114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–743

REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS ACT OF 2016

SEPTEMBER 13, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3438]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3438) to amend title 5, United States Code, to postpone the effective date of high-impact rules pending judicial review, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

59–006

The Amendment

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Require Evaluation before Implementing Executive Wishlists Act of 2016" or as the "REVIEW Act of 2016".

SEC. 2. RELIEF PENDING REVIEW.

Section 705 of title 5, United States Code, is amended—

(1) by striking "When" and inserting the following:

"(a) IN GENERAL.—When"; and

(2) by adding at the end the following:

"(b) HIGH-IMPACT RULES.—

"(1) DEFINITIONS.—In this subsection—

"(A) the term 'Administrator' means the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget; and

"(B) the term 'high-impact rule' means any rule that the Administrator determines may impose an annual cost on the economy of not less than $1,000,000,000.

"(2) IDENTIFICATION.—A final rule may not be published or take effect until the agency making the rule submits the rule to the Administrator and the Administrator makes a determination as to whether the rule is a high-impact rule, which shall be published by the agency with the final rule.

"(3) RELIEF.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), an agency shall postpone the effective date of a high-impact rule of the agency until the final disposition of all actions seeking judicial review of the rule.

"(B) FAILURE TO TIMELY SEEK JUDICIAL REVIEW.—Notwithstanding section 553(d), if no person seeks judicial review of a high-impact rule—

"(i) during any period explicitly provided for judicial review under the statute authorizing the making of the rule; or

"(ii) if no such period is explicitly provided for, during the 60-day period beginning on the date on which the high-impact rule is published in the Federal Register,

the high-impact rule may take effect as early as the date on which the applicable period ends.

"(4) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to impose any limitation under law on any court against the issuance of any order enjoining the implementation of any rule.".

Purpose and Summary

H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2016" or the "REVIEW Act of 2016," amends the Administrative Procedure Act to require administrative stays of the effective dates of new regulations imposing one billion dollars or more in annual costs to the U.S. economy, if litigation to challenge the regulations is brought within statutorily specified periods for the initiation of such litigation.

Background and Need for the Legislation

I. GENERALLY

H.R. 3438 responds to situations like the United States Supreme Court's decision in *Michigan v. EPA,* 576 U.S. ___, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015), and the adverse regulatory cost phenomena for which that case is emblematic.

In *Michigan v. EPA,* the Court ruled against the U.S. Environmental Protection Agency, holding that its Utility MACT rule, which newly regulated air emissions from power plants, was legally

infirm because the agency deemed costs irrelevant to its decision to promulgate the rule. Those costs totaled an estimated $9.6 billion per year, to achieve benefits in airborne mercury emissions of only $4–6 million per year.

The Court, however, failed to set aside the rule, requiring the continuing incurrence of compliance costs pending remand to the court of appeals. Billions of additional dollars, moreover, had already been incurred by the power-generating industry under the unlawful rule, because the rule was not stayed by the courts pending the multi-year, ultimately successful legal challenge to the rule.

The REVIEW Act would prevent such needless and wasteful expenditures to comply with unlawful, billion-dollar rules. To do so, it would require agencies, when they promulgate new rules determined by the Administrator of the Office of Information and Regulatory Affairs to impose $1 billion or more in costs on the economy, to provide that the rules will not become legally effective until after the conclusion of litigation challenging them, if the litigation is timely filed in the wake of the rules' publication. The Act would effectuate this reform by amending 5 U.S.C. sec. 705, the Administrative Procedure Act's provision authorizing agency or judicial stays of agency action pending judicial review. 705 currently leaves it wholly to the discretion of agencies and the courts to issue stays, whether for new billion-dollar rules or otherwise.

The reform contained in the REVIEW Act has become increasingly needed in recent years. Historically, it was unusual for regulatory agencies to promulgate new regulations with estimated annual costs of $1 billion per year or more. Since the turn of the century, however, and particularly under the Obama administration, billion-dollar rules have become more and more frequent. As the American Action Forum summarized in 2015:

> From 2006 to 2008, the nation averaged two of these rules annually. From 2009 to present, this figure has increased to roughly three per year. During the Obama administration, these mega-rules have imposed total annual costs of $65.1 billion, with a related 19.5 million paperwork burden hours.
>
> * * *
>
> [T]hese rules are somewhat rare . . . but their impact cannot be overstated. The five largest rules from [the current] Administration have imposed an average of $6.7 billion in annual costs and more than $33.6 billion in total annual burdens.[1]

As of today, based on available data, since 2005, there have been no fewer than 34 billion-dollar rules, including 24 from the Obama administration, following a total of ten from the George W. Bush administration. These rules include the following:

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[1] Sam Batkins, *The House on Regulation: Addressing Billion-Dollar Rules,* American Action Form (Oct. 22, 2015) (available at http://americanactionforum.org/insights/the-house-on-regulation-addressing-billion-dollar-rules).

Regulation	Agency	Cite	CFR	Annualized Cost (in millions)
CAIR	Environmental Protection Agency	70 FR 25162	40 CFR 51	3,100
Regional Haze Regulations and Guidelines for Best Available Retrofit Technology	Environmental Protection Agency	70 FR 39104	40 CFR 51	2,900
Federal Motor Vehicle Safety Standards; Tire Pressure Monitoring Systems	Transportation	70 FR 18136	49 CFR 571	1704
National Ambient Air Quality Standards for Particulate Matter	Environmental Protection Agency	71 FR 61144	40 CFR 50	5,400
Average Fuel Economy Standards for Light Trucks Model Years 2008-2011	Transportation	71 FR 17566	49 CFR 523	1,591
Clean Air Fine Particle Implementation Rule	EPA	72 FR 20586	40 CFR 51	7,900
Federal Motor Vehicle Safety Standards; Occupant Protection in Interior Impact	NHTSA	72 FR 51908	49 CFR 571	1,100
Importer Security Filing and Additional Carrier Requirements	Homeland Security	73 FR 71730	19 CFR 192	4,900
Ozone-Depleting Substances; Removal of Essential-Use Designation	FDA	73 FR 69532	21 CFR 2	1,100
CAFE Model Year 2011	NHTSA	74 FR 14196	49 CFR 523	1,460
Health Insurance Reform; Modifications to the Health Insurance Portability	HHS	74 FR 3296	45 CFR 162	1,144
Federal Motor Vehicle Safety Standards	NHTSA	74 FR 22348	49 CFR 571	1,391
Amendments to Regulation SHO	SEC	75 FR 11231	17 CFR 242	1,154.96
Energy Conservation Standards for Residential Water Heaters	Energy	75 FR 20112	10 CFR 430	1,285
Light-Duty Vehicle Greenhouse Gas Emission Standards	EPA	75 FR 25323	40 CFR 600	4,900
Energy Conservation Program: Standards, Residential Refrigerators	Energy	76 FR 57516	10 CFR 430	1,569
Swap Data Recordkeeping and Reporting Requirements	CFTC	77 FR 2136	17 CFR 45	1,113.75
Medicaid Program; Community First Choice Option	CMS	77 FR 26828	42 CFR 441	1,092
Regulation of Fuels and Fuel Additives: 2013 Biomass-Based Diesel	EPA	77 FR 59457	40 CFR 80	3,525
2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions	EPA	77 FR 62623	40 CFR 600; 49 CFR 537	10,800
National Emission Standards for HAPs From Coal	EPA	77 FR 9304	40 CFR 63	9,600
Medicaid, CHIP, and Exchanges	CMS	78 FR 4593	42 CFR 430; 45 CFR 155	1,311
NESHAP: Major Sources: Industrial and Commercial Boilers and Process Heaters	EPA	78 FR 7137	40 CFR 63	1,600
Control of Air Pollution From Motor Vehicles: Tier 3	EPA	79 FR 23413	40 CFR 79	1,500
Carbon Pollution Emission Guidelines for Existing Stationary Sources	EPA	79 FR 34829	40 CFR 60	8,400
Change to the Compliance Date: International Classification of Diseases, 10th	HHS	79 FR 45128	45 CFR 162	4,007
Prohibitions and Restrictions on Proprietary Trading	Comptroller of the Currency	79 FR 5535	12 CFR 44; 17 CFR 255	4,346
Liquidity Coverage Ratio: Liquidity Risk Measurement Standards	Comptroller of the Currency	79 FR 61439	12 CFR 50	3,600
National Ambient Air Quality Standards for Ozone	EPA	79 FR 75233	40 CFR 50	1,400
Margin Requirements for Uncleared Swaps for Swap Dealers	CFTC	81 FR 635	17 CFR 23	2,050
Definition of the Term "Fiduciary"; Conflict of Interest Rule	Labor	81 FR 20945	29 CFR 2510	1,960
Joint Industry Plan; Notice of Filing of the National Market System Plan	SEC	81 FR 30613	17 CFR	1,702
Occupational Exposure to Respirable Crystalline Silica	Labor	81 FR 16285	29 CFR 1910	1,056
Standards for Medium- and Heavy-Duty Engines and Vehicles-Phase 2	EPA	80 FR 40137	40 CFR 85; 49 CFR 538	2,587

Although the courts, when rules are challenged judicially, have authority to issue stays pending review, testimony elicited at the Subcommittee on Regulatory Reform, Commercial and Antitrust Law's hearing on H.R. 3438 indicated that it is very difficult to obtain judicial stays and may be getting harder still.[2] One case highlighted during the Subcommittee's hearing provides an instructive example of the consequences when courts do not issue stays in what ultimately is successful litigation to challenge a new rule:

[2] *Require Evaluation before Implementing Executive Wishlists (REVIEW) Act of 2015; and the Regulatory Predictability for Business Growth Act of 2015,* Hearing before the H. Subcomm. on Reg. Reform, Com. and Antitrust Law, 114th Cong. 51 at 57 (2015) *(Legislative Hrg.)* (testimony of Jeffrey Bossert Clark, Sr., Esq.).

> In 2007, about $200 million in compliance investments were stranded in the paper and wood products industry when a court struck down the 2004 Boiler MACT rules just 3 months before the compliance deadline. When the rules were reissued in 2013, the new standards had changed significantly, and previous investments proved to be the wrong approaches to achieve compliance. Wasting limited capital undermines the competitiveness of U.S. businesses and impedes growth and job creation.[3]

The reluctance of courts to issue judicial stays creates increasing difficulties for the economy and economic recovery that are particularly acute in the cases of billion-dollar rules. It also provides undesirable incentives for administrative agencies.

For example, in *Michigan v. EPA,* the challenged rule imposed an estimated $9.6 billion in annual costs to achieve only $4–6 million in benefits. The Court ultimately found the rule unlawful, but, even then, did not set it aside, nor did the courts ever stay the rule pending review. As a result, after years of litigation that still have not been concluded, but during which compliance has been required, it may well be the case that over $50 billion in vitally-needed economic resources will be wasted on compliance with a rule that ultimately is discarded for legal insufficiency.

Further, when agencies know that the courts may allow them to impose such levels of costs on regulated entities pending lengthy judicial reviews, it creates a dangerous incentive for agencies to impose more legally infirm, high-cost rules on the economy. In these circumstances, the agencies know that they may be able to leverage very high compliance expenditures by covered entities pending review to force the entities' ultimate acquiescence to the rules. This is because, once such costs are sunk into the regulated entities' cost structures, it can be difficult for these entities to face both a complete loss of those costs and the risk of totally new and still unpredictable costs to comply with the requirements of a successor rule.

Testimony received by the Committee indicating that it is exceedingly hard for entities challenging new agency rules to obtain judicial stays, even against rules imposing a billion dollars or more in costs on the economy per year, is deeply troubling to the Committee. Indeed, testimony received suggested that summary denials of stay petitions, even during challenges to high-cost rules, is routine. It is the Committee's sincere hope that the REVIEW Act will provide an impetus to the courts to consider more deeply petitions for judicial stays filed by those who must bear the costs of new rules that impose high costs—particularly in light of the perverse incentive agencies have to impose even more costly rules, to leverage immediate and very high compliance costs to squelch opposition to the rules. The Committee's concern extends, at a minimum, to the many major rules issued each year that impose one hundred million dollars or more in annual costs per year, albeit less than one billion dollars per year. Many of these rules can impose several hundreds of millions of dollars or even over one billion dollars in compliance costs over their life cycles, or even during the course of several years of litigation. That the REVIEW Act does not require

[3] *Legislative Hrg.* at 26 (testimony of Paul R. Noe, Esq.).

automatic administrative stays against these rules pending litigation does not mean that courts or agencies should assume Congress believes such stays, whether judicial or administrative, are not merited. On the contrary. The bill does, though, leave the question of whether to grant stays in such cases where it lies now, to the courts' and the agencies' case-by-case discretion, and subject to Congress' continuing oversight for needs for further reform.

Amending the APA to include the REVIEW Act's important but, it is to be hoped for, only occasionally needed reform, would prevent such waste and preclude this undesirable incentive for agencies. It also would create a salutary incentive for agencies to devise new rules that achieve the similar levels of benefits for less than $1 billion in annual costs. Finally, the reform would be consistent with broadly applicable concepts long included in executive orders considering the rulemaking process. Executive Order 12866, for example, has since the Clinton administration highlighted the need for special care in the review and imposition of rules costing over $100 million annually, and has consistently encouraged agencies to tailor rules in the manner least burdensome to society.

Hearings

On November 3, 2015, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a legislative hearing on H.R. 3438. Witnesses at the hearing included: Mr. Edward Brady, President, Brady Homes of Illinois and Second Vice Chairman, National Association of Home Builders; Paul R. Noe, Esq., Vice President for Public Policy, American Forest & Paper Association; Jeffrey Bossert Clark, Sr., Esq., Partner, Kirkland & Ellis, LLP; and, Professor William W. Buzbee, Georgetown University School of Law.

Committee Consideration

On September 8, 2016, the Committee met in open session and ordered the bill H.R. 3438 favorably reported, with an amendment, by a rollcall vote of 18 to 13, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 3438.

1. Amendment #2, offered by Mr. Conyers. The Amendment would carve out of the bill regulations that would provide for a reduction in the amount of lead in public drinking water. Defeated 11 to 15.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	11	15	

2. Amendment #3, offered by Ms. Jackson Lee. The Amendment would carve out of the bill rules promulgated to prevent, respond to, or mitigate the adverse effects of public health emergencies such as the outbreak of the Zika and Ebola viruses. Defeated 14 to 14.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	14	14	

3. Amendment #4, offered by Ms. DelBene. The Amendment would carve out of the bill rules that would increase college affordability. Defeated 14 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	14	15	

4. Amendment #5, offered by Mr. Cicilline. The Amendment would carve out of the bill regulations that would reduce the cost of healthcare for a person over the age of 65. Defeated 13 to 17.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)	X		
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	13	17	

5. Motion to report H.R. 3438 as amended favorably to the House of Representatives. Approved 18 to 13.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		
Mr. Gowdy (SC)			
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Ms. Walters (CA)			
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)		X	
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Peters (CA)		X	
Total	18	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to

the bill, H.R. 3438, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 12, 2016.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3438, the "REVIEW Act of 2016."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3438—REVIEW Act of 2016.

As ordered reported by the House Committee on the Judiciary on September 8, 2016.

H.R. 3438 would require Federal agencies to postpone the implementation of any rule imposing an annual cost on the economy of at least $1 billion if a petition seeking judicial review of that regulation is filed within 60 days of the rule taking effect. Under the bill, implementation would be postponed until any judicial review is resolved.

An analysis of recent reports by the Office of Information and Regulatory Affairs within the Office of Management and Budget indicates that about five regulations are issued each year that would have an estimated annual impact on the economy of $1 billion or more. A delay in implementing such regulations could affect spending subject to appropriation, direct spending, and revenues. For example, implementing the legislation could affect when rules related to Federal entitlement programs or the collection of fees would take effect and those timing delays could either increase or decrease Federal spending and revenues. However, CBO has no basis for estimating how long such delays would last, how delays in the implementation of such rules would affect the regulatory process, or what effect they might have on the Federal budget.

Because enacting the legislation could affect direct spending and revenues, pay-as-you-go procedures apply.

CBO cannot determine whether enacting H.R. 3438 would increase net direct spending or on-budget deficits by more than $5 billion in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3438 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 3438 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 3438 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3438 prevents the waste of compliance costs under new but legally infirm regulations imposing one billion or more in costs on the U.S. economy, by requiring stays of such regulations if litigation challenging them is timely filed within statutorily specified periods.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3438 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes H.R. 3438 as reported by the Committee.

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.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 7—JUDICIAL REVIEW

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§ 705. Relief pending review

[When] *(a) IN GENERAL.—When* an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(b) HIGH-IMPACT RULES.—

(1) DEFINITIONS.—In this subsection—

(A) the term "Administrator" means the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget; and

(B) the term "high-impact rule" means any rule that the Administrator determines may impose an annual cost on the economy of not less than $1,000,000,000.

(2) IDENTIFICATION.—A final rule may not be published or take effect until the agency making the rule submits the rule to the Administrator and the Administrator makes a determination as to whether the rule is a high-impact rule, which shall be published by the agency with the final rule.

(3) RELIEF.—

(A) IN GENERAL.—Except as provided in subparagraph (B), an agency shall postpone the effective date of a high-impact rule of the agency until the final disposition of all actions seeking judicial review of the rule.

(B) FAILURE TO TIMELY SEEK JUDICIAL REVIEW.—Notwithstanding section 553(d), if no person seeks judicial review of a high-impact rule—

(i) during any period explicitly provided for judicial review under the statute authorizing the making of the rule; or

(ii) if no such period is explicitly provided for, during the 60-day period beginning on the date on which the high-impact rule is published in the Federal Register,

the high-impact rule may take effect as early as the date on which the applicable period ends.

(4) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to impose any limitation under law on any court against the issuance of any order enjoining the implementation of any rule.

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Dissenting Views

INTRODUCTION

H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2016" or the "REVIEW Act of 2016," would automatically stay the implementation of any rule that imposes an annual cost of more than $1 billion on the economy if an entity sought judicial review of such rule within certain time-frames. The bill is essentially an open invitation to anyone who opposes a proposed regulation to stay its implementation by seeking judicial review. As a result, H.R. 3438 is yet another anti-consumer, anti-public health and safety measure intended to thwart the regulatory process, a process that is already very time-consuming and cumbersome. Rather than improving this process, the bill would lengthen it by years pending the outcome of a lawsuit, which could entail appeals that may ultimately need to be determined by the U.S. Supreme Court. Worse yet, the measure fails to include any exception for rules addressing emergent public health and imminent safety crises, such as the current Zika epidemic.

As with other anti-regulatory measures that the Committee has considered this Congress, H.R. 3438 is dangerous solution to an undocumented problem. Courts already have adequate tools to stay poorly-designed rules through a well-calibrated test that serves the public interest. While regulatory stays are sometimes appropriate, the wholesale delay of high-impact rules upon the filing of even meritless litigation would upset this balanced and flexible approach designed to serve the public interest in favor of a standard that only benefits special interests.

In recognition of these concerns, Coalition for Sensible Safeguards—an alliance of more than 150 consumer, labor, research, faith, and other public interest groups—strongly opposes this legislation, noting that the bill "further tilts the regulatory process in favor of corporate special interests by creating more opportunities for the manipulation and abuse of the process to their benefit and at the expense of protecting consumers, working families, and other vulnerable communities." [1]

[1] Letter from the Coalition for Sensible Safeguards to Chairman Bob Goodlatte (R-VA) and Representative John Conyers, Jr. (D-MI), Ranking Member, Committee on the Judiciary (Sept. 7, 2016) (on file with Democratic staff of the H. Comm. on the Judiciary). Current members of the Coalition include: AFL-CIO; Alliance for Justice; American Association of University Professors; American Federation of State, County and Municipal Employees; American Federation of Teachers Americans for Financial Reform; American Lung Association; American Rivers; American Values Campaign; American Sustainable Business Council; BlueGreen Alliance; Campaign

Continued

DESCRIPTION AND BACKGROUND

DESCRIPTION

When "justice so requires," section 705 of the Administrative Procedure Act (APA) authorizes agencies to postpone the effective date of a rule pending judicial review.[2] Courts may also stay the effective date of a rule under "such conditions as may be required and to the extent to prevent irreparable harm."[3] H.R. 3438 amends section 705 in several respects. First, the bill establishes a new section 705(b) of the APA that would prohibit a final "high-impact rule" (defined as a rule that imposes an annual cost on the economy in excess of $1 billion) from being published or taking effect until the Administrator of the Office of Information and Regulatory Affairs (OIRA) determines whether the rule qualifies as a high-impact rule. Such determination would have to be published in the *Federal Register* by the agency together with the final rule. Second, the bill would require an agency to postpone the effective date of any high-impact rule until the final disposition of all actions seeking judicial review of it. Third, the bill provides if no person seeks judicial review of a high-impact rule either: (1) within any period explicitly provided for judicial review under applicable law; or (2) during the 60-day period beginning on the date the high impact rule is published in the *Federal Register,* then the rule can take effect as soon as the applicable period ends.

BACKGROUND

I. Overview of Federal Rulemaking

Federal regulations impact nearly every aspect of our lives and are "one of the basic tools of government used to implement public policy."[4] Enacted in 1946, the Administrative Procedure Act (APA) establishes the minimum rulemaking and formal adjudication requirements for all administrative agencies.[5] The APA's baseline

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for Contract Agriculture Reform; Center for Effective Government; Center for Digital Democracy; Center for Food Safety; Center for Foodborne Illness Research & Prevention; Center for Independent Living; Center for Science in the Public Interest; Citizens for Sludge-Free Land; Clean Air Watch; Clean Water Network; Consortium for Citizens with Disabilities; Consumer Federation of America; Consumers Union; CounterCorp; Cumberland Countians for Peace & Justice; Demos; Economic Policy Institute; Edmonds Institute; Environment America; Farmworker Justice; Free Press; Friends of the Earth; Green for All; Health Care for America Now; In the Public Interest; International Brotherhood of Teamsters; International Center for Technology Assessment; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); League of Conservation Voters; Los Angeles Alliance for a New Economy; Main Street Alliance; National Association of Consumer Advocates; National Center for Healthy Housing; National Consumers League; National Council for Occupational Safety and Health; National Employment Law Project; National Lawyers Guild, Louisville Chapter; National Women's Health Network; National Women's Law Center; Natural Resources Defense Council; Network for Environmental & Economic Responsibility of United Church of Christ; New Jersey Work Environment Council; New York Committee for Occupational Safety and Health; Oregon PeaceWorks; People for the American Way; Protect All Children's Environment; Public Citizen; Reproductive Health Technologies Project; Safe Tables Our Priority; Sierra Club; Service Employees International Union; Southern Illinois Committee for Occupational Safety and Health; The Arc of the United States; The Partnership for Working Families; Trust for America's Health; U.S. Chamber Watch; U.S. PIRG; Union of Concerned Scientists; Union Plus; United Food and Commercial Workers Union; United Steelworkers; Waterkeeper Alliance; and Worksafe. Coalition for Sensible Safeguards, *Our Members* (last visited on Sept. 10, 2016), http://sensiblesafeguards.org/about-us/members/.

[2] 5 U.S.C. § 705 (2016).

[3] 5 U.S.C. § 705 (2016).

[4] CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2005).

[5] The APA defines "rulemaking" as the "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5) (2016). A "rule" is defined as "an agency statement of general or par-

procedural requirements serve to maintain a balance between agency flexibility and the requirements of due process. As 84 leading administrative law academics have observed, "The APA has served for nearly 70 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life." [6] In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking process by Congress and various presidents.[7] These requirements focus "predominately on agencies' development of new rules," according to the Government Accountability Office (GAO).[8]

In general, proposed rules go through an extensive vetting process that many believe is already too ossified and burdened by delay.[9] The APA defines "rulemaking" as the "agency process for formulating, amending or repealing a rule." [10] The process for informal rulemaking, commonly referred to as notice-and-comment rulemaking, is outlined in section 553 of the APA, and is the process that agencies follow for promulgating the rules in the overwhelming majority of cases.[11]

In the informal notice-and-comment rulemaking process, agencies are required to provide the public with adequate notice of a proposed rule and a meaningful opportunity to comment on the rule's content.[12] A notice is "adequate" if an agency publishes a notice of proposed rulemaking in the *Federal Register* and the notice contains the time, place, and nature of public rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.[13] With respect to the required public comment period, the agency must provide

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ticular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2016).

[6] Letter from 84 administrative law academics to H. Judiciary Comm. Chair Bob Goodlatte (R-VA) and H. Judiciary Comm. Ranking Member John Conyers, Jr. (D-MI), 2 (Jan. 12, 2015) (on file with the H. Comm. on the Judiciary, Democratic staff).

[7] Examples of legislative mandates include the Unfunded Mandates Reform Act, Pub. L. No. 104-4 (1995); the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 1169 (1980); and the Congressional Review Act, Pub. L. No. 104-121 (1996). In addition, both Republican and Democratic Presidents have issued executive orders mandating additional procedural and analytical requirements for Federal rulemakings. *See, e.g.,* Exec. Ord. No. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993) (outlining requirements for cost-benefit analysis and review by the Office of Information and Regulatory Affairs for significant rules issued by executive branch agencies).

[8] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 1 (2007).

[9] *See, e.g.,* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis,* 80 GEO. WASH. L. REV. 1493 (2012); *H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015;" and, H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act): Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 114th Cong. 1, 4-5 (2015) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen), http://judiciary.house.gov/_cache/files/cfc2a8c6-729e-4e77-9f9f-561f60f1c153/narang-testimony.pdf.

[10] 5 U.S.C. § 551(5) (2016).

[11] 5 U.S.C. § 553 (2016). Agencies may also choose or may be required by statute to use other rulemaking procedures, including formal rulemaking, negotiated rulemaking, and hybrid or expedited approaches, which generally tend to have greater procedural requirements and be subject to stricter judicial review than section 553 notice-and-comment rulemaking. Though rarely used, agencies must sometimes follow the APA's formal rulemaking procedures "when rules are required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c) (2016).

[12] 5 U.S.C. § 553(b), (c) (2016).

[13] 5 U.S.C. § 553(b) (2016).

the public with the opportunity to submit written "data, views, or arguments."[14] There is no minimum time period during which an agency must accept comments, but courts reviewing an agency's compliance with this APA requirement inquire as to whether the opportunity to comment was "adequate," which may inform how long the comment period should be for a given rule.

After the comment period closes, the agency must consider the public's comments and incorporate into the adopted rule a "concise general statement" of the "basis and purpose" of the final rule.[15] From this general statement, the public should be able to obtain a general idea of the purpose of and basic justification for the rule. The final rule and the general statement must be published in the *Federal Register* not less than 30 days before the rule's effective date.[16]

II. Judicial Review of Final Agency Action

Section 702 of the APA subjects agency rulemaking to judicial review, providing a statutory mechanism for relief for "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[17] The APA requires a reviewing court to compel agency action when it is unlawfully withheld or unreasonably delayed and to set aside as unlawful agency action, findings, and conclusions when they are 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 if 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 formal rulemaking] 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.[18]

The two exceptions to this presumption of judicial review under the APA are when "statutes preclude judicial review" and when "agency action is committed to agency discretion by law."[19] A court, however, always has the authority to review the constitu-

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[14] 5 U.S.C. § 553(c) (2016).
[15] *Id.*
[16] 5 U.S.C. § 553(d) (2016). The APA exempts from all of its informal rulemaking requirements rules relating to certain subject matter areas. These rules include those governing: (1) "a military or foreign affairs function of the United States;" (2) "a matter relating to agency management or personnel;" or (3) a matter relating to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a) (2016). The APA also exempts from the notice-and comment requirements rules that are issued for "good cause," i.e., where an agency finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b) (2016).
[17] 5 U.S.C. § 702 (2016).
[18] 5 U.S.C. § 706(2) (2016).
[19] 5 U.S.C. § 701 (2016).

tionality of agency action, including those actions that are otherwise unreviewable.[20]

Even where agencies agency action suffers a deficiency, the APA recognizes that no agency is perfect and leaves room for harmless error.[21] Section 706 of the APA instructs courts to take into account "the rule of prejudicial error,"[22] which courts have occasionally utilized to excuse deviations in the rulemaking process.[23] The Ninth Circuit has held that a failure to provide notice and comment is harmless only where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached."[24] Courts have been reluctant, however, to excuse deficiencies in notice and comment through the harmless-error doctrine,[25] though the Supreme Court has held that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations.[26] Although the APA does not contain a statute of limitations for civil actions, there is a 6-year limitation on civil actions brought against the United States.[27]

Under current law, both the court and the agency issuing a rule may stay the effective date of a final rule.[28] While agencies have broad discretion in postponing the effective date of a rule, a court typically considers four factors in deciding whether to stay a rule:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[29]

The authority of courts to grant stays of final agency action has "historically been justified by the perceived need 'to prevent irreparable injury to the parties or to the public' pending review."[30] Importantly, the Supreme Court has also clarified that judicial stays are not "a matter of right, even if irreparable injury might otherwise result." Rather, courts exercise discretion on an case-by-case basis.[31] Indeed, the Supreme Court has long-held that since tradi-

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[20] *See* Webster v. Doe, 486 U.S. 592 (1988); Oestereich v. Selective Service System, 393 U.S. 233 (1968).

[21] Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements,* 82 NOTRE DAME L. REV. 1727, 1791 (2007).

[22] 5 U.S.C. § 706 (2016).

[23] Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements,* 82 NOTRE DAME L. REV. 1727, 1791 (2007).

[24] Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (9th Cir. 1992).

[25] Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements,* 82 NOTRE DAME L. REV. 1727, 1791 (2007).

[26] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) (holding that courts must defer to agency interpretation of an existing regulation unless plainly erroneous).

[27] 28 U.S.C. § 2401 (2016)

[28] *Hearing on H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015;" and, H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015" Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 114th Cong. 5 (2015) (statement of William Funk, Lewis & Clark Distinguished Professor of Law, Lewis & Clark Law School).

[29] Nken v. Holder, 556 U.S. 418, 426 (2009).

[30] *Id.* at 432.

[31] *Id.* at 433.

tional stay factors "contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules."[32]

CONCERNS WITH H.R. 3438

I. H.R. 3438 Will Further Delay the Implementation of Time-Sensitive Rules That Are Critical to Public Health and Safety

There is broad agreement among administrative law experts that the regulatory system is already too ossified and burdened by regulatory delay.[33] Both the American Bar Association (ABA) and the Administrative Conference of the United States (ACUS) have urged Congress to "exercise restraint" in imposing additional procedural and analytical requirements in agency rulemaking.[34] In his testimony before the Senate Committee on Homeland Security and Government Affairs in 2015, Professor Sidney Shapiro noted that "rules can take several years, if not decades to come to fruition, and scarce public resources are wasted," while "the risks these rules are meant to address do not pause or evaporate into the ether; rather, they continue unabated, threatening the health and security of families and businesses across the country."[35] Professor Shapiro and others have also observed that, as of 2000, agencies may be subject to "as many as 110 separate procedure requirements in the rulemaking process," noting that more procedural requirements have been added since that time.[36]

Earlier this year, Public Citizen, a consumer interest non-profit, released a seminal report on regulatory delays that found that increasing burdens imposed on the rulemaking system have resulted in years of delays in actually adopting a proposed rule.[37] For example, the study found that while the Occupational Safety and Health Administration (OSHA) promulgated many lifesaving rules in less than a year in its early years, OSHA has required 12 years on average to adopt economically significant rules since 1996.[38] Amit Narang, a Regulatory Policy Advocate for Public Citizen, explains:

> It is true that the regulatory system is broken, but not because there is too much regulation. Rather the system is broken because the current regulatory process is too slow, too calcified, and too inflexible to respond to public health and safety threats as they emerge . . . the current process is a model of inefficiency, with a dizzying array of duplica-

[32] *Id;* Hilton v. Braunskill, 481 U.S. 770, 777 (1987).

[33] *See, e.g., A Review of Regulatory Reform Proposals: Hearing Before the S. Comm. on Homeland Security & Gov't Affairs,* 114th Cong. 4 (2015) (statement of Sidney Shapiro, Vice President, Center for Progressive Reform, and Chair of Administrative Law, Wake Forest University School of Law), http://progressivereform.org/articles/Shapiro—SenateRegReform—091615.pdf.

[34] *Id.* citing SEC. OF ADMIN. L. & REG. PRACTICE, AM. BAR ASSOC., *Policy: Regulatory Impact Analyses* 3, http://www.americanbar.org/groups/administrative—law/policy.html (last visited Oct. 29, 2015) ("The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations.").

[35] *A Review of Regulatory Reform Proposals: Hearing Before the S. Comm. on Homeland Security & Gov't Affairs,* 114th Cong. (2015) (statement of Sidney Shapiro, Vice President, Center for Progressive Reform, and Chair of Administrative Law, Wake Forest University School of Law), http://progressivereform.org/articles/Shapiro_SenateRegReform_091615.pdf.

[36] *Id.* at 6; *see* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking,* 27 FLA. ST. U. L. REV. 533 (2000) (cataloguing 110 different requirements for agency rulemaking), http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf; E. Donald Elliott, *Re-Inventing Rulemaking,* 41 DUKE L.J. 1490, 1494 (1992).

[37] Michael Tanglis, *Unsafe Delays: An Empirical Analysis Shows That Federal Rulemakings To Protect the Public Are Taking Longer Than Ever,* PUBLIC CITIZEN (June 28, 2016), http://www.citizen.org/documents/Unsafe-Delays-Report.pdf.

[38] *Id.* at 5.

> tive and redundant requirements interspersed throughout a byzantine network that is a virtual maze for agencies to navigate. This is the result of an accumulation of analyses and procedures that Congress and the Executive have imposed on agencies over the years leaving agencies in a state of 'paralysis by analysis.' Far from the popular conception of 'regulators run amok,' the reality is that agency delays are rampant, congressional and judicial deadlines are routinely missed or pushed back, and ample evidence exists that the situation is getting worse. . . . As is apparent, delay permeates all aspects of the rulemaking process, touching virtually all agencies and regulatory sectors.[39]

These delays have serious consequences on human lives. In April 2016, the AFL-CIO reported that OSHA regulations have saved more than 532,000 lives since the passage of the Occupational Safety and Health Act of 1970, which "promised workers in this country the right to a safe job."[40]

Rather than streamline the regulatory system, H.R. 3438 would worsen regulatory paralysis and delay in the rulemaking system by enabling regulated interests to block the implementation of critical rules simply by filing a lawsuit. Under current law, the agency that promulgates a high-impact rule may delay the rule's effective date on a discretionary basis when "justice so requires."[41] Courts may also postpone a rule's effective date to prevent irreparable injury to a party.[42] In practice, the Supreme Court has clarified that this requires a reviewing court to determine whether the party seeking to delay the rule will be irreparably harmed absent a stay and has made a strong showing that it will succeed on the merits of the case, or alternatively, whether granting a stay serves the public interest and avoids substantial injury to another party to the litigation.[43] The Court has also noted that stays are an intrusion into the "ordinary processes of administration," while judicial review is "not a matter of right, even if irreparable injury might otherwise result to the appellant."[44]

As Lewis & Clark Law School Professor William Funk explains, the bill's "absolute incentive" to challenge and stay the implementation of high-impact rules would create years of costly delays.[45]

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[39] *A Review of Regulatory Reform Proposals: Hearing Before the S. Comm. on Homeland Security & Gov't Affairs,* 114th Cong. 3 (2015) (statement of Sidney Shapiro, Vice President, Center for Progressive Reform, and Chair of Administrative Law, Wake Forest University School of Law), http://progressivereform.org/articles/Shapiro_SenateRegReform_091615.pdf. Even the late-Justice Antonin Scalia has expressed concerns with imposing greater analytical requirements on agency rulemaking. In 1981, Justice Scalia, then a professor of law at the University of Chicago, wrote that "the procedural advantages of rulemaking for the agency itself are headed for extinction," pointing to burdens imposed by the courts and Congress on flexible agency rulemaking. Antonin Scalia, *Back to Basics: Making Law Without Making Rules,* AEI JOURNAL ON GOV'T & SOCIETY 25, 26 (July/Aug. 1981), http://object.cato.org/sites/cato.org/files/serials/files/regulation/1981/7/v5n4-5.pdf.

[40] AFL-CIO, *Death on the Job: A National and State-by-State Profile of Worker Safety and Health in the United States* 1 (Apr. 2016), http://www.aflcio.org/content/download/174867/4158803/1647_DOTJ2016.pdf

[41] 5 U.S.C. §705 (2016).

[42] *Id.*

[43] Nken v. Holder, 556 U.S. 418, 426 (2009)

[44] *Id.* at 427.

[45] *Hearing on H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists Act of 2015," and H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015" Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the*

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Georgetown University Law Center Professor William Buzbee concurs that the bill would create years of delays for "virtually all" high-impact rules blocked by "years of litigation."[46]

It is particularly problematic that H.R. 3438 fails to impose any requirement that a judicial review challenge to a rulemaking be meritorious. As a result, any entity that opposes a proposed regulation could commence a lawsuit against it, if only to delay its implementation while the court determines the sufficiency of the suit.[47]

II. H.R. 3438 Fails to Exempt from its Onerous Mandates Rules Needed to Prevent Imminent Public Health and Safety Crises

Although the unnecessary regulatory delays imposed by H.R. 3438 would cost the U.S. economy billions of dollars,[48] most importantly is the bill's threat to public health and safety. Agencies typically adopt high-impact rules in response to serious public health risks or to prevent imminent environmental disasters.[49] As Georgetown University Law School Professor William Buzbee warns:

> A virtually guaranteed stay would mean that the regulated harms might go unchecked for years, potentially resulting in illnesses and deaths or environmental destruction on a huge scale. That such impacts would continue has been shown by innumerable cost-benefit analyses by agencies and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). US laws regulate many risks, and in our highly urbanized and industrialized society with massive and often uniform methods of production, risks and harms on a huge scale are a prevalent risk. Cost-benefit analysis is criticized by many, but one of its valuable lessons is that prudent regulation should be preceded by consideration of both the costs and the benefits of any regulation. An automatically stayed regulation would turn those regulatory benefits into years of ongoing harms.[50]

For example, few matters are more important to Americans than the safety of the water they drink as illustrated by the national outrage in response to the lead-contaminated public water system in Flint, Michigan. Nevertheless, H.R. 3438 lacks any exception for a time-sensitive rule dealing with contaminated public water systems. To highlight this shortcoming in the bill, Ranking Member John Conyers, Jr. (D-MI), offered an amendment that would have exempted from the measure high-impact rules issued by the Environmental Protection Agency (EPA) intended to reduce lead and copper in drinking water.[51] As Ranking Member Conyers explained, his amendment was necessary to prevent delays to critical high-impact rules promulgated in response to public-health crises

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Judiciary, 114th Cong. 5 (statement of Professor William Funk, Lewis and Clark Law School) (on file with Democratic staff of the H. Comm. on the Judiciary).

[46] *Id.*at 53 (statement of Professor William Buzbee, Professor of Law, Georgetown University Law Center).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 54.

[50] *Id.*

[51] Tr. of Markup of H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists (Review) Act of 2015" by the H. Comm. on the Judiciary, 114th Cong. 26 (Sept. 8, 2016).

"such as the EPA's proposed revisions to lead to its lead and copper rule."[52] And, as Ranking Member Conyers observed, "the drinking water of potentially millions of Americans may be contaminated by lead."[53] Unfortunately, this amendment failed by a party-line vote of 15 to 11.[54]

Representative Sheila Jackson Lee (D-TX) similarly offered an amendment to exempt from the bill high-impact rules intended to prevent the spread of infectious diseases such as the Zika virus.[55] She stated in support of her amendment that H.R. 3438 is "an unnecessary and misguided bill that can dangerously hamper our Nation's efforts to respond to public health emergencies."[56] According to Anne Schuchat, Principal Deputy Director of the Center for Disease Control (CDC), increased cases of the Zika virus, which causes severe permanent birth defects in children that are untreatable, have been reported in the Commonwealth of Puerto Rico earlier this year.[57] Since then, the CDC reports that the Zika virus disease has infected 2,964 people in the United States, and 15,809 cases in U.S. territories.[58] Speaking in support of the amendment, Resident Commissioner Pedro Pierluisi (D-PR), who represents 3.5 million U.S. citizens of Puerto Rico, stated that 98% of those infected with Zika were in Puerto Rico:

> On August 12, 2016, Health Secretary Sylvia Burwell declared a public health emergency for Puerto Rico. The declaration is an administrative tool that provides flexibility for health officials in Puerto Rico to address the outbreak on the island. Through the public health emergency declaration, the government of Puerto Rico can apply for funding to hire and train unemployed workers to assist in vector control and outreach efforts, and request temporary reassignment of local public health department or agency personnel who are funded through public health service act programs in Puerto Rico, to assist in the Zika response. . . . You all should remember that Puerto Rico is a U.S. territory. We do not need passports to travel from Puerto Rico to the States. There is migration all the time, travel all the time. Women are exposed, particularly. Unborn children and children are particularly exposed, so this amendment is well-taken, is well thought-out, and I urge my colleagues to make this exception. Zika, again, merits an exception.[59]

Representative Zoe Lofgren (D-CA) similarly observed that H.R. 3438 would disrupt regulatory efforts to prevent the transmission of the Zika virus, which "is a very devastating disease for families"

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[52] *Id.* at 28.
[53] *Id.* at 27.
[54] *Id.* at 35.
[55] *Id.* at 37.
[56] *Id.* at 38.
[57] Anne Schuchat, *Zika 101,* DEP'T OF HEALTH & HUMAN SERVICES (Jan. 28, 2016), http://www.hhs.gov/blog/2016/01/28/zika-101.html.
[58] CENTER FOR DISEASE CONTROL AND PREVENTION, *Cases Counts in the US* (Sept. 7, 2016), http://www.cdc.gov/zika/geo/united-states.html.
[59] Tr. of Markup of H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists (REVIEW) Act of 2015" by the H. Comm. on the Judiciary, 114th Cong. 45 (Sept. 8, 2016).

and "carries at least $2 million in treatment costs."[60] Unfortunately, this amendment failed by a party-line vote of 14 to 14.[61]

It should also be noted that high-impact rules often concern the administrative transfer of billions of dollars in Federal benefits to the public. During fiscal year 2014, for instance, executive branch agencies adopted 54 major rules,[62] 35 of which were transfer rules.[63] According to the Office of Management and Budget (OMB), transfer rules merely "implement Federal budgetary programs as required or authorized by Congress, such as rules associated with the Medicare Program and the Federal Pell Grant Program."[64] H.R. 3438, however, fails to exempt such rules and thus, as a result, any entity could challenge the transfer of these funds and thereby effectively postpone them to the detriment of millions of Americans.

To underscore this concern, Representative Suzan DelBene (D-WA) offered an amendment to exempt high-impact rules that would increase college affordability.[65] She observed that 56% of college graduates in Washington, her home state, "owe more than $23,000 upon graduation,"[66] while student debt exceeds $1.3 trillion nationwide.[67] Representative DelBene further explained that her amendment was needed to prevent the underlying bill from facilitating frivolous challenges to the transfers of Federal financial aid.[68] Speaking in support of the amendment, Representative David Cicilline (D-RI) noted that "the Federal Pell Grant program, named for United States Senator Claiborne Pell, who represented my home State of Rhode Island in the United States Senate, is one more critical way to open doors and doorways of opportunity for more than 8 million low-income students who receive financial aid to pay for tuition, books, and room and board each year."[69] He also observed that H.R. 3438 would allow any party to delay the effective date of any high-impact rule," including those involving the transfer of Federal funds, such as the Pell Grant program.[70] This amendment failed by a party-line vote of 15 to 14.[71]

Likewise, Representative Cicilline offered an amendment to exempt high-impact rules that lower health-care costs for persons over the age of 65.[72] Describing H.R. 3438 as a "gift to the special interest, who wish to spend millions and waste years fighting regulations that could benefit the American people," he explained that the bill could allow a frivolous claim to automatically stay the

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[60] *Id.* at 46.
[61] *Id.* at 52.
[62] The Congressional Review Act defines "major rule" as one having an annual *effect* on the economy of more than $100 million, as determined by OIRA, or a rule that adversely impacts competition, employment, or results in major costs to consumers, among other considerations. 5 U.S.C. § 804(2) (2016).
[63] OFFICE OF MGMT & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 2 (2015).
[64] *Id.*
[65] Tr. of Markup of H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists (Review) Act of 2015" by the H. Comm. on the Judiciary, 114th Cong. 53 (Sept. 8, 2016).
[66] *Id.*
[67] *Id.*
[68] *Id.* at 55.
[69] *Id.* at 56.
[70] *Id.* at 57.
[71] *Id.* at 64.
[72] *Id.* at 65.

transfer of funds through the Medicare Program.[73] Representative Cicilline warned that allowing frivolous lawsuits to delay the benefits of the "44.9 million seniors on Medicare in this country . . . would be a grave betrayal of the promise we have made to keep America's seniors healthy."[74] Notwithstanding these serious concerns, his amendment failed by a party-line vote of 17 to 13.[75]

The risk of delaying these highly beneficial rules could be devastating. As the Administration noted in its opposition to another regulatory reform bill designed to impede the implementation of rules on the basis of cost, these delays "would increase business uncertainty, undermine much-needed protections of the American public, and create unnecessary confusion. There is no justification for such an unprecedented requirement."[76]

III. H.R. 3438 Is a Solution in Search of Problem That Ignores Existing Procedural Safeguards

H.R. 3438 is a dangerous solution to an undocumented problem. To begin with, it ignores the benefits of regulations, which typically exceed their cost by many multiples. For example, the 13 rules that had both quantified and monetized annual costs in fiscal year 2014 ranged between $2.5 billion and $3.7 billion, while the estimated benefits of these rules ranged between $8.1 billion and $18.9 billion.[77]

In addition, any entity under current law already may challenge a proposed rule in court and seek to have the rule's effective delayed, subject to the court's discretion.[78] Such discretionary basis serves an important purpose. As Professor William Funk explains, "[e]xisting law regarding stays weeds out frivolous claims and takes account of both the costs of the rule and the benefits of the rule that would be avoided by granting the stay."[79] In March 2016, for example, the Supreme Court issued a stay of the Clean Power Plan, a high-impact rule to limit carbon pollution produced by existing power plants, delaying the rule's effective date until the lawsuits filed against the Environmental Protection Agency (EPA) have been resolved,[80] even though the climate and health benefits of the rule, according to the EPA, are an estimated $55 billion to $93 billion per year in 2030, in addition to reducing thousands of premature deaths and hundreds of thousands of children's asthma cases, compared to a $7.3 billion to $8.8 billion cost in 2030.[81]

The Majority claims that H.R. 3438 is intended to maintain the status quo until the validity of a proposed rule is determined by a court and cites in support Supreme Court's decision in *Michigan*

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[73] *Id.* at 67.
[74] *Id.*
[75] *Id.* at 93.
[76] EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY ON H.R. 427, REGULATIONS FROM THE EXECUTIVE IN NEED OF SCRUTINY ACT OF 2015 (July 27, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr427r_20150727.pdf.
[77] OFFICE OF MGMT & BUDGET OFFICE OF INFORMATION AND REGULATORY AFFAIRS 2015 REPORT TO CONGRESS ON THE BENEFITS, AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 1-2 (2015).
[78] 5 U.S.C. § 705 (2016).
[79] *Id.*at 7
[80] Adam Liptak & Coral Davenport, *Chief Justice Rejects Effort to Block E.P.A. Limit on Power Plants,* N.Y. TIMES, Mar. 3, 2016, http://www.nytimes.com/2016/03/04/us/politics/supreme-court-chief-justice-john-roberts-epa-coal.html.
[81] Envt'l Protection Agency, Fact Sheet: Clean Power Plan Benefits (last visited on Sept. 9, 2016), https://www.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-benefits.

v. EPA,[82] where it invalidated a rule adopted by the EPA to reduce power plants' emissions of hazardous air pollutants.[83] Although the Majority claims this rule caused irreparable harm and cost billions of dollars to implement while only offering potential benefits in the millions of dollars,[84] OIRA states that annual benefits of the rule range between $30 to $90 billion, very much dwarfing their annual costs of $9.6 billion.[85] Moreover, as Professor Funk has noted, "the grounds upon which the Supreme Court found the rule invalid appear to be easily remedied," while delaying this rule would cost the U.S. economy $20 to $80 billion per year.[86] Additionally, as Professor Buzbee has observed, courts already provide an adequate "check on shoddy regulation" through traditional motions for stays:

> Courts will hear from a wide array of supporters and challengers. This bill, in contrast, would by fiat grant a stay, regardless of the stakes, the legal merits, and risks and costs of the harms that would otherwise be addressed. It is rare that even very high cost rules are not accompanied by massive, usually far higher societal and economic benefits of regulation. With this bill's automatic stay, those harms would go on for years, typically costing the country and its citizens and possibly the environment billions of dollars in harms that would usually far surpass regulatory costs.[87]

Consider the costs to industry presented by an extended period of uncertainty once a stay is imposed under H.R. 3438. Proposed rules with significant costs and benefits typically undergo thorough vetting through the notice-and-comment process that often takes several years and allows industry to adjust its future plans in anticipation of its timely finalization. In sharp contrast, under H.R. 3438, this regulatory certainty would suddenly be subject to an automatic stay of unpredictable length should some itinerant entity seek judicial review of such rule.

Absent any evidence that courts have refused to grant stays in appropriate cases, it is clear that existing law adequately protection against the theoretical harms the bill is designed to fix.

CONCLUSION

H.R. 3438 would severely undermine the efficiency of the rulemaking system, which is already burdened by needless delay. It accomplishes this goal by encouraging well-funded opponents of regulations to delay the implementation of critical rules by simply filing lawsuits challenging such rules and thereby triggering the bill's automatic stay preventing these rules from going into effect. The

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[82] Tr. of Markup of H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists (Review) Act of 2015" by the H. Comm. on the Judiciary, 114th Cong. 10 (Sept. 8, 2016) (statement of Representative Tom Marino (R-PA)).

[83] Michigan v. E.P.A., 135 S. Ct. 2699, 2712 (2015).

[84] Tr. of Markup of H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists (Review) Act of 2015" by the H. Comm. on the Judiciary, 114th Cong. 10 (Sept. 8, 2016) (statement of Representative Tom Marino (R-PA)).

[85] H.*R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015"; and, H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015": Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 114th Cong. 5-6 (2015) (statement of Professor William Funk, Lewis and Clark Law School) (on file with Democratic staff of the H. Comm. on the Judiciary).

[86] *Id.*

[87] *Id.* at 54 (statement of Professor William Buzbee Georgetown University Law Center).

bill does not prevent or deter frivolous challenges. Nor does the bill recognize critical exceptions for emergent public health and safety rules or rules that simply authorize Federal funding transfers for important programs such as Medicare and Federal student loans. The bill replaces well-established legal doctrines designed to protect the public interest with statutorily sanctioned legal uncertainty that will delay and perhaps derail the implementation of critical regulations. As with nearly every other anti-regulatory measure that the Committee has considered this Congress, H.R. 3438 completely ignores the benefits of regulation and well-established law that shapes the rulemaking process. Rather than improving this process, the bill is simply a blatant effort to prevent the implementation of rules.

For all of the foregoing reasons, we must respectfully oppose H.R. 3438 and we urge our colleagues to join us in opposition.

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