

AMENDMENT NO. _____

Calendar No. _____

Purpose: To provide a substitute.

IN THE SENATE OF THE UNITED STATES—104th Cong., 1st Sess.

S. 343

To reform the regulatory process, and for other purposes.

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. GRASSLEY

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Comprehensive Regu-
5 latory Reform Act of 1995”.

6 **SEC. 2. DEFINITIONS.**

7 Section 551 of title 5, United States Code, is amend-
8 ed—

9 (1) in the matter preceding paragraph (1), by
10 striking “this subchapter” and inserting “chapters
11 5, 6, 7, and 8 of this title”; and

1 (2) in paragraph (13), by striking “; and” and
2 inserting a semicolon;

3 (3) in paragraph (14), by striking the period at
4 the end and inserting “; and”; and

5 (4) by adding at the end the following new
6 paragraph:

7 “(15) ‘Director’ means the Director of the Of-
8 fice of Management and Budget.”.

9 **SEC. 3. RULEMAKING.**

10 Section 553 of title 5, United States Code, is amend-
11 ed to read as follows:

12 **“§ 553. Rulemaking**

13 “(a) This section applies to every rulemaking, accord-
14 ing to the provisions thereof, except to the extent that
15 there is involved—

16 “(1) a matter pertaining to a military or for-
17 eign affairs function of the United States;

18 “(2) a matter relating to the management and
19 personnel practices of an agency;

20 “(3) an interpretive rule, general statement of
21 policy, or rule of agency organization, procedure, or
22 practice that is not generally applicable or does not
23 alter or create rights or obligations of persons out-
24 side the agency; or

1 “(4) a rule relating to the acquisition, manage-
2 ment, or disposal by an agency of real or personal
3 property, or of services, that is promulgated in com-
4 pliance with criteria and procedures established by
5 the Administrator of General Services.

6 “(b)(1) General notice of proposed rulemaking shall
7 be published in the Federal Register, unless all persons
8 subject thereto are named and either personally served or
9 otherwise have actual notice of the proposed rulemaking
10 in accordance with law. Each notice of proposed rule-
11 making shall include—

12 “(A) a statement of the time, place, and nature
13 of public rulemaking proceedings;

14 “(B) a succinct explanation of the need for and
15 specific objectives of the proposed rule, including an
16 explanation of the agency’s determination of whether
17 or not the rule is a major rule within the meaning
18 of section 621(2);

19 “(C) an explanation of the specific statutory in-
20 terpretation under which the rule is proposed, in-
21 cluding an explanation of—

22 “(i) whether the interpretation is expressly
23 required by the text of the statute; or

24 “(ii) if the interpretation is not expressly
25 required by the text of the statute, whether

1 such interpretation is within the range of per-
2 missible interpretations of the statute, and why
3 the agency selected that interpretation;

4 “(D) the proposed provisions of the rule;

5 “(E) a summary of any initial analysis of the
6 proposed rule required to be prepared or issued pur-
7 suant to chapter 6 of this title;

8 “(F) a statement that the agency seeks propos-
9 als from the public and from State and local govern-
10 ments for alternative methods to accomplish the ob-
11 jectives of the rulemaking that are more effective or
12 less burdensome than the approach used in the pro-
13 posed rule;

14 “(G) a description of any data, methodologies,
15 reports, studies, scientific evaluations, or other simi-
16 lar information available to the agency for the rule-
17 making, including an identification of each author or
18 source of such information and the purposes for
19 which the agency plans to rely on such information;
20 and

21 “(H) a statement specifying where the file of
22 the rulemaking proceeding maintained pursuant to
23 subsection (f) may be inspected and how copies of
24 the items in the file may be obtained.

1 “(2) Except when notice or hearing is required by
2 statute, a final rule may be adopted and may become ef-
3 fective without prior compliance with this subsection and
4 subsections (c) and (f) if—

5 “(A) the agency for good cause finds that pro-
6 viding notice and public procedure thereon before
7 the rule becomes effective is contrary to an impor-
8 tant public interest or unnecessary due to the insig-
9 nificant impact of the rule;

10 “(B) the agency publishes the rule in the Fed-
11 eral Register with such finding and a succinct expla-
12 nation of the reasons therefor; and

13 “(C) the agency complies with this subsection
14 and subsections (c) and (f) to the maximum extent
15 feasible prior to the promulgation of the final rule,
16 and fully complies with such provisions as soon as
17 reasonably practicable after the promulgation of the
18 rule.

19 “(3) Whenever the provisions of a final rule that an
20 agency plans to adopt are so different from the provisions
21 of the proposed rule that the original notice of proposed
22 rulemaking did not fairly apprise the public of the issues
23 ultimately to be resolved in the rulemaking or of the sub-
24 stance of the rule, the agency shall publish in the Federal
25 Register a notice of the final rule the agency plans to

1 adopt, together with the information relevant to such rule
2 that is required by the applicable provisions of this section
3 and ~~that~~ has not previously been published in the Federal
4 Register. The agency shall allow a reasonable period for
5 comment on such final rule.

6 “(c)(1) After providing the notice required by this
7 section, the agency shall give interested persons not less
8 than 60 days to participate in the rulemaking through the
9 submission of written data, views, or arguments.

10 “(2)(A) To collect relevant information, and to iden-
11 tify and elicit full and representative public comment on
12 the significant issues of a particular rulemaking, the agen-
13 cy may use such other procedures as the agency deter-
14 mines are appropriate, including—

15 “(i) the publication of an advance notice of pro-
16 posed rulemaking;

17 “(ii) the provision of notice, in forms which are
18 more direct than notice published in the Federal
19 Register, to persons who would be substantially af-
20 fected by the proposed rule, but who are unlikely to
21 receive notice of the proposed rulemaking through
22 the Federal Register;

23 “(iii) the provision of opportunities for oral
24 presentation of data, views, information, or rebuttal
25 arguments at informal public hearings, which may

1 be held in the District of Columbia and other loca-
2 tions;

3 “(iv) the provision of summaries, explanatory
4 materials, or other technical information in response
5 to public inquiries concerning the issues involved in
6 the rulemaking; and

7 “(v) the adoption or modification of agency pro-
8 cedural rules to reduce the cost or complexity of par-
9 ticipation in a rulemaking.

10 “(B) The decision of an agency to use or not to use
11 such other procedures in a rulemaking pursuant to this
12 paragraph shall not be subject to judicial review.

13 “(3) To ensure an orderly and expeditious proceed-
14 ing, an agency may establish reasonable procedures to reg-
15 ulate the course of informal public hearings under para-
16 graphs (2) and (3), including the designation of represent-
17 atives to make oral presentations or engage in direct or
18 cross-examination on behalf of several parties with a com-
19 mon interest in a rulemaking. Transcripts shall be made
20 of all such public hearings.

21 “(4) An agency shall publish any final rule it adopts
22 in the Federal Register, together with a concise statement
23 of the basis and purpose of the rule and a statement of
24 when the rule may become effective. The statement of
25 basis and purpose shall include—

1 “(A) an explanation of the need for, objectives
2 of, and specific statutory authority for, the rule;

3 “(B) a discussion of, and response to, any sig-
4 nificant factual or legal issues raised by the com-
5 ments on the proposed rule prior to its promulga-
6 tion, including a description of the reasonable alter-
7 natives to the rule proposed by the agency and by
8 interested persons, and the reasons why each such
9 alternative was rejected;

10 “(C) an explanation of how the factual conclu-
11 sions upon which the rule is based are substantially
12 supported in the rulemaking file maintained pursu-
13 ant to subsection (f); and

14 “(D) a summary of any final analysis of the
15 rule required to be prepared or issued pursuant to
16 chapter 6 of this title.

17 “(5) The provisions of sections 556 and 557 shall
18 apply in lieu of this subsection in the case of rules that
19 are required by statute to be made on the record after
20 opportunity for an agency hearing.

21 “(d)(1) An agency shall publish the final rule in the
22 Federal Register not less than 60 days before the effective
23 date of such rule. An agency may make a rule effective
24 in less than 60 days after publication in the Federal Reg-
25 ister if the rule grants or recognizes an exemption, relieves

1 a restriction, or if the agency for good cause finds that
2 such a delay in the effective date would be contrary to
3 an important public interest and publishes such finding
4 and an explanation of the reasons therefor, with the final
5 rule.

6 “(2) In promulgating a final rule, an agency may not
7 substantially rely on any material that was not identified
8 in the notice of proposed rulemaking. Notwithstanding the
9 preceding sentence, an agency may rely on such mate-
10 rial—

11 “(A) if such material was placed in the rule-
12 making file promptly upon its receipt by the agency
13 and, if such material is of central relevance to the
14 rulemaking, the agency provided a reasonable oppor-
15 tunity for interested persons to comment thereon;

16 “(B) if such material is material referred to in
17 subsection (f)(3) of this section and the agency has
18 complied with the requirements of that subsection;
19 or

20 “(C) if, in the case of material developed by or
21 for the agency, such material was placed in the rule-
22 making file promptly upon its completion and, if
23 such material is of central relevance to the rule-
24 making, was made available in time for interested

1 persons to have an adequate opportunity to comment
2 thereon.

3 “(e)(1) Each person subject to a major rule may peti-
4 tion—

5 “(A) for the issuance, amendment, or repeal of
6 such rule;

7 “(B) for the amendment or repeal of an inter-
8 pretive rule or general statement of policy;

9 “(C) for an interpretation regarding the mean-
10 ing of the rule; and

11 “(D) for a variance or exemption from the
12 terms of the rule.

13 “(2) Each person subject to a rule may petition an
14 agency for the performance of any analysis provided under
15 chapter 6 of this title if such person presents a substantial
16 question that the rule is a major rule within the meaning
17 of section 621(2). The agency shall grant the petition and
18 promptly conduct the analysis sought if the agency deter-
19 mines that the rule is a rule for which an analysis is re-
20 quired under chapter 6. If the rule does not satisfy the
21 decisional criteria set forth in section 623, then the agency
22 shall take immediate action to either revoke or amend the
23 rule to conform the rule to the requirements of chapter
24 6 and the decisional criteria under section 623.

1 “(3) The agency shall grant or deny a petition made
2 pursuant to this subsection, and give written notice of its
3 determination to the petitioner, with reasonable prompt-
4 ness, but in no event later than 180 days after the petition
5 was received by the agency. The written notice of the
6 agency’s determination shall include an explanation of the
7 determination and a response to each factual and legal
8 claim that forms the basis of the petition. Such notice
9 shall constitute final agency action for purposes of appeal.

10 “(f)(1) The agency shall maintain a file for each rule-
11 making proceeding conducted pursuant to this section and
12 shall maintain a current index to such file. The file and
13 the material excluded from the file pursuant to paragraph
14 (3) shall constitute the rulemaking record for purposes of
15 judicial review. Except as provided in paragraph (3), the
16 file shall be made available to the public beginning on the
17 date on which the agency makes an initial publication con-
18 cerning the rule.

19 “(2) The rulemaking file shall include—

20 “(A) the notice of proposed rulemaking, any
21 supplement to, or modification or revision of, such
22 notice, and any advance notice of proposed rule-
23 making;

24 “(B) copies of all written comments received on
25 the proposed rule;

1 “(C) a transcript of any public hearing con-
2 ~~ducted~~ on the rulemaking;

3 “(D) copies, or an identification of the place at
4 which copies may be obtained, of all material de-
5 scribed by the agency pursuant to subsection
6 (b)(1)(G) and of other factual and methodological
7 ~~material~~ not described by the agency pursuant to
8 ~~such~~ subsection that pertains directly to the rule-
9 ~~making~~ and that was available to the agency in con-
10 ~~nection~~ with the rulemaking, or that was submitted
11 to or prepared by or for the agency in connection
12 ~~with~~ the rulemaking; and

13 “(E) any statement, description, analysis, or
14 ~~any~~ other material that the agency is required to
15 ~~prepare~~ or issue in connection with the rulemaking,
16 ~~including~~ any analysis prepared or issued pursuant
17 to chapter 6 of this title.

18 “(3) The agency shall place the materials described
19 in paragraph (2) in the file as soon as practicable after
20 such ~~materials~~ become available to the agency.

21 “(4) The file required by paragraph (1) need not in-
22 clude ~~any~~ material that need not be made available to the
23 public under section 552(b)(4) if the agency includes in
24 such ~~file~~ a statement that notes the existence of such ma-
25 terial and the basis upon which the material is exempt

1 from public disclosure under such section. The agency may
2 not substantially rely on any such material in formulating
3 a rule unless it makes the substance of such material
4 available for adequate comment by interested persons. The
5 agency may use summaries, aggregations of data, or other
6 appropriate mechanisms to protect the confidentiality of
7 such material to the maximum extent possible.

8 “(5) No court shall hold unlawful or set aside an
9 agency rule because of a violation of this subsection unless
10 the court finds that such violation has precluded fair pub-
11 lic consideration of a material issue of the rulemaking
12 taken as a whole. Judicial review of compliance or non-
13 compliance with this subsection shall be limited to review
14 of action or inaction on the part of an agency.

15 “(g) Notwithstanding any other provision of law, ex-
16 cept as otherwise provided in this section, subsections
17 (b)(1)(C), (c)(4)(D), and (e) shall supplement, and not
18 supplant, any other law or regulation governing rule-
19 making procedures.

20 “(h) Nothing in this section authorizes the use of ap-
21 propriated funds available to any agency to pay the attor-
22 ney's fees or other expenses of persons participating or
23 intervening in agency proceedings.”.

1 **SEC. 4. ANALYSIS OF AGENCY RULES.**

2 (a) IN GENERAL.—Chapter 6 of title 5, United
3 States Code, is amended by adding at the end the follow-
4 ing:

5 “SUBCHAPTER II—ANALYSIS OF AGENCY
6 RULES

7 “§ 621. Definitions

8 “For purposes of this subchapter and subchapter
9 III—

10 “(1) the term ‘rule’ has the same meaning as
11 in section 551(4) of this title, and—

12 “(A) includes any statement of general ap-
13 plicability that alters or creates rights or obliga-
14 tions of persons outside the agency; and

15 “(B) does not include a rule of particular
16 applicability that approves or prescribes the fu-
17 ture rates, wages, prices, services, corporate or
18 financial structures, reorganizations, mergers,
19 acquisitions, accounting practices, or disclosures
20 bearing on any of the foregoing;

21 “(2)(A) the term ‘major rule’ means—

22 “(i) a rule or a group of closely related
23 rules that the agency proposing the rule, the
24 Director, or a designee of the President reason-
25 ably determines is likely to have a gross annual
26 effect on the economy of \$50,000,000 or more

1 in reasonably quantifiable increased direct and
2 indirect costs, or has a significant impact on a
3 sector of the economy; or

4 “(ii) a rule or a group of closely related
5 rules that is otherwise designated a major rule
6 by the agency proposing the rule, the Director,
7 or a designee of the President on the ground
8 that the rule is likely to result in—

9 “(I) a substantial increase in costs or
10 prices for wage earners, consumers, indi-
11 vidual industries, nonprofit organizations,
12 Federal, State, or local government agen-
13 cies, or geographic regions; or

14 “(II) significant adverse effects on
15 competition, employment, investment, pro-
16 ductivity, innovation, the environment,
17 public health or safety, or the ability of en-
18 terprises whose principal places of business
19 are in the United States to compete in do-
20 mestic or export markets;

21 “(B) the term ‘major rule’ does not include—

22 “(i) a rule that involves the internal reve-
23 nue laws of the United States; or

24 “(ii) a rule or agency action that author-
25 izes the introduction into, or removal from,

1 commerce, or recognizes the marketable status,
2 of a product pursuant to sections 408, 409(c),
3 and 706 of the Federal Food, Drug, and Cos-
4 metic Act;

5 “(3) the term ‘benefit’ means the reasonably
6 identifiable significant benefits, including social and
7 economic benefits, that are expected to result di-
8 rectly or indirectly from implementation of a rule or
9 an alternative to a rule;

10 “(4) the term ‘cost’ means the reasonably iden-
11 tifiable significant costs and adverse effects, includ-
12 ing social and economic costs, reduced consumer
13 choice, substitution effects, and impeded techno-
14 logical advancement, that are expected to result di-
15 rectly or indirectly from implementation of, or com-
16 pliance with, a rule or an alternative to a rule;

17 “(5) the term ‘market-based mechanism’ means
18 a regulatory program that—

19 “(A) imposes legal accountability for the
20 achievement of an explicit regulatory objective
21 on each regulated person;

22 “(B) affords maximum flexibility to each
23 regulated person in complying with mandatory
24 regulatory objectives, which flexibility shall,
25 where feasible and appropriate, include, but not

1 be limited to, the opportunity to transfer to, or
2 receive from, other persons, including for cash
3 or other legal consideration, increments of com-
4 pliance responsibility established by the pro-
5 gram; and

6 “(C) permits regulated persons to respond
7 automatically to changes in general economic
8 conditions and in economic circumstances di-
9 rectly pertinent to the regulatory program with-
10 out affecting the achievement of the program’s
11 explicit regulatory mandates; and

12 “(6) the term ‘cost-benefit analysis’ means an
13 evaluation of the costs and benefits of a rule, quan-
14 tified to the extent feasible and appropriate and oth-
15 erwise qualitatively described, that is prepared in ac-
16 cordance with the requirements of this subchapter at
17 the level of detail appropriate and practicable for
18 reasoned decisionmaking on the matter involved,
19 taking into consideration the significance and com-
20 plexity of the decision and any need for expedition.

21 **“§ 622. Rulemaking cost-benefit analysis**

22 “(a) Prior to publishing notice of a proposed rule-
23 making for any rule (or, in the case of a notice of a pro-
24 posed rulemaking that has been published on or before the
25 date of enactment of this subchapter, not later than 30

1 days after such date of enactment), each agency shall de-
2 termine whether the rule is or is not a major rule within
3 the meaning of section 621(2)(A)(i) and, if it is not,
4 whether it should be designated a major rule under section
5 621(2)(A)(ii). For the purpose of any such determination
6 or designation, a group of closely related rules shall be
7 considered as one rule.

8 “(b)(1) If an agency has determined that a rule is
9 not a major rule within the meaning of section
10 621(2)(A)(i) and has not designated the rule a major rule
11 within the meaning of section 621(2)(A)(ii), the Director
12 or a designee of the President may, as appropriate, deter-
13 mine that the rule is a major rule or designate the rule
14 a major rule not later than 30 days after the publication
15 of the notice of proposed rulemaking for the rule (or, in
16 the case of a notice of proposed rulemaking that has been
17 published on or before the date of enactment of this sub-
18 chapter, not later than 60 days after such date of enact-
19 ment).

20 “(2) Such determination or designation shall be pub-
21 lished in the Federal Register, together with a succinct
22 statement of the basis for the determination or designa-
23 tion.

24 “(c)(1)(A) When the agency publishes a notice of pro-
25 posed rulemaking for a major rule, the agency shall issue

1 and place in the rulemaking file an initial cost-benefit
2 analysis, and shall include a summary of such analysis in
3 the notice of proposed rulemaking.

4 “(B)(i) When the Director or a designee of the Presi-
5 dent has published a determination or designation that a
6 rule is a major rule after the publication of the notice of
7 proposed rulemaking for the rule, the agency shall prompt-
8 ly issue and place in the rulemaking file an initial cost-
9 benefit analysis for the rule and shall publish in the Fed-
10 eral Register a summary of such analysis.

11 “(ii) Following the issuance of an initial cost-benefit
12 analysis under clause (i), the agency shall give interested
13 persons an opportunity to comment pursuant to section
14 553 in the same manner as if the draft cost-benefit analy-
15 sis had been issued with the notice of proposed rule-
16 making.

17 “(2) Each initial cost-benefit analysis shall contain—

18 “(A) an analysis of the benefits of the proposed
19 rule, and an explanation of how the agency antici-
20 pates each benefit will be achieved by the proposed
21 rule, including a description of the persons or classes
22 of persons likely to receive such benefits;

23 “(B) an analysis of the costs of the proposed
24 rule, and an explanation of how the agency antici-
25 pates each such cost will result from the proposed

1 rule, including a description of the persons or groups
2 of persons likely to bear such costs;

3 “(C) an identification (including an analysis of
4 the costs and benefits) of reasonable alternatives au-
5 thorized under the statute granting the rulemaking
6 authority for achieving the identified benefits of the
7 proposed rule, including alternatives that—

8 “(i) require no government action;

9 “(ii) will accommodate differences among
10 geographic regions and among persons with dif-
11 fering levels of resources with which to comply;
12 and

13 “(iii) employ voluntary, performance, or
14 other market-based standards that permit the
15 greatest flexibility in achieving the identified
16 benefits of the proposed rule and that comply
17 with the requirements of subparagraph (D);

18 “(D) an assessment of the feasibility of estab-
19 lishing a regulatory program that operates through
20 the application of market-based mechanisms;

21 “(E) in any case in which the proposed rule is
22 based on one or more scientific evaluations or infor-
23 mation or is subject to the risk assessment require-
24 ments of subchapter III, a description of actions un-
25 dertaken by the agency to verify the quality, reliabil-

1 ity, and relevance of such scientific evaluations or
2 scientific information in accordance with the risk as-
3 sessment requirements of subchapter III;

4 “(F) an analysis, to the extent practicable, of
5 the effect of the rule on—

6 “(i) the cumulative burden of compliance
7 with the rule and other existing regulations on
8 persons complying with it; and

9 “(ii) the net effect on small businesses
10 with fewer than 100 employees, including em-
11 ployment in such businesses;

12 “(G) an analysis of whether the identified bene-
13 fits of the proposed rule justify the identified costs
14 of the proposed rule, and an analysis of whether the
15 proposed rule will provide greater net benefits to so-
16 ciety than any of the alternatives to the proposed
17 rule, including alternatives identified in accordance
18 with subparagraph (C).

19 “(d)(1) When the agency publishes a final major rule,
20 the agency shall also issue and place in the rulemaking
21 file a final cost-benefit analysis, and shall include a sum-
22 mary of the analysis in the statement of basis and pur-
23 pose.

24 “(2) Each final cost-benefit analysis shall contain—

1 “(A) a description and comparison of the bene-
2 fits and costs of the rule and of the reasonable alter-
3 natives to the rule described in the rulemaking, in-
4 cluding the market-based mechanisms identified pur-
5 suant to subsection (c)(2)(D); and

6 “(B) an analysis, based upon the rulemaking
7 record considered as a whole, of—

8 “(i) whether the benefits of the rule justify
9 the costs of the rule; and

10 “(ii) whether the rule will provide greater
11 net benefits to society than any of the reason-
12 able alternatives described in the rulemaking,
13 including the market-based incentives identified
14 pursuant to subsection (c)(2)(D).

15 “(e)(1)(A) The analysis of the benefits and costs of
16 a proposed and a final rule required under this section
17 shall include, to the extent feasible, a quantification or nu-
18 merical estimate of the quantifiable benefits and costs.
19 Such quantification or numerical estimate shall be made
20 in the most appropriate unit of measurement, using com-
21 parable assumptions, including time periods, shall specify
22 the ranges of predictions, and shall explain the margins
23 of error involved in the quantification methods and in the
24 estimates used. An agency shall describe the nature and
25 extent of the nonquantifiable benefits and costs of a final

1 rule pursuant to this section in as precise and succinct
2 a manner as possible. An agency shall not be required to
3 make such evaluation primarily on a mathematical or nu-
4 merical basis.

5 “(B) Where practicable, the description of the bene-
6 fits and costs of a proposed and final rule required under
7 this section shall describe such benefits and costs on an
8 industry by industry basis.

9 “(2)(A) In evaluating and comparing costs and bene-
10 fits and in evaluating the risk assessment information de-
11 veloped pursuant to subchapter III, the agency shall not
12 rely on cost, benefit, or risk assessment information that
13 is not accompanied by data, analysis, or other supporting
14 materials that would enable the agency and other persons
15 interested in the rulemaking to assess the accuracy, reli-
16 ability, and uncertainty factors applicable to such informa-
17 tion.

18 “(B) The agency evaluations of the relationships of
19 the benefits of a proposed and final rule to its costs shall
20 be clearly articulated in accordance with this section.

21 “(f) The preparation of the initial or final cost-benefit
22 analysis required by this section shall only be performed
23 by an officer or employee of the agency. The preceding
24 sentence shall not preclude a person outside the agency
25 from gathering data or information to be used by the

1 agency in preparing any such cost-benefit analysis or from
2 providing an explanation sufficient to permit the agency
3 to analyze such data or information. If any such data or
4 information is gathered or explained by a person outside
5 the agency, the agency shall specifically identify in the ini-
6 tial or final cost-benefit analysis the data or information
7 gathered or explained and the person who gathered or ex-
8 plained it, and shall describe the arrangement by which
9 the information was procured by the agency, including the
10 total amount of funds expended for such procurement.

11 “(g)(1) Each person subject to a major rule may peti-
12 tion for the issuance of a cost-benefit analysis for the rule,
13 including a major rule in effect on the date of enactment
14 of this subchapter for which a cost-benefit analysis meet-
15 ing the requirements of this subchapter has not been per-
16 formed.

17 “(2) The agency shall grant the petition and prompt-
18 ly conduct the analysis sought if the agency determines
19 that the rule is a rule for which a cost-benefit analysis
20 is required under this subchapter. If the rule does not sat-
21 isfy the decisional criteria set forth in section 623, then
22 the agency shall take immediate action to either revoke
23 or amend the rule to conform the rule to the requirements
24 of this subchapter and the decisional criteria under section
25 623.

1 “(3) The agency shall grant or deny a petition made
2 pursuant to this subsection, and give written notice of its
3 determination to the petitioner, with reasonable prompt-
4 ness, but in no event later than 180 days after the petition
5 was received by the agency. The written notice of the
6 agency’s determination shall include an explanation of the
7 determination and a response to each factual and legal
8 claim that forms the basis of the petition.

9 **“§ 623. Decisional criteria**

10 “(a) Subject to subsection (b), no final rule subject
11 to this subchapter shall be promulgated unless the agency
12 finds that—

13 “(1) the potential benefits to society from the
14 rule justify the potential costs of the rule to society,
15 as determined by the analysis required by section
16 622(d)(2)(B); and

17 “(2) the rule will substantially achieve greater
18 net benefits to society than any of the reasonable al-
19 ternatives identified pursuant to section
20 622(d)(2)(B).

21 Subject to the provisions of subsection (b), the require-
22 ments of this section shall supplement any other decisional
23 criteria otherwise provided by law.

24 “(b)(1) If the text of a statute expressly requires that
25 a rule shall be promulgated without regard to whether the

1 rule satisfies the criterion provided in subsection (a)(1),
2 the rule must satisfy the criterion provided in subsection
3 (a)(2).

4 “(2) If the text of a statute expressly requires that
5 a rule shall be promulgated even if the rule does not sat-
6 isfy both criteria provided in subsection (a), the rule must
7 impose lower net costs to society than any of the reason-
8 able alternatives identified pursuant to section
9 622(d)(2)(B).

10 “(c) If an agency determines that the text of a statute
11 expressly requires a rule to be promulgated even if the
12 rule does satisfy the criterion of subsection (a)(1) or the
13 criteria of both subsections (a)(1) and (a)(2), the agency
14 shall—

15 “(1) include a written explanation of such de-
16 termination in the initial and final cost-benefit anal-
17 ysis required by section 622; and

18 “(2) transmit the final cost-benefit analysis to
19 Congress when the final rule is promulgated.

20 **“§ 624. Judicial review**

21 “Any cost-benefit analysis of, or risk assessment con-
22 cerning, a rule shall constitute part of the whole rule-
23 making record of agency action for the purpose of judicial
24 review of the rule, and shall be considered by a court in
25 determining the legality of the rule. The court shall apply

1 the same standards of judicial review that govern the re-
2 view of agency findings under the statute granting the
3 agency authority to conduct the rulemaking. The court
4 shall set aside agency action that fails to satisfy the
5 decisional criteria of section 623.

6 **“§ 625. Deadlines for rulemaking**

7 “(a) Beginning on the date of enactment of this sec-
8 tion, all deadlines in statutes that require agencies to pro-
9 pose or promulgate any rule subject to this subchapter
10 shall be suspended until such time as the requirements
11 of this subchapter are satisfied.

12 “(b) Beginning on the date of enactment of this sec-
13 tion, the jurisdiction of any court of the United States
14 to enforce any deadline that would require an agency to
15 propose or promulgate a rule subject to this chapter shall
16 be suspended until such time as the requirements of this
17 subchapter are satisfied.

18 “(c) In any case in which the failure to promulgate
19 a rule by a deadline would create an obligation to regulate
20 through individual adjudications, the deadline shall be sus-
21 pended to allow the requirements of this subchapter to be
22 satisfied.

23 **“§ 626. Agency review of rules**

24 “(a)(1)(A) Not later than 9 months after the date
25 of enactment of this section, each agency shall prepare and



1 publish in the Federal Register a proposed schedule for
2 the review, in accordance with this section, of—

3 “(i) each rule of the agency that is in effect on
4 such effective date and which, if adopted on such ef-
5 fective date, would be a major rule under section
6 621(2)(A);

7 “(ii) each rule of the agency that is inconsistent
8 or in conflict with any other obligation or require-
9 ment established by any Federal statute, rule, or
10 other agency statement, interpretation, or action
11 that has the force of law; and

12 “(iii) each rule of the agency in effect on the
13 date of enactment of this section (in addition to the
14 rules described in clauses (i) and (ii)) that the agen-
15 cy has selected for review.

16 “(B) Each proposed schedule required by subpara-
17 graph (A) shall include—

18 “(i) a brief explanation of the reasons the agen-
19 cy considers each rule on the schedule to be a major
20 rule under section 621(2)(A), or the reasons why the
21 agency selected the rule for review;

22 “(ii) a date set by the agency, in accordance
23 with subsection (b)(1), for the completion of the re-
24 view of each such rule; and

1 “(iii) a statement that the agency requests com-
2 ments from the public on the proposed schedule.

3 “(C) The agency shall set a date to initiate review
4 of each rule on the schedule in a manner that will ensure
5 the simultaneous review of related items and that will
6 achieve a reasonable distribution of reviews over the period
7 of time covered by the schedule.

8 “(2) Not later than 90 days before publishing in the
9 Federal Register the proposed schedule required under
10 paragraph (1), each agency shall make the proposed
11 schedule available to the Director or a designee of the
12 President, or to the Vice President or other officer to
13 whom oversight authority has been delegated under sec-
14 tion 643. The President or that officer may select for re-
15 view in accordance with this section any additional rule.

16 “(3) Not later than 1 year after the date of enact-
17 ment of this section, each agency shall publish in the Fed-
18 eral Register a final schedule for the review of the rules
19 referred to in paragraphs (1) and (2). Each agency shall
20 publish with the final schedule the response of the agency
21 to comments received concerning the proposed schedule.

22 “(b)(1) Except as explicitly provided otherwise by
23 statute, the agency shall, pursuant to subsections (c)
24 through (e), review—

1 “(A) each rule on the schedule promulgated
2 pursuant to subsection (a);

3 “(B) each major rule under section 621(2) pro-
4 mulgated, amended, or otherwise renewed by an
5 agency after the date of the enactment of this sec-
6 tion; and

7 “(C) each rule promulgated after the date of
8 enactment of this section that the President or the
9 officer designated by the President selects for review
10 pursuant to subsection (a)(2).

11 “(2) Except as provided pursuant to subsection (f),
12 the review of a rule required by this section shall be com-
13 pleted not later than 10 years after the date of enactment
14 of this section or 10 years after the date on which the
15 rule is promulgated, amended, or renewed, whichever is
16 earlier.

17 “(c) An agency shall publish in the Federal Register
18 a notice of its proposed action under this section with re-
19 spect to a rule being reviewed. The notice shall include—

20 “(1) an identification of the specific statutory
21 authority under which the rule was promulgated and
22 an explanation of whether the agency’s interpreta-
23 tion of the statute is expressly required by the cur-
24 rent text of that statute or, if not, whether it is

1 within the range of permissible interpretations of the
2 statute;

3 “(2) an analysis of the benefits and costs of the
4 rule during the period in which it has been in effect;

5 “(3) an explanation of the proposed agency ac-
6 tion with respect to the rule, including action to re-
7 peal or amend the rule to resolve inconsistencies or
8 conflicts with any other obligation or requirement es-
9 tablished by any Federal statute, rule, or other
10 agency statement, interpretation, or action that has
11 the force of law; and

12 “(4) a statement that the agency seeks propos-
13 als from the public for modifications or alternatives
14 to the rule which may accomplish the objectives of
15 the rule in a more effective or less burdensome man-
16 ner.

17 “(d) If an agency proposes to repeal or amend a rule
18 under review pursuant to this section, the agency shall,
19 after issuing the notice required by subsection (c), comply
20 with the provisions of this chapter, chapter 5, and any
21 other applicable law. The requirements of such provisions
22 and related requirements shall apply to the same extent
23 and in the same manner as in the case of a proposed agen-
24 cy action to repeal or amend a rule that is not taken pur-
25 suant to the review required by this section.

1 “(e) If an agency proposes to renew without amend-
2 ment a rule under review pursuant to this section, the
3 agency shall—

4 “(1) give interested persons not less than 60
5 days after the publication of the notice required by
6 subsection (c) to comment on the proposed renewal;
7 and

8 “(2) publish in the Federal Register notice of
9 the renewal of such rule, an explanation of the con-
10 tinued need for the rule, and, if the renewed rule is
11 a major rule under section 621(2), an explanation of
12 the reasonable determination of the agency that the
13 rule complies with section 623.

14 “(f) Any agency, which for good cause finds that
15 compliance with this section with respect to a particular
16 rule during the period provided in subsection (b) of this
17 section is contrary to an important public interest may
18 request the President, or the officer designated by the
19 President pursuant to subsection (a)(2), to establish a pe-
20 riod longer than 10 years for the completion of the review
21 of such rule. The President or that officer may extend the
22 period for review of a rule to a total period of not more
23 than 15 years. Such extension shall be published in the
24 Federal Register with an explanation of the reasons there-
25 for.

1 “(g) In any case in which an agency has not com-
2 pleted the review of a rule within the period prescribed
3 by subsection (b) or (f) of this section, the agency shall
4 immediately publish in the Federal Register a notice pro-
5 posing to amend, repeal, or renew the rule under sub-
6 section (c), and shall complete proceedings pursuant to
7 subsection (d) or (e) not later than 180 days after the
8 date on which the review was required to be completed
9 under subsection (b) or (f).

10 “(h) Nothing in this section shall relieve any agency
11 from its obligation to respond to a petition to issue,
12 amend, or repeal a rule, for an interpretation regarding
13 the meaning of a rule, or for a variance or exemption from
14 the terms of a rule, submitted pursuant to section 553(e).

15 “SUBCHAPTER III—RISK ASSESSMENTS

16 “§ 631. Definitions

17 “For purposes of this subchapter—

18 “(1) the term ‘best estimate’ means an estimate
19 that, to the extent feasible and scientifically appro-
20 priate, is based on—

21 “(A) central estimates of risk using the
22 most plausible assumptions;

23 “(B) an approach that combines multiple
24 estimates based on different scenarios and
25 weighs the probability of each scenario; and

1 “(C) any other methodology designed to
2 provide the most unbiased representation of the
3 most plausible level of risk, given the current
4 scientific information available to the agency
5 concerned;

6 “(2) the term ‘emergency’ means a clearly im-
7 minent and substantial endangerment to public
8 health or the environment;

9 “(3) the term ‘hazard identification’ means
10 identification of a substance, activity, or condition as
11 potentially posing a risk to human health or safety
12 or the environment based on empirical data, meas-
13 urements, or testing showing that it has caused sig-
14 nificant adverse effects at some levels of dose or ex-
15 posure not necessarily relevant to level of dose or ex-
16 posure that are normally expected to occur;

17 “(4) the term ‘negative data’ means data indi-
18 cating that under certain conditions a given sub-
19 stance or activity did not induce an adverse effect;

20 “(5) the term ‘risk assessment’ means—

21 “(A) the iterative process of identifying
22 hazards, and quantifying (to the maximum ex-
23 tent practicable) or describing the degree of
24 toxicity, exposure, or other risk the hazards

1 pose for exposed individuals, populations, or re-
2 sources; and

3 “(B) the document containing the expla-
4 nation of how the assessment process has been
5 applied to an individual substance, activity, or
6 condition;

7 “(6) the term ‘risk characterization’—

8 “(A) means the element of a risk assess-
9 ment that involves presentation of the degree of
10 risk to individuals and populations expected to
11 be protected, as presented in any regulatory
12 proposal or decision, report to Congress, or
13 other document that is made available to the
14 public; and

15 “(B) includes discussions of uncertainties,
16 conflicting data, estimates, extrapolations, in-
17 ferences, and opinions; and

18 “(7) the term ‘substitution risk’ means a poten-
19 tial increased risk to human health, safety, or the
20 environment resulting from market substitutions, a
21 reduced standard of living, or a regulatory alter-
22 native designed to decrease other risks.

23 **“§ 632. Applicability**

24 “(a) Except as provided in subsection (b), this sub-
25 chapter shall apply to all risk assessments and risk charac-

1 terizations prepared by, or on behalf of, or prepared by
2 others and adopted by, any Federal agency in connection
3 with health, safety, and environmental risks.

4 “(b)(1) This subchapter shall not apply to risk as-
5 sessments or risk characterizations performed with respect
6 to—

7 “(A) a situation that the head of the agency
8 finds to be an emergency;

9 “(B) a rule or agency action that authorizes the
10 introduction into, or removal from, commerce, or
11 recognizes the marketable status of a product;

12 “(C) a health, safety, or environmental inspec-
13 tion or individual facility permitting action; or

14 “(D) a screening analysis clearly identified as
15 such.

16 “(2)(A) An analysis shall not be treated as a screen-
17 ing analysis for the purposes of paragraph (1)(D) if the
18 result of the analysis is used—

19 “(i) as the basis for imposing a restriction on
20 a substance, product, or activity; or

21 “(ii) to characterize a positive finding of risks
22 from a substance or activity in any agency document
23 or other communication made available to the public,
24 the media, or Congress.

1 “(B) Among the analyses that may be treated as a
2 screening analyses for the purposes of paragraph (1)(D)
3 are product registrations, reregistrations, tolerance set-
4 tings, and reviews of premanufacture notices and existing
5 chemicals under the Federal Insecticide, Fungicide, and
6 Rodenticide Act (7 U.S.C. 136 et seq.) and the Toxic Sub-
7 stances Control Act (15 U.S.C. 2601 et seq.).

8 “(3) This subchapter shall not apply to any food,
9 drug, or other product label or to any risk characterization
10 appearing on any such label.

11 **“§ 633. Rule of construction**

12 “Nothing in this subchapter shall be construed to—

13 “(1) preclude the consideration of any data or
14 the calculation of any estimate to more fully describe
15 risk or provide examples of scientific uncertainty or
16 variability; or

17 “(2) require the disclosure of any trade secret
18 or other confidential information.

19 **“§ 634. Requirement to prepare risk assessments**

20 “(a) Except as provided in section 632, the head of
21 each agency shall prepare for each major rule relating to
22 human health, safety, or the environment that is proposed
23 by the agency after the date of enactment of this sub-
24 chapter, is pending on the date of enactment of this sub-

1 chapter, or is subject to a granted petition for review pur-
2 suant to section 553(e) or 622(g)—

3 “(1) a risk assessment in accordance with this
4 subchapter;

5 “(2) for each such proposed or final rule, an as-
6 sessment, quantified to the extent feasible, of incre-
7 mental risk reduction or other benefits associated
8 with each significant regulatory alternative to the
9 rule or proposed rule; and

10 “(3) for each such proposed or final rule, quan-
11 tified to the extent feasible, a comparison of any
12 human health, safety, or environmental risks ad-
13 dressed by the regulatory alternatives to other rel-
14 evant risks chosen by the head of the agency, includ-
15 ing at least 3 other risks regulated by the agency
16 and to at least 3 other risks with which the public
17 is familiar.

18 “(b) A risk assessment prepared pursuant to this
19 subchapter shall be a component of and used to develop
20 the cost-benefit analysis required by subchapter II, and
21 shall be made part of the administrative record for judicial
22 review of any final agency action.

23 **“§ 635. Principles for risk assessment**

24 “(a)(1) The head of each agency shall apply the prin-
25 ciples set forth in subsection (b) when preparing any risk

1 assessment, whether or not required by section 634, to en-
2 sure that the risk assessment and all of its components—

3 “(A) distinguish scientific findings and best es-
4 timates of risk from other considerations;

5 “(B) are, to the maximum extent practicable
6 scientifically objective, unbiased and inclusive of all
7 relevant data; and

8 “(C) rely, to the extent available and prac-
9 ticable, on scientific findings.

10 “(2) An agency shall not be required to repeat discus-
11 sions or explanations required under this section in each
12 risk assessment document if there is a reference to the
13 relevant discussion or explanation in another agency docu-
14 ment.

15 “(b) The principles to be applied when preparing risk
16 assessments are as follows:

17 “(1)(A) When assessing human health risks, a
18 risk assessment shall consider and discuss both the
19 most important laboratory and epidemiological data
20 and summarize the remaining data that finds, or
21 fails to find, a correlation between a health risk and
22 a potential toxin or activity.

23 “(B) When conflicts among such data appear to
24 exist, or when animal data are used as a basis to as-
25 sess human health, the assessment shall include a

1 discussion of possible reconciliation of conflicting in-
2 formation, and, as appropriate, differences in study
3 designs, mechanisms of action, comparative physiol-
4 ogy, routes of exposure, bioavailability,
5 pharmacokinetics, and any other relevant factor, in-
6 cluding the availability of raw data for review.
7 Greatest emphasis shall be placed on data that indi-
8 cates the biological basis of the resulting harm in
9 humans. Animal data shall be reviewed with regard
10 to relevancy to humans.

11 “(2) When a risk assessment involves a choice
12 of any significant assumption (including the use of
13 safety factors and default assumptions), inference,
14 or model, the agencies or instrumentality preparing
15 the assessment shall—

16 “(A) present a representative description
17 and explicit explanation of plausible and alter-
18 native similar assumptions, inferences, or mod-
19 els (including the assumptions incorporated into
20 the model) and the sensitivity of the conclusions
21 to them;

22 “(B) explain the basis for any choices;

23 “(C) identify any science policy or value
24 judgments;

1 “(D) describe any model used in the risk-
2 assessment and make explicit the assumptions
3 incorporated into the model; and

4 “(E) indicate the extent to which any sig-
5 nificant model has been validated by, or con-
6 flicts with, empirical data.

7 “(3) A risk assessment shall clearly separate
8 hazard identification from risk characterization and
9 make clear the relationship between the level of risk
10 and the level of exposure to a potential hazard.

11 “(4) A risk assessment shall be prepared at the
12 level of detail appropriate and practicable for rea-
13 soned decisionmaking on the matter involved, taking
14 into consideration the significance and complexity of
15 the decision and any need for expedition.

16 **“§ 636. Principles for risk characterization and com-**
17 **munication**

18 “In characterizing risk in any risk assessment docu-
19 ment, regulatory proposal or decision, report to Congress,
20 or other document that is made available to the public,
21 each agency characterizing the risk shall comply with each
22 of the following:

23 “(1)(A) The head of the agency shall describe
24 the populations or natural resources that are the
25 subject of the risk characterization.

1 “(B) If a numerical estimate of risk is provided,
2 the head of the agency, to the extent feasible and
3 scientifically appropriate—

4 “(i) shall provide—

5 “(I) the best estimate or estimates for
6 the specific populations or natural re-
7 sources that are the subject of the charac-
8 terization (based on the information avail-
9 able to the department, agency, or instru-
10 mentality) or, in lieu of a single best esti-
11 mate, an array of multiple estimates
12 (showing the distribution of estimates and
13 the best estimate) based on assumptions,
14 inferences, or models which are equally
15 reasonably plausible, given current sci-
16 entific understanding;

17 “(II) a statement of the reasonable
18 range of scientific uncertainties; and

19 “(III) descriptions of the distribution
20 and probability of risk estimates to reflect
21 differences in exposure variability in popu-
22 lations and uncertainties;

23 “(ii) in addition to a best estimate or esti-
24 mates, may present plausible upper-bound or
25 conservative estimates, but only in conjunction

1 with equally plausible lower-bound estimates;
2 and

3 “(iii) shall ensure that, where a safety fac-
4 tor, as distinguished from an inherent quan-
5 titative uncertainty factor, is used, such factor
6 shall reflect safety factors commonly used to
7 ensure human safety in other human activities.

8 “(2) The head of the agency shall explain the
9 exposure scenarios used in any risk assessment, and,
10 to the extent feasible, provide a statement of the size
11 of the corresponding population at risk and the like-
12 lihood of such exposure scenarios.

13 “(3) To the extent feasible, the head of the
14 agency shall provide a statement that places the na-
15 ture and magnitude of individual and population
16 risks to human health in context.

17 “(4) When a Federal agency provides a risk as-
18 sessment or risk characterization for a proposed or
19 final regulatory action, such assessment or charac-
20 terization shall include a statement of any signifi-
21 cant substitution risks to human health identified by
22 the agency or contained in information provided to
23 the agency by a commentator.

1 “(5) An agency shall present a summary in
2 connection with the presentation of the agency’s risk
3 assessment or the regulation if—

4 “(A) the agency provides a public comment
5 period with respect to a risk assessment or reg-
6 ulation;

7 “(B) a commentator provides a risk assess-
8 ment, and a summary of results of such risk as-
9 sessment; and

10 “(C) such risk assessment is reasonably
11 consistent with the principles and the guidance
12 provided under this subtitle,

13 **“§ 637. Regulations; plan for assessing new informa-**
14 **tion**

15 “(a)(1) Not later than 1 year after the date of enact-
16 ment of this subchapter, the Director or a designee of the
17 President shall—

18 “(A) issue a final regulation that has been sub-
19 ject to notice and comment under section 553 that
20 directs agencies to implement the risk assessment
21 and characterizatiōn principles set forth in sections
22 635 and 636; and

23 “(B) provide a format for summarizing risk as-
24 sessment results.

1 “(2) The regulation under paragraph (1) shall be suf-
2 ficiently specific to ensure that risk assessments are con-
3 ducted consistently by the various agencies.

4 “(b)(1) Review of the risk assessment for any major
5 rule shall be conducted by the head of the agency on the
6 written petition of a person showing a reasonable likeli-
7 hood that—

8 “(A) the risk assessment is inconsistent with
9 the principles set forth in sections 635 and 636;

10 “(B) the risk assessment produces substantially
11 different results;

12 “(C) the risk assessment is inconsistent with a
13 rule issued under subsection (a); or

14 “(D) the risk assessment does not take into ac-
15 count material significant new scientific data or sci-
16 entific understanding.

17 “(2) Not later than 90 days after receiving a petition
18 under paragraph (1), the head of the agency shall respond
19 to the petition by agreeing or declining to review the risk
20 assessment referred to in the petition, and shall state the
21 basis for the decision.

22 “(3) If the head of the agency agrees to review the
23 petition, the agency shall complete its review not later
24 than 180 days after the decision made under paragraph
25 (2), unless the Director agrees in writing with an agency

1 determination that an extension is necessary in view of
2 limitations on agency resources.

3 “(4) Denial of a petition by the agency head shall
4 be subject to judicial review in accordance with chapter
5 7.

6 “(5) A risk assessment completed pursuant to a peti-
7 tion may be the basis for initiating a regulatory review
8 pursuant to section 622(g).

9 “(c) The regulations under this section shall be devel-
10 oped after notice and opportunity for public comment, and
11 after consultation with representatives of appropriate
12 State agencies and local governments, and such other de-
13 partments, agencies, offices, organizations, or persons as
14 may be advisable.

15 “(d) At least every 4 years, the Director or a designee
16 of the President shall review, and when appropriate, re-
17 vise, the regulations published under this section.

18 **“§ 638. Decisional criteria**

19 “For each major rule subject to this subchapter, the
20 head of the agency, subject to review by the Director or
21 a designee of the President, shall make a determination
22 that—

23 “(1) the risk assessment under section 634 is
24 based on a scientific and unbiased evaluation, re-
25 flecting realistic exposure scenarios, of the risk ad-

1 dressed by the major rule and are supported by the
2 best available scientific data, as determined by a
3 peer review panel in accordance with section 639;
4 and

5 “(2) there is no alternative that is allowed by
6 the statute under which the major rule is promul-
7 gated that would provide greater net benefits or that
8 would achieve an equivalent reduction in risk in a
9 more cost-effective and flexible manner.

10 **“§ 639. Establishment of program**

11 “(a) The Director of the Office of Science and Tech-
12 nology shall develop a systematic program for the peer re-
13 view of work products covered by subsection (c), which
14 program shall be used uniformly across the agencies.

15 “(b) The program under subsection (a)—

16 “(1) shall provide for the creation of peer re-
17 view panels consisting of independent and external
18 experts who are broadly representative and balanced
19 to the extent feasible;

20 “(2) shall not exclude peer reviewers merely be-
21 cause they represent entities that may have a poten-
22 tial interest in the outcome, if that interest is fully
23 disclosed;

24 “(3) shall exclude, to the maximum extent prac-
25 ticable, any peer reviewer who has been involved in

1 any previous analysis of the tests and evidence pre-
2 sented for certification by the peer review panel; and

3 “(4) shall provide for a timely completed peer
4 review, meeting agency deadlines, which contains a
5 balanced presentation of all considerations, including
6 minority reports and an agency response to all sig-
7 nificant peer review comments.

8 “(c) The draft peer review and the agency’s responses
9 shall be made available to the public for comment and
10 shall be made part of the administrative record of the final
11 peer review for purposes of judicial review of any final
12 agency action.

13 “(d) The proceedings of peer review panels under this
14 section shall be subject to the applicable provisions of the
15 Federal Advisory Committee Act (5 U.S.C. App.).

16 “SUBCHAPTER IV—EXECUTIVE OVERSIGHT

17 “§ 641. Procedures

18 “The Director or a designee of the President shall—

19 “(1) establish procedures for agency compliance
20 with this chapter; and

21 “(2) monitor, review, and ensure agency imple-
22 mentation of such procedures.

23 “§ 642. Promulgation and adoption

24 “(a) Procedures established pursuant to section 641
25 shall only be implemented after opportunity for public

1 comment. Any such procedures shall be consistent with the
2 prompt completion of rulemaking proceedings.

3 “(b)(1) If procedures established pursuant to section
4 641 include review of any initial or final analyses of a rule
5 required under chapter 6, the time for any such review
6 of any initial analysis shall not exceed 30 days following
7 the receipt of the analysis by the Director, a designee of
8 the President, or by an officer to whom the authority
9 granted under section 641 has been delegated pursuant
10 to section 643.

11 “(2) The time for review of any final analysis re-
12 quired under chapter 6 shall not exceed 30 days following
13 the receipt of the analysis by the Director, a designee of
14 the President, or such officer.

15 “(3)(A) The times for each such review may be ex-
16 tended for good cause by the President or such officer for
17 an additional 30 days.

18 “(B) Notice of any such extension, together with a
19 succinct statement of the reasons therefor, shall be in-
20 serted in the rulemaking file.

21 **“§ 643. Delegation of authority**

22 “(a) The President may delegate the authority grant-
23 ed by this subchapter to the Vice President or to an officer
24 within the Executive Office of the President whose ap-

1 pointment has been subject to the advice and consent of
2 the Senate.

3 “(b)(1) Notice of any delegation, or any revocation
4 or modification thereof shall be published in the Federal
5 Register.

6 “(2) Any notice with respect to a delegation to the
7 Vice President shall contain a statement by the Vice Presi-
8 dent that the Vice President will make every reasonable
9 effort to respond to congressional inquiries concerning the
10 exercise of the authority delegated under this section.

11 **“§ 644. Judicial review**

12 “The exercise of the authority granted under this
13 subchapter by the Director, the President, or by an officer
14 to whom such authority has been delegated under section
15 643 shall not be subject to judicial review in any manner
16 under this chapter.”.

17 (b) REGULATORY FLEXIBILITY ANALYSIS.—(1) Sec-
18 tion 611 of title 5, United States Code, is amended to
19 read as follows:

20 **“§ 611. Judicial review**

21 “(a)(1) Except as provided in paragraph (2), not
22 later than 2 years after the effective date of a final rule
23 with respect to which an agency—

1 “(A) certified, pursuant to section 605(b), that
2 such rule would not have a significant economic im-
3 pact on a substantial number of small entities;

4 “(B) prepared a final regulatory flexibility anal-
5 ysis pursuant to section 604; or

6 “(C) did not prepare an initial regulatory flexi-
7 bility analysis pursuant to section 603 or a final reg-
8 ulatory flexibility analysis pursuant to section 604
9 except as permitted by sections 605 and 608,
10 an affected small entity may petition for the judicial re-
11 view of such certification, analysis, or lack of analysis, in
12 accordance with this subsection. A court having jurisdic-
13 tion to review such rule for compliance with section 553
14 or under any other provision of law shall have jurisdiction
15 to review such certification or analysis.

16 “(2)(A) Notwithstanding any other provision of law,
17 an affected small entity shall have 2 years to challenge
18 such certification, analysis or lack of analysis.

19 “(B) If an agency delays the issuance of a final regu-
20 latory flexibility analysis pursuant to section 608(b), a pe-
21 tition for judicial review under this subsection shall be
22 filed not later than 2 years after the date the analysis is
23 made available to the public.

1 “(3) For purposes of this subsection, the term ‘af-
2 fected small entity’ means a small entity that is or will
3 be adversely affected by the final rule.

4 “(4) Nothing in this subsection shall be construed to
5 affect the authority of any court to stay the effective date
6 of any rule or provision thereof under any other provision
7 of law.

8 “(5)(A) Notwithstanding section 605, if the court de-
9 termines, on the basis of the rulemaking record, that there
10 is substantial evidence to conclude that the rule would
11 have a significant economic impact on a substantial num-
12 ber of small entities, the court shall order the agency to
13 prepare a final regulatory flexibility analysis pursuant to
14 section 604.

15 “(B) If the agency prepared a final regulatory flexi-
16 bility analysis, the court may order the agency to take cor-
17 rective action consistent with section 604 if the court de-
18 termines, on the basis of the rulemaking record, that the
19 final regulatory flexibility analysis was prepared by the
20 agency without complying with section 604.

21 “(6) The court may stay the rule or grant such other
22 relief as it deems appropriate if, by the end of the 90-
23 day period beginning on the date of the order of the court
24 pursuant to paragraph (5) (or such longer period as the
25 court may provide), the agency fails, as appropriate—

1 “(A) to prepare the analysis required by section
2 604; or

3 “(B) to take corrective action consistent with
4 section 604.

5 “(7) In making any determination or granting any
6 relief authorized by this subsection, the court shall take
7 due account of the rule of prejudicial error.

8 “(b) In an action for the judicial review of a rule,
9 any regulatory flexibility analysis for such rule (including
10 an analysis prepared or corrected pursuant to subsection
11 (a)(5)) shall constitute part of the whole record of agency
12 action in connection with such review.

13 “(c) Nothing in this section bars judicial review of
14 any other impact statement or similar analysis required
15 by any other law if judicial review of such statement or
16 analysis is otherwise provided by law.”.

17 (2) EFFECTIVE DATE.—The amendment made by
18 paragraph (1) shall take effect on the date of enactment
19 of this Act, except that the judicial review authorized by
20 section 611(a) of title 5, United States Code (as added
21 by subsection (a)), shall apply only to final agency rules
22 issued after the date of enactment of this Act.

23 (c) PRESIDENTIAL AUTHORITY.—Nothing in this Act
24 shall limit the exercise by the President of the authority
25 and responsibility that the President otherwise possesses

1 under the Constitution and other laws of the United
2 States with respect to regulatory policies; procedures, and
3 programs of departments, agencies, and offices.

4 (d) TECHNICAL AND CONFORMING AMENDMENTS.—

5 (1) Part I of title 5, United States Code, is
6 amended by striking out the chapter heading and
7 table of sections for chapter 6 and inserting in lieu
8 thereof the following:

9 **“CHAPTER 6—THE ANALYSIS OF**
10 **REGULATORY FUNCTIONS**

“SUBCHAPTER I—REGULATORY ANALYSIS

“Sec.

“601. Definitions.

“602. Regulatory agenda.

“603. Initial regulatory flexibility analysis.

“604. Final regulatory flexibility analysis.

“605. Avoidance of duplicative or unnecessary analyses.

“606. Effect on other law.

“607. Preparation of analysis.

“608. Procedure for waiver or delay of completion.

“609. Procedures for gathering comments.

“610. Periodic review of rules.

“611. Judicial review.

“612. Reports and intervention rights.

“SUBCHAPTER II—ANALYSIS OF AGENCY RULES

“621. Definitions.

“622. Rulemaking cost-benefit analysis.

“623. Decisional criteria.

“624. Judicial review.

“625. Deadlines for rulemaking.

“626. Agency review of rules.

“SUBCHAPTER III—RISK ASSESSMENTS

“631. Definitions.

“632. Applicability.

“633. Rule of construction.

“634. Requirement to prepare risk assessments.

“635. Principles for risk assessment.

“636. Principles for risk characterization and communication.

“637. Regulations; plan for assessing new information.

"638. Decisional criteria.

"639. Establishment of program.

"SUBCHAPTER IV—EXECUTIVE OVERSIGHT

"641. Procedures.

"642. Promulgation and adoption.

"643. Delegation of authority.

"644. Judicial review."

1 (2) Chapter 6 of title 5, United States Code, is
2 amended by inserting immediately before section
3 601, the following subchapter heading:

4 "SUBCHAPTER I—REGULATORY ANALYSIS".

5 **SEC. 5. JUDICIAL REVIEW.**

6 (a) DEFINITIONS.—Section 701(b)(2) of title 5, Unit-
7 ed States Code, is amended by inserting before the period
8 at the end the following: " , except that 'agency action'
9 does not include action or inaction alleged to constitute
10 a breach of contract or to cause an inability to perform,
11 or to frustrate the purpose of a contract, where jurisdic-
12 tion over a claim raising such an allegation would be prop-
13 er under section 1346(a)(2) or 1491(a)(1) of title 28,
14 United States Code".

15 (b) RIGHT OF REVIEW.—Section 702 of title 5, Unit-
16 ed States Code, is amended—

17 (1) in the second sentence by striking "seeking
18 relief other than money damages and"; and

19 (2) in the last sentence by striking "or
20 impliedly".

1 (c) ACTIONS REVIEWABLE.—Section 704 of title 5,
2 United States Code, is amended in the first sentence by
3 inserting “other than the Court of Federal Claims” after
4 “court”.

5 (d) SCOPE OF REVIEW.—Section 706 of title 5, Unit-
6 ed States Code, is amended to read as follows:

7 **“§ 706. Scope of Review**

8 “(a) To the extent necessary to decision and when
9 presented, the reviewing court shall decide all relevant
10 questions of law, interpret constitutional and statutory
11 provisions, and determine the meaning or applicability of
12 the terms of an agency action. The reviewing court shall—

13 “(1) compel agency action unlawfully withheld
14 or unreasonably delayed; and

15 “(2) hold unlawful and set aside agency action,
16 findings and conclusions found to be—

17 “(A) arbitrary, capricious, an abuse of dis-
18 cretion, or otherwise not in accordance with
19 law;

20 “(B) contrary to constitutional right,
21 power, privilege, or immunity;

22 “(C) in excess of statutory jurisdiction, au-
23 thority, or limitations, or short of statutory
24 right;

1 “(D) without observance of procedure re-
2 quired by law;

3 “(E) unsupported by substantial evidence
4 in a proceeding subject to sections 556 and 557
5 or otherwise reviewed on the record;

6 “(F) without substantial support in the
7 rulemaking file, viewed as a whole, for the as-
8 serted or necessary factual basis, as distin-
9 guished from the policy or legal basis, of a rule
10 adopted in a proceeding subject to section 553;
11 and

12 “(G) unwarranted by the facts to the ex-
13 tent that the facts are subject to trial de novo
14 by the reviewing court; and

15 “(3) award monetary relief, including money
16 damages, where appropriate.

17 “(b) In making the foregoing determinations, the
18 court shall review the whole record or those parts of it
19 cited by a party, and due account shall be taken of the
20 rule of prejudicial error.

21 “(c) In reviewing an agency interpretation of a stat-
22 ute governing the authority for an agency action, including
23 agency action taken pursuant to a statute that provides
24 for review of final agency action, the reviewing court
25 shall—

1 “(1) hold erroneous and unlawful—

2 “(A) an agency interpretation that is other
3 than the interpretation of the statute clearly in-
4 tended by Congress; or

5 “(B) an agency interpretation that is out-
6 side the range of permissible interpretations of
7 the statute; and

8 “(2) hold arbitrary, capricious, or an abuse of
9 discretion—

10 “(A) an agency action as to which the
11 agency has not explained in a reasoned analysis
12 why it selected the interpretation, rather than
13 other permissible interpretations of the statute;
14 or

15 “(B) in the case of agency action subject
16 to chapter 6 of this title, an interpretation that
17 does not give the agency the broadest discretion
18 to develop rules that will satisfy the decisional
19 criteria of section 623.

20 “(d) Notwithstanding any other provision of law, the
21 provisions of this subsection shall apply to, and supple-
22 ment, the requirements contained in any statute for the
23 review of final agency action which is not otherwise subject
24 to this subsection.”.

25 (e) COURT OF FEDERAL CLAIMS.—

1 (1) IN GENERAL.—Section 1491(a) of title 28,
2 United States Code, is amended—

3 (A) in paragraph (1), by amending the
4 first sentence to read as follows: “The United
5 States Court of Federal Claims shall have juris-
6 diction to render judgment upon any claim
7 against the United States for monetary relief
8 founded either upon the Constitution or any
9 Act of Congress or any regulation of an execu-
10 tive department, or upon any expressed or im-
11 plied contract with the United States, in cases
12 not sounding in tort, or for invalidation of any
13 Act of Congress or any regulation of an execu-
14 tive department that adversely affects private
15 property rights in violation of the fifth amend-
16 ment of the United States Constitution.”;

17 (B) in paragraph (2), by inserting before
18 the first sentence the following: “In any case
19 within its jurisdiction, the Court of Federal
20 Claims shall have the power to grant injunctive
21 and declaratory relief when appropriate.”; and

22 (C) by adding at the end the following new
23 paragraphs:

24 “(4) In cases otherwise within its jurisdiction, the
25 Court of Federal Claims shall also have ancillary jurisdic-

1 tion, concurrent with the courts designated in section
2 1346(b), to render judgment upon any related tort claim
3 authorized under section 2674.

4 “(5) In proceedings within the jurisdiction of the
5 Court of Federal Claims which constitute judicial review
6 of agency action (rather than de novo proceedings), the
7 provisions of section 706 of title 5 shall apply.”.

8 (2) PENDENCY OF CLAIMS IN OTHER
9 COURTS.—Section 1500 of title 28, United States
10 Code, is repealed.

11 **SEC. 6. CONGRESSIONAL REVIEW.**

12 (a) IN GENERAL.—Title 5, United States Code, is
13 amended by inserting immediately after chapter 7 the fol-
14 lowing new chapter:

15 **“CHAPTER 8—CONGRESSIONAL REVIEW**
16 **OF AGENCY RULEMAKING**

17 **“§ 801. Congressional review of agency rulemaking**

18 “(a)(1) Before a rule takes effect as a final rule, the
19 agency promulgating such rule shall submit to the Con-
20 gress a report containing a copy of the rule, the notice
21 of proposed rulemaking, and the statement of basis and
22 purpose for the rule, including a complete copy of any
23 analysis required under chapter 6 of this title, and the
24 proposed effective date of the rule. In the case of a rule
25 that is not a major rule within the meaning of section

1 621(2), summary of the rulemaking proceedings shall be
2 submitted.

3 “(2) A rule relating to a report submitted under
4 paragraph (1) shall take effect as a final rule, the latest
5 of the following:

6 “(A) The later of the date occurring 45 days
7 after the date on which—

8 “(i) the Congress receives the report sub-
9 mitted under paragraph (1); or

10 “(ii) the rule is published in the Federal
11 Register.

12 “(B) If the Congress passes a joint resolution
13 of disapproval described under subsection (g) relat-
14 ing to the rule, and the President signs a veto of
15 such resolution, the earlier date—

16 “(i) on which either House of Congress
17 votes and fails to override the veto of the Presi-
18 dent; or

19 “(ii) occurring 30 session days after the
20 date on which the Congress received the veto
21 and objections of the President.

22 “(C) The date the rule would have otherwise
23 taken effect, if not for this section (unless a joint
24 resolution of disapproval under subsection (g) is ap-
25 proved).

1 “(b) A rule shall not take effect as a final rule if the
2 Congress passes a joint resolution of disapproval described
3 under subsection (g).

4 “(c)(1) Notwithstanding any other provision of this
5 section (except subject to paragraph (3)), a rule that
6 would not take effect by reason of this section may take
7 effect if the President makes a determination under para-
8 graph (2) and submits written notice of such determina-
9 tion to the Congress.

10 “(2) Paragraph (1) applies to a determination made
11 by the President by Executive order that the rule should
12 take effect because such rule is—

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

15 “(B) necessary for the enforcement of criminal
16 laws; or

17 “(C) necessary for national security.

18 “(3) An exercise by the President of the authority
19 under this subsection shall have no effect on the proce-
20 dures under subsection (g) or the effect of a joint resolu-
21 tion of disapproval under this section.

22 “(4) This subsection and an Executive order issued
23 by the President under paragraph (2) shall not be subject
24 to judicial review by a court of the United States.

1 “(d)(1) Subsection (g) shall apply to any rule that
2 is published in the Federal Register (as a rule that shall
3 take effect as a final rule) during the period beginning
4 on the date occurring 60 days before the date the Con-
5 gress adjourns sine die through the date on which the suc-
6 ceeding Congress first convenes.

7 “(2) For purposes of subsection (g), a rule described
8 under paragraph (1) shall be treated as though such rule
9 were published in the Federal Register (as a rule that shall
10 take effect as a final rule) on the date the succeeding Con-
11 gress first convenes.

12 “(3) During the period between the date the Congress
13 adjourns sine die through the date on which the succeed-
14 ing Congress first convenes, a rule described under para-
15 graph (1) shall take effect as a final rule as otherwise pro-
16 vided by law.

17 “(e) Any rule that takes effect and later is made of
18 no force or effect by the enactment of a joint resolution
19 under subsection (g) shall be treated as though such rule
20 had never taken effect.

21 “(f) If the Congress does not enact a joint resolution
22 of disapproval under subsection (g), no court or agency
23 may infer any intent of the Congress from any action or
24 inaction of the Congress with regard to such rule, related
25 statute, or joint resolution of disapproval.

1 “(g)(1) For purposes of this subsection, the term
2 ‘joint resolution’ means only a joint resolution introduced
3 after the date on which the report referred to in subsection
4 (a) is received by Congress the matter after the resolving
5 clause of which is as follows: ‘That Congress disapproves
6 the rule submitted by the _____ relating to
7 _____, and such rule shall have no force or ef-
8 fect.’ (The blank spaces being appropriately filled in.)

9 “(2)(A) A resolution described in paragraph (1) shall
10 be referred to the committees in each House of Congress
11 with jurisdiction. Such a resolution shall not be reported
12 before the eighth day after its submission or publication
13 date.

14 “(B) For purposes of this subsection the term ‘sub-
15 mission or publication date’ means the later of the date
16 on which—

17 “(i) the Congress receives the report submitted
18 under subsection (a)(1); or

19 “(ii) the rule is published in the Federal Reg-
20 ister.

21 “(3) If the committee to which a resolution described
22 in paragraph (1) is referred has not reported such resolu-
23 tion (or an identical resolution) at the end of 20 calendar
24 days after its submission or publication date, such com-
25 mittee may be discharged by the Majority Leader of the

1 Senate or the Majority Leader of the House of Represent-
2 atives, as the case may be, from further consideration of
3 such resolution and such resolution shall be placed on the
4 appropriate calendar of the House involved.

5 “(4)(A) When the committee to which a resolution
6 is referred has reported, or when a committee is dis-
7 charged (under paragraph (3)) from further consideration
8 of, a resolution described in paragraph (1), it shall at any
9 time thereafter be in order (even though a previous motion
10 to the same effect has been disagreed to) for any Member
11 of the respective House to move to proceed to the consider-
12 ation of the resolution, and all points of order against the
13 resolution (and against consideration of the resolution)
14 shall be waived. The motion shall be highly privileged in
15 the House of Representatives and shall be privileged in
16 the Senate and shall not be debatable. The motion shall
17 not be subject to amendment, or to a motion to postpone,
18 or to a motion to proceed to the consideration of other
19 business. A motion to reconsider the vote by which the
20 motion is agreed to or disagreed to shall not be in order.
21 If a motion to proceed to the consideration of the resolu-
22 tion is agreed to, the resolution shall remain the unfin-
23 ished business of the respective House until disposed of.

24 “(B) Debate on the resolution, and on all debatable
25 motions and appeals in connection therewith, shall be lim-

1 ited to not more than 10 hours, which shall be divided
2 equally between those favoring and those opposing the res-
3 olution. A motion further to limit debate shall be in order
4 and shall not be debatable. An amendment to, or a motion
5 to postpone, or a motion to proceed to the consideration
6 of other business, or a motion to recommit the resolution
7 shall ~~not~~ be in order. A motion to reconsider the vote by
8 which the resolution is agreed to or disagreed to shall not
9 be in order.

10 “(C) Immediately following the conclusion of the de-
11 bate on a resolution described in paragraph (1), and a sin-
12 gle quorum call at the conclusion of the debate if re-
13 quested in accordance with the rules of the appropriate
14 House, the vote on final passage of the resolution shall
15 occur.

16 “(D) Appeals from the decisions of the Chair relating
17 to the application of the rules of the Senate or the House
18 of Representatives, as the case may be, to the procedure
19 relating to a resolution described in paragraph (1) shall
20 be decided without debate.

21 “(5) If, before the passage by one House of a resolu-
22 tion of that House described in paragraph (1), that House
23 receives from the other House a resolution described in
24 paragraph (1), then the following procedures shall apply:

1 “(A) The resolution of the other House shall
2 not be referred to a committee.

3 “(B) With respect to a resolution described in
4 paragraph (1) of the House receiving the resolu-
5 tion—

6 “(i) the procedure in that House shall be
7 the same as if no resolution had been received
8 from the other House; but

9 “(ii) the vote on final passage shall be on
10 the resolution of the other House.

11 “(6) This subsection is enacted by Congress—

12 “(A) as an exercise of the rulemaking power of
13 the Senate and House of Representatives, respec-
14 tively, and as such it is deemed to be a part of the
15 rules of each House, respectively, but applicable only
16 with respect to the procedure to be followed in that
17 House in the case of a resolution described in para-
18 graph (1), and it supersedes other rules only to the
19 extent that it is inconsistent with such rules; and

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

1 (b) The table of chapters for part I of title 5, United
2 States Code, is amended by inserting immediately after
3 the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rulemaking 801".

4 **SEC. 7. STUDIES AND REPORTS.**

5 (a) RISK ASSESSMENTS.—The Administrative Con-
6 ference of the United States shall—

7 (1) develop and carry out an ongoing study of
8 the operation of the risk assessment requirements of
9 subchapter III of chapter 6 of title 5, United States
10 Code (as added by section 4 of this Act); and

11 (2) submit an annual report to the Congress on
12 the findings of the study.

13 (b) ADMINISTRATIVE PROCEDURE ACT.—Not later
14 than December 31, 1996, the Administrative Conference
15 of the United States shall—

16 (1) carry out a study of the operation of the
17 Administrative Procedure Act (as amended by sec-
18 tion 3 of this Act); and

19 (2) submit a report to the Congress on the find-
20 ings of the study, including proposals for revision, if
21 any.

March 24, 1982

CONGRESSIONAL RECORD — SENATE

ENCLOSURE 4

S 2713

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall the bill pass?

Mr. LAXALT. Mr. President, have we ordered the yeas and nays?

The PRESIDING OFFICER. They have not yet been ordered.

Mr. LEAHY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. Is all time yielded back?

Mr. LAXALT. All time is yielded back.

The PRESIDING OFFICER. The question is, Shall the bill pass? The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. STEVENS. I announce that the Senator from Rhode Island (Mr. CHAFEE), and the Senator from Mississippi (Mr. COCHRAN) are necessarily absent.

Mr. CRANSTON. I announce that the Senator from Nevada (Mr. CANNON), the Senator from Hawaii (Mr. INOUE), and the Senator from Louisiana (Mr. LONG) are necessarily absent. I further announce that, if present and voting, the Senator from Nevada (Mr. CANNON) would vote "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 94, nays 0, as follows:

(Rollcall Vote No. 62 Leg.)

YEAS—94

Abner	Glenn	Movnihan
Andrews	Goldwater	Murkowski
Armstrong	Gorton	Nickles
Baker	Grassley	Nunn
Baucus	Hart	Packwood
Beauregard	Hatch	Pell
Biden	Hatfield	Percy
Borah	Hawkins	Pressler
Broun	HAWAKAWA	Proxmire
Bumpers	Hellin	Pryor
Burdick	Heinz	Quayle
Burr	Holmes	Randolph
Byrd	Hollins	Riegle
Chafee	Huddleston	Roth
Chambers	Humphrey	Rudman
Chen	Jackson	Sabados
Cheney	Jensen	Sasser
Clinton	Johnston	Schmitt
Coburn	Kelley	Simpson
Conrad	Kennedy	Specter
DeLoach	Kennedy	Stafford
DeMunn	Laxalt	Stennis
Denton	Leahy	Stevens
Dole	Levin	Symms
Domenici	Lugar	Thurmond
Dunbar	Mathias	Tower
Dunbar	McConnell	Trombly
Eagleton	McCarthy	Wahlgren
East	McClure	Warner
Evans	Mohr	Wicker
Ford	Mohrbaum	Wicker
Gale	Mitchell	Wicker

NAYS—0

NOT VOTING—5

Cannon	Cochran	Long
Chafee	Inoue	

So the bill (S. 1080), as amended, was passed as follows:

S. 1080

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Reform Act".

DEFINITION OF RULE

Sec. 2. Section 551(4) of title 5, United States Code, is amended by inserting before the semicolon at the end thereof a comma and the following: "except that the term 'rule' does not include agency statements involving a matter relating to public property or contracts or general statements of policy of the Tennessee Valley Authority except where an applicable statute requires notice and hearing pursuant to this chapter or the statement to be made on the record after opportunity for an agency hearing".

RULEMAKING

Sec. 3. Section 553 of title 5, United States Code, is amended to read as follows:

"§ 553. Rule making

"(a) This section applies to every rule making, according to the provisions thereof, except to the extent that there is involved—

"(1) a matter pertaining to a military or foreign affairs function of the United States;

"(2) a matter relating to the management and personnel practices of an agency;

"(3) an interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, unless such rule or statement has general applicability and substantially alters or creates rights or obligations of persons outside the agency; or

"(4) a rule relating to the acquisition, management, or disposal by an agency of real or personal property or of services that is promulgated in compliance with criteria and procedures established by the Administrator for Federal Procurement Policy or the Administrator of General Services.

"(b)(1) General notice of proposed rule making shall be published in the Federal Register, unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. Each notice of proposed rule making shall include—

"(A) a statement of the time, place, and nature of public rule making proceedings;

"(B) a succinct explanation of the need for and specific objectives of the proposed rule;

"(C) an explanation of the specific statutory authority under which the rule is proposed;

"(D) the proposed provisions of the rule;

"(E) a statement that the agency seeks proposals from the public and from State and local governments for alternative methods to accomplish the objectives of the rule making that are more effective or less burdensome than the approach used in the proposed rule;

"(F) a description of any data, methodologies, reports, studies, scientific evaluations, or other similar information on which the agency plans to substantially rely in the rule making, including an identification of each author or source of such information and the purposes for which the agency plans to rely on such information; and

"(G) a statement specifying where the file of the rule making proceeding maintained pursuant to subsection (f) of this section may be inspected and how copies of the items in the file may be obtained.

"(2) Except when notice or hearing is required by statute, a final rule may be adopted and may become effective without prior compliance with the provisions of this subsection and subsections (c) and (f) of this section if—

"(A) the agency for good cause finds that providing notice and public procedure thereon before the rule becomes effective is impracticable or contrary to an important public interest;

"(B) the agency publishes the rule in the Federal Register with such finding and a succinct explanation of the reasons therefor; and

"(C) the agency complies with the provisions of this subsection and subsections (c) and (f) of this section to the maximum extent feasible prior to the promulgation of the final rule and fully complies with such provisions as soon as reasonably practicable after the promulgation of the rule.

"(3) Except when notice or hearing is required by statute, this subsection and subsections (c) and (f) of this section do not apply to a rule when the agency for good cause finds that notice and public procedure thereon are unnecessary due to the insignificant impact of the rule and publishes, at the time of publication of the final rule, such finding and a succinct explanation of the reason therefor.

"(4) Whenever the provisions of a final rule that an agency plans to adopt are so different from the provisions of the proposed rule that the original notice of proposed rule making did not fairly apprise the public of the issues ultimately to be resolved in the rule making or of the substance of the rule, the agency shall publish in the Federal Register a notice of the final rule the agency plans to adopt, together with the information relevant to such rule which is required by the applicable provisions of this section and which has not previously been published in the Federal Register. The agency shall allow a reasonable period for comment on such final rule.

"(c)(1) After providing the notice required by this section, the agency shall give interested persons at least sixty days to participate in the rule making through the submission of written data, views, and arguments.

"(2) In order to collect relevant information, and to identify and elicit full and representative public comment on the significant issues of a particular rule making, the agency may use such other procedures as the agency determines are appropriate, including—

"(A) the publication of an advance notice of proposed rule making;

"(B) the provision of notice, in forms which are more direct than notice published in the Federal Register, to persons who would be substantially affected by the proposed rule, but who are unlikely to receive notice of the proposed rule making through the Federal Register;

"(C) the provision of opportunities for oral presentation of data, views, information, or rebuttal arguments at informal public hearings, which may be held in the District of Columbia and other locations;

"(D) the provision of summaries, explanatory materials, or other technical information in response to public inquiries concerning the issues involved in the rule making; and

"(E) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in a rule making.

The decision of the agency to use or not to use such other procedures in a rule making pursuant to this paragraph shall not be subject to judicial review.

"(3)(A) The opportunity for participation in a rule making for a major rule (as defined in section 621(4) of this title) shall include the opportunity for oral presentation of data, views, and information at informal public hearings. Such public hearings—

"(i) may include an opportunity for oral rebuttal or argument where appropriate; and

"(ii) shall include an opportunity for direct and cross-examination of the principal agency employees or other persons who prepared for the agency data on which the agency substantially relied in formulating the rule, and of any other persons who present testimony, documents, or other information at such hearings, where other procedures, such as the convening of public meetings, conferences or panel discussions, or the presentation of staff arguments for comment and rebuttal, are determined to be inadequate for the resolution of significant issues of fact upon which the rule is based.

"(B) No court shall hold unlawful or set aside an agency rule because of a failure by the agency to use a particular procedure pursuant to subparagraph (A) of this paragraph unless—

"(i) an objection to the failure to use such procedure was presented to the agency in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

"(ii) the court finds that such failure substantially precluded a fair consideration and informed resolution of a central issue of the rule making taken as a whole.

"(4) To ensure an orderly and expeditious proceeding, the agency may establish reasonable procedures to regulate the course of informal public hearings under paragraphs (2) and (3) of this subsection, including the designation of representatives to make oral presentations or engage in direct or cross-examination on behalf of several parties with a common interest in a rule making. Transcripts shall be made of all such public hearings.

"(5) An agency shall publish any final rule it adopts in the Federal Register, together with a concise statement of the basis and purpose of the rule and a statement of when the rule may become effective. The statement of basis and purpose shall include—

"(A) an explanation of the need for, objectives of, and statutory authority for the rule;

"(B) a discussion of any significant issues raised by the comments on the proposed rule, including a description of the reasonable alternatives to the rule proposed by the agency and by interested persons, and the reasons why each such alternative was rejected; and

"(C) an explanation of how the factual conclusions upon which the rule is based are substantially supported in the rule making file maintained pursuant to subsection (f) of this section.

"(6) When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d)(1) An agency shall publish the final rule adopted in the Federal Register at least thirty days before the effective date of the rule. An agency may make a rule effective in less than thirty days after publishing the final rule in the Federal Register in the case of a rule that grants or recognizes an exemption or relieves a restriction, or in the case of a rule for which the agency for good cause finds that such a delay in the effective date would be contrary to an important public interest and publishes such finding and an explanation of the reasons therefor with the final rule.

"(2) In promulgating a final rule, the agency may not substantially rely on any factual or methodological material that was not placed in the rule making file maintained pursuant to subsection (f) of this section in time to afford an adequate opportu-

nity for public comment thereon during the period for public participation in the rule making. Notwithstanding the preceding sentence, an agency may rely on such material—

"(A) if, in the case of material developed by or for the agency, such material was placed in the rule making file promptly upon its completion and, if such material is of central relevance to the rule making, was made available in time for interested persons to have an adequate opportunity to comment thereon;

"(B) if, in the case of material submitted by a person outside the agency, such material was placed in the rule making file promptly upon its receipt by the agency and, if such material is of central relevance to the rule making, the agency provided not less than fifteen days for interested persons to comment thereon in addition to the period for comment provided under paragraph (1) of subsection (c);

"(C) if such material is material of which the agency properly can take official notice; or

"(D) if such material is material referred to in subsection (f)(3) of this section and the agency has complied with the requirements of that subsection.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule, for an interpretation regarding the meaning of a rule, and for a variance or exemption from the terms of a rule if the agency may grant such variance or exemption. The agency shall act on such petitions with reasonable promptness. The response of the agency to each such petition shall be in writing accompanied by a statement of reasons.

"(f)(1) The agency shall maintain a file for each rule making proceeding conducted pursuant to this section and shall maintain a current index to such file. The file and the material excluded from the file pursuant to paragraph (2) of this subsection shall constitute the rule making record for purposes of judicial review. Except as provided in paragraph (2) of this subsection, the file shall be made available to the public beginning on the date on which the agency makes an initial publication concerning the rule. The file shall include—

"(A)(i) the notice of proposed rule making and any supplement to or modification or revision of such notice; and

"(ii) any advance notice of proposed rule making;

"(B) copies of all written comments received on the proposed rule;

"(C) a transcript of any public hearing conducted in the rule making;

"(D) copies, or an identification of the place at which copies may be obtained, of all material described by the agency pursuant to subsection (b)(1)(F) of this section and of other factual and methodological material not described by the agency pursuant to such subsection that pertains directly to the rule making and that the agency considered in connection with the rule making, or that was prepared by or for the agency in connection with the rule making;

"(E) any statement, description, analysis, or any other material that the agency is required to make public in connection with the rule making, including any preliminary or final regulatory analysis issued by the agency pursuant to chapter 6 of this title;

"(F) copies of all written material pertaining to the rule, including any drafts of the proposed and the final rule, submitted by the agency to the President or his designee directed by the President to review proposed or final rules for their regulatory impact; and

"(G) a written explanation of the specific reasons for any significant changes made by the agency in the drafts of the proposed or final rule which respond to any comment received by the agency on the draft proposed prepared, draft final, or final rule, made by the President or his designee directed by the President to review proposed or final rules for their regulatory impact.

"(2) The agency shall place the materials described in clauses (A) through (F) of the last sentence of paragraph (1) in the file required by such paragraph as soon as practicable after such materials become available to the agency.

"(3) The file required by paragraph (1) of this subsection need not include any material that need not be made available to the public under section 552 of this title if the agency includes in such file a statement that notes the existence of such material and the basis upon which the material is exempt from public disclosure under such section. The agency may not substantially rely on any such material in formulating a rule unless it makes the substance of such material available for adequate comment by interested persons. The agency may use summaries, aggregations of data, or other appropriate mechanisms so as to protect the confidentiality of such material to the maximum extent possible.

"(4) No court shall hold unlawful or set aside an agency rule because of a violation of paragraph (1) of this subsection unless the court finds that such violation has precluded fair public consideration of a material issue of the rule making taken as a whole. Judicial review of compliance or noncompliance with paragraph (1) of this subsection shall be limited to review of action or inaction on the part of an agency.

"(g) For a period of one year after the effective date of a final rule issued pursuant to this section, such rule shall not substantially change the requirements of any contract, cooperative agreement, or grant existing on such effective date between a Federal agency and a State or local government. The preceding sentence does not apply to any case in which the agency for good cause finds that a delay in the effect of the rule would be contrary to an important public interest and publishes such finding and an explanation of the reasons therefor, with the final rule.

"(h) Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings."

REGULATORY ACTIVITIES: ANALYSIS; PRIORITIES AND REVIEW; REPORT

Sec. 4. (a) Chapter 6 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"§ 621. Definitions

"For purposes of this subchapter and subchapters III and IV of this chapter:

"(1) The term 'agency' has the same meaning as in section 551(1) of this title.

"(2) The term 'person' has the same meaning as in section 551(2) of this title.

"(3) The term 'rule' has the same meaning as in section 551(4) of this title, except that such term does not include—

"(A) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers or acquisitions, or accounting practices or disclosures bearing on any of the foregoing.

"(B) a rule relating to monetary policy proposed or promulgated by the Board of Governors of the Federal Reserve System; or

"(C) a rule issued by the Federal Election Commission or a rule issued by the Federal Communications Commission pursuant to sections 315 and 312 (a)(7) of the Communications Act of 1934.

"(4) The term 'major rule' means—

"(A) a rule or a group of closely related rules that the agency, the President, or the officer selected under section 624 of this title reasonably determines is likely to have an annual effect on the economy of \$100,000,000 or more in reasonably quantifiable direct and indirect costs; and

"(B) a rule or a group of closely related rules that is otherwise designated a major rule by the agency proposing the rule, or is so designated by the President, or by the officer selected under section 624 of this title, on the ground that the rule is likely to result in—

"(i) a substantial increase in costs or prices for wage earners, consumers, individual industries, nonprofit organizations, Federal, State, or local government agencies, or geographic regions; or

"(ii) significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets.

For purposes of subparagraph (A) of this paragraph, the term 'rule' does not mean—

"(I) a rule that involves the internal revenue laws of the United States;

"(II) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product, pursuant to sections 408, 409(c), and 706 of the Federal Food, Drug, and Cosmetic Act;

"(III) a rule exempt from notice and public procedure pursuant to section 553(a) of this title; or

"(IV) a rule relating to the viability, stability, asset powers, or categories of accounts of, or permissible interest rate ceilings applicable to, depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Share Insurance Fund of the National Credit Union Administration Board.

"(5) The term 'benefit' means the reasonably identifiable significant benefits and beneficial effects, including social and economic benefits and effects, that are expected to result directly or indirectly from implementation of a rule or an alternative to a rule.

"(6) The term 'cost' means the reasonably identifiable significant costs and adverse effects, including social and economic costs and effects, that are expected to result directly or indirectly from implementation of a rule or an alternative to a rule.

"(7) Regulatory analysis.

"(a) Prior to publishing notice of proposed rule making for any rule, each agency shall determine whether the rule is or is not a major rule within the meaning of section 621(4)(A) of this title and, if it is not, whether it should be designated a major rule under section 621(4)(B) of this title. For the purpose of any such determination or designation, a group of closely related rules shall be considered as one rule. Every notice of proposed rule making shall include a succinct statement and explanation of the agency's determination of whether or not the rule is a major rule within the meaning of section 621(4)(A) of this title and, if ap-

plicable, of its designation as a major rule under section 621(4)(B) of this title.

"(b) The President or the officer selected by the President under section 624 of this title may determine that a rule is a major rule within the meaning of section 621(4)(A) of this title or may designate a rule as a major rule under section 621(4)(B) of this title not later than thirty days after the publication of the notice of proposed rule making for that rule. Such determination or designation shall be published in the Federal Register, together with a succinct statement of the basis for the determination or designation. The President or the officer selected by the President under section 624 of this title may designate not more than seventy-five rules as major rules under section 621(4)(B) of this title in any fiscal year.

"(c)(1) When the agency publishes a notice of proposed rule making for a major rule, the agency shall issue and place in the rule making file maintained under section 553(f) of this title a preliminary regulatory analysis and shall include in such notice of proposed rule making a summary of the analysis. When the President or the officer selected by the President under section 624 of this title has published a determination or designation that a rule is a major rule after the publication of the notice of proposed rule making for that rule, the agency shall promptly issue and place in the rule making file maintained under section 553(f) of this title a preliminary regulatory analysis for the rule and shall publish in the Federal Register a summary of such analysis. Following the issuance of a preliminary regulatory analysis under the preceding sentence, the agency shall give interested persons an opportunity to comment thereon pursuant to section 553 of this title in the same manner as if the preliminary regulatory analysis had been issued with the notice of proposed rule making.

"(2) Each preliminary regulatory analysis shall contain—

"(A) a succinct description of the benefit of the proposed rule, including any beneficial effects that cannot be quantified, and an explanation of how the agency anticipates each benefit will be achieved by the proposed rule, including a description of the persons, classes of persons, or particular levels of Government likely to receive such benefits;

"(B) a succinct description of the costs of the proposed rule, including any costs that cannot be quantified, and an explanation of how the agency anticipates each such cost will result from the proposed rule, including a description of the persons, classes of persons, or particular levels of Government likely to incur such costs;

"(C) a succinct description of reasonable alternatives for achieving the identified benefits of the proposed rule, including alternatives that—

"(i) require no Government action;

"(ii) will accommodate differences between geographic regions; and

"(iii) employ performance or other standards which permit the greatest flexibility in achieving the identified benefits of the proposed rule;

"(D) a statement—

"(i) identifying any source of funds available from the Federal Government to pay State and local governments the costs incurred by such governments as a result of the proposed rule; or

"(ii) specifying that the agency does not know of any such source;

scientific evaluations or scientific information; and

"(F) where it is not expressly or by necessary implication inconsistent with the provisions of the enabling statute pursuant to which the agency is proposing the rule, an explanation of how the identified benefits of the proposed rule are likely to justify the identified costs of the proposed rule, and an explanation of how the proposed rule is likely to substantially achieve the rule making objectives in a more cost-effective manner than the alternatives to the proposed rule.

"(d)(1) When the agency publishes a final major rule, the agency shall also issue and place in the rule making file maintained under section 553(f) of this title a final regulatory analysis, and shall include a summary of the analysis in the statement of basis and purpose required by section 553 (c)(6) of this title. Notwithstanding the preceding sentence, in any case in which an agency, under section 553(b)(2) of this title, is not required to comply with subsections (b) through (f) of section 553 of this title prior to the adoption of a final rule, an agency is not required to comply with the preceding sentence prior to the adoption of the final rule but shall comply with such sentence when complying with section 553(b)(2)(C) of this title.

"(2) Each final regulatory analysis shall contain—

"(A) a description and comparison of the benefits and costs of the rule and of the reasonable alternatives to the rule described in the rule making; and

"(B) where it is not expressly or by necessary implication inconsistent with the provisions of the enabling statute pursuant to which the agency is acting, a reasonable determination, based upon the rule making file considered as a whole, that the benefits of the rule justify the costs of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making.

"(e)(1) An agency shall describe the nature and extent of the nonquantifiable benefits and costs of a proposed and a final rule pursuant to this section in as precise and succinct a manner as possible. The description of the benefits and costs of a proposed and a final rule required under this section shall include a quantification or numerical estimate of the quantifiable benefits and costs. Such quantification or numerical estimate shall be made in the most appropriate unit of measurement and shall specify the ranges of predictions and explain the margins of error involved in the quantification methods and in the estimates used.

"(2) In evaluating and comparing costs and benefits, the agency shall not rely on cost or benefit information submitted by any person that is not accompanied by data, analysis, or other supporting materials that would enable the agency and other persons interested in the rule making to assess the accuracy and reliability of such information. The agency evaluations of the relationships of the benefits of a proposed and final rule to its costs required by this section shall be clearly articulated in accordance with the provisions of this section. An agency is not required to make such evaluation primarily on a mathematical or numerical basis.

"(f) The preparation of the preliminary or final regulatory analysis required by this section shall only be performed by an officer or employee of the agency. The provisions of the preceding sentence do not preclude a person outside the agency from gathering data or information to be used by the agency in preparing any such regulatory

analysis or from providing an explanation sufficient to permit the agency to analyze such data or information. If any such data or information is gathered or explained by a person outside the agency, the agency shall specifically identify in the preliminary or final regulatory analysis the data or information gathered or explained and the person who gathered or explained it, and shall describe the arrangement by which the information was procured by the agency, including the total amount of funds expended for such procurement.

"(g) The requirements of this section do not alter the criteria for rule making otherwise applicable under other statutes.

"§ 623. Judicial review

"(a) Compliance or noncompliance by an agency with the provisions of this subchapter shall not be subject to judicial review except according to the provisions of this section.

"(b) Any determination by the President or by the officer selected under section 624 of this title that a rule is a major rule within the meaning of section 621(4)(A) of this title, and any designation by the President or the officer selected under section 624 of this title that a rule is a major rule under section 621(4)(B) of this title, or any failure to make such a designation, shall not be subject to judicial review in any manner.

"(c) The determination of an agency of whether a rule is or is not a major rule within the meaning of section 621(4)(A) of this title shall be set aside by a reviewing court only upon a clear and convincing showing that the determination is erroneous in light of the information available to the agency at the time it made the determination. Any designation by an agency that a rule is a major rule under section 621(4)(B) of this title, or any failure to make such a designation, shall not be subject to judicial review in any manner.

"(d) Any regulatory analysis prepared under section 622 of this title shall not be subject to judicial consideration separate or apart from review of the rule to which it relates. When an action for judicial review of a rule is instituted, any regulatory analysis for such rule shall constitute part of the whole rule making record of agency action for the purpose of judicial review of the rule and shall, to the extent relevant, be considered by a court in determining the legality of the rule.

"§ 624. Executive oversight

"(a) The President shall have the authority to establish procedures for agency compliance with this subchapter and subchapter III of this chapter. The President shall have the authority to monitor, review, and ensure agency implementation of such procedures. The President shall report annually to the Congress on agency compliance or noncompliance with the requirements of this chapter.

"(b) Any procedures established pursuant to the authority granted under subsection (a) of this section shall be adopted after the public has been afforded an opportunity to comment thereon, and shall be consistent with the prompt completion of rule making proceedings. If such procedures include review of preliminary or final regulatory analyses to ensure that they comply with the procedures established pursuant to subsection (a), the time for any such review of a preliminary regulatory analysis shall not exceed thirty days following the receipt of that analysis by the President or by an officer to whom the authority granted under subsection (a) of this section has been delegated pursuant to subsection (c) of this section, and the time for such review of a final regulatory analysis shall not exceed thirty

days following the receipt of that analysis by the President or such officer. The times for each such review may be extended for good cause by the President or such officer for an additional thirty days. Notice of any such extension, together with a succinct statement of the reasons therefore, shall be inserted in the rule making file.

"(c) The President may delegate the authority granted by subsection (a) of this section, in whole or in part, to the Vice President or to an officer within the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate. Any such notice with respect to a delegation to the Vice President shall contain a statement by the Vice President that the Vice President will make every reasonable effort to respond to Congressional inquiries concerning the exercise of the authority delegated under this subsection. Notice of any such delegation, or any revocation or modification thereof, shall be published in the Federal Register.

"(d) The authority granted under subsection (a) of this section shall not apply to rules issued by the Nuclear Regulatory Commission.

"(e) Any exercise of the authority granted under this section, or any failure to exercise such authority, by the President or by an officer to whom such authority has been delegated under subsection (c) of this section, shall not be subject to judicial review in any manner under this Act.

"SUBCHAPTER III—REGULATORY PRIORITIES AND REVIEW

"§ 631. Review of agency rules

"(a)(1)(A) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register a proposed schedule for the review, in accordance with this section, of—

"(i) each rule of the agency which is in effect on such effective date and which, if adopted on such effective date, would be a major rule under section 621(4)(A) of this title, and

"(ii) each rule of the agency in effect on such effective date (in addition to the rules described in clause (i)) which the agency has selected for review.

"(B) Each proposed schedule required by subparagraph (A) shall include—

"(i) a brief explanation of the reasons the agency considers each rule on the schedule to be such a major rule under section 621(4)(A) of this title or of the reasons why the agency selected the rule for review;

"(ii) a date set by the agency, in accordance with the provisions of subsection (b)(1) of this section, for the completion of the review of each such rule; and

"(iii) a statement that the agency requests comments from the public on the proposed schedule.

"(C) The agency shall set a date to initiate review of each rule on the schedule in a manner which will ensure the simultaneous review of related items and which will achieve a reasonable distribution of reviews over the period of time covered by the schedule.

"(2) At least ninety days before publishing in the Federal Register the proposed schedule required under paragraph (1), each agency shall make the proposed schedule available to the President, or to the Vice President or other officer to whom oversight authority has been delegated under section 624(b) of this title. The President or that officer may select for review in accordance with this section any additional rule that the President or such officer determines to be a major rule under section 621(4)(A) of this title.

"(3) Not later than one year after the effective date of this section, each agency shall publish in the Federal Register a final schedule for the review of the rules referred to in paragraphs (1) and (2) of this subsection. Each agency shall publish with the final schedule the response of the agency to comments received concerning the proposed schedule.

"(b)(1) Except where explicitly provided otherwise by statute, the agency shall, pursuant to subsections (c) through (e) of this section, review:

"(A) each rule on the schedule promulgated pursuant to subsection (a) of this section;

"(B) each major rule under section 621(4) of this title promulgated, amended, or otherwise renewed by an agency after the date of the enactment of this section; and

"(C) each rule promulgated after the date of enactment of this section which the President or the officer designated by the President pursuant to subsection (a)(2) of this section determines to be a major rule under section 621(4)(A) of this title.

Except where an extension has been granted pursuant to subsection (f) of this section, the review of a rule required by this section shall be completed within ten years after the effective date of this section or within ten years after the date on which the rule is promulgated, amended, or renewed, whichever is later.

"(2) A rule required to be reviewed under the preceding subsection on grounds that it is major need not be reviewed if the agency determines that such rule, if adopted at the time of the planned review, would not be major under the definition previously applied to it. When the agency makes such a determination, it shall publish a notice and explanation of the determination in the Federal Register.

"(c) An agency shall publish in the Federal Register a notice of its proposed action under this section with respect to a rule being reviewed. The notice shall include—

"(1) an identification of the specific statutory authority under which the rule was promulgated and a statement specifying the agency's determination of whether the rule continues to fulfill the intent of Congress in enacting that authority;

"(2) an assessment of the benefits and costs of the rule during the period in which it has been in effect;

"(3) an explanation of the proposed agency action with respect to the rule; and

"(4) a statement that the agency seeks proposals from the public for modifications or alternatives to the rule which may accomplish the objectives of the rule in a more effective or less burdensome manner.

"(d) If an agency proposes to repeal or amend a rule under review pursuant to this section, the agency shall, after issuing the notice required by subsection (c) of this section, comply with the provisions of this chapter and chapter 5 of this title or other applicable law. The requirements of such provisions and related requirements of law shall apply to the same extent and in the same manner as in the case of a proposed agency action to repeal or amend a rule which is not taken pursuant to the review required by this section.

"(e) If an agency proposed to renew without amendment a rule under review pursuant to this section, the agency shall—

"(1) give interested persons not less than sixty days after the publication of the notice required by subsection (c) of this section to comment on the proposed renewal; and

"(2) publish in the Federal Register notice of the renewal of such rule and an explanation of the continued need for the rule, and

if the renewed rule is a major rule under section 621(4) of this title, include with such notice an explanation of the reasonable determination of the agency that the rule complies with the provisions of section 622(d)(2)(B) of this title.

"(f)(1) Any agency, which for good cause finds compliance with this section with respect to a particular rule to be impracticable during the period provided in subsection (b) of this section, may request the President, or the officer designated by the President pursuant to subsection (a)(2) of this section, to establish a period longer than ten years for the completion of the review of such rule. The President or that officer may extend the period for review of a rule to a total period of not more than fifteen years. Such extension shall be published in the Federal Register with an explanation of the reasons therefor.

"(2) An agency may, with the concurrence of the President or the officer designated by the President pursuant to subsection (a)(2) of this section, or shall, at the direction of the President or that officer, alter the timing of review of rules under any schedule required by this section for the review of rules if an explanation of such alteration is published in the Federal Register at the time such alteration is made.

"(g) In any case in which an agency has not completed the review of a rule within the period prescribed by subsection (b) or (f) of this section, the agency shall immediately publish in the Federal Register a notice proposing to amend, repeal, or renew the rule under subsection (c) of this section, and shall complete proceedings pursuant to subsection (d) or (e) of this section within one hundred and eighty days of the date on which the review was required to be completed under subsection (b) or (f) of this section.

"(h)(1) Agency compliance or noncompliance with the provisions of subsection (a) of this section shall not be subject to judicial review in any manner.

"(2) Agency compliance or noncompliance with the provisions of subsections (b), (c), (e), (f), and (g) of this section shall be subject to judicial review only pursuant to section 706(a)(1) of this title.

"(i) Nothing in this section shall relieve any agency from its obligation to respond to a petition to issue, amend, or repeal a rule, for an interpretation regarding the meaning of a rule, or for a variance or exemption from the terms of a rule, submitted pursuant to section 553(e) of this title.

"§ 632. Regulatory agenda and calendar

"(a) Each agency shall publish in the Federal Register in April and October of each year an agenda of the rules that the agency expects to propose, promulgate, renew, or repeal in the preceding twelve months. For each rule on the agenda shall contain, at a minimum, certain information in any other information required by law.

"(1) a general description of the rule, including a citation to the authority under which the agency is acting with respect to the rule is to be promulgated, and an explanation of the agency's interest in the rule; the objectives of the rule; and

"(2) a statement of whether or not the rule is or is expected to be a major rule, together with an approximate schedule of the significant dates on which the agency will take action on the rule, including the date of the notice of proposed rulemaking, hearing, and final action on the rule.

"(3) the name, address, and telephone number of an agency official responsible for answering questions from the public concerning the rule;

"(5) a statement specifying whether each rule listed on the previous agenda has been published as a proposed rule, has been published as a final rule, has become effective, has been repealed, or is pending in some other status; and

"(6) a cumulative summary of the status of the rules listed on the previous agenda in accordance with clause (5) of this subsection.

"(b) The President or an officer in the Executive Office of the President whose appointment has been subject to the advice and consent of the Senate shall publish in the Federal Register in May and November of each year a Calendar of Federal Regulations listing each of the major rules identified in the regulatory agendas published by agencies in the preceding month. Each rule listed in the calendar shall be accompanied by a summary of the information relating to the rule that appeared in the most recent regulatory agenda in which the rule was identified.

"(c) An agency may propose or promulgate a major rule that was not listed in the regulatory agenda required by subsection (a) of this section only if the agency publishes with the rule an explanation of the omission of the rule from such agenda and otherwise complies with this section with respect to that rule.

"(d) Any compliance or noncompliance by the agency with the provisions of this section shall not be subject to judicial review.

"§ 633. Establishment of deadlines

"(a)(1) Whenever any agency publishes a notice of proposed rulemaking pursuant to section 553 of this title, the agency shall include in such notice an announcement of the date by which it intends to complete final agency action on the rule.

"(2) If any agency announcement under this section indicates that the proceeding relating to such rule will require more than one year to complete, the agency shall also indicate in the announcement the date by which the agency intends to complete each major portion of that proceeding. In carrying out the requirements of this subsection, the agency shall select dates for completing agency action which will assure the most expeditious consideration of the rule which is possible, consistent with the interests of fairness and other agency priorities.

"(3) The requirements of this subsection shall not apply to any rule on which the agency intends to complete action within one hundred and twenty days after providing notice of the proposed action.

"(b) If an agency fails to complete action in a proceeding, or a major portion of the proceeding, by the date announced pursuant to subsection (a) of this section, or, in the case of a proceeding described in paragraph (3) of such subsection, if an agency fails to complete action within one hundred and twenty days after providing notice of such proposed action, and the expected delay in completing action will exceed thirty days, the agency shall promptly announce the new date by which the agency intends to complete action in such proceeding and new dates by which the agency intends to complete action on each major portion of the proceeding.

"(c) Compliance or noncompliance by an agency with the provisions of this section shall not be subject to judicial review except in accordance with subsection (d).

"(d) In determining whether to compel agency action unreasonably delayed pursuant to section 706(a)(1) of this title, the reviewing court shall consider, in addition to any other relevant factors, the extent to which the agency has failed to comply with this section.

SUBCHAPTER IV—REPORT TO THE CONGRESS

"§ 641. Annual report

"Not later than January 31 of each year, the President shall report to the Congress on the regulatory activities of the Government. The report shall include—

"(1) a description of the regulatory functions and activities of the Government, and the relationship of such functions and activities to national needs; and

"(2) an estimate, for the national economy and for each of the major sectors of the national economy, of the costs and benefits resulting from—

"(A) all major rules promulgated during the preceding fiscal year;

"(B) all major rules included on the regulatory agenda published under section 632 of this title during April and October of the year preceding the year in which the report is made; and

"(C) all major rules scheduled for review under section 631 of this title to the extent possible."

"(b) Such chapter is further amended—
(1) by inserting after the chapter analysis the following new subchapter heading:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

"(2) by striking out "this chapter" each place it appears in subchapter I and inserting in lieu thereof in each such place "this subchapter";

"(c) The chapter analysis of such chapter is amended—

"(1) by inserting after the chapter heading the following new subchapter heading:

"SUBCHAPTER I—REGULATORY FLEXIBILITY";

and

"(2) by adding at the end thereof the following:

"SUBCHAPTER II—ANALYSIS OF AGENCY PROPOSALS

"Sec.

"621. Definitions.

"622. Regulatory analysis.

"623. Judicial review.

"624. Executive oversight.

"SUBCHAPTER III—REGULATORY PRIORITIES AND REVIEW

"631. Review of agency rules.

"632. Regulatory agenda and calendar.

"633. Establishment of deadlines.

"SUBCHAPTER IV—REPORT TO THE CONGRESS

"641. Annual report."

Sec. 5. Section 706 of title 5, United States Code, is amended to read as follows:

"§ 706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

"(d) In making a finding under subsection (a)(2)(A) of this section, the court shall determine whether the factual basis of a rule adopted in a proceeding subject to section 553 of this title is without substantial support in the rule making file."

VENUE

SEC. 6. (a) Section 2112 of title 28, United States Code, is amended—

(1) by striking out the last three sentences of subsection (a);

(2) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(3) by inserting the following new subsection:

"(b)(1) If proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the first such proceeding was instituted more than five days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than five days before the institution of a later proceeding with respect to the same agency action, and the agency, board, commission, or officer concerned has received written notice from the parties instituting each of these proceedings, the agency, board, commission, or officer concerned shall promptly advise in writing the Administrative Office of the United States Courts, with respect to the first proceeding and all proceedings instituted within five days of the first proceeding, that such multiple proceedings have been instituted and shall identify each court for which is has notice that such proceedings are pending. Pursuant to a system of random selection devised for this purpose, the Administrative Office shall select the court in which the record shall be filed from among those identified by the agency. Upon notification of such selection, the agency, board, commission, or officer concerned shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded to the agency, board, commission, or officer concerned, the record shall be filed in the court of appeals which remanded such order.

"(2) Where proceedings have been instituted in two or more court of appeals with respect to the same agency action and the record has been filed in one of such courts

pursuant to paragraph (1), to the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending selection of a court pursuant to subsection (1), any court in which a proceeding has been instituted may postpone the effective date of the agency action until fifteen days after the Administrative Office has selected the court in which the record shall be filed. Such postponement by the court may thereafter be modified, revoked, or extended by the court in which the record is to be filed.

"(3) Any court in which a proceeding with respect to any agency action is pending, including any court selected pursuant to paragraph (1), may transfer such proceeding to any other court of appeals for the convenience of the parties or otherwise in the interest of justice."

(b) Section 604(a) of title 28, United States Code, is amended—

(1) by redesignating paragraphs (17) and (18) as paragraphs (18) and (19), respectively, and

(2) by inserting after paragraph (16) the following new paragraph:

"(17) Pursuant to section 2112 of this title, where proceedings with respect to action of any agency, board, commission, or officer have been instituted in two or more courts of appeals, administer a system of random selection to determine the appropriate court in which the record is to be filed."

ADVISORY COMMITTEE

SEC. 7. Clause (iii) of section 3(2)(C) of the Federal Advisory Committee Act is amended to read as follows: "(iii) any committee which is composed wholly of full-time officers or employees of the Federal Government, or elected officials of State or local governments acting in their official capacities or their representatives or representatives of their national organizations."

RESOLUTION OF AGENCY JURISDICTIONAL CONFLICT

SEC. 8. (a) Section 2201 of title 28, of the United States Code is amended by inserting "(a)" before "In" and by adding at the end thereof the following new subsections:

"(b)(1) Except as provided in paragraph (3), upon the filing of an appropriate pleading by a regulatory agency or a public utility, the district courts shall have original jurisdiction of any civil action or proceeding to resolve a controversy between two or more regulatory agencies, with respect to jurisdiction to regulate any of the rates, services, or records relating thereto, of a public utility unless all of such agencies are agencies of the same State.

"(2) If any party shall apply to the court before whom the pleading is filed for leave to adduce additional evidence relevant to a finding of jurisdiction, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such additional evidence in proceedings before one or more of the regulatory agency parties to the action brought hereunder, the court may order such additional evidence to be taken before any of such regulatory agencies and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper.

"(3) If the courts of appeals have exclusive original jurisdiction to review agency action of a regulatory agency, then an action or proceeding under this subsection with respect to a controversy to which such regulatory agency is a party shall be brought in such court of appeals rather than in the district court.

"(c) The court may declare the rights and other legal relations of the parties to an

action or proceeding brought under subsection (b) to the extent necessary to resolve the controversy with respect to jurisdiction and may take any action necessary to maintain the status quo pending such declaration, or pending appeal of such declaration, including staying any civil action or proceeding that might be affected by such declaration. Such action or declaration shall not be withheld—

"(1) on the ground that a controversy with respect to matters other than jurisdiction to regulate may exist between or among the parties.

"(2) due to failure to pursue or exhaust any administrative remedies, or

"(3) due to inconsistent provisions of other statutes providing for judicial review of such agency action, including the regulatory statutes under which the controversy has arisen.

Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

"(d) For purposes of this subsection—

"(1) the term 'State' includes the District of Columbia and any territory or possession of the United States;

"(2) the term 'public utility' is any entity which offers its services to the public or any segment thereof, and whose rates are subject to regulation on a cost of service or rate of return basis by one or more regulatory agencies;

"(3) the term 'regulatory agency' includes any agency having or exercising any regulatory function with respect to any public utility; and

"(4) the term 'agency' means the United States, a State or political subdivision of a State, or any agency or instrumentality of the United States or any such State subdivision or agency."

(b)(1) Chapter 151 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2203. Process and procedure

"In any civil action or proceeding under section 2201(b) of this title, (1) the United States or any agency of the United States may join or be joined as a party, (2) any State or State subdivision or agency thereof may join or, with its consent where necessary, be joined as a party, and a district court may issue its process for such purposes without regard to territorial limitations."

(2) The table of sections for chapter 151 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"§ 2203. Process and procedure."

(c)(1) Chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1409. Public utility jurisdictional controversies

"Any civil action or proceeding for a declaratory judgment under section 2201(b) of this title may be brought in any judicial district in which the public utility resides or has its principal office, or in the United States District Court for the District of Columbia, except that whenever one or more States or subdivisions thereof or the agencies of a State or a subdivision thereof are parties, the civil action or proceeding must be brought in a judicial district within one of such States."

(2) The table of sections for chapter 87 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1409. Public utility jurisdictional controversies."

PROHIBITION AGAINST INTERVENOR FUNDING

Sec. 9. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§560. Prohibition against intervenor funding

"Except as provided in section 504 of this title, section 2412 of title 28, section 319 of the Federal Power Act, section 18(h) of the Federal Trade Commission Act, section 7(c) of the Consumer Product Safety Act, section 22 of the Act entitled 'An Act to provide certain basic authority for the Department of State', approved August 1, 1956, and paragraphs (4) and (5) of section 6(c) of the Toxic Substances Control Act, and except as otherwise expressly authorized by statute, no appropriated funds available to any agency may be used to pay the expenses of persons participating or intervening in agency proceedings."

(b) The table of sections for such chapter is amended by adding at the end thereof the following:

"560. Prohibition against intervenor funding."

USE OF STATE AND LOCAL REQUIREMENTS

Sec. 10. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§560. Use of duplicative State or local requirements

"(a) Except as otherwise provided by law, the head of each Federal agency is authorized, in the administration of a Federal statute with respect to any State or locality, to adopt as a Federal rule a regulation of that State or local government or use as a Federal recordkeeping or reporting requirement or implementation procedure a recordkeeping or reporting requirement or implementation procedure of that State or locality if the head of the agency determines—

"(1) that such State or local government regulation, implementation procedure, recordkeeping requirement, or reporting requirement duplicates a Federal regulation, procedure, recordkeeping requirement, or reporting requirement; and

"(2) that such State or local government regulation, implementation procedure, recordkeeping requirement, or reporting requirement is substantively equivalent to or more stringent than the Federal regulation, procedure, recordkeeping requirement, or reporting requirement.

"(b) When the head of an agency determines to use a State or local recordkeeping or reporting requirement, or implementation procedure, as a Federal recordkeeping or reporting requirement or implementation procedure in that State or locality, the head of the agency shall prepare at a minimum, a written statement of the reasons for any determination made under subsection (a), and shall make such statement available to the public."

"(c) This section does not limit the authority or responsibility of the head of any agency to enforce Federal law."

"(d) Section 551 of title 5, United States Code, is amended by inserting the following between "rule" and the semicolon: ", or the adoption of a rule pursuant to section 560 of this title."

"(e) The table of sections for chapter 5 of such title is amended by inserting after the item relating to section 559 the following new item:

"560. Use of duplicative State or local requirements."

PRESIDENTIAL AUTHORITY

Sec. 11. Nothing in this Act (1) limits the exercise by the President of the authority and responsibility that he otherwise possesses under the Constitution and other laws of the United States with respect to regulatory policies, procedures, and programs of departments, agencies, and offices, or (2) alters in any manner rulemaking authority vested by law in an agency to initiate or complete a rulemaking proceeding, or to issue, modify, or rescind a rule.

CONFORMING AMENDMENTS

Sec. 12. (a) Section 33(c) of the Federal Energy Administration Act of 1974 (U.S.C. 789(c)) is amended by striking out "(without regard to subsection (a)(2) thereof)" and inserting in lieu thereof "(without regard to clauses (2) and (4) of subsection (a) of such section)".

(b)(1) Section 3(e)(1) of the Federal Hazardous Substances Labeling Act (15 U.S.C. 1262(e)(1)) is amended by striking out "(other than clause (B) of the last sentence of subsection (b) of such section)" and inserting in lieu thereof "(other than paragraphs (2)(A) and (3) of subsection (b) of such section)".

(2) Section 3(e)(3)(C) of such Act (15 U.S.C. 1262(e)(3)(C)) is amended by inserting "(a)" after "section 706."

(c)(1) Section 5(a) of the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1474(a)) is amended by striking out "(other than paragraph (3)(B) of the last sentence of subsection (b) of such section)" and inserting in lieu thereof "(other than paragraphs (2)(A) and (3) of subsection (b) of such section)".

(2) Section 5(b)(3) of such Act (15 U.S.C. 1474(b)(3)) is amended by inserting "(a)" after "section 706."

(d) Section 19(c)(1)(B)(iii)(II) of the Toxic Substances Control Act (15 U.S.C. 2618(c)(1)(B)(iii)(II)) is amended by striking out "section 553(c)" and inserting in lieu thereof "section 553(e)(6)".

(e) Section 4218(b) of title 18, United States Code, is amended—

(1) by striking out "section 553(b)(3)(A)" and inserting in lieu thereof "section 553(a)(3)"; and

(2) by striking out "statements" and inserting in lieu thereof "statement".

(f) Section 409 of the General Education Provisions Act (20 U.S.C. 1221e-4) is amended by striking out "exception provided under section 553(b)" and inserting in lieu thereof "exceptions provided under subsection (a)(3) and paragraphs (2)(A) and (3) of subsection (b) of section 553".

(g)(1) Section 508 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 358) is amended—

(A) by striking out "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)" in subsection (c) and inserting in lieu thereof "section 553"; and

(B) by striking out "section 4 of the Administrative Procedure Act (5 U.S.C. 1003)" in subsection (e) and inserting in lieu thereof "section 553".

(2) Section 514(e)(4) of such Act (21 U.S.C. 360d(e)(4)) is amended by striking out "subsection (b)(A)" and inserting in lieu thereof "subsection (a)(3)".

(h) Section 426(a) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 936(a)) is amended by striking out "subsection (a) thereof" and inserting in lieu thereof "subsection (a)(1), (2), and (4) of such section".

(i) Section 5(a) of the Deepwater Port Act of 1974 (33 U.S.C. 1504(a)) is amended by striking out "without regard to subsection

(a) thereof" and inserting in lieu thereof "without regard to clauses (1), (2), and (4) of subsection (a) of such section".

(j) Section 10(a) of the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 43a(a)) is amended by striking out "section 4 of the Administrative Procedure Act, such Act" and inserting in lieu thereof "section 553 of title 5, United States Code, the provisions of chapters 5, 6, and 7 of such title".

(k) Section 2(a)(2) of the Act of June 25, 1936 (52 Stat. 1196; 41 U.S.C. 47(a)(2)) is amended by striking out "subsections (b), (c), (d), and (e) of section 553 of title 5, United States Code," and inserting in lieu thereof "section 553 of title 5, United States Code (without regard to clauses (1), (2), and (4) of subsection (a) of such section)".

(l) Section 170A(c) of the Atomic Energy Act of 1954 (42 U.S.C. 2210a(c)) is amended by striking out "(without regard to subsection (a)(2) thereof)" and inserting in lieu thereof "(without regard to clauses (2) and (4) of subsection (a) of such section)".

(m) Section 6(c)(2) of the Noise Control Act of 1972 (42 U.S.C. 4905(c)(2)) is amended by striking out "the first sentence of".

(n) Section 501(b)(3) of the Department of Energy Organization Act (42 U.S.C. 7191(b)(3)) is amended by striking out "subsection (a)(2) of such section with respect to public property, loans, grants, or contracts" and inserting in lieu thereof "section (a)(4) of such section".

(o) Section 307(d) of the Clean Air Act (42 U.S.C. 7607(d)) is amended by striking out "subparagraphs (A) or (B) of subsection 553(b)" in paragraph (1)(N) and inserting in lieu thereof "subsection (a)(3) and paragraphs (2)(A) and (3) of subsection (b) of section 553".

(p) Section 102(a) of the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9112(a)) is amended by striking out "without regard to subsection (a) thereof" and inserting in lieu thereof "without regard to clauses (1), (2), and (4) of subsection (a) of such section".

(q) Section 310 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1740) is amended by striking out "section 553(a)(2)" and inserting in lieu thereof "clauses (2) and (4) of section 553(a)".

CONGRESSIONAL REVIEW

Sec. 13. (a) Title 5, United States Code, is amended by inserting immediately after chapter 7 the following new chapter:

"CHAPTER B—CONGRESSIONAL REVIEW OF AGENCY RULE MAKING

"Sec.

"801. Definitions.

"802. Congressional review of agency rules.

"803. Procedures for consideration of resolutions of disapproval.

"§ 801. Definitions

"For purposes of this chapter—

"(1) the term 'agency' has the same meaning as in section 551(1) of this title;

"(2) the term 'rule' means any rule which is subject to section 553 of this title;

"(3) the term 'resolution of disapproval' means a concurrent resolution of the Congress, the matter after the resolving clause of which is as follows: 'That the Congress disapproves the recommended final rule issued by dealing with the matter of which rule was transmitted to the Congress on _____, the first blank being filled with the name of the agency issuing the rule, the second blank being filled with the title of the rule and such further description as may be necessary to identify it, and the third blank being filled with the date of transmittal of the rule to the Congress; and

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"(4) the term 'appropriate committee' means the committee of the House of Representatives and the committee of the Senate which has primary legislative jurisdiction over the statute pursuant to which an agency issues a rule.

"§ 802. Congressional review of agency rules

"(a)(1) The provisions of this section do not apply to—

"(A) any rule for which an agency makes a finding under section 553(b)(3) of this title;

"(B) any rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; and

"(C) any rule if—

"(i) the agency made a finding with respect to such rule under section 553(b)(2) of this title; or

"(ii) the head of the agency determines that the rule is being issued in response to an emergency situation or other exceptional circumstances requiring immediate agency action in the public interest; and

"(iii) on the date on which the agency issues the rule, the head of the agency submits to the chairman and ranking minority member of the appropriate committee a written notice specifying the reasons for the determination of the agency under clause (i) or (ii) of this subparagraph.

"(3) Notwithstanding any other provision of law, unless earlier withdrawn by the agency or earlier set aside by judicial action, a rule to which paragraph (1)(C) of this subsection applies shall terminate 120 days after the date on which it is issued.

"(b)(1) Notwithstanding any other provision of law, any final rule subject to this section shall be considered a recommendation of the agency to the Congress and shall have no force and effect as a rule unless such rule has become effective in accordance with this section.

"(2)(A) Notwithstanding any other provision of law, no recommended final rule of an agency may become effective until the expiration of a period of forty-five days of continuous session of Congress after the date on which the rule is received by the Congress under paragraph (4) of this subsection. If before the expiration of such forty-five-day period, either appropriate committee orders reported or is discharged from consideration of a resolution of disapproval with respect to such rule, such rule may not become effective if within thirty days of continuous session of Congress after the date on which such committee orders reported or is discharged from further consideration of such resolution, one House of Congress agrees to such resolution of disapproval of the rule and within thirty additional days of continuous session of Congress after the date of transmittal of the resolution of disapproval to the other House, such other House agrees to such resolution of disapproval.

"(B) Whenever an appropriate committee reports a resolution of disapproval pursuant to this paragraph, the resolution shall be accompanied by a committee report specifying the reasons for the committee's action.

"(C) Notwithstanding subparagraph (A) of this paragraph, a recommended final rule may become effective at any time after the day on which either House of Congress defeats a resolution of disapproval, and, in the case of the Senate, a motion to reconsider such resolution is disposed of.

"(3)(A) Except as provided in subparagraph (B) of this paragraph, if Congress adjourns sine die at the end of a Congress

prior to the expiration of the periods specified in paragraph (2)(A) of this subsection with respect to a recommended final rule, the rule shall not become effective during that Congress. The agency which issued such recommended final rule may transmit such rule at any time after the first day of the following Congress in accordance with paragraph (4) of this subsection, and the periods specified in paragraph (2)(A) of this subsection with respect to any such rule shall begin on the date such rule is transmitted to the Congress.

"(B) If—

"(i) Congress adjourns sine die at the end of a Congress prior to the expiration of the periods specified in paragraph (2)(A) of this subsection with respect to a recommended final rule;

"(ii) an agency transmits such recommended final rule to the Congress at least forty-five days of continuous session of Congress prior to the day on which Congress adjourns sine die at the end of a Congress; and

"(iii) either House of Congress does not adopt a resolution of disapproval with respect to such recommended final rule prior to the day on which Congress adjourns sine die at the end of a Congress such rule may become effective at any time after the day on which Congress adjourns sine die at the end of a Congress.

"(4)(A) On the day on which a recommended final rule is transmitted for publication to the Federal Register, an agency shall transmit to the Secretary of the Senate and the Clerk of the House of Representatives a copy of the complete text of such recommended final rule and a copy of any other materials transmitted to the Federal Register with such rule.

"(E)(1) If either House of Congress is not in session on the day on which a recommended final rule is transmitted for publication to the Federal Register, the periods specified in paragraph (2)(A) of this subsection with respect to such rule shall begin on the first day thereafter when both Houses of Congress are in session.

"(ii) The Secretary of the Senate and the Clerk of the House of Representatives are authorized to receive recommended final rules and materials transmitted under this paragraph on days when the Senate or the House of Representatives, as the case may be, is not in session.

"(C) On the day on which the Secretary of the Senate and the Clerk of the House of Representatives receive a recommended final rule and the materials transmitted with such rule, the Secretary and the Clerk shall transmit a copy of such rule and such materials to the appropriate committees.

"(c)(1) If a recommended final rule of an agency is disapproved under this section, the agency may issue a recommended final rule which relates to the same acts or practices as the disapproved rules. Such recommended final rule—

"(A) shall be based upon—

"(i) the rule making record of the recommended final rule disapproved by the Congress; or

"(ii) such rule making record and the record established in supplemental rule making proceedings conducted by the agency in accordance with section 553 of this title, in any case in which the agency determines that it is necessary to supplement the existing rule making record; and

"(B) may reflect such changes as the agency considers necessary or appropriate including such changes as may be appropriate in light of congressional debate and consideration of the resolution of disapproval with respect to the rule.

"(2) An agency, after issuing a recommended final rule under this subsection,

shall transmit such rule to the Secretary of the Senate and the Clerk of the House of Representatives in accordance with subsection (b) of this section, and such rule shall only become effective in accordance with such subsection.

"(d) Congressional inaction on or rejection of a resolution of disapproval with respect to a recommended final rule shall not be deemed an expression of approval of such rule.

"§ 803. Procedures for consideration of resolutions of disapproval

"(a) The provisions of this section, paragraphs (3) and (4) of section 801, and paragraphs (2)(B) and (4)(C) of section 802(b) are enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions of disapproval; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(b) Except as provided in subsection (e) of this section, resolutions of disapproval shall, upon introduction or receipt from the other House of Congress, be immediately referred by the presiding officer of the Senate or the House or Representatives to the appropriate committee of the Senate or the House of Representatives, as the case may be.

"(c)(1)(A) Except as provided in subparagraph (B) of this paragraph, if the committee to which a resolution of disapproval has been referred does not report such resolution within thirty days of continuous session of Congress after the date of transmittal to the Congress of the recommended final rule to which such resolution relates, it shall be in order to move to discharge the committee from further consideration of such resolution.

"(B) If the committee to which a resolution of disapproval transmitted from the other House has been referred does not report such resolution within twenty days after the date of transmittal of such resolution from the other House, it shall be in order to move to discharge such committee from further consideration of such resolution.

"(2) Any motion to discharge under paragraph (1) of this subsection must be supported in writing by one-fifth of the Members, duly chosen and sworn, of the House of Congress involved, and is highly privileged in the House and privileged in the Senate (except that it may not be made after a resolution of disapproval has been reported with respect to the same rule); and debate thereon shall be limited to not more than one hour, the time to be divided in the House of Representatives equally between those favoring and those opposing the motion to discharge and to be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. An amendment to the motion is not in order.

"(d)(1) Except as provided in paragraphs (2) and (3) of this subsection, consideration of a resolution of disapproval shall be in accord with the rules of the Senate and of the House of Representatives, respectively.

"(2) When a committee has reported or has been discharged from further consideration of a resolution of disapproval, or when the companion resolution from the other House has been placed on the Calendar of the first House, it shall be in order, notwithstanding the provisions of rule XXII of the Standing Rules of the Senate or any other rule of the Senate or the House of Representatives, at any time thereafter (even though a previous motion to the same effect has been disagreed to) to move to proceed to the immediate consideration of either such resolution. The motion is highly privileged in the House and privileged in the Senate and is not debatable. An amendment to the motion is not in order.

"(3) Debate on a resolution of disapproval shall be limited to not more than two hours (except that when one House has debated its resolution of disapproval, the companion resolution shall not be debatable), which shall be divided in the House of Representatives equally between those favoring and those opposing the resolution and which shall be divided in the Senate equally between, and controlled, by the majority leader and the minority leader or their designees. A motion further to limit debate is not in order. An amendment to, or motion to recommit the resolution is not in order. A motion to reconsider shall be in order only on the day on which occurs the vote on adoption of the resolution of disapproval, and shall not be debatable. Any other motions shall be decided without debate.

"(e) If a resolution of disapproval has been ordered reported or discharged from the committee of the House to which it was referred, and that House receives a resolution of disapproval with respect to the same rule from the other House, the resolution of disapproval of the other House shall be placed on the appropriate calendar of the first House. If prior to the disposition of a resolution of disapproval of one House, that House receives the companion resolution of disapproval from the other House, the vote in the first House shall occur on the resolution of disapproval of the other House.

"(f) The provisions of this chapter supercede any other provision of law requiring action by both Houses of Congress for Congressional review or disapproval of agency rules to the extent such other provisions are inconsistent with this chapter. The provisions of this chapter do not supercede any other provisions of law requiring action by only one House of Congress for Congressional review or disapproval of agency rules.

"(g) For the purposes of this chapter—

"(1) continuity of session is broken only by an adjournment sine die at the end of a Congress; and

"(2) the days on which either House is not in session because of an adjournment or recess of more than fifteen days are excluded in the computation of days of continuous session."

"(b) The table of chapters for part I of title 5, United States Code, is amended by inserting immediately after the item relating to chapter 7 the following:

"8. Congressional Review of Agency Rule Making 801"

"(c) This section and the amendments made by this section shall take effect on the first day of the Ninety-eighth Congress.

SEVERABILITY

Sec. 14. If the provisions of any part of this Act or the amendments made by this Act, or the application thereof, to any person or circumstances is held invalid, the provisions of the other parts of this Act or the amendments made by this Act and their application to other persons or circumstances shall not be affected.

OPEN MEETINGS

Sec. 15. Section 552b(a)(1) of title 5, United States Code, is amended by inserting before the semicolon a comma and "and also means the Chrysler Corporation Loan Guarantee "Board".

EFFECTIVE DATE

Sec. 16. (a)(1) Sections 2, 3, 5, and 12 of this Act, and the provision of section 4 of this Act adding a new subchapter II of chapter 6 of title 5, United States Code, shall take effect on January 1, 1983, and shall not apply to any proceeding for which a notice of proposed rulemaking was issued before such effective date or to any other agency action initiated before such effective date.

"(2) The provisions of section 621(4)(IV) of title 5, United States Code, shall not be in effect after June 30, 1985, unless the President certifies that the extension or reinstitution of those provisions is necessary to allow the Federal agencies authorized to issue rules identified in that section to take expeditious and appropriate action to preserve the viability, safety, or soundness of federally insured depository institutions. Any certification by the President under this subsection may only be made for a single one-year period beginning after June 30, 1985.

"(b) The provisions of section 4 of this Act adding a new subchapter III to chapter 6 of title 5, United States Code, shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

"(c) Section 6 of this Act shall take effect three months after the date of enactment of this Act and shall apply, according to the provisions thereof, to review proceedings instituted after such date.

"(d) The provision of section 4 of this Act adding a new subchapter IV of chapter 6, United States Code, and sections 7, 10, 11, and 15 of this Act shall take effect immediately upon enactment.

"(e) The amendments made by section 8 shall take effect on the date of enactment of this Act, and shall not apply to any civil action commenced prior to such date.

"(f) The amendments made by section 9 of this Act shall take effect on the date of enactment of this Act.

"(g) The provisions of section 14 of this Act shall take effect on the date of enactment.

Mr. LAXALT. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. LEAHY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LAXALT. Mr. President, I commend my colleagues for this overwhelming vote of confidence on this significant and historic piece of legislation. We have been nursing this for many, many years.

Many have referred to PAT LEAHY and PAUL LAXALT as being the ultimate political odd couple. Perhaps we are. But the fact is that, due to our concerted efforts and following up on efforts of people like John Culver, it has been a good year. I think both of us would like to take full and deserved credit for what has been accomplished, but we really cannot. It has truly been a tremendous demonstration of magnificent staff support.

There has been compromise after compromise effected on a complex piece of legislation ending up in what I

consider to be a very worthwhile product.

I want to thank my colleague, PAT LEAHY. It is always a pleasure doing business with him and working with him on legislation. I certainly want to compliment the staff that has been involved during all of these extensive early months.

I hope that, as a result of this rather impressive vote, we can have comparable action in timely fashion in the other body. Regulatory reform, in my estimation, has been long overdue. What we have finally crafted here, really, does not present any threat to the organic statutes. We have tried to respond to the concerns of some of our colleagues that this legislation would hurt the Clean Air Act, OSHA, and others. It does not do anything of the kind. What it does is to improve procedures, so regulations will be more effective and less costly. I think we have ended up with legislation through which the regulators will do a better job, the courts will do a better job and, very frankly, we here in Congress will do a better job.

I thank my distinguished colleague from New Hampshire. I yield the floor.

Mr. LEAHY. Mr. President, I wish to return the compliment to my very close personal friend, the distinguished Senator from Nevada (Mr. LAXALT).

He said some of our colleagues referred to us as the odd couple for putting together the Laxalt-Leahy bill. I heard one of our colleagues in the well during the vote. He came back, double-checked, and said to me, "Pat, is it true you and Paul wrote this bill and you are both supporting it completely?"

I said, "That is right."

He said, "It means one of two things. Either you have a darned good bill or one or the other of you has not read it."

Mr. President, I happen to think we have a darned good bill and I am delighted the Senate passed it overwhelmingly. I agree with the Senator from Nevada and hope that the other body will be able to work on it expeditiously.

Mr. President, I could not let the moment pass without complimenting Senator LAXALT, who has been very straightforward and forthcoming on this bill all the way through, over all the long months—a year, really—that we have worked on it. He has been concerned and given up his time, but I also want to thank John Nash and Bob Cynkar, who are here on the floor with him, who have done so much, especially working with John Podesta and Ann Harkins, of my office, and my own administrative assistant, Sanford Kinzer, who worked on this way back in the last Congress.

I have already thanked the many people who have helped develop this important legislation since the begin-

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ning of this Congress. I also want to take this opportunity to thank Jim Davidson, Patti Sarris, and Bob Nichols, who worked on regulatory reform in the 96th Congress. Their help and the solid foundation they gave us for writing this bill has been very important and is very much appreciated.

I yield the floor.

The PRESIDING OFFICER (Mr. NICKLES). The majority leader is recognized.

Mr. BAKER. Mr. President, let me take a moment to commend the distinguished Senator from Nevada and the distinguished Senator from Vermont for their successful efforts in managing this important—indeed, this milestone—legislation. It is truly extraordinary when a matter of this importance is managed as expeditiously and is dealt with on so truly a bipartisan basis as this one was. I congratulate both Senators for their participation and express my admiration for the method by which they worked out the myriad difficulties involved and reduced this otherwise highly controversial measure to manageable form. It is a mark of high legislative skill and craftsmanship that both of them can be justly proud of.

Mr. President, I express my admiration as well for their staff in each case for their wise and able assistance to their principals and, indeed, to the entire Senate.

Mr. ROBERT C. BYRD. Mr. President, will the distinguished majority leader yield?

Mr. BAKER. Yes, I yield.

Mr. ROBERT C. BYRD. Mr. President, I only add my comments to those just expressed by the distinguished majority leader, and most deservedly, to the distinguished Senator from Nevada (Mr. LAXALT) and the equally distinguished Senator from Vermont (Mr. LEAHY). I marvel at their patience, their skill, their understanding of the legislation. I compliment them on the expedition with which they have worked. The Senate is in their debt, the country is in their debt, and I personally feel very grateful to the two Senators who, by working together, have effectively managed a very complex bill.

STANDBY PETROLEUM ALLOCATION ACT OF 1982—VETO

Mr. BAKER. Mr. President, I have consulted with the distinguished minority leader in this matter and with the distinguished Senator from Idaho and others, who have expressed a particular interest in this matter.

Mr. President, according to the provisions of the unanimous-consent agreement on Monday last, I ask that the Chair lay before the Senate a message with respect to S. 1503, which I will read.

The PRESIDING OFFICER. The Chair lays before the Senate a message from the President, which the clerk will state.

The legislative clerk read as follows:
Veto message on S. 1503, the Standby Petroleum Allocation Act of 1982.

(The text of the President's veto message is printed on page S2513 of the CONGRESSIONAL RECORD of March 22, 1982.)

The Senate proceeded to consider the bill.

The PRESIDING OFFICER. The question is, Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?

The majority leader is recognized.

Mr. BAKER. Mr. President, this is, of course, the veto message on the Emergency Petroleum Allocation Act. I hope—indeed, I believe—that it will be possible to work out a time agreement on this measure in a little while. I hope and I expect that, pursuant to that time agreement, if it is completed, we shall be able to dispose of this matter yet today.

Mr. President, I shall not further detain the Senate except to say I shall continue to work on this matter and try to have a further announcement to make in respect to the management of time under a unanimous-consent agreement limiting the time for debate and fixing a time certain for final disposition. I encourage, however, those who are particularly interested in this matter to proceed with their statements and debate while we continue in our effort to arrive at a consent agreement.

The PRESIDING OFFICER. The Senator from Idaho is recognized.

Mr. McCLURE. Mr. President, I appreciate the statement of the majority leader. I share the hope that we can arrive at a unanimous-consent agreement dealing with the time to be allocated to the consideration of this bill.

I approach this task today, Mr. President, with a great deal of reluctance and with some mixed emotions, as I am sure the occupant of the chair and others would know.

Today, the Senate will vote on whether to override the President's veto of the conference report on S. 1503, the Standby Petroleum Allocation Act of 1982. I want to say one thing to my friend from Tennessee: One of the hardest things we have had to overcome in the debate was the lapse in language that was used by the Senator from Tennessee, our distinguished majority leader, just a moment ago, in referring to this bill as the Emergency Petroleum Allocation Act. Far too many have equated this bill with an extension of EPAA. We have tried very hard over the last year to distinguish that it is we are trying to do away from EPAA. Those people who had problems with allocations under the EPAA have constantly referred to this legislation as a re enactment of, or an extension of, the allocations, price controls, and regulatory nightmare that we did see under EPAA, which this is not.

This is a very, very strictly limited piece of legislation, much more confined and confining in its terms than was EPAA, which was a permanent control mechanism as distinguished from what we have here, a very limited, very temporary authority, limited wholly to the discretion of the present occupant of the White House. It expires by its terms on December 31, 1984.

This measure would provide the President with standby authority to allocate petroleum supplies in the event of a severe petroleum supply shortage. It also requires the President to devise a standby Federal allocation program to insure that the United States is fully prepared to respond effectively to a serious petroleum supply shortage.

As my colleagues will remember, S. 1503 originally passed the Senate on October 29, 1981 by a vote of 85 to 7. The conference agreement was approved by the Senate on March 2, 1982, by a vote of 86 to 7.

The arguments made by the President in his veto message I do not find persuasive.

I ask my colleagues to consider as they look at their vote what has changed since October 29 when they voted 85 to 7 pass it, or since March 2, when they voted by a vote of 86 to 7. The only thing that has changed is the President's veto message.

That should not come as any surprise to anyone. The President said all along that he did not want the authority, he did not ask for this legislation, and he did not want it to be passed.

So nothing has changed except now we have the question of whether or not somehow we ought to blindly support the President, even though we may think that his judgment in this particular instance is flawed.

As I was saying, Mr. President, I do not find that the arguments made by the President in his veto message are very persuasive.

First, as President Reagan observes:

We must recognize that an interruption of a significant portion of foreign energy supplies, whether because of armed strife, human choice or natural disaster, will involve real costs to the United States and the world.

Precisely for this reason, a major petroleum supply disruption is a national problem that demands a coordinated national response. Only the Federal Government can organize such a response.

Second, the President contends that the legislation was based on the assumption that giving the Federal Government the power to allocate supplies and set prices will result in an equitable and orderly response to a supply interruption. To the contrary, the legislation was based on the opposite assumption, which is that the free market is the most efficient allocator of supplies during a shortage. Only in the event of a severe and prolonged

Summary Comparison of S. 291 and S. 343

Cost/Benefit Analysis

- S. 291 Agencies (including independent regulatory agencies) must perform cost/benefit analysis of major rules (a rule or group of related rules having over \$100 million cost or other significant impact), including analysis of direct and indirect, and quantifiable and nonquantifiable costs and benefits, and regulatory alternatives. Benefits must "justify" costs, to the extent permitted by law. Peer review of all major rule analyses.

Regulatory Accounting -- bi-annual reports to Congress on estimates of the quantitative and qualitative costs and benefits of Federal regulation.

- S. 343 Agencies must perform cost/benefit analysis of major rules (a rule or group of related rules having over \$50 million or other significant impact on the economy -- sec. 621(4)). No major rule may be promulgated unless: (1) the benefits "outweigh" the costs; and (2) the rule will provide greater net benefits to society than any other reasonable alternatives identified in the rulemaking (sec. 623(a)). Where "practicable" agencies must conduct their cost/benefit analyses on an industry-by-industry basis (sec. 622(e)). These criteria "supplement" criteria otherwise applicable under law, except when such law explicitly prohibits consideration of costs and benefits (sec. 623(b)).

S. 343's prescriptive "supplemental" criteria would override virtually all statutory language on regulatory analysis, because no statute explicitly prohibits reliance, let alone consideration of, cost/benefit analysis. It is the scope of this provision that creates an effective "supermandate".

Risk Assessment

- S. 291 Covered agencies (EPA, DOL, FDA, CPSC, DOT, DOE, USDA, DOI, NRC) must perform standardized risk assessments of major rules supported by the best available scientific evidence and unbiased risk estimates.
- S. 343 Agencies must use standardized risk assessment methods (e.g., priority for human health pharmacokinetic studies). Agencies must also certify that a rule

*S. 343 risk assessment
human health, safety*

significantly reduces risks, and that no alternative reduces the risk in a more cost-effective manner. Agencies must have a process to allow public to petition for review of risk assessments and such reviews must be completed within 180 days. Peer review of risk assessments. [S. 343 risk language modeled on S. 333].

Comparative Risk Analysis

S. 291 The covered agencies (i.e., the risk assessment agencies) must study and develop methodologies to prioritize risk reduction activities, i.e., addressing the most serious risks in the most cost-effective manner, with reports to Congress including risk reduction cost estimates.

S. 343 [Very similar to S. 291.]

Peer Review

S. 291 Broad stakeholder participation in peer review of each major rule's cost/benefit analysis and risk assessment. Disclosure of financial interest in matters under review is no disqualifier.

S. 343 Peer review of risk assessment.

Review of Existing Rules

S. 291 Agencies must review major and other important rules at least once every ten years, with an initial schedule of review to be published for notice and comment within 9 months of the enactment of this Act.

S. 343 Any person "subject to a major rule" may petition the agency to conduct a cost/benefit analysis of the rule (sec. 625). Any person may petition an agency to review a rule's risk assessment (sec. 637).

Judicial Review

S. 291 Judicial review of agency major rule determinations (but not of presidential major rule determinations), and of regulatory analyses, but only as a part of the rulemaking record of a rule undergoing review.

- S. 343 Judicial review of almost every step (sec. 624) -- cost/benefit and regulatory flexibility analyses, risk assessments, agency or presidential determinations of major rules, decisions on petitions to review existing rules. Any finding of a violation of any analytic requirement will make the rule have "no force and effect."

Congressional Review

- S. 343 Congress has 45 days after issuance of a major rule to block the rule by passing a joint resolution of disapproval (sec. 626). [Nickles' "Congressional Oversight Act"]

Market Incentives

- S. 291 Agencies must maximize use of market-based mechanisms (e.g., pollution trading credits) in major rules.
- S. 343 Finding of a rule's benefits and review of alternatives should include attention to market-based mechanisms.

dp:3/9/95

SUMMARY OF REGULATORY REFORM BILL

I. Cost-Benefit Analysis. The bill would require agencies to prepare a cost-benefit analysis that is then incorporated into the normal rulemaking process found in the Administrative Procedures Act.

A. The cost-benefit analysis applies only to "major rules" defined as likely to have a "gross annual effect on the economy of \$50 million in reasonably quantifiable increased direct and indirect costs," or as likely to have a significant effect on the economy in terms of competition, employment or investment.

B. Costs and benefits are defined broadly. Costs, for example, include "social and economic costs, reduced consumer choice, substitution effects, and impeded technological advancement."

C. A cost-benefit analysis must assess:

1) the feasibility of using "market-based mechanisms" (such as markets for increments of compliance responsibility) instead of command and control regulation;

2) the reasonable alternatives to the rule including "no-action;" and

3) the effect of a rule on small businesses with fewer than 100 employees.

D. The cost-benefit analysis is incorporated into the decision-making and judicial review procedures already in place for rulemakings and requires two major determinations that are the heart of this bill:

1) the agency must determine that the benefits "outweigh" the costs of the rule; and

2) the agency must determine that the rule will provide greater net benefits to society than any of the alternatives analyzed in the rulemaking.

Without these two determinations, a rule may not be promulgated. The bill provides that these decisional factors supplement the factors provided in the enabling statute that is the basis for the rulemaking, unless there is explicit textual statutory language to the contrary.

E. The bill also provides for petitions to review existing regulations for conformity with the cost-benefit analysis but the bill places a greater burden on the petitioner to make the case

that costs are likely to outweigh benefits in order to prevent swamping the agencies with requests for reviews.

1) A denial is subject to judicial review.

2) If, after review with a cost-benefit analysis, the rule is found not provide benefits that outweigh costs or is not the rule that provides the greater net benefit to society, the agency must take action to amend or revoke the rule to bring into compliance with those requirements.

F. The bill provides that no rule becomes effective until after a 45-day period in which both houses of Congress have the opportunity to address the rule by legislation.

G. The bill extends all statutory and judicial deadlines that force agencies to finalize regulations for a period of eighteen months in order to allow the agencies to subject "major rules" to the requirements of this bill for cost-benefit analyses.

H. The bill prohibits agencies from expanding federal power by issuing so-called "discretionary rules" that go beyond the minimum required by statute, but exempt rules that are intended to streamline regulations or provide for regulatory relief.

I. The bill codifies one line of cases under the Supreme Court's Chevron decision in order to make clear that agencies' interpretation of statutory directives are due deference only where a court finds that the agency interpretation is the only permissible interpretation of the statute.

II. Risk Assessments. The bill uses Senator Murkowski's draft risk assessment language as the basis for this section. The bill would subject rulemakings that relate to human health, safety or the environment to the requirements that risks be quantified with "sound science" and peer review, and the risks addressed by the rule be compared with other risks subjected to regulation. *where?*

A. As with the cost-benefit section, the bill would require each major rule to be accompanied by two determinations:

1) that the risk assessment procedures of this bill have been followed and are based on the best available scientific data; and

2) that there is no regulatory alternative allowed by the underlying statute that would achieve an "equivalent reduction in risk in a more cost-effective and flexible manner."

B. The responsibility for developing a peer review program with is placed with the Office of Science and Technology.

with this legislation a new procedural framework for rule making. It is the business of the courts to ensure that agencies comply with this law, not to make new law.

In summary, the need for legislative reform of informal rule making procedures seems clear. As explained above, bare bones notice-and-comment procedures are no longer sufficient for resolution of the many complex, technical and factual issues arising in recent rule makings. The Committee feels that neither judicial activism nor ad hoc legislative activity is the best approach to remedying procedural inadequacies. What is needed is a thorough and systematic modernization of section 553. This fact was pointed out as long ago as 1973 by Professor Scalia, writing for the Administrative Conference of the United States.

It sometimes appears that Congress has lost confidence in the judgments it made in 1946, and feels obliged to reconsider the question of what constitutes fair and efficient procedure each time it writes new legislation. This is a major challenge facing the Conference in the years ahead: To prevent the balkanization of administrative law, by either re-establishing the validity of the general dispositions made in the Administrative Procedure Act as may be necessary to satisfy more recent standards of fairness and efficiency. Unless this is done, I fear that repeated Congressional attention to administrative procedure as a mere subsidiary issue in the context of more important substantive controversies will lead to an administrative process that is pointlessly diverse and frequently unsound. 1973-74 Report, Administrative Conference of the United States 2 (1974).

Enactment of S. 1080 will accomplish this necessary modernization of section 553, thereby obviating the need for Congress to repeatedly address issues of administrative procedure. Also, the courts should no longer feel impelled to engraft their own notion of proper procedures onto the A.P.A.; nor will they be faced with the difficulties and uncertainties of reconciling the holding in *Vermont Yankee* with a decade-and-a-half of hybrid rule making case law.

V. SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 sets out the short title of this bill, the "Regulatory Reform Act."

SECTION 2

Section 2 makes two amendments to section 551 of title 5, United States Code. Subsection (a) of this section adds a new paragraph to section 551, defining "emergency rule." An emergency rule is a rule which may be made temporarily effective without prior compliance with the procedures for rulemaking required by section 553 of title 5, United States Code, where the consequences of a delay in the effective date of the rule are deemed to be sufficiently grave to outweigh, at least in the short term, the fundamental

public policy supporting public rule making procedures prior to the promulgation of a regulation.

This policy is fundamental because agencies exercise a law making power, through rule making, which has little difference in practical effect from that exercised by Congress. A public rule making proceeding is one of the essential ways in which such agency law making is made accountable to citizens generally, and made legitimate in Republican government. Due to this important role of section 553 procedures, the definition of an emergency rule goes on to identify the only two consequences which the Committee believes justify a delay in normal rule making proceedings. First, the agency may delay its compliance with section 553 procedures if the result of normal processing time through those procedures would seriously injure "an important public interest" of the magnitude of, for example, safe travel on commercial aircraft without air piracy. *E.g., Airport Operators Council, Int'l v. Shaffer*, 354 F. Supp. 79 (D.D.C. 1973) ("The public interest lies in protecting the safety of air commerce from the threat of a now more sophisticated type of hijacker—the armed and fleeing felon." *Id.* at 81.) Second, the agency may place into effect an emergency rule when a delay in the effective date of the rule would seriously injure a person or class of persons without serving any important public interest. A rule excepting or waiving a particular class of producers from a standard rule because of weather conditions or because of a short-term lack of supply in some material could be an example of such an emergency rule. The agency would be expected in this case, according to the provisions of new section 553(b)(3), to explain in the Federal Register that no important public interest counteracts the need of the person or class of persons for the rule.

The Committee expects that the emergency rule authority will be used in limited circumstances. The mere assertion by an agency that the consequences set out in this definition will occur, without reliable and credible grounds for the assertion, is not sufficient. For example, the mere suggestion by an interested person that there might be such an "important public interest" involved in a rule making does not trigger this emergency rule exemption. Cf. *Nader v. FAA*, 440 F. 2d 292 (D.C. Cir. 1971) ("Because emergency power must be reasonably exercised the suggestion of any safety hazard does not automatically require the [Federal Aviation] Administrator to act." *Id.* at 294.)

Though the term "emergency rule" is new to the A.P.A., the concept behind the term is not new to administrative law. A comparable provision already exists in the Model State Administrative Procedure Act, which has been adopted by 28 states and the District of Columbia since its promulgation in 1961. Under section 3 of that Model Act, an agency may delay rule making procedures on an emergency rule if it "finds that an imminent peril to the public health, safety or welfare" requires rapid adoption.

Under the current provisions of the A.P.A., the exemption of rules for which "the agency for good cause finds . . . that notice and public procedure thereon are contrary to the public interest," 5 U.S.C. § 553(b)(3)(B), embraces the factors underlying this new provision for "emergency rules." *American Federation of Government Employees, AFL-CIO v. Block*, No. 79-1724 (D.C. Cir. March 18,

1981) (The "use of these exceptions by administrative agencies should be limited to emergency situations. . . ." *Id.*, slip op. at 5.). However, the Committee concluded that the existing provision was unsatisfactory because its lack of specificity gives an agency only limited guidance concerning what is a legitimate emergency and consequently relies greatly on agency discretion to determine when normal rule making procedures should not be applied. Furthermore, current law allows an agency to completely dispense with those procedures when it concludes they are "contrary to the public interest." In light of the strong public policy supporting public rulemaking, both of these characteristics of the existing A.P.A. were unacceptable. Accordingly, this provision of S. 1080 is drafted to allow an exemption for legitimate emergencies, but to narrow the statutory language by which the exemption is expressed to avoid its excessive application.

Subsection (b) of section 2 makes the second change to section 551 of title 5, United States Code, modifying the existing definition of a "rule." This change provides that a statement by the Tennessee Valley Authority relating to the property, contracts, or the general policies of that agency is not a "rule" and therefore does not need to be promulgated through the rule making procedures of section 553. However, another statute may require the application of any of the procedures of the A.P.A. to these statements. In addition, another statute may establish its own procedure for the promulgation of such statements. This provision essentially carries forward the existing exemption for these matters for the TVA. The Committee had adopted this provision due to the unique status of the TVA as a wholly government-owned corporation carrying out mainly business-like activities, rather than playing a regulatory role.

Some controversy has arisen over TVA's contracting policies, especially concerning TVA's exclusion from the requirement of OMB Circular A-76 that decisions to use government work forces, rather than contracting out work to the private sector, be based on thorough cost comparisons. The Committee received testimony which strongly criticized the exclusion of the TVA from this requirement. Hearing on S. 1080, *supra* (statement of F. Thomas Westcott, at 4). It was clear that the construction industries were of the opinion that the TVA has been the greatest offender against OMB's requirement that agencies "contract out" in accordance with the spirit of federal policy—economy and efficiency in government.

More importantly, the Committee on the Environment and Public Works held oversight hearings earlier this year on the TVA. Due to concern expressed in those hearings about the continuing rise in TVA's electric power rates, and the impact of TVA's use of its own labor force for construction projects on those rates, Senator Howard Baker and Congressman Robin Beard requested that the General Accounting Office conduct a detailed assessment of the economic viability of TVA doing its own construction.

Obviously, the economic impact of the actions of the federal bureaucracy is a central concern of S. 1080. However, in light of the pending report of the General Accounting Office and the expertise of the Committee on the Environment and Public Works, we

concluded that this exemption should be maintained for the time being in anticipation of proposals to be made by that Committee.

SECTION 3

Section 3 substantially rewrites section 553 of title 5, United States Code. New section 553 would have the following provisions:

New Subsection 553(a)

This subsection sets out the basic requirement that the procedures of section 553 apply to all rule makings except those specifically exempted by new subsection 553(b). To those not closely familiar with its provisions, current section 553 does not clearly state its applicability, due in large part to the exemptions which are located in different parts of the section. The Committee felt that the applicability and requirements of section 553 should be reorganized in this way so as to more clearly express the provisions of this statute.

New Subsection 553(b)

This subsection provides exemptions from the rule making procedures of section 553 and, for certain of these exemptions, the particular procedures which the agency must follow to take advantage of the exemption. These exemptions are not available if another statute requires notice and hearing for the rules exempted by this subsection.

New Subparagraph 553(b)(1)(A)

Subparagraph (b)(1)(A) maintains the current rule making exemption for a rule to the extent it involves a matter pertaining to a military or foreign affairs function of the United States.

New Subparagraph 553(b)(1)(B)

This subparagraph tightens the existing rule making exemption for "a matter relating to agency management or personnel." 5 U.S.C. § 553(a)(2). Under this provision only a "rule relating exclusively to internal personnel rules and personnel practices of an agency" are exempted from normal section 553 rulemaking procedures.

This change limits the class of rules for which public rulemaking procedures are not provided to those rules for which such procedures genuinely produce little or no benefits to the public. One central benefit of those procedures is allowing members of the public to participate in the formulation and promulgation of rules which are likely to have an impact on them. The types of internal personnel rules which the Committee intends to exempt with this provision are those which an agency routinely adopts for purposes of its own internal housekeeping and which do not have an effect beyond the members or employees of the agency. For example, the rules of an agency for processing job applications, handling employee sick leaves, or the assignment of parking spaces are not the kinds of rules which would have an impact outside of the agency and are exempted under this new subsection.

This change brings this exemption from section 553 procedures closely in line with the similar provision in the Freedom of Information Act exempting matters "relating solely to the internal per-

sonnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Of course, the policies behind this section of the FOIA and this new subsection of the A.P.A. are not precisely the same. Mere disclosure under the FOIA generally is not as burdensome as section 553 rulemaking, and therefore the public interests justifying disclosure might not be sufficient to justify rulemaking. Yet the case law applying section 552(b)(2) provides a guide to the practical application of this new subsection of section 553 and suggests examples of rules which would be exempted from normal rulemaking procedures. Paraphrasing the Supreme Court's interpretation of section 552(b)(2) and applying it to new subparagraph (b)(1)(B): "[T]he general thrust of the exemption is simply to relieve agencies of the burden" of public rulemaking proceedings for "matter in which the public could not reasonably be expected to have an interest." *Department of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1976). E.g., *Cox v. United States Dep't of Justice*, 601 F.2d 1,5 (D.C. Cir. 1979) (holding that the Manual for United States Marshals pertained "solely to housekeeping concerns of interest only to agency personnel" because it neither regulated activities of the public nor set standards for agency actions affecting the public); *United States v. Hayes*, 325 F.2d 307, 309 (4th Cir. 1963) (holding the certification of photostatic copies by the Comptroller General as not directly affecting private or public interests outside the agency); *National Treasury Employees Union v. United States Dep't of the Treasury*, 487 F. Supp. 1321, 1323 (D.D.C. 1980) (holding an Internal Revenue Service "Multi-District Collective Bargaining Contract Administration Handbook" as establishing only the terms and conditions of employment for IRS employees, not providing "substantive or procedural guidance for IRS officials in their administration of tax policy").

New Subparagraph 553(b)(1)(C)

Currently the A.P.A. contains an exception for "interpretative rules and general statements of policy," allowing an agency to bypass the public notice and comment requirements otherwise applicable to agency regulations. 5 U.S.C. § 553(b)(A). Since the A.P.A. was first enacted in 1946, there has been continuous confusion and ambiguity concerning whether or not a regulation is merely clarifying or interpreting an already existing right or obligation or is a statement of new requirements. The original version of the A.P.A. did not define the terms "interpretative rules" or "policy statements," and Congress did not define them later, in 1966, when it required their public availability or publication under the first part of the Freedom of Information Act. 5 U.S.C. § 552(a)(1-2). It was generally considered under the 1946 Act that an interpretive rule served the function of informing the public of the agency's construction of a particular statutory provision or definition, and that while these constructions of statutory terms were often persuasive, they would have no legally binding effect. For example, a "working definition" offered by the Attorney General's Manual on the Administrative Procedure Act (1947) defines interpretative rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* at 39 n. 3. The Manual considers general statements of

policy to be "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Id.* See also Attorney General's Committee on Administrative Procedure, *supra* at 27.

Truly legislative or substantive regulations or important policy changes having the force and effect of law were not intended to be included within the exception. "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (Interpretative rules are not binding nor have the force of law because they do not affect individual rights and obligations.). See 1 K. Davis, *supra* at 597 ("The main occasion for judicial requirement of notice and comment procedure for rule making that is exempt from § 553 has to do with adoption of interpretative rules that have significant impact upon affected persons.").

New subparagraphs 553(b)(1)(C) qualifies the existing exemption by making it unavailable where an "interpretive rule, general statement of policy, or rule of agency organization procedure, or practice" would have general applicability and would substantially and directly alter or create rights or obligations of persons outside the agency. The Committee felt this change was necessary not only to preclude agency abuse of the exemption, but also to reassert the correct understanding of this exemption which had been confused in several judicial interpretations, all problems ultimately due to deficiencies in the original concept and language of the exemption. See Scalia, *supra* at 383-84.

Abuse of the existing exemption can have serious consequences. For example, in the early 1970's, the Atomic Energy Commission used self-styled "guidance documents" to promulgate *de facto* rules for specific technological or operating requirements for nuclear reactors without following public notice and comment procedures. In practice, this "guidance" was just as binding as a substantive rule. Hearing on S. 1080, *supra* (statement of George C. Freeman, Jr., at 26). Such *de facto* rule making not only blocks private citizens from effectively participating in this form of law making, but also prevents agencies from benefiting from the information persons outside the agency can contribute.

We intend, under this exemption, to allow an agency to make interpretations or policy statements applicable to a particular person for a particular regulated situation without following section 553 rule making procedures. The agency is not able to use that process of individualized interpretations for matters of general applicability to a larger number of individuals or groups if such an "interpretation" will be applied so as to alter or create a right or obligation of persons outside the agency. The Committee intends that a person affected by an agency's rule would be entitled to assert that the interpretation was a non-exempted "rule." But that person would have to demonstrate that the rule had general applicability and that persons outside the agency, after adoption of that interpretation or policy statement, had been given new rights or

obligations or had rights or obligations which had been substantially altered.

There is a line to be drawn to differentiate the creation of new obligations, which is a substantive task, from the education of the public to the agency's assessment of existing obligations, which may be done by interpretative rules. This exemption does not authorize the agency to fill in gaps in existing regulations; such measures must be adopted through the normal rulemaking procedures. Interpretive rules "are merely an agency's interpretation of a statute it is charged with implementing and create no law and have no effect beyond that of the statute." *Id.* at 876, quoting *Pesikoff v. Secretary of Labor*, 501 F. 2d 757, 763 n. 12, cert. denied, 419 U.S. 1038 (1974). The proper role of the interpretive rule is to provide uniform guidelines to agency staffs and to assist regulated parties to comply with the law, without undue delay.

Revenue Rulings issued by the Internal Revenue Service are common examples of what the Committee generally conceives of as genuine interpretive rules, exempted from normal rule making procedures under this new subparagraph. Where Revenue Ruling assists citizens in complying with the tax laws, but does not create new obligations or rights, or alter those that exist, it will be exempt from the notice-and-comment procedures as an interpretive rule. *Cf. Stubbs, Overbeck & Assoc. v. United States*, 445 F. 2d 1142, 1146-47 (5th Cir. 1971).

On the other hand, an agency "interpretation" or "statement of policy" which has the effect of creating or altering obligations or rights is not an "interpretive rule" or "general statement of policy" within the meaning of this exemption. This exemption does not afford an agency a facile alternative to rulemaking where the consequence of the "interpretation" will be severe, identifiable with a regulated person, a group, or a product. While an agency may choose to utilize a generic format for rulemaking, the adoption by interpretive rule of factors which are of essential importance in its subsequent rulemakings is not a proper use of this exemption. *Dow Chemical v. Consumer Product Safety Comm'n*, 549 F. Supp. 378 (W.D. La. 1979). It is appropriate that such determinations of future effect, which are intended to fit into more specific subsequent rules, should be done by rulemaking rather than by interpretive rule or general policy statement.

Likewise, rule making and an opportunity for consideration of the consequences of a significant policy change is appropriate when an agency changes its past practice for the conditions of approval or licensing. Its change will have a significant impact on both past applicants and those future applicants who expect to meet the new, rather than the old, requirements. This is a concern addressed in several recent cases involving significant changes in an agency's past approval standards. *E.g., Burroughs Wellcome Co. v. Schweiker*, Food Drug Cos. L. Rep. ¶ 38,109 (4th Cir. 1981). All manufacturers of that class of products who have received licenses are materially affected by the alteration of the conditions of approval for subsequent licensees, and this is of particular concern when the public is not in a position itself to evaluate the comparative merits of the previously licensed product with those approved under the new policy.

In the view of the Committee, varying case law interpretations of the current version of this exemption, evolving over the years, have resulted in several different understandings of the exemption, many of which are not faithful to the Congressional purpose underlying it. Obviously, merely because an agency characterizes a rule as interpretive or as a general policy statement does not mean that such a characterization is accurate and that the exemption applies. Rather, the ultimate impact of the rule must be the basic criterion for application of the exemption. It is unlikely, for example, that an agency statement, characterized as an "interpretive rule" or as a "general policy statement," applied retroactively to modify existing understandings of the requirements of a statute or a regulation, and consequently changing the action needed to comply with those requirements, would be exempt.

Some cases, while seeming to look at the impact of a rule to determine if it is interpretive, often styled an examination of its "legal effect," have in fact relied on agency characterizations by looking to the "form" of the rule. E.g., *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1092 (T.E.C.A. 1978); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952). Under the somewhat circular reasoning of these cases, if the form of a rule is interpretive, it does not, by definition, affect a person's rights or obligations. Yet the practical impact of a rule is not governed by the label attached to it nor by the manner in which the agency treats it. An interpretation of already binding regulations may, for example, impose a new obligation or significantly alter an existing obligation. E.g., *National Restaurant Ass'n v. Simon*, 411 F. Supp. 993, 999 (D.D.C. 1976). Such "interpretations" have the kind of impact which the Committee believes warrant promulgation through section 553 procedures and are not, therefore, exempt from rule making under new subparagraph (b)(1)(C). Similarly, a rule is not interpretive merely because it is generally consistent with the statute it purports to explain, as some courts have contended. E.g., *Chemical Specialties Mfr's Ass'n v. EPA*, 484 F. Supp. 513 (D.D.C. 1980). The lack of actual impact on the rights and obligations of affected persons is the basic test for the application of this exemption.

Actual impact obviously varies from case to case. Generally, there are few rules which automatically can be deemed exempt from section 553 rule making under this provision merely because they belong to a class of rules which normally are exempt. It is conceivable that a rule, of a type usually considered interpretive, may in certain circumstances have the kind of substantial impact on rights or obligations which remove it from the ambit of this modified exemption for interpretive rules.

The Committee intends that the impact of a proposed interpretive rule, policy statement, or rule of agency organization, procedure, or practice upon persons outside the agency should be considered carefully in the terms of the better case law under the current exemption. E.g., *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972) (holding that because a Secretary of Labor directive abrogating precertification of occupations for visa issuance "changed existing rights and obligations" section 553 rule making was required); *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969).

(holding that a "general statement of policy" does "not impose any rights and obligations" on those regulated); *Pharmaceutical Mfr's Ass'n v. Finch*, 307 F. Supp. 858, 864 (D. Del. 1970) (holding that FDA rules prescribing the kinds of clinical investigation needed to establish drug effectiveness had "an immediate and substantial impact" on the drug industry were invalid for failure to use section 553 rule making procedures); *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 95-96 (D.D.C. 1967) (holding that agency actions exempt from rule making procedures are those which are "insignificant in nature and impact").

By narrowing this exemption only to agency statements which do not substantially alter or create rights or obligations, the Committee does not suggest that a rule exempt under this provision has no impact. Every interpretive rule, policy statement, or rule of procedure by its nature will have some pragmatic consequences. Indeed, if such statements had no impact they would have no value. By narrowing this exemption, the Committee does not intend to require rule making procedures for every interpretive rule or policy statement that affects a person's expectations. However, in the view of the Committee, rules which create or alter rights or obligations pass beyond the useful impact of genuine interpretive rules or policy statements into the realm of law making, requiring the use of the notice-and-comment procedures of section 553.

New Subparagraph 553(b)(1)(D)

This subparagraph narrows the existing A.P.A. provision exempting matters relating to "public property, loans, grants, benefits, or contracts" from section 553 rule making. 5 U.S.C. § 553(a)(2). An exemption from notice-and-comment rule making procedures will now apply only to those rules that are issued in compliance with criteria and procedures established by the Administrator for Federal Procurement Policy or by the Administrator of General Services.

The Administrative Conference of the United States has recommended completely deleting this exemption. "Elimination of Certain Exemptions from the A.P.A. Rulemaking Requirements," Rec. No. 69-8, 1 C.F.R. § 305.69-8 (1980). In the opinion of ACUS:

These types of rules may . . . bear heavily upon nongovernmental interests. . . . The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking in these as in other areas. *Id.*

ACUS believes that the "good cause" exemption of the A.P.A. is sufficient to allow the promulgation of these kinds of rules where uniquely justified. *Id.*; Bonfield, "Report of the Committee on Rulemaking in Support of Recommendation No. 16," published in 23 *Ad. L. Rev.* 101 (1971). This legislation is not intended to interfere with the efficient administration of Federal grant programs or to subject routine program documents or statements that are not "rules" under the long-established definition to the rulemaking process. For example, technical advisories, guidelines, and similar nonregulatory statements issued by the Federal Highway Administration directly to the affected State highway agencies are commonly not considered "rules," and are therefore not issued via notice-and-comment rulemaking.

The Committee agreed that an exemption for loans, grants, and benefits was no longer needed, but was persuaded to maintain a limited rule making exemption for public property or contracts. The Committee intends this modified property and contracts exemption to achieve three basic goals, advocated by the American Bar Association and others. First, the development and promulgation of general policies regarding public property and contracts should be governed by rulemaking procedures. Second, the agencies charged with the responsibility for these policies, rather than the implementing agencies, should promulgate such policies through rulemaking. Finally, these rulemaking procedures should be governed by section 553. American Bar Assoc. Section of Admin. Law and Section of Corporation, Banking, and Business Law, *supra* at 2-3. Thus, under this new subparagraph, the "criteria and procedures" of the Administrator for Federal Procurement Policy or by the Administrator of General Services must be promulgated pursuant to section 553 procedures.

New Subparagraph 553(b)(1)(E)

Subparagraph 553(b)(1)(E) continues in limited form the current A.P.A. exemption for those rules for which the agency has found, for good cause, that notice-and-comment rule making is unnecessary. It allows an agency to delay compliance with section 553 rule making procedures, to comply only partially, or to not comply at all for a rule which will have only an "insignificant impact."

For example, a rule has insignificant impact when it details the performance of ministerial functions within the agency which have slight external effects, such as the appropriate processing of filings and forms within the agency's offices, *United States v. Hayes*, 325 F. 2d 307 (4th Cir. 1963), or when it is merely a published notice of changes of address within the agency structure in accordance with section 552(a)(1)(A) of title 5. An agency which consolidates two offices within its headquarters may rearrange its structure and may be required to publish such changes for the guidance of the public. But notice and comment are not necessary for the implementation of such actions. Also, events of an ephemeral nature which pass quickly but which are required to be done by rule, such as a temporary air space limitation for commercial aircraft over a missile range, are the kinds of events of insignificant public impact for which delay is appropriate. The person asserting that there is a need for prompt notice and an opportunity for comment is able to ask for such action by petition or by seeking injunctive relief.

New Subparagraph 553(b)(1)(F)

This subparagraph establishes an exemption from section 553 rule making procedures for an "emergency rule."

New Paragraph 553(b)(2)

This paragraph qualifies the exemption from notice-and-comment rule making set out in new subparagraph 553(b)(1)(E). Under this provision, the exemption for rules with an insignificant impact is applicable only if the agency publishes the rule in the Federal Register with a statement explaining the finding of the agency that the rule will have an insignificant impact.

This provision codifies the notion that a mere agency recital that a rule will have insignificant impact does not mean that the rule will in fact have only an insignificant impact. This is an approach adopted by the courts in applying the existing exemptions. E.g., *Mobil Oil Corp. v. Dep't of Energy*, 610 F. 2d 796 (T.E.C.A. 1979) ("It is axiomatic that a mere recital of good cause does not create good cause." Id. at 803.). Under this new paragraph, an agency must publicly justify its use of the rule making exemption for rules with an insignificant impact.

This paragraph and other provisions of this bill contain the terms "statement" and "findings." Under current law, courts have treated the rule making process as generally exempt from a requirement for findings of fact, such as a court would produce, because of the "legislative type" activity which an agency undertakes in its rule making. The use of the term "finding" is an improvement on that current law and requires the agency to make more definite factual determinations. Court decisions interpreting "findings" and "statements" have been relatively few, except for those construing the role of the environmental impact "statement" in administrative decisions under the National Environmental Policy Act. E.g., *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975).

The Committee intends the "statement" that must be published under paragraph 553(b)(2), for example, to be a brief but articulated rationale which explains how the rule will produce only an insignificant impact and which supports the decision of the agency to delay rule making procedures or to dispense with them altogether. Consequently, this rationale will include both an explanation of facts and of reasons which justify using this exemption to override the normal process of rulemaking. The purpose of the exemption is to meet a narrow, well-defined need. The publication of this statement is an enforcement device which seeks to ensure that the agency will not avoid public notice-and-comment simply as a matter of its own convenience. Though the extent and detail of these statements will vary with the circumstances, courts should not accept at face value any sparse recitations of agency convenience when a party seeking an opportunity for comment has made a rational challenge to the agency's stated intention to avoid comment.

The use of the terms "statement" and "finding" in other parts of this legislation has a similar purpose. It requires an agency to fully set out on the record its rationale for the exercise of its judgment in applying those provisions of this statute. Furthermore, it provides some check to ensure that agency exercise of judgment is reasonable.

New Paragraph 553(b)(3)

Like the immediately preceding paragraph, this paragraph requires an explanation of the applicability of the exemption from notice-and-comment rule making set out in subparagraph 553(b)(1)(F). Accordingly, the "emergency rule" exemption is applicable only when the agency publishes a statement with the rule describing the emergency, and explaining why the agency chose the rule as a response to the emergency and why the agency could

not comply with the normal rule making procedures. The agency must comply with those procedures "to the maximum extent feasible" before it promulgates the emergency rule and must fully comply "as soon as practicable thereafter." The emergency rule may be only temporarily effective, not longer than "a reasonable period necessary" to complete compliance with section 553 procedures.

The Committee intends that an agency shall follow the rule making procedures normally required before a rule is made effective even in the context of emergencies, "to the maximum extent feasible." "Feasible" here means "possible." Compliance with those procedures "as soon as practicable thereafter" has a similar meaning: as soon as the agency can fully comply, it must.

The Committee intends the phrase "not . . . longer than a reasonable period necessary to complete agency compliance" to be construed narrowly. An agency can customarily proceed through rulemaking within 120 days from the date of its proposal, and more rapidly in some cases. The agency may not continue to defer the proper procedures while continuing to enforce the rule, *United States v. Vail*, 252 F. Supp. 823, 825 (S.D. Ohio 1966), but there are emergency situations, such as that of airline piracy, in which rule making may be delayed for several months after the implementation of the needed public safety regulations. E.g., *United States v. Davis*, 432 F. 2d 893, 902-3 (9th Cir.

New Paragraph 553(c)(1)

This paragraph considerably expands the amount of information which must be included in a notice of proposed rule making. In general, these expanded notice provisions will require an agency to give the public a clearer idea of the problem an agency believes a proposed rule addresses, of the contemplated provisions of the proposed rule, of how the rule will remedy the identified problem, and of the agency thinking behind the rule. These provisions will "require more careful and thoughtful internal planning, evaluation and management of agency action and provide more informed public participation in the rulemaking process." Hearing on S. 1080, *supra* (statement of Nicholas Calio, at 6).

The fact that these provisions will require an agency to begin the public rule making process with a much clearer sense of what a particular rule is designed to achieve obviously means that the notice of proposed rulemaking will be a less tentative document than at present. A related purpose of these notice-and-comment procedures is for the agency to learn from the public more about the potential effect of a particular proposal. Accordingly, though the Committee has expanded the notice requirements of the A.P.A. so that the public will be fully apprised of an agency proposal, the Committee does expect that these modifications will preclude an agency from changing its thinking with respect to a particular rule making after receiving public comment. The expanded notice provisions are intended to give the public a clear idea of agency thinking, so that if that thinking should be changed, helpful comments to that effect will be forthcoming. Indeed, these provisions do not preclude an agency from using various informal and flexible techniques, such as the so-called advance notice of proposed rule

making, to solicit information from the public or to otherwise test ideas before issuing a notice of proposed rule making. In some instances, these expanded notice requirements may be a practical incentive for an agency to employ such informal techniques to more satisfactorily prepare the notice of proposed rule making. The Committee concluded that any attempt to provide for such informal mechanisms in this legislation might detract from the flexibility and informality which recommends them. However, the Committee strongly encourages agencies to use such techniques whenever appropriate.

The Committee expects that these expanded notice provisions will improve the rule eventually proposed by an agency; and, by setting out more definitely the rationale for the rule, make public comment more specific and useful:

The required statements on statutory authority, congressional intent, regulatory objectives, and sources of information will focus the agency's inquiry on the actual need, purpose and likely success of its proposal. Simultaneously, those statements will allow affected parties and the public to grasp the bases and intent of the agency's action and better formulate their support or challenge to it. *Id.* (statement of Nicholas Calio, at 6-7).

The beginning of new paragraph (c)(1) essentially maintains the present requirement governing how notice of a proposed rule making shall be given; that is, it shall be published in the *FEDERAL REGISTER* unless each person subject to the proposed rule is personally served with the notice or had actual notice of the proposed rule making. This provision does not preclude an agency from taking additional steps to ensure that those affected by a proposed rule are aware of the rule making, and the Committee encourages agencies to take such steps. The individual subparagraphs of paragraph (c)(1) specify what information must be included in the notice.

New Subparagraph 553(c)(1)(A)

This subparagraph requires an agency to state in the notice when comments from the public will be received and the "time, place, and nature" of any hearings which the agency is planning to hold. Under this provision, an agency must give the public all the basic information of a more mechanical nature that they need to know to adequately participate in the rule making.

New Subparagraph 553(c)(1)(B)

Under subparagraph (B), an agency must explain its statutory authority to propose the rule which is the subject of the rule making. The Committee expects that this explanation will be specific, setting out the explicit Congressional delegation of rule making authority involved. As statutory language may be quite general or ambiguous, this subparagraph also requires an agency to succinctly explain how the rule making is consistent with the intent of Congress in delegating this authority to the agency.

New Subparagraph 553(c)(1)(C)

Under current law, the notice of proposed rule making must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The Committee felt that this formulation allowed an agency to make too generalized a statement of a proposed rule, limiting the ability of interested persons to effectively comment on a rule an agency was likely to implement. Consequently, this subparagraph tightens this language, requiring that the notice include the "proposed provisions of the rule." The requirement of "a succinct statement of the need for, and the objectives of, the rule" is intended to give the public a clear understanding of the perceived problem addressed by a proposed rule and how the agency expects the rule will resolve it. Obviously included in this basic rationale for the rule will be some explanation of the deficiencies in the existing regulatory scheme which necessitate the promulgation of the rule. In addition, this requirement will focus the attention of the agency on assessing whether a proposed rule reasonably can be expected to provide a reasonable improvement in the status quo. Thus, the agency should be able to identify such a reasonable improvement in the notice. The notice of proposed rule making should identify and discuss the factual information and policy determinations, including the justifications for any assumptions that underlie the agency's determination of need. In this way, this provision is essentially a confirmation of the ethic which supports our regulatory structure generally, an ethic reiterated by other statutes and judicial interpretations of them.

New Subparagraph 553(c)(1)(D)

This subparagraph requires the agency in the notice to solicit suggestions from the public for more effective or less burdensome ways to achieve the objective of the rule making. The Committee does not expect an agency unfailingly to generate by itself the "right" approach to a particular problem. The agency should learn, and the rule making benefit, from the ideas, expertise, and information contributed by interested members of the public. Consequently, the Committee does not intend this requirement to degenerate into a mere recitation that the "agency seeks proposals." Rather, an agency complying with this provision in good faith should tailor its invitation for alternatives to the particular rule making so as to stimulate helpful public comment.

New Subparagraph 553(c)(1)(E)

In adopting subparagraph (E), the Committee intends to require an agency to provide a comprehensive description of the underlying data and scientific and other information which supports the proposal of the agency as well as other relevant information considered, including data which does not support the agency proposal. This description should indicate both the source of the supporting information and, where appropriate, the purposes for which the agency plans to rely on such information. Material "that pertains directly to the rule making and that the agency has considered in connection with the rule making" must be described so as to disclose any information which may contradict the assumptions or

conclusions of the agency which underlie the proposed rule. Subparagraph 553(c)(1)(E) would require an agency to identify the data upon which it relied or planned to rely in proposing a rule concerning the health effects of a particular substance, and to indicate the purpose or purposes for which the agency would rely upon the data. The agency would also describe other information that pertained directly to the rule making, such as what steps the agency had undertaken to verify the quality and reliability of the information and evaluations upon which the agency plans to rely.

The intent of this provision is to make all relevant scientific evaluations, data, and other information considered by an agency in connection with a rule making available to the public in a manner which will aid public understanding both of the basis for the regulation and of the evidence challenging that basis; and which will ensure that the opportunity for public participation in the rule making will allow the public to present informed and meaningful comments.

New Subparagraph 553(c)(1)(F)

This provision requires an agency to identify where the rule-making file may be inspected or where copies of the file may be obtained.

New Subparagraph 553(c)(1)(G)

Subparagraph (G) provides that the explanation of the agency of whether the proposed rule is a "major rule," required under new subsection 622(a) of title 5, United States Codes, must be published in the notice of proposed rulemaking.

New Subparagraph 553(c)(1)(H)

This subparagraph requires that a summary of any preliminary regulatory analysis, required to be issued for a proposed "major rule" under new subchapter II of chapter 6 of title 5, United States Code, be published in the notice of proposed rulemaking. The Committee did not require the whole preliminary regulatory analysis to be published in the notice because of the expense involved in printing a lengthy analysis and because the whole analysis will be in the rule making file, available for public inspection and copying. The complete preliminary regulatory analysis must be placed in the rulemaking file pursuant to subparagraph 553(f)(1)(F). The Committee intends that the summary published in the notice will be a concise presentation of the substance of the preliminary regulatory analysis, yet comprehensive enough to basically advise the public of its contents.

New Paragraph 553(c)(2)

The Committee has determined that a successful public comment process requires fair and complete notice to the public of the subject of the rulemaking and of the agency's approach to that subject. When the agency's approach changes greatly in the course of the rule making, the public may no longer be in a position to offer valuable comment. Accordingly, paragraph (c)(2) is intended to require agencies to keep interested members of the public fairly and contemporaneously apprised of the material issues being consid-

ered by the agency and of the potential substance of rules under consideration. Sometimes an initial notice of proposed rulemaking will identify all of the significant issues, identify all persons who may be covered by the rule, and indicate the potential substance of a final rule, including alternatives that are under consideration even though not reflected in the proposed language of the rule. This paragraph is intended to encourage agencies to do so by not requiring further notices where alternatives being considered were fully described in the initial notice of proposed rule making. In *Sierra Club v. Costle*, No. 79-1565, slip op. at 99-100 (D.C. Cir. April 29, 1981), for example, the court found that EPA had announced in the preamble to the proposed rule that it was still considering a range of alternatives on various issues and expressly requested public comment on the alternatives.

In other cases, additional issues and alternative proposals will be identified in comments on the proposed rule. Where these comments have been made available in a public file and an opportunity for response thereto allowed, the Committee does not intend that this paragraph should require the agency to publish a separate notice of the issues raised. If the agency decides to make substantial changes in the proposed rule, however, such as by adopting a significantly different approach recommended in comments or subsequently developed by the agency, or by changing the scope of the rule to cover a significantly broader or different category of persons, a notice describing these changes and providing the necessary supporting information and analyses would be required. E.g., *American Iron and Steel Institute v. EPA*, 568, F.2d 284, 292 (3rd Cir. 1977) (holding that the agency "failed to give adequate notice that [its rule] would govern the specialty steel industry). The notice required by this subsection need not be in the form of a reproposal, but should be designed to provide sufficient opportunity for comment by affected persons.

The objective of this paragraph is to preclude agencies from making drastic departures from proposals or from the foundation for rule making developed by the agency which could not have been reasonably anticipated by interested persons. E.g., *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980). Such revisions would require prior notice under this section and reasonable opportunity to comment. Where a change goes to the heart of a rule and represents a substantial departure from the proposal commented on by the public commenters should be informed of that change and allowed to comment on it.

Several court decisions thoughtfully consider the instances in which changes in proposed rules warrant new opportunities for public comment, and therefore will provide guidance in applying this provision. For example, this paragraph should not "automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions." *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973). An agency "need not subject every incremental change in its conclusions after each round of notice and comment to further public scrutiny before final action." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978). "Rather, incremental changes are permissible so long as

the final rule is a 'logical outgrowth' of the proposals highlighted and discussed during the notice-and-comment period." *Sierra Club v. Costle*, *supra*, slip op. at 97.

"Even substantial changes in the original [rule] may be made so long as they are 'in character with the original scheme' and 'a logical outgrowth' of the notice and comment already given. *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974). The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final [rule]." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979) cert. denied, 444 U.S. 1096 (1980). This opportunity for comment is also important because it "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3d Cir. 1969). The question of what is "a logical outgrowth" always will require careful consideration on a case-by-case basis. *BASF Wyandotte Corp. v. Costle*, *supra* at 642.

New Subsection 553(d)

Subsection 553(d) revises the procedures to be utilized in informal rule making, both for major and for non-major rules. These new provisions, together with certain others found in S. 1080, embody what has collectively come to be called "hybrid" rule making. Hybrid procedures are aspects of more formal, adversarial rule making which are engrafted onto the informal rule making procedures found in section 553 of the A.P.A. Current law, as set forth in section 553, simply provides that, following publication of a notice of proposed rule making, the agency shall provide interested persons with the opportunity to submit written comments, with or without the opportunity for oral presentation. 5 U.S.C. § 553(c). The need for modernization of section 553, together with the case law and other statutory provisions regarding hybrid procedures, is discussed in greater detail earlier in this Report.

New Paragraph 553(d)(1)

Paragraph (1) of subsection (d) restates and elaborates on the current section 553(c). The significant new requirement is that agencies provide interested persons a period of not less than 60 days for the submission of written data, views, arguments and statements. Existing law provides no minimum comment period. The new 60-day requirement is in accord, however, with the practice of many agencies. It was also the minimum comment period specified for significant rules in Executive Order 12044, issued by President Carter. Exec. Order 12044, 43 Fed. Reg. 12661 (1978). Given the complexity of many of the issues involved in agency rule makings, the Committee believes that the 60-day period is necessary and will not result in delays in agency rulemaking. It should be emphasized, however, that the provisions of the bill regarding emergency rules will give agencies the necessary flexibility to place a rule into effect before allowing a normal comment period where a delay would seriously injure the public interest.

The second sentence of paragraph 1 points out that an agency may use other procedures "as it determines are appropriate" to

gather information and to ensure public participation in the rule making process. While the authority of an agency to utilize procedures in addition to those required for informal rulemaking under section 553 has always been clear, this statutory language reiterates that Congress does not intend to limit the authority of agencies to use means other than those set forth in the statute to gather information and that Congress is, in fact, encouraging agencies to do so where such other procedures are appropriate to "identify, and ensure full public comment on, the significant issues of law, fact, and policy of a particular rule making." Such procedures might include publishing an advance notice of proposed rule making, convening advisory committees pursuant to the Federal Advisory Committee Act, discussing proposals informally with interested persons, obtaining independent expert reviews of scientific data and studies, holding public workshops at which scientific or technical papers may be reviewed, presenting staff assessments for written comment and rebuttal, and providing the public opportunities to file replies to arguments and information. The Committee intends for agencies to consider using these and other informal procedures to increase public participation in rule makings.

New Paragraph 553(d)(2)

Paragraph (2) of this subsection directs the agency, when engaged in a rulemaking for a major rule, to provide an opportunity for oral presentation of data, views, and information at informal public hearings. For non-major rules, oral hearings are to be held when the agency determines that such presentations "are appropriate for the resolution of significant controversies in a rule making." Thus, such hearings are mandatory for major rules, but are not required in non-major rule makings.

This reflects the Committee's view that the policy, legal, and factual issues involved in major rulemakings are sufficiently important and complex that interested parties should be given the opportunity to offer their comment orally. Furthermore, the Committee intends that state and local governments—levels of government often severely affected by federal regulatory requirements—have, through this provision the opportunity to participate fully in the rulemaking and therefore have a hand in shaping the rule. Also, there may be other rule makings, while not involving a major rule, in which oral hearings may be particularly appropriate to resolve significant controversies. This paragraph makes clear the Committee's intent that oral hearings be held in non-major rule makings when appropriate but gives the agency needed flexibility by allowing it to make that determination of appropriateness. As discussed earlier in this Report, both the Courts and Congress have recognized the need for oral hearings in certain circumstances.

Paragraph (2) of subsection (d) also provides that when such informal hearings are held, either because the rule making involves a major rule or because the agency has determined that oral presentations are appropriate for the resolution of significant controversies, such hearings *may* include oral rebuttal or argument and *shall* include direct and cross-examination "when other procedures are determined to be inadequate for the resolution of material issues of fact." This is a carefully limited provision, requiring

certain additional procedures that the Committee believes are necessary to assure fairness and sound decision-making on complex factual issues. This provision is *not* intended to convert informal rule making into a time-consuming and costly adjudicatory process.

The Committee believes that the concerns expressed by those who fear that even a limited right of cross-examination will result in undue delay in rule making proceedings on major rules have been addressed by the significant limitations contained in paragraph (2). The Committee is confident that these limitations will assure that the opportunity for cross-examination will not be abused and will not result in undue delay. First, this provision does not apply to all issues involved in the rulemaking proceeding but only to those factual issues which are material to the rule making proceedings.

Second, even where a material issue of fact is involved, the agency should not permit direct and cross-examination of its witnesses or those of other parties if it determines that the other procedures—such as the exchange of written submissions—are adequate to resolve the disputed issues of fact. In most instances, other procedures, or combination of procedures, such as written rebuttal statements, advance questions for response at the hearings, pre-hearing discussion of the agenda of issues, opening and closing arguments, presentation of exhibits, agency publication of advanced notice of proposed rule making, creation of advisory councils, conferences or panel discussions, will be adequate to resolve disputed issues of fact.

When a material issue of fact cannot adequately be resolved on the record by these customary methods, the agency should allow direct examination and cross-examination in a manner which will serve to resolve such issues. Thus, this provision contemplates the examination and cross-examination of the persons who prepared data on which the agency is relying in the rulemaking, and of any other persons who present at the hearing significant information with respect to the material factual issues of the rulemaking. Cross-examination may well be appropriate, for example, to help resolve disputed technical or scientific issues that are of central relevance to the proceeding. This paragraph is not intended to transform the rulemaking into a trial, or to convert the role of the agency into that of a stakeholder between opposing non-agency parties.

Current law does not permit the courts to mandate the use of cross-examination in informal rulemaking. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). As we pointed out above, several courts had identified a need for such procedures as a matter of fairness before the Supreme Court ruling in *Vermont Yankee*. See *Walter Holm & Co. v. Hardin*, 449 F.2d 109 (D.C. Cir. 1979); *International Harvester Co.*, 478 F.2d 615 (D.C. Cir. 1973). The Committee has included cross-examination within the agency options specifically to respond to the perceived weaknesses in current law. Though it does not intend the use of cross-examination to become the norm, it expects that cross-examination will be used in appropriate cases to resolve significant controversies and that courts will consider the results of

cross-examination as a part of the agency's record when reviewing a rule.

Finally, the last sentence of paragraph (2) makes clear that agencies may establish reasonable procedures "to regulate the course of informal public hearings to ensure an orderly and expeditious proceeding." This provision confirms the authority of an agency to place reasonable limits on the opportunity for oral presentations and direct and cross-examination. The types of limitations that are necessary or appropriate may vary from agency to agency and from proceeding to proceeding, depending on the complexity of the issues and the number of parties involved. Agencies should utilize this discretion to control their own proceedings to produce the best possible record within a reasonable time.

If resources of personnel and time do not permit extensive oral argument, for example, the agency's procedures could regulate such argument by imposing reasonable limitations on the amount of time allotted to any party for the examination or cross-examination of a particular witness. In proceedings involving multiple parties, it would be entirely appropriate to limit the total amount of time for examination and to require that parties with the same or substantially the same interests choose a single representative to cross-examine on their behalf.

New Paragraph 553(d)(3)

Paragraph (3) sets out strict criteria for courts to observe in reviewing any agency refusal to utilize a certain procedure. Rules may not be set aside due to an agency's failure to utilize a specific procedure unless the requesting party made a timely objection to the agency and the agency's refusal precluded "a fair consideration and informed resolution of a central issue of the rule making taken as a whole." The burden rests with the party challenging the rule to make a timely objection (or to present extraordinary circumstances that excuse the failure to make such an objection) and to demonstrate that the particular procedural deprivation precluded a fair and informed resolution of a central issue of the whole rule-making.

The requirement that a dissatisfied participant make a timely objection to the failure to utilize a particular procedure or show why such an objection could not be made, is a very important one. The Committee believes that the agency should have the opportunity, in the first instance, to address objections to its choice of procedures. The Committee wishes to emphasize that a party who has failed to make a timely objection must show compelling circumstances which excuse the omission.

Besides demonstrating the timeliness of the objection, the challenging party has a burden of persuading a court that the denial of a requested procedure prevented a fair consideration and informed resolution of a central issue. The focus is on the record of the total proceeding. If the issue was central to the agency determination, such as the technological limits of a pollution control process or the appropriateness of a label of a certain type for consumer awareness, then the issue should be fully and fairly explored. The burden might be met, for example, where the assumptions or bases underlying the agency's conclusions regarding the feasibility of some

process, which was at the heart of the rulemaking was challenged but where the agency declined to permit cross-examination of the technical consultant on whom it was relying, and thereby precluded a fair consideration and informed resolution of the question of feasibility.

The court should not lightly reverse the agency for procedural reasons unless the flaw in the agency process has seriously affected the quality of the rulemaking on that central issue. With regard to cross-examination, there will be circumstances in which a supposition underlying an agency witness's presentation will be so important to the whole rulemaking that a failure to bring out and explore that supposition will be reversible error. There will be other situations in which the requested cross-examination would produce, at best, results cumulative of other information already in the record.

The most extensive study of administrative agency cross-examination, done by the Administrative Conference, suggests that denial of cross-examination could be appropriate where an issue is not capable of being resolved as a matter of fact, and where the evaluation of the proposed rule or its formulation by the agency do not depend on resolution of that issue. 1 CFR § 305.79-1(14) (discussing procedures under section 18 of the Magnuson-Moss Warranties-Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 57a(c)(1)(B) (1976)). See also Boyer, "Trade Regulation Rule-making Procedures of the Federal Trade Commission," Report to the Administrative Conference ch. VI (1979). A closely parallel approach to these provisions may be found in the Toxic Substances Control Act, 15 U.S.C. § 2618(c)(1)(B)(ii) (1976). See also the Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(b) (1976).

The Committee intends that the judicial review process act as a safety valve for incidents of unusual insufficiency and not as a means of imposing cross-examination or any other procedure in every proceeding. The Committee wishes to emphasize that, subject to the provisions of this legislation, the determination of which procedures to use in a particular rule making remains in the first instance with the agency and that courts should not engage in "engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 525 (1978). The limitations on judicial review found in paragraph (3) are intended to counter any possibility of the over-judicialization of agencies' decision-making processes and thus to preserve the flexibility and informality of rule making under section 553. The safety valve of judicial review is necessary, however, to assure that the complex factual issues addressed in a given rule making are fairly and thoroughly explored.

New Paragraph 553(d)(4)

This paragraph retains the identical language presently in subsection 553(c) of the A.P.A.

New Paragraph 553(d)(5)

This paragraph makes clear that nothing in section 553, including the new "hybrid rule making" provisions, explicitly or implicit-

ly authorizes an agency to pay in any way for the attorney's fees or other expenses of persons participating in the rule making.

New Paragraph 553(e)(1)

This paragraph requires the agency to publish a statement of a rule's basis and purpose upon final publication of the rule. The Committee intends that the agency statement of basis and purpose be more complete and significantly more informative than the minimal statement provided for in current law. In contrast to present law, such statements no longer should be "general." Instead, agencies should articulate carefully and fully the basis and purpose of a rule grounded upon the rule making file as constituted on the date of the final rule making. This statement must accompany final publication of the rule, which must occur not less than thirty days before the effective date of the rule.

The agency will be required to articulate the reasons behind the rule making as well as the factual and policy determinations that support it. This will afford a reviewing court the opportunity to "consider whether [the agency's decision] embodies an abuse of discretion or error of law." *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849 (D.C. Cir. 1972). Only if the agency is required to "articulate the standards and principles that govern [its] discretionary decisions in as much detail as possible," *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971), will a reviewing court be able to determine whether the agency "[took] a 'hard look' at the salient problems and [had] not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (The agency "must disclose the factors that were considered [and its] construction of the evidence." *Id.* at 420.). As a general matter, this will require the agency to cite the credible and reliable evidence in the rule-making record and the policy bases which support its determinations, identify the factors considered in promulgating the rule, and explain how information received by the agency was developed and evaluated.

It is important that the basis and purpose of the rule be delineated fully at the time of promulgation to avoid "post hoc rationalizations" by the agency or the courts. The requirement that the statement accompany the rule is also intended to further this goal. As the Supreme Court stated in *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974), "we cannot 'accept . . . post hoc rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" Post hoc rationalizations serve to defeat the purpose of notice and comment rule makings by permitting the one-sided articulation or creation of a "rationale" without the opportunity for public examination or commentary.

New Subparagraph 553(e)(1)(A)

The subparagraph (A) provision for "a statement of the need for, and the objectives of, the rule" is intended to require an agency to demonstrate adequate support for its determination that the final rule reasonably can be expected to improve significantly the status

quo. Thus, the agency should make a threshold determination that there is a need for such a rule and that there is a reasonable likelihood of significant improvement as a result of the rule. This provision is intended to avoid regulation where significant improvement cannot reasonably be predicted based on the information available to the agency. The agency's determination of need should be based on adequate information which, if questioned, has been validated and confirmed on the basis of generally accepted standards in relevant fields of expertise.

New Subparagraph 553(e)(1)(B)

This subparagraph is intended to ensure that an agency will genuinely consider and respond to reasonable alternatives to a rule proposed by persons outside the agency. The agency need not consider approaches which are not lawful under the applicable statutes. In such a case, the agency should explain its conclusion that a particular alternative is not lawful. This subparagraph also is intended to put on the record alternatives considered by the agency on its own and the reasons why the agency rejected these alternatives. As a result, the Committee expects that this provision will create an incentive for an agency to approach the resolution of a particular problem from the broadest possible perspective, always searching for more effective or less burdensome ways to fulfill its basic statutory mandate. In addition, by requiring an agency to address and respond to the reasonable alternatives proposed by the public, this subparagraph creates an incentive for interested members of the public to devote their time and energy to develop such alternatives. Both of these incentives only serve to improve the quality of rule making.

The explanation of new subparagraph 553(e)(1)(D) below, concerning agency response to public comments, contains further elaboration applicable to this subparagraph.

New Subparagraph 553(e)(1)(C)

This subparagraph requires essentially the same information to be published in the statement of basis and purpose as must be published in the notice of proposed rule making pursuant to new subparagraph 553(c)(1)(B). This requirement is reiterated here to ensure that the agency addresses any comments from the public challenging the agency's assertion in the proposed rule. The Committee felt that this legal issue should be segregated from other issues raised by public comments and subjected to particular scrutiny because of the serious consequences of expansive agency interpretations of enabling statutes. In addition, insofar as Congress has inadvertently created improperly ambiguous delegations of authority to agencies, highlighting of statutory ambiguities in this way assists Congress in fulfilling its oversight responsibilities and provides an incentive for the Congress to avoid such ambiguities in the future. Finally, this process will assist the Congress in avoiding the constitutional shoals of standardless delegations of law making authority.

New Subparagraph 553(e)(1)(D)

Subparagraph (D) requires an agency to publish in the statement of basis and purpose "a succinct explanation of how the factual conclusions upon which the rule is based are substantially supported in the rule making file." Under this provision, the agency must explain how the factual conclusions on which the rule is based are supported by reliable and credible evidence in the rule making file. This explanation does not need to be made for every factual conclusion. Rather, this requirement involves only factual conclusions of enough significance that they can be characterized as conclusions "upon which the rule is based."

For those factual conclusions "upon which the rule is based," however, the Committee expects the "succinct explanation" will be more than a mere recitation of the agency's factual conclusions. In its "succinct explanation," the agency should meaningfully relate how its finding that a certain fact exists flows from the evidence before the agency, justifying its rejection of any contrary evidence.

This subparagraph further requires the agency to publish a summary of its assessment of the comments presented by the public. This assessment should contain the agency's response to those comments. The agency is not required to respond to each commenter, but should respond to significant issues raised in the comments to the proposed rule. Of course, the Committee does not intend that the significance of an issue be determined by the number of commenters who raise it. In some cases, a significant issue may be raised by only one commenter. The Committee expects that response to be commensurate with the comment. If comments are cursory or are concerned with trivial issues, they warrant little agency response. As the court noted in *Portland Cement Ass'n. v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied 417 U.S. 921 (1974), an agency's obligation to respond arises when public comments are "significant enough to step over a threshold requirement of materiality. . . ." What will be required from the agency by way of response will depend on what is presented. *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 666 n.19 (D.C. Cir. 1975). In each instance, the agency's response should be sufficient to demonstrate that the agency has given due consideration to the comments in arriving at a final rule making decision.

Thus, this provision essentially codifies the better case law under the A.P.A., requiring courts to look for an agency's "conscientious attention to the objectives raised to the proposed rule, and their reasoned disposition on the basis of technical information and other relevant considerations." *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 341 (D.C. Cir. 1968). Accord, *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 547 F.2d 633, 646 (D.C. Cir. 1976), cert. denied, 429 U.S. 1090 (1977).

New Subparagraph 553(e)(1)(E)

Subparagraph 553(e)(1)(E) requires an agency, in the statement of basis and purpose accompanying a final rule, to describe the scientific evaluations, data, and other similar information substantially relied upon by the agency in promulgating the rule. Like subparagraph 553(c)(1)(E), this subparagraph is intended to increase public

awareness of the data and evaluations that underlie agency resolution of complex factual issues, especially those involving scientific and technical matters, including any efforts undertaken by the agency to validate data or to verify the accuracy of scientific conclusions, such as peer review. The description required by this subparagraph should clearly inform the public of precise purposes for which an agency is relying on specific data, studies, or other information. The source of each piece of such information should be identified with sufficient specificity to allow members of the public to evaluate that source's credibility and authority and consequently to judge the ultimate reliability of the information.

New Subparagraph 553(e)(1)(F)

Like subparagraph 553(e)(1)(H), this subparagraph requires that a summary of any final regulatory analysis, required to be issued for a proposed "major rule" under new subchapter II of chapter 6 of title 5, United States Code, be published in the statement of basis and purpose. The Committee did not require the whole final regulatory analysis to be published in the statement of basis and purpose because of the expense involved in printing a lengthy analysis and because the whole analysis will be in the rule making file, available for public inspection and copying. The complete final regulatory analysis is a part of the file of the rulemaking. The Committee intends that the summary published in the statement of basis and purpose will be a concise presentation of the substance of the final regulatory analysis, yet comprehensive enough to inform the public of its contents.

New Paragraph 553(e)(2)

Paragraph 553(e)(2) requires an agency to identify and disclose, at the time it proposes a rule, the information upon which it plans to substantially rely in the rulemaking. "Substantial reliance" means the use of material to establish one or more of the elements of the factual foundation of the rule, so that but for that material, the rule would not have sufficient factual support.

In many cases, however, factual and methodological material relating to significant issues in the rulemaking proceeding may be developed or received by the agency after the notice of proposed rule making has been published. An agency should endeavor to place such material in the rulemaking file at the earliest possible time. *Cf. Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375, 392-94 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

The term "methodological material" refers to techniques, assumptions, formulae, models or any other methods used to collect or analyze factual information, or to predict events. The term "methodology" was employed in this customarily broad sense by the court in *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 648 (D.C. Cir. 1973). Methodological material has often been at issue in complex cases. *E.g., Kennicott Copper Corp. v. EPA*, 462 F. 2d 846 (D.C. Cir. 1972). For example, the method by which surveys or samples are taken can be critical to the validity of findings premised upon those methods. *E.g., Aqua Slide 'n Dive Corp. v. Consumer Product Safety Comm'n*, 569 F. 2d 831 (5th Cir. 1978).

Policy recommendations, by themselves, are not encompassed by the term.

In order to ensure that agencies will undertake to provide a full and fair opportunity to comment on critical factual and methodological material, subsection 553(e)(2) prohibits an agency from relying substantially on such material if it was not identified in the notice of proposed rulemaking, unless it was placed in the rulemaking file during the period for public participation in the proceeding. The Committee is hopeful that, in most cases, such material will be placed in the rule making file sufficiently in advance of the close of the comment period as to allow interested persons to address the new material in their comments.

The Committee recognizes, however, that there will be cases in which the agency develops or receives the material either after the normal comment period has ended or so close to its termination that interested persons will not have an opportunity to comment on the material in the normal course. In some such cases, it may be desirable to extend the comment period. However, the Committee understands that, in theory at least, this could lead to endless rounds of comment on new material, thereby creating insuperable practical obstacles. Paragraph 553(e)(2) is not intended to create such obstacles. "Finality, after all, has a place in administrative rulemaking, just as it does in judicial decisionmaking." *Sierra Club v. Costle*, No. 79-1565 (D.C. Cir., April 29, 1981) slip op. at 201-202. Consequently, paragraph 553(e)(2) does not, as a general rule, preclude an agency from relying on factual or methodological material that was not placed in the rulemaking file during the period for public participation in the proceeding. However, if the material on which the agency plans to rely substantially is "of central relevance to the proceeding," interested persons must be afforded an opportunity to comment on the material. Material is of central relevance to the proceeding when consideration of the piece of information would be crucial to the factual premises upon which the rule rests. For example, where information relates to the technological feasibility of a proposed rule, and acceptance or rejection of that information could result in different conclusions on the matter of technological feasibility, the information is of central relevance. *E.g., Bunker Hill Co. v. EPA*, 572 F.2d 1286 (9th Cir. 1977).

The Committee believes that this is a fair and practical approach to defining the scope of permissible agency reliance on critical factual and methodological information—as opposed to more general policy considerations—involved in a rule making proceeding. It is consistent with the approach reflected in the Clean Air Act, as recently interpreted by the Court of Appeals for the District of Columbia Circuit in the *Sierra Club* decision. *Id.*, slip op. at 195-202. It also is consistent with more generalized notions of administrative fairness. See *e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d at 392-94, 402; *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631-33 (1973). The Committee believes it strikes an appropriate balance between the need to ensure a full and fair opportunity for interested persons to participate in rule-making proceedings and the need to conclude such proceedings in a reasonably timely and expeditious manner.

New Paragraph 553(f)(1)

Paragraph (f)(1) specifies the categories of documents that comprise the rulemaking file. This file, plus the material excluded from the file pursuant to new paragraph 553(f)(2), constitutes the record of the rule making for purposes of judicial review. Thus, for example, the complete preliminary and final regulatory analysis and transcripts of any hearings, are part of the whole rulemaking record.

The current A.P.A. contains no provision setting out what is to be the record of informal rule making, or indeed requiring that there is to be such a record. In order to make the judicial review provisions of the A.P.A. viable, however, the courts have found it necessary to imply a requirement that administrative decisions be based on some kind of a record. E.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Camp v. Pitts*, 411 U.S. 138, 142 (1973). See generally 1 K. Davis *supra* at § 6:5. Obviously, requiring a record for rule making in such a backhanded manner injects considerable, and unnecessary, uncertainty into judicial review of rulemaking. As one witness testified:

The problem with the "records" currently certified to the courts is that their content is unknown until judicial review is well under way. This may lead either to inclusion of far more documents than are needed to understand the rule or to exclusion of documents that have a legitimate bearing on it. As a result the courts are confronted with huge, unwieldy records, and are forced to spend undue effort in weighing the parts of each record and extracting underlying reasons from the documents—jobs which the agencies should have done themselves. Hearing on S. 1080, *supra* (statement of Raymond Momboisse, at 11).

Furthermore, a requirement for a rulemaking record articulated essentially in judicial precedents is by nature indefinite in its application to specific rulemakings and leaves an agency with enormous discretion to determine the contents of the record:

Agency practice has often varied widely from court requirements. A chief reason for this is the current absence of any general statutory requirement that a record, available to the public, be established at some point before a final decision is made. Unless some special statutory provision requires otherwise, no discrete record is currently necessary in informal rule making until a court challenge is begun. . . . [T]he agency's instinct is to find everything that conceivably supports its decision and claim that these materials, together with publicly filed comments, constitute the record. Unfavorable material, on the other hand, especially if its existence is known only to the agency, will not be handled so carefully. In fact, such material may even be concealed. *Id.* (statement of Raymond Momboisse, at 11-12).

Accordingly, the Committee intends that paragraph (f)(1) be a clear statutory articulation both of a requirement that informal

rule making be based on material in a public file compiled contemporaneously with the progress of the rule making and of the categories of material that must be included in the file. By specifying these categories, the Committee intends for the file to include those materials that might reasonably be expected to play an important role during a rulemaking or on judicial review of a rule. The record for judicial review includes not only the rulemaking file, but also confidential material excluded from the file pursuant to paragraph (2). If courts are to scrutinize rulemakings carefully on judicial review, they should have access to the complete text of significant confidential material, which the agency will place in the public file only in summary or aggregate form. It may be necessary for reviewing courts to exercise their inherent authority to preserve the confidentiality of such material during judicial review through appropriate in camera inspections, protective orders or similar devices.

New Paragraph 553(f)(2)

Paragraph (f)(2) provides that material used in a rulemaking, which is exempt from disclosure under the Freedom of Information Act, may be excluded from the rulemaking file and thereby protected from disclosure. If an agency intends to rely substantially on any such confidential material, however, it must utilize appropriate mechanisms to make the substance of the confidential material available for meaningful public comment. The purpose of these provisions is to protect trade secrets and similar confidential matters, while permitting agencies to use confidential materials to the maximum extent in rulemakings. Insofar as an agency cannot make the substance of such material available for comment, the agency may not substantially rely on it in formulating a rule. Conversely, the fact that the substance of such material is disclosed by the agency shall not be deemed a waiver of any privilege of confidentiality that may be applicable.

This paragraph strikes a cautious balance between the important value of public access to data underlying an agency decision and the right to protect private information which should merit legitimate confidential handling. The alternate means for disclosure of this record-building material may be the creation of summaries, aggregations of data, protective orders for parties granted access to the material, or other mechanisms. The intent of the Committee is to protect this material to the maximum extent possible, while allowing the aspects of the information upon which the agency's final decision is based to become known in a nonconfidential form.

There is ample precedent for this approach. The Toxic Substances Control Act recognized that some agency rulemaking proceedings will necessarily involve competitively sensitive business data which parties to the rulemaking who are competitors of the submitting firm should not receive. That Act provides that disclosure occur in such a manner as to preserve confidentiality to the greatest extent, and a standard of due care is established which the agency must meet in its handling of confidential business information. 15 U.S.C. 2613(a)(4).

New Paragraph 553(f)(3)

This paragraph provides that analyses required by another statute, such as those required under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., may be included in the notice of proposed rulemaking and the statement of basis and purpose insofar as those analyses satisfy the requirements of this section, or are not inconsistent with them. This paragraph is intended to avoid unnecessary duplication or overlap in rulemaking.

New Subsection 553(g)

This subsection expands the rights of petition under the A.P.A. by providing that an interested person may petition for advice or interpretation regarding the application of a rule, or, where permitted by law, for a variance or exemption. It also requires the agency to respond in writing and with reasonable promptness to such a petition and to state the reasons which support the agency's conclusions.

The provision for advice or interpretation is not novel; it codifies the better practices of some agencies to respond to inquiries, sometimes only informally and sometimes formally, such as the Internal Revenue Service's private rulings. In the view of the Committee, a person faced with conflicting rules and apparent inconsistencies in agency decisions, for example, should be able to promptly obtain advice from agencies to eliminate the potential for duplicative liability. This provision is intended to require agencies to reasonably respond to petitions for such interpretations. The provision for variances or exemptions is also not out of the ordinary; some agencies already are required to consider and act upon such requests, as the Supreme Court recognized in *U.S. v. Storer Broadcasting*, 351 U.S. 192, 201, 205 (1955).

This subsection also requires a written response with a statement of reasons to be issued with reasonable promptness. In *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 667 (D.C. Cir. 1975), Judge Leventhal noted that "the substantiality of the [agency's] response [to a petition] must necessarily be related to the substantiality of the issues raised." The Committee endorses this reasoning as spelled out in the *Oljato* case:

Naturally the expansiveness of the Administrator's articulation of reasons depends on the complexity and substantiality of the issues raised. We are by no means demanding comprehensive responses to frivolous petitions, but nor are we sanctioning summary dismissals of meritorious claims * * *. In large part what we will demand by way of response from the Administrator will depend on what is presented by petitioners in support of this claim. Id. at 666-667 n. 19.

The nature and substantiality of the agency's response will depend in each case on the relevance and importance of the issues raised in a petition, on the detail with which the petitioner's claims are presented, and on the quality and substantiality of the data, evidence and other material submitted in support of those claims.

This subsection requires further that an agency respond "with reasonable promptness" to any petition. What this requires neces-

sarily will vary from case-to-case. However, the agency should make consistent progress toward completing its evaluation and resolving the issues raised by the petition and should advise the petitioner promptly of its decision.

It must be emphasized that the Committee does not intend that this subsection create rights to a particular interpretation, or to a variance or exemption. If an agency is precluded by law from granting a variance or exemption from a rule, for example, this subsection does not give it the authority to do so. Similarly, this subsection does not contemplate a particular procedure by which an agency must respond to these petitions. An agency may employ, or even already have in place, any procedure for responding to such petitions which is consistent with and which achieves the goals of this subsection.

SECTION 4

Section 4 adds two new subchapters to chapter 6 of title 5, United States Code. These subchapters would have the following provisions:

Subchapter II

This subchapter sets out the provisions for the regulatory analysis of major rules and for executive oversight of that process.

Section 621

Section 621 sets out the definitions of important terms used in both subchapter II and III.

Subchapter 621(1)

This subsection maintains the definition of "agency" set out in section 551(1) for purposes of subchapters II and III.

Subsection 621(2)

Subsection (2) applies the definition of "rule" provided in section 551 to subchapters II and III.

Subsection 621(3)

Subsection (3) defines the term "major rule" as used in this bill. This definition establishes the criteria for designating the rules for which regulatory analyses shall be performed under Section 622 and which shall be treated as major rules for other purposes under this Act.

This subsection provides two basic definitions for a "major rule." These definitions are disjunctive and not conjunctive or cumulative. Thus, the test set out in paragraph (A) is distinct from, and does not apply to, that in paragraph (B). It is possible that a rule might be "major" under the criteria of both tests, but that outcome is not required; a rule need meet the standard of only one of these paragraphs to be major.

In evaluating whether a rule is major, both definitions apply to a "rule or a group of closely related rules." In this manner, the definition of "major rule" recognizes that a number of different rules which, though not strictly "major" independently of each other, may be so related in either design or ultimate effect that

together they have an impact of sufficient significance that they should be considered "major" and subjected to regulatory analysis. On the other hand, there may be a group of rules which individually are major rules, but which are so intimately related that one regulatory analysis can thoroughly explore all their effects to reasonably meet the standard in paragraphs 622 (c)(4) and (d)(2).

A "group of closely related rules" might be rules to be promulgated contemporaneously which are directed at the same activity or industry. Thus, if an agency is developing regulations to be applied to a number of different portions of an industry's operations or different stages of a production or manufacturing process, the agency should determine whether the impacts of those rules are so related that the promulgation of the group of rules can be considered as the promulgation of one major rule. An agency is not permitted to avoid preparing a regulatory analysis by simply dividing a major rulemaking into smaller component parts which do not qualify as a major rule.

Another example of a "group of closely related rules" is an umbrella generic regulation, setting out regulatory standards or categories to be applied to specific subjects in subsequent rulemakings, and the subsequent rules applying those standards or categories. A requirement promulgated in such an umbrella rule often forecloses central issues from consideration in its application in the subsequent rulemaking. The umbrella generic rule and the subsequent rules in such a case are quite closely related in that the provisions, and consequently the impact, of those subsequent rules are greatly determined by the provisions of the umbrella rule. Accordingly, the combined impact of the generic rule and the subsequent rules should be considered to determine whether this group of rules is a major rule under the definition of this subsection.

The Committee wishes to point out that this grouping of rules is done for the purposes of determining whether rules are major rules, but it does not mandate how regulatory analysis is to be performed once major rule status is determined. One regulatory analysis might be performed for the whole group, or, where each rule of the group is itself major, individual analyses might be performed on each rule. In the case of a generic rule, one broad analysis might be done for the more general issues of that rulemaking, while a more focused analysis, of a significantly more limited scope, might be done of a subsequent rule which, applying the generic standards, is itself a major rule.

This provision, however, should not be construed to obviate the need for any regulatory analysis of subsequent rules that independently meet the criteria for treatment as a major rule under this subsection, unless the initial analysis for a group of regulations has considered fully the potential effects of the subsequent regulation.

Subparagraph 621(3)(A)(i)

This subparagraph sets out the basic elements of the first definition of "major rule." It provides that a regulation is a major rule if it has "an annual effect on the economy of \$100,000,000 or more in direct or indirect enforcement and compliance costs." The Committee intends that the phrase "direct or indirect enforcement and

compliance costs" should be read broadly to include the secondary costs that can be said to result from the rule and that can reasonably be measured in monetary terms. Thus, compliance costs, as used in this subsection, are not limited to those expenses for equipment and labor necessary to meet the terms of the rule, but also include indirect costs, such as adverse effects on employment, wages, consumer prices, and the like. Remote or highly speculative costs, however, should not be included. As our ability to make such quantified estimates expands, the class of costs encompassed by this definition will also expand. "Annual effect" also should include that portion of the amortized capital costs of compliance that may reasonably be attributed to a given year.

As it is keyed to economic impact expressed in monetary terms, this test can be considered a relatively more "objective" standard than the second definition, contained in paragraph (B). Data, studies, and other information can be adduced to support any estimates used, and the ultimate characterization of a rule as major will rely to a much lesser degree on the judgment of the agency than a similar characterization under paragraph (B).

The determination of whether or not a rule has a \$100,000,000 impact on the economy is to be made in the first instance by the agency. If the agency does not determine that a rule is major under this standard, the President or his delegate may determine that the rule is major.

Subparagraph 621(3)(A)(ii)

Subparagraph (ii) provides for two exceptions from the first definition of major rule. In both cases, the Committee concluded that regulatory analysis would contribute little to these excepted rule-makings, being either duplicative or irrelevant.

Clause 621(3)(A)(ii)(a)

This clause exempts from the first major rule definition matters which are not within a common sense of the word "rules." The rules exempted under this clause are either so limited in their application or so directly address only narrow economic issues that the process of regulatory analysis would add little to the rule making.

The phrase "particular applicability" is drawn from the A.P.A. definition of a rule as a statement of "general or particular applicability." 5 U.S.C. § 551(4). Its present meaning in the A.P.A. is unclear and has been generally criticized by commentators. E.g., 1 K. Davis, *supra* at § 7:3; Nathanson, "Some Comments on the Administrative Procedure Act," 41 Ill. L. Rev. 368, 372-77 (1946). The better case law holds that rule making involves the declaration by an agency of "generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before [the agency]." *PBW Stock Exchange, Inc. v. SEC*, 485 F. 2d 718, 732 (3d Cir. 1973), cert. denied, 416 U.S. 969 (1974). The Committee declined at this time to amend the existing A.P.A. definition of rule to delete the phrase "or particular" because it was advised that some agencies use rule making in a manner which could be called "informal adjudication." Though the Committee feels this is not an appropriate use of informal rule

making, any change in the definition of rule obviously involves the A.P.A. provisions for adjudication. Since this legislation does not address those provisions, the Committee refrained from modifying the definition of rule in this way in this bill.

For purposes of this exemption from the major rule definition, however, the term "rule of particular applicability" is intended to refer to a rule not affecting the general public, but applying to particular persons or classes of persons. This understanding is consistent with some interpretations of "particular applicability" as it is presently used in the A.P.A. E.g., Attorney General's Manual on the Administrative Procedure Act, *supra* (A rule of particular applicability applies "either to a class or to a single person." *Id.* at 13.).

A prime example of the type of rulemaking the Committee has in mind would be a rate making proceeding such as those held under the Natural Gas Act, 15 U.S.C. §§ 717c, 717d. In such a case, where the agency is reviewing or prescribing rates to be charged in the future by a regulated entity, the requirements applicable to major rules would not come into play.

Another example of a matter which will not be a major rule under this provision is the authorization of a new communications service or the modification of such standards for an existing service by the Federal Communications Commission. This exemption does not extend, however, to the imposition of performance requirements or other regulatory burdens on the persons authorized to perform such services. Costs of compliance or other effects of regulatory requirements should be considered separately from the non-regulatory costs or effects of providing the communications service, and if the regulatory burdens alone would warrant treatment as a major rule, then those aspects of the rule making shall be subject to the requirements applicable to a major rule. Similarly, an SEC rule regarding the mergers or acquisitions of a particular firm or of a particular class of firms would not be a major rule under this exception. This clause also exempts rules of the Internal Revenue Service from treatment as major rules under paragraph (A).

Clause 621(3)(A)(ii)(b)

Clause (ii) exempts from the "major rule" definition a rule that authorizes the introduction into commerce or recognizes the marketable status of a product or service that, pursuant to statute, could not lawfully be introduced into commerce or marketed in the absence of a rule. Under current law, industry applications for agency approval or certification of new food additives or color additives, 21 U.S.C. §§ 348, 376, of new antibiotics, 21 U.S.C. § 357, are processed through informal rule making. As a general matter, such rules should not fall within the "major rule" definition of subparagraph 621(3)(A) in the first place. However, lest there be any doubt, clause (ii) would expressly exempt such "pre-market approval" regulations from the first definition of major rule. It is the Committee's intention, however, that this exemption be interpreted narrowly. This exemption would not include such agency initiatives as USDA and FDA food labeling rules and other rules of more a "regulatory" nature. Generally these rule makings focus on one issue on which the marketing of a product is dependent. Ap-

proval of a food additive, for example, addresses only whether a particular additive is safe for human consumption, but does not involve the setting of general standards with which the public must comply. Regulatory analysis is an irrelevant exercise in this context.

Paragraph 612(3)(B)

Paragraph (B) sets out the second definition for a "major rule." It provides that an agency, or the President or his delegate, may designate a rule as major due to the significant impact of the rule, irrespective of whether or not it will have an annual effect on the economy of \$100,000,000. This definition has been characterized as relatively more subjective than that in paragraph (A) because, not setting out a clear standard like an impact of \$100,000,000, it relies heavily on the judgment of the agency, and of the President or his delegate, regarding the ultimate impact of a rule.

In spite of this subjective element, the Committee concluded that this alternate definition for major rules was necessary due to the inadequacy of the simple "\$100,000,000 test" in capturing rules whose disruptive impact was significant enough to warrant regulatory analysis, but whose impact did not rise to that level or was not reducible to a monetary measure.

Both hearing testimony and responses of witnesses to questions submitted after the hearing conducted by the Subcommittee on Regulatory Reform confirmed this view of the Committee. For example, Robert Muth explained why the elements of this second definition were needed:

They are necessary, both because subparagraph (i) will not provide a brightline test in all cases, and because much damage can be done to the U.S. economy by regulations having a severe impact on small business segments. Total sales in the U.S. of many vital materials are less than \$100,000,000 per year. Examples include cadmium, arsenic, selenium, beryllium and any number of specialty drugs and chemicals. Since few industries have \$1 in capital investment for \$1 of annual sales, production of any of those materials could presumably be banned entirely without imposing a compliance cost of \$100,000,000 per year. We need to pay attention to micro-economic impacts. Hearing on S. 1080, *supra* (response of Robert Muth to written questions).

The representative of the American Bar Association pointed out:

The problem with subparagraph (i) alone is that it does not cover situations in which no additional costs are imposed upon the economy as a whole, but substantial costs are *transferred* from one sector of the economy to another—for example, a rule adopted by the Food and Drug Administration transferring testing or labelling requirements formerly imposed upon the manufacturer to the retailer. Nor does it cover those rules whose economic effects are quite literally incalculable in dollar terms, but which will significantly deter useful economic activity—for example, a Food and Drug Administration ban on all new

drugs. Rules of this sort clearly demand the same close scrutiny as those which impose a calculable compliance burden of \$100 million. Hearing on S. 1080, *supra* (response of Richard Smith to written questions) (emphasis in original).

In addition, the "\$100,000,000 test" tends to focus heavily on economic matters, or at least on quantifiable effects, thereby not completely reflecting the Committee's view that regulatory analysis is not merely an economic impact analysis, but encompasses all effects of a rule. Thus, a "significant adverse effect on public health" is as important as a "significant adverse effect on investment" for the purpose of warranting regulatory analysis under this paragraph. See Hearing on S. 1080, *supra* (response of Nancy Drabble and Carolyn Brickey to written questions). Finally, the inclusion of effects which may not at present be quantifiable "reinforces our understanding that S. 1080 contains more than a strictly mathematical requirement for assessing costs and benefits." Hearing on S. 1080, *supra* (response of F. Thomas Westcott to written questions).

In short, the type of rule which warrants a regulatory analysis will vary significantly depending on a vast array of different variables. "S. 1080 takes a practical approach to the problem which provides both the necessary specificity and flexibility by incorporating economic and non-economic facts into the decisional process." Hearing on S. 1080, *supra* (statement of Nicholas Calio, at 5). If a rule "is likely" to produce the effects set out in paragraph (B)—that is, if there is a substantial probability that those effects will result from the rule—the rule should be designated as "major" and subjected to a regulatory analysis.

Subparagraph 621(j)(B)(i)

Subparagraph (i) provides that a rule may be designated "major" on the ground that it is likely to result in "a substantial increase in costs or prices" for individuals or for various types of organizations. Designation of a rule as "major" because it is likely to result in such "substantial" increases in costs or prices obviously involves the application of sound judgment by the agency, the President, or his designate to the question of what degree of increase in costs or prices produced by a particular rule is "substantial." What may be "substantial" in one industry, for example, may be insignificant in another. It is anticipated that the official charged with responsibility for designating a rule will take into account the economic circumstances of the affected class, the consequence of the cost or price increase to a typical member of that class, and the ability of that class to carry or pass along such increases as a normal function of its operations. So the term "substantial" has no single meaning but should be judged within the context in which an increase is likely to be felt by affected persons, firms, organizations, agencies or regions.

Subparagraph 621(j)(B)(ii)

Subparagraph (ii) sets out as a ground for the designation of a rule as "major" the "significant adverse effects" of the rule on "competition, employment, investment, productivity, innovation,

the environment, public health or safety, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets." The term "significant adverse effects" is very widely used in both federal and state law concerning the impacts of certain agency and private actions. E.g., *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 624 (1975); *Chandler v. Florida*, — U.S. —, 49 U.S.L.W. 4141 (1981). The wide variety of environmental, labor, and other situations in which the term has been used make it impossible to adopt any particular line of decisions as controlling.

The Committee intends the term "adverse effects" to mean consequences which lessen or are contrary to the interests of public health, productivity, competition, or the other listed factors, as compared to the relative position of those factors if the agency's rule were adopted. For example, a group of U.S. firms able to compete in the export market for wheat against foreign competitors would be adversely affected by a rule which restricts their ability to compete in the world wheat market. Their status after adoption of the rule would be lessened as compared to their position prior to its adoption.

An adverse effect is "significant" if, taking into account the context, there is more than a slight impact upon the conditions listed in subparagraph (ii). No absolute standard can be applied to the determination of what is a "significant adverse effect." As with other legislative-type judgments, the person authorized to designate the rule as "major" will be making that determination in the context of the particular set of circumstances surrounding a particular rule.

Subparagraph 621(3)(B)(iii)

Subparagraph (iii) provides that certain rules may be designated as major due to other effects that warrant a regulatory analysis. Such effects include inter alia, significant intangible costs, such as a loss of consumer freedom of choice, and costs that are significant to the particular industry or geographic region that must bear them.

Subsection 621(4)

Subsection (4) defines the term "benefit" broadly so as not to exclude from consideration any significant beneficial effects that might derive from a rule or an alternative to a rule. The ultimate impact of a rule on society or the economy generally, on a distinct class of persons, or on identifiable individuals is the standard for determining the benefits or beneficial effects of a rule. Accordingly, the benefits of an OSHA noise regulation would be the reduction in harmful noise actually reaching worker's ears, not merely the number of muffling devices required to be worn by workers. The benefits of a water pollution regulation would be favorable effects on the aquatic ecosystem or society's enjoyment of it, not merely reduction of the discharge of a particular chemical. E.g., *Appalachian Power Co. v. Train*, 545 F. 2d 1351 (4th Cir. 1976) ("[I]f there is no expectancy of benefits of aquatic life, is the expenditure of billions of dollars [in reducing heat discharges] justified under any standard?" *Id.* at 1364 n. 31.).

The benefits and beneficial effects resulting directly or indirectly from a rule are not limited to effects which can be quantified. For example, they may include, where identifiable and significant, benefits of a less tangible nature, such as increased freedom of choice for consumers or other groups, or a positive impact on human enjoyment of the environment.

At the same time, the definition specifies that the benefits to be considered are only those that are "identifiable."

The Committee intends this qualification to exclude speculative benefits and to clarify that the identification of benefits to a rule or an alternative to a rule should be supported by adequate information and not by mere assumptions or guesses. In *Monsanto Co. v. Kennedy*, 613 F. 2d 947, 955 (D.C. Cir. 1979), for example, the court held that the Food and Drug Administration could not rely solely on a scientific principle to support a finding which could have been tested against actual scientific data. "The Commissioner . . . must support his decision with more than a conclusory reference to the diffusion principle of the second law of thermodynamics." *Id.* at 956. Thus, estimated benefits to public health should be based, wherever practicable, on scientific information of acceptable quality, and any "prediction" must be a "meaningful projection(s) from reliable data." *Id.* at 955.

Finally, the definition of benefits is limited to those that are "significant." This language specifies, as did the Supreme Court in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, (1980), that administrative agencies should not devote society's finite resources to achieving benefits whose significance is de minimis.

Subsection 621(5)

Subsection (5) defines the term "cost" in a manner identical to the definition of "benefit," and the concerns expressed above regarding the definition of "benefit" apply equally here. Costs, like benefits, are defined broadly to ensure agency consideration of any significant, identifiable costs to a rule or an alternative to a rule. Indirect or secondary adverse effects should be considered, even though the agency may not always be able to measure such adverse effects precisely. Like benefits, the costs and adverse effects that must be considered are those that are "significant" and "identifiable," and agencies should also consider intangible costs, such as restrictions on freedom of consumer choice. Agency cost estimates should also be based on information of reliable quality. Estimates should be based on representative data and should use accepted principles of economic and technical analysis. For example in *National Lime Ass'n v. EPA*, 627 F. 2d 416 (D.C. Cir. 1980), the court emphasized that "due consideration must be given to the possible impact on emissions of recognized variations in operations and some rationale offered for the achievability of the promulgated standard given the tests conducted and the relevant variables identified." *Id.* at 434. Once again, the ultimate impact of a rule on society or the economy generally, on a distinct class of persons, on particular levels of government, or on identifiable individuals is the standard for determining the costs and adverse effects of a rule.

Subsection 622(a)

This subsection requires an agency to determine whether or not a rule is major within the meaning of paragraph 621(3)(A) before publishing the notice of proposed rule making. If an agency determines that the rule is not major under that definition, it must also decide, again before publishing the notice, whether it will designate the rule as major on the grounds set out in paragraph 621(3)(B). As discussed above under subsection 621(3), a "group of closely related rules shall be considered as one rule" for the purpose of making this determination or designation.

The notice of proposed rule making must include an explanation of the agency's determination of whether or not a rule is major under paragraph 621(3)(A). If an agency has determined that a rule is not major under paragraph 621(3)(A), but has designated it as major under paragraph 621(3)(B), the notice must include in addition the agency's explanation of the basis for that designation. It should be noted that the agency is not required to explain a decision not to designate a rule as major under paragraph 621(3)(B). Thus, if the agency determines a rule not to be major under paragraph 621(3)(A), and it decides not to designate it as major under paragraph 621(3)(B), the notice will include only the agency's explanation of its determination that the rule is not major under paragraph 621(3)(A).

Subsection 622(b)

This subsection provides that, not later than thirty days after the publication of a notice of proposed rule making, the President, or an officer selected by him under new section 624, may determine that a rule is major under paragraph 621(3)(A), or may designate a rule as major under paragraph 621(3)(B). If the President or his designee makes such a determination or designation, he must publish an explanation of his determination or designation in the Federal Register when he makes that determination or designation.

This provision is not intended to displace the agency as the entity with primary responsibility for deciding whether a rule is major. Rather, it is intended as an oversight device to ensure that agencies evaluate the potential impact of a rule thoroughly and fairly. Such oversight is critical to the effective application of regulatory analysis. There is evidence that agencies in the past have tried to avoid doing regulatory analysis. Reviewing the application of President Carter's Executive Order 12044, for example, OMB reported that "agencies are not doing an adequate job of determining when a regulatory analysis is required." Office of Management and Budget, "Improving Government Regulations: A Progress Report," pt. 1 at 20 (Sept. 1979). That report also noted that "agencies are at times reluctant to do regulatory analyses and make them available to the public because they are 'too hard.'" *Id.* at 21.

However, the Committee intends the President or his designate to use this authority responsibly. Regulatory analyses are expensive, and they should be performed only where warranted according to the criteria of this legislation. Accordingly, to circumscribe excessive imposition of regulatory analysis without undermining the vital oversight role of the President or his designate, subsection (b)

prohibits the President or his designate from designating more than 75 rules as major under paragraph 621(3)(B) in any fiscal year. No limitation is put on the number of rules the President or his designate may determine to be major under paragraph 621(3)(A).

Subsection 622(c)

This subsection sets forth the basic requirements for the regulatory analysis which must be issued when a major rule is proposed. This analysis, the "preliminary regulatory analysis," must be issued when the notice of proposed rulemaking is published. A summary of the analysis is included in the notice, and the whole analysis is placed in the rulemaking file, as discussed above. If the President or his designate has determined the rule to be major, or has designated it as major after the notice has been published, the agency must prepare the preliminary regulatory analysis immediately and issue it as soon as possible to avoid undue delay of the rulemaking process. The proceeding may not go forward until the preliminary analysis is issued. The Committee intends this provision to allow for full public review of each regulatory analysis.

Paragraph 622(c)(1)

Paragraph (1) requires that preliminary regulatory analyses contain a succinct description of the anticipated benefits of a rule including benefits that cannot be quantified. When a benefit involves protecting public health, for example, the agency should evaluate the underlying data and information to ensure that it is reliable and accurate and that the rule addresses the true cause of the particular public health problems. It can be expected that the group of benefits that are quantifiable will expand as measurement techniques improve, in some degree due to the impetus of this legislation. For intangible benefits that cannot be quantified, agencies should discuss the nature of the benefits and should explain the factual information and judgments that support the significance ascribed to such benefits by the agency.

It must be remembered, in any event, that at this point the analysis is "preliminary." This does not mean that the agency is free to make only minimal efforts to evaluate the potential effects of a proposed major rule. Rather, it serves to underscore the fact that this analysis is made at the beginning of the rulemaking process, before the agency has had the benefit of public comment. Accordingly, though the Committee expects an agency to make its best efforts to analyze the ramifications of a proposed rule at this stage, we recognize that these efforts are, by definition, preliminary, and, practically speaking, cannot be the kind of thorough and probing evaluation expected in the final regulatory analysis.

The agency must also explain how it expects the rule will produce each benefit. This explanation is central to the goals of this legislation because this explanation gives the public added insight into what the agency hopes to achieve with a particular rulemaking and how it expects to do so. With this information, interested persons outside the agency are in a better position to make useful comments on the rule, to either improve its effectiveness or reduce its burdens. This explanation must also describe the persons

or classes of persons who will benefit from a proposed rule, the so-called "distributive effects" of a rule. The agency should include in this explanation an identification of any special persons or classes of persons which might be intended by the enabling statute to benefit from the rule being promulgated.

Paragraph 622(c)(2)

This paragraph sets out the requirements for the description of the costs of a rule in a manner paralleling paragraph (1), governing the description of benefits. Both provisions are shaped by the same concern that the broadest range of reasonably identifiable effects—effects on individuals, on industries, on different levels of government—be taken into account in rulemaking. Consequently, paragraph (2) requires agencies to succinctly describe all the anticipated costs of a proposed rule, including costs which cannot be quantified, or which are indirect results of the rule, such as the loss of the use of a product or service. As explained above in the discussion of subsection 621(4), "costs" is not limited to economic impacts, but includes social effects as well. A deleterious impact on the environment, a restriction of consumer choice, or a constraint on the movement of populations could all be considered social costs of a rule.

When a cost involves a potential adverse effect which is difficult to quantify, such as an adverse effect on public health or the environment, an agency should evaluate the available data and information to determine how significant is the potential harm posed by such an effect.

The Committee recognizes that the ability of an agency to prepare estimates of all these potential costs will vary from case to case and will depend on the availability of supporting information. Under this bill an agency is expected to use the best reasonably available methods and information in each case, including representative primary cost data from actual industry operations and to use economic models where appropriate.

Paragraph 622(c)(3)

Paragraph (3) requires that an agency describe and thoroughly evaluate the reasonable alternatives to a proposed rule identified by the agency. In the preliminary regulatory analysis, an agency should list those alternatives that are under consideration, with a preliminary evaluation of the costs and benefits of each such alternative.

An agency should consider the extent to which the benefits of a proposed rule can be achieved through alternative means and evaluate any costs associated with the use of such alternative means, including potential adverse effects on public health and welfare. Attempts to solve one environmental problem, for example, may create other, potentially greater problems. See, e.g., *E.I. du Pont de Nemours & Co., v. Train*, 541 F.2d 1018, 1034-37 (4th Cir. 1976), modified, 430 U.S. 112 (1977), where the regulation of waste water discharges could have resulted in greater environmental damage from solid waste and air pollution.

This subsection specifically provides that an agency should consider lawful alternatives that require no government action (including voluntary or consensus standard-setting and taking no regula-

tory action), alternatives that account for differences among geographic regions (including the use of state or local level implementation and enforcement), and alternatives that employ performance or other types of flexible standards.

Regional differences, for example, between the Western states and those in the East, are increasingly seen as critical factors in the damaging impact of pollution on the environment. E.g., Barrett, "Regional Effects of Air Pollutants on Soil" (June 1981) (paper presented at the 74th Annual Meeting of the Air Pollution Control Association). Alternatives could be proposed which would provide for the achievement of substantially the same objectives, but which would reduce the regulatory burdens which are generated by regional characteristics.

Whenever possible, and not barred by the relevant enabling statute, the Committee believes that an agency should consider such alternative regulatory approaches as different degrees of control, adjusted deadlines for implementation, different requirements for different industries or stages of processing, and provisions for variances and exceptions. Agency analysis of the costs and benefits of alternatives should be similar to the corresponding analysis for the proposed regulation.

Paragraph 622(c)(4)

Paragraph 622(c)(4) requires that the preliminary regulatory analysis issued with the notice of proposed rulemaking for a major rule include an explanation of how the identified benefits of the proposed rule are likely to justify its identified costs and of why the proposed rule is likely to substantially achieve the rulemaking objectives in a more cost-effective manner than alternatives to the proposed rule. (Paragraph 622(d)(2) establishes a parallel requirement for the final regulatory analysis that is to be issued when an agency publishes a final major rule.)

This requirement applies "except where the enabling statute pursuant to which the agency is acting directs otherwise." This qualification ensures that the provisions of this legislation do not override the provisions of any specific enabling statute under which an agency may be acting.

Under this exception, an agency is directed to comply with the requirements of paragraph (4) unless contrary to the provisions of its "enabling statute." The determination of whether the requirement of paragraph 622(c)(4) is contrary to the provisions of the relevant enabling statute should be made on the basis of the language of the enabling statute supplemented where necessary by reference to authoritative sources of legislative history such as committee and conference reports. General sweeping statements of policy objectives or an elusive "spirit" of the law should not be applied to prevail over the requirements of this section. Thus, when the requirements of paragraph (4) can be said to be inconsistent with the provisions of an enabling statute, either by virtue of that statute's explicit provisions or by necessary implication from them, the enabling statute "directs otherwise," and paragraph (4) could not be applied. However, mere silence in an enabling statute concerning how an agency is to evaluate the effects of a rule is not, in itself, to "direct otherwise." In such a case, one cannot reasonably

say that there is a provision in another statute with which paragraph (4) is inconsistent.

The Committee believes that paragraph (4) will generally not be inconsistent with the explicit or necessarily implicit provisions of another statute. This conclusion flows both from the nature of the requirements of paragraph (4) and from the nature of the vast majority of enabling statutes. We will first address the nature of those enabling statutes, and then, as part of our further explanation of paragraph (4), elaborate on the operation of this paragraph.

Whether an enabling statute precludes the application of paragraph (4) will in most cases be dependent on whether and how that statute provides for the consideration in rule making of the potential benefits of a proposed rule in light of its potential costs. Indeed, "benefits" and "costs" as factors in rulemaking may even merge where a particular "cost" of a rule is an adverse impact which is not strictly an "economic" cost. For example, a proposed rule to control discharges into a waterway may mandate a control technique which in itself would upset the ecosystem, thereby undermining the environmental goal the proposed rule is intended to achieve.

Generally the body of enabling statutes can be broken down into three different approaches to these matters. First, some clearly do preclude expressly, or by necessary implication, the consideration of costs and adverse effects in the manner contemplated by paragraph (4). Second, others are less clear because they are ambiguous as to whether and how costs and adverse effects are to be considered. And third, still others require or allow costs and adverse effects to be considered, sometimes spelling out how.

A limited number of enabling statutes clearly do preclude agencies from taking the costs and adverse effects of rules into account in adopting them. One example is the Delaney Clause of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A), which unequivocally declares that "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal." If an additive has been found to induce cancer when ingested by man or animal, the Delaney Clause leaves no room for considering the adverse effects of prohibiting the use of an additive or the relative cost-effectiveness of such a ban.

For federal statutes that do not explicitly address the question of whether factors involving the costs and adverse effects of rules must or can be taken into account in promulgating them, the Committee intends that, unless the enabling statutes, expressly or by necessary implication, preclude the use of such factors as elements in regulatory decisionmaking, the determinations required by paragraph (4) shall be made for major rules. Mere silence in the enabling statute concerning the consideration of such factors in rule making is not, in itself, evidence of a "necessary implication" that these determinations must not be made. Application of the maxim, "expressio unius est exclusio alterius," is not in order.

Quite obviously, when the ambiguity of any particular statutory provision regarding this question is resolved as a matter of law, that provision will fall into one of the other two categories described here. That is, it will either be a statutory provision precluding, whether expressly or by necessary implication, the determina-

tions required by paragraph (4); or it will be a statutory provision allowing those determinations to be made in a rulemaking. As this Committee does not claim expertise beyond its jurisdiction, and as it would be inappropriate for one Committee to attempt to unilaterally resolve any currently disputed matters of law, we decline to offer our interpretation of any particular statutory provision which may be ambiguous on this question.

A different category of statutes expressly, or by necessary implication, requires the consideration of relative costs and benefits in rule making. Such statutes contemplate the type of analysis required under paragraphs (c)(4) and (d)(2) of this section.

One example is the Flood Control Act of 1936, 33 U.S.C. § 710a, which directs the federal government to participate in the improvement of navigable waters for flood control purposes "if the benefits . . . are in excess of the estimated costs. . . ." Similarly, the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347(b), require the use of specified technologies in offshore drilling operations, "except where the Secretary determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies."

Other statutes have been found to require a balancing of costs and benefits, even though the statutory language does not specifically call for cost-benefit analysis. Before its recent modifications, the Consumer Product Safety Act of 1972 was an example of such a statute. See *American Textile Manufacturers Institute Inc. v. Donovan*, 49, U.S.L.W. 4720, 4725 n.30 (June 16, 1981); *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n*, 569 F.2d 831, 839 (5th Cir. 1978).

In short, the various enabling statutes to which S. 1080 would be "plugged-in" exhibit a variety of approaches to the treatment of costs in regulatory decisionmaking. If such an enabling statute precludes, either expressly or by necessary implication, the type of cost and benefit consideration contemplated by paragraphs (c)(4) and (d)(2) of this section, those paragraphs would not apply. In all other cases, the explanations and determinations required by paragraphs (c)(4) and (d)(2) should be made.

The nature of the requirements of paragraph (4) also makes it unlikely that paragraph (4) will be inconsistent with the explicit or necessarily implicit provisions of another statute. Title 5 of the U.S. Code currently defines the procedural steps an agency must follow when engaged in a rulemaking proceeding. Substantive factors which agencies must consider in rulemaking decisions are still determined by substantive enabling legislation. Moreover, the provisions of the enabling statute may also determine in what manner the various possible decisionmaking factors are to be compared and weighed.

What this section does do is remedy a serious deficiency in the decisionmaking process of too many agencies; namely, a failure to seriously and comprehensively assess all the effects of regulations. To remedy this situation, this section establishes a new framework or structure for the range of decision factors expressed in the provisions of enabling legislation. In this sense, this section canalizes an agency understanding of its mission and application of the provisions of its enabling statute. Under paragraph (4), the agency must explain how the benefits of the proposed rule are likely to "justify" its costs. The choice of the word "justify" is an important one. It signifies two things: first, that precise numerical quantification of costs and benefits is neither required nor anticipated in all cases; second, that agencies are free to bring to bear certain judgmental factors—to supplement their numerical analysis—in making the required determination. Thus, the fact that a particular rule might fail a strict, rigidly-applied cost-benefit test does not mean that the benefits of such a rule do not "justify," or warrant, its costs. Indeed, for this reason it is incorrect to consider paragraph (4) or the related paragraph (b)(2) a "cost-benefit" test.

One such judgmental element is the weighing of the different factors, whether benefits or costs, on which the justification of a rule is based. If an enabling statute specifies certain factors, again whether benefits to be achieved or costs to be avoided, to play a certain role in a regulator's decisionmaking, that regulator should give those factors added weight in determining whether the benefits of a rule justify its costs.

Similarly, an enabling statute may specify the relationship between certain factors which must exist for a rule to be promulgated. The rudimentary framework for regulatory decisionmaking set out in this legislation is designed to encompass and faithfully apply such provisions. For example, the Congress recently enacted, in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, amendments to the Consumer Product Safety Act. Under those provisions, the Consumer Product Safety Amendments of 1981, 95 Stat. 703 (1981), a consumer product safety rule may not be promulgated unless the Consumer Product Safety Commission finds, among other factors, "that the benefits expected from the rule bear a reasonable relationship to its costs." The threshold determinations required by paragraph (4) do not in any way override this requirement, but rather give expression to it. Obviously, if the Commission determines that the benefits of a rule bear a reasonable relationship to its costs, those benefits "justify" the costs of that rule.

Even where Congress can be said to have already performed a generalized balancing of benefits and costs in determining that

same goal—preservation of the environmental, improvement of worker safety, and the like—shall be a national priority, an agency evaluation of the costs and benefits of specific rules usually will be necessary. In some cases, Congress may have precluded agency consideration of certain costs (e.g., direct industry financial expenditures for compliance), but not others (e.g., adverse consequences to the environment, public health, or the overall national economy). Paragraph (4) allows a regulator to conform his evaluation of the effects of a rule to such provisions of an enabling statute.

The second part of paragraph (4) requires the agency to explain “why the proposed rule is likely to substantially achieve the rule-making objectives in a more cost-effective manner than the alternatives to the proposed rule.” This part of paragraph (4) is even less likely to be expressly or by necessary implication inconsistent with the provisions of an enabling statute. As was discussed in detail earlier in this report, this part of paragraph (4) addresses the means to a regulatory goal. Given the objective, it provides that an agency should choose a cost-effective course to achieve it. Most enabling statutes address objectives, not the means to them, and are therefore unlikely to contradict the cost-effectiveness aspect of paragraph (4). Where means are addressed in some fashion in an enabling statute, the agency is free to adopt this cost-effectiveness evaluation, either by limiting the number of acceptable alternatives or by weighing the costs involved according to the requirements of the enabling statute involved.

As made explicit in subsection 622(e), the analysis required by this legislation is not required to be made primarily on a numerical basis. Consequently, the phrase “more cost-effective” in this part of paragraph (4) embodies the common-sense notion that, when choosing among alternatives that will substantially achieve the rulemaking objectives, agencies must clearly explain why the alternative chosen is likely to be less economically burdensome or wasteful than others.

In summary, paragraph (4) is designed, as discussed earlier in this report, to “plug into” the requirements of other statutes. Such a design was employed because it is vital that the standards reflected in paragraph 622 (c)(4) and (d)(2) be applied as widely as possible in agency proceedings involving major rules. If the explanations and determinations required by those paragraphs are reasonably and fairly made by agencies, Congress and the public will have some assurance that major federal regulations are doing more good than harm and that they are being structured in ways that achieve the most good at the least cost. Accordingly, this framework for rule making assures that agencies proceed toward the achievements of the important national goals embodied in enabling statutes in a responsible and expeditious manner, indeed, in a manner more clearly designed to effectively achieve those goals.

Subsection 622(d)

Subsection (d) requires an agency to issue a final regulatory analysis when it issues a final major rule. A summary of the analysis is included in the statement of basis and purpose while the complete final regulatory analysis is placed in the rulemaking file.

Paragraph 622(d)(1)

For all major rules, paragraph (1) requires that the final regulatory analysis describe and compare the benefits and costs of the rule and of the reasonable alternatives to the rule that were described in the rule making proceeding. This analysis should, at minimum, consider all the types of costs, benefits and alternatives that should be contained in preliminary analyses, as described in subsection (c) above. At this stage, costs and benefits identified in public comments will also be included. The Committee intends that agencies will clearly and logically array the costs and benefits of the final rule and of the various alternatives to the rule, so that the basis for the agency's assessment of the costs and benefits and of the associated adverse and beneficial effects, can easily be understood.

The final description of the costs and benefits under this section, to be prepared in accordance with subsection 622(e) discussed below, should identify the costs and benefits and quantify them where possible. Where some aspect of the costs or benefits cannot be quantified, the agency should state what significance it attributes to the nonquantifiable cost or benefit and should explain the basis for its conclusion on this point. Finally, the agency should compare the costs and benefits of the rule and of the various alternatives.

As indicated in the discussion of subsection 622(e) below, the Committee does not expect that the foregoing exercise necessarily will be performed with a high degree of precision or that the accuracy of the results will be assured. There is no question but that agencies will have to utilize various techniques of estimation and extrapolation in developing their assessments of costs and benefits. The data base available for preparing cost-benefit assessments of major rules will always be more limited than what an economist would regard as the ideal case for performing a cost-benefit analysis. Nonetheless, agencies will have to do the best they can with the information available.

In effect, the requirement of Subsection 622(d)(1) for a description and comparison of benefits and costs calls upon agencies to engage in an analytical exercise of the sort that typically might be done in connection with the first stage of a formal cost-benefit analysis. Subsection 622(d)(1) does not, however, require agencies to engage in the kind of exercise that is the hallmark of a strict cost-benefit analysis, that is, placing the costs and benefits side by side on a strictly numerical basis in order to determine whether the benefits exceed the costs. Subsection 622(d)(1) stops short of this formal, numerical comparison; indeed, it does not require a direct determination of the relative weight of the costs and benefits at all.

Paragraph 622(d)(2)

Paragraph (2) takes the agencies one step beyond the descriptive exercise of paragraph 622(d)(1). Subject to a carefully limited exception discussed at length above, it requires that, in the final regulatory analysis for a major rule, the agency must make a twofold determination: (1) that the benefits of the rule justify its costs; and (2) that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives present-

ed in the rule making proceeding. The requirement for such a determination parallels the requirement of paragraph 622(c)(4) as applied to a preliminary regulatory analysis issued in connection with the notice of proposed rule making for a major rule. Unless the limited enabling statute exception applies, the Committee contemplates that paragraph (d)(2) will require an agency to assess how the benefits of the rule stand up when judged in light of the costs and how the rule compares to the various alternatives in terms of cost-effectiveness.

A similar arraying of factors should take place when an agency evaluates alternatives to a proposed rule. In this way, agencies can compare the incremental costs and benefits of various possible standards and thereby determine whether a somewhat different rule than that initially proposed would be justified.

Once again, the Committee would emphasize that this determination need not be made on the basis of formal cost-benefit principles. Agencies may, where appropriate, adopt major rules where they cannot demonstrate on a precisely numerical basis that the benefits of the rule exceed its costs or that the rule is the most cost-effective approach to achieving the rulemaking objectives. Rather, Section 622(d)(2) imposes a less rigid standard that allows leeway for the exercise of reasonable and responsible judgment on the part of the agency. All that the agency must determine, based upon the rule making file considered as a whole, is that the benefits of the rule *justify* the costs of the rule, and that the rule substantially achieves the rule making objectives in a more cost-effective manner than the alternatives described in the proceeding. As discussed above, this means that agencies are free to bring to bear certain judgmental factors in making the required determination.

This does not mean, however, that agencies are free to act arbitrarily or in the absence of appropriate record support in making their determinations under paragraph 622(d)(2). An agency's cost-benefit and cost-effectiveness determination under that provision must be "reasonable." By imposing the requirement of reasonableness, the Committee intends that the agency will engage in "reasoned decisionmaking," *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), in reaching its determination under paragraph (2). To satisfy this standard, an agency must give "reasoned consideration to all the material facts and issues," must apply clearly articulated and understandable standards, and must explain the reasons why it has reached the determination required under paragraph (2). See *id.* The requirements for such a determination recently were summarized by the D.C. Circuit in *National Lime Ass'n v. EPA*, 627 F.2d 416, 452-53 (D.C. Cir. 1980). They include "a requirement that assumptions be stated, that process be revealed, that the rejection of alternate theories or abandonment of alternate courses of action be explained and that the rationale for the ultimate decision be set forth in a manner which permits the public to exercise its statutory prerogative of comment and the courts to exercise their statutory responsibility upon review." A determination that represents "reasoned decisionmaking" in this sense will be "reasonable" determination within the meaning of subsection 622(d)(2).

This approach is comparable to the "rational basis" standard of review of agency decisions in which the courts require the agency to show a rational, articulated connection between the facts found and the choice of remedies made. E.g., *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Seatrain International Inc. v. FMC*, 598 F.2d 289, 292-93 (D.C. Cir. 1979); *City of Rochester v. EPA*, 496 F. Supp. 751 (D. Minn. 1980).

Subsection 622(e)

Subsection (e) requires an agency to quantify or to estimate numerically the costs and benefits of a rule whenever it is reasonably possible to do so. The Committee intends that the agency should perform this quantification even if uncertainties in the data preclude a precisely accurate numerical estimate. An agency should explain any assumptions necessary for its quantitative assessment, identify sources of uncertainty, quantify the magnitude of uncertainty and margins of error where involved, and place confidence intervals around the estimates obtained. In such cases, results may be expressed as a range of predicted values.

In requiring that quantitative estimates of costs and benefits be accompanied by data, analysis or other supporting materials, the Committee intends that such estimates include information sufficient to allow the agency and interested persons to determine how the estimate was developed—e.g., what data was used and how it was gathered, what assumptions were made, what criteria were used in selecting data, and how calculations were performed.

By requiring that benefits and costs be quantified "in the most appropriate unit of measurement," the Committee intends to emphasize that benefits and costs need not always be expressed in monetary terms. For example, benefits that consist of reducing or controlling adverse effects on health or the environment should be described whenever practicable by estimating the degree to which the rule would reduce the risk that such effects would occur.

The Committee recognizes that many estimates of benefits and costs cannot be prepared with precision, and that the accuracy of such estimates cannot always be guaranteed. The Committee does not intend to prevent agencies from considering such estimates. Furthermore, the requirement for the underlying data for cost or benefit information submitted by a person outside the agency should not be taken as requiring that person to undertake some complicated analysis on his own in order to comment on a proposed rule. Rather, this subsection is intended to require that persons submitting cost or benefit estimates to an agency disclose the information, data and methodologies used in preparing estimates in sufficient detail to allow the agency or interested persons to analyze and evaluate the accuracy and potential limitations of estimates and underlying data. This also will allow agencies to determine how much reliance can be placed on each estimate.

In the limited instance of an intangible cost or benefit that cannot be quantified in any meaningful way, an agency should describe the nature and extent of such cost or benefit in as precise and succinct a manner as possible. This explanation should include a reasonably detailed description and justification of the significance ascribed by the agency to the cost or benefit in question.

Finally, the subsection stresses that comparisons of costs and benefits need not involve a formal mathematical equation, where such an approach cannot realistically be followed in view of the limitations of the available data. The Committee intends that this section should not be construed to require a rigidly formal, dollar-for-dollar balancing of costs against benefits. Rather, the Committee believes that the agency should evaluate carefully the costs and benefits of a rule and should demonstrate that the expected benefits of that rule warrant its anticipated costs. Likewise, an agency would be required to demonstrate that the rule substantially achieves the rulemaking objectives more cost-effectively than alternative rules described in the rulemaking.

Subsection 622(f)

This subsection provides that the agency decision maker is the person who must perform the preliminary and final regulatory analysis and make the various determinations concerning the costs and benefits and the cost-effectiveness of a rule. This requirement is important, for it preserves the role of regulatory analysis as a process which shapes regulatory decisionmaking.

At the same time, the complexities of a particular rule might compel an agency to hire consultants to gather data, and perform some analysis of that data, for use in the regulatory analysis. This subsection specifically allows for such use of consultants as long as this practice does not usurp the position of the agency as the primary entity evaluating the effects of a rule. This provision does not countenance the use by an agency of an analysis prepared by a consultant as the preliminary or final regulatory analysis required by this legislation, unless the agency carefully reviews and explicitly adopts the analysis as its own.

When a consultant is employed according to the provisions of this subsection, that fact must be disclosed in the preliminary and final regulatory analyses, including a description of the arrangement with the consultant. This subsection does not constitute a grant of authority to an agency to expend funds for this purpose, nor does the Committee intend this subsection to provide a justification for particular budget requests.

Section 623

Section 623 sets forth the basis for judicial review of agency compliance or non-compliance with the regulatory analysis requirements of the bill. This section is an important part of what the Committee conceives of as a coherent framework for the oversight of agency operations.

The Committee views no one method of oversight over federal agencies as foolproof or without inherent weaknesses. We have therefore tried to weave various oversight techniques together in S. 1080 in a way which employs their strengths to their best advantage, while minimizing their weaknesses. Section 623 is part of this system, providing for judicial review of regulatory analysis. Section 624 sets out provisions for Executive Branch oversight.

Congress obviously has a primary responsibility to oversee the operations of federal agencies. This duty is partly fulfilled in Congressional deliberations on enabling statutes, but most commonly in

the authorization and appropriation process. Both of these tasks are critically important. However, Congress is institutionally and constitutionally incapable of performing the kind of oversight which can provide a remedy for distinct agency violations of law. Providing such remedies has traditionally been within the competence of the courts.

Judicial review of agency actions has several advantages. Being outside of the Executive Branch, courts obviously do not share interests with agencies and can provide a relatively unbiased review of agency actions. In addition, private parties can seek a remedy in court on their own initiative, providing effective oversight of agency operations without the creation of an extensive federal oversight bureaucracy. Finally, judicial review involves the application of standards of law which, for the most part, are not created either by the agency or by the reviewing court. Thus, agency activity can be held up to a uniform standard of conduct known by all and not subject to change to suit particular circumstances.

Yet judicial review suffers from its own peculiar weaknesses. Judicial review is a formal process which is relatively inflexible. It can be used as a weapon to attack agency activity with which a challenger merely disagrees, rather than to remedy arguably unlawful agency acts. Finally, judicial review often puts unelected judges in a position to in effect second guess agency policy judgments, a result that must be rigorously avoided.

Consequently, there is a need for the President, or someone designated by him, to play some role in oversight of agency activities. Such oversight within the Executive Branch has the flexibility and informality which allows the correction of discrete problems without unduly snarling the regulatory process. At the same time, however, such oversight is a relatively closed process compared to judicial review, not open to the same public scrutiny or participation as a judicial proceeding.

Subsection 623(a)

Under this subsection, agency compliance or noncompliance with the requirements of subchapter II of chapter 6 may not be subject to judicial review except according to the provisions of section 623.

Subsection 623(b)

A rule may be selected as "major" and subjected to the regulatory analysis process in several different sets of circumstances. For the most part, these decisions involving major rule status are not subject to judicial review of any sort. Subsection (b) completely precludes judicial review of the President's, or his designate's, determination of whether or not a rule is major under the "\$100,000,000 test" of paragraph 621(3)(A) and of their designation of a rule as major under paragraph 621(3)(B).

Subsection 623(c)

This subsection provides the one exception to the general preclusion of judicial review of the question whether a rule is major. Thus, the determination of an agency that a rule is or is not a major rule under paragraph 621(3)(A) is subject to judicial review.

However, the scope of review even for that determination is limited: The agency's determination may be set aside by a reviewing court only upon a clear and convincing showing that it was erroneous in light of the information that was available to the agency at the time the determination was made.

In establishing this standard, the Committee intends to ensure that a court will not lightly substitute its judgment for that of the agency on the question of whether a rule falls within the \$100 million criterion of paragraph 621 (3)(A). A party seeking to challenge an agency determination under the \$100 million standard would have to carry the burden of proof of demonstrating to the reviewing court that the agency's determination on this question was erroneous. Moreover, this burden of proof would have to be carried in a clear and convincing manner and would have to be made solely on the basis of the information that was available to the agency at the time it made the determination. Only when a court is persuaded on such a clear and convincing basis would it be justified in finding that the agency's application of the \$100 million test was erroneous, thereby creating the possibility of a remand for additional proceedings, as discussed below.

Subject to the foregoing limitations the Committee concluded that judicial review of an agency's application of the \$100,000,000 impact test is vital to ensure that an agency evaluates in good faith the status of a rule as major under this standard. Such review is especially important in light of evidence that agencies have manipulated this determination to avoid characterizing a rule as major, as discussed earlier. In addition, as we explained above, the \$100,000,000 impact test is a relatively objective standard involving the evaluation of reasonably quantifiable effects. As a result, the Committee feels a dispute over the application of this standard is susceptible to resolution by the offer of proof in a judicial setting.

This subsection does not allow for this review on an interlocutory basis. The Committee concluded that interlocutory review would serve no real function while providing an opportunity for vexatious litigation not constituting a bona fide challenge to an alleged agency error. A challenge to an agency's decision whether or not a rule is major under paragraph 621(3)(A), can be made only upon review of a final rule.

In the context of such review, if the court concludes, under the "clear and convincing" standard, that an agency erroneously determined that a rule was not major within the meaning of paragraph 62(3)(A), the rule ordinarily would have to be set aside and remanded to the agency, so that it could comply with the requirements applicable to major rules. However, application of the rule of prejudicial error may make such a remand unnecessary. Under section 706 of title 5, both in its current form and with the changes made by this legislation, a reviewing court must take account of the rule of prejudicial error. Similarly, section 2111 of title 28 provides that a court "shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." E.g., *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir.), cert. denied sub nom. *Kerner v. Gardner*, 382 U.S. 861 (1975). The harmless error rule of section 2111 has been applied to judicial review of administrative actions. E.g., *Consolidated Gas*

Supply Co. v. FERC, 606 F.2d 323 (D.C. Cir. 1979). Thus, despite the fact that an agency erroneously determined that a rule was not a major rule (and, accordingly, failed to observe all of the regulatory analysis formalities required by section 622 for major rules), the agency may have effectively developed and analyzed the information and made the determinations that constitute the substance of a regulatory analysis under section 622. In such a case, taking due account of the rule of prejudicial error, a reviewing court should not set aside the resulting rule simply because the agency erroneously determined that the rule was not a major rule within the meaning of subsection 621(3)(A).

By the same token, if a rule, not determined to be major by the agency, truly has an impact of at least \$100,000,000, and the agency does not evaluate its effects, the error is not "trivial" or merely "procedural." As we explained thoroughly earlier, there is a strong public interest in the agency evaluating the tradeoffs of regulations. Judicial review of an agency's determination of a rule's status under the \$100,000,000 standard is designed to prevent an agency from undermining this interest.

Subsection 623(d)

A regulatory analysis prepared under section 622 may not be reviewed by any court on an interlocutory or other basis separate and apart from review of the rule to which it relates. When a major rule is brought before a court for review, the accompanying regulatory analysis shall constitute part of the whole rule making record and shall be considered by the court in determining the legality of the rule.

Where the agency simply fails to make the determinations required by paragraph 622(d)(2), the resulting rule would not be based upon a consideration of the significant factors that Congress intends will be reflected in the decisionmaking process for major rules. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). For that reason, a major rule that is adopted without the determinations required by paragraph 622(d)(2) would not be a rule that the agency is authorized to issue. Cf. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 639-40, 642 (1980). In such a case, the resulting rule should be set aside and the agency directed to make the required determination on the basis of the existing or a supplemental rulemaking record, unless the substance of such a determination clearly appears in the existing record.

Where the determinations required by paragraph 622(d)(2) have been made, the Committee expects that the court will review the entire rulemaking record, including the regulatory analysis and any other relevant information, to ensure that the agency's decision making in the rulemaking is not arbitrary, irrational, or otherwise unsupported by the rulemaking record viewed as a whole. The Committee intends that courts will discharge their reviewing function so as to ensure that "the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules . . . for the future." *Automotive Parts & Acces-*

sories Association v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). Accord, *Sierra Club v. Costle*, — F.2d —, No. 79-1565 (D.C. Cir. April 29, 1981), slip op. at 31-32 & n. 66; *National Lime Ass'n v. EPA*, 627 F.2d 416, 429-30 (D.C. Cir. 1980); *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 475 (D.C. Cir. 1974).

In making the regulatory analysis part of the entire rulemaking record on review, the Committee intends not to focus an "arbitrary or capricious" evaluation on the regulatory analysis by itself, but to make the analysis relevant to the arbitrariness or capriciousness of the whole rule. In this way, the Committee has adopted the now familiar approach of courts reviewing a rule, an approach recognizing that an agency decision that is based upon factual or methodological information is arbitrary and capricious if it lacks adequate evidentiary support in the rule making record viewed as a whole. See *Sierra Club v. Costle*, supra, slip op. at 31-32 & n. 67; *Associated Industries of New York State, Inc. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973). During its review of the entire administrative record, the court may find the discussion of the issues to be addressed in the final regulatory analysis to be so lacking that these weaknesses taint the competence of the entire record as a fair basis for the agency rulemaking.

Section 624

Section 624 is designed to achieve the important but limited goal of assuring effective Executive Branch oversight of agency compliance with the new procedures for major rules added to Chapter 6 by this bill. As the savings clause contained in section 7 of the bill makes clear, section 624 is not intended to comprise a complete catalog or description of the President's authority vis-a-vis Executive Branch agencies and independent agencies. Nor is it intended to resolve all the questions—some of which are quite difficult—as to what the President's authority is under the Constitution and existing laws, or what it should be. It does not change the authority an agency is given by other laws to make the substantive decisions in a rulemaking. Section 624 neither grants to nor withholds from the President any authority to determine what the substance of the agency's rule should be.

The Committee does believe, however, that effective coordination of compliance with the new procedure required for major rules is essential. The Committee also believes that this need extends to independent agencies as well. Particularly given the limited scope of judicial review of the regulatory analysis permitted under the bill, it is essential that the President have authority to assure that there is effective coordination and implementation of this new process by the independent agencies as well as Executive Branch agencies.

Subsection 624(a)

This subsection authorizes the President to "establish procedures for agency compliance" with chapter 6 of title 5, United States Code. The subsection provides that these procedures should be "adopted after the public has been afforded an opportunity to comment thereon." This provision does not require that these procedures be adopted through notice and comment rule making or

through any other particular process. Rather, this provision reflects the view of the Committee that the procedures for agency compliance through which this oversight authority will be exercised should be adopted publicly and, except in the extraordinary case, the authority should be exercised in a uniform fashion. Furthermore, the Committee contemplates that the President, or his designee, shall take advantage of public comment and expertise outside of the Executive Office of the President in developing these procedures. At the same time, the Committee has no intention to unreasonably constrain the President or his designee. Flexibility is vital to ensure that the President or his designee can act to deal with unexpected developments or emergencies.

Equally important is the requirement that those procedures "be consistent with the prompt completion of rulemaking proceedings." Executive Oversight is a coordination and management tool. The Committee intends that this procedural oversight not be used as a delay mechanism.

In exercising his authority under this subsection, it would be entirely appropriate for the President or his designee to set up a procedure to be followed by agencies in determining whether a particular rule is a major rule. The Committee must emphasize, as section 7 of this bill makes clear, that this subsection is not intended to displace the ultimate decisionmaker in rule making under other provisions of law. This subsection provides one kind of oversight of the decisionmaking process, but does not change who must make a particular substantive decision in rulemaking. Subsection (a), for example, does not authorize the President to substitute his judgment for that of an agency in making the determinations required by paragraph 622 (c)(4) and (d)(2), insofar as he has not been delegated the power to do so by law.

The President, or his delegate, also may "monitor, review, and ensure agency implementation of such procedures." This provision allows the President, or his delegate, to take steps to ensure agencies have followed the procedure established by him for compliance with chapter 6. The President could require agencies to submit to him or his delegate proposed regulatory analyses for this purpose. If an agency has not implemented a procedure for compliance with chapter 6 which may have been established by the President or his delegate, he could require the agency to complete the mandated procedure. The President must report to the Congress annually concerning agency compliance or non-compliance with chapter 6.

Subsection 624(b)

Subsection (b) allows the President to delegate the oversight authority set out in subsection (a) to the Vice President or an officer within the Executive Office of the President. To ensure that this important authority is actually exercised by a senior official, one to whom Congress has ready access, a designee, other than the Vice President, must be confirmed by the Senate. This delegate could be an official who would otherwise be subject to Senate confirmation, or he could be confirmed specifically to exercise this authority. Notice of any change in the designee must be published in the Federal Register.

Subsection 624(c)

Subsection 624(c) precludes judicial review under the Regulatory Reform Act of the exercise, or the failure to exercise, the authority granted to the President pursuant to this section. The executive oversight provision is intended to be just that—i.e., a management tool that the President can use to monitor, review and ensure that agencies implement procedures designed to effectuate compliance with the regulatory analysis and related requirements of chapter 6. This is an area in which the need for some sort of centralized oversight and coordination is imperative; Section 624 responds to that need.

While executive oversight and coordination is essential to make the regulatory reforms of Chapter 6 function effectively, judicial intrusion into this executive management process would almost certainly create obstacles to the smooth functioning of the process without protecting any important interests. For this reason, subsection 624(c) insulates from judicial review under this Act the exercise or failure to exercise the authority granted by section 624.

By stating that the exercise or failure to exercise this authority is not subject to judicial review "under this Act," the Committee recognizes that there may be instances in which the exercise or nonexercise of such authority involves actions that might be authorized or precluded under the Constitution or other statutes which are subject to judicial review.

For example, suppose the President established a purported procedure under subsection 624(a) that precluded an agency from adopting any major rule unless the benefits of the rule justified its costs, without regard to any provisions of the enabling statute pursuant to which the agency was acting. An agency, attempting to implement the President's directive, might conceivably utilize cost-benefit analysis as a decision factor in adopting a rule, even though the relevant enabling statute "directs otherwise" within the meaning of paragraph (2) of subsection 622(d). Subsection 624(c) would not preclude a person from challenging such an agency rule in court on the ground that the rule conflicted with the relevant enabling statute. Since judicial review would be based on a statute other than "this Act"—i.e., the enabling statute—the reviewing court would be justified in setting aside such an agency rule. The agency could not defend against such an action by asserting that its rule was adopted in accordance with procedures established by the President under subsection 624(a), which themselves are insulated from judicial review under subsection 624(c). For in such a case, the challenge to the agency rule would not have been brought "under this Act" within the meaning of subsection 624(c).

Similarly, if the President takes action that is based upon authority that he possesses both under section 624 and under some other statute, the fact that his action would not be subject to judicial review as an exercise of authority under section 624 does not mean that it would not be subject to judicial review as an exercise of authority under the other statute. By the same token, if some other statute *requires* the President to exercise authority of the same sort that is granted in section 624 of this Act, the President's failure to exercise such authority could be subject to judicial

review under such other statute, even though it could not be reviewed "under this Act."

Subchapter III

Subchapter III provides for the periodic review of major rules and for the publication of agenda and calendars of contemplated agency actions.

Section 631

This section sets out a procedure for the review of each major rule every ten years. This provision is intended to subject existing rules which are major under subsection 621(3) at the time of review to the discipline of regulatory analysis. In addition, this section builds into the regulatory system a mechanism for the review of major rules to periodically determine whether those rules are still useful or are in need of modification.

Paragraph 631(a)(1)

Paragraph (1) initiates the process of reviewing existing major rules by requiring each agency to prepare and publish for comment a proposed schedule for the review of existing major rules within a ten year period of the effective date of section 631. This provision will require an agency to determine which of its existing rules are major under the definition in subsection 621(3). The schedule must be published not later than nine months after the effective date of section 631.

Paragraph 631(a)(2)

This paragraph requires the agency to submit its proposed schedule to the President or an officer designated by him pursuant to section 624 at least ninety days before the schedule is to be published. The President or his designee may select additional rules to be placed on the agency's schedule of review.

The schedule must contain a brief explanation of why the agency considers each rule on the schedule to be major and must set a date for the initiation and completion of the review of each such rule. Related rules may be grouped for simultaneous review.

Paragraph 631(a)(3)

Paragraph (3) requires each agency to publish its final schedule for review of existing major rules, including those selected by the President or his designee, not later than one year after the effective date of section 631. The agency must publish with the final schedule its response to the reasonably significant comments received on the proposed schedule.

Paragraph 631(a)(4)

Unless provided otherwise by another statute or granted an extension pursuant to subsection 631(f), paragraph (4) requires an agency to review each major rule in effect when section 631 is enacted within ten years. These rules may be reviewed within a shorter period. There are three possible results to each review: the renewal, amendment, or repeal of the rule.

Paragraph 631(b)(1)

This paragraph parallels paragraph 631(a)(4), requiring that each major rule promulgated, amended, or otherwise renewed by the agency after the enactment of section 631 to be reviewed within ten years of the date on which such a rule becomes effective. Again, there are three possible results to each review: renewal, amendment, or repeal.

This paragraph inaugurates a regime of repeated review of major rules at ten year intervals. For example, a major rule which is promulgated after the effective date of this section must be reviewed no later than ten years after it becomes effective. If the rule is renewed or amended when that review is performed, the rule must be reviewed again within ten years of the date of the renewal or amendment, that is, within ten years of the date the renewed or amended rule becomes effective.

Paragraph 631(b)(2)

Paragraph (2) allows the President or the officer designated by him pursuant to section 624 to select for periodic review additional rules which were promulgated after the enactment of section 631.

Subsection 631(c)

Subsection (c) sets out the procedure by which review of a major rule is initiated, the publication of a notice of proposed action regarding the rule under review. This notice is similar in purpose and function to a notice of proposed rule making.

The most critical information included in this notice is "an assessment of the benefits and costs of the rule during the period in which it has been in effect." The Committee contemplates that this assessment will be similar to the "description and comparison of the benefits and costs" of a rule required in a final regulatory analysis under paragraph 622(d)(1), except that this assessment will be based on empirical data flowing from the actual operation of the rule. Such assessments can be expected to provide very useful, and hitherto unavailable, data on the actual impact of federal regulations.

Paragraph (4) emphasizes the Committee's intention that the periodic review of rules is to be performed only on rules which qualify as major at the time such a review would be performed. Accordingly, if the agency determines that a rule is no longer a major rule at the time it is to be reviewed, or if the agency is proposing changes to the rule which would make it no longer a major rule, paragraph (4) requires that determination or the proposed changes to be explained in the notice of proposed action.

Subsection 631(d)

This subsection applies the provisions of section 553 and of chapter 6 of title 5 to any repeal or amendment of a major rule through the review process in the same manner as if the repeal or amendment was initiated outside of the periodic review.

Subsection 631(e)

Subsection (e) provides a procedure similar to present notice-and-comment rule making for the renewal of a rule as a result of

periodic review. In publishing a renewed rule which continues to be major, however, the agency must explain its determination that the benefits of the rule continue to justify its costs and that the rule continues to be cost-effective.

Paragraph 631(f)(1)

This paragraph allows the President, or the officer designated by him, to extend the period for the review of a major rule by up to an additional five years if an agency for good cause is unable to comply with the requirements of section 631 with respect to that rule within the normal ten-year period. An extension must be published in the Federal Register with an explanation of the reasons for the extension.

Paragraph 631(f)(2)

Paragraph (2) allows an agency to amend any schedule for review of rules if the amendment is approved by the President or his designee. The President or his designee may also order such an amendment. Any amendment must be published in the Federal Register.

Subsection 631(g)

Subsection (g) provides that, when an agency fails to comply with this section within the applicable time periods with respect to a particular major rule, it must publish a notice pursuant to subsection 631(c) to withdraw or renew the rule and complete proceedings on that proposed action within 180 days. If the agency fails to take such action, a private party may seek judicial relief pursuant to section 706 of title 5.

Subsection 632(a)

Subsection 632(a) requires each agency to publish during April and October of each year an agenda of the rules the agency expects to propose, promulgate, renew, or withdraw during the next twelve months. This subsection sets out certain information about these contemplated actions which must be included in the agenda. These agendas are intended to increase the opportunities for the public to participate in the development of regulations by providing them with an "early warning" system. This semi-annual survey of the agency's activity is also an important managerial tool for the agency. It helps to identify overlapping or conflicting regulations, so that coordination can occur when it is most effective, i.e., while the rules are still being developed. The agendas also give the President, the Congress, other agencies, and all those affected by rules, advance notice of important, upcoming rules, thereby facilitating planning and public participation.

Subsection 632(b)

Subsection (b) provides that in May and November of each year the President or his designee shall publish a Calendar of Federal Regulations listing each of the major rules expected to be acted on by all agencies, as described in their regulatory agendas.

Subsection 632(c)

This subsection makes clear that the failure of an agency to list a major rule on its regulatory agenda does not preclude it from proposing that rule if it publishes with the proposed rule an explanation of its failure to list the rule in its agenda.

Subsection 632(d)

Subsection (d) precludes judicial review of the operation of section 632.

SECTION 5

Section 5 makes two important changes in the provisions of the A.P.A. dealing with judicial review of agency actions.

Subsection 5(a)

Subsection 5(a) of this bill gives the United States courts of appeals exclusive jurisdiction to review informal rule making. It provides further that a petition to review an agency rule may be filed with the United States Court of Appeals for the District of Columbia Circuit, or for the circuit in which such a person resides or in which such person's principal place of business is located.

Subsection 5(b)

This subsection of S. 1080 makes several changes to the provisions of the A.P.A. governing the scope of judicial review of agency actions. These amendments are premised on the basic constitutional principle that in a republic, legislative power must be exercised by elected representatives to whom this power has been delegated by the citizenry, see *Field v. Clark*, 143 U.S. 649, 692 (1892), and on a growing discontent with the degree to which Congress has delegated this power to administrative agencies. As Justice Douglas once asserted, "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York v. United States*, 342 U.S. 882, 884 (1951) (dissenting opinion).

One primary mechanism for control of agency discretion is the requirement that when the legislature delegates power, it must establish an "intelligible principle" to govern the delegation, and that the judiciary will hold invalid actions which are not authorized by the statutory delegation. Indeed, a number of recent opinions by members of the Supreme Court have underscored that need by emphasizing that absent clear Congressional guidelines as to the limits of delegated power and clear Congressional guidelines as to how, once delegated, the power is to be used, the purported grant may be unconstitutional. E.g., *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, (1980) (Rehnquist, J. concurring) (concluding that §6(b)(5) of the Occupational Safety and Health Act violates "the doctrine against uncanalized delegations of legislative power"); *American Textile Manufacturers Institute, Inc. v. Donovan*, 49 U.S.L.W. 4729, (U.S. June 16, 1981) (Rehnquist, J., dissenting). Moreover, once Congress has done its

duty by establishing such principles, the courts must do their duty by holding invalid actions which are not authorized by that statutory delegation. In the words of Mr. Justice Reed, "An agency may not finally determine the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946).

We believe that it is appropriate for Congress to underscore this principle that the courts, and not agencies, make the final decisions as to the extent of agency jurisdiction or authority. Moreover, other experiences with judicial review during the past decade demonstrate the need for additional Congressional guidance to the courts on other aspects of the review of agency rules. In certain cases, the courts have given undue deference to agency interpretations of Congressional intent in construing statutory provisions or terms. This judicially created doctrine of deference, which in certain instances is applied as a virtual presumption of correctness of all interpretations of law by an agency, imposes unfair burdens on citizens in appeals of agency rules and undermines the proper role of the courts. We wish to make clear our disapproval of this doctrine and our intent that the courts not presume that the agencies are correct in their interpretations of the law, whether derived from the Constitution, the organic statutes and implementing regulations, procedural statutes, such as the Administrative Procedure Act, or federal common law where it exists.

The first change made by subsection 5(b) is the insertion of the word "independently" in the introductory sentence of section 706 of title 5, United States Code ("the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"). This modification applies to all the duties of a reviewing court set out in that sentence and is intended to reemphasize the primary role of the courts in interpreting all sources of law involved in the review of agency rules.

The addition of a new clause (F) to section 706(a)(2) provides a separate, clarified standard for review of certain factual determinations in informal rulemakings. Relying on the analysis in Recommendation 74-4 of the Administrative Conference, 1 C.F.R. § 305.74-4 (1980), clause 2(F) requires substantial support for factual determinations in informal rulemaking when (1) the determination of fact is necessary to the rule, (that is, where the rule would fail to satisfy the "arbitrary, capricious, [or] an abuse of discretion" criterion, or where the rule would be in excess of the agency's authority, absent such a finding of fact), or (2) the finding of fact is an "asserted" basis for the rule, (that is, where the agency relies on the finding as part of its rationale for the policy choice reflected in the rule).

Under clause 2(F) the "substantial support" must be found in "the rule making file, viewed as a whole." This provision meshes with other provisions of S. 1080 amending section 553, discussed earlier, which require the organized and systematic development of a file on which the rule making action is to be based and judicially reviewed.

Section 706 in its present form does not specifically prescribe the standard of review for factual issues raised in review of rules

promulgated under section 553 procedures. Courts have thus had to apply the "arbitrary, capricious, [or] an abuse of discretion" test to these factual issues. Many have looked for analogy to the "substantial evidence" standard now applicable to review of rule makings "on the record" and have formulated an equivalent standard requiring a court to take a "hard look" at agency factual determinations. Other courts have reviewed factual issues in a variety of ways, none easily defined.

The "substantial support" criterion is based on the precedents of judicial review provisions in recent enabling statutes that follow the logic of the "hard look" line of cases. E.g., Toxic Substances Control Act, 15 U.S.C. § 2618(c)(B)(i); Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(e)(3)(A). We intend that the courts, in applying this standard, essentially follow the criteria discussed by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 471, 487-88 (1951) and *Consolo v. FMC*, 383 U.S. 607, 619-20 (1966). Later circuit cases such as *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (D.C. Cir. 1970) characterize the court's role as making certain that the agency took a "hard look" at the salient problems and "genuinely engaged in reasoned decision-making." Others, citing the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), have held that "the grounds upon which the agency acted must be clearly disclosed in, and substantiated by the record." *Appalachian Power Co. v. Train*, 545 F. 2d 1351, 1356 (4th Cir. 1976). See *Sierra Club v. Costle*, No. 79-1565 (D.C. Cir. April 29, 1981) ("If the agency's decision is not based on substantial evidence it will be held to be arbitrary and capricious." *Id.* slip op. at 32 n. 67.). The words "substantial support" are also intended to require that the data or materials in the record on which the agency based its factual determinations must be reliable and credible even though they do not necessarily satisfy the rules of evidence applied in judicial proceedings.

Earlier versions of this amendment used the words "substantial evidence" rather than "substantial support" in clause (2)(F). The change in language here is meant to negate any implication that the intent of these amendments is to require indirectly the use of trial-type procedures in informal rule making. Procedural requirements for informal rule making will be found in other provisions of the A.P.A., such as in our amendments to section 553, and in constitutional and common law considerations of fairness. We do not intend the words "substantial support" to imply that agencies must use procedures beyond those required by law elsewhere.

Finally, "substantial support" standard in new clause (2)(F) recognizes that there is a distinction between an exercise of discretion (policy choice) by the agency, which remains subject to the "arbitrary, capricious, [or] an abuse of discretion" standard of clause 2(A), and the factual foundation for such a choice.

The final change of subsection 5(b) adds a new subsection (c) to section 706 of title 5, United States Code. The first sentence of new subsection (c) of section 706 directs the courts to play a more active role in policing regulatory power by closely construing statutes which transfer regulatory authority to administrators. The Supreme Court has followed this approach in recent decisions. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *NLRB v. Catholic Bish-*

ops of Chicago, 440 U.S. 490 (1979). See also *Kent v. Dulles*, 357 U.S. 116 (1958); *National Cable Television Assn. Inc. v. United States*, 415 U.S. 336 (1974); Schwartz, *Administrative Law Cases During 1979*, 32 Ad. L. Rev. 441, 413-415 (1980).

Thus, subsection (c) emphasizes the responsibility of reviewing courts to make sure that agencies do not exceed the jurisdiction or authority conferred on them by statute. There are many who believe that reviewing courts have fulfilled their reviewing duties in the manner prescribed by Justice Reed in *Social Security Board v. Nierotko*, *supra*. Others, in the Congress and in the public at large, believe that when federal regulators do seek to intrude into areas not contemplated by the authorizing statute, reviewing courts are too lenient in judging whether an agency has imposed an unauthorized regulatory burden on the citizen. Subsection (c) does not seek to resolve this controversy but imposes a standard which is intended to assure the critics and at the same time not change the existing law to the extent that courts are in fact discharging the conventional responsibility of the judiciary to prevent agencies from exceeding their delegated powers.

In this respect, subsection (c) embodies a legislative solution similar to that employed by the Congress when it enacted the Administrative Procedure Act and the Taft-Hartley Act in 1946 and 1947. That story is recounted in Justice Frankfurter's opinion for the Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). The following conclusion reached by the Court in that case is, in the Committee's opinion, equally applicable to this subsection:

[E]nactment of these statutes does not require every Court of Appeals to alter its practice. Some—perhaps a majority—have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

Under subsection (c), a court must determine that the agency's authority to act has been granted expressly in the organic statute or, in the event of ambiguity, by reference to the statute's legislative history or other contemporary materials relevant to ascertaining legislative intent. This provision is intended to underscore the duty of the courts to ensure that agencies do not transcend the boundaries of the authority delegated by Congress. Indeed, for a court to allow an agency to go beyond these boundaries would be "an unwarranted judicial intrusion upon the legislative sphere wholly at odds with the democratic processes of lawmaking contemplated by the Constitution." *Lubrizol Corp. v. EPA*, 562 F.2d 807, 820 (D.C. Cir. 1977). See *City of Palestine v. United States*, 559 F.2d 408, 414 (5th Cir. 1977); *National Nutritional Foods Ass'n v. Matthews*, 557 F.2d 325, 326, (2d Cir. 1976).

Since by its terms, new subsection (c) of section 706 is applicable only to "determinations concerning statutory jurisdiction or authority under clause (2)(C)" of section 706(a), it does not govern review of agency action that allegedly violates other clauses of section 706(a)(2). Thus, for example, an agency's failure to comply

with its own regulations might not be "in accordance with law", but would not be in excess of the agency's statutory jurisdiction or authority within the meaning of subsection (c). Likewise, review of agency action which allegedly violates the clause (B) language "contrary to constitutional right," the clause (C) language "short of statutory right," or the clause (D) language "without observance of procedure required by law" would not be subject to the requirements of subsection (c).

In the broadest sense, of course, an agency may be said to exceed its "jurisdiction or authority" whenever it acts improperly. As already noted, those words are not used in that expansive sense in this legislation. "Jurisdiction" is to be given its conventional meaning of the capacity or power to act concerning a subject matter, area of activity or class of persons or firms. *E.g.*, *N.L.R.B. v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The word "authority" is sometimes regarded as a synonym for "jurisdiction". As used in subsection (c), however, it has a broader significance. When an agency's action is alleged to be in excess of its statutory authority, the issue will be the meaning of the statute, which is a judicial question to be decided by the court. Subsection (c) directs the court to make sure that the agency's assertion of authority is supported by the language of the statute or other evidence of ascertainable legislative intent. *E.g.* *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). In that case, the FCC issued regulations prohibiting common ownership of broadcast stations and daily newspapers in the same market. In the terminology of subsection (c), issuance of the regulation would be within the FCC's "jurisdiction"—over broadcast licensees, and the question for decision on review, as the Supreme Court stated at the outset of its opinion, would be "whether these regulations . . . exceed the Commission's authority under the Communications Act," *id.* at 779, thus triggering the provisions of subsection (c). On the other hand, if the Commission has concluded that the Communications Act did not authorize it to take into account a licensee's ownership of other media facilities, the first sentence of subsection (c) would not be applicable, because in such a case the consequence of the Commission's conclusion would be a lessening rather than an increase of regulation. In such a situation, those contending that the Commission was required to take into account the factor of ownership of other media would in effect be arguing that the Commission's failure to do so was, in the words of clause (C), "short of statutory right." But agency action short of statutory right is not subject to this requirement of subsection (c), because by its specific terms the subsection applies only to a determination concerning jurisdiction or authority. Action allegedly short of statutory right, of course, would be subject to judicial review pursuant to section 706(a)(2)(C) but not pursuant to this requirement of subsection (c).

The phrase, "in the event of ambiguity," reflects the Committee's recognition that if a court looks only at the words of a statute, there may be ambiguity concerning the agency's jurisdiction or authority not only because the statute may be couched in broad terms, but also because a literal interpretation of the relevant statutory provision would produce an anomalous result. In *United Housing Federation, Inc. v. Forman*, 421 U.S. 837 (1975), for exam-

ple, the lower court held that shares of stock in a cooperative housing project were securities. The Supreme Court reversed, rejecting the "literal approach" that "the sale of shares called 'stock' must be considered a security transaction simply because the statutory definition of a security includes the words 'and . . . stock'." [Id. at 848. The Court said that it was "guided by a traditional canon of statutory construction: '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' Id. at 849. Thus while courts may resort to the statute as a whole and its legislative history to ascertain the legislative will, we do not intend to allow abuses of post-hoc legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

The requirement that the court's decision concerning an agency's jurisdiction or authority be based on the language of the statute or other evidence of "ascertainable legislative intent," reflects the intention of the Committee that an extension of an agency's jurisdiction or authority beyond that expressed in the language of the statute must be based on facts or materials in the statute's legislative history that can be discerned, identified, and discussed by the reviewing court. Subsection (c) requires more than surmise, more than a lack of evidence which would negate the extension. It requires, instead, identifiable materials which provide support for the extension.

The Committee thus is of the belief that under subsection (c) an asserted extension of jurisdiction or authority that is unsupported by the language of the statute may not be upheld merely on the ground that the legislative history is not illuminating and the agency has made a determination that the court finds reasonable. Accordingly, under this amendment, a reviewing court could not properly uphold an extension of agency authority beyond that expressed in the statutory language on the ground that the extension "is reasonable and is not prohibited by the statute" or that the extension "is reasonable and is consistent with the statute." Subsection (c)'s requirement of affirmative evidence is not met by an absence of contradictory evidence. Reasonableness and consistency with the statutory purpose are not the equivalent of evidence of ascertainable legislative intent.

Subsection (c) directs reviewing courts to play a more active role than some courts have in the past by carefully construing statutes which transfer regulatory power to administrative agencies. In complying with the subsection, reviewing courts should take a hard look at assertions of regulatory jurisdiction or authority which an agency seeks to justify by the argument that the asserted power is granted by implication. In the exercise of its reviewing responsibility, the court will make use of all appropriate materials for ascertaining the legislative will and will be influenced as well by the nature of the asserted power. If, for example, the agency is seeking to assert a basic or significant extension of authority, the reviewing court should not uphold the extension unless it is conscientiously convinced that the statute and relevant legal materials demonstrate that Congress addressed the issue, and that the statute does contain the authority asserted by the agency. On the other hand, if the asserted authority at issue relates to an interstitial or minor

matter, the reviewing court might well conclude that although Congress had not addressed the specific issue, the matter is of such a character that sensible administration necessarily requires exercise of such an implementing authority and therefore that a fair construction of the statute and relevant legislative materials lead the reviewing court to conclude that Congress has conferred the necessary authority.

In imposing a duty on the court to ascertain the statutory basis for agency jurisdiction or authority we do not intend to impose a burden on them to act *sua sponte*. Those seeking review of a rule must still raise the question of jurisdiction or authority, but once raised, the burden of persuasion passes to the person asserting that agency jurisdiction exists. This is not a revolutionary change. It is consistent with the Constitutional premise that delegations of legislative power to unelected officials are to be narrowly construed. It is also far easier to prove the affirmative, that an agency has jurisdiction, than to prove the negative, that it does not. This is consistent with other sections of this legislation which require an agency to include a statement of specific statutory authority under which the rule is proposed and of the congressional intent specifically sought to be achieved by the rule in the notice of proposed rule making, and which require an agency to include in the statement of basis and purpose a memorandum of law supporting the determinations of the agency that the final rule is within the authority delegated by Congress and is consistent with Congressional intent.

The second sentence of new subsection (c) of section 706 is intended to make clear the Congress's intent that the courts perform, and perform diligently, their traditional role as the ultimate and impartial interpreters of the law. It is designed to ensure that, as to questions of law, the agency and those seeking review stand on equal footing before the court without bias, preference, or deference to either and without any presumption in support of or against agency action. The only exception we make is for questions of jurisdiction or authority. Where such an issue is raised on review, the first sentence of subsection (c) imposes the burden on the proponent of agency jurisdiction to demonstrate that Congress has delegated to the agency the authority to act. The word "other" in the second sentence of new subsection (c) makes clear that the general rule of the second sentence is not to be read to lessen the obligations imposed by the preceding sentence on the proponent of agency jurisdiction and authority.

When a citizen challenges an agency's rule or order in the courts, the odds should not be stacked against him by judicial presumptions in favor of the agency. The judicially created doctrine of deference to agency interpretations of law, which some courts have elevated to a virtual presumption of correctness, places the bureaucratic thumb on the scales of justice, weighting them against the citizen. We intend this amendment to reestablish an equal balance.

These amendments do, however, leave room for proper reliance on agency expertise where it actually exists. It is not our intent to preclude judicial consideration of an agency's legal interpretation. This interpretation will be one element of the process of independ-

ent judicial examination. Nonetheless, the effect of any agency interpretation of law on the court's own interpretation should not depend on some general rule of deference or presumption of validity. Rather, in examining an agency interpretation of law, the court should evaluate "the thoroughness exhibited in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.* 323 U.S. 134, 140 (1944). The court should also weigh any countervailing factors bearing on the validity of the agency's legal position.

Accordingly, under this amendment, a reviewing court may not proceed on the assumption that it should uphold an agency's statutory construction merely because that construction is not unreasonable or not irrational. By including the second sentence of paragraph (c), we intend to reject the view expressed in *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and other cases that a court should defer to an agency's interpretation of a statutory or regulatory term even though it is not the only reasonable interpretation or even one that a court would have reached. Instead, the courts are to regard the interpretation of law as a question which they must decide. See e.g., *Coca-Cola Co. v. Atchison Topeka & Santa Fe Ry.*, 608 F.2d 113 (5th Cir. 1979); *Bituminous Coal Operators Ass'n. v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977); and *Beryllium Corp. v. United States*, 449 F.2d 362 (Ct. Cl. 1971).

In providing that the "no presumption" criterion will apply only to questions of law, our intent is to preserve the existing "arbitrary, capricious, [or] an abuse of discretion" standard of section 706 with respect to policy determinations made within the permissible limits of agency discretion. In addition, the "no presumption criterion" does not apply to questions of fact, which are covered by the "substantial support" criterion.

We recognize that some issues will involve mixed questions of law and policy, or law and fact. But the difficulties in parsing and reviewing such issues under differing criteria now exist under section 706 in its present form. Thus this revision of section 706 does not create an obligation for the courts to wrestle with a new categorization. Despite the difficulties inherent in this task, courts can and do distinguish factual and policy from legal questions when reviewing agency action. E.g., *Sweringen Aviation Corp. v. NLRB*, 568 F.2d 458, 463 (5th Cir. 1978); *Getty Oil Co. v. DOE*, 478 F. Supp. 523, 527 (C.D. Cal. 1978). Moreover, courts generally have to distinguish legal from factual issues when hearing appeals from lower court rulings, since different standards of appellate review govern resolution of each category of issues on appeal. E.g., *Buchanan v. United States Postal Service*, 508 F.2d 259, 267 n. 24 (5th Cir. 1975); *Crosby v. United States*, 496 F.2d 1384, 1389 (5th Cir. 1974); *Rockwood & Co. v. Adams*, 486 F.2d 110, 112 (10th Cir. 1973). By establishing clear standards for review of the various components of agency decisions, these amendments will simplify the task of the courts.

The Committee believes that these changes to section 706 will not cause any dramatic upheaval in the process of judicial review of agency actions. These amendments to section 706 are not intend-

ed to affect any applicable rule of law which provides that in a civil or criminal action reliance on an agency rule or order is a defense. Thus, a defendant who has acted in compliance with an agency rule or order would continue to have any protection the law now provides even if the rule or order is subsequently found to be invalid.

The Committee expects that whenever an agency rule or order is challenged in a civil action where a private party is suing under an express or implied right of action for violation of an agency rule (arguably not a "proceeding for judicial enforcement" within the meaning of section 706) the court will apply the same standards of review as those set forth in section 706. In stating this expectation, we do not intend to imply any new standing or right of a defendant to challenge the validity of an agency rule or order. Thus, only if and to the extent that a rule can be reviewed by the court in the action would the reviewing court be expected to apply the same section 706 tests of lawfulness of agency action.

The "no presumption" criterion does not suspend the effectiveness of rules during the pendency of an appeal. This criterion affects only the judicial review of legal issues raised in appeals of agency action. Pending the outcome of that judicial review, the rule or agency action at issue would remain in effect unless, as under current law, a court issues a stay of the effectiveness of a particular agency action pending appeal. 5 U.S.C. § 705. This requirement would not be changed by the amendment.

While this amendment applies to the judicial review of questions arising under the existing and future organic acts of Congress where the general standards for judicial review as previously articulated in section 706 have been applicable, it is not intended either to change any settled judicial interpretation existing at the date of enactment as to the boundaries of a particular agency's jurisdiction or authority determined by a federal appellate court, or to unsettle any res judicata or collateral estoppel effects of final prior court decisions on substantive legal questions.

The ultimate objective of these amendments to section 706 is to make sure that the pace, scope, and substance of regulation conform to the timetable and map established by elected representatives, rather than by an unelected bureaucracy. Since courts do not act on their own initiative, citizens have an important role to play in assuring the attainment of that objective. In protecting their individual interests they can also help to protect the public interest. We are convinced that the further Congressional guidance to the courts afforded by these amendments to section 706 is necessary to maintain a fair and meaningful right to judicial review.

In addition, we expect closer judicial reading of the statutory authority of agencies, perhaps producing decisions that agencies have no authority to act in some situations, will be an incentive for the Congress to "canalize" more specifically its delegations of law making power to agencies. "Congress defaulted when it left it up to an agency to do what the 'public interest' indicated should be done." W. Douglas, "Go East Young Man" 217 (1974). See J. Skelly Wright, Book Review, 81 Yale L. J. 575 (1972) ("There is every reason to believe that, with a slight nudge from the courts, Congress would eagerly reassume its rightful role as the author of

meaningful organic charters for administrative agencies." *Id.* at 584.).

Indeed, as one critic of agency behavior put it, likening agencies unconstrained by statutes to Plato's philosopher-king:

[O]ur whole constitutional structure has been erected upon the assumption that the king not only is capable of doing wrong, but also is more likely to do wrong than other men if he is left unrestrained. We must not today judge those in possession of governmental power more favorably than did our ancestors, with the presumption that they can do no wrong. On the contrary, if there is any presumption, it should be against the holders of power, and increasing as the power increases. In the field of administrative law, historic responsibility can never make up for the want of legal responsibility. Schwartz, "Of Administrators and Philosopher-Kings: The Republic, The Laws, And Delegations of Power," 72 *Nw. U.L. Rev.* 443, 450 (1977).

SECTION 6

Many regulatory statutes permit judicial review of rules in the U.S. Court of Appeals for the circuit in which a petitioner resides or has its principal place of business. See, e.g., Occupational Safety and Health Act, 29 U.S.C. § 655(f). Such provisions often result in the filing of petitions for review of a rule in more than one circuit. Petitions filed in different circuits must be consolidated in one circuit both to ensure consistent results and to conserve judicial resources.

The current venue provision requires consolidation of multi-circuit petitions in the circuit in which the first petition was filed. 28 U.S.C. § 2112(a). This provision has led petitioners to "race to the courthouse" to file the first petition and thereby establish venue in a forum they perceive to be more favorable. Many commentators have criticized this practice as unseemly. See, e.g., Ross and Goldman, "Racing to the Court: An 'Unseemly' Way to Challenge Agency Orders," *Nat'l L.J.*, Mar. 3, 1980, at 27.

The bill addresses the race to the courthouse. New subsection 2112(b) provides that venue will lie in the circuit receiving the first petition for review, but only if no other petition is filed in another circuit within the following five days. If petitions are filed in other circuits within the following five days, venue is to lie in the circuit chosen at random from among the circuits receiving a petition by the Administrative Office of the United States Courts. The system for making this random selection is to be devised by the Administrative Office. The Committee expects that this system will be developed with the participation and comment of the public. Paragraph 2112(b)(3) retains a court's authority to transfer proceedings to another court "for the convenience of the parties or otherwise in the interest of justice."

SECTION 7

Section 7 makes clear that nothing in S. 1080 limits the authority that the President possesses independently of the provisions of

this Act with respect to regulatory policy and programs. This section also reiterates that nothing in S. 1080 is intended to displace the ultimate decisionmaker in rulemaking as established under other provisions of law. S. 1080 establishes various new procedural requirements that must be met, require certain determinations to be made in regulatory decisionmaking, and in other ways shapes that decisionmaking. Compliance with these new requirements, where applicable, is a prerequisite to the adoption of a valid rule. In that respect, agency rule making authority is canalized by S. 1080 in the same way the current A.P.A. now affects such authority; that is, agencies are authorized to promulgate rules for certain purposes in enabling statutes, but they must do so in compliance with the provisions of the A.P.A. In any event, S. 1080 does not divest an agency having "rulemaking authority" of the responsibility to make the determinations they are required or authorized to make under S. 1080 or other applicable statutes. This legislation is not intended to disturb such agency authority delegated by Congress in substantive regulatory statutes.

SECTION 8

Section 8 establishes the effective dates for the various sections of this Act.

VI. REGULATORY AND PAPERWORK IMPACT STATEMENT

In compliance with paragraph 5 of rule XXIX of the Standing Rules of the Senate, the following is an evaluation of the anticipated regulatory and paperwork impacts of the Regulatory Reform Act, as amended.

A. REGULATORY IMPACT

This legislation does not create any new regulations with which the public must comply, and is targeted solely at the activities of the agencies themselves.

S. 1080 will decrease the adverse economic impact of government regulation on individuals, consumers, and businesses and improve the effectiveness of federal agencies in achieving their regulatory goals. It achieves these two goals by requiring agencies, when promulgating a major rule, to evaluate the economic and non-economic effects of a proposed regulation, to examine alternatives which may accomplish the regulatory goal in a less burdensome way, and to justify that rule in terms of this evaluation and examination.

B. PAPERWORK IMPACT

S. 1080 will decrease the amount of unnecessary paperwork with which the public must comply. Paperwork and recordkeeping requirements are one of the most significant burdens in complying with federal regulations. The process of regulatory analysis will accordingly focus agency attention on the burdens of paperwork and encourage them to reduce this burden wherever possible. The legislation will increase the opportunities for the public to comment on paperwork and recordkeeping requirements and increase the responsibility of an agency to explain its regulatory recordkeeping and reporting requirements.