

## **SECTION-BY-SECTION ANALYSIS – H.R. 5, the “Regulatory Accountability Act of 2015”**

### *Title 1: “Regulatory Accountability Act”*

#### *Sec. 1. Short title.*

Designates the title the ‘Regulatory Accountability Act.’

#### *Sec. 2. Definitions.*

Adds to the APA definitions of the following terms: ‘major rule,’ based on the definition given to that term in Section 1(b) of Executive Order 12291; ‘high-impact rule’ as any rule likely to impose an annual cost of \$1 billion on the economy; ‘guidance,’ based on the definition given to that term in Section 3(g) of Executive Order 13422; ‘major guidance,’ based on the definition given to the term ‘significant guidance document’ in Section 3(h) of Executive Order 13422; ‘negative-impact on a jobs and wages rule’ as rules that will reduce annual employment or wages by specified levels in the first one, five or ten years following a rule’s issuance; and ‘Information Quality Act,’ as Section 515 of Public Law 106-554 and its implementing OMB and agency guidelines; and, the ‘Office of Information and Regulatory Affairs.’

#### *Sec. 3. Rulemaking (references are to amended section 553 of title 5).*

*Subsec. 553(b): Rulemaking Principles.* Incorporates into the APA universally applicable rulemaking principles rooted in the good-government principles of Executive Orders 12291, 12866, 13422 and 13563, making them statutorily mandatory and judicially enforceable. The agency must consider—

*Subsec. 553(b)(1)-(2):* The legal authority for the rule and other relevant statutory considerations.

*Subsec. 553(b)(3):* The specific nature of the problem, whether it genuinely warrants new regulations, and countervailing risks that may be posed by alternatives for new agency action.

*Subsec. 3(b)(4):* Whether the problem could be addressed by repealing or modifying existing regulations.

*Subsec. 553(b)(5):* Potential alternatives to adopting a new regulation, including no Federal response and a regional/State/local/tribal response.

*Subsec. 553(b)(6):* Notwithstanding any other law, the potential costs and benefits--direct, indirect and cumulative--associated with each

alternative, as well as estimated impacts on jobs, economic growth, innovation, economic competitiveness, and low-income populations.

*Subsec. 553(c): Early Public Outreach.* Consistent with President Obama's call in E.O. 13563 for earlier, more transparent outreach to the public and affected entities, the Bill requires Advance Notices of Proposed Rulemaking (ANPRs) 90 days before an agency may propose any major or high-impact rule. ANPRs must disclose information already known to the agency, the legal basis for a potential rulemaking, identify an achievable objective of the potential proposed rule and metrics to be used to measure project toward that objective, and allow the public 60 days to submit written views about the information and issues discussed in the advance notice.

*Subsec. 553(d) Notices of Proposed Rulemaking; Determination of Other Agency Course*

*Subsec. 553(d)(1)(1): Improved Notices of Proposed Rulemaking.* Improved Notice of Proposed Rulemaking requirements that assure major and high-impact proposed rules are built upon the sound, transparent decision-making platform made possible by the ANPR process and that other proposed rules also rest on a more robust and transparent decision-making platform. These requirements will crystallize for final public comment the agency's preliminary determinations of whether a Federal regulation is needed; whether the benefits of the proposed rule meet statutory objectives and justify its costs; whether alternatives exist that could achieve statutory objectives at lower costs; whether and why the agency has not proposed a lower-cost alternative; whether existing regulations or other law have produced or contributed to the problem the agency seeks to correct with new regulation; and, if so, whether modification or repeal of those other regulations or laws could resolve the problem more effectively than a new rule. The agency also is required to identify an achievable objective of the potential proposed rule and metrics to be used to measure project toward that objective.

*Subsec. 553(d)(2): Determination of Other Agency Course.* After concluding the ANPR process, if applicable, an agency may alternatively publish a Determination of Other Agency Course, describing the alternative response the agency chose rather than issue a new rule.

*Subsec. 553(d)(3): Public Participation in Rulemaking.* Requires the agency to give interested parties at least 90 days to submit written data,

views or arguments related to the proposed rule and 120 days to do so for any proposed major or high-impact rule.

*Subsec. 553(d)(4): Efficient Early Resolution of Information Quality Act Issues.* Early opportunities for quick administrative appeals of whether the key studies or other information on which agencies base their proposed rules meet vital information quality standards set under the Information Quality Act.

*Subsecs. 553(e), (h): Formal Rulemaking Hearings on the Most Critical Issues for High-Impact Rules.* Formal hearings with opportunities for cross-examination on the most critical factual issues for proposed rules that impose a \$1 billion burden on the economy. These issues concern the key information on 'whether the agency's asserted factual predicate for the rule is supported by the evidence'; whether there is a lower-cost alternative for regulation that achieves statutory objectives, and why the agency did not choose it; and whether the final information on which the agency relies satisfies standards under the Information Quality Act. The agency must publish public notice of the hearing not less than 45 days in advance. Upon petition, hearings or issues may be waived by participants in the rulemaking other than the agency. Issues also may be added to hearings on high-impact rules, and hearings may be granted on major rules, upon petition and at the agency's discretion.

*Subsec. 553(f): Improved Requirements for Final Rules.* In adopting a final rule, the agency must:

*Subsec. 553(f)(1):* Consult with the OIRA Administrator.

*Subsec. 553(f)(2):* Rely only on the best reasonably obtainable scientific, technical and economic information.

*Subsec. 553(f)(3):* Adopt only the least-cost alternative considered during rulemaking that meets statutory objectives, unless the agency explains why a more costly rule is justified to serve interests of public health, safety or welfare clearly within the scope of the statutory provision that authorizes the rule and the more costly rule's additional benefits justify its additional costs.

*Subsec. 553(f)(4):* Publish a notice of final rulemaking giving: 'a concise, general statement of the rule's basis and purpose,' an explanation of the need for the rule, the costs and benefits, and why the agency did not adopt an alternative rule or amend or rescind an existing rule. The agency must rest on specific, final determinations on the critical issues considered during formal rulemaking hearings, based on data that meets the strictures of the Information Quality Act. The agency must publish plans for periodic review of high-impact, major and

negative-impact-on-jobs-and-wages rules to determine whether the agency's final rule still is needed, achieves statutory objectives, and produces benefits that justify its costs or whether the rule could be modified or rescinded. The agency must also describe how the rule meets the objective stated in its notice of proposed rulemaking or why the rule meets other objectives determined to be more appropriate in light of the administrative record, and establish that the rule did not deviate from the metrics for measurement of achievement of objectives described in the proposed rule or why different metrics are more appropriate in light of the administrative record and that the agency did not deviate from those metrics. The agency further must provide, for negative-impact-on-jobs-and-wages rules, a statement by the agency head that the rule was approved with the knowledge that it qualified as a negative-impact-on-jobs-and-wages rule.

*Subsect. 553(g): Better Protections against Abuse of Interim-Final Rules.* Allows agencies in cases of public urgency to issue 'interim-final rules' that are effective before full rulemaking procedures are completed, but also requires prompt subsequent completion of full rulemaking procedures and allows affected entities to seek rapid judicial review of agency decisions to adopt interim-final rules (except for national security rules).

*Subsec. 553(i):* Requires publication of a substantive final or interim rule no less than 30 days before its effective date.

*Subsec. 553(j):* 'Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.'

*Subsec. 553(k): Guidance for Agencies on Cost-Benefit Analysis and other Key Issues.* Authorizes OIRA to issue guidelines for agencies to follow as they assess economic and scientific issues in rulemaking; observe statute-specific rulemaking regimes in conjunction with the generally applicable procedures of the APA as amended; work to assure better coordination, simplification and coordination by agencies in rulemaking; and conduct hearings under sections 553, 556 and 557 of title 5.

*Subsec. 553(l):* Requires the agency to include in the rule making record 'all documents and information considered by the agency during the proceeding' including, at the discretion of the President or the OIRA Administrator, communications from OIRA to the agency.

*Subsec. 553(m):* Exempts the Board of Governors of the Federal Reserve System and the Federal Open Market Committee from performing cost-benefit analysis or holding formal hearings for monetary policy rules.

*Sec. 4. Agency Guidance.*

Curbs agency abuse of purportedly non-binding 'guidance'—particularly guidance with major or significant economic impacts—to avoid statutory rulemaking requirements.

*Sec. 5. Hearings.*

Adopts technical changes to existing APA requirements for formal, on-the-record rulemaking hearings that support hearing-based reforms in Section 3 of the Bill.

*Sec. 6. Actions Reviewable.*

Provides for immediate judicial review of agency decisions to establish 'interim-final rules' before complying with normal rulemaking requirements. An abuse of discretion standard applies in such review.

*Sec. 7. Scope of Review.*

Clarifies that courts may review agency action for violations of the Information Quality Act. Prohibits judicial deference to agency interpretations of regulations rendered outside of rulemaking; agency determinations of cost-benefit issues, other economic assessments or risk assessments that do not comply with applicable OIRA guidelines; and agency determinations of law and fact to support interim-final rules. Allows agency denials of petitions for hearings or consideration of specific issues in hearings to be reviewed for abuse of discretion.

*Sec. 8. Added Definition.*

Codifies the definition of the term 'substantial evidence' given by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

*Sec. 9. Effective Date.*

Provides that the Bill's provisions generally do not apply to any rulemaking pending or completed on the date of enactment. Exceptions are made for the Bill's amendments to establish definitions in section 551 of title 5; prohibit judicial

deference to agency interpretations of regulations outside of rulemaking; and guarantee judicial review of Information Quality Act violations.

## *Title II: the “Separation of Powers Restoration Act”*

### *Section 1. Short Title.*

Section 1 sets forth the short title of the bill as the ‘Separation of Powers Restoration Act.’

### *Section 2. Judicial Review of Statutory and Regulatory Interpretations.*

Section 2 amends section 706 of title 5 to explicitly state that courts are to decide all relevant questions of law de novo, including all questions of the interpretation of constitutional, statutory, and regulatory provisions.

## *Title III: the “Small Business Regulatory Flexibility Improvements Act”*

### *Section 301. Short Title.*

The short title of this title is the Small Business Regulatory Flexibility Improvements Act.

### *Section 302. Clarification and Expansion of Rules Covered by the Regulatory Flexibility Act.*

The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, (RFA) currently defines a rule as one that is issued pursuant to the notice and comment provisions of the Administrative Procedure Act (APA). Section 302(a) simply adopts, for the purposes of the RFA, the definition of a rule in the APA except that the RFA definition excludes: rules pertaining to the protection of the rights of and benefits for veterans; rules pertaining to the protection of active duty servicemembers from predatory lending; and rules of particular applicability, i.e. rules of relevance only to one identifiable entity.

The RFA requires an agency to prepare a regulatory flexibility analysis if it determines that the rule will have a “significant economic impact on a substantial number of small entities.” To counter court decisions limiting the analysis to direct effects, section 302(b) clarifies that “economic impact” means any direct economic

effect and any indirect economic effect on small entities (including compliance costs and effects on revenue) which is reasonably foreseeable – a definition that is taken directly from regulations governing the writing of environmental impact statements.

“Significant economic impact” is economically neutral. Section 302(c) clarifies that the RFA applies whether impacts are positive or negative. This change will require agencies to assess alternatives that enhance positive economic effects as well as the current practice of examining alternatives that mitigate negative economic consequences.

It is unclear whether the RFA applies to tribal governments. Section 302(d) resolves this ambiguity by extending the requirements of the RFA to small tribal organizations, i.e., one with a population of less than 50,000.

Neither the Forest Service nor the Bureau of Land Management comply with the RFA when developing or significantly modifying management plans for lands under their respective oversight. Section 302(e) requires compliance with the RFA by these agencies when making revisions that require preparation of environmental impact statements.

Section 302(f) requires the Internal Revenue Service (IRS) to comply with the RFA, whenever it intends to codify a regulation in the Code of Federal Regulations and the regulation or statute that the regulation is interpreting imposes a “collection of information” requirement as that term is defined in the Paperwork Reduction Act. The change should increase the number of rules for which the IRS must analyze the economic impact on small entities.

The current definition of small organization in the RFA is unclear. Section 302(g) clarifies the definition by adapting an extant United States Small Business Administration (SBA) size standard for organizations that have for-profit equivalents or, if none exist, a net worth of \$7,000,000 and not more than 500 employees. While local chapters of labor unions are small organizations, section 302(g) provides a separate definition that accounts for the structure of labor unions.

### *Section 303. Expansion of Report of Regulatory Agenda.*

Section 602 of the current RFA requires agencies to publish regulatory flexibility agendas each April and October in the Federal Register. Section 303 expands the information required to be provided in the regulatory flexibility agendas

so that they will provide small entities, particularly small businesses, with more useful information on proposed rules that might affect them.

*Section 304. Requirements Providing for More Detailed Analyses.*

Section 304 modifies the RFA by requiring that agencies provide a detailed statement rather than a statement. The detailed statement will require identification of rules that are duplicative, overlapping, or conflicting. In addition, the detailed statement must include an evaluation of the cumulative impacts of the rule or specify why that is not possible. Lastly, Section 304(b) requires any final regulatory flexibility analysis to summarize comments that were submitted when the proposed rule was certified that the proposal would not have a significant economic impact on a substantial number of small entities.

Section 304(c)-(e) make important technical changes to the information provided to the public when an agency issues a regulatory flexibility analysis or certifies that the rule will not have a significant economic impact on a substantial number of small entities. Section 304(c) ensures that agencies provide proper cross-references when they incorporate other material into their analyses prepared pursuant to the RFA. Section 304(d) ensures that certifications be accompanied by detailed statements demonstrating the rationale for not performing a regulatory flexibility analysis. Section 304(e) mandates quantification of impacts on small entities unless the agency finds it impracticable to do so and, in such cases, must provide a detailed non-quantitative description of impacts.

*Section 305. Repeal of Waiver and Delay Authority; Additional Powers of the Chief Counsel for Advocacy.*

Under the APA, there is no circumstance in which an agency would be required to issue a final rule in an emergency and be required to comply with the RFA. As a result, the waiver authority is pointless and this section removes it from the RFA.

Section 305 then provides new authority to the Chief Counsel for Advocacy, the executive branch official responsible for monitoring and reporting on agency compliance with the RFA. 5 U.S.C. §§ 612(a). Of most significance is the authority to write regulations that all agencies must follow when complying with the RFA. This will ensure that the Chief Counsel's interpretation of the RFA, in particular rulemakings, will be accorded substantial deference in court challenges rather than the courts relying on the rulewriting agency's interpretation of the RFA.

Section 305 also clarifies the ability of the Chief Counsel to intervene in the proceedings conducted by federal agencies that may impose policies on multiple small



entities. Thus, the Chief Counsel may intervene in agency adjudications and file comments on rules not issued pursuant to notice and comment.

*Section 306. Procedures for Gathering Comments.*

Currently, three agencies, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau are required to obtain input from small entities prior to publication in the Federal Register of rules that will have a significant economic impact on a substantial number of small entities.

Section 306 extends that requirement to all federal agencies, makes technical changes in the process of obtaining such input to improve its utility to agencies, and addresses procedures for dealing with rules promulgated by a collegial body, independent regulatory agencies such as the Securities and Exchange Commission.

*Section 307. Periodic Review of Rules.*

Section 610 of the RFA requires agencies to periodically review their rules that have a significant economic impact on a substantial number of small entities. Although this requirement has existed since 1980, agencies have no plans on how to conduct such reviews. This section requires adoption of plans for review, publishing on agency websites, and clarifies that the trigger is present significant economic impact irrespective of what the impact was when the rule was promulgated.

*Section 308. Judicial Review of Compliance with the Requirements of the Regulatory Flexibility Act Available After Publication of the Final Rule.*

Section 308 clarifies that promulgation of a final regulatory flexibility analysis or certification with a final rule constitutes final agency action triggering the right to challenge agency compliance in court irrespective of any other internal agency processes that may apply for review of the rule. This section also clarifies that the Chief Counsel, in any amicus brief, can address not just compliance with the RFA but the overall legality of the rule.

*Section 309. Jurisdiction of Court of Appeals over Rules Implementing the Regulatory Flexibility Act.*

Section 309 grants jurisdiction to the United States Court of Appeals to review challenges by small entities to rules promulgated by the Chief Counsel for Advocacy to implement the RFA as set forth in section 305.

*Section 310. Establishment and Approval of Small Business Concern Size Standards By Chief Counsel for Advocacy.*

Section 310 transfers from the SBA Administrator to the Chief Counsel for Advocacy the function of determining size standards of small businesses for purposes other than the Small Business Act and the Small Business Investment Act of 1958 – a power that has been used by the SBA approximately 30 times since 1993. This ensures that Advocacy is the final arbiter of size standards used to comply with the RFA and any subsequent change to a small business size standard used in the final rule.

*Section 311. Clerical Amendments.*

Section 311 contains appropriate clerical amendments needed to make the United States Code consistent with the changes sought by the Committee.

*Section 312. Agency Preparation of Guides.*

Section 312 amends Section 212(a)(5) of Small Business Regulatory Enforcement Fairness Act to require agencies to solicit input from affected small entities or associations of affected small entities in the development of compliance guides.

*Section 313. Comptroller General Report*

Section 313 requires the Comptroller General of the United States to examine whether the Chief Counsel for Advocacy of the Small Business Administration has the capacity and resources to carry out its duties under the Small Business Regulatory Flexibility Improvements Act of 2017. The Government Accountability Office's study must be completed and published not later than 90 days after the Small Business Regulatory Flexibility Improvements Act of 2017's enactment.

*Title IV: the "Require Evaluation before Implementing Executive Wishlists Act" (REVIEW Act)*

*Sec. 1. Short Title.* Section 1 sets forth the short title of the bill as the 'Require Evaluation before Implementing Executive Wishlists Act of 2016,' or the 'REVIEW Act of 2016.'

*Sec. 2: Relief Pending Review.* Section 2 amends section 705 of title 5 to designate as 'high-impact' rules those rules determined by the Administrator of the Office of

Information and Regulatory Affairs to impose an annual cost on the economy of not less than \$1 billion; requires agencies to submit new rules to the Administrator for the rendering of such determinations; requires agencies to publish such determinations with the rules; requires agencies to postpone the effective dates of high-impact rules until the end of litigation challenging the rules, if such litigation is filed within 60 days after the rules' publication or otherwise applicable statutory periods for the filing of litigation; and, sets forth a rule of construction that the legislation is not to be construed to limit the courts' discretion to issue judicial stays against the implementation of any rules.

*Title V: the “All Economic Regulations are Transparent Act” (ALERT Act)*

*Sec. 1. Short title.*

Section 1 sets forth the short title of the bill as the ‘All Economic Regulations are Transparent Act,’ or the ‘ALERT Act.’

*Sec. 2: Office of Information and Regulatory Affairs Publication of Information Relating to Rules.*

*Subsec. (a). Amendment.* Amends Title 5 of the United States Code by inserting ‘Chapter 6A--OIRA Publication of Information Relating to Rules,’ which includes the following sections:

*Sec. 651. Agency monthly submission to OIRA.* Requires agency heads to submit a monthly update to the Administrator of the Office of Information and Regulatory Affairs (OIRA) that includes each rule the agency expects to propose or finalize in the upcoming year. The monthly updates, for each rule, must include: a summary, objectives, legal basis, whether comments will be requested on the proposed rule, the stage of the rulemaking process, and whether the rule is subject to a regulatory review under 5 U.S.C. 610. If a notice of proposed rulemaking has been issued for a rule, the agency must also include a schedule for completion, an estimate of the costs the regulation is expected to impose, and an estimate of the overall economic effects of the rule, including the effect on jobs, or an affirmative statement that no economic information was considered.

*Section 652. OIRA Publications.* Requires the Administrator to make the monthly updates publicly available on the Internet. Requires the Administrator to publish an annual cumulative assessment of agency rulemaking in the

Federal Register. The following information will be included: information received in the monthly submissions, cost and benefit analyses of rules, agency action that reduced the scope of the regulatory state, the total cost of rules, and the total number of rules for which a cost estimate was unavailable. Requires the OIRA Administrator to make publicly available on the Internet on an annual basis certain information about the review and analysis of each proposed or finalized rule. The following information will be included: cost and benefit analyses, docket numbers, regulatory identifier number, the number and a list of rules reviewed by OIRA, and the number and list of rules covered under the Congressional Review Act. The first publication will require the cost and benefit analyses for all proposed and final rules in the past 10 years.

*Sec. 653. Requirement for rules to appear in agency-specific monthly publication.* Provides that a rule may not take effect until the monthly submission to OIRA has been publicly available on the Internet for not less than 6 months. The 6-month requirement does not apply to rules that do not require notice and public comment and rules the President issues an Executive Order declaring necessary for emergency, national security, or other specified purposes.

*Sec. 654. Definitions.* Defines agency, agency action, rule and rule making as having the meaning given those terms in 5 U.S.C. 551.

*Subsec. (b). Technical and conforming amendment.* This subsection amends the table of chapters for part I of title 5 of the U.S.C.

*Subsec. (c). Effective dates.* This subsection establishes effective dates for the monthly updates and OIRA publications, and provides that the requirement that monthly-update information about new rules be published online for 6 months before a new rule may become effective shall take effect 8 months after enactment.

## *Title VI: the “Providing Accountability Through Transparency Act”*

*Sec. 1. Short title.* Section 1 sets forth the short title of the bill as the ‘Providing Accountability Through Transparency Act.’

*Sec. 2. Requirement to Post a 100 Word Summary to regulations.gov.* Section 2 amends the Administrative Procedure Act at 5 U.S.C. 553(b) to require that general notices of proposed rulemaking issued by Federal agencies include the Internet

address of a plain-language summary, not exceeding 100 words, of the proposed rule, and that the summary be posted on the regulations.gov website. That website is maintained by the Federal Government pursuant to the E-Government Act of 2002 (44 U.S.C. 3501 note).