deadline for evaluating public comments and modifying the rule, it confronts the unpalatable choice of allowing its rule to lapse or rushing the process through to completion before the public comments have been properly analyzed and modifications to the rule have been carefully considered. Neither alternative is desirable, especially given that the rule was adopted to deal with an emergency situation.

An agency may be unable to meet the deadline for completing the post-promulgation modification process for many legitimate reasons. Often, a

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129. A scholar who examined every issue of the Federal Register published during a six-month period found that agencies expressly invoked the good cause exemption in twenty-five percent of the rules they issued (not counting many more in which they appeared to rely on it by implication). Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 338–39, 339 n.86 (1989). Of these, about twenty percent, or five percent of the overall total, invoked the "unnecessary" exemption alone. *Id.* at 351 n.124. He added that, although these figures may sound excessive, "an examination of the actual cases where the clause is invoked does not reveal general misuse." *Id.* at 339–40.

130. ACUS Recommendation 83-2, The "Good Cause" Exemption from APA Rulemaking Requirements, 48 Fed. Reg. 31,180 (July 7, 1983); *see also* ACUS Recommendation 95-4, Procedures for Noncontroversial and Expedited Rulemaking, 60 Fed. Reg. 43,110, 43,113 n.15 (Aug. 18, 1995).

131. *See* ACUS Recommendation 95-4, *supra* note 130, at 43,113, ¶ II.B.3 (recommending that agencies consider imposing deadlines on themselves in particular cases), discussed in relevant part in Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 736–40 (1999).

large set of complex interim rules are adopted at the same time to implement a new statute; these would all expire at the same time, creating a serious time crunch on limited agency staff resources. Or the agency may confront more urgent rulemaking or enforcement priorities, so staff is simply not available to deal with an expiring interim rule. Or the leadership of an agency may change just before the rule expires, and the new agency heads need to make their own decision about how to modify the interim rule.

In any event, if Congress decides to impose a deadline, we would suggest that it be at least three years, as in the case of tax regulations.[132] Consideration should also be given to allowing the agency to extend its time limit for a defined period upon showing good cause—a showing that presumably would be judicially reviewable (as the bill could specify).[133]

### *B. Judicial Review*

Proposed § 553(g)(2)(C) goes on to provide that, in general, an interested party may seek immediate judicial review of an agency's decision to adopt an interim rule. Proposed § 704(b) essentially repeats this provision and adds that review shall be limited to whether the agency abused its discretion in adopting the interim rule without complying with ordinary rulemaking procedure. (Inconsistently, however, § 706(b)(3) provides that the court shall not defer to the agency's determinations during such review.)

One has to wonder why § 553(g)(2)(C) (and the repeated language in § 704(b)) is thought to be needed at all. Under existing law, interim rules are already reviewable immediately upon their issuance, if other prerequisites for judicial review are satisfied. Interim rules (also commonly called interim *final* rules) are not like an interlocutory order in an adjudicated case. They are legislative rules with the force of law and immediate operative effect. As such, they fall within the usual meaning of "final agency action" and are subject to judicial review under § 704.[134] Were there a body of case law that holds otherwise, one could make a case that Congress needs to clarify this principle, but we are aware of no such

132. *See* I.R.C. § 7805(e)(2) (2006).

133. As written, the bill provides especially tight deadlines in the case of non-major rules, but that distinction is artificial. Whether a rule is major or non-major says little or nothing about the practical difficulties of meeting the deadline, the complexity of the regulatory problem, or the number of public comments that must be analyzed.

134. Ark. Dairy Coop. Ass'n v. USDA, 573 F.3d 815, 827 (D.C. Cir. 2009); Pub. Citizen v. DOT, 316 F.3d 1002, 1019 (9th Cir. 2003), *rev'd on other grounds*, 541 U.S. 752 (2004); Career Coll. Ass'n v. Riley, 74 F.3d 1265, 1268–69 (D.C. Cir. 1996); Beverly Enters. v. Herman, 50 F. Supp. 2d 7, 17 (D.D.C. 1999) (claim was time-barred because plaintiff *failed* to seek review of interim rule when it was promulgated).

cases.

A similar point can be made about the two inconsistent standards of review. We see no reason to choose between them, because neither is needed. An agency's decision to issue an interim rule, instead of complying with ordinary rulemaking procedures, is essentially a decision to invoke an exemption to the APA. Courts already decide issues of APA compliance, such as this one,[135] without appreciable deference to agencies, because no single agency administers that Act.[136]

### C. *Other Exemptions*

The good cause provision is not the only rulemaking exemption that Congress should consider in connection with APA revision. It should take this opportunity to rescind the broad and anachronistic exemption for rules relating to "public property, loans, grants, benefits, or contracts."[137] ACUS has repeatedly called for repeal of this language, beginning in 1969,[138] and the ABA has concurred with a minor reservation relating to public property and contracts.[139] Similarly, the APA contains a sweeping exemption for matters involving "a military or foreign affairs function of the United States."[140] Both ACUS and the ABA have for decades been on record as urging that this exemption be narrowed, so that it would only apply (as does the corresponding exemption in the Freedom of Information Act) to matters that are specifically required by executive order to be kept secret in the interest of national defense or foreign policy.[141] A requirement that rules in the subject areas of both exemptions must be issued through the normal notice-and-comment process would harmonize well with the bill's overall emphasis on promoting public participation and agency

135. Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003).

136. United States v. Fla. E. Coast Ry., 410 U.S. 224, 236 n.6 (1973); Collins v. NTSB, 351 F.3d 1246, 1252 (D.C. Cir. 2003); Am. Airlines, Inc. v. DOT, 202 F.3d 788, 796 (5th Cir. 2000).

137. 5 U.S.C. § 553(a)(2) (2006).

138. ACUS Recommendation 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 38 Fed. Reg. 19,782, 19,784–85 (July 23, 1973).

139. *1981 ABA Recommendation*, *supra* note 7, at 783–84, 788. The reservation was that if rulemaking procedures are followed by an agency with overall responsibility for public property or contracts, including the Administrator for Federal Procurement Policy or the Administrator of General Services, the implementing agency should not have to repeat the process on its own; moreover, the APA should not displace any rulemaking procedures specified in the applicable organic statute. *Id.*

140. 5 U.S.C. § 553(a)(1) (2006).

141. *1981 ABA Recommendation*, *supra* note 7, at 784, 788–89; ACUS Recommendation 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 39 Fed. Reg. 4847 (Feb. 7, 1974).

accountability in rulemaking.

Finally, we note that § 553(g)(1) apparently seeks to carry forward without change the existing APA exemption for interpretive rules, policy statements, and procedural rules.[142] It does so imperfectly, however, because it would require an agency to take account of the § 553(b) considerations in issuing an interpretive rule or policy statement and also satisfy the requirements for final rules in § 553(f). These requirements would be excessive, not only for the reasons we have already mentioned regarding those subsections, but also because it would tend to deter agencies from issuing guidance at all. This would be detrimental to the interests of those citizens who rely on agency guidance for advice as to how they can best comply with their regulatory obligations.

## XI. OIRA GUIDELINES

Section 553(k) would authorize OIRA to "establish guidelines" regarding multiple aspects of the rulemaking process. Of course, OIRA already does issue such guidelines. Insofar as the purpose of the subsection is simply to recognize and ratify this practice, we support the provision. Presumably, one consequence of codifying this authority would be to make OIRA guidelines applicable to independent agencies' rulemaking. As stated above, the ABA does support the extension of OIRA oversight to independent agencies.[143]

We assume that the "guidelines" authorized by the subsection would not be legally binding. At present, OIRA does have rulemaking authority in limited subject areas, such as the Paperwork Reduction Act and the Information Quality Act, but it has not claimed a general authority to regulate the rulemaking process. Indeed, the presidential oversight orders have all specifically disclaimed the intention to displace the authority granted by law to the respective agencies.[144] Our understanding is that the bill does not seek to alter that state of affairs. The sponsors should, however, reconsider certain language in the provision that may give rise to a contrary impression—e.g., that the guidelines would "ensure" that agencies use the best available techniques for cost-benefit analysis, "assure" that each agency avoids regulations that are inconsistent with those of other agencies, and "ensure" consistency in federal rulemaking.

Subsection 553(k) also authorizes OIRA to issue guidelines in subject matter areas that it has not heretofore addressed. The benefits of such

142. *See* 5 U.S.C. § 553(b)(3)(A) (2006).

143. *See supra* note 76 and accompanying text.

144. *See, e.g.*, Exec. Order No. 13,563, *supra* note 27, § 7(b)(i); Exec. Order No. 12,866, *supra* note 5, § 9.

pronouncements may vary according to context. For example, the case for empowering OIRA to issue binding guidelines "to promote coordination, simplification, and harmonization of agency rules" is relatively strong, because problems of incompatible or duplicative regulations as between agencies are real, yet individual agencies cannot readily solve these problems on their own. The case for guidelines to ensure that rulemaking conducted outside the APA framework "conform to the fullest extent allowed by law with the procedures set forth in section 553" is less clear, because diverse approaches among the agencies may rest on legitimate differences in their respective missions and programs. In short, the direction in which § 553(k) appears to be headed may have merit, but its proponents will need to make a careful case for individual aspects of it.

In any event, we do not support the provision in § 706(b)(2) that would deny any judicial deference to agency cost–benefit determinations or risk assessments that fail to conform to OIRA guidelines—a purpose for which those guidelines clearly were not designed. We discuss this provision in Part XIII below.

## XII. AGENCY GUIDANCE

Section 4 of the bill adds to the APA a new provision, § 553a, on the subject of agency guidance. It provides that, before issuing any *major* guidance, an agency must consider certain stated issues and consult with OIRA. It also states that any guidance must be explicitly labeled as nonbinding and that OIRA may issue guidelines to agencies as to how they should use guidance documents.

Most of these provisions have counterparts in existing practice and are supportable or at least not objectionable. The factors listed in § 553a(a)(1) as threshold considerations are mostly straightforward matters that one would normally expect the agency to consider, such as whether the guidance is understandable and supported by legal authority, and whether its benefits justify its costs.[145] (However, to the extent that this subsection incorporates by reference all of the cost factors listed in § 553(b), we would object for the same reasons discussed above in relation to the latter provision.) Moreover, OIRA already consults with executive agencies about significant guidance, and OMB has already published guidelines regarding the recommended use of guidance by agencies.[146] A consequence of codification in the APA would be that the application of these oversight functions would be extended to independent agencies, but

145. The reference in § 553a(a)(1)(B) to "the rule making" should say "a rule making."

146. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

such an extension would be consistent with ABA policy.[147]

The provision's general provision on guidance could benefit from refinement, however. First, the statement in subsection (b)(1) that agency guidance "may not be relied upon by an agency as legal grounds for agency action" could prove confusing, because interpretive rules certainly "may sometimes function as precedents."[148] Perhaps the quoted language should be rephrased as "may not be used to foreclose consideration of issues as to which the document reaches a conclusion,"[149] or should simply be deleted. Second, the requirement in subsection (b)(2) that any guidance must be labeled as not legally binding in a "plain, prominent and permanent manner" may be problematic. In the abstract, such labeling represents good administrative practice,[150] but conversion of this principle into a legal requirement may cause difficulties, particularly with respect to internal documents that technically meet the definition of "guidance" but are routine or casual statements, such as internal memoranda, that are prepared with little internal review.[151] Codification would also give rise to the question of what the consequences of breach would be. The ramifications of the principle of prejudicial error under § 706 could be difficult to sort out. Even OMB's Good Guidance Practices Bulletin treats the labeling practice as optional, although it suggests that agencies consider following it.[152] Thus, encouragement of labeling may be better left to advisory documents as opposed to the APA. Finally, subsection (b)(3), which identifies ways in which guidance shall be "made available," covers terrain that is already addressed in the Freedom of Information Act (FOIA), which is part of the APA.[153] It does not seem to add anything to what FOIA already requires, and it could create confusion. If the sponsors deem

147. *See supra* note 76 and accompanying text.

148. United States v. Mead Corp., 533 U.S. 218, 232 (2001).

149. *See* REVISED MODEL STATE ADMIN. PROCEDURE ACT § 311(b) (2010) (HeinOnline) ("An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.").

150. *See* ACUS Recommendation 92-2, Agency Policy Statements, 57 Fed. Reg. 30,103, ¶ II.A. (July 8, 1992).

151. *See* 118 No. 2 A.B.A. ANN. REP. 57, 58 (1993) (making recommendations on agency use of guidance, but with the caveat that the resolution "reaches only those agency documents respecting which public reliance or conformity is intended, reasonably to be expected, or derived from the conduct of agency officials and personnel;" as opposed to "enforcement manuals setting internal priorities or procedures rather than standards for conduct by the public").

152. Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, *supra* note 146, at 3437.

153. 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B) (2006).

the current requirements for making guidance available inadequate, amending that requirement seems preferable to enacting a new provision on the same subject.

## XIII. JUDICIAL REVIEW

We have already discussed the bill's provisions on judicial review as they relate to interim rules and the Information Quality Act, so the following comments relate to other provisions.

### *A. Scope of Review*

Section 7 of the bill would add a new subsection (b) to the APA's scope of review provision, § 706, stating that a reviewing court "shall not defer" to various interpretations and determinations by an agency unless the agency followed certain specified procedures in relation to that determination.

The Section believes that this subsection is unwarranted. Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron*[154] and *State Farm*[155]—and, of course, for decades prior to their issuance—courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.

In any event, the principles proposed fall well outside the range of doctrines that can find support in the case law. For example, the bill provides in § 706(b)(2) that "the court shall not defer to" an agency's "determination of the costs and benefits of a rule or economic or risk assessment of the action" if the agency failed to conform to guidelines prescribed by OIRA. This provision is unwise.

Under standard judicial review principles, such shortcomings in reasoning normally result in a *remand for reconsideration*, so that the agency can (attempt to) provide an adequate basis for its position, or, perhaps, a proper regulatory analysis. It should not result in the court making its own findings on these issues. Such judicial overrides would defeat the purposes of the enabling legislation, because they would effectively mean that the court would make policy judgments that Congress has entrusted to the judgment of an administrative agency (subject to traditional political and

154. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
155. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

judicial oversight). This development would dramatically increase the policymaking power of federal judges who do not have experience in the relevant subject area and have no political accountability to Congress or the public. Moreover, scattered judicial interventions of this kind would inevitably tend to undermine the coherence of major regulatory programs.

We would add that the innovations introduced by § 706(b)(2) would also result in substantial burdens for the courts themselves. Appellate litigation would become more complicated (and expensive for litigants), because the courts would have to make complex threshold inquiries into whether or not the agency had complied with OIRA's guidelines. These questions would not necessarily have been resolved at the agency level, because the issue of judicial deference would not have been directly germane at that level. Of course, if the reviewing court were to resolve the threshold issue adversely to the agency, it would then face even more daunting challenges, as it would be required to become a de facto administrator charged with balancing costs and benefits of a rule, assessing risks, etc., for which the judges would likely have had no training. These new judicial tasks strike us as unwarranted—and all the more so at the present time, when many of the courts are facing "judicial emergencies" because of vacancies on the bench and the pressures of heavy caseloads in criminal, immigration, and other areas.

Another troubling provision is § 706(b)(1), which provides that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures in adopting the interpretation. Under those circumstances, however, the agency would actually be issuing a new regulation—it would not be interpreting the old one. Effectively, therefore, § 706(b)(1) would abolish all judicial deference to agencies' interpretations of their own rules. Yet many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it. A prohibition on such deference would be both unwise and unsupported by case law.[156]

156. There is a serious debate in the cases and the law review literature as to whether an agency's interpretation of a regulation should receive *diminished* deference if the agency arrived at it without engaging in sufficient procedural formalities. *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449 (2011); Harold J. Krent, *Judicial Review of Nonstatutory Legal Issues*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 147, 151–58 (John F. Duffy & Michael Herz eds., 2005). That debate, however, has not generated substantial (if any) support for the proposition that such an interpretation should receive no judicial deference whatsoever, as § 706(b)(1) would provide.

Courts do, of course, play an indispensable role in overseeing agency action and correcting abuses. If Congress decides to reconsider the premises of that role, the Section would be very willing to work with it on proposals to refine the judicial review provisions of the APA. The principles of § 706(b), however, are in our judgment too far removed from current judicial review practice to offer a promising start in that direction.

### *B. Substantial Evidence*

Section 8 of the bill would add a new definition of "substantial evidence" to the judicial review chapter of the APA. The definition itself is innocuous, as it is based directly on well-recognized case law.[157]

We are unconvinced, however, that the amendment is necessary or will accomplish what its sponsors expect. A press release by the sponsors indicates that the bill is intended to ensure that, "[a]s a consequence of the formal hearing [mandated by the APA as amended], high-impact rules would be reviewed under a slightly higher standard in court—substantial evidence review."[158] Apart from our objections to the formal hearings themselves, discussed above, we must question some of the premises of this statement.

As an initial matter, it is not at all clear that the bill as drafted would, indeed, subject high-impact rules to substantial evidence review. The APA provides that the substantial evidence test applies to "a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."[159] The first prong of this trigger may not apply because rulemakings that involved a formal hearing, i.e. were "subject to sections 556 and 557," will *also* have been "subject to" notice-and-comment under § 553. The second prong may not be satisfied because

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157. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There the Court stated:

> We [have] said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it . . . must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

*Id.* at 477 (internal citations and quotation marks omitted). Some cases quote only the middle of these three adjacent sentences for the meaning of "substantial evidence," and others the last one, but we know of no case that has suggested that those two formulations have different meanings.

158. Press Release, Rob Portman & Mark Pryor, U.S. Senators, and Lamar Smith & Collin Peterson, U.S. Representatives, Regulatory Accountability Act of 2011: Key Provisions (Sep. 22, 2011), *available at* http://portman.senate.gov/public/index.cfm/files/serve?File_id=472d1a09-93d5-4454-964a-54baf0d930cc.

159. 5 U.S.C. § 706(2)(E) (2006).

the bill expressly states that the record for review in a case of this nature would be the record of the formal hearing *plus* the ordinary § 553 record.[160] However, for purposes of the following discussion we will assume that the bill may be interpreted (or revised) to make the substantial evidence standard applicable.

The main problem with the apparent goal of the bill is that the case law has generally abandoned the assumption that substantial evidence review is a "slightly higher standard" than arbitrary–capricious review. The modern view, as stated in a leading D.C. Circuit opinion by then-Judge Scalia, is that "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter."[161] Other circuits have agreed.[162] With the advent of the "hard look" doctrine in arbitrary-and-capricious review, older conceptions of a disparity between the two standards of review have been seen as obsolete.[163]

If the sponsors were to rewrite the bill to make the substantial evidence test squarely applicable to review of high-impact rules, it would present the courts with a need for what Judge Scalia called a "fairly convoluted" inquiry:

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160. H.R. 3010, sec. 5 (proposed § 556(e)(2)).

161. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984). The court has repeatedly reaffirmed this view. *See, e.g.*, Butte Cnty. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010); Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 422 (D.C. Cir. 1986) (expressly relating this view to the "reasonable mind" definition of substantial evidence that the bill would codify).

162. Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005); Sevoian v. Ashcroft, 290 F.3d 166, 174 (3d Cir. 2002); Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374–75 (9th Cir. 1995), *rev'd on other grounds*, 521 U.S. 457 (1997); Tex. World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 n.3 (5th Cir. 1991); Cruz v. Brock, 778 F.2d 62, 63–64 (1st Cir. 1985). The Supreme Court has cited to the *Data Processing* reasoning and expressed no qualms about it. Dickinson v. Zurko, 527 U.S. 150, 158 (1999).

163. In *Data Processing*, Judge Scalia went on to say that the "distinctive function of paragraph (E) [substantial evidence]—what it achieves that paragraph (A) [arbitrary and capricious] does not—is to require substantial evidence to be found *within the record of closed-record proceedings* to which it exclusively applies." 745 F.2d at 684. Even this distinction would become less relevant under the amended APA, because the bill also creates a defined record for review of rules subject to arbitrary-capricious review.

> Suppose, for example, that Congress clearly intended to switch to a stricter test, but was also clearly operating on the mistaken belief that the existing test ("arbitrary or capricious") was more lenient than the "substantial evidence" standard. Should one give effect to the congressional intent to adopt a stricter standard, or rather to the congressional intent to adopt the "substantial evidence" standard (which is in fact, as we have discussed, no stricter)?[164]

The limited nature of the formal hearings contemplated by the bill could make the situation even more convoluted. Some, but not all, of the factual issues would have been litigated via the formal hearing process, for which substantial evidence review is designed. Does this mean that some factual determinations underlying a high-impact rule would be reviewed for substantiality of evidence, and others for arbitrariness? Drawing that distinction could prove confusing if not unmanageable. On the other hand, the bill may be construed to mean that the entire proceeding should be reviewed for substantiality of evidence. This reading would create what the D.C. Circuit has called an "anomalous combination" of features that gives rise to difficult questions as to "whether the determinations in [the case] are of the kind to which substantial evidence review can appropriately be applied," as well as "the adequacy of the record to permit meaningful performance of the required review."[165]

In short, we believe there is great doubt that legislation to impose a substantial evidence test for review of high-impact rules would accomplish what the sponsors intend for it, and every reason to think it would lead to confusion and complexity. As the Supreme Court has recognized, "case-specific factors, such as a finding's dependence upon agency expertise or the presence of internal agency review . . . will often prove more influential in respect to outcome than will the applicable standard of review."[166]

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Thank you in advance for your consideration of these comments. We hope they will be helpful, and we would be happy to work with the committee in its efforts to refine this bill further.

164. *Id.* at 686.
165. Indus. Union Dep't v. Hodgson, 499 F.2d 467, 473–74 (D.C. Cir. 1974).
166. *Zurko*, 527 U.S. at 163.