

117TH CONGRESS
1ST SESSION

S. 2801

To amend title 5, United States Code, to improve the effectiveness of major rules in accomplishing their regulatory objectives by promoting retrospective review, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22 (legislative day, SEPTEMBER 21), 2021

Ms. SINEMA (for herself and Mr. LANKFORD) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To amend title 5, United States Code, to improve the effectiveness of major rules in accomplishing their regulatory objectives by promoting retrospective review, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Setting Manageable
5 Analysis Requirements in Text Act of 2021” or the
6 “SMART Act of 2021”.

1 **SEC. 2. INCORPORATING RETROSPECTIVE REVIEW INTO**
 2 **NEW MAJOR RULES.**

3 (a) IN GENERAL.—Subchapter II of chapter 5 of title
 4 5, United States Code, is amended—

5 (1) in section 551—

6 (A) in paragraph (13), by striking “; and”
 7 and inserting a semicolon;

8 (B) in paragraph (14), by striking the pe-
 9 riod at the end and inserting a semicolon; and

10 (C) by adding at the end the following:

11 “(15) ‘Administrator’ means the Administrator
 12 of the Office of Information and Regulatory Affairs
 13 of the Office of Management and Budget established
 14 under section 3503 of title 44 and any successor to
 15 that office; and

16 “(16) ‘major rule’ means any rule that the Ad-
 17 ministrator finds has resulted in or is likely to result
 18 in—

19 “(A) an annual effect on the economy of
 20 \$100,000,000 or more;

21 “(B) a major increase in costs or prices for
 22 consumers, individual industries, Federal,
 23 State, or local government agencies, or geo-
 24 graphic regions; or

25 “(C) significant effects on competition, em-
 26 ployment, investment, productivity, innovation,

1 health, safety, the environment, or on the abil-
2 ity of United States-based enterprises to com-
3 pete with foreign-based enterprises in domestic
4 and export markets.”; and

5 (2) in section 553, by adding at the end the fol-
6 lowing:

7 “(f) MAJOR RULE FRAMEWORKS.—

8 “(1) IN GENERAL.—Beginning 180 days after
9 the date of enactment of this subsection, when an
10 agency publishes in the Federal Register—

11 “(A) a proposed major rule, the agency
12 shall include a potential framework for assess-
13 ing the major rule, which shall include a gen-
14 eral statement of how the agency intends to
15 measure the effectiveness of the major rule; or

16 “(B) a final major rule, the agency shall
17 include a framework for assessing the major
18 rule under paragraph (2), which shall include—

19 “(i) a statement of the regulatory ob-
20 jectives of the major rule, including a sum-
21 mary of the societal benefit and cost of the
22 major rule;

23 “(ii) the methodology by which the
24 agency plans to analyze the major rule, in-

cluding metrics by which the agency can
measure—

“(I) the effectiveness and bene-
fits of the major rule in producing the
regulatory objectives of the major
rule; and

“(II) the effects and costs of the
major rule on regulated and other af-
fected entities;

“(iii) a plan for gathering data re-
garding the metrics described in clause (ii)
on an ongoing basis, or at periodic times,
including a method by which the agency
will invite the public to participate in the
review process and seek input from other
agencies; and

“(iv) a specific time frame, as appro-
priate to the major rule and not more than
10 years after the effective date of the
major rule, under which the agency shall
conduct the assessment of the major rule
in accordance with paragraph (2)(A).

“(2) ASSESSMENT.—

“(A) IN GENERAL.—Each agency shall as-
sess the data gathered under paragraph

1 (1)(B)(iii), using the methodology set forth in
2 paragraph (1)(B)(ii) or any other appropriate
3 methodology developed after the issuance of a
4 final major rule to determine whether the regu-
5 latory objective is being achieved—

6 “(i) to analyze how the actual benefits
7 and costs of the major rule may have var-
8 ied from those anticipated at the time the
9 major rule was issued; and

10 “(ii) to determine whether—

11 “(I) the major rule is accom-
12 plishing the regulatory objective;

13 “(II) the major rule has been
14 rendered unnecessary, taking into
15 consideration—

16 “(aa) changes in the subject
17 area affected by the major rule;
18 and

19 “(bb) whether the major
20 rule overlaps, duplicates, or con-
21 flicts with other rules or, to the
22 extent feasible, State and local
23 government regulations;

1 “(III) the major rule needs to be
 2 improved in order to accomplish the
 3 regulatory objective; and

4 “(IV) other alternatives to the
 5 major rule or a modification of the
 6 major rule could better achieve the
 7 regulatory objective while imposing a
 8 smaller burden on society or increase
 9 net benefits, taking into consideration
 10 any cost already incurred.

11 “(B) DIFFERENT METHODOLOGY.—If an
 12 agency uses a methodology other than the
 13 methodology set forth in paragraph (1)(B)(ii)
 14 to assess data under subparagraph (A), the
 15 agency shall include as part of the notice re-
 16 quired under subparagraph (D) an explanation
 17 of the changes in circumstances that militated
 18 the use of that other methodology.

19 “(C) SUBSEQUENT ASSESSMENTS.—If,
 20 after an assessment of a major rule under sub-
 21 paragraph (A), an agency determines that the
 22 major rule will remain in effect with or without
 23 modification, the agency shall—

24 “(i) in consultation with the Adminis-
 25 trator, include with the assessment pro-

1 duced under subparagraph (A) a list of cir-
2 cumstances or events that would neces-
3 sitate a subsequent review in accordance
4 with subparagraph (A) to ensure that the
5 major rule continues to meet the regu-
6 latory objective; and

7 “(ii) develop a mechanism for the
8 public to petition for a subsequent review
9 of the major rule, which the head of the
10 agency shall grant or deny.

11 “(D) PUBLICATION.—Not later than 180
12 days after the date on which an agency com-
13 pletes an assessment of a major rule under sub-
14 paragraph (A), the agency shall publish a notice
15 of availability of the results of the assessment
16 in the Federal Register, including the specific
17 circumstances or events that would necessitate
18 a subsequent assessment of the major rule
19 under subparagraph (C)(i).

20 “(3) AGENCY HEAD RESPONSIBILITIES.—The
21 head of each agency shall—

22 “(A) oversee the timely compliance of the
23 agency with this subsection; and

1 “(B) ensure that the results of each as-
2 sessment conducted under paragraph (2)(A)
3 are—

4 “(i) published promptly on a central-
5 ized Federal website; and

6 “(ii) noticed in the Federal Register
7 in accordance with paragraph (2)(D).

8 “(4) OMB OVERSIGHT.—The Administrator
9 shall—

10 “(A) issue guidance for agencies regarding
11 the development of the framework under para-
12 graph (1) and the conduct of the assessments
13 under paragraph (2)(A);

14 “(B) encourage and assist agencies to
15 streamline and coordinate the assessment of
16 major rules with similar or related regulatory
17 objectives;

18 “(C) exempt an agency from including the
19 framework required under paragraph (1)(B)
20 when publishing a final major rule, if the agen-
21 cy did not issue a notice of proposed rule mak-
22 ing for the major rule in order to provide a
23 timely response to an emergency or comply with
24 a statutorily imposed deadline, in accordance
25 with paragraph (6)(B); and

1 “(D) extend the deadline specified by an
2 agency for an assessment of a major rule under
3 paragraph (1)(B)(iv) or paragraph (2)(C)(i) for
4 a period of not more than 90 days if the agency
5 justifies why the agency is unable to complete
6 the assessment by that deadline.

7 “(5) RULE OF CONSTRUCTION.—Nothing in
8 this subsection may be construed to affect—

9 “(A) the authority of an agency to assess
10 or modify a major rule of the agency earlier
11 than the end of the time frame specified for the
12 major rule under paragraph (1)(B)(iv); or

13 “(B) any other provision of law that re-
14 quires an agency to conduct retrospective re-
15 views of rules issued by the agency.

16 “(6) APPLICABILITY.—

17 “(A) IN GENERAL.—This subsection shall
18 not apply to—

19 “(i) a major rule of an agency—

20 “(I) that the Administrator re-
21 viewed before the date of enactment of
22 this subsection;

23 “(II) for which the agency is re-
24 quired to conduct a retrospective re-
25 view under—

1 “(aa) section 2222 of the
2 Economic Growth and Regu-
3 latory Paperwork Reduction Act
4 of 1996 (12 U.S.C. 3311);

5 “(bb) section 170(d) of the
6 Financial Stability Act of 2010
7 (12 U.S.C. 5370(d)); or

8 “(cc) any other provision of
9 law with requirements that the
10 Administrator determines—

11 “(AA) include robust
12 public participation;

13 “(BB) include signifi-
14 cant agency consideration
15 and analysis of whether the
16 rule is achieving the regu-
17 latory objective of the rule;
18 and

19 “(CC) meet, are sub-
20 stantially similar to, or ex-
21 ceed the requirements of
22 this subsection;

23 “(III) for which the authorizing
24 statute of the rule is subject to peri-
25 odic authorization by Congress not

1 less frequently than once every 10
2 years; or

3 “(IV) for which the authorizing
4 statute of the rule requires the pro-
5 mulgation of a new or revised rule not
6 less frequently than once every 10
7 years; or

8 “(ii) interpretative rules, general
9 statements of policy, or rules of agency or-
10 ganization, procedure, or practice.

11 “(B) DIRECT AND INTERIM FINAL MAJOR
12 RULE.—In the case of a major rule for which
13 the agency is not required to issue a notice of
14 proposed rule making in response to an emer-
15 gency or a statutorily imposed deadline, the
16 agency shall publish the framework required
17 under paragraph (1)(B) in the Federal Register
18 not later than 6 months after the date on which
19 the agency publishes the final major rule.

20 “(7) JUDICIAL REVIEW.—

21 “(A) IN GENERAL.—Judicial review of
22 agency compliance with this subsection is lim-
23 ited to—

1 “(i) whether an agency published the
 2 framework for assessment of a major rule
 3 in accordance with paragraph (1); or

4 “(ii) whether an agency completed
 5 and published the required assessment or
 6 subsequent assessment of a major rule in
 7 accordance with subparagraphs (A), (C),
 8 and (D) of paragraph (2).

9 “(B) REMEDY AVAILABLE.—In granting
 10 relief in an action brought under subparagraph
 11 (A), the court may only issue an order remand-
 12 ing the major rule to the agency to comply with
 13 paragraph (1) or subparagraph (A), (C), or (D)
 14 of paragraph (2), as applicable.

15 “(C) EFFECTIVE DATE OF MAJOR RULE.—
 16 If, in an action brought under subparagraph
 17 (A)(i), a court determines that the agency did
 18 not comply, the major rule shall take effect not-
 19 withstanding any order issued by the court.

20 “(D) ADMINISTRATOR.—Any determina-
 21 tion, action, or inaction of the Administrator
 22 shall not be subject to judicial review.”.

23 (b) AUTHORIZATION OF APPROPRIATIONS.—There
 24 are authorized to be appropriated such sums as may be

1 necessary to carry out the amendments made by sub-
2 section (a).

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