



# Regulatory Reform Legislation in the 112<sup>th</sup> Congress

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## Summary

In the 112<sup>th</sup> Congress, a number of bills have been introduced that would, if enacted, change current requirements in the federal rulemaking process. In the Senate, the proposed legislation includes (1) S. 128, the Small Business Paperwork Relief Act of 2011; (2) S. 299, the Regulations from the Executive in Need of Scrutiny Act of 2011; (3) S. 358, the Regulatory Responsibility for Our Economy Act of 2011; (4) S. 474, the Small Business Regulatory Freedom Act of 2011; (5) S. 602, the Clearing Unnecessary Regulatory Burdens Act; and (6) S. 817, which would make changes to the application of the Unfunded Mandates Reform Act. In the House of Representatives, the bills include (1) H.R. 10, the Regulations from the Executive in Need of Scrutiny Act of 2011; (2) H.R. 213, the Regulation Audit Revive Economy Act of 2011; (3) H.R. 214, the Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011; (4) H.R. 373, the Unfunded Mandates Information and Transparency Act of 2011; (5) H.R. 527, the Regulatory Flexibility Improvements Act of 2011; (6) H.R. 1235, the Regulation Moratorium Act of 2011; and (7) H.R. 1432, the Creating Sunshine, Participation, and Accountability for our Nation Act.

This report describes each of those bills, notes whether similar legislation has been introduced or acted upon in the past, summarizes the comments of those supporting and opposing the proposed legislation, and provides other relevant information. To put those regulatory reform bills in context, the report first summarizes the current rulemaking requirements (primarily statutes and executive orders) that the proposed legislation would amend, codify, or otherwise affect. The report ends with some concluding observations, noting similarities, differences, and broad themes in the legislative proposals. Those themes include (1) an expansion of current rulemaking requirements, (2) an expansion of those requirements to independent regulatory agencies, (3) an emphasis on retrospective reviews of existing rules, and (4) an increase in the role of Congress in overseeing the actions of regulatory agencies. Within each of these broad areas, however, the bills often take very different approaches. Some of the reforms would, if enacted, place new and potentially substantial responsibilities on federal agencies and the Office of Management and Budget, which may require additional resources and time to satisfy. Some of the bills may require clarification to ensure that they are enacted as Congress intended, and some may raise legal or policy concerns.

This report will be updated to reflect new proposed legislation and actions on bills that have been introduced.

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## Introduction

Regulations generally start with an act of Congress and are the means by which statutes are implemented and specific requirements are established. Federal agencies usually issue more than 3,000 final rules each year on topics ranging from the timing of bridge openings to the permissible levels of arsenic and other contaminants in drinking water. During the past 65 years, Congress and various Presidents have developed an elaborate set of procedures and requirements to guide the federal rulemaking process, often with the implicit or explicit goal of reducing the amount of regulatory burden placed on the public. These cross-cutting statutory and executive order rulemaking requirements often require some type of analysis or disclosure on the part of the rulemaking agency before issuing a covered rule, but also often give agencies substantial discretion regarding whether the requirements are applicable.

In the 112<sup>th</sup> Congress, a number of bills have been introduced that would, if enacted, change many of the current requirements in the federal rulemaking process. This report will describe many of those bills, note whether similar legislation has been introduced or acted upon in the past, summarize the comments of those supporting and opposing the proposed legislation, and provide other relevant information. The report ends with some concluding observations, noting similarities, differences, and broad themes in the legislative proposals. To put the regulatory reform bills in context, however, the report first summarizes the current rulemaking requirements (primarily statutes and executive orders) that the proposed legislation would amend, codify, or otherwise affect.

## Current Rulemaking Requirements

### Administrative Procedure Act

The most long-standing and broadly applicable federal rulemaking requirements are in the Administrative Procedure Act (APA) of 1946 (5 U.S.C. § 551 *et seq.*). Although the APA discusses both formal and informal rulemaking, this summary focuses on the more common informal “notice and comment” rulemaking requirements. For informal rulemaking, the APA generally requires that agencies (Cabinet departments and independent agencies as well as independent regulatory agencies) publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, and give “interested persons” an opportunity to comment on the proposed rule.<sup>1</sup> After considering the public comments, the agency may then publish the final rule, incorporating a general statement of its basis and purpose. Although the APA does not specify the length of this public comment period, agencies commonly allow at least 30 days.<sup>2</sup> Finally, the APA states that the final rule cannot become effective until at least 30 days after its publication unless (1) the rule grants or recognizes an exemption or relieves a restriction, (2) the rule is an interpretative rule or

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<sup>1</sup> As used in this report, the term “independent regulatory agencies” refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. § 3502(5)), including the Federal Communications Commission, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission. The term “independent agencies” refers to other agencies that answer directly to the President, but are not part of Cabinet departments (e.g., the Environmental Protection Agency and the General Services Administration).

<sup>2</sup> Executive Order 12866, discussed in detail later in this report, suggests that agencies allow the public at least 60 days to comment for “significant” rules.

a statement of policy, or (3) the agency determines that the rule should take effect sooner for “good cause,” and publishes that determination with the rule.<sup>3</sup>

Although the APA generally requires agencies to publish NPRMs before promulgating a final rule, the act also provides exceptions to this requirement. For example, the APA (5 U.S.C. § 553(b)(B)) states that the notice and comment procedures generally do not apply when an agency finds, for “good cause,” that those procedures are “impracticable, unnecessary, or contrary to the public interest.”<sup>4</sup> When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception’s use when the rule is published in the *Federal Register*. “Interim final” rulemaking can be viewed as a particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.<sup>5</sup> Congress sometimes requires agencies to use interim final rulemaking, and may also specify the length of the comment period.<sup>6</sup>

## Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. §§ 3501-3520) was originally enacted in 1980, but was subsequently amended in 1986 and again in 1995. One of the purposes of the PRA is to minimize the paperwork burden for individuals, small businesses, and others resulting from the collection of information by or for the federal government. The act generally defines a “collection of information” as the obtaining or disclosure of facts or opinions by or for an agency (Cabinet departments and independent agencies as well as independent regulatory agencies) by 10 or more nonfederal persons. Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies’ regulatory provisions.<sup>7</sup> The PRA requires agencies to justify any collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.

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<sup>3</sup> For a legal overview of rulemaking and judicial review under the APA, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Vanessa K. Burrows and Todd Garvey.

<sup>4</sup> The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice. However, these rules do have to be published in the *Federal Register*.

<sup>5</sup> For more, see Michael Asimow, “Interim Final Rules: Making Haste Slowly,” *Administrative Law Review*, 51 (Summer 1999), pp. 703-755.

<sup>6</sup> For example, Subsection (b)(2) of Section 1104 of the Patient Protection and Affordable Care Act amended Section 1173 of the Social Security Act (at 42 U.S.C. § 1320d-2) and states, in part, that the Secretary “shall promulgate an interim final rule applying any standard or operating rule recommended by the National Committee on Vital and Health Statistics,” and “shall accept and consider public comments on any interim final rule published under this subparagraph for 60 days after the date of such publication.”

<sup>7</sup> For example, Environmental Protection Agency’s Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses to inform the public about chemical hazards in their communities. TRI reports require businesses in certain industries to report the quantity of any of more than 600 chemicals entering each environmental medium on site, transfers of the chemical in wastes to off-site locations, on-site treatment methods and efficiency, and source reduction and recycling activities.

The original PRA established the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Agencies must receive OIRA-approval (signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years. Failure to obtain OIRA approval for an active collection, or the lapse of that approval, represents a violation of the act, and triggers the PRA's public protection provision. Under that provision, no one can be penalized for failing to comply with a collection of information subject to the act if the collection does not display a valid OMB control number.<sup>8</sup> OIRA can disapprove any collection of information if it believes the collection is inconsistent with the requirements of the PRA.<sup>9</sup>

## Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§ 601-612) requires federal agencies to assess the impact of their forthcoming regulations on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, Cabinet departments and independent agencies as well as independent regulatory agencies must prepare a “regulatory flexibility analysis” at the time proposed and certain final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities” (hereafter referred to as a “SEISNSE”). The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act's analytical requirements are initiated. Also, the RFA's analytical requirements do not apply to final rules for which the agency does not publish a proposed rule.

The RFA initially did not permit judicial review of agencies' actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA, 5 U.S.C. § 601 note) permitted judicial review regarding, among other things, agencies' regulatory flexibility analyses for final rules and any certifications that their rules will not have a significant impact on small entities. As a result, a small entity that is adversely affected or aggrieved by an agency's determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities.

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<sup>8</sup> For an up-to-date inventory of OMB-approved information collections, see <http://www.reginfo.gov/public/do/PRAMain>.

<sup>9</sup> Multi-headed independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed collection of information. See 44 U.S.C. § 3507(f). For more information on the PRA, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows.

The RFA also contains several other notable provisions. For example, Section 610 of the act requires agencies to review those rules that have or will have a significant impact within 10 years of their promulgation to determine whether they should be continued without change or should be amended or rescinded to minimize their impact on small entities. Section 612 of the RFA requires the chief counsel of the Small Business Administration's (SBA) Office of Advocacy to monitor and report at least annually on agencies' compliance with the act. SBA's primary method of monitoring agencies' compliance is to review and comment on proposed regulations when they are published for notice and comment in the *Federal Register*. However, the statute also specifically authorizes the chief counsel to appear as *amicus curiae* (i.e., "friend of the court") in any court action to review a rule.

The RFA also requires agencies to ensure that small entities have an opportunity to participate in the rulemaking process, and the 1996 amendments to the act in SBREFA required the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene "advocacy review panels" before publishing a regulatory flexibility analysis for a proposed rule. Specifically, the agency issuing the regulation must notify the SBA chief counsel for advocacy and provide information on the draft rule's potential impacts on small entities and the type of small entities that might be affected. The chief counsel then must identify representatives of affected small entities within 15 days of the notification. The review panel must consist of full-time federal employees from the rulemaking agency, OMB, and SBA's chief counsel for advocacy. During the panel process, the panel must collect the advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. The panel must report on the comments received and on the panel's recommendations no later than 60 days after the panel is convened, and the panel's report must be made public as part of the rulemaking record.<sup>10</sup> The agency may or may not adopt the panel's recommendations. The Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) required the new Consumer Financial Protection Bureau (CFPB) to also hold such panels.

The Government Accountability Office (GAO, formerly the General Accounting Office) has examined the implementation of the RFA several times within the past 20 years, and a recurring theme in GAO's reports is a lack of clarity in the act and a resulting variability in the act's implementation. For example, in 1991 GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions.<sup>11</sup> In 1994 GAO again reported that agencies' compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently.<sup>12</sup> In a 1999 report on the implementation of Section 610 of the RFA and in a 2000 report on the implementation of the RFA at the EPA, GAO concluded that agencies had broad discretion to determine what the statute required.<sup>13</sup> In all of these reports, GAO suggested that Congress consider clarifying the act's requirements and/or give SBA or some other entity the responsibility to develop criteria for whether and how agencies should conduct

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<sup>10</sup> For an examination of the first five advocacy review panels were implemented, see U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, March 18, 1996.

<sup>11</sup> U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, January 11, 1991.

<sup>12</sup> U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, April 27, 1994.

<sup>13</sup> U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999; U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193. September 20, 2000.



RFA analyses. In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a “significant economic impact” and a “substantial number of small entities” mean in a rulemaking setting.<sup>14</sup> However, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency’s operating environment.<sup>15</sup>

## Small Business Regulatory Enforcement Fairness Act

Some of the provisions in SBREFA imposed new rulemaking-related requirements on federal agencies, but did not amend the RFA. For example, Section 212 of SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare a regulatory flexibility analysis. Specifically, Section 212 requires the guides to (1) be published, (2) be designated as “small entity compliance guides,” and (3) explain the actions a small entity is required to take to comply with an associated final rule. However, the discretion inherent in the RFA regarding when a regulatory flexibility analysis is required also applies to whether compliance guides must be developed. Section 212 gives agencies broad discretion in other areas as well. For example, it says agencies “may” prepare separate guides covering groups or classes of similarly affected small entities, and “may” cooperate with associations of small entities to develop and distribute the guides. Agencies are given “sole discretion” in the use of plain language in the guides. The statute does not indicate when the guides must be developed or how they must be “published.” In December 2001, GAO reported that Section 212 of SBREFA did not appear to have had much of an impact on agencies’ rulemaking activities, and its implementation varied across and sometimes within agencies.<sup>16</sup> Using the discretion that the section provided, GAO said “an agency could legally exclude all of its rules from coverage by the statute, designate a previously published document as its small entity compliance guide, or develop and publish a guide with no input from small entities years after the covered rule takes effect.” GAO recommended several changes it felt were needed to strengthen and clarify the requirements in Section 212.<sup>17</sup>

Section 223(a) of SBREFA requires federal agencies regulating the activities of small entities to establish a policy or program for the reduction and, under appropriate circumstances, the waiver of civil penalties by small entities. In February 2001, GAO concluded that all of the agencies’ penalty reduction and waiver policies were within the broad discretion afforded by the statute.<sup>18</sup> However, GAO also reported that some of the policies covered only a portion of the agencies’ enforcement actions involving small entities, and some treated small entities no differently than

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<sup>14</sup> U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, April 24, 2001.

<sup>15</sup> See, for example, page 17 of the SBA Office of Advocacy’s guidance on the implementation of the RFA, available at <http://www.sba.gov/sites/default/files/rfaguide.pdf>, which says “Significance should not be viewed in absolute terms....” For more information on the RFA, see CRS Report RL34355, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, by Curtis W. Copeland.

<sup>16</sup> U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, December 28, 2001.

<sup>17</sup> In 2007, Congress enacted some changes to these requirements. See P.L. 110-28, Title VI, Subtitle B, sec. 7005. Among other things, agencies must prepare compliance guides for any rule for which it must prepare a final regulatory flexibility analysis, and must post the guides on their web sites.

<sup>18</sup> U.S. General Accounting Office, *Regulatory Reform: Implementation of Selected Agencies’ Civil Penalty Relief Policies for Small Entities*, GAO-01-280, February 20, 2001.

large entities. The agencies' policies also differed in terms of how key terms such as "small entity" and "penalty reduction" were defined, and most were developed before SBREFA took effect. GAO suggested several changes to the statute to strengthen agencies' penalty relief policies and make them more consistent.

## Congressional Review Act

The statutory provision commonly known as the Congressional Review Act (CRA) (5 U.S.C. §§ 801-808) was included as part of SBREFA as enacted in March 1996, and established expedited procedures by which Congress may disapprove agencies' rules by enacting a joint resolution of disapproval.<sup>19</sup> Under the CRA, before any final rule can become effective it must be filed with each House of Congress and GAO.<sup>20</sup> The definition of a "rule" under the CRA is very broad, and the act applies to rules issued by Cabinet departments and independent agencies as well as independent regulatory agencies.

If OIRA considers the issuing agency's rule to be "major" (e.g., the rule is expected to have a \$100 million annual effect on the economy), the agency generally must delay the rule's effective date by 60 days after the date of publication in the *Federal Register* or submission to Congress and GAO, whichever is later. Within 15 calendar days of receiving a major rule, GAO is required to provide Congress with a report on the rule assessing the issuing agency's compliance with the procedural steps required by the various acts and executive orders applicable to the rulemaking process.<sup>21</sup> Although the CRA establishes these special requirements for major rules, the CRA procedures for disapproving regulations apply to all rules, whether or not they are declared to be major.

Within 60 days after Congress receives an agency's rule, excluding periods when Congress is in recess or adjournment, a Member of Congress can introduce a resolution of disapproval that, if adopted by both Houses and enacted into law, can nullify the rule, even if it has already gone into effect. Senate action on a disapproval resolution under the act must occur within 60 days of session after the regulation is submitted, and makes available during that period an expedited procedure intended to ensure that the Senate can take up and vote on the measure before the period expires. The act establishes no such expedited procedure for the House. If Congress adjourns less than 60 days of session after a rule is submitted, a new 60 day period for disapproval under the act begins on the 15<sup>th</sup> legislative day of the next session. If a disapproval resolution is rejected by either House of Congress, the rule can take effect immediately (or as provided by other governing law or rule).

Federal agencies have submitted more than 50,000 rules to GAO (and presumably, Congress) since the CRA took effect in March 1996, including more than 1,000 major rules. However, only one rule had been overturned through CRA's procedures—OSHA's ergonomics standard in March 2001 (P.L. 107-5). Many reasons have been suggested for why the CRA has not been used more often,<sup>22</sup> but chief among them may be the fact that, if the President vetoes a resolution of

<sup>19</sup> For a detailed discussion of CRA procedures, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

<sup>20</sup> Nevertheless, some rules have not been submitted. See CRS Report R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland.

<sup>21</sup> To view these reports, see <http://www.gao.gov/decisions/majrule/majrule.php>.

<sup>22</sup> Morton Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, (continued...)"

disapproval (which is likely if the underlying rule is developed during his administration), then enactment of the resolution would require approval of a two-thirds majority in both houses of Congress. The rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.<sup>23</sup>

## Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995 was enacted in an effort to reduce the costs associated with federal imposition of responsibilities, duties, and regulations upon state, local, and tribal governments and the private sector without providing the funding appropriate to the costs imposed by those responsibilities.<sup>24</sup> Title II of UMRA (2 U.S.C. §§ 1532-1538) contains requirements imposed on covered federal agencies during the rulemaking process. For example, Section 202 of the act requires Cabinet departments and independent agencies (but not independent regulatory agencies) to, among other things, prepare a written statement containing specific descriptions and estimates for any proposed rule or any final rule for which a proposed rule was published that includes any federal mandate that may result in the expenditure of \$100 million or more in any year by state, local, or tribal governments, in the aggregate, or the private sector. One of the items required in the written statement is a qualitative and quantitative assessment of the anticipated costs and benefits of the mandate. OIRA has primary responsibility for monitoring agency compliance with Title II of UMRA, and publishes an annual report on the implementation of Title II.<sup>25</sup>

In February 1998, GAO reported that, because of the way the statute was written, Title II of UMRA had little effect on agencies' rulemaking actions during its first two years of implementation.<sup>26</sup> First, many of the act's requirements did not appear to apply to most of the "economically significant" rules (e.g., rules with a \$100 million impact on the economy) that were promulgated during this period. Even when UMRA was triggered, it often required agencies to take actions that were identical or similar to actions that they were already required to take. In

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(...continued)

Assessment, and Proposal for Reform," *Administrative Law Review*, vol. 51, fall 1999, pp. 1051-1092.

<sup>23</sup> See, for example, Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, vol. 24 (Spring 2001), p. 9, who noted that the "veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office." For a discussion of which rules may be carried over and disapproved after a transition, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth.

<sup>24</sup> For an overview of UMRA, see CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger and Richard S. Beth.

<sup>25</sup> In recent years, OIRA's annual report on UMRA has been combined with its report on the costs and benefits of federal regulations. See, for example, Office of Management and Budget, Office of Information and Regulatory Affairs, *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010\\_Benefit\\_Cost\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf).

<sup>26</sup> U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, February 4, 1998.

May 2004, GAO again reported that UMRA's written statement requirements did not apply to most major or economically significant final rules issued in 2001 and 2002, even though some of the rules "appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act's thresholds."<sup>27</sup> In February 2011, GAO reiterated these conclusions, noting that there are 14 reasons why a rule would not be considered a "mandate" under UMRA.<sup>28</sup>

## Small Business Paperwork Relief Act

In June 2002, Congress enacted and the President signed the Small Business Paperwork Relief Act of 2002 (P.L. 107-198). The act amended the Paperwork Reduction Act to, among other things, require each agency to establish a single point of contact to act as a liaison for small business concerns with regard to information collection and paperwork issues. It also directed agencies to make a special effort to reduce information collection burdens for small businesses with fewer than 25 employees. OMB was directed to publish in the *Federal Register* and make available on the Internet an annual list of the compliance assistance resources available to small businesses.<sup>29</sup> The act also required agencies to report to Congress on the amount of penalty relief provided to small businesses, and established a task force to study the feasibility of streamlining information collection requirements on small businesses.<sup>30</sup>

## Executive Order 12866

Centralized review of agencies' regulations within the Executive Office of the President has been part of the federal rulemaking process for more than 30 years, perhaps most notably by President Ronald Reagan in Executive Order 12291.<sup>31</sup> The current process is delineated in Executive Order 12866, which was issued by President William Clinton on September 30, 1993.<sup>32</sup> The executive order limits OIRA's reviews to proposed and final rules published by agencies other than independent regulatory agencies,<sup>33</sup> and to actions identified by the rulemaking agency or OIRA as "significant" regulatory actions, defined as those that were "economically significant" (e.g., those with a \$100 million impact on the economy) or that (1) were inconsistent or interfered with an action taken or planned by another agency; (2) materially altered the budgetary impact of entitlements, grants, user fees, or loan programs; or (3) raised novel legal or policy issues. OIRA reviews between 500 and 700 regulatory actions per year.

<sup>27</sup> U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

<sup>28</sup> Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight of Government Management, available at <http://www.gao.gov/products/GAO-11-385T>.

<sup>29</sup> These lists of compliance assistance resources are available at <http://www.sba.gov/category/navigation-structure/starting-managing-business/starting-business/business-law-regulations/contact-government-agency/fe>.

<sup>30</sup> See <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/foreg/sbpr2004.pdf> for a copy of the task force's June 28, 2004, final report.

<sup>31</sup> The President, "Executive Order 12291—Federal Regulation," 46 *Federal Register* 13193, February 17, 1981.

<sup>32</sup> The President, "Executive Order 12866—Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

<sup>33</sup> Independent regulatory agencies are, however, covered by requirements in Section 4 of Executive Order 12866 regarding regulatory planning.

Executive Order 12866 generally requires that OIRA complete its reviews of proposed and final rules within 90 calendar days, and requires both rulemaking agencies and OIRA to disclose certain information about how the regulatory reviews were conducted. The executive order requires the issuing agency to provide to OIRA the text of the draft rule, a description of why the rule is needed, and a general assessment of the rule's costs and benefits. For draft rules that are "economically significant" (e.g., rules expected to have at least a \$100 million annual impact on the economy), it requires a detailed cost-benefit analysis, including an assessment of the costs and benefits of "potentially effective and reasonably feasible alternatives to the planned regulation." The executive order states that agencies shall "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," and that unless a statute requires another regulatory approach, "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits."<sup>34</sup>

During the review process, OIRA analyzes the draft rule in light of the principles of the executive order and discusses the rule with staff and officials at the rulemaking agency. At the end of the review OIRA either concludes that the draft rule is consistent with the principles of the executive order (the majority of the cases) or returns the rule to the agency "for further consideration." If the draft is a proposed rule, the agency may then publish an NPRM. If the draft is a final rule, the agency may then publish a final rule and allow the rule to take effect.

Executive Order 12866 also includes several other notable requirements. For example, Section 5(a) of the order requires agencies to periodically review their existing significant regulations to determine whether they should be modified or eliminated. In March 1995, President Clinton reemphasized this requirement by directing each agency to conduct a page-by-page review of all existing regulations. In June 1995, the President announced that 16,000 pages had been eliminated from the *Code of Federal Regulations*, but GAO reported that the page elimination totals in four agencies did not take into account pages that had been added while the eliminations took place.<sup>35</sup> GAO also reported that about half of the actions taken appeared to have no effect on the burden felt by regulated entities, would have little effect, or could increase regulatory burden.

## Executive Order 13422

On January 18, 2007, President George W. Bush issued Executive Order 13422, making the most significant amendments to Executive Order 12866 since it was published.<sup>36</sup> The most important changes fell into five general categories: (1) a requirement that agencies identify in writing the specific market failure or problem that warrants a new regulation, (2) a requirement that each agency head designate a presidential appointee within the agency as a "regulatory policy officer"

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<sup>34</sup> In January 1996, OIRA published a document that described "best practices" for preparing the economic analyses called for by the executive order. This document was revised and issued as guidance in 2000. In September 2003, OMB and the Council of Economic Advisors finalized new guidance for agencies on regulatory analysis, refining and replacing the 1996 "best practices" document. For a copy of this guidance, see <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

<sup>35</sup> U.S. General Accounting Office, *Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3, October 2, 1997.

<sup>36</sup> The President, Executive Order 13422, "Further Amendment to Executive Order 12866 on Regulatory Planning and Review," 72 *Federal Register* 2763, January 23, 2007. Five years earlier, E.O. 13258 reassigned certain responsibilities from the Vice President to the President's chief of staff, but otherwise did not change the OIRA review process. See Executive Order 13258, "Amending Executive Order 12866 on Regulatory Planning and Review," 67 *Federal Register* 9385, February 28, 2002.

who can control upcoming rulemaking activity in that agency, (3) a requirement that agencies provide their best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in the coming year, (4) an expansion of OIRA review to include “significant guidance documents,”<sup>37</sup> and (5) a provision permitting agencies to consider whether to use more formal rulemaking procedures in certain cases.<sup>38</sup> Some of these changes were highly controversial, and in the first half of 2007, two House subcommittees held three oversight hearings on the order. A provision was added to the appropriations measure funding OMB for FY2008 that would have prevented the implementation of the executive order, but the measure was eliminated from the final version of the legislation. On January 30, 2009, President Barack Obama issued Executive Order 13497, which (among other things) revoked Executive Order 13422.<sup>39</sup> As a result, Executive Order 12866 was returned to the form when it was issued in September 1993. Less than two months later, though, the Director of OMB instructed federal agencies to continue sending their significant guidance documents to OIRA for review.<sup>40</sup>

## OMB Bulletin on Agency Guidance

On the same day that President Bush issued Executive Order 13422, OMB issued a “Final Bulletin for Agency Good Guidance Practices” that mirrored, in many respects, the guidance provisions in the executive order.<sup>41</sup> Unlike the order, however, the bulletin has not been revoked. It generally requires agencies to (1) have written procedures for the approval of significant guidance documents; (2) include certain standard elements in those documents (e.g., include a citation to the statute or regulation that it interprets, and not include mandatory language such as “shall” or “must”); (3) list those documents on the agencies’ websites and allow the public to submit electronic comments; and (4) publish a notice in the *Federal Register* soliciting public comments on “economically significant” documents. OMB later issued a memorandum to the agencies on the implementation of the bulletin.<sup>42</sup>

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<sup>37</sup> The executive order defined a “significant guidance document” as a guidance document disseminated to regulated entities or the public that may reasonably be anticipated to “(A) Lead to an annual effect of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (D) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”

<sup>38</sup> For more information, see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland.

<sup>39</sup> Executive Order 13497, “Revocation of Certain Executive Orders Concerning Regulatory Planning and Review,” 74 *Federal Register* 6113, February 4, 2009.

<sup>40</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf) for a copy of this memorandum.

<sup>41</sup> To view a copy of this bulletin, see <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>; and Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” 72 *Federal Register* 3432, January 25, 2007.

<sup>42</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/m07-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-13.pdf) for a copy of this memorandum.

## Executive Order 13563

On January 18, 2011, President Obama issued Executive Order 13563 on “Improving Regulation and Regulatory Review.”<sup>43</sup> Section 1(b) states that “This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993.” Although similar to the 1993 order in many respects, Executive Order 13563 contains some new provisions. For example, Section 2(b) of the order states that agencies should generally provide “timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.”

Also, Section 6(b) of the new order requires agencies to initiate retrospective reviews of their existing rules. Specifically, it states the following:

Within 120 days of the date of this order [i.e., by May 18, 2011], each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.

As noted earlier in this report, Section 5(a) of Executive Order 12866 required agencies to submit a plan for retrospective reviews to OIRA, so this provision appears to require agencies to update those plans. On February 2, 2011, the OIRA Administrator issued guidance to federal agencies on the implementation of the executive order, including these retrospective reviews.<sup>44</sup> Several agencies have published notices in the *Federal Register* requesting comments on their review plans.<sup>45</sup> On April 25, 2011, the OIRA Administrator issued another memorandum to the heads of executive departments and agencies providing guidance on the processes through which agencies’ preliminary plans for retrospective reviews will be finalized.<sup>46</sup> Among other things, agencies were instructed to make their preliminary plans available to the public within two weeks of May 18, 2011, and should finalize those plans within 80 days after they are released.

## Other Obama Administration Initiatives

The Obama Administration has also announced several other initiatives related to the rulemaking process. For example:

- On April 7, 2010, the OIRA Administrator issued a memorandum to the President’s Management Council instructing agencies to use the Regulation

<sup>43</sup> Executive Order 13563, “Improving Regulation and Regulatory Review,” 76 *Federal Register* 3821, January 21, 2011.

<sup>44</sup> See <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

<sup>45</sup> See, for example, U.S. Department of Transportation, Office of the Secretary, “Regulatory Review of Existing DOT Regulations,” 76 *Federal Register* 8940, February 16, 2011; and U.S. Environmental Protection Agency, “Improving EPA Regulations,” 76 *Federal Register* 9988, February 23, 2011.

<sup>46</sup> See <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.

Identification Number on all relevant documents to improve the transparency of the rulemaking process.<sup>47</sup>

- On May 28, 2010, the OIRA Administrator issued two memoranda. One memorandum to the heads of cabinet departments and agencies outlined the availability and uses of “generic” information clearances under the Paperwork Reduction Act as a way for agencies to meet the act’s requirements while eliminating unnecessary burdens and delays.<sup>48</sup> The other memorandum to the President’s Management Council provided “guidance to agencies in compiling and maintaining comprehensive electronic regulatory dockets on Regulations.gov, in order to give members of the public improved access to information on which agencies rely in making decisions relevant to rulemaking.”<sup>49</sup>
- On June 18, 2010, the OIRA Administrator issued a memorandum to the heads of cabinet departments and agencies setting out guidance to inform the use of disclosure and simplification in the regulatory process (e.g., that disclosed information should be as accessible and usable as possible, and that agencies should consider using default rules as a substitute for or a supplement to mandates and bans).<sup>50</sup>
- On January 18, 2011 (the same day that Executive Order 13563 was issued), President Obama issued a memorandum on “Regulatory Flexibility, Small Business, and Job Creation.”<sup>51</sup> Among other things, the President directed executive departments and agencies, and requested independent regulatory agencies, to “give serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens on small businesses, through increased flexibility” when they issue a proposed or final rule that will have a significant economic impact on a substantial number of small entities. When an agency chooses not to provide such flexibility, the President directed the agency to “explicitly justify its decision not to do so in the explanation that accompanies that proposed or final rule.”
- Also on January 18, 2011, President Obama issued a memorandum on “Regulatory Compliance.”<sup>52</sup> Among other things, the memorandum directed agencies with broad compliance and enforcement responsibilities to develop plans to make public information on those responsibilities accessible, downloadable, and searchable online, and directed the Federal Chief Information Officer and Chief Technology Officer to work with their agency counterparts to

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<sup>47</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness\\_04072010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness_04072010.pdf).

<sup>48</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA\\_Gen\\_ICRs\\_5-28-2010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf).

<sup>49</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket\\_final\\_5-28-2010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf).

<sup>50</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure\\_principles.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf).

<sup>51</sup> See <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/POTUS-Memo-on-Regulatory-Flexibility-Small-Business-and-Job-Creation-01-18-2011.pdf>. See also The President, “Regulatory Flexibility, Small Business, and Job Creation,” 76 *Federal Register* 3827, January 21, 2011.

<sup>52</sup> See <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/POTUS-Memo-on-Regulatory-Compliance-01-18-2011.pdf>. See also The President, “Regulatory Compliance,” 76 *Federal Register* 3825, January 21, 2011.



- explore how to generate and share enforcement and compliance information across the government.
- On March 11, 2011, the OIRA Administrator, the Director of the Office of Science and Technology Policy, and the U.S. Trade Representative issued a joint memorandum on “Principles for Regulation and Oversight of Emerging Technologies.”<sup>53</sup> Areas covered by the memorandum included public participation, benefits and costs, flexibility, and coordination.
  - On April 13, 2011, the OIRA Administrator issued a memorandum to the heads of executive departments and agencies providing final guidance on implementing the Plain Writing Act of 2010 (P.L. 111-274).<sup>54</sup> For example, by July 13, 2011, agencies must create a plain writing section on their websites, and by October 13, 2011, they must write all new or substantially revised documents in plain writing.

## Regulatory Reform Legislation Introduced During the 112<sup>th</sup> Congress

The remainder of this report discusses various regulatory reform bills that had been introduced in the 112<sup>th</sup> Congress as of the date of this report.<sup>55</sup> The report first presents the bills that have been introduced in the Senate, and then discusses the bills that have been introduced in the House of Representatives. In some cases, virtually the same proposed legislation has been introduced in both chambers (e.g., S. 299 and H.R. 10). For each bill, the report provides the bill number, the title, the primary sponsor of the proposed legislation, the date that it was introduced, and the committee(s) to which it was referred. The report then describes each bill’s main provisions, and an “analysis” section for each bill discusses any similar or related legislation that has been enacted or considered in the past, and other potentially relevant information.

### Senate Bills

#### S. 128: the Small Business Paperwork Relief Act of 2011

S. 128, introduced by Senator David Vitter on January 25, 2011, and referred to the Senate Committee on Homeland Security and Governmental Affairs, would amend the Paperwork Reduction Act (adding a new subsection to 44 U.S.C. § 3506) and direct agency heads not to impose civil fines for first-time paperwork violations by small business concerns, unless the

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<sup>53</sup> See <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Principles-for-Regulation-and-Oversight-of-Emerging-Technologies-new.pdf>.

<sup>54</sup> See <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf>.

<sup>55</sup> The report includes only legislation designed to result in public laws, and does not include other types of legislation (e.g., H.Res. 72, which directed certain standing committees to inventory and review existing, pending, and proposed regulations and orders from agencies, particularly with respect to their effect on jobs and economic growth). It also does not include bills designed to affect rulemaking in only one agency (e.g., H.R. 128, which would direct the Secretary of Labor to revise regulations concerning the recording and reporting of occupational injuries and illnesses under the Occupational Safety and Health Act of 1970). Neither does the report include bills focusing only on judicial review of rules (e.g., H.R. 455, which would authorize a state official to file a legal brief challenging the constitutionality of a rule under the Tenth Amendment).

agency head determines that (1) there is potential for “serious harm to the public interest;” (2) the detection of criminal activity would be impaired; (3) the violation is not corrected within six months of written notification from the agency; (4) the violation involves an internal revenue law or a law concerning the assessment or collection of any tax, debt, revenue, or receipt; or (5) the violation presents a “danger to the public health or safety.” If a small business had previously violated any of the same agency’s information collection requirements, the prohibition on civil fines is not applicable. Even if the agency head determines that a violation presents a danger to public health or safety, the bill allows an agency to decide not to impose a civil fine if the violation is corrected within 24 hours after the small business owner is notified of the violation. If an agency does not allow a small business 24 hours to correct such a violation, the agency head is required to notify Congress within 60 days.

### *Analysis*

Similar penalty-relief legislation has been introduced but not enacted for more than 10 years (e.g., S. 1116 in the 111<sup>th</sup> Congress and S. 281 in the 110<sup>th</sup> Congress, both of which were also introduced by Senator Vitter). In 1999, the House of Representatives passed a bill (H.R. 391 in the 106<sup>th</sup> Congress) that would have barred federal agencies from issuing penalties for most first-time paperwork violations, but similar legislation was not passed by the Senate. Supporters of such legislation in the past have said that agencies that promulgate new paperwork requirements often forget that small businesses face numerous other paperwork requirements from other agencies, and that small businesses are concerned about violating requirements that they do not know about. Opponents, however, have asserted that the legislation could encourage companies to violate the law, could prevent detection of serious violations, and that a single company could be a “first-time” violator in different agencies.<sup>56</sup> They also contended that agencies already typically provide penalty relief for first-time paperwork violations except in the most egregious cases.

As noted previously in this report, many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools, and are the essence of many agencies’ regulatory provisions (e.g., the EPA Toxics Release Inventory program). However, because S. 128 does not define such terms as “serious harm to the public interest,” the bill appears to give agency heads substantial discretion to decide when penalty relief will be provided. Also, although an agency must notify Congress when a small business is not given 24 hours to correct a violation that “presents a danger to the public health or safety,” if the agency head concludes that some other exception applies (e.g., that the violation could cause “serious harm to the public interest”), then no such notification appears to be necessary.

Congress has enacted legislation that is somewhat related to this issue. As noted earlier in this report, Section 223(a) of SBREFA (enacted in March 1996) required federal agencies regulating the activities of small entities to establish a policy or program for the reduction and, under appropriate circumstances, the waiver of civil penalties for small entities. However, GAO reported in February 2001 that the five agencies it examined had such policies, but some of the

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<sup>56</sup> See, for example, Ralph Lindeman, “Witnesses Debate Need for Legislation Giving Businesses Paperwork Relief,” *BNA Daily Report for Executives*, September 27, 2006, p. A-45. The legislation under consideration at the time was S. 2656 and H.R. 5242, 109<sup>th</sup> Congress.

policies gave small entities no more penalty relief than provided to large entities, and other policies covered only certain types of actions.<sup>57</sup>

In 2002, Congress enacted the Small Business Paperwork Reduction Act (P.L. 107-198), which established an interagency task force to study the feasibility of streamlining small business paperwork requirements. (An amendment to this legislation that would have barred penalties for first-time paperwork violations was defeated.) In its June 2004 final report, the task force described opportunities to consolidate and coordinate information dissemination efforts, described an interactive web-based system to help small businesses understand and comply with paperwork requirements, and identified other opportunities to provide assistance to small businesses.<sup>58</sup> The legislation also required OMB and SBA to establish a list of compliance assistance resources, and required each agency to establish a single point of contact for small business concerns.<sup>59</sup>

### **S. 299: the Regulations from the Executive in Need of Scrutiny Act of 2011**

S. 299, introduced by Senator Rand Paul on February 7, 2011, and referred to the Senate Committee on Homeland Security and Governmental Affairs, would, if enacted, amend the Congressional Review Act to require congressional approval of major rules before they could take effect. The bill defines a “major rule” as any rule that the OIRA Administrator finds has resulted in or is likely to result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or U.S. competitiveness. If a joint resolution of approval of a major rule is not enacted by the end of 70 session days or legislative days after the issuing agency submits its report on such rule to Congress, the rule shall be deemed not to be approved and shall not take effect. However, the proposed legislation permits a major rule to take effect for 90 calendar days without congressional approval if the President determines that the rule is necessary because of an imminent threat to health or safety or other emergency, for the enforcement of criminal laws, for national security, or to implement an international trade agreement. S. 299 states that the enactment of a joint resolution of approval does not provide or modify the statutory authority for the rule, and does not affect any claim against an alleged defect in the rule. The bill also clarifies that, notwithstanding the CRA’s prohibition on judicial review, “a court may determine whether a Federal Agency has completed the necessary requirements under this chapter for a rule to take effect.”

### **Analysis**

In contrast to the CRA disapproval process for all rules, the REINS Act would require congressional *approval* before a *major* rule could take effect. (Non-major rules would take effect as otherwise provided in law, and Congress could still disapprove non-major rules through the CRA or some other legislative process.) Supporters of the legislation assert that it would allow Congress to reclaim its legislative responsibility and better oversee the regulations being written

<sup>57</sup> U.S. General Accounting Office, *Regulatory Reform: Implementation of Selected Agencies’ Civil Penalty Relief Policies for Small Entities*, GAO-01-280, February 20, 2001.

<sup>58</sup> See <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/sbpr2004.pdf> for a copy of this report.

<sup>59</sup> See <http://www.sba.gov/category/navigation-structure/starting-managing-business/starting-business/business-law-regulations/contact-government-agency/fe> for this information.

pursuant to congressionally established requirements or authorities.<sup>60</sup> Opponents, however, have expressed concerns about the constitutionality of the REINS Act, about whether Congress has the time or expertise necessary to approve or disapprove as many as 100 major rules each year, and whether the legislation is even necessary for Congress to oversee the federal rulemaking process.<sup>61</sup>

Somewhat similar legislation has been previously introduced but not acted upon. For example, in the 106<sup>th</sup> Congress, S. 1348 (the Congressional Responsibility Act of 1999) would have required Congress to enact a bill containing the text of a final rule (not just major rules) before it could take effect. H.R. 110 in the 108<sup>th</sup> Congress (the “Congressional Responsibility Act of 2003”) would have required a similar approach. Also in the 106<sup>th</sup> Congress, S. 2670 (the Congressional Regulatory Reform Act of 2000) would have required Congress to enact a joint resolution of approval before any major rule could take effect. In the 111<sup>th</sup> Congress, H.R. 3765 and S. 3826 (the Regulations from the Executive in Need of Scrutiny Act) would have also required Congress to enact a joint resolution of approval before any major rule could take effect.

The provision in S. 299 clarifying that “a court may determine whether a Federal Agency has completed the necessary requirements under this chapter for a rule to take effect” could make it more likely that agencies would submit their covered rules to GAO and Congress.<sup>62</sup> The courts have generally interpreted the CRA to conclude that they do not have judicial review over whether agencies must submit their rules to GAO and Congress before they can take effect.<sup>63</sup>

A February 2011 CRS report provided information on the number of major rules issued in recent years, and noted that the 100 major rules issued in calendar year 2010 were considered major for a variety of reasons—not just compliance costs.<sup>64</sup> For example, 37 of the rules appeared to be major because they involved transfers of funds from one party to another (most commonly, federal funds to the recipients of those funds). Ten other rules appeared to be major because they were expected to prompt consumer spending, or because they established fees for the reimbursement of federal functions. Thirty-nine rules appeared major because they were expected to result in at least \$100 million in annual compliance costs, regulatory benefits, or both.

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<sup>60</sup> See, for example, testimony of David McIntosh, before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, January 24, 2011, available at <http://judiciary.house.gov/hearings/pdf/McIntosh01242011.pdf>; and testimony of Eric R. Claeys, Professor of Law, George Mason University, before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, March 8, 2011, available at <http://judiciary.house.gov/hearings/pdf/Claeys03082011.pdf>.

<sup>61</sup> See, for example, testimony of Sally Katzen, before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, January 24, 2011, available at <http://judiciary.house.gov/hearings/pdf/Katzen01242011.pdf>; and testimony of David Goldston, Director of Government Affairs, Natural Resources Defense Council, before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, March 8, 2011, available at <http://judiciary.house.gov/hearings/pdf/Goldston03082011.pdf>.

<sup>62</sup> See CRS Report R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, by Curtis W. Copeland, which reported that many final rules were not submitted to GAO or Congress from 1999 through 2009.

<sup>63</sup> The CRA (5 U.S.C. § 805) states that “No determination, finding, action, or omission under this chapter shall be subject to judicial review.” See *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009).

<sup>64</sup> CRS Report R41651, *REINS Act: Number and Types of “Major Rules” in Recent Years*, by Curtis W. Copeland and Maev P. Carey.

## S. 358: the Regulatory Responsibility for Our Economy Act of 2011

S. 358, introduced by Senator Pat Roberts on February 15, 2011, and referred to the Senate Committee on Homeland Security and Governmental Affairs, would, if enacted, put into statute many of the broad regulatory goals enunciated in Executive Orders 12866 and 13563 (e.g., that federal agencies should adopt regulations only upon a reasoned determination that the benefits justify the costs, tailor regulations to accomplish regulatory objectives while imposing the least burden on society, select regulatory approaches that maximize net benefits, and allow for public participation). However, because the bill defines a covered “agency” to include independent regulatory agencies like the FCC and the SEC, S. 358 would be broader than the executive orders (which do not cover independent regulatory agencies). S. 358 also contains some new requirements on rulemaking agencies. For example, it would require a minimum of 60 days for public comment, unless a rule is designated by OIRA as an emergency rule. Also, if an interim final rule is issued under the APA’s “good cause” exception in 5 U.S.C. § 553(b)(B) and challenged in a U.S. court, the issuing agency would be required to delay the implementation of the rule until final disposition of the challenge.

Section 8 of the bill would put into statute, broaden, and modify the requirements for retrospective rule review that are in Executive Order 13563. Specifically, agencies (including independent regulatory agencies) would be required to develop and submit to the “appropriate congressional committees” a “preliminary plan” for reviewing “significant” rules issued by the agencies every five years to determine if they should be “modified, streamlined, expanded, or repealed.” “Significant” regulatory actions are defined as they are in Executive Orders 12866 and 13563 (e.g., rules expected to have a \$100 million impact on the economy or conflict with another agency’s actions), but also includes regulatory actions that are expected to “add to the national debt.” Upon completion of any such retrospective review, the agency must submit a report to the appropriate congressional committees describing the outcome of the review.

### *Analysis*

Shortly after Senator Roberts introduced S. 358, he said the bill would “strengthen and codify President Obama’s Executive Order from January 18 (Executive Order 13563),” and would ensure that provisions in the executive order would be implemented.<sup>65</sup> He also said that the legislation would improve on the executive order by including independent regulatory agencies and eliminating other “loopholes” (e.g., eliminating a provision stating that agencies may consider values that are difficult to quantify, such as equity, human dignity, fairness, and distributive impacts). However, S. 358 states that agencies may “take into account benefits and costs, both quantitative and qualitative,” so agencies could arguably include equity, human dignity, fairness, and distributive effects as “qualitative” benefits. Also, some of the standards in both the executive order and the proposed legislation may conflict with each other. For example, a regulatory option that imposes the “least burden on society” may not be the option that will “maximize net benefits.”<sup>66</sup>

<sup>65</sup> Senator Pat Roberts, “Regulatory Responsibility for Our Economy Act of 2011,” remarks in the Senate, *Congressional Record*, daily edition, February 16, 2011, p. S766.

<sup>66</sup> For example, one regulatory option could have estimated costs of \$50 million and benefits of \$100 million, yielding net benefits of \$50 million. Another regulatory option could have estimated costs of \$100 million and benefits \$200 million, yielding net benefits of \$100 million. The first option would impose the least burden, while the second option would produce the largest net benefits.

Even if S. 358 is enacted, significant regulations issued by independent regulatory agencies would not be reviewed by OIRA under the procedures currently in Section 6 of Executive Order 12866, so their regulations would not be independently analyzed for consistency with these legislative standards. Those agencies' rules could be made subject to review by OIRA by statute or by the President amending Executive Order 12866. As discussed in more detail later in this report, however, doing so would put independent regulatory agencies more under the control of the President than ever before.

The retrospective review requirements in S. 358 differ somewhat from the requirements in Executive Order 13563. For example, whereas the executive order requires agencies to submit their preliminary regulatory review plans to OIRA, the bill would have those plans submitted to the appropriate congressional committees. Also, the executive order does not specify how frequently these "periodic" reviews would occur, whereas S. 358 specifies that the reviews must be done once every five years. Finally, it is unclear what effect the addition of a new category to the definition of "significant regulatory actions" (i.e., actions that are expected to "add to the national debt") will have on the number of rules that would be retrospectively reviewed.

#### **S. 474: the Small Business Regulatory Freedom Act of 2011**

S. 474, introduced by Senator Olympia Snowe on March 3, 2011, and referred to the Senate Committee on Homeland Security and Governmental Affairs, proposes to make several amendments to the Regulatory Flexibility Act (RFA). Section 3 of the legislation would add a definition of "economic impact" (at 5 U.S.C. § 601(a)), defining it (in the context of a proposed or final rule) as any direct economic effects on small entities and "any indirect economic effect on small entities, including potential job creation or job loss, that is reasonably foreseeable and that results from the rule, without regard to whether small entities are directly regulated by the rule." Section 4 of the bill would permit judicial review of agency compliance with the initial regulatory flexibility analysis requirements in Section 603 of the act for proposed rules.<sup>67</sup> (Currently, judicial review is only available for final regulatory flexibility analyses.) Small entities must seek such review before the close of the public comment period provided for in the proposed rule. Section 4 would also permit courts to issue an injunction prohibiting an agency from taking any action relating to the rule until it is in compliance with the RFA's requirements for initial and final regulatory flexibility analysis.<sup>68</sup>

Section 5 of S. 474 would amend Section 610 of the RFA and require each agency to establish a plan for the periodic review of each rule that the agency head determines has a significant economic impact on a substantial number of small entities, "without regard to whether the agency performed an analysis under section 604 with respect to the rule." (At the present time, it is unclear whether agencies must review all of their rules that *currently* have such impacts, or only those rules that were expected to have such impacts *at the time they were issued*.) Section 5 also requires agencies to review any small entity compliance guides that were required to be published under Section 212 of SBREFA. Reviews of existing rules and compliance guides would be required to be completed within eight years after the date of enactment, and every subsequent

<sup>67</sup> Judicial review is already permitted with regard to agency compliance with sections 601, 604, 605(b), 608(b), and 610, and agency compliance with sections 607 and 609(a) is permitted in connection with judicial review of section 604. See 5 U.S.C. § 611(a)(1).

<sup>68</sup> Courts are already permitted to remand the rule to the agency and to defer enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest. See 5 U.S.C. § 611(a)(4).

eight years. Rules and compliance guides issued after the date of enactment would be required to be completed within eight years “after the date the final rule is published in the *Federal Register*.” (Agencies are allowed to extend these deadlines for up to two years, if necessary.) The proposed legislation also details the contents of those reviews and public notices of the reviews. Six months after the deadline for review, if the SBA Chief Counsel for Advocacy determines that an agency has failed to complete the required review, “each rule issued by the agency that the head of the agency determined under subsection (a) has a significant economic impact on a substantial number of small entities shall immediately cease to have effect.”

Currently, only rules issued by EPA, OSHA, and the soon-to-be-established CFPB are required to hold SBREFA review panels before publishing a proposed rule that is expected to have a SEISNSE. Section 6 of the S. 474 would expand the requirement for review panels to all federal agencies.

Currently, the RFA’s requirements only apply to proposed rules and final rules for which the agency published a notice of proposed rulemaking. Section 7 of the proposed legislation would expand the scope of the RFA to include significant guidance documents as defined in OMB’s final bulletin for agency good guidance procedures.<sup>69</sup>

The bill would also require agencies’ initial and final regulatory flexibility analyses to be more detailed, and would require quantification of those analyses to the extent possible. It would also require agencies to notify the SBA Office of Advocacy of any draft rules that are expected to have a SEISNSE when the rule is submitted to OIRA for review or at least three months before publication. Finally, the bill would establish qualifications for the Chief Counsel for Advocacy, and would permit the office to comment on any regulatory action that affects small businesses, without regard to whether the agency is required to file a notice of proposed rulemaking.

### ***S.Amdt. 299 to S. 493, the SBIR/STTR Reauthorization Act of 2011***<sup>70</sup>

S.Amdt. 299, introduced by Senator Olympia Snowe on April 14, 2011, and referred to the Senate Committee on Small Business and Entrepreneurship, is very similar to Senator Snowe’s original bill, S. 474. Some of the differences are:

- S.Amdt. 299 defines “indirect” economic impact somewhat differently (“the reasonably foreseeable economic effects of the rule on small entities that (i) purchase products or services from, sell products or services to, or otherwise conduct business with entities directly regulated by the rule; (ii) are directly regulated by other governmental entities as a result of the rule; or (iii) are not

<sup>69</sup> The bulletin defines a “significant” guidance document” as a guidance document disseminated to regulated entities or the public that may reasonably be anticipated to “(1) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866.” See U.S. Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” 72 *Federal Register* 3432, January 25, 2007, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf).

<sup>70</sup> Among other things, S. 493 would reauthorize through FY2019 the SBA’s Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs.

directly regulated by the agency as a result of the rule but are otherwise subject to other agency regulations as a result of the rule”).

- S.Amdt. 299 requires agencies to review their rules and compliance guides within nine years of the date of enactment (instead of eight years in S. 474), and every nine years thereafter. It does not allow agencies to extend the deadline if they are unable to complete their reviews within this time period.
- S.Amdt. 299 requires the Inspector General (IG) for the agency (not the SBA Office of Advocacy) to determine whether the agency has conducted the required retrospective review “appropriately” (not just whether the required reviews have been completed). The IG is required to notify the agency of any deficiency, and if the agency does not address the issues within six months, the IG is required to notify Congress within 30 days. Thirty days after that notice, “an amount equal to 1 percent of the amount appropriated for the fiscal year to the appropriations account of the agency that is used to pay salaries shall be rescinded.” (In S. 474, the rule would go out of effect if the analysis was not conducted appropriately.)
- Instead of subjecting all agencies to the panel requirements in Section 609 of the RFA, S.Amdt. 299 would require the SBA Chief Counsel for Advocacy to designate three additional agencies each year for three years “based on the economic impact of the rules of the agency on small entities.”

S.Amdt. 299 does not establish qualifications for the Chief Counsel for Advocacy, but adds an authorization of appropriation for FY2012 through FY2013 of the costs associated with these amendments and repeals certain statutory provisions to offset those costs.

On May 2, 2011, the Senate Majority Leader filed for cloture on S. 493, citing concerns about “extraneous amendments” to the bill. According to press accounts, one of the primary areas of concern was S.Amdt. 299, particularly the requirement for retroactive review.<sup>71</sup> As a result, it appears unlikely that S. 493 and its amendments will come to a vote in the 112<sup>th</sup> Congress.

### *Analysis*

Some of the provisions in S. 474 were in proposed legislation that Senator Snowe sponsored during the 111<sup>th</sup> Congress (S. 3103, the Small Business Job Creation Act of 2010), but which was not enacted. Among other things, that legislation would have amended the RFA to require (1) each initial regulatory flexibility analysis to estimate the economic impact of the proposed rule on small businesses; (2) an agency to notify the SBA Chief Counsel for Advocacy of any draft rules that may have a significant economic impact on a substantial number of small businesses; (3) each final regulatory flexibility analysis to include the agency’s response to any comments filed by the Chief Counsel in response to the proposed rule; and (4) the agency to publish the final regulatory flexibility analysis on its website. It also would have required each agency to place on its website its plan for the periodic review of rules.

In a press release issued when she introduced S. 474, Senator Snowe said the bill would “ensure that federal agencies fully consider small business economic impact during the regulatory

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<sup>71</sup> Dean Scott, “Snowe’s Regulatory Review Plan May Stall if Reid Shelves Small Business Bill,” *BNA Daily Report for Executives*, May 4, 2011, p. A-30.



process.”<sup>72</sup> In that same press release, a representative of the National Federation of Independent Businesses was quoted as saying that the bill would “help prevent the threat of costly new regulations.” However, representatives from the Center for Progressive Reform said that S. 474 would effectively give regulatory veto power to the SBA Chief Counsel for Advocacy, and that agencies have insufficient staff and resources to take on additional rulemaking requirements.<sup>73</sup>

To the extent that agencies are already conducting the retrospective reviews of all of their rules that are required by Executive Order 13563, the review requirements in S. 474 (focusing only on rules that have a SEISNSE) may be viewed as a subset of the broader requirement. However, the retrospective reviews that would be required under S. 474 differ from the executive order’s reviews in several other respects: (1) the S. 474 reviews are required to be completed within eight years, and must be repeated at least every subsequent eight years; (2) the S. 474 reviews include compliance guides, not just rules; (3) the reviews are to be overseen by an outside entity (SBA’s Office of Advocacy or, in the case of S. Amnt. 299, the agencies’ IGs); and (4) there are potentially severe consequences for failing to conduct the required reviews.

Regarding those consequences, if the SBA Chief Counsel for Advocacy concludes that an agency has “failed to complete the review” required, then “each rule issued by the agency that the head of the agency determined under subsection (a) has a significant economic impact on a substantial number of small entities shall immediately cease to have effect.” Arguably, therefore, if an agency has 50 rules that the agency head concludes have a SEISNSE, and the SBA Chief Counsel for Advocacy concludes that the agency did not “complete” the review of all of them within the eight year period (e.g., the agency reviews only 40 of the 50 rules), then all 50 of the rules would “cease to have effect.” The somewhat different approach outlined in S.Amdt. 299 (determinations by the agency IGs as to whether the retrospective reviews had been done “appropriately,” with subsequent periods for the agencies to respond to those determinations) seems less abrupt, and may raise fewer concerns about whether one agency (SBA) can take another agency’s rules out of effect. Nevertheless, S.Amdt. 299 does not indicate how the IGs should determine whether the agencies’ retrospective reviews had been done “appropriately.”

The implications of including in the reviews any small entity compliance guides that are “required to be published by the agency under section 212” of SBREFA are unclear. For example, if an agency designated an existing compliance guide as a Section 212 guide (as GAO reported agencies have done), then the agency arguably would not have to review the guide because it was not “required to be published” under Section 212 of SBREFA.

The implications of expanding the RFA to include significant guidance documents are also unclear. On one hand, this change could significantly expand the scope of the RFA, for agencies issue thousands of guidance documents each year that are intended to clarify the requirements in related statutes and regulations.<sup>74</sup> Also, the OMB bulletin on guidance documents states that the definition of a guidance document

<sup>72</sup> See [http://snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=b871d6b2-4df2-40ac-b096-6c70d403b15d&ContentType\\_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group\\_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=3&YearDisplay=2011](http://snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=b871d6b2-4df2-40ac-b096-6c70d403b15d&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=2643ccf9-0d03-4d09-9082-3807031cb84a&MonthDisplay=3&YearDisplay=2011).

<sup>73</sup> Jonathan Riskind, “Environmental Setbacks Feared in Snowe Bill,” *Portland Press Herald*, March 30, 2011, p. B3.

<sup>74</sup> For example, the Occupational Safety and Health Administration indicated in 2000 that it had issued 3,374 guidance documents since March 1996. See U.S. Congress, House Committee on Government Reform, *Non-Binding Legal Effect of Agency Guidance Documents*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 106-1009 (Washington: GPO, 2000), p. 5.

is not limited only to written guidance materials and should not be so construed. OMB recognizes that agencies are experimenting with offering guidance in new and innovative formats, such as video or audio tapes, or interactive web-based software. The definition of “guidance document” encompasses all guidance materials, regardless of format.<sup>75</sup>

On the other hand, the number of “significant” guidance documents that would be covered by S. 602 could be quite small. First, guidance documents, unlike regulations, cannot have a binding effect on the public.<sup>76</sup> Therefore, it is not clear how guidance can be expected to have the effects delineated in the definition of a “significant” guidance document (e.g., “lead to an annual effect of \$100 million or more” or “materially alter the budgetary impact” of entitlements or grants). Even if an agency concludes that its guidance is “significant,” the agency may decide not to conduct a regulatory flexibility analysis because it concludes that the guidance does not have a “significant” economic effect on a “substantial” number of small entities.

Requiring all agencies to hold SBREFA review panels before proposing a rule that is expected to have a SEISNSE could significantly slow down the process of issuing such rules. On the other hand, including the views of small entities early in the rule development process may ease the path of subsequent implementation. Expanding the requirements for such panels could also have unexpected results. For example, when EPA was required to hold review panels for its rules, the percentage of rules that the agency certified as not having a SEISNSE increased substantially.<sup>77</sup> The slower expansion of the panel requirements advocated in S.Amdt. 299 (three additional agencies per year) could allow for monitoring of those kinds of effects.

### **S. 602: the Clearing Unnecessary Regulatory Burdens (CURB) Act**

S. 602, introduced by Senator Susan Collins on March 16, 2011, and referred to the Senate Committee on Homeland Security and Governmental Affairs, would, if enacted, codify and expand the cost-benefit analysis requirements that are currently in Executive Order 12866. Specifically, the bill would generally require all agencies (including independent regulatory agencies) to submit cost-benefit analyses to OIRA for their significant regulatory actions.<sup>78</sup> A “significant regulatory action” is defined in the bill as it currently is defined in Executive Order 12866: an action that is likely to result in a regulation that may

<sup>75</sup> Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” p. 3434.

<sup>76</sup> See, for example, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); Robert A. Anthony, “Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Agencies Use Them to Bind the Public?” *Duke Law Journal*, vol. 41 (1992), p. 1311.

<sup>77</sup> See U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, September 20, 2000. GAO reported that EPA certified 78% of its rules in the two years prior to the enactment of SBREFA, and certified 96% of its rules in the two years after SBREFA was enacted.

<sup>78</sup> Section 2(a)(2) of S. 602 defines an “agency” as having the same meaning as Section 3502(1) of title 44, United States Code. That provision defines an agency as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include - (A) the Government Accountability Office; (B) Federal Election Commission; (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.”

(A) have an annual effect on the economy of \$100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (B) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (C) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (D) raise novel legal or policy issues arising out of legal mandates and the priorities, principles, and provisions of this section.

The bill would require agencies to quantify regulatory benefits and costs “to the extent feasible,” and to assess the costs and benefits “potentially effective and reasonably feasible alternatives to the planned significant regulatory action.”

The bill would also codify and expand current OMB policies regarding guidance documents.<sup>79</sup> For example, it would require each agency (including independent regulatory agencies) to develop or have written procedures for the approval of significant guidance documents, and require each such guidance document to include certain elements (e.g., cite the related statutory or regulatory provision, and not include mandatory terms such as “shall” or “must”). Each agency would also be required to (1) maintain an electronic list (with links to the text) of all significant guidance documents in effect, (2) allow the public to electronically submit comments regarding such documents, and (3) publish a notice in the *Federal Register* and solicit comments regarding “economically significant” guidance documents (defined as a “significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of \$100,000,000 or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts”). Exceptions would be permitted when soliciting comments is not feasible (e.g., emergencies or deadlines).

Finally, the bill would add a new section to the Regulatory Flexibility Act stating that if a small entity so requests, a Regional Advocate of the SBA Office of Advocacy must request that an agency reduce or waive a civil penalty if the Regional Advocate concludes that the penalty was the result of a first-time violation of a reporting requirement, and the reduction or waiver is consistent with conditions described in Section 223 of SBREFA.<sup>80</sup> The agency must make a written determination within 60 days, and the Chief Counsel for Advocacy is required to submit an annual report to Congress on such requests and decisions.

### *Analysis*

The cost-benefit analysis requirements in S. 602 would expand the requirements in Executive Order 12866 in several ways. First, it would include independent regulatory agencies like the Securities and Exchange Commission and the Federal Communications Commission, which are not currently covered by the analytical requirements in the order, and which are not currently required to submit their rules for review to OIRA. Requiring independent regulatory agencies to

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<sup>79</sup> OMB’s current policies are in its “Final Bulletin for Agency Good Guidance Practices,” available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf>.

<sup>80</sup> Section 223 of SBREFA states that agencies’ penalty relief policies and programs shall contain certain conditions and exclusions, which may include such factors as (1) requiring the small entity to correct the violation within a reasonable period of time; (2) limiting the applicability to violations discovered through a compliance assistance or audit program; or (3) excluding violations that pose serious health, safety, or environmental threats.

submit cost-benefit analyses for their significant rules to OIRA could put them more under the control of the President than ever before—often in direct contravention of the statutes that created them in the first place.<sup>81</sup> Second, even among agencies that are already covered by Executive Order 12866, S. 602 would greatly expand the number of rules subject to cost-benefit analysis. Currently, these agencies are required to prepare cost-benefit analyses only for “economically significant” rules that are submitted to OIRA (about 100 per year). S. 602 expands this requirement to all “significant” rules (about 650 per year). With the expansion of OIRA reviews to independent regulatory agencies and all significant regulatory actions, it is unclear whether current OIRA staffing would be sufficient to analyze and comment on all of these cost-benefit analyses.<sup>82</sup>

Also, the guidance document provisions in S. 602 would include independent regulatory agencies for the first time (they are not currently covered by the OMB bulletin on guidance documents). Although the legislation does not require independent regulatory agencies to submit their significant guidance documents to OIRA for review, if S. 602 is enacted, OMB could amend its current procedures and require them to do so. Again, however, resource constraints could become an issue if S. 602 was enacted.

The penalty relief provisions in the bill focus on first-time violations of paperwork requirements, as does S. 128. However, whereas S. 128 would generally require agencies to provide penalty relief for first-time violations (with some exceptions), S. 602 appears to give federal agencies more discretion to decide whether penalty relief should be provided.

### **S. 817: Independent Agencies and the Unfunded Mandates Reform Act**

S. 817, introduced by Senator Rob Portman on April 14, 2011, and referred to the Senate Committee on the Budget, would, if enacted, amend the Congressional Budget and Impoundment Control Act of 1974 (as amended by the Unfunded Mandates Reform Act (UMRA) of 1995) and change the definition of an “agency” to include independent regulatory agencies. The bill would, however, exempt from titles, II, III, or IV of UMRA “rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.”

#### ***Analysis***

Legislation has been previously introduced to amend UMRA (e.g., H.R. 2255 in the 111<sup>th</sup> Congress, and H.R. 6964 in the 110<sup>th</sup> Congress), but the scope of those bills was broader than S. 817, and they were not enacted. As noted earlier in this report, several GAO reviews have indicated that UMRA currently covers only a small portion of the “economically significant” rules that agencies issue. Therefore, expanding the coverage of the act to include rules issued by independent regulatory agencies would likely increase the number of written reports that agencies

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<sup>81</sup> Notably, although S. 602 would require independent regulatory agencies to submit cost-benefit analyses for their significant regulatory actions to OIRA, it does not require them to submit the regulatory actions themselves. Also, S. 602 states that the cost-benefit analyses must be submitted “at such times specified by the Administrator.” Therefore, the OIRA Administrator could greatly limit the effect of this requirement (e.g., requiring submission of the analyses after the rules have been published and taken effect).

<sup>82</sup> OIRA currently has about 50 staff members, of which about 30 do regulatory reviews and reviews of about 3,000 agency information collection requests per year.

will be required to submit. However, as GAO also pointed out, there are many other reasons why rules are not covered by UMRA, and UMRA written reports cover the same types of issues that are already covered by other rulemaking requirements. Therefore, the net effect in terms of additional information may be quite small.

## House Bills

### **H.R. 10: the Regulations from the Executive in Need of Scrutiny (REINS) Act of 2011**

H.R. 10, introduced by Representative Geoff Davis on January 20, 2011, and referred to the House Committee on the Judiciary and the House Committee on Rules, would, like its counterpart S. 299, amend the Congressional Review Act to require congressional approval of major rules before they could take effect. Because the texts of the two bills are virtually identical, the summary and analysis provided above in relation to S. 299 also applies to H.R. 10, and will not be repeated here.

### **H.R. 213: the Regulation Audit Revive Economy (RARE) Act of 2011**

H.R. 213, introduced by Representative Don Young on January 7, 2011, and referred to the House Committee on Oversight and Government Reform and the House Committee on the Judiciary, would, if enacted, impose a moratorium on all federal agencies taking any “regulatory rulemaking action” beginning 30 days after the date of enactment and ending on the later of (1) 14 days after the Director of the Office of Management and Budget (OMB) publishes a report on a review of rules; or (2) two years after the date of enactment. In producing the report, the OMB Director is required to review each covered rule being enforced as of the date of enactment, and report on (1) the estimated total annual costs and benefits of each rule, “to the extent feasible”; (2) recommendations for reform of an existing rule; and (3) the total number of rules being enforced. No private right of action is allowed for violations of the act.

The bill allows exceptions from the moratorium for rules necessary because of an imminent threat to health or safety or other emergency, for the enforcement of criminal laws, or to establish or enforce statutory rights against discrimination. The term “regulatory rulemaking action” is defined as any rule normally published in the *Federal Register*, but excluding any action that the head of the agency and the Administrator of OIRA certify is limited to (1) reducing regulatory burdens; (2) military or foreign affairs functions, implementing international trade agreements, or agency management or personnel, loans, grants, benefits, or contracts; or (3) routine administrative functions of the agency. Also excluded are agency actions that supervise or insure depository institutions and other entities, and actions that the agency head certifies are limited to implementing the internal revenue laws or would otherwise qualify for an exemption under the act. (The definition of a “rule” in the act also excludes other actions, including aviation safety, monetary policy, and license applications.)

## *Analysis*

Other regulatory moratorium legislation has been introduced in the past, but not enacted. For example, in the 104<sup>th</sup> Congress, H.R. 450 would have imposed a 13-month moratorium on

rulemaking (from November 20, 1994, to December 31, 1995). Although the bill was passed by the House of Representatives in early 1995, its Senate counterpart (S. 219) was not passed.

As noted earlier in this report, federal agencies typically issue between 3,000 and 4,000 final rules each year. It is unclear how many rules each year would fall under the various exemptions and exclusions in H.R. 213, so it is unclear how many rules would be subject to the proposed moratorium. It is also unclear how many rules are currently being “enforced,” because some new rules replace earlier rules, and some existing rules are no longer applicable. Nevertheless, it is likely that a moratorium of any breadth or duration (at least two years in H.R. 213) would affect the ability of some agencies to carry out their missions, and could affect the general public. For example, some agency regulations establish fees that fund certain government operations (e.g., the inspections of nuclear power plants by the Nuclear Regulatory Commission, and the processing of passport applications by the Department of State). Other regulations transfer federal funds to Medicare and Medicaid providers, so a moratorium affecting those rules could result in reduced health care for the affected populations. Most of the 3,000 final rules that are typically issued each year are administrative in nature (e.g., Coast Guard temporary safety zones and traffic separation schedules), and these kinds of rules are often welcomed by the regulated communities.

The broadest requirement for cost-benefit analysis is in Executive Order 12866, which required cabinet departments and independent agencies (e.g., EPA) to analyze the costs and benefits of their “economically significant” rules before being submitted to OIRA for review. Non-economically significant rules are not covered by this requirement, nor are any rules issued by independent regulatory agencies (e.g., the Federal Reserve System or the Securities and Exchange Commission). Also, OMB has said in the past that cost and benefit estimates prepared for rules adopted more than 10 years earlier “are of questionable relevance now.”<sup>83</sup> Therefore, OMB will likely not have readily available cost or benefit estimates for some of the covered rules that are currently being enforced, and may focus its report on the major rules issued in the previous 10 years for which cost-benefit information is available.

### **H.R. 214: the Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011**

Title I of H.R. 214, which was introduced by Representative Don Young on January 7, 2011, and referred to the House Committee on the Judiciary and the House Committee on Oversight and Government Reform, would, if enacted, establish a Congressional Office of Regulatory Analysis (CORA), with the Director of that office appointed by the Speaker of the House of Representatives and the majority leader of the Senate (after considering recommendations from two House and Senate committees). The Director could be removed by a concurrent resolution of Congress. H.R. 214 would transfer to the CORA Director the GAO Comptroller General’s responsibilities for the congressional review of agency rules that was provided in the Congressional Review Act (i.e., receiving all rules and writing a report on each major rule). The bill would require the CORA Director’s report on each major rule to include an analysis of the rule, including its potential benefits and costs and an analysis of less costly alternatives. It also would require the office to (1) conduct an assessment and analysis of any non-major rule upon

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<sup>83</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2003\\_cost-ben\\_final\\_rpt.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2003_cost-ben_final_rpt.pdf), p. 7. In its 2010 report to Congress, OMB continues to say that estimates that are more than 10 years old are of “questionable relevance.” See [http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010\\_Benefit\\_Cost\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf), p. 11.

request by a congressional committee or Member; and (2) issue an annual report including estimates of the total costs and benefits of all existing federal regulations. Title I would also amend the Unfunded Mandates Reform Act of 1995 to transfer to the CORA Director the responsibilities of the Director of the Congressional Budget Office (CBO) to: (1) compare agency and CBO estimates of the costs of regulations implementing an act containing a federal mandate; and (2) receive agency statements to accompany significant regulatory actions.

Title II of H.R. 214 sets forth proposed requirements for agencies (including independent regulatory agencies) to review their significant rules to determine whether they should be continued without change, modified, consolidated with another rule, or terminated. It defines a “significant rule” as one that the OIRA Administrator determines (1) results in an annual effect on the economy of \$100 million or more; (2) is a major rule; or (3) was issued pursuant to a “significant regulatory action” as that term is defined in Executive Order 12866. The bill provides for the sunset review of a rule that is not a significant rule upon petition by a person adversely affected, or at the request of a congressional committee or a majority of the majority or non-majority party members of such a committee (unless the OIRA Administrator determines that such reviews are not in the public interest).

Title II of H.R. 214 would also require the OIRA Administrator to (1) inventory existing rules; (2) publish a list of covered rules and deadlines for their sunset review within seven years; (3) prioritize rules for review based on specified criteria, including the rule’s cost to those regulated and the burden of reviewing it; (4) group related rules for simultaneous review; (5) provide guidance to agencies on conducting sunset reviews; and (6) provide feedback to agencies on sunset reviews and results. It also requires new significant rules to be reviewed within three years after taking effect. Each agency would be required to (1) conduct a sunset review of its significant rules; (2) publish a sunset review notice, consider public comments, and issue a preliminary report; and (3) issue a final report recommending that a rule be continued without change or that it be changed or discontinued, in which case the agency shall conduct a rulemaking to modify, consolidate, or terminate such rule. Each agency would also be required to designate a “regulatory policy officer” responsible for the implementation of Title II, who reports to the agency head and the OIRA Administrator.

### *Analysis*

Legislation to establish a CORA has been previously introduced but not enacted (e.g., H.R. 6223 in the 111<sup>th</sup> Congress). One of the first such bills was H.R. 1704 (and its Senate counterpart, S. 1675) in the 106<sup>th</sup> Congress. At a March 11, 1998, hearing on H.R. 1704, Representative Sue Kelly, who introduced the legislation, indicated that it was needed because of the lack of congressional action under the CRA.

In my opinion, this [lack of action] can be explained in large part because of the fact that nearly all of Congress’s information about the impact of new regulations comes from the agencies who are developing them. This information is often unreliable because agencies have a vested interest in downplaying any negative aspects of the regulations they have proposed. As a result, Congress is at a disadvantage when trying to determine just how a particular regulation will impact the economy, making it that much more difficult to effectively implement the CRA.<sup>84</sup>

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<sup>84</sup> Testimony of Representative Sue Kelly before the Subcommittee on National Economic Growth, Natural Resources, (continued...)

In the past, supporters of similar legislation have asserted that, as part of the same presidential administration that produced the rules, OIRA is incapable of providing an independent view of agencies' regulations, and that a CORA could make the regulatory process more rational and transparent.<sup>85</sup> On the other hand, concerns have been expressed regarding the ability of a CORA to develop its own estimates of costs, benefits, and alternative approaches within the time frames provided, and whether the appointment of the CORA Director by the House and Senate leadership would make the office political in nature.<sup>86</sup>

Although H.R. 214 would require CORA to produce an annual report on the costs and benefits of all existing regulations, OMB is already required to do so.<sup>87</sup> It is not clear whether both requirements would still be needed if H.R. 214 is enacted. Also, as noted earlier in this report, OMB has indicated that cost and benefit estimates prepared for rules adopted more than 10 years earlier "are of questionable relevance now,"<sup>88</sup> so it is not clear how CORA would produce this report. Questions have also been raised about other efforts to measure cumulative regulatory costs.<sup>89</sup>

It is unclear how many rules would be covered by the review requirements in Title II of H.R. 214. The first two categories of rules (those with at least a \$100 million impact on the economy, and "major" rules) are a subset of the third category (rules issued pursuant to a significant regulatory action as defined in Executive Order 12866). Since it was issued in 1993, federal agencies subject to the executive order have submitted more than 5,700 significant final rules to OIRA for review, but some of those rules may not have been issued. Also, other non-significant rules may also be required to be reviewed upon petition from the public or congressional request. Those reviews could consume a significant amount of both OIRA's and the rulemaking agencies' time and resources.

Finally, requiring each agency to designate a "regulatory policy officer" who reports to the agency head and the OIRA Administrator may remind some observers of a similar requirement in Executive Order 13422, which was highly controversial. At the time, the *New York Times* characterized such officers as White House "gatekeepers" who would "make sure the agencies

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and Regulatory Affairs, House Committee on Government Reform and Oversight, "H.R. 1704, Congressional Office of Regulatory Analysis Creation Act," 105<sup>th</sup> Cong., 2<sup>nd</sup> sess., Serial No. 105-146, March 11, 1998 (Washington: GPO, 1998), p. 6.

<sup>85</sup> Robert W. Hahn and Robert E. Litan, "The Regulatory Right-to-Know Act and the Congressional Office of Regulatory Analysis Act," Joint Testimony before the Senate Committee on Governmental Affairs, April 1999, at [http://www.brookings.edu/~media/Files/rc/testimonies/1999/04\\_righttoknow\\_litan/04\\_righttoknow\\_litan.pdf](http://www.brookings.edu/~media/Files/rc/testimonies/1999/04_righttoknow_litan/04_righttoknow_litan.pdf).

<sup>86</sup> Ibid; and Jennifer Coderre, "Senate Panel Continues Debate on Costs, Benefits of 'Regulatory Right-to-Know' Bills," *BNA Daily Report for Executives*, April 23, 1999, p. A-30. Comments regarding CORA were attributed to Gary Bass of OMB Watch.

<sup>87</sup> Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the "Regulatory Right-to-Know Act," put in place a permanent requirement for an OMB report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President's budget an "accounting statement and associated report" containing an estimate of the total costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule.

<sup>88</sup> OMB has made such statements in its reports to Congress since 2003. See [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2003\\_cost-ben\\_final\\_rpt.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2003_cost-ben_final_rpt.pdf), p. 7; and [http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010\\_Benefit\\_Cost\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf), p. 11.

<sup>89</sup> CRS Report R41763, *Analysis of an Estimate of the Total Costs of Federal Regulations*, by Curtis W. Copeland.



carry out the president's priorities."<sup>90</sup> Although the responsibilities assigned to regulatory policy officers in H.R. 214 are quite different than in the executive order, the requirement that the officers report to OIRA, and that independent regulatory agencies have them, may be of concern to some.

### **H.R. 373: the Unfunded Mandates Information and Transparency Act of 2011**

H.R. 373, introduced by Representative Virginia Foxx on January 20, 2011, and referred to the House Committee on Oversight and Government Reform, the House Committee on Rules, and the House Committee on the Judiciary, would, if enacted, make several changes to the Congressional Budget and Impoundment Control Act of 1974 (as amended by the Unfunded Mandates Reform Act (UMRA) of 1995). Changes that would affect agency rulemaking include (1) expanding the act's coverage to include independent regulatory agencies; (2) expanding the act's coverage to include "reasonably foreseeable indirect costs" (including lost income and secondary monetary costs); (3) changing the written statement reporting requirement in Section 202 of UMRA from "expenditure" to "direct or reasonably foreseeable indirect costs;" (4) changing "'unless otherwise prohibited by law" to "unless otherwise expressly prohibited by law;" and (5) requiring final rules that were not preceded by a notice of proposed rulemaking to have a written statement under Section 202 of UMRA within six months after promulgation.

#### *Analysis*

Representative Foxx has introduced proposed legislation to amend UMRA previously (e.g., H.R. 2255 in the 111<sup>th</sup> Congress, and H.R. 6964 in the 110<sup>th</sup> Congress), but those bills did not address all of the issues in H.R. 373, and they were not enacted. Section 3 of H.R. 373 states that one of the bill's purposes is "to enhance the ability of Congress and the public to identify Federal mandates that may impose undue harm on consumers, workers, employers, small businesses, State, local, and tribal governments." As noted earlier in this report, several previous GAO reviews have indicated that UMRA currently covers only a small portion of the "economically significant" rules that agencies issue. Therefore, expanding the coverage of the act to include rules issued by independent regulatory agencies, direct and indirect costs (instead of "expenditures"), and final rules issued without a prior notice of proposed rulemaking would likely increase the number of written reports that agencies will be required to submit. However, as GAO also pointed out, those written reports cover the same types of issues that are already covered by other rulemaking requirements, so the net effect in terms of additional information may be quite small.

### **H.R. 527: the Regulatory Flexibility Improvements Act of 2011**

H.R. 527, introduced by Representative Lamar Smith on February 8, 2011, and referred to the House Committee on the Judiciary and the House Committee on Small Business, proposes to make several changes to the RFA. Section 2(a) of the bill would (if enacted) change the definition of a "rule" from those for which a notice of proposed rulemaking is published under Section 553(b) of Title 5 to the much broader definition of a rule under Section 551(4) of Title 5.<sup>91</sup>

<sup>90</sup> Robert Pear, "Bush Directive Increases Sway on Regulation," *New York Times*, January 30, 2007, p. A1.

<sup>91</sup> That section defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or (continued...)"

However, the definition excludes certain types of rules from coverage (e.g., rules of particular applicability relating to rates, wages, corporate or financial structures). Also, the bill would (1) define the term “economic impact” to include both direct economic effects and any indirect effect “which is reasonably foreseeable” and results from such rules;<sup>92</sup> (2) require regulatory flexibility analyses to include alternatives that would maximize any beneficial economic effects on small entities;<sup>93</sup> (3) require such analyses for land management plans, as defined in the bill;<sup>94</sup> and (4) require the analyses to contain greater details,<sup>95</sup> and to provide quantifiable or numerical descriptions of the rules’ effects or an explanation of why quantification is not practicable or reliable.

Section 4 of H.R. 527 would require the SBA Chief Counsel for Advocacy to issue rules governing agency compliance with the RFA. The bill requires these rules to be issued within 270 days after the date of enactment, after an opportunity for notice and comment. Also, agencies are prohibited from issuing their own rules on RFA compliance without first consulting with the chief counsel for advocacy. The chief counsel is generally authorized to intervene in any agency adjudication, informing the agency of any impacts on small entities, and is authorized to file comments in any agency notice requesting comments.

Section 5 of H.R. 527 would amend Section 609(b) of Title 5, and would require agencies to notify the chief counsel for advocacy about any proposed rule expected to have a SEISNSE, or expected to have other economic effects (even if the rule is not expected to have a SEISNSE). Those economic effects are defined as follows:

- (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, tribal organizations, or geographic regions; [or] (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>96</sup>

This definition is the same as is used in the definition of a “major rule” in the Congressional Review Act (5 U.S.C. § 804(2)). For any proposed rule that the issuing agency or the OIRA Administrator expects to have a SEISNSE or be “major,” the issuing agency is generally required to provide the chief counsel for advocacy with all materials used in the development of the proposed rule, and “information on the potential adverse and beneficial economic impacts of the proposed rule on small entities, and the type of small entities that might be affected.”<sup>97</sup> Within 15 days after receiving these materials, the chief counsel is required to (1) identify affected small entities or their representatives from whom information about the impacts of the rule can be obtained, and (2) convene a “review panel” to examine the materials provided to the chief

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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.”

<sup>92</sup> Section 2(b).

<sup>93</sup> Section 2(c).

<sup>94</sup> Section 2(e).

<sup>95</sup> Section 3(a) and (b).

<sup>96</sup> Section 5(e).

<sup>97</sup> Section 5(b)(1)(B). Agencies are not required to provide drafts of proposed rules if the rule relates to U.S. internal revenue laws, or if it is to be issued by an independent regulatory agency.

counsel. Within 60 days after the panel is convened, the chief counsel for advocacy is required to submit a report to the agency and to OIRA (unless the rule is issued by an independent regulatory agency) assessing the economic impact of the proposed rule on small entities and any alternatives that would minimize adverse impacts or maximize beneficial impacts. The report is required to become part of the rulemaking record, and the agency is required to explain what actions the agency took in response to the report.

Section 6 of H.R. 527 would amend Section 610 of Title 5 and require that each agency publish a plan for the periodic review of rules that the head of the agency determines have a SEISNSE, without regard to whether the agency had previously made such a determination. The plans would generally require the review of all existing rules within 10 years of the date that the bill is enacted, and any subsequent rule within 10 years of its publication in the *Federal Register*. Agencies would be required to publish a list of rules to be reviewed, and to request comments from the public, the chief counsel for advocacy, and the regulatory enforcement ombudsman. Other sections of the bill would make certain changes to the judicial review provisions in Section 611 of Title 5, and to the chief counsel's amicus authority under Section 612 of Title 5.

### *Analysis*

Proposed legislation has been previously introduced in the House of Representatives to make some (but not all) of the amendments to the RFA that are proposed in H.R. 527 (e.g., H.R. 4458 in the 110<sup>th</sup> Congress, and H.R. 682 in the 109<sup>th</sup> Congress), but those bills were not enacted. Some of the provisions in H.R. 527 appeared to address certain long-standing issues of concern regarding the implementation of the RFA (e.g., the inclusion of “indirect” effects in the definition of “economic impact,” and clarifying that Section 610 reviews are required for any rule determined to have a SEISNSE, even if a final regulatory flexibility analysis was not prepared). Other provisions appear to add to the number or depth of the analytical and notification requirements placed on rulemaking agencies. Perhaps most notably, the SBA chief counsel for advocacy is required to issue rules governing agency compliance with the RFA. If those rules clarify what is meant by the term “significant economic impact on a substantial number of small entities,” they have the potential to improve the implementation of the RFA as well as related statutory requirements that are linked to that determination.

Other portions of H.R. 527 appear to widen the scope and impact of the RFA substantially. For example, by defining a covered “rule” using the definition in Section 551(4) of Title 5, the RFA would appear to include not just legislative rules that appear in the *Federal Register* and the *Code of Federal Regulations*, but also agency guidance documents and policy statements. Also, the amendments to Section 609 of Title 5 would, if enacted, substantially broaden the requirement for advocacy review panels. Currently, the requirements only apply to EPA and OSHA, and will extend to the CFPB when the agency is established in July 2011. H.R. 527 would, if enacted, expand the panel requirements to all agencies, and make them applicable to “major” rules, even if they did not have a SEISNSE. Also, some rules that are considered “major” impose no compliance costs, and instead are considered major because they involve more than \$100 million in federal transfer payments (e.g., to Medicare and Medicaid providers, or as crop subsidies), fees for government services (e.g., passport application fees paid to the Department of State), or consumer spending (e.g., migratory bird hunting rules issued by the Department of the Interior).<sup>98</sup>

<sup>98</sup> CRS Report R41651, *REINS Act: Number and Types of “Major Rules” in Recent Years*, by Curtis W. Copeland and Maeve P. Carey.

Some observers have indicated that these changes to the RFA could affect agencies' ability to issue needed regulations,<sup>99</sup> while others have applauded the changes.<sup>100</sup> Both groups would likely agree that the amendments, if enacted, would fundamentally alter the nature and reach of the RFA's requirements.

The impact of other changes contemplated in H.R. 527 are unclear. For example, for more than 20 years, courts have ruled that agencies need not prepare regulatory flexibility analyses if the effects of a rule on an industry are indirect.<sup>101</sup> Therefore, for example, if a federal agency is issuing a final rule establishing a health standard that is implemented by states or other entities, the federal agency issuing the rule need not prepare a regulatory flexibility analysis even if it is clear that the implementation of that or related rules will ultimately have a significant economic effect on a substantial number of small entities.<sup>102</sup> Agencies have also indicated that they do not consider the secondary effects that a rule may have on the cost of compliance with other programs.<sup>103</sup> By clarifying that the term "economic impact" includes indirect effects that are "reasonably foreseeable and result from the rule," H.R. 527 might result in more agency rules being viewed as requiring a regulatory flexibility analysis.<sup>104</sup> Nevertheless, agencies appear to have substantial discretion in determining what indirect effects are "reasonably foreseeable," because the proposed legislation does not define that term. Also, even when the indirect effects of a rule are foreseeable, in some cases the agencies may not be able to provide much detail regarding those effects in their regulatory flexibility analyses (e.g., when the implementation details are left to states or local governments).

H.R. 527 would, if enacted, also clarify how agencies' reviews under Section 610 of the RFA should be conducted. As a result, agencies would be required to review all of their rules to determine if they currently have a SEISNSE, and could not simply rely on their previous determinations when the final rule was published in the *Federal Register*. Enactment of this change could result in substantially more Section 610 reviews, but with a concomitant increase in

<sup>99</sup> Testimony of J. Robert Schull before the Subcommittee on the Courts, Commercial and Administrative Law, House Committee on the Judiciary, February 10, 2011, at <http://judiciary.house.gov/hearings/pdf/Shull02102011.pdf>.

<sup>100</sup> Testimony of Thomas M. Sullivan before the Subcommittee on the Courts, Commercial and Administrative Law, House Committee on the Judiciary, February 10, 2011, at <http://judiciary.house.gov/hearings/pdf/Sullivan02102011.pdf>.

<sup>101</sup> See, for example, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985).

<sup>102</sup> For example, when EPA published a final rule establishing national ambient air quality standards (NAAQS) for particulate matter in October 2006, the agency certified the rule as not having a SEISNSE "because NAAQS themselves impose no regulations on small entities." In its cost-benefit analysis for the rule, EPA estimated the cost of installing controls to meet the health standard at \$5.6 billion in 2020. See U.S. Environmental Protection Agency, "National Ambient Air Quality Standards for Particulate Matter; Final Rule," 71 *Federal Register* 61144, 61217. In a similar case (*American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999)), affirmed in part and reversed in part, *Whitman v. American Trucking Associations*, 532 U.S. 457 (2001), the U.S. Court of Appeals for the District of Columbia ruled that EPA had complied with the RFA because the states, not EPA, had the direct authority to impose requirements to control ozone and particulate matter consistent with EPA health standards.

<sup>103</sup> For example, in a 1991 rule, EPA acknowledged that the rule in question may have "trickle down" effects on other EPA programs under the Clean Air Act (CAA), Superfund, or the Resource Conservation and Recovery Act (RCRA), but went on to say that "the purpose of today's action is solely to establish drinking water standards that public water systems must comply with. Consequently, EPA does not consider the cost of secondary impacts which may occur under the CAA, Superfund, or RCRA." U.S. Environmental Protection Agency, "Drinking Water; National Primary Drinking Water Regulations; Monitoring for Volatile Organic Chemicals," 56 *Federal Register* 30266, July 1, 1991.

<sup>104</sup> The SBA Chief Counsel for Advocacy said his office's "biggest concern with the RFA is that it does not require agencies to analyze indirect impacts." See <http://www.sba.gov/advo/press/07-38.html>.

time and effort required by federal agencies. However, it is unclear how this requirement for renewed plans for regulatory review will interact with similar requirements for retrospective analysis under Executive Order 13563.<sup>105</sup> As noted earlier in this report, Section 6 of that order requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to submit a preliminary plan to OIRA for the review of all of their existing rules.

### **H.R. 1235: the Regulatory Moratorium Act of 2011**

H.R. 1235, introduced by Representative John Carter on March 29, 2011, and referred to the House Committee on Government Oversight and Reform, and the House Committee on the Judiciary, would, if enacted, would generally prevent any federal agency from putting “into force” any rule until January 31, 2013. The bill exempts, however, any rule excepted from the APA notice and comment requirements by (1) 5 U.S.C. § 553(a) (i.e., rules involving military or foreign affairs functions, or rules relating to agency management or personnel or to public property, loans, grants, benefits, or contracts); or (2) 5 U.S.C. § 553(b) (i.e., the “good cause” exception to notice and comment).

### *Analysis*

H.R. 1235 is different from H.R. 213, the other legislation that would impose a regulatory moratorium, in several ways. First, whereas H.R. 213 would prevent federal agencies from taking any “regulatory rulemaking action” (which would arguably include the publication of rules as well as their implementation), H.R. 1235 would prevent agencies from putting rules “into force” (which would appear to allow rules to be published, but just not implemented or enforced). Also, the exemptions in the two bills are similar in some respects (e.g., both exempting rules involving military and foreign affairs function), but different in other respects (e.g., H.R. 213 exempts rules needed because of an imminent threat to health and safety, whereas H.R. 1235 does not). Finally, whereas H.R. 1235 would prevent all rules from being put into force until January 31, 2013), H.R. 213 would prohibit rulemaking for at least two years after the date of enactment. As noted previously in relation to H.R. 213, a moratorium on the implementation of rules of any significant breadth and duration would likely affect the ability of some agencies to carry out their missions, and could affect the general public.

The exemption for rules that are exempted from the APA’s notice and comment requirement may be substantial. GAO reported in 1998 that about half of the final rules published during the previous year did not have a notice of proposed rulemaking, and that the agencies most commonly cited the “good cause” exception for not publishing a proposed rule.<sup>106</sup>

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<sup>105</sup> Executive Order 13563, “Improving Regulation and Regulatory Review,” 76 *Federal Register* 3821, January 21, 2011.

<sup>106</sup> U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, August 31, 1998.

## H.R. 1432, the Creating Sunshine, Participation, and Accountability for Our Nation Act

H.R. 1432, introduced by Representative David Schweikert on April 7, 2011, and referred to the House Committee on the Judiciary, would require formal rulemaking procedures for “any rule issued under a health care reform law.” Specifically, the bill would require any such rule to be “made on the record after opportunity for an agency hearing,” and that the hearing be open to the public (including radio and television coverage), and “presided over by an officer confirmed by the Senate.” The bill defines the term “health care reform law” as (1) the Patient Protection and Affordable Care Act (P.L. 111-148), and the amendments made by that act; and (2) title I or subtitle B of title II of the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152).

### *Analysis*

Virtually all agency regulations are currently issued under APA informal rulemaking procedures, in which agencies publish proposed rules in the *Federal Register* for public comment, and subsequently publish a final rule reflecting any changes made as a result of those comments. Formal rulemaking, as the name implies, is a much more rigorous, trial-like, on-the-record procedure in which interested persons testify and cross-examine witnesses, and the agency may take depositions and issue subpoenas. It is generally considered a more time-consuming and expensive process than informal rulemaking. Also, according to 5 U.S.C. § 556(d)(1), “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” Formal rulemaking was criticized in the 1970s, and has fallen into disuse since then.<sup>107</sup> The Administrative Conference of the United States recommended that Congress should not require procedures beyond informal rulemaking, and should never require trial-type procedures for resolving questions of policy or fact.<sup>108</sup> One administrative law scholar has referred to formal rulemaking as a “discredited” procedure that allows regulated entities to slow down the rulemaking process.<sup>109</sup> However, other scholars have recently voiced support for formal rulemaking procedures in certain circumstances.<sup>110</sup>

## Concluding Observations

In addition to the proposed legislation discussed previously, several Members of Congress have indicated that other regulatory reform bills may soon be introduced in the 112<sup>th</sup> Congress. For example, Senator Mark Warner has said that he plans to introduce legislation that

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<sup>107</sup> For a discussion of formal rulemaking, see Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: American Bar Association, 2006), pp. 58-59.

<sup>108</sup> ACUS Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, 38 *Federal Register* 19782, 1972; Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition*, pp. 309-310.

<sup>109</sup> Testimony of Peter Strauss, Betts Professor of Law, Columbia Law School, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, hearing on Executive Order 13422, February 13, 2007, available at <http://judiciary.house.gov/media/pdfs/Strauss070213.pdf>.

<sup>110</sup> See, for example, testimony of Susan E. Dudley, Director, George Washington University Regulatory Studies Center, and testimony of Jeffrey A. Rosen, Kirkland & Ellis, LLP, before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law, hearing on the Administrative Procedure Act, February 28, 2011, available at <http://judiciary.house.gov/hearings/pdf/Dudley02282011.pdf>, and <http://judiciary.house.gov/hearings/pdf/Rosen02282011.pdf>.

would require federal agencies to produce a baseline catalogue of their existing regulations and a credible, quantifiable estimate of the economic impact for each one. OMB should have primary responsibility for these estimates, and the Congressional Budget Office or the Government Accountability Office should be given responsibility for checking the math and verifying the underlying assumptions. Regulatory pay-go would discourage agencies from continually adding new rules because they would be required to eliminate one outdated or duplicative regulation of the same approximate economic impact for each new rule they want to enact.<sup>111</sup>

Also, press accounts have indicated that Senator Mary Landrieu may reintroduce her Small Business Investment and Innovation Act (S. 3967 in the 111<sup>th</sup> Congress), which would (among other things) amend the RFA to allow small businesses to challenge rules during the rulemaking period when the agency contends that they will not have a significant economic impact on a substantial number of small entities.<sup>112</sup>

## Committee Referrals

Five of the six Senate bills (S. 128, S. 299, S. 358, S. 474, and S. 602) have been referred to the Committee on Homeland Security and Governmental Affairs. One bill (S. 817) was referred to the Committee on the Budget.

As **Table 1** below indicates, committee referrals in the House of Representatives are more numerous and differentiated. All of the seven regulatory reform bills have been referred to the Committee on the Judiciary, but four of them were also referred to the Committee on Oversight and Government Reform. One of those four (H.R. 373) was also referred to the Committee on Rules, which also was referred H.R. 10. One other bill (H.R. 527) was also referred to the Committee on Small Business.

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<sup>111</sup> Mark R. Warner, "To Revive the Economy, Pull Back the Red Tape," *Washington Post*, December 13, 2010, available at <http://warner.senate.gov/public/index.cfm?p=regulatory-paygo>.

<sup>112</sup> Stephen Lee, "Sen Landrieu's Small Business Bill To Be Reintroduced in Next Congress," *BNA Daily Report for Executives*, December 1, 2010, p. A-30.

**Table 1. House of Representative Committee Referrals of Regulatory Reform Bills in the 112<sup>th</sup> Congress**

Bill Number	Committee on the Judiciary	Committee on Oversight and Government Reform	Committee on Rules	Committee on Small Business
H.R. 10	x		x	
H.R. 213	x	x		
H.R. 214	x	x		
H.R. 373	x	x	x	
H.R. 527	x			x
H.R. 1235	x	x		
H.R. 1432	x			

**Source:** CRS, based on information in the Legislative Information System (LIS).

## Themes in Regulatory Reform Bills

As **Table 2** below indicates, the regulatory reform bills discussed in this report would, if enacted, address a variety of rulemaking issues, with some issues addressed by more than one piece of legislation. Some of the issues addressed in those bills have been the subject of proposed legislation for more than 10 years (e.g., congressional rule approval proposed in S. 299 and H.R. 10, penalty relief for first-time violation of paperwork requirements proposed in S. 128, and proposals to establish a Congressional Office of Regulatory Analysis as in H.R. 214). Other bills, however, involve issues that do not appear to have been addressed previously (e.g., the codification and expansion of OMB guidance policies in S. 602).



**Table 2. Regulatory Reform Bills in the 112<sup>th</sup> Congress Address a Variety of Issues**

Issues	S. 128	S. 299	S. 358	S. 474	S. 602	S. 817	H.R. 10	H.R. 213	H.R. 214	H.R. 373	H.R. 527	H.R. 1235	H.R. 1432
Penalty relief	X				X								
Congressional rule approval		X					X						
Expansion of EO 13563 requirements			X										
independent regulatory agencies (IRAs)			X										
rule reviews			X						X				
other			X										
Amendment of the RFA				X	X						X		
indirect effects				X							X		
judicial review				X									
Section 610 reviews				X							X		
advocacy review panels				X							X		
non-NPRM rules				X									
guidance documents				X							X		
SBA rules on RFA compliance											X		
other				X							X		
Expansion of cost-benefit					X								
IRAs					X								
significant rules					X								
Expansion of guidance policies					X								

Issues	S. 128	S. 299	S. 358	S. 474	S. 602	S. 817	H.R. 10	H.R. 213	H.R. 214	H.R. 373	H.R. 527	H.R. 1235	H.R. 1432
Moratorium								X				X	
Congressional Office of Regulatory Analysis									X				
Amendment of UMRA						X			X	X			
Formal Rulemaking													X

Source: CRS, based on analysis of regulatory bills.



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## Expansion of Current Requirements

Looking across all of the bills, several broad themes seem apparent. One such theme is an expansion of current rulemaking requirements in terms of the nature of the requirements, the rules or agencies to which they are applicable, or both. For example:

- S. 358 would, for the first time, generally require agencies to allow the public at least 60 days to comment on a proposed rule (the Administrative Procedure Act does not currently specify the length of comment periods).
- S. 474 would expand the RFA's analytical requirements from rules to significant guidance documents, require agencies to consider indirect impacts (not just direct impacts) in their analyses, expand the review panel requirement in Section 609 of the RFA to all agencies, and expand the scope of judicial review to agencies' analyses for proposed rules.
- H.R. 527 would expand the review panel requirements in Section 609 of the RFA to include "major" rules, even if they did not have an impact on small entities.
- S. 602 would require agencies to prepare cost-benefit analyses for all significant rules, not just the rules that are considered "economically significant" (e.g., those with a \$100 million annual impact on the economy).

## Independent Regulatory Agencies

In particular, several of the bills would extend certain rulemaking requirements to independent regulatory agencies. For example:

- S. 358 and H.R. 214 would expand the retrospective review requirements in Executive Order 13563 to include independent regulatory agencies.
- S. 358 would also require independent regulatory agencies to comply with the broad rulemaking principles in Executive Orders 12866 and 13563 (e.g., that they adopt regulations only upon a reasoned determination that the benefits exceed the costs).
- S. 602 would require independent regulatory agencies to prepare cost-benefit analyses for their "significant" rules, and to submit those analyses to OIRA for review. It would also, for the first time, require those agencies to comply with current OMB requirements for guidance documents.
- S. 817 and H.R. 373 would amend the Unfunded Mandates Reform Act to cover rules issued by most independent regulatory agencies.

In some cases, there does not currently appear to be an administrative mechanism to oversee and ensure compliance with these requirements on independent regulatory agencies. For example, although S. 358 requires independent regulatory agencies to comply with the broad rulemaking policies in Executive Orders 12866 and 13563, and S. 602 requires those agencies to comply with OMB requirements for guidance documents, independent regulatory agencies (unlike other types of agencies) are not currently required to submit any of their rules or guidance documents to OIRA for review. Therefore, unless the President or Congress requires independent regulatory

agencies to submit their rules to OIRA, OIRA will not be able to ensure that the independent regulatory agencies are complying with the new requirements.

President Obama could amend Executive Order 12866 and require independent regulatory agencies to submit their draft significant proposed and final rules and guidance documents to OIRA for review. Both President Ronald Reagan and President William Clinton received legal opinions from the Department of Justice indicating that there was no legal or constitutional impediment preventing such action, but both Presidents reportedly decided not to do so for political, not legal, reasons.<sup>113</sup> Although several individuals and organizations have recommended that President Obama require that independent regulatory agencies be covered by an amended Executive Order 12866,<sup>114</sup> neither Executive Order 13563 nor any of the other memoranda issued by the President or OMB in recent years have included independent regulatory agencies.<sup>115</sup>

Some in Congress and elsewhere may object to requiring independent regulatory agencies, which historically have been considered more independent of the President than other departments and agencies, from having to submit their rules to OIRA (located within the Executive Office of the President) for review and approval. One possible alternative could be to follow the approach currently employed under the Paperwork Reduction Act, in which multi-headed independent regulatory agencies are required to submit their proposed collections of information to OIRA for review, but those agencies can, by majority vote, void any OIRA disapproval of a proposed collection.<sup>116</sup>

## **Retrospective Reviews**

Another recurring theme in the regulatory reform bills is an emphasis on retrospective reviews of agencies' existing rules. For example:

- Both S. 358 and H.R. 214 would put into statute and expand the requirement for retrospective rule reviews that is in Executive Order 13568.
- Both S. 474 and H.R. 527 would clarify and reinstitute the retrospective rule review requirements in Section 610 of the RFA. S. 474 would broaden the reviews to include agencies' compliance guides.

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<sup>113</sup> At a September 2006 conference at CRS, Sally Katzen, OIRA Administrator during most of the Clinton Administration, said "When Boyden Gray was drafting 12291 for President Reagan, the same issue was raised. And as I said, the Department of Justice opined that the President had constitutional authority to extend to independent regulatory commissions. They chose not to do it. We reconsidered the question and chose not to do it. I think there is an aspect of an independent regulatory commission that says it should somehow be kept a little distant from the validly political actors. And this was not in that direction, and I think it's a sound one. It's not one based on the law. I think we had the authority; I think it's purely a question of desirability." See <http://www1.american.edu/rulemaking/doc/PCJCRtrans4.doc>. Ms. Katzen made essentially the same comments at an April 2011 conference at Resources for the Future, and those comments are available at [http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407\\_Regulation\\_KatzenRemarks.pdf](http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf).

<sup>114</sup> See, for example, comments from Jim Tozzi, Center for Regulatory Effectiveness, at [http://www.reginfo.gov/public/jsp/EO/fedRegReview/Jim\\_Tozzi.pdf](http://www.reginfo.gov/public/jsp/EO/fedRegReview/Jim_Tozzi.pdf), and comments from the National Federation of Independent Businesses, at [http://www.reginfo.gov/public/jsp/EO/fedRegReview/NFIB\\_Comments.pdf](http://www.reginfo.gov/public/jsp/EO/fedRegReview/NFIB_Comments.pdf).

<sup>115</sup> Although Executive Order 13563 and the various memoranda did not apply to independent regulatory agencies, they were "encouraged" to "give consideration" to their provisions.

<sup>116</sup> 44 U.S.C. § 3507(f).

Supporters of retrospective reviews assert that agencies should reexamine rules after they have been in effect to ensure that they are operating as expected and are consistent with underlying statutory intent. However, some previous review efforts have not proven to be very successful,<sup>117</sup> and GAO reported in 2007 that such reviews have historically been most frequent and most productive when initiated by the agencies themselves, not by statutory or executive order requirement.<sup>118</sup> GAO also said that discretionary reviews were more likely to involve the public in the process than mandatory reviews, and were more likely to result in changes to the rules. On the other hand, statutorily required reviews were more likely to have review standards, and were more likely to be documented. GAO recommended that agencies incorporate various elements into their policies and procedures to improve the effectiveness and transparency of retrospective regulatory reviews, and that they identify opportunities for Congress to revise and consolidate existing review requirements.

## Congressional Oversight

Another theme in the regulatory reform bills seems to be an effort to increase the role of Congress in overseeing the actions of regulatory agencies. For example:

- S. 299 and H.R. 10 would, if enacted, generally require congressional approval before any major rule could take effect.
- H.R. 214 would create a Congressional Office of Regulatory Analysis that could assist in oversight activities by providing Congress with an in-depth and independent perspective on agencies' rules. It would also allow agencies to review non-significant rules upon congressional request.
- S. 358 would require agencies to submit their preliminary retrospective review plans to the appropriate congressional committees. Upon completion of any such review, the agency must submit a report to the appropriate congressional committees describing the outcome of the review.
- S.Amdt. 299 would require the Inspector General of each agency to determine if the agency did not conduct the retrospective review appropriately, and if the agency does not address any deficiencies within six months, the IG is required to notify Congress within 30 days.
- S. 128 would require agency heads to notify Congress within 60 days if the agency does not allow a small business 24 hours to correct a serious paperwork violation.

The degree of congressional involvement contemplated in these bills varies significantly, from simple notification requirements to requiring Congress to approve major rules before they can take effect.

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<sup>117</sup> See U.S. General Accounting Office, *Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3, October 2, 1997.

<sup>118</sup> U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 16, 2007.

## Similarities and Differences in Regulatory Reform Bills

Even when the same general issue is addressed, the regulatory reform bills sometimes take very different approaches. For example:

- Both S. 128 and S. 602 would, if enacted, provide penalty relief for first-time violations of paperwork requirements. However, whereas S. 128 would generally require agencies to provide such relief for any such violations (with some exceptions), S. 602 would establish a process by which regional advocates of the SBA Office of Advocacy could request agencies to provide such relief for small entities.
- Both S. 474 and H.R. 527 proposed to amend the Regulatory Flexibility Act, and many of the amendments in those bills address the same issues (e.g., requiring agencies to consider the indirect effects of their rules, clarifying the requirements for reviews under Section 610 of the act, and making more agencies subject to the panel requirements in Section 609 of the act). The bills differ, however, in many respects. S. 474 would permit judicial review of agencies' compliance with initial regulatory flexibility analysis requirements, while H.R. 527 does not address that issue. On the other hand, H.R. 527 (but not S. 474) would expand the panel requirements to include major rules, even if there is no impact on small entities. While both bills would amend Section 610 of the RFA and require agencies to review their rules with a SEISNSE without regard to the agencies' previous determinations, only S. 474 establishes a penalty for failing to complete the required review (i.e., taking all of an agency's rules with a SEISNSE out of effect).
- H.R. 373 would amend the Unfunded Mandates Reform Act in a number of ways that are designed to improve its operation (e.g., including independent regulatory agencies, changing "expenditures" to direct and "reasonably foreseeable" indirect costs, and including final rules without prior proposed rules. In contrast, H.R. 214 would only amend UMRA to transfer the CBO Director's responsibilities to the CORA Director), and S. 817 would only expand the definition of an "agency" to include independent regulatory agencies.
- Both S. 358 and H.R. 214 would require agencies to review their "significant" rules to determine whether they should be continued, amended, or withdrawn. However, S. 358 would require agencies to submit their preliminary review plans to congressional committees, whereas H.R. 214 would have the OIRA Administrator publish a list of rules to be reviewed by particular deadlines.
- Both H.R. 213 and H.R. 1235 propose to establish moratoriums on certain regulatory actions, but the nature of the actions affected and the exemptions in the bills differ considerably.

## Reforms May Require Additional Resources and Time

Several of the reform bills would, if enacted, codify certain existing rulemaking requirements (e.g., S. 358 and the codification of the broad regulatory goals in Executive Orders 12866 and 13563, and the retrospective reviews required in Executive Order 13563). Therefore, to the extent that covered agencies were already complying with these requirements, enactment of the

legislation may require little or no change in those agencies' behavior, and no increase in resources.

Other bills, however, would place new and potentially substantial responsibilities on rulemaking agencies and OIRA, or would expand existing requirements to new agencies. For example, enactment of S. 602 would require cabinet departments and independent agencies to conduct cost-benefit analyses for all of their "significant rules," which (based on the number of such rules in previous years) could significantly increase the number of cost-benefit analyses conducted each year by these agencies, with a concomitant increase in the number of analyses that OIRA would have to review. Also, S. 602 would apply the cost-benefit analysis requirement to independent regulatory agencies for the first time, and S. 358 and H.R. 214 would require those agencies to conduct retrospective reviews for the first time. S. 474 would apply the RFA to significant guidance documents. S. 474 and H.R. 527 would expand the requirements that agencies use RFA Section 609 panels prior to issuing proposed rules, and both bills would require agencies to review all of their existing rules to determine if they have a SEISNE, and if so, whether they should be continued in their current form. Enactment of these bills could lead to agencies asking for additional resources to carry out their new responsibilities—resources that may prove difficult to provide in the current budgetary environment.

These and certain other requirements in the regulatory reform bills could also increase the amount of time required to issue rules or to put them into effect. For example, S. 358 would generally require a minimum of 60 days for public comment, and if an interim final rule is challenged in a U.S. court, the issuing agency would be required to delay the implementation of the rule until final disposition of the challenge. H.R. 474 would allow judicial review of agencies' initial regulatory flexibility analyses, which could slow down the rulemaking process until any such challenge is resolved. Under H.R. 10 and S. 299, Congress could take up to 70 legislative or session days (which could take several months) to enact legislation approving major regulations, and under H.R. 213, agencies could be prevented from issuing most rules for up to two years. H.R. 1432 would require that certain health care reform rules be issued through formal rulemaking procedures, which are generally considered to be more time consuming than informal procedures.

## **Other Issues**

Some of the provisions in these bills may need to be clarified before enactment to ensure that they are carried out as Congress intended. For example, S.Amdt. 299 to S. 493 would require the IG for each agency to determine whether the agency has conducted the required retrospective reviews of their existing rules and compliance guides "appropriately." The amendment does not define what is meant by "appropriately," which could give the IGs substantial latitude to define the term, and could result in inconsistent administration across the agencies. Also, S. 128 says that agencies must notify Congress if they do not allow small business owners 24 hours to correct first-time paperwork violations that present a "danger to the public health or safety," but because the bill does not define that term, agencies may use another provision that allow civil fines to be imposed (e.g., violations with the potential for "serious harm to the public interest").

Some of the bills may also raise constitutional or legal concerns. As noted earlier in this report, some observers have questioned whether the provisions in H.R. 10 and S. 299 that would require Congress to approve major rules before they can take effect are constitutional (while others are equally convinced that such provisions are, in fact, constitutional). Some have also questioned whether the SBA Chief Counsel for Advocacy can take all of another agency's rules with a

SEISNSE out of effect if the agency has failed to complete the required reviews of their rules and compliance guides (as S. 474 provides).

Another potential policy issue may arise as a consequence of statutory requirements for cost-benefit analysis, and requirements that the benefits of agencies' regulations exceed or "justify" the costs. Although Executive Orders 12866 and 13563 currently contain such requirements, they also say that agencies are to do so "to the extent permitted by law." Some authorizing legislation does not permit the consideration of costs in setting health or safety standards, and other legislation is silent about the role of costs. The Supreme Court, in a unanimous decision written by Justice Scalia, has said that Section 109(b)(1) of the Clean Air Act prevents the EPA Administrator from taking costs into consideration in setting standards for certain pollutants.<sup>119</sup> If Congress were to codify the analytical requirements in Executive Order 12866, they could be interpreted as a "supermandate" that would supplant the previous legislative standards. Concerns about such effects were a primary reason why similar efforts to legislatively require cost-benefit analysis were unsuccessful in the mid-1990s.<sup>120</sup>

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<sup>119</sup> *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

<sup>120</sup> For example, Section 623 of S. 343 (104<sup>th</sup> Congress) stated that no final major rule could be issued unless the agency concluded that the potential benefits of the rule "outweigh" the potential costs of the rule, and that the rule would provide greater net benefits to society than "any of the reasonable alternatives" identified during the rulemaking process. President Clinton opposed this section of the bill, saying that it would "override every single health and safety law on the books." Testimony of Sally Katzen, OIRA Administrator, in U.S. Congress, Senate Committee on Governmental Affairs, *Regulatory Reform*, hearings, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., March 8, 1995, S.Hrg. 104-419, p. 435.