

Calendar No. 672

117TH CONGRESS
2^D SESSION

S. 2801

[Report No. 117-273]

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

DECEMBER 19, 2022

Reported by Mr. PETERS, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

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,*

1 **SECTION 1. SHORT TITLE.**

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

5 **SEC. 2. INCORPORATING RETROSPECTIVE REVIEW INTO**
6 **NEW MAJOR RULES.**

7 (a) IN GENERAL.—Subchapter II of chapter 5 of title
8 5, United States Code, is amended—

9 (1) in section 551—

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

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

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

15 “(15) ‘Administrator’ means the Administrator
16 of the Office of Information and Regulatory Affairs
17 of the Office of Management and Budget established
18 under section 3503 of title 44 and any successor to
19 that office; and

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

23 “(A) an annual effect on the economy of
24 \$100,000,000 or more;

25 “(B) a major increase in costs or prices for
26 consumers; individual industries; Federal,

1 State, or local government agencies, or geo-
 2 graphic regions; or

3 “(C) significant effects on competition, em-
 4 ployment, investment, productivity, innovation,
 5 health, safety, the environment, or on the abil-
 6 ity of United States-based enterprises to com-
 7 pete with foreign-based enterprises in domestic
 8 and export markets.”; and

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

11 “(f) MAJOR RULE FRAMEWORKS.—

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

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

20 “(B) a final major rule, the agency shall
 21 include a framework for assessing the major
 22 rule under paragraph (2), which shall include—

23 “(i) a statement of the regulatory ob-
 24 jectives of the major rule, including a sum-

1 mary of the societal benefit and cost of the
2 major rule;

3 “(ii) the methodology by which the
4 agency plans to analyze the major rule, in-
5 cluding metrics by which the agency can
6 measure—

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

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

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

21 “(iv) a specific time frame, as appro-
22 priate to the major rule and not more than
23 10 years after the effective date of the
24 major rule, under which the agency shall

1 conduct the assessment of the major rule
2 in accordance with paragraph (2)(A).

3 ~~“(2) ASSESSMENT.—~~

4 ~~“(A) IN GENERAL.—~~Each agency shall as-
5 sess the data gathered under paragraph
6 ~~(1)(B)(iii)~~, using the methodology set forth in
7 paragraph ~~(1)(B)(ii)~~ or any other appropriate
8 methodology developed after the issuance of a
9 final major rule to determine whether the regu-
10 latory objective is being achieved—

11 ~~“(i) to analyze how the actual benefits~~
12 and costs of the major rule may have var-
13 ied from those anticipated at the time the
14 major rule was issued; and

15 ~~“(ii) to determine whether—~~

16 ~~“(I) the major rule is accom-~~
17 plishing the regulatory objective;

18 ~~“(II) the major rule has been~~
19 rendered unnecessary, taking into
20 consideration—

21 ~~“(aa) changes in the subject~~
22 area affected by the major rule;
23 and

24 ~~“(bb) whether the major~~
25 rule overlaps, duplicates, or con-

1 flicts with other rules or, to the
2 extent feasible, State and local
3 government regulations;

4 “(III) the major rule needs to be
5 improved in order to accomplish the
6 regulatory objective; and

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

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

22 “(C) SUBSEQUENT ASSESSMENTS.—If,
23 after an assessment of a major rule under sub-
24 paragraph (A), an agency determines that the

major rule will remain in effect with or without modification, the agency shall—

“(i) in consultation with the Administrator, include with the assessment produced under subparagraph (A) a list of circumstances or events that would necessitate a subsequent review in accordance with subparagraph (A) to ensure that the major rule continues to meet the regulatory objective; and

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

“(D) PUBLICATION.—Not later than 180 days after the date on which an agency completes an assessment of a major rule under subparagraph (A), the agency shall publish a notice of availability of the results of the assessment in the Federal Register, including the specific circumstances or events that would necessitate a subsequent assessment of the major rule under subparagraph (C)(i).

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

1 “(A) oversee the timely compliance of the
2 agency with this subsection; and

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

6 “(i) published promptly on a central-
7 ized Federal website; and

8 “(ii) noticed in the Federal Register
9 in accordance with paragraph (2)(D).

10 “(4) OMB OVERSIGHT.—The Administrator
11 shall—

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

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

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

1 a statutorily imposed deadline, in accordance
 2 with paragraph (6)(B); and

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

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

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

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

18 “(6) APPLICABILITY.—

19 “(A) IN GENERAL.—This subsection shall
 20 not apply to—

21 “(i) a major rule of an agency—

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

1 “(H) for which the agency is re-
 2 quired to conduct a retrospective re-
 3 view under—

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

8 “(bb) section 170(d) of the
 9 Financial Stability Act of 2010
 10 (12 U.S.C. 5370(d)); or

11 “(cc) any other provision of
 12 law with requirements that the
 13 Administrator determines—

14 “(AA) include robust
 15 public participation;

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

22 “(CC) meet, are sub-
 23 stantially similar to, or ex-
 24 ceed the requirements of
 25 this subsection;

1 “(III) for which the authorizing
 2 statute of the rule is subject to peri-
 3 odic authorization by Congress not
 4 less frequently than once every 10
 5 years; or

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

11 “(ii) interpretative rules, general
 12 statements of policy, or rules of agency or-
 13 ganization, procedure, or practice.

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

23 “(7) JUDICIAL REVIEW.—

1 “(A) IN GENERAL.—Judicial review of
2 agency compliance with this subsection is lim-
3 ited to—

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

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

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

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

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

1 (b) ~~AUTHORIZATION OF APPROPRIATIONS.—~~There
 2 are authorized to be appropriated such sums as may be
 3 necessary to carry out the amendments made by sub-
 4 section (a).

5 **SECTION 1. SHORT TITLE.**

6 *This Act may be cited as the “Setting Manageable*
 7 *Analysis Requirements in Text Act of 2022” or the*
 8 *“SMART Act of 2022”.*

9 **SEC. 2. INCORPORATING RETROSPECTIVE REVIEW INTO**
 10 **NEW MAJOR RULES.**

11 (a) *IN GENERAL.—*Subchapter II of chapter 5 of title
 12 5, United States Code, is amended—

13 (1) *in section 551—*

14 (A) *in paragraph (13), by striking “; and”*
 15 *and inserting a semicolon;*

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

18 (C) *by adding at the end the following:*

19 “(15) ‘Administrator’ means the Administrator
 20 of the Office of Information and Regulatory Affairs of
 21 the Office of Management and Budget established
 22 under section 3503 of title 44 and any successor to
 23 that office; and

1 “(16) ‘major rule’ means any rule that the Ad-
 2 ministrators finds has resulted in or is likely to result
 3 in—

4 “(A) an annual effect on the economy of
 5 \$100,000,000 or more;

6 “(B) a major increase in costs or prices for
 7 consumers, individual industries, Federal, State,
 8 or local government agencies, or geographic re-
 9 gions; or

10 “(C) significant adverse effects on competi-
 11 tion, employment, investment, productivity, in-
 12 novation, health, safety, the environment, or the
 13 ability of United States-based enterprises to com-
 14 pete with foreign-based enterprises in domestic
 15 and export markets.”; and

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

18 “(f) MAJOR RULE FRAMEWORKS.—

19 “(1) IN GENERAL.—On and after the date that
 20 is 1 year after the date of enactment of this sub-
 21 section—

22 “(A) with respect to a proposed rule pub-
 23 lished by an agency in the Federal Register that
 24 the agency reasonably expects would meet the
 25 definition of a major rule, the agency shall in-

1 *clude a potential framework for assessing the im-*
2 *plemented rule, which shall include a general*
3 *statement of how the agency intends to measure*
4 *the effectiveness of the rule; and*

5 *“(B) with respect to a final major rule pub-*
6 *lished by an agency in the Federal Register, in-*
7 *cluding a major rule that the agency did not ini-*
8 *tially reasonably expect would meet the defini-*
9 *tion of a major rule under subparagraph (A), the*
10 *agency shall include a framework for assessing*
11 *the major rule under paragraph (2), which shall*
12 *include—*

13 *“(i) a statement of the regulatory ob-*
14 *jectives of the major rule, including a sum-*
15 *mary of the societal benefit and cost of the*
16 *major rule;*

17 *“(ii) the methodology by which the*
18 *agency plans to analyze the qualitative and*
19 *quantitative outcomes of the major rule so*
20 *that the agency can assess—*

21 *“(I) the effectiveness and benefits*
22 *of the major rule in producing the reg-*
23 *ulatory objectives of the major rule;*
24 *and*

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

4 “(iii) a plan for gathering data, in-
5 cluding public input, regarding the method-
6 ology described in clause (ii) on an ongoing
7 basis or at periodic times; and

8 “(iv) a time frame, as appropriate to
9 the major rule and not more than 10 years
10 after the effective date of the major rule,
11 under which the agency shall conduct the
12 assessment of the major rule in accordance
13 with paragraph (2)(A).

14 “(2) ASSESSMENT.—

15 “(A) IN GENERAL.—Each agency shall as-
16 sess the data gathered under paragraph
17 (1)(B)(iii), using the methodology set forth in
18 paragraph (1)(B)(ii) or any other appropriate
19 methodology developed after the issuance of a
20 final major rule—

21 “(i) to analyze how the actual benefits
22 and costs of the major rule may have varied
23 from those anticipated at the time the major
24 rule was issued; and

25 “(ii) to determine whether—

1 “(I) the major rule is accom-
2 plishing the regulatory objective of the
3 major rule;

4 “(II) the major rule has been ren-
5 dered unnecessary, taking into consid-
6 eration—

7 “(aa) changes in the subject
8 area affected by the major rule;
9 and

10 “(bb) whether the major rule
11 overlaps, duplicates, or conflicts
12 with other rules or, to the extent
13 feasible, State and local govern-
14 ment regulations;

15 “(III) the major rule needs to be
16 expanded, streamlined, or otherwise
17 modified in order to accomplish the
18 regulatory objective of the major rule;
19 and

20 “(IV) other alternatives to the
21 major rule or a modification of the
22 major rule could better achieve the reg-
23 ulatory objective of the major rule by
24 increasing the benefits of the major
25 rule or imposing a smaller burden on

1 *society, or both, taking into consider-*
 2 *ation any changes in the regulatory*
 3 *environment that may have made the*
 4 *major rule more or less necessary or ef-*
 5 *fective, and any cost already incurred.*

6 “(B) *DIFFERENT METHODOLOGY.*—*If an*
 7 *agency uses a methodology other than the meth-*
 8 *odology set forth in paragraph (1)(B)(ii) to as-*
 9 *sess data under subparagraph (A), the agency*
 10 *shall include notification of the revised method-*
 11 *ology and an explanation of the changes in cir-*
 12 *cumstances that necessitated the use of that other*
 13 *methodology as part of the notice required under*
 14 *subparagraph (D).*

15 “(C) *SUBSEQUENT ASSESSMENTS.*—*If, after*
 16 *an assessment of a major rule under subpara-*
 17 *graph (A), an agency determines that the major*
 18 *rule will remain in effect with or without modi-*
 19 *fication, the agency shall, in consultation with*
 20 *the Administrator, include with the assessment*
 21 *produced under subparagraph (A) a list of cir-*
 22 *cumstances or events that would necessitate a*
 23 *subsequent review in accordance with subpara-*
 24 *graph (A) to ensure that the major rule con-*

1 *tinues to meet the regulatory objective of the*
 2 *major rule.*

3 “(D) *PUBLICATION.*—*Not later than 180*
 4 *days after the date on which an agency completes*
 5 *an assessment of a major rule under subpara-*
 6 *graph (A), the agency shall publish prominently*
 7 *on the website of the agency the results of the as-*
 8 *essment, including the circumstances or events*
 9 *that would necessitate a subsequent assessment of*
 10 *the major rule under subparagraph (C).*

11 “(3) *AGENCY HEAD RESPONSIBILITIES.*—*The*
 12 *head of each agency shall—*

13 “(A) *oversee the timely compliance of the*
 14 *agency with this subsection; and*

15 “(B) *ensure that the results of each assess-*
 16 *ment conducted under paragraph (2) are pub-*
 17 *lished promptly in accordance with paragraph*
 18 *(2)(D).*

19 “(4) *OMB OVERSIGHT.*—*The Administrator*
 20 *shall—*

21 “(A) *issue guidance for agencies regarding*
 22 *the development of the framework under para-*
 23 *graph (1) and the conduct of the assessments*
 24 *under paragraph (2)(A);*

1 “(B) encourage and assist agencies to
2 streamline and coordinate the assessment of
3 major rules with similar or related regulatory
4 objectives;

5 “(C) exempt an agency from including the
6 framework required under paragraph (1)(B)
7 when publishing a final major rule, if—

8 “(i) the agency did not issue a notice
9 of proposed rule making for the major rule
10 in order to provide a timely response to an
11 emergency or comply with a statutorily im-
12 posed deadline, in accordance with para-
13 graph (6)(B); or

14 “(ii) the Administrator determines
15 that—

16 “(I) the final major rule falls
17 within a category of major rules that
18 are routine or periodic in nature, in-
19 cluding those issued on an annual
20 basis in order to put in place annual
21 spending programs; or

22 “(II) for any other reason, the
23 conduct of an assessment would be im-
24 practicable, unnecessary, or contrary
25 to the public interest; 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) for a
 4 period of not more than 90 days if the agency
 5 justifies why the agency is unable to complete the
 6 assessment by that deadline.

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

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

13 “(B) any other provision of law that re-
 14 quires an agency to conduct retrospective reviews
 15 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 Regulatory*
 3 *Paperwork Reduction Act of 1996*
 4 (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 this
 22 subsection;

23 “(III) for which the authorizing
 24 statute of the rule is subject to periodic

1 *authorization by Congress not less fre-*
 2 *quently than once every 10 years; or*

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

7 *“(ii) interpretative rules, general state-*
 8 *ments of policy, or rules of agency organiza-*
 9 *tion, procedure, or practice.*

10 *“(B) GOOD CAUSE EXEMPTION.—In the case*
 11 *of a major rule for which the agency has not*
 12 *issued a notice of proposed rule making, the*
 13 *agency shall publish the framework required*
 14 *under paragraph (1)(B) in the Federal Register*
 15 *not later than 6 months after the date on which*
 16 *the agency publishes the final major rule.*

17 *“(7) JUDICIAL REVIEW.—*

18 *“(A) IN GENERAL.—Judicial review of*
 19 *agency compliance with this subsection—*

20 *“(i) shall be strictly limited to—*

21 *“(I) whether an agency published*
 22 *the framework for assessment of a*
 23 *major rule described in paragraph (1);*
 24 *or*

1 “(II) *whether an agency published*
2 *the assessment or subsequent assess-*
3 *ment of a major rule described in sub-*
4 *paragraphs (A), (C), and (D) of para-*
5 *graph (2); and*

6 “(ii) *shall not include a substantive re-*
7 *view of the framework, assessment, or action*
8 *of an agency under this subsection.*

9 “(B) *REMEDY AVAILABLE.—In granting re-*
10 *lief in an action brought under subparagraph*
11 *(A), a court may only issue an order remanding*
12 *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 determination,*
21 *action, or inaction of the Administrator shall not*
22 *be subject to judicial review.”.*

23 “(b) *AUTHORIZATION OF APPROPRIATIONS.—There are*
24 *authorized to be appropriated such sums as may be nec-*
25 *essary to carry out the amendments made by subsection (a).*

Calendar No. 672

117TH CONGRESS
2^D Session

S. 2801

[Report No. 117-273]

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.

DECEMBER 19, 2022

Reported with an amendment