104TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPT. 104–284, Part 1

REGULATORY SUNSET AND REVIEW ACT OF 1995

OCTOBER 19, 1995.—Ordered to be printed

Mr. CLINGER, from the Committee on Government Reform and Oversight, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 994]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform and Oversight, to which was referred the bill (H.R. 994) to require the periodic review and automatic termination of Federal regulations, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment adopted by the Committee is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Sunset and Review Act of 1995".

SEC. 2. PURPOSE.

The purposes of this Act are—

(1) to require agencies to regularly review their significant rules to determine whether they should be continued without change, modified, consolidated with another rule, or allowed to terminate;

(2) to require agencies to consider the comments of the public, the regulated community, and the Congress regarding the actual costs and burdens of rules being reviewed under this Act, and whether the rules are obsolete, unnecessary, duplicative, conflicting, or otherwise inconsistent;

(3) to require that any rules continued in effect meet all the legal requirements that would apply to the issuance of a new rule, including any applicable Federal cost/benefit and risk assessment requirements;

(4) to provide for the automatic termination of significant rules that are not continued in effect as a result of sunset reviews;

(5) to provide for a petition process that allows the public and appropriate committees of the Congress to request that other rules that are not significant be reviewed in the same manner as significant rules; and

(6) to require the Administrator to coordinate and be responsible for sunset reviews conducted by the agencies.

SEC. 3. REVIEW AND TERMINATION OF REGULATIONS.

The effectiveness of a covered rule shall terminate on the applicable termination date specified in section 7(a) or (b), unless the rule is reviewed in accordance with the procedures in section 6 before that termination date and complies with section 5.

SEC. 4. RULES COVERED.

(a) COVERED RULES.—For purposes of this Act, a covered rule is a rule that—

(1) is determined by the Administrator to be a significant rule under subsection (b); or

(2) is any other rule designated by the Administrator under this Act for sunset review.

(b) SIGNIFICANT RULES.—For purposes of this Act, a significant rule is a rule that the Administrator determines—

(1) has resulted in or is likely to result in an annual effect on the economy of $100,000,000 or more;

(2) is a major rule, as that term is defined in Executive Order 12291 (as in effect on the first date that Executive order was in effect); or

(3) was issued pursuant to a significant regulatory action, as that term is defined in Executive Order 12866 (as in effect on the first date that Executive order was in effect).

(c) PUBLIC PETITIONS.—

(1) IN GENERAL.—Any person adversely affected by a rule that is not a significant rule may submit a petition to the Administrator requesting that the Administrator designate the rule for sunset review. The Administrator shall designate the rule for sunset review unless the Administrator determines that it would be unreasonable to conduct a sunset review of the rule. In making such determination, the Administrator shall take into account the number and nature of other petitions received on the same rule, whether or not they have already been denied.

(2) FORM AND CONTENT OF PETITION.—A petition under paragraph (1)—

(A) shall be in writing, but is not otherwise required to be in any particular form;

(B) shall identify the rule for which sunset review is requested with reasonable specificity and state on its face that the petitioner seeks sunset review or a similar review of the rule; and

(C) shall be accompanied by a $20 processing fee.

(3) RESPONSE REQUIRED FOR NONCOMPLYING PETITIONS.—If the Administrator determines that a petition does not meet the requirements of this subsection, the Administrator shall provide a response to the petitioner within 30 days after receiving the petition, notifying the petitioner of the problem and providing information on how to formulate a petition that meets those requirements.

(4) DECISION WITHIN 90 DAYS.—Within the 90-day period beginning on the date of receiving a petition that meets the requirements of this subsection, the Administrator shall transmit a response to the petitioner stating whether the petition was granted or denied, except that the Administrator may extend such period by a total of not more than 30 days.

(5) PETITIONS DEEMED GRANTED FOR SUBSTANTIAL INEXCUSABLE DELAY.—A petition for sunset review of a rule is deemed to have been granted by the Administrator, and the Administrator is deemed to have designated the rule for sunset review, if a court finds there is a substantial and inexcusable delay, beyond the period specified in paragraph (4), in notifying the petitioner of the Administrator's determination to grant or deny the petition.

(6) PUBLIC LOG.—The Administrator shall maintain a public log of petitions submitted under this subsection, that includes the status or disposition of each petition.

(d) CONGRESSIONAL REQUESTS.—

(1) IN GENERAL.—An appropriate committee of the Congress, or a majority of the majority party members or a majority of nonmajority party members of such a committee, may request in writing that the Administrator designate any rule that is not a significant rule for sunset review. The Administrator shall designate such rule for sunset review within 30 days after receipt of such a request unless the Administrator determines that it would be unreasonable to conduct a sunset review of the rule.

(2) NOTICE OF DENIAL.—If the Administrator denies a congressional request under this subsection, the Administrator shall transmit to the congressional committee making the request a notice stating the reasons for the denial.

(e) PUBLICATION OF NOTICE OF DESIGNATION FOR SUNSET REVIEW.—After designating a rule under this Act for sunset review, the Administrator shall promptly publish a notice of that designation in the Federal Register.

SEC. 5. CRITERIA FOR SUNSET REVIEW.

(a) COMPLIANCE WITH OTHER LAWS.—In order to continue without change, modify, or consolidate any rule subject to sunset review, the continued, modified, or consolidated rule must be authorized by law and meet all applicable requirements that would apply under other laws or Executive orders if it were issued as a new rule. For purposes of this section, applicable requirements include any requirements for cost/benefit analysis and any requirements for standardized risk analysis and risk assessment.

(b) GOVERNING LAW.—If there is an irreconcilable conflict between such applicable requirements and an Act under which a rule was issued, the conflict shall be resolved in the same manner as such conflict would be resolved if the agency were issuing a new rule.

SEC. 6. SUNSET REVIEW PROCEDURES.

(a) FUNCTIONS OF THE ADMINISTRATOR.—

(1) NOTICE OF RULES SUBJECT TO REVIEW.—

(A) INVENTORY AND FIRST LIST.—Within 6 months after the date of the enactment of this Act, the Administrator shall conduct an inventory of existing rules and publish a first list of covered rules. The list shall—

(i) specify the particular group to which each significant rule is assigned under paragraph (2), and state the termination date for all significant rules in each such group; and

(ii) include other rules subject to sunset review for any other reason, and state the termination date for each such rule.

(B) SUBSEQUENT LISTS.—After publication of the first list under subparagraph (A), the Administrator shall publish an updated list of covered rules at least annually, specifying the termination date for each rule on the list.

(2) GROUPING OF SIGNIFICANT RULES IN FIRST LIST.—

(A) STAGGERED REVIEW.—The Administrator shall assign each significant rule in effect on the date of enactment of this Act to one of 4 groups established by the Administrator to permit orderly and prioritized sunset reviews, and specify for each group a termination date in accordance with section 7(a)(1).

(B) PRIORITIZATIONS.—In determining which rules shall be given priority in time in that assignment, the Administrator shall consult with appropriate agencies, and shall prioritize rules based on—

(i) the grouping of related rules in accordance with paragraph (3);

(ii) the extent of the cost of each rule on the regulated community and the public, with priority in time given to those rules that impose the greatest cost;

(iii) consideration of the views of regulated persons, including State and local governments;

(iv) whether a particular rule has recently been subject to cost/benefit analysis and risk assessment, with priority in time given to those rules that have not been subject to such analysis and assessment;

(v) whether a particular rule was issued under a statutory provision that provides relatively greater discretion to an official in issuing the rule, with priority in time given to those rules that were issued under provisions that provide relatively greater discretion;

(vi) the burden of reviewing each rule on the reviewing agency; and

(vii) the need for orderly processing and the timely completion of the sunset reviews of existing rules.

(3) GROUPING OF RELATED RULES.—The Administrator shall group related rules (and designate other rules) for simultaneous sunset review based upon their subject matter similarity, functional interrelationships, and other relevant factors to ensure comprehensive and coordinated review of redundant, overlapping, and conflicting rules and requirements. The Administrator shall ensure simultaneous sunset reviews of covered rules without regard to whether they were issued by the same agency, and shall designate any other rule for sunset review that is necessary for a comprehensive sunset review whether or not such other rule is otherwise a covered rule under this Act.

(4) GUIDANCE.—The Administrator shall provide timely guidance to agencies on the conduct of sunset reviews and the preparation of sunset review notices and reports required by this Act to ensure uniform, complete, and timely sunset reviews and to ensure notice and opportunity for public comment.

(5) REVIEW AND EVALUATION OF REPORTS.—The Administrator shall review and evaluate each preliminary and final report submitted by the head of an agency pursuant to this section. Within 90 days after receiving a preliminary report, the Administrator shall transmit comments to the head of the agency regarding—

(A) the quality of the analysis in the report, including whether the agency has properly applied section 5;

(B) the consistency of the agency's proposed action with actions of other agencies; and

(C) whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate.

(b) AGENCY SUNSET REVIEW PROCEDURE.—

(1) SUNSET REVIEW NOTICE.—At least 2½ years before the termination date under section 7(a) for a covered rule issued by an agency, the head of the agency shall—

(A) publish a sunset review notice in accordance with section 8(a) in the Federal Register and, to the extent reasonable and practicable, in other publications or media that are designed to reach those persons most affected by the covered rule; and

(B) request the views of the Administrator and the appropriate committees of the Congress on whether to continue without change, modify, consolidate, or terminate the covered rule.

(2) PRELIMINARY REPORT.—In reviewing a covered rule, the head of an agency shall—

(A) consider public comments and other recommendations generated by a sunset review notice under paragraph (1); and

(B) at least 1 year before the termination date under section 7(a) for the covered rule, publish in the Federal Register and transmit to the Administrator and the appropriate committees of the Congress a preliminary report in accordance with section 8(b).

(3) FINAL REPORT.—The head of an agency shall consider the public comments and other recommendations generated by the preliminary report under paragraph (2) for a covered rule, and shall consult with the appropriate committees of the Congress before issuing a final report. At least 90 days before the termination date of the covered rule, the head of the agency shall publish in the Federal Register and transmit to the Administrator and the appropriate committees of the Congress a final report in accordance with section 8(c).

(c) EFFECTIVENESS OF AGENCY RECOMMENDATION.—If a final report under subsection (b)(3) recommends that a covered rule should be continued without change, modified, or consolidated with another rule, the rule is continued, modified, or consolidated in accordance with the recommendation effective 60 days after publication of the final report, unless the Administrator or another officer designated by the President publishes a notice within that 60-day period stating that the rule shall

not be so continued without change, modified, or consolidated. The Administrator or other officer designated by the President shall state in the notice the reasons for such action.

(d) REISSUANCE.—If a covered rule terminates for any reason pursuant to this Act, it shall not be reissued in substantially the same form unless the rule complies with section 5 and the Administrator or other officer designated by the President approves the rule.

(e) PRESERVATION OF INDEPENDENCE OF FEDERAL BANK REGULATORY AGENCIES.—The head of any appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), the Federal Housing Finance Board, the National Credit Union Administration, and the Office of Federal Housing Enterprise Oversight shall have the authority with respect to that agency that would otherwise be granted under subsections (c) and (d) of this section, section 7(a)(2)(B), and section 7(c) to the Administrator or other officer designated by the President.

SEC. 7. TERMINATION DATES FOR COVERED RULES.

(a) IN GENERAL.—For purposes of section 3, the termination date of a covered rule is as follows:

(1) EXISTING SIGNIFICANT RULES.—For a significant rule in effect on the date of the enactment of this Act, the initial termination date is the last day of the 4-year, 5-year, 6-year, or 7-year period beginning on the date of the enactment of this Act, as specified by the Administrator under section 6(a)(2)(A). For any significant rule that 6 months after the date of enactment is not assigned to such a group specified under section 6(a)(2)(A), the initial termination date is the last day of the 4-year period beginning on the date of enactment of this Act.

(2) NEW SIGNIFICANT RULES.—For a significant rule that first takes effect after the date of the enactment of this Act, the initial termination date is the last day of either—

(A) the 3-year period beginning on the date the rule takes effect, or

(B) if the Administrator determines as part of the rulemaking process that the rule is issued pursuant to negotiated rulemaking procedures or that compliance with the rule requires substantial capital investment, the 7-year period beginning on the date the rule takes effect.

(3) RULES COVERED PURSUANT TO PUBLIC PETITION OR CONGRESSIONAL REQUEST.—For any rule subject to sunset review pursuant to a public petition under section 4(c) or a congressional request under section 4(d), the initial termination date is the last day of the 3-year period beginning on—

(A) the date the Administrator so designates the rule for review; or

(B) the date of issuance of a final court order that the Administrator is deemed to have designated the rule for sunset review.

(4) RELATED RULE DESIGNATED FOR REVIEW.—For a rule that the Administrator designates under section 6(a)(3) for sunset review because it is related to another covered rule and that is grouped with that other rule for simultaneous review, the initial termination date is the same as the termination date for that other rule.

(5) RULES EXTENDED IN EFFECTIVENESS.—For a rule the effectiveness of which has been extended under section 3, the next termination date is the last day of the 7-year period beginning on the date the rule would have terminated under section 3 if it had not been extended.

(b) TEMPORARY EXTENSION.—The termination date under subsection (a) for a covered rule may be extended by the Administrator for not more than 6 months by publishing notice thereof in the Federal Register that describes—

(1) modifications that should be made to the rule and the reasons why the modifications cannot be made by the original termination date; or

(2) reasons why the temporary extension is necessary to respond to or prevent an emergency situation.

(c) LIMITATION ON INTERIM REVIEWS.—An agency may not undertake a comprehensive review and significant revision of a covered rule more frequently than required by this section or another law, unless the head of the agency determines, and the Administrator concurs, that the likely benefits from such review and revision outweigh the reasonable expenditures that have been made in reliance on the rule. For purposes of this section, a law may be considered to require a comprehensive review and significant revision of a rule if it makes significant changes in the Act under which the rule was issued.

(d) DETERMINATIONS WHERE RULES HAVE BEEN AMENDED.—For purposes of this Act, if various provisions of a covered rule were issued at different times, then the rule as a whole shall be treated as if it were issued on the later of—

(1) the date of issuance of the provision of the rule that was issued first; or

(2) the date the most recent comprehensive review and significant revision of the rule was completed.

(e) COMPREHENSIVE REVIEW AND SIGNIFICANT REVISION DEFINED.—In this section, the term "comprehensive review and significant revision" means—

(1) a sunset review, whether or not the rule is revised; or

(2) a review and revision of a rule consistent with subsection (c).

SEC. 8. SUNSET REVIEW NOTICES AND AGENCY REPORTS.

(a) SUNSET REVIEW NOTICES.—The sunset review notice under section 6(b)(1) for a rule shall—

(1) request comments regarding whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate;

(2) if applicable, request comments regarding whether the rule meets the applicable Federal cost/benefit and risk assessment criteria; and

(3) solicit comments about the past implementation and effects of the rule, including—

(A) the direct and indirect costs incurred because of the rule, including the net reduction in the value of private property (whether real, personal, tangible, or intangible), and whether the incremental benefits of the rule exceeded the incremental costs of the rule, both generally and regarding each of the specific industries and sectors it covers;

(B) whether the rule as a whole, or any major feature of it, is outdated, obsolete, or unnecessary, whether by change of technology, the marketplace, or otherwise;

(C) the extent to which the rule or information required to comply with the rule duplicated, conflicted, or overlapped with requirements under rules of other agencies;

(D) in the case of a rule addressing a risk to health or safety or the environment, what the perceived risk was at the time of issuance and to what extent the risk predictions were accurate;

(E) whether the rule unnecessarily impeded domestic or international competition or unnecessarily intruded on free market forces, and whether the rule unnecessarily interfered with opportunities or efforts to transfer to the private sector duties carried out by the Government;

(F) whether, and to what extent, the rule imposed unfunded mandates on, or otherwise affected, State and local governments;

(G) whether compliance with the rule required substantial capital investment and whether terminating the rule on the next termination date would create an unfair advantage to those who are not in compliance with it;

(H) whether the rule constituted the least cost method of achieving its objective consistent with the criteria of the Act under which the rule was issued, and to what extent the rule provided flexibility to those who were subject to it;

(I) whether the rule was worded simply and clearly, including clear identification of those who were subject to the rule;

(J) whether the rule created negative unintended consequences;

(K) the extent to which information requirements under the rule can be reduced; and

(L) the extent to which the rule has contributed positive benefits, particularly health or safety or environmental benefits.

(b) PRELIMINARY REPORTS ON SUNSET REVIEWS.—The preliminary report under section 6(b)(2) on the sunset review of a rule shall request public comments and contain—

(1) specific factual findings and legal conclusions of the head of the agency conducting the review regarding the application of section 5 to the rule, the continued need for the rule, and whether the rule duplicates functions of another rule;

(2) a preliminary determination on whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate; and

(3) if consolidation or modification of the rule is recommended, the proposed text of the consolidated or modified rule and other relevant information required by law in a notice of proposed rulemaking.

(c) FINAL REPORTS ON SUNSET REVIEWS.—The final report under section 6(b)(3) on the sunset review of a rule shall contain—

(1) the final factual findings and legal conclusions of the head of the agency conducting the review regarding the application of section 5 to the rule and

whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate; and

(2) in the case of a rule that is continued without change, modified, or consolidated with another rule, the text of the rule.

SEC. 9. DESIGNATION OF AGENCY REGULATORY REVIEW OFFICERS.

The head of each agency shall designate an officer of the agency as the Regulatory Review Officer of the agency. The Regulatory Review Officer of an agency shall be responsible for the implementation of this Act by the agency and shall report directly to the head of the agency and the Administrator with respect to that responsibility.

SEC. 10. RELATIONSHIP TO OTHER LAW; SEVERABILITY.

(a) RELATIONSHIP TO APA.—Except to the extent that there is a direct conflict with the provisions of this Act, nothing in this Act is intended to supersede the provisions of chapters 5, 6, and 7 of title 5, United States Code.

(b) SEVERABILITY.—If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

SEC. 11. EFFECT OF TERMINATION OF A COVERED RULE.

(a) EFFECT OF TERMINATION, GENERALLY.—If the effectiveness of a covered rule terminates under section 3—

(1) this Act shall not be construed to prevent the President or an agency from exercising any authority that otherwise exists to implement the statute under which the rule was issued;

(2) in an agency proceeding or court action between an agency and a non-agency party, the rule shall be given no legal effect (subject to paragraph (3)) except at the request of the non-agency party; and

(3) notwithstanding section 3, this Act shall not be construed to prevent the continuation or institution of any enforcement action that is based on a violation of the rule that occurred before the effectiveness of the rule terminated.

(b) EFFECT ON DEADLINES.—

(1) IN GENERAL.—Notwithstanding subsection (a), any deadline for, relating to, or involving any action dependent upon, any rule terminated under this Act is suspended until the agency that issued the rule issues a new rule on the same matter, unless otherwise provided by a law.

(2) DEADLINE DEFINED.—In this subsection, the term "deadline" means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal rule, or by or under any court order implementing any Federal rule.

SEC. 12. JUDICIAL REVIEW.

(a) IN GENERAL.—A denial or substantial inexcusable delay in granting or denying a petition under section 4(c) shall be considered final agency action. A denial of a congressional request under section 4(d) shall not be subject to judicial review.

(b) TIME LIMITATION ON FILING A CIVIL ACTION.—Notwithstanding any other provisions of law, an action seeking judicial review of a final agency action under this Act may not be brought—

(1) in the case of a final agency action denying a public petition under section 4(c) or continuing without change, modifying, or consolidating a covered rule, more than 30 days after the effective date of that agency action; or

(2) in the case of an action challenging a delay in granting or denying a petition for a rule under section 4(c), more than 1 year after the period applicable to the rule under section 4(c)(4).

(c) AVAILABILITY OF JUDICIAL REVIEW UNAFFECTED.—Except to the extent that there is a direct conflict with the provisions of this Act, nothing in this Act is intended to affect the availability or standard of judicial review for agency regulatory action.

SEC. 13. DEFINITIONS.

In this Act:

(1) ADMINISTRATOR.—The term "Administrator" means the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget.

(2) AGENCY.—The term "agency" has the meaning given that term in section 551(1) of title 5, United States Code.

(3) APPROPRIATE COMMITTEE OF THE CONGRESS.—The term "appropriate committee of the Congress" means, with respect to a rule, each standing committee

of Congress having authority under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(4) RULE.—

(A) GENERAL RULE.—Subject to subparagraph (B), the term "rule" means any agency statement of general applicability and future effect, including agency guidance documents, designed to implement, interpret, or prescribe law or policy, or describing the procedures or practices of an agency, or intended to assist in such actions, but does not include—

(i) regulations or other agency statements issued in accordance with formal rulemaking provisions of sections 556 and 557 of title 5, United States Code;

(ii) regulations or other agency statements that are limited to agency organization, management, or personnel matters;

(iii) regulations or other agency statements issued with respect to a military or foreign affairs function of the United States;

(iv) regulations, statements, or other agency actions that are reviewed and usually modified each year (or more frequently), or are reviewed regularly and usually modified based on changing economic or seasonal conditions;

(v) regulations or other agency actions that grant an approval, license, permit, registration, or similar authority or that grant or recognize an exemption or relieve a restriction, or any agency action necessary to permit new or improved applications of technology or to allow the manufacture, distribution, sale, or use of a substance or product; and

(vi) regulations or other agency statements that the Administrator certifies in writing are necessary for the enforcement of the Federal criminal laws.

(B) SCOPE OF A RULE.—For purposes of this Act, each set of rules designated in the Code of Federal Regulations as a part shall be treated as one rule. Each set of rules that do not appear in the Code of Federal Regulations and that are comparable to a part of that Code under guidelines established by the Administrator shall be treated as one rule.

(5) SUNSET REVIEW.—The term "sunset review" means a review of a rule under this Act.

SEC. 14. SUNSET OF THIS ACT.

This Act shall have no force or effect after the 10-year period beginning on the date of the enactment of this Act.

I. SUMMARY OF LEGISLATION

H.R. 994, the Regulatory Sunset and Review Act of 1995, provides a framework for the systematic review of current and future federal rules. The bill requires federal agencies to periodically review their significant rules to determine whether the rules should be continued without change, modified, consolidated with other rules, or allowed to terminate. The legislation also creates a petition process that would permit the public and appropriate Committees of Congress to request that agencies review less significant rules in the same manner.

A rule designated for review will not expire if the issuing agency reviews and reissues it in accordance with the procedures established by the bill and the rule meets all the legal requirements that apply to the issuance of new rules. This legislation will help ensure that obsolete, unnecessary, duplicative, or conflicting rules are reviewed and either modified or terminated.

Agencies will review their existing significant rules, which include those that have an annual effect on the economy of $100 million or more, over a staggered seven-year period beginning on the date the bill becomes law. Agencies will review their new significant rules seven years after issuance if the rules are capital inten-

sive or were promulgated pursuant to a negotiated rulemaking procedure. Agencies will review their new significant rules seven years after issuance if the rules are capital intensive or were promulgated pursuant to a negotiated rulemaking procedure. Agencies will review other new significant rules three years after issuance. After the initial agency review, all covered rules will be subject to review every seven years.

The Administrator for the Office of Information and Regulatory Affairs in the Office of Management and Budget is responsible for supervising and coordinating agency sunset reviews and providing guidance on how to conduct sunset reviews properly. The Administrator's initial task is to establish and publish a schedule in the Federal Register of all covered rules together with the potential termination date for each rule, and to update that list at least annually. In setting the sunset review schedule, the Administrator shall consult with the agencies and prioritize the sunset reviews based on: the cost of each rule to the regulated community, the views of regulated parties, whether a particular rule has recently undergone cost/benefit and risk assessment analysis, the burden that reviewing the rule places on the agency, and the need for orderly and timely sunset review of all rules. In addition, the Administrator shall group related rules for simultaneous review, regardless of the issuing agency, based upon their subject matter similarity and their interrelationship with other rules to ensure efficient, comprehensive, and coordinated review of all rules across the government.

The legislation establishes a reasonable review timetable to ensure that agencies will complete each sunset review in an orderly manner and well ahead of the rule's potential termination date. The dates in the timetable will alert the Administrator and other interested parties of the need to take corrective action if the agency falls behind schedule. All of the deadlines on the timetable are linked to the rule's potential termination date, which the Administrator shall specify at the time the Administrator designates the rule for sunset review. The Administrator must make that designation at least three to seven years prior to the potential termination date so that the agencies and all interested parties will have sufficient notice that the rule is subject to termination if it is not reauthorized.

The legislation provides that, at least two and one half years before the rule's scheduled termination date, the agency shall publish a sunset review notice in the Federal Register requesting comments on twelve factors related to the rule's implementation. This notice will allow the public to comment on the actual costs, burdens, and benefits of the rule and whether the rule is obsolete, unnecessary, duplicative, conflicting, or otherwise inconsistent with the requirements of other rules. At least one year before the rules potential termination date, the agency must issue a preliminary report stating whether it intends to continue the rule without change, modify it, consolidate it with another rule, it must publish the text of the new proposed rule in its preliminary report. The agency then shall consult the appropriate Committees of Congress regarding its preliminary report and its proposed rulemaking action. At least 90 days before the rule's scheduled termination date,

the agency must issue a final report (with a final rule, if the rule is going to be modified or consolidated). The final rule would become effective 60 days after publication. The Administrator may extend the potential sunset date of a rule by six months if necessary modifications in the rule cannot be made in time or if it is necessary to respond to or prevent an emergency situation.

The Regulatory Sunset and Review Act covers regulatory actions by all the federal agencies. However, the legislation does contain several generic exceptions that cross agency lines. Covered rules do not include: formal rulemaking (agency adjudication) pursuant to 5 U.S.C. §§ 556 and 557; rules related to agency organization, management, and personnel matters; rules related to military or foreign affairs functions; rules that are already reviewed and usually modified each year or are based on changing economic or seasonal conditions; rules that grant a product approval, license, permit, or permission, or relieve a statutory restriction; or rules that the Administrator certifies are necessary for the enforcement of the federal criminal laws.

In the event of a rule's unintended termination, the legislation expressly recognizes the President's and the agency's authority to continue to enforce the underlying statute. The bill provides that the President or an agency is free to exercise any authority that otherwise exists to implement the statute under which the rule was issued. Thus, the termination of a rule does not prevent the Executive Branch from taking action to enforce the statute or to replace any important rule that has terminated.

The Sunset and Review Act, itself, will terminate and will have no force or effect ten years after the date of its enactment unless it is reauthorized by a subsequent act of Congress.

II. BACKGROUND AND NEED FOR THE LEGISLATION

Although public frustration with regulation has increased over the past three decades, Alexis de Tocqueville's warning more than 150 years ago about the dangers of despotic power applies to this concern about over-regulation:

> [Despotic power] covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate. * * * Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.[1]

The Regulatory Sunset and Review Act of 1995 makes a substantial contribution toward addressing public concerns about over-regulation by requiring that agency rules undergo regular public review and reauthorization.

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[1] Alexis de Tocqueville, "Democracy in America" (1840), edited by Phillips Bradly, vol. 2 at 319 (Alfred A. Knopf, New York 1976).

A. Brief history of Federal regulation[2]

The history of federal regulation in the United States shows that the theory supporting the creation of various regulatory programs has changed over time and, in some cases, is no longer valid. Yet many regulatory agencies and programs remain largely unchanged from their creation. Their missions and outlook continue to be defined by their original organic acts, agency history, and regulatory inertia. This creates an institutional bias in favor of each agency maintaining and defending the corpus of its own regulations and regulatory programs—even if they are unnecessary or overlap with the regulatory programs of other agencies. Past regulatory reform efforts have had some positive effects, but they have not kept pace with the increased public demand for systematic regulatory reform. More importantly, these past efforts have not included an effective mechanism requiring regulatory agencies to regularly review and revise existing regulations.

Although Congress established the first regulatory agency—the Interstate Commerce Commission—more than 100 years ago, the number of regulatory agencies grew rapidly during the Great Depression. President Franklin Roosevelt's Administration argued that the Depression was caused in large part by a general malfunctioning of the American economic system, including perceived market failures in the price and distribution of goods and services. Thus, the Congress created new regulatory agencies to administer "economic regulations" such as rate making, licensing, route allocation, subsidization of services in rural areas, and the policing of financial markets. Unfortunately, because services were not allocated by market forces, the aggregate cost of all services was usually greater than if providers were free to respond to prevailing market conditions.[3]

In response to concerns about the economic well-being of certain industries. Congress also established new "independent agencies," often with the justification that only agencies with neutral institutional expertise and technical staff could effectively regulate these industries. The public, the legislature, and the courts were thought to lack the necessary expertise, and thus, substantial discretion was given to agency decision-making. It was also argued that such independent agencies would exercise neutral and unbiased policy expertise free of political constraints.

Within a few decades, however, questions were raised about the level of discretion regulatory agencies exercised to meet broad legislative objectives. In 1946, Congress enacted the Administrative Procedure Act (APA)[4] provide specific procedures for agencies to follow in issuing regulations. APA established standards of procedural due process for the regulated community and guaranteed the right of public participation in the rulemaking process. The APA also restated and codified the right to judicial review of agency regulatory action. Congress thought judicial review was a necessary

[2] See Daniel J. Gifford, "The New Deal Regulatory Model: A History of Criticisms and Refinements," 68 Minn. L. Rev. 299 (1983). Professor Gifford's article provides the background for much of the information in this history.

[3] Gifford, supra, note 2, at 304.

[4] Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

element of agency oversight; without it, private citizens would have little protection from abuses of discretion.

In the 1950s and beyond, the theory of agency technical competence began to erode, as did the perception that administrative decisions lacked and political element, As federal agencies grew in size and jurisdiction and began to address issues that required overt policy choices that were not rooted in legislation or legislative history, these problems became more evident.[5] During this period, the theory of administrative expertise increasingly was undermined by the realization that agency expertise alone, even where it was present, was not enough to guide agency action. Furthermore, agencies were increasingly criticized for failing to develop effective and transparent standards for governing their own actions.[6]

Beginning in the late 1960s, Congress responded with changes in the regulatory statues which agencies administered. Contrary to the New Deal approach, Congress began enacting regulatory statutes with much greater specificity. This new approach reflected the concern that regulatory agencies lacked the ability to set public welfare goals and the perception that agencies had misused their discretion.[7] For example, Congress passed environmental legislation with very specific standards and goals. Partly in response to this type of legislation, agencies increasingly resorted to rulemaking of general applicability rather than case-by-case adjudication, which previously had been the prevailing method of regulation. As a result, each rulemaking had a broad impact on a greater number of people and entities.

Regulatory statutes in the 1960s and early 1970s also differed from New Deal "economic regulations" by concentrating on remedying social problems relating to human health, safety, and the environment. Many of these statutes were based on perceived "external" costs, or those costs from production or operations that are borne by persons other than producers.[8] Major legislation of that era included the National Traffic and Motor Vehicle Safety Act of 1966, the Federal Coal Mine Health and Safety Act of 1969, the Clean Air Act Amendments of 1970, the National Environmental Policy Act of 1969, the Occupational Safety and Health Act of 1970, and the Consumer Product Safety Act of 1972.

Proponents argued that the appropriate response to "externalities" is to require the producers to "internalize" such costs so that they have an incentive to take the optimal level of preventive care. However, the type of regulations promulgated under these statutes imposed government-mandated preventive solutions. In many cases, agencies imposed one-size-fits-all preventive measures on the regulated community which prevented individual employers or producers from developing more cost-effective approaches for achieving the specified level of protection. For instance, the Occupational Safety and Health Administration often imposes identical safety rules on all employers in a given industry. These standards removed the discretion of employers to take ac-

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[5] See Marver H. Bernstein, "Regulating Business by Independent Commission" 74–92 (1955).
[6] See Henry J. Friendly, "The Federal Administrative Agencies" (1962).
[7] Gifford, supra, note 2, at 319.
[8] See Richard A. Posner, "Economic Analysis of Law" 30 (1972).

tions that, under the particular circumstances, would achieve the same or a superior level of worker protection at less cost.

Thus, the command-and-control regulations created under these new statutes failed to achieve the intended legislative goals or achieved them at an unnecessarily high price. In the end, agencies tried to remedy the perceived market failure of external costs by forcing industry to over internalize such costs, thereby unduly increasing production costs and the prices paid by consumers.[9]

Today, the theory of unbiased and technically competent agency decision-making underlying the growth of regulatory agencies for half a century is the subject of even greater skepticism than ever. Those who criticize the lack of regulatory action accuse agencies of being "captured" by the industries they regulate. Those who believe that these agencies promulgate overly burdensome regulations maintain that the agencies do not adequately consider the regulations' economic and social costs and whether there are more flexible alternatives that achieve the same level of protection.[10]

B. Regulatory reform efforts

There is little dispute that many regulations have provided increased protections for human health, safety, and the environment. In the last twenty years, however, there also has been a growing recognition that over-regulation imposes unnecessary costs on the United States economy. Beginning in the late 1970s, Congress began to evaluate and reform regulations, starting with so-called "economic regulations" in the transportation sector. In 1978, Congress reexamined the comprehensive structure of airline regulations.[11] Congress found that airline regulation had produced an inefficient airline system with noncompetitive fares and virtually no offsetting benefits. As a result, Congress deregulated the airline industry and eliminated the Civil Aeronautics Board. Later, Congress substantially deregulated the rail and motor transport industries. Congress concluded that market forces provided a more efficient method for satisfying the public interest than government regulation. As a result of deregulation, transportation costs have fallen substantially and the array and frequency of services have increased.

Most other regulatory reform efforts undertaken during the 1980s and 1990s were procedural in nature and focused on mechanisms by which the three branches of government could better oversee the work of the regulatory agencies. In 1980, Congress enacted the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA). The RFA was designed to reduce the regulatory burdens on small businesses and government entities by requiring agencies to analyze proposed regulations and tailor those regulations to lessen the impacts on small entities. Although the RFA has achieved some success, agencies have taken advantage of loopholes

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[9] Gifford, supra, note 2, at 325–26.

[10] Modern public choice theory, which attempts to explain the actions of pubic decision-makers, provides support for both types of criticism of agency regulatory behavior. Agency objectivity is undermined when agencies provide disproportionate attention to the views of favored "stakeholders" in relation to the concerns of the general public. At the same time, the incentive agency officials have to increase their influence is a powerful force that often conflicts with sound science and regulatory need analysis, and creates an insensitivity to the costs regulations impose on the regulated community and the public.

[11] See Stephen G. Breyer, "Regulation and Its Reform" 197–221 (1982).

in the statute and failed to implement it fully. The RFA does not require impact analysis if an agency certifies that a proposed rule had no significant impact on small entities.[12] Most importantly, the RFA does not contain an effective enforcement mechanism since it prohibits judicial review in cases where an agency certifies that an RFA analysis was not necessary.[13]

The intent of the PRA was to minimize the federal paperwork burden on individuals, businesses, state and local governments, and others, and to maximize the usefulness of information collected by the government. Essentially, the PRA established a policy for the handling of government information and designated the Office of Management and Budget (OMB) to administer that policy. Significantly, the PRA contained a "hammer" provision which prevented an agency from taking enforcement actions for violations of paperwork requirements when PRA approval had expired. Administrative agencies thus came to understand the importance of regularized paperwork review.[14] Notwithstanding the meritorious intent of the statute, the PRA was only authorized for sporadic three-year periods, 1981–83 and 1987–89.[15] On the whole, the reform efforts embodied in the RFA and the PRA did not significantly change the rulemaking process.

Early executive branch reform efforts relied on the theory that requiring agencies expressly to consider costs or other factors during the process of developing new regulations would cure over-regulation. These efforts began as early as the Nixon Administration, which initiated "Quality of Life" review in the White House, primarily of EPA regulations. Both Presidents Ford and Carter implemented more formal Executive Orders designed to require all executive branch agencies to consider inflation or other cost factors in developing regulations. None of these efforts met with much success, however, until President Reagan issued Executive Order 12291 in 1981.

President Reagan's approach was effective because it was more comprehensive in reforming the regulatory process and it created a centralized review process at OMB to enforce such reforms. Executive Order 12291 provided mandatory requirements for agencies to follow when issuing a regulation. The order empowered OMB to oversee and enforce its provisions, with support from the Presidential Task Force on Regulatory Relief headed by the Vice President. The requirements of Executive Order 12291 were simple: the agencies could not regulate unless a clear need existed, benefits outweighed costs, and the agency chose the least costly alternative. Moreover, President Reagan backed up the executive order the day after he took office with a regulatory moratorium that halted most regulatory activity for several months. The Reagan Administration

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[12] 5 U.S.C. 605(b); see also "Regulatory Flexibility Act: Status of Compliance," GAO Report to the Chairman, Committee on Small Business, House of Representatives and Chairman, Committee on Government Affairs, U.S. Senate (April 1994).

[13] 5 U.S.C. § 611(a); see also Paul R. Verkuil, "A Critical Guide to the Regulatory Flexibility Act," Duke L.J. 213, 259–60 (1982).

[14] The Regulatory Sunset Review Act extends this principle to more general rulemaking activities.

[15] Through the work of this Committee in the 104th Congress, the PRA was reauthorized for a six-year period of time. Pub. L. No. 104–13, 109 Stat. 163 (1995). The reauthorized PRA will strengthen the OMB Office of Information and Regulatory Affairs (OIRA), increase agency responsibilities for the reduction of paperwork burdens on the public, and improve OIRA and other central management oversight of agency information collection policies and practices.

eventually documented tens of billions of dollars saved as a result of such efforts.

During the Bush Administration, the most important legislative reform was the development of market incentives as an alternative compliance mechanism, as exemplified by the acid rain allowance trading system in the Clean Air Act. The innovation, modeled in part upon the successful lead phase-down program of the early 1980s, cut the anticipated costs of the acid rain reduction program by as much as 50% and greatly accelerated the cleanup.[16] Both the Bush and Clinton Administrations have explored ways to extend this innovation to other regulatory programs. The Bush Administration's effort was part of a reform initiative that began in January of 1992 with a moratorium on new regulations.

However, other developments made it difficult for the Bush Administration to continue the executive branch reform efforts President Reagan had begun. The agencies' regulatory budgets were increased and expansive new regulatory statutes were enacted. At the same time, the Senate refused to confirm an Administrator for the OMB Office of Information and Regulatory Affairs (OIRA), which had played a central role in overseeing agency regulatory activities and implementing E.O. 12291. OIRA oversight was further hampered by Congress's refusal to reauthorize the PRA.

Partially in response to these developments, President Bush created the President's Council on Competitiveness. The Council was a Cabinet-level body, chaired by Vice President Dan Quayle. The Council strove to reduce the burdens of excessive regulation and to encourage America's international competitiveness. The Council reported many notable successes, including reforms to the FDA drug approval process that were estimated to save thousands of lives, efforts to streamline regulations for small businesses, and other actions which cut regulatory red tape to save an estimated 200,000 jobs. When President Clinton was elected, however, he eliminated the Council on Competitiveness and repealed President Reagan's E.O. 12291, replacing it with a weaker executive order, E.O. 12866.

The congressional mid-term election of November 8, 1994 provided the catalyst for congressional action to pass comprehensive regulatory reform legislation, including this bill. As part of the Republican Contract with America, the House considered and passed two regulatory reform bills in late February and early March of 1995. H.R. 450, the "Regulatory Transition Act of 1995," would impose a moratorium on most new federal regulations to allow the Congress time to enact substantive regulatory reform legislation. H.R. 9, the "Job Creation and Wage Enhancement Act of 1995," contained the House version of such a regulatory reform program. H.R. 9 would establish reasonable criteria that agencies must apply prospectively to ensure that future regulations are reasonable and cost-effective given the actual risks involved. Until now, however, the full House has not considered a comprehensive bill to require agencies to review or reform existing regulations.

H.R. 994 extends the regulatory reform effort and bridges a crucial gap by addressing concerns about existing regulations. Much of

[16] "Economic Environmental and Coal Market Impacts of SO_2 Emissions Tracking Under Alternative Acid Rain Control Proposals," I.C.F. Resources, Inc. (March 1989).

the public concern and criticism about regulations is directed at rules currently in effect. H.R. 994 requires agencies to periodically review existing and future regulations to ensure that they are still necessary and effective.

C. The need for a Sunset and Review Act

The total number of federal regulations continues to grow at a rapid pace as reflected in the thousands of new final rules issued each year.[17] Many of the older rules were adopted under conditions that have long since changed. Although some regulations are essential to protect human health, safety, and the environment, the American public should not be asked to bear the burden of any regulation if there is an alternative that would achieve the same or a superior level of protection at a lower cost. Unless there is a mechanism to require the review and revision of existing regulations, American consumers and workers will be forced to continue to absorb the costs of a growing number of regulations that are no longer warranted, are not particularly effective, or should be modified to reflect less costly alternatives.

President Clinton's National Performance Review recently stated that the cost of complying with current federal regulations on the private sector alone is "at least $430 billion per year—9 percent of our gross domestic product." Others have estimated that the cost to the private sector and to State and local governments is between $500 and $850 billion per year—more than the total amount of discretionary domestic spending by the federal government each year.

Although President Clinton has expressed support for several important regulatory reforms, the agencies have not always acted consistently with his stated goals. On the surface, President Clinton's Executive Order 12866 on "Regulatory Planning and Review" includes some of the same standards and requirements that are in President Reagan's E.O. 12291 and many pending regulatory reform bills. For example, E.O. 12866 addresses the need for risk analysis and cost/benefit analysis and examines the need for selecting the most cost-effective and least burdensome means of complying with regulations.[18]

President Clinton's Executive Order, however, has not effectively curbed the excesses of the regulatory agencies. Like the previous executive orders, including E.O. 12291, there is no effective enforcement mechanism and the requirements of the order are not judicially enforceable. Although OIRA bears responsibility for overseeing the implementation of Executive Order 12866, OIRA's implementation of the order has been the subject of criticism.[19]

Most importantly, E.O. 12866 does not ensure the periodic review of existing regulations. Although it states as a goal that agencies should review existing regulations to eliminate rules that are

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[17] Between 1990–1993, OMB has reviewed approximately 1,100–1,300 final rules each year, which does not include all types of rules or the rules issued by certain independent agencies.

[18] Although E.O. 12866 incorporated many of the important features of E.O. 12291, it significantly limited the number of regulations that must undergo cost/benefit analysis.

[19] One recent study found OIRA's oversight was inadequate to ensure compliance. "Ensuring Accountability for Developing Well-Founded Federal Regulations," Institute for Regulatory Policy (Federal Focus, Inc. 1995). Although the study's methodology has been challenged, the limited study still highlights some problems in current OIRA oversight of many rulemaking actions. Even OIRA admits "that there is much to be done to obtain the benefits" of the executive order. "The First Year of Executive Order No. 12866," OMB Report (Oct. 1994).

duplicative, unnecessary, or not cost-effective, there is no effective mechanism to ensure that such reviews actually take place. In short, federal agencies are unlikely to review their existing rules on a regular basis unless legislation is enacted requiring them to do so.

In addition to E.O. 12866, the Clinton Administration has announced several other public reviews of its regulatory activity. For example, EPA announced its Common Sense Initiative ("CSI") two years ago. CSI was designed to encourage intergovernmental coordination and technological innovation in pollution control. In practice, CSI has provided little in the way of true reform. Despite much fanfare, a proposed CSI project known as the pulp and paper cluster rulemaking (as originally proposed) did not significantly reexamine or harmonize command-and-control-style regulation. One portion of the proposed rule designed to control air pollutants alone might have cost $4.4 billion. The total cost for the cluster rule might have been as high as $11.5 billion for very small benefits. As a result of public criticism and congressional pressure, EPA was forced to abandon its initial rulemaking plans.

After the House began legislative action on H.R. 450 and H.R. 9, President Clinton announced a new regulatory reform agenda that is fully consistent with the purposes of the Sunset and Review Act. In a speech on February 21, 1995, the President acknowledged that the regulatory culture that has permeated the government needs fundamental change. The President instructed all regulatory agencies "to go over every single regulation and cut those regulations which are obsolete * * * and make a report to me by June 1st, along with any legislative recommendations [needed] to implement the changes that would be necessary to reduce the regulatory burden on the American people." Weekly Comp. Pres. Docs. 280 (Feb. 27, 1995). See also id. at 281 ("this is very important. By June 1st, I want to know which obsolete regulations we can cut and which ones you can't cut without help from Congress.").

The agencies' response to President Clinton's directive, however, has been disappointing and again underscores the need for congressional action that will be legally binding on regulatory agencies. Instead of focusing on reforms that will actually reduce the regulatory burden on consumers and businesses, the agencies have largely turned the President's initiative into a housekeeping exercise. EPA, for instance, responded to the initiative by eliminating a number of rules from the Code of Federal Regulations (CFR)—but only rules that no longer are in effect. See, e.g., 60 Fed. Reg. 33915 (June 29, 1995) (rules eliminated are those that (1) "implement statutory provisions which have been repealed;" (2) "have expired by their own terms;" and (3) "have been vacated (i.e., declared void and of no effect by a court")). While these efforts are commendable, they are insufficient. Moreover, the Committee has found the past several months that many regulatory agencies are unwilling to discuss alternative means of regulation seriously.

On June 15, 1995, the Administrative Conference of the United States (ACUS) adopted Recommendation 95-3 on the "Review of Existing Agency Regulations." ACUS explained in is preamble that:

> There is increasing recognition * * * of the need to review regulations already adopted to ensure that they remain

> current, effective, and appropriate. Although there have been instances where agencies have been required to review their regulations to determine whether any should be modified or revoked, *there is no general process for ensuring review of agency regulations.* * * * The obligation to review existing regulations should be made applicable to all agencies, whether independent or in the executive branch. (Emphasis in italic.)

The ACUS recommendation contains many important features that are in the Committee legislation, including recommendations that legislation: should cover all agencies; "should assign to the President the responsibility for overseeing agency compliance;" should set priorities regarding which rules should be reviewed first; should provide adequate opportunity for public input; should not change the standard or availability of judicial review of agency action; and should review rules on a pre-set schedule subject to "sunset" dates.

The Sunset and Review Act takes the regulatory review concepts embodied in Executive Orders 12291 and 12866 and President Clinton's speech of February 21, 1995 and creates an efficient, accountable, and enforceable process for the review of existing rules. Given the scope of existing rules and their drain on the United States economy, H.R. 994 will provide a review mechanism to determine when rules are unnecessary and when rules should be modified to reflect the actual costs, benefits, and risks involved. Just as important, the review procedure will require agencies to take account of subsequent changes in technology, science, markets, and other factors. An enforceable review mechanism is an essential tool to ensure that regulatory programs make sense and do not overly burden the public.

Because current law does not require old rules to be reviewed, obsolete and duplicative rules remain in place when they no longer represent the most cost-efficient or effective means of dealing with particular problems. H.R. 994 requires federal agencies to listen to the public's comments on their existing regulatory programs and evaluate whether improvements can be made in light of changing conditions, new information, and experience under the current rules. In this way, the Sunset and Review Act provides a mechanism for eliminating conflicting, duplicative, and unnecessarily costly regulations in an era when regulations impose an enormous burden on our economy.

III. LEGISLATIVE HEARINGS AND COMMITTEE ACTIONS

H.R. 994, the bipartisan "Regulatory Sunset and Review Act of 1995," was introduced by Reps. Jim Chapman, John Mica, Tom DeLay, Nathan Deal, and Gene Green on February 21, 1995, and referred to the Committee on Government Reform and Oversight and the Committee on the Judiciary. On February 24, 1995, Government Reform and Oversight Committee Chairman William F. Clinger, Jr. referred the bill to the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs for its consideration.

A. Subcommittee action

On March 28, 1995, Chairman David M. McIntosh convened the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (the Subcommittee) for the first day of hearings on H.R. 994. The witnesses at the hearing included the principal congressional sponsors of the legislation, the OIRA Administrator, an administrative law and regulatory expert, private citizens, and business people concerned about federal regulations.

The Honorable John Mica and the Honorable Jim Chapman testified strongly in favor of the bill. Congressman Mica testified that over-regulation has become the number one job killer in the United States and that it penalizes American business, sending more American jobs overseas than any other action by the federal government. He also stated that a commonsense approach was needed to review the massive number of regulations that are already on the books. Congressman Mica said that because technology and communications now outpace regulations, it is critical to review, revise, and discard unnecessary regulations on a regular basis.

Congressman Chapman testified that the regulations contained in the Federal Register for just the past twelve years were monumental. He explained that the regulatory reforms in H.R. 9 would provide prospective relief only, and that Congress needed to address federal regulations already on the books that are counterproductive and anti-competitive. He said that every President in recent history has attempted to deal with excessive regulatory burdens by executive order, but that the agencies have not faithfully complied with the Presidents' executive orders.

The Honorable Sally Katzen, Administrator of the Office of Information and Regulatory Affairs, OMB, testified that the Clinton Administration agreed with the bill's goals but did not agree with all of the provisions in the original version of H.R. 994. Ms. Katzen questioned why the original version of H.R. 994 applied to every regulation without a monetary threshold or all of the traditional exemptions found in the Administrative Procedure Act (APA). She also said that some of the language used in the original bill was ambiguous or inconsistent and might result in litigation. Ms. Katzen was opposed to providing citizens even the limited right of judicial review of agency action provided in the APA. At the same time, she said that she thought the review process should be open to more public comment as provided in the APA. In addition, she was concerned that the bill could divert agency resources away from other regulatory activities. Ms. Katzen testified that S. 291, a regulatory reform bill introduced in the Senate, had a "look back" provision that she believed was more workable.

Mr. Gene Schaerr, a partner at Sidley & Austin law firm and former Associate Counsel to the President, testified in favor of H.R. 994. Mr. Schaerr said that every regulatory system needs some mechanism in place to systematically review and abolish outdated or unnecessary regulatory requirements or the economy will be seriously impaired. He stated that there is currently no check on the power of regulatory agencies to issue regulations that impose staggering costs on private enterprise. He recommended reducing the review period for existing regulations to three years and requiring agencies to apply a cost/benefit standard when they review their

regulations. He suggested that the cost/benefit standard should be the main review criterion and that agencies should simply consider the remaining factors identified in the bill to determine whether the cost/benefit standard is met.

Mr. Charles Bechtel, CEO of the Harold J. Becker Company, Inc. and President of the National Roofing Contractors Association, testified in support of H.R. 994. Mr. Bechtel stated that H.R. 994 is necessary to establish a thorough regulatory review process to remove the stranglehold that regulations have on economic growth. He said that the impact of government regulations on his small business is staggering because of regulatory discrepancies. Although OIRA is supposed to reduce these discrepancies, he said the problem has not been alleviated. He testified that small business owners must become experts in OSHA, DOT, and EPA regulations—to name a few. He believed that a mandated review of regulations would result in the termination of outmoded and misguided rules. Mr. Bechtel said that H.R. 994 would impose a disciplined, enforceable regimen of review for federal agencies.

Ms. Kaye Whitehead, who owns and operates a small family farm near Muncie, Indiana, testified in strong support of H.R. 994. Ms. Whitehead testified that farmers cannot keep up with the thousands of burdensome farming regulations that agencies issue each year. She testified that there are 75 handbooks of regulations that deal with grain farming alone, and that in 1994, there were 1,180 regulatory changes for farmers in her county. She said that many of these regulations conflict with each other. Ms. Whitehead testified that state EPA officials (following guidelines from Washington) and USDA Soil and Conservation Service officials contradict each other regarding how to dispose of manure, such as that from her pig farm. One agency required her to plow it into the soil while the other mandated that she spread it on top of the ground. By complying with one rule, she automatically violated the other. She testified that she does what makes here neighbors happy and plows the waste into the soil. Ms. Whitehead said that while farmers are expected to be major players in a global market, over-regulation is eroding American farmers' competitive advantages.

Mr. Steven Dean, who operates a family-owned sawmill and lumber treating company in Gilmer, Texas, testified in favor of H.R. 994. As the head of one of the largest employers in the county, Mr. Dean charged the federal government with being his company's "number one problem." Mr. Dean's testimony included various anecdotes revealing the excessive and counterproductive nature of many of the regulations to which his company is subjected. He produced a piece of pressure-treated "two-by-four" lumber, which he said the EPA deemed to be "very, very, very hazardous." He also said that he had to seek the assistance of a professional engineer to obtain a federal permit to deal with rainwater runoff on his property. Mr. Dean expressed aggravation at what he perceived as the prevailing attitude that every possible problem must be dealt with by regulation and that people are not responsible for their own behavior.

Mr. Joe Bob Burgin, President of the Sulphur Springs Chamber of Commerce, owns and operates two convenience stores in Sulphur Springs, Texas. Mr. Burgin testified in favor of H.R. 994 because

he said that any attempt to reduce the number of local, state, and federal regulations imposed upon small business people was a step in the right direction. Mr. Burgin was especially critical of recent federal regulations that he said made it difficult for him to run a profitable business. He described several regulations regarding fuel storage tanks with which he had to comply that he believed were unnecessarily burdensome and prescriptive. In addition, he said that the regulations mandated that he replace his storage tanks by 1998. He said that these regulations highlight "only the tip of the environmental regulatory iceberg." Mr. Burgin summarized his plight by saying that he and other small businesses were "choking to death on" and "drowning in" excessive federal regulations.

Mr. Paul Mashburn, owner and President of Viking Builders in Winter Park, Florida, also testified in favor of H.R. 994. He said current regulatory overkill is the reason that Viking Builders is no longer in construction and development activities, resulting in lost jobs. He mentioned three major regulatory problems that are important to America's builders. First, he said the EPA's and Army Corps of Engineer's guidelines on wetlands classifications are questionable and have forced builders to wait two to three years and spend hundreds of thousands of dollars to obtain necessary permits, all of which builders have to pass on to consumers as a hidden tax. Second, he complained about the economic impact of determinations under the Endangered Species Act. Mr. Mashburn testified that the designation of land in Texas as protected habitat reduced the value of the land dramatically, including the value of people's homes. Lastly, he testified that the numerous OSHA regulations are too lengthy and non-specific. He said OSHA often does not distinguish between a small home remodeling site and a major industrial or commercial works project.

David Vladeck, Director of the Public Citizen Litigation Group, testified against the original version of H.R. 994. However, he said that there is a need for a mechanism to ensure that regulations imposed on businesses are not obsolete or outdated. Mr. Vladeck suggested strengthening judicial review of agency regulatory action, utilizing the petition process in the Administrative Procedure Act, and scrutinizing statutory mandates. He also said that industry needs the complex documents issued by federal agencies and that regulated industries create a demand for guidance documents.

At the request of four minority Members of the Subcommittee, Chairman David McIntosh scheduled a second day of hearings with additional testimony heard from Administration witnesses on their concerns with H.R. 994 as originally introduced. On May 2, 1995, the Subcommittee reconvened pursuant to notice and heard testimony from officials of the Securities Exchange Commission (SEC), the Department of Health and Human Services, the Department of Agriculture, the Department of Treasury, the Department of Transportation, and the Federal Communications Commission (FCC).

SEC Commissioner Richard Roberts testified that he shared the goals of H.R. 994, but expressed concerns about how the bill's regulatory review process would affect the SEC. Commissioner Roberts said that the original version of H.R. 994, which covered almost all rules, did "not adequately distinguish between those rules that are critical to the functioning of our markets that may need careful and

constant monitoring or that deal with areas in which specific problems have arisen, and those that are not and do not." He said that because the original version of H.R. 994 required agency resources to review many non-problematic rules, less attention would be paid to key regulations or to the immediate problems that affect the securities markets. He claimed this would adversely affect both the securities industry and investors.

Ms. Judith Feder, Principal Deputy Assistant Secretary for Planning and Evaluation in the Department of Health and Human Services, testified that the Department strongly agreed with the objective of H.R. 994 and commended the idea "that no regulatory burdens continue without careful evaluation and an affirmative decision to continue them." However, Ms. Feder was skeptical about the impact the original version of H.R. 994 would have on the Department's programs. Ms. Feder suggested that, in practice, the original bill might produce an "uneven process." She said the original bill might require "cumbersome, complex, and unnecessary steps in reviewing every existing regulation." Instead, Ms. Feder suggested that the regulatory streamlining effort focus more narrowly on the desired goals while providing flexibility in attaining them.

Mr. James Gilliland, General Counsel to the Department of Agriculture, testified that the Department of Agriculture also agreed with the objectives of H.R. 994. However, Mr. Gilliland said that he was opposed to the original version of H.R. 994 because he did not believe it provided "an effective or efficient means of assuring that unnecessary regulations are eliminated." Mr. Gilliland stated that he thought the original scope of the bill was too broad, and that the eighteen review criteria were inappropriate for the review of all regulations. He testified that the Agriculture Department already has a regulatory review process which he believed "works," and guards against potentially complex and uncertain rules. In addition, he believed Executive Order 12866 had improved their regulatory process tremendously. Because of these existing procedures at the Department of Agriculture, Mr. Gilliland believed that H.R. 994 was unnecessary for his Department.

Mr. Edward Knight, General Counsel to the Department of the Treasury, agreed with the other witnesses that "principles of good government and sound regulatory policy demand that agencies periodically review their regulations [to ensure] that they are necessary and working as intended, reflect current statutory authority, and impose the least burden on the public consistent with legitimate regulatory objectives." Mr. Knight testified that the Treasury Department already reviewed its regulations to make them less burdensome. Moreover, Mr. Knight thought the original version of H.R. 994 was flawed because its scope was too broad, and as originally written, it would have required significant agency resources. Mr. Knight also said that the definition of a rule did not distinguish between regulations published only in the Federal Register and those codified in the Code of Federal Regulations.

Mr. Stephen Kaplan, General Counsel for the Department of Transportation, testified against H.R. 994 largely because he believed the bill was unnecessary compared to the demands it might place on his agency. Mr. Kaplan testified that the Department of

Transportation already reviewed its own regulations and, in response to President Clinton's order, would produce a list of DOT regulations that it should modify or eliminate as obsolete, unnecessary, or overly burdensome. Moreover, Mr. Kaplan questioned the necessity of certain of the eighteen review criteria in the original version of the bill. Mr. Kaplan also said that it might take the Department of Transportation longer than seven years to review certain of its rules.

Mr. William Kennard, FCC General Counsel, testified that "the FCC strongly support[ed] H.R. 994 goal of eliminating unnecessary regulation." Mr. Kennard said that the FCC is committed to regular review of its regulations and that it has elimated numerous regulations, streamlined many others in recent years, and sought to ensure that those regulations kept in place further the development of pro-competitive markets and new services to the benefit of American consumers. He also explained that the FCC already uses a sunset mechanism on certain types of regulations. Yet, Mr. Kennard said that he believed that a targeted sunset approach is preferable to the one contained in the original version of H.R. 994, which covered almost every regulation.

Congressman Paul Kanjorski, one of the Members of the Subcommittee who requested the second day of hearings, disagreed that current agency reforms and processes would resolve the problems. In particular, Rep. Kanjorski admonished the agency witnesses for not providing constructive suggestions for improving H.R. 994:

> Listening to the testimony of the panel, I come to the conclusion that you're almost defenders of the status quo. And although I know the administration, over the last two years, has endeavored to [improve the regulatory process], * * * I'm not sure the panel and the administration [understand] the frustration that brings about this type of legislation. * * * There are millions and millions of average Americans, millions of small business people, that totally feel overwhelmed in dealing with the Federal government. * * * [T]he people are so frustrated out there, they're going to do anything to change the circumstances. There's got to be a middle ground of reasonableness. * * * But I don't hear a reasonable alternative put forth as to what we really should do. * * * And I'm just telling you from the position of a Democratic member of Congress—if you all don't tell us how to change it, it's [still] going to be changed. * * * I don't think it's good enough for you to come up here and tell us why this won't work. I think you've got to come up here and tell us what we have to do to make a more user-friendly government and a fairer government.

In addition to the testimony of the hearing witnesses, the Subcommittee received written testimony from a variety of sources. Among the groups to submit written testimony was the American National Standards Institute (ANSI). Sergio Mazza, President of ANSI, explained that the member organizations of ANSI were composed of private sector and federal, state, and local government

standards writers. There are approximately 11,500 ANSI-approved American National Standards that provide ratings, test methods, performance, and safety requirements for a large number of industries. ANSI determines whether standards meet the necessary criteria to be approved as American National Standards, including whether the proposed standard is contrary to the public interest, contains unfair provisions, or is unsuitable for national use.

Government representatives work closely with ANSI and often participate in the standards writing process. Many government bodies and agencies adopt or incorporate ANSI-approved standards in lieu of their own rulemaking in such areas as architecture, engineering, construction, nuclear safety, medical equipment, heating equipment, financial services, radiation protection, electrical codes, and many others. In fact, OMB has instructed federal agencies to utilize such industry standards whenever possible and practicable. See OMB Circular A119, 58 Reg. 57,643 (Oct. 26, 1993); see also Administrative Conference of the United States Recommendation 94–1 (encouraging federal agencies to use such standards to meet regulatory needs). For example, there are over 200 instances in the Code of Federal Regulations referring to or incorporating the National Fire Protection Association codes and standards alone.

Mr. Mazza wrote that "under ANSI's Procedures for the Development and Coordination of American National Standards, all such standards must be revised, reaffirmed or withdrawn at a minimum of every five years." Mr. Mazza described the ANSI three-step standards review process that is quite similar to the three-step agency review process ultimately adopted by the Committee:

> In order to revise or reaffirm an American National Standard, the standards developer must fulfill due process requirements and demonstrate that there is consensus. The standards developer must * * * [provide in ANSI's publication "Standards Action"] public notice that the standard is beginning to be reviewed to determine if it should be revised or reaffirmed. Interested persons may submit comments or may participate in the review process. When a course of action is decided upon, the standard then undergoes a more lengthy public review period which also is announced in "Standards Action."
>
> The standard ultimately is voted upon by the consensus body whose members are representatives from directly and materially affected interest groups, often including regulators at the federal, state and local level. * * * If it is determined that the standard is technically relevant and should be reaffirmed, the process generally takes about six months. If it is decided that the Standard should be revised, the process will take longer. In some cases, if the standard has become obsolete or not pertinent, it is withdrawn as an American National Standard. *The net result is that the American National Standards are subject to a continuous review cycle to determine if they are still relevant and effective.* (Emphasis in italic.)

On May 18, 1995, the Subcommittee met pursuant to notice to mark-up H.R. 994. Chairman McIntosh offered a bipartisan sub-

stitute on behalf on behalf of himself and more than two-thirds of the Subcommittee Members as co-sponsors that addressed many of the issues raised by the Administration and other witnesses about the original bill and made the sunset review process more than clear and workable. The Subcommittee passed the bipartisan substitute bill on a voice vote without amendment. The principal changes reflected in the bipartisan subcommittee substitute bill were as follows:

(1) *Rules Covered.* Agencies would automatically review only significant rules. A petition process would allow the public and appropriate Committees of Congress to request agencies to review less significant rules. In addition, some generic, multi-agency exceptions were added to the type of rules covered by the bill.

(2) *Criteria for Review.* Each agency would solicit public comment on a rule's actual costs, burdens and other issues related to its past implementation, including whether the rule is obsolete, unnecessary, duplicative, or otherwise inconsistent with the requirements of other federal rules. However, the ultimate review criteria would be the same criteria that applies to the issuance of analogous new rules.

(3) *Sunset Review Termination Dates.* To make the initial reviewing task more workable for the agencies and the public, the bill would stagger the initial review of existing significant rules over a seven-year period. In addition, the first review of new, capital-intensive rules or new rules promulgated pursuant to a negotiated rulemaking procedure would take place after seven years.

(4) *Centralizing and Coordinating the Review Process.* The OIRA Administrator would receive additional authority to group related or conflicting rules for simultaneous review by the issuing agencies. The Administrator also would be required to review the preliminary reports of the agencies and forward recommendations on how to resolve any regulatory conflicts. Finally, the Administrator would have the role of informing the public of the rules that are subject to sunset review and the termination dates for each rule.

(5) *Review Timetable Established.* The substitute also contained a reasonable timetable which agencies would follow so that each sunset review is completed in an orderly manner and well ahead of the rule's potential termination date.

B. Full Committee action

On July 18, 1995, the full Committee met pursuant to notice to mark-up H.R. 994. Chairman Clinger offered a bipartisan substitute to H.R. 994. The principal changes reflected in Chairman Clinger's substitute include the following:

(1) *Rules Covered.* The substitute expanded the generic, multi-agency exceptions to the type of rules covered by the bill. Covered rules do not include: rules that are reviewed and changed at least every year or are reviewed and modified regularly based on changing seasonal or economic conditions; rules that grant a product approval, license, or permission or relieve a restriction; and rules that the Administrator certifies in writing are necessary for the enforcement of the federal criminal laws.

(2) *Prioritization of Reviews.* Additional guidance was provided to the OIRA Administrator on how to prioritize the schedule of sunset

reviews, for example, by giving priority in time to those rules that impose the greatest cost on the regulated community or are otherwise the most problematic rules.

(3) *Revised the Petition Process.* The substitute revised the petition process to lessen the chance that the Administrator will be burdened with frivolous petitions for sunset review, and lengthened the time that the Administrator has to respond to a valid petition.

(4) *Clarified the Ultimate Review Criteria.* The substitute further clarified that other laws supply the ultimate review criteria and that the Sunset and Review Act does not create a mandate that overrides other laws.

(5) *Clarified the Effect of Rule's Termination.* A new provision clarifies the effect of a rule's termination. It provides that termination of a rule does not affect enforcement actions based on conduct committed while the rule was in effect. It also provides that a citizen or other non-agency party may rely on a terminated rule for guidance in actions brought by the agency until the agency promulgates a new rule or standard.

The Chairman and the Committee adopted three amendments to the Chairman's substitute by voice vote. An amendment offered by Rep. Kanjorski provided a sunset of the legislation ten years after enactment. An amendment offered by Rep. Slaughter increased the monetary threshold for a significant rule from fifty million dollars to one hundred million dollars. An amendment offered by Rep. Shays required agencies to solicit information regarding the positive benefits of a rule being reviewed, particularly health or safety or environmental benefits.

The amended bill passed on a recorded vote of 39–7.

IV. SECTION BY SECTION ANALYSIS

Section 1—Short title

The bill's title is the "Regulatory Sunset and Review Act of 1995."

Section 2—Purpose

The purpose of the legislation is to require agencies to conduct regular reviews of their significant rules to determine whether they should be continued without change, modified, consolidated with another rule, or allowed to terminate. The bill also establishes a petition process that allows the public and appropriate committees of Congress to request that less significant rules be reviewed in the same manner. The bill specifies the procedure agencies must follow to consider the comments of the public, the regulated community, and the Congress regarding the actual costs and burdens of rules, and whether the rules are obsolete, unnecessary, duplicative, conflicting, or otherwise inconsistent. Rules continued in effect in any form must meet all the legal requirements that apply to new rules, including any applicable federal cost/benefit and risk assessment requirements.

Another purpose of the legislation is to provide the Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget authority to coordinate the sunset reviews conducted by the agencies and to make the Adminis-

trator principally responsible for the implementation of the Sunset and Review Act. The Administrator shall establish the agency sunset review schedule and shall designate any nonsignificant rules for sunset review in response to public petitions or congressional requests for such review.

Section 3—Review and termination of regulations

Section 3 provides for the termination of covered rules that are not reauthorized after the agency completes the sunset reviews. Section 3 specifies that covered rule shall have no force or effect after its applicable termination date (specified in section 7) unless the rule is reviewed and reauthorized in accordance with the procedures in section 6 and complies with the criteria in section 5.

The Committee expects this provision to operate only in cases where the agency, after a review, consciously determines that the rule should terminate. The Sunset and Review Act does not undermine any health or safety protections. The purpose of this legislation is simply to require agencies to regularly review their rules. The more important the rule is for the protection of human health, safety, or the environment, the more important it is that it be periodically reviewed, updated, and improved to make it more effective. Thus, no one should assume that any particular rule will expire, and if a particular rule is mandated by law, the issuing agency could not allow the rule to expire without replacing it. In sum, there is simply no reason for the Committee to believe that agencies will violate this or other laws that require them to keep important regulations in place.

Moreover, the bill contains a review timetable that requires agencies to complete each review well in advance of the potential sunset date.[20] For example, agencies must begin the review process and publish a sunset review notice at least two and one-half years in advance of a rule's potential sunset date. At least one year before its potential sunset date, the agency must publish a new proposed rule or a preliminary determination that the rule shall continue in its current form. If an agency does not comply with this schedule, it will be apparent well in advance of the sunset date, and the OIRA Administrator or any interested party may take corrective action to see that the agency completes the review on time. In addition, the Administrator may extend the scheduled sunset date for up to six months if an agency cannot revise the rule by its original sunset date or if the delay is necessary to prevent an emergency situation.

The Committee believes that agencies can easily follow the review timetable, particularly in light of the agencies' response to President Clinton's directive of March 4, 1995, which ordered them to review all of their rules and issue a report in less than three months on which rules should be streamlined or eliminated. Regardless of how long it takes an agency to issue a rule, two and one-half years is long enough to review it. If a rule is not problematic, it should not take much time or many resources to review it

[20] See the discussion of section 6 and 7 infra.

and reissue it.[21] If a rule is problematic, the agency should spend the time and resources it takes to make it right. If the Sunset and Review Act is to be effective, there must be a potential termination date.[22]

Section 4—Rules covered

Section 4(a) defines what is a "covered rule" that an agency must review pursuant to the bill.[23] A covered rule is: (1) a rule the OIRA Administrator determines is a "significant rule" under section 4(b); or (2) any other rule designated by the Administrator for sunset review. Because no rule is a "covered rule" unless the Administrator designates it for review, no rule can expire by operation of this legislation unless it first is designated for review. If there is a dispute about whether a rule should be designated by the Administrator for sunset review, the review clock will not begin to run until the dispute is resolved. A rule is not subject to termination until the Administrator designates the rule for sunset review or until a court with proper jurisdiction issues a final order providing that the rule is deemed designated for sunset review. In short, the definition of a covered rule helps ensure that no rule can expire inadvertently.

Section 4(b) defines a "significant rule" as one that the Administrator determines: (1) has resulted in or is likely to result in an annual effect on the economy of $100 million or more; (2) is a major rule as that term was defined in Executive Order 12291 (when that Executive order was in effect); or (3) was issued pursuant to a significant regulatory action, as that term is defined in Executive Order 12866. Since 1981, OIRA has been responsible for determining whether a rule is a major rule as defined in E.O. 12291 or constitutes a significant regulatory action as defined in E.O. 12866. The $100 million monetary threshold in section 4(b) is consistent with both Executive orders. Because the bill incorporates the definition of a "major rule" and a "significant regulatory action" that is in these executive orders, OIRA has the experience to make the determinations required by the bill.[24]

Sections 4(c) and (d) allow the general public and appropriate committees of Congress to request that the Administrator designate non-significant rules for sunset review. Section 4(c)(1) provides that any person adversely affected by a non-significant rule may request that the Administrator designate the rule for review. The Administrator shall designate the rule for review unless the Administrator determines that it would be unreasonable to conduct such a review of the rule. The standard of reasonableness is a def-

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[21] The Congressional Budget Office (CBO) examined the requirements of the bill and concluded that "the average cost of reviewing an individual rule, as required by H.R. 994, would be small." This led CBO to estimate that the bill could cost as little as $4 million per year for the entire government.

[22] Both bills reported out of committee in the Senate that require the review of existing agency rules contain an automatic sunset provision to ensure that the review will take place as scheduled. S. 291 was reported out of the Senate Committee on Governmental Affairs with a unanimous vote. S. 343, which was reported out of the Senate Committee on the Judiciary and considered on the Senate floor, contains a sunset and review section that is even more like the provisions of H.R. 994.

[23] See also section 13(4), which defines what constitutes a "rule" for purposes of the bill. Section 13(4)(A) defines what agency documents or other statements constitute a rule. Section 13(4)(B) defines what set of regulations shall be treated as a single rule. Essentially, each "part" of the Code of Federal Regulations shall be treated as one rule.

[24] See also the discussion of section 6(a).

erential one that allows the Administrator to distinguish between frivolous and meritorious petitions. Together with the deferential standard of judicial review that applies under existing law to such determinations, the Administrator has broad discretion to grant or deny public petitions.

Section 4(c)(2) imposes only three substantive requirements for a proper petition. It must be in writing, identify the rule for which sunset review is requested with reasonable specificity, and state on its face that the petitioner seeks sunset review or a similar review of the rule. To satisfactorily identify the rule, the petitioner need not list the formal name of the rule or provide a legal citation. However, the petitioner must describe the rule with sufficient specificity so that an appropriate agency official has no serious doubt about the rule's identity. All petitions that reasonably could be interpreted as requesting sunset review of a rule should be treated as satisfying the requirement of specifying that the petitioner seeks sunset review or similar review of the rule.

The Committee intends the petition process to be simple for the petitioner. The Administrator may provide forms or a format for the convenience of all concerned, but section 4(c)(2) makes it clear that a petitioner does not need to submit a petition on an approved government form or in an approved government format. Moreover, the petitioner need not make any special showing to establish a right to have the rule considered for sunset review, except that the petitioner must be "adversely affected by [the] rule" in order to obtain judicial review of any denial.

Petitioners must pay a twenty dollar fee pursuant to section 4(c)92)(C) to help defray the cost of the petition process. The fee also will help discourage the filing of frivolous petitions, such as those that do not provide information about why the rule should be reviewed. If the Administrator does receive large numbers of identical petitions requesting sunset review of the same rule, however, the Administrator may either: (1) designate the rule for sunset review and answer all of the petitions in the affirmative or (2) deny all the petitions with the same or similar response letter. In short, the Administrator need not specify a reason for a denial of a public petition and need not personalize each response.

In deciding whether to grant or deny a given petition, section 4(c)(1) directs the Administrator to take into account the number and nature of other petitions received on the same rule, whether or not they already have been denied. The number of petitions on the same rule is particularly relevant if the petitions convey different information about why the rule should be reviewed. Accordingly, the Administrator must consider each petition to determine if information or arguments contained in later petitions make the case stronger for granting the request for a sunset review. In other words, the Administrator should consider the cumulative evidence for designating a rule for sunset review in evaluating later petitions. Although the Administrator is given broad discretion to deny any petition, the Committee intends for the Administrator to exercise discretion whenever possible in favor of granting petitions for sunset review.

If the Administrator determines that a petition does not satisfy the minimal requirements of section 4(c), section 4(c)(3) requires

the Administrator to notify the petitioner of the problem within 30 days and provide information about how to formulate a petition that meets those requirements. The Administrator could fulfill the requirements of section 4(c)(3) by indicating which of the requirements the original petition did not satisfy those requirements.

Section 4(c)(4) directs the Administrator to make a determination and forward a response within 90 days after receiving a proper petition, except that the Administrator may extend such period by a total of not more than 30 days. The Committee does not intend the Administrator to routinely extend the response period, but to do so only when necessary to respond to an unusual and unexpected circumstance. Section 4(c)(5) allows a petitioner to file a civil action if there is a substantial delay in the Administrator's ruling beyond the period specified in section 4(c)(4). If a court finds there was a substantial and inexcusable delay beyond the period specified in section 4(c)(4) in notifying the petitioner of the Administrator's decision to grant or deny the petition, the petition shall be deemed to have been granted.

Section 4(c)(6) directs the Administrator to maintain a public log of petitions submitted which includes the status or disposition of each public petition. The log will allow Congress and the public to know of the Administrator's determinations in a timely manner.

Section 4(d) permits an appropriate committee of Congress, or a majority of the majority or non-majority party members of such a committee, to request in writing that the Administrator designate a non-significant rule for sunset review. The Administrator shall apply the same standard to these requests that applies to a public petition. However, there are two minor differences between a public petition and a congressional request. The first is that the Administrator must explain to the congressional committee making the request the reasons for any denial. This courtesy to a co-equal branch of government eliminates the need for the congressional committee to make a subsequent request for information in aid of its legislative duties. The second difference is that section 12(a) provides that a denial of a congressional request is not subject to judicial review.

Because of their legislative experience and oversight responsibilities, congressional committees often have special knowledge and access to unique information about regulatory programs within their jurisdiction. Even if the Administrator already has denied public petitions for the review of certain non-significant rules, it would be proper for the appropriate committees of Congress to make similar requests and provide additional information within their purview as to why such rules should be reviewed. Although a congressional committee would not be exercising any power not conferred to the general public when it makes such a request, the information it provides would be valuable. Moreover, the Administrator's response to the congressional request would assist the committee in performing its core lawmaking duties.

In addition to keeping a public log of public petitions, section 4(e) requires the Administrator to promptly publish a notice in the Federal Register after the Administrator designates a rule for sunset review, whether as a result of a public petition, congressional request, or for any other reason.

Section 5—Criteria for sunset review

Section 5 provides that a rule subject to sunset review must be authorized by law and meet all of the requirements that would apply under other laws or executive orders if it were a new rule. Such requirements include any applicable federal requirements for cost/benefit analysis and for risk analysis and risk assessment. However, section 5 does not create any new cost/benefit or risk assessment standards or any new decisional criteria. In short, this bill does not override or change the mandates of any organic act; i.e., this bill has no "supermandate." Agencies merely have to apply those requirements that exist under other laws. Moreover, agencies only need to apply such requirements to the extent that they would apply if the continued, modified, or consolidated rules were issued as a new rule. For example, if existing law does not require Internal Revenue Service rules to undergo cost/benefit analysis when they are newly issued, then Internal Revenue Service rules subject to sunset review would not need to undergo cost/benefit analysis.

Thus, a rule continued in effect after a sunset review, even one continued without any change, must meet the same legal requirements that would apply if the rule were issued as a new rule. Simply put, all rules continued in effect must comply with then current law governing the promulgation of rules. The Committee believes this is an important purpose of the legislation and one that is necessary to ensure that reauthorized rules are subject to the same requirements as new rules.

The requirement in section 5(a) that all rules must be "authorized by law" is intended to focus attention on this issue during the sunset review process. Although all rules must be authorized by law in any event, the Committee is aware of many rules of questionable validity and others whose citation of authority is no longer valid because of a change in law. The Committee intends that an agency conducting a sunset review expressly state the authority for an extended, modified or consolidated rule in its preliminary and final report on the sunset review of the rule.

Section 5(b) states the choice of law rule to apply if there is an irreconcilable conflict between an organic act that authorized the rule and another law, such as a law governing cost/benefit analysis or risk assessment. An irreconcilable conflict of law does not exist if the agency can exercise its discretion to comply with both laws. Statutes that do not to require cost/benefit analysis or risk assessment in rulemaking do not necessarily conflict with a later statute that does require such analysis to be performed. Agencies generally have discretion in issuing most rules and few, if any, statutes actually prohibit considerations of cost or risk. Thus, an irreconcilable conflict of law rarely will arise. The test of whether an irreconcilable conflict exists is if it would be impossible for the agency to comply with the requirements of both statues. A statute that actually prohibits an agency from considering costs in promulgating a rule and another statute that requires agencies to take the costs of rules into account presents a hypothetical example of a true conflict of law.

If an irreconcilable conflict of law does exist, the agency shall resolve the conflict in the same manner as if it would if the agency were issuing a new rule. Thus, if the agency cannot comply with

the legal mandates of several laws, the agency first should determine which law would prevail if it were issuing a new rule like the one under review. The agency then should apply that same choice of law rule to the rule under review. This reflects the Committee's judgment that future legislation may address the choice of law issue for new rules and that a rule subject to sunset review should satisfy the exact same legal requirements as a new rule.

Section 6—Sunset review procedures

Section 6(a) sets forth the functions of the Administrator under the Sunset and Review Act. Section 6(a)(1) governs the Administrator's duty to provide a notice of rules subject to review. Within six months after enactment, the Administrator must conduct an inventory of existing rules and publish a first list of covered rules. This first list will be comprised primarily of significant rules in effect on the date of the bill's enactment. Section 13(4)(B) specifies that a "part" in the Code of Federal Regulations (CFR) or an equivalent set of regulations if it is not contained in the CFR, shall constitute one rule. Thus, the Administrator essentially must determine how many CFR parts and equivalent sets of non-codified regulations satisfy the definition of a significant rule.

Because the definition of a significant rule in section 4(b) incorporates both the definition of "major rule" in E.O. 12291 and "significant regulatory action" in E.O. 12866, any rule that was determined originally to satisfy either of these definitions will almost certainly constitute the whole or a part of a "significant rule" within the meaning of this bill.[25] Thus, the first list of covered rules the Administrator publishes should include all, or almost all, of the regulations issued since 1981 that OMB determined to be major rules or significant rules pursuant to Executive Orders 12291 and 12866.

The Administrator should also consult the agencies to help identify other existing rules that fit the definition of a significant rule under section 4(b), including rules issued prior to 1981 and other rules that OMB did not review. President Clinton's directive of March 4, 1995 ordered the agencies to conduct a thorough review of every one of their rules in a three-month period. The information gathered in response to the President's directive should be useful in identifying any other rules that fit the definition of a significant rule. To the extent that the agencies fail to identify all possible significant rules, the Committee encourages the public to inform the Administrator of rules it considers significant under the legislation.

When the Administrator publishes the first list of covered rules subject to sunset review, the Administrator must state the potential sunset date for each rule on the list so that the reviewing agencies and the public will have ample notice of when each rule is scheduled for sunset review. For significant rules in existence at the time of enactment, the Administrator shall assign each rule to one of four groups. Pursuant to section 6(a)(2) and 7(a)(1), the Ad-

[25] It is possible that some rules that originally were determined to be "major rules" or "significant rules" under these executive orders have been modified sufficiently that they no longer fit that definition. Nevertheless, the relevant determination under the bill is whether the CFR part that contains the rule (if it is codified in the CFR) satisfies the definition of a significant rule.

ministrator shall specify the 4-year, 5-year, 6-year, or 7-year sunset date applicable to each group, to stagger the review of these rules.

In determining which rules shall be given priority in that assignment, section 6(a)(2)(B) provides that the Administrator shall consult with the appropriate agencies, and shall prioritize rules based on: the grouping of related rules as provided by section 6(a)(3); the cost of each rule to the regulated community and the public, with priority given to those rules that impose the greatest cost; consideration of the views of regulated persons, including State and local governments; whether a rule has recently been subject to cost/benefit analysis and risk assessment, with priority given to those rules that have not yet undergone such analysis or assessment; whether a particular rule was issued under a statutory provision that provides relatively greater discretion to the official issuing the rule, with priority in time given to those rules issued under provisions that provide relatively greater discretion; the burden of reviewing each rule on the reviewing agency; and the need for orderly processing and the timely completion of the sunset reviews of existing rules.

Section 6(a)(1)(B) provides that the Administrator shall publish an updated list of covered rules at least annually and specify the potential termination date for each rule on the list. An updated list should include the rules on earlier lists (unless they no longer exist), any new significant rules that have been issued since the publication of the last list, and any rules designated for sunset review as a result of a public petition or a congressional request.

Section 6(a)(3) provides for simultaneous sunset review of related rules. Section 6(a)(3) directs the Administrator to group related rules for simultaneous sunset review based on their subject matter similarity, functional interrelationships, and other relevant factors, to ensure a comprehensive and coordinated review of overlapping and conflicting rules. The Administrator shall group rules for simultaneous sunset review without regard to whether the same agency issued the rules. The Administrator also shall designate for sunset review any other rule that is necessary for comprehensive sunset review, whether or not such rule is otherwise covered by this legislation.

Section 6(a)(4) specifies that the Administrator shall provide timely guidance to agencies on how to conduct sunset reviews and the preparation of sunset review notices and reports required by this legislation, to ensure uniform, complete, and timely sunset reviews and to ensure notice and opportunity for public comment.

Section 6(a)(5) provides that the Administrator shall review and evaluate each preliminary and final report submitted by the head of an agency. Within 90 days after receiving a preliminary report, the Administrator shall transmit comments to the head of the agency regarding the quality of the analysis in the report, including: whether the agency has properly applied the review criteria in section 5; the consistency of the agency's proposed action with actions of other agencies; and whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate.

Section 6(b) specifies the agency's three-step review process, consisting of publishing a sunset review notice, a preliminary report,

and a final report. Section 6(b)(1) provides that a sunset review notice must be published by the reviewing agency or agencies at least two and one-half years before the potential termination date of each rule. An agency should begin the sunset review process even earlier if the agency believes it might take more than two and one-half years to complete the review and revise the rule.

Section 6(b)(1)(A) provides that the agency head shall publish a sunset review notice in the Federal Register and, to the extent reasonable and practicable, in other publications or media designed to reach persons most affected by the covered rule. Such other publications or media would include trade journals, newspapers, and other periodicals read by those persons most affected by the covered rule. Section 8(a) specifies the contents of the sunset review notice, which include the solicitation of information on twelve enumerated factors related to the rule's implementation. Section 6(b)(1)(B) provides that, at the time the agency publishes the sunset review notice, the agency head also must request the views of the Administrator and the appropriate congressional committees on whether to extend, modify, consolidate, or terminate the covered rule. The comments of the Administrator and the appropriate congressional committee should be made public and remain a part of the rulemaking record.

In reviewing a covered rule, section 6(b)(2)(A) requires the head of the agency to consider the public comments and other recommendations generated by the sunset notice. Section 6(b)(2)(B) provides that, at least one year before the termination date of the rule, the agency head must publish a preliminary report in the Federal Register and transmit it to the Administrator and the appropriate congressional committees. Section 8(b) details the specific requirements of the preliminary report, which shall include the agency's preliminary determination of whether the rule should be continued without change, modified, consolidated or terminated. If the agency recommends modification or consolidation of the rule, the preliminary report must contain the text of the draft rule and all other information that is required in a notice of proposed rulemaking under the Administrative Procedure Act (APA). If the agency recommends terminating the rule, it still must follow the notice and comment requirements of the APA, since this legislation is not intended to supersede any such requirements.

The preliminary report will provide the general public, the Administrator, and the appropriate congressional committees with an opportunity to comment upon the preliminary conclusions reached by the agency and the agency's proposed solution. Under section 6(b)(3), the agency must take the comments and other recommendations generated by the preliminary report into account in issuing its final report on the sunset review of a rule. Thus, the comments, recommendations, and information generated in response to the preliminary report provide a basis upon which the agency head should make a decision regarding a covered rule. Before issuing the final report, the agency also must consult with the appropriate congressional committee about its planned rulemaking action. At least 90 days prior to the termination date of the covered rule, the agency must publish its final report in the Federal Register and transmit it to the Administrator and to the appropriate

congressional committees. Section 8(c) specifies the contents of the final report, which shall include the text of any final rule and the factual findings and legal conclusions upon which the agency's rulemaking is predicated.

Section 6(c) provides that if a final report recommends that a covered rule be continued without change, modified, or consolidated with another rule, such action will take effect 60 days after publication of the final report, unless the Administrator or another officer designated by the President publishes a notice within that 60-day period stating that the rule should not be so continued without change, modified, or consolidated.

When different agencies simultaneously review the same or related rules, agencies should try to resolve any conflict prior to each agency's preliminary report. Under section 6(c), the Administrator or other officer designated by the President should ensure that regulations do not conflict and that they satisfy the requirements of this and other laws. If necessary, the Administrator may also extend the review period under section 7(b) to provide time to resolve any regulatory conflict. In short, the Committee believes it is necessary to give the President's representative some means to resolve inter-agency conflict and to ensure that the agencies carry out the intent of this legislation. If the Administrator or other officer designated by the President exercises his or her authority under section 6(c), such officer shall specify the reasons for doing so in the public notice.

Section 6(d) provides that if a covered rule terminates for any reason pursuant to this legislation, the rule shall not be reissued in substantially the same form unless the rule complies with section 5 and the Administrator or other officer designated by the President approves the rule. This provision eliminates any incentive there otherwise might be to allow a rule to terminate in an attempt to avoid the requirements of this bill. This is important because nothing in this legislation overrides an organic statute that requires an agency to issue a rule or keep it in place. Thus, allowing a rule required by statute to terminate would be as wrongful as repealing the rule.

Section 6(e) preserves the independence of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Comptroller of the Currency, the Federal Housing Finance Board, the National Credit Union Administration, and the Office of Federal Housing Enterprise Oversight by providing that the head of such agencies shall exercise the authority of the Administrator or other officer designated by the President, for purposes of section 6(c), section 6(d), section 7(a)(2)(B), and section 7(c). These agencies will have to conduct sunset reviews of their rules, consult with appropriate congressional committees on such reviews, and solicit comments from the public and the Administrator on the sunset review of their rules. The Administrator will also have the authority to set the initial sunset review schedule for these agencies and group related rules for simultaneous sunset review. However, the Administrator or other officer designated by the President will not have final review authority over the rules of these agencies; nor will the Administrator have certain other related authority. This preserves the in-

tegrity of these federal financial regulatory agencies, which is justified by the nature of their underlying statutes and because of their unique history, which in some cases includes a history of improper political interference.

Section 7—Termination dates for covered rules

Section 7 specifies the potential sunset dates on which covered rules will terminate unless the agency reviews the rule and extends it consistent with sections 5 and 6. For significant rules in effect on the date of enactment, the first potential termination date for the rule depends upon which of the four groups the Administrator assigns the rule, as specified in section 6(a)(2)(A). The potential termination date of rules placed in the respective four groups is 4 years, 5 years, 6 years, and 7 years from the date of enactment of this bill. For any significant rule the Administrator has not assigned to one of these groups six months after the date of enactment, the initial termination date is 4 years from the date of the bill's enactment.

With regard to significant rules that first take effect after the date of enactment of this bill, the first potential termination date is either three or seven years from the date the rule takes effect. If the Administrator determines as part of the rulemaking process that the agency issued the rule pursuant to negotiated rulemaking procedures or that compliance with the rule requires substantial capital investment, the first potential termination date is seven years from the date the rule takes effect. Otherwise the initial termination date is three years from the date the new significant rule takes effect.

The Committee believes that participants in a negotiated rulemaking procedure generally will provide sufficient input so that a subsequent review may not be necessary after only three years. The distinction between a capital-intensive and a noncapital-intensive rule provides the other ground for delaying the initial sunset review of a new rule. Businesses making a substantial capital investment to comply with a rule need to know that the rule will not terminate or be substantially modified a few years after implementation, which would allow others who did not comply with the rule to gain a competitive advantage. This exception promotes additional certainty and stability in the regulatory review process.

A rule that only imposes extensive record-keeping or reporting requirements on a number of entities is an example of a non-capital intensive rule. Although a business might purchase a computer program to help it comply with the rule, it is still probably a labor-intensive rule. By reviewing the rule after only three years, the agency will learn early if it is working as intended or if the rule needs to be modified, and if the rule costs more than initially projected. Moreover, no business would suffer a particular competitive disadvantage if the agency modified or terminated a labor-intensive rule after only three years. Instead, most businesses could benefit equally.

Many environmental regulations are examples of capital-intensive rules because they impose substantial costs. The reformulated gas rule is an obvious example of a capital-intensive rule because of the hundred of millions of dollars required ensure refinery com-

pliance. Yet, there is no set dollar threshold required in order for a rule to require a "substantial capital investment." A rule that requires a substantial capital investment for someone like Joe Bob Burgin, who testified before the Subcommittee, is one that requires him to spend thousands of dollars to replace his gas storage tanks at his convenience store. The used oil rule, 40 C.F.R. Part 279, provides another helpful example of a capital-intensive rule because it requires those who handle used oil process and store it using approved storage equipment, tanks, or other collection devices that cost a substantial amount of money. The handlers also must meet general facility standards for preparedness and prevention of fire, explosion, and unplanned releases of oil, and must have the ability to determine if used oil is contaminated with other hazardous wastes. It does not matter if most of the current handlers of used oil already had the capital equipment to comply with the rule before it was issued. To the extent that the rule imposes substantial capital costs on new entrants in the market, it is a capital-intensive rule.

The used oil rule is also an example of a rule that is phased-in over several years. The used oil rule will be phased-in over several years because different states will implement it over the course of several years.[26] Other capital-intensive rules frequently are phased-in over several years to allow the regulated community time to purchase the required capital equipment or to develop the technology necessary for compliance. The Sunset and Review Act requires a sunset review seven years after such a rule first becomes effective, which may mean seven years after the first phase of the rule becomes effective or seven years after the first State implements it. The Committee believes that those affected by the rule will be able to provide meaningful comments 5–7 years after such a rule is first made effective even if the rule is not completely phased-in at that time. The regulated community and other affected persons will know how difficult the first phase of the rule's implementation was and generally will know what problems might arise in the next phase of the rule's implementation. Any other approach would create an incentive for agencies to phase-in rules over long periods of time in order to delay the eventual review of the rule.

For rules subject to sunset review as a result of a public petition under section 4(c) or a congressional request under section 4(d), section 7(a)(3) specifies that the first potential termination date is 3 years from the date the rule is designated for sunset review. Under section 6(a)(3), if the Administrator designates a rule for sunset review because it is related to another covered rule, the termination date is the same as that for the rule with which it is grouped.

For rules that have undergone an initial sunset review and have been continued in any form, section 7(a)(5) provides that the next termination date is seven years from the original termination date. Thus, once a rule is reviewed and reauthorized, it is subject to sun-

[26] I should be noted, however, that state rules themselves are not covered rules subject to review or termination under this bill. See also the discussion of section 13(2), which defines an agency not to include agencies of States or the District of Columbia.

set review every seven years thereafter (unless the agency conducts another review of the rule prior to that time).[27]

Section 7(b) provides that the Administrator may grant a temporary extension of the termination date of a covered rule for up to six months by publishing a notice in the Federal Register that describes either necessary modifications to the rule and the reasons why the modifications cannot be made by the original termination date, or reasons why the temporary extension is necessary to respond to or prevent an emergency situation.

To ensure predictability in the rulemaking process, the Committee has established a review schedule that allows businesses to anticipate any review or revision of a rule years in advance. Under current law and practice, however, agencies can and sometimes do change their rules after a short period of time without taking into account the expenditures made in reasonable reliance on the rules. On some occasions, a new administration changes a rule to reflect different policies without adequate consideration of the reliance on the existing rule.

Section 7(c) provides that an agency may not engage in comprehensive review and significant revision of a covered rule more frequently than required by this section or another act, unless the head of the agency determines, and the Administrator concurs, that the likely benefits from such review and revision outweigh the reasonable expenditures made in reliance on the rule. There are some statutes that require agencies to review or revise specified rules more frequently than under this bill, based on a periodic schedule or upon the happening of some event (such as a technological development). Such regulatory reviews are "required by * * * another act" and would not be subject to the limitation on interim reviews in section 7(c). Section 7(c) also provides that "a law may be considered to require a comprehensive review and significant revision of a rule" (and thus no finding needs to be made) if it significantly revises the act that authorized the rule. In other words, if a statutory revision or reauthorization of an organic act requires revision of a rule, Congress has made the necessary finding that the rule must be changed.

When a rule has been amended or parts of it have been promulgated at different times, section 7(d) provides the means to determine the date of issuance of the rule, which is important for determining the when the rule must be reviewed next. If an agency issued various provisions of a covered rule at different times, then the rule as a whole shall be treated as if it were issued on the latter of either: (1) the date the agency issued the first portion of the rule, or (2) the date the agency completed the most recent comprehensive review and significant revision of the rule. Section 7(e) defines "comprehensive review and significant revision" to mean a sunset review, whether or not the rule is revised, or a review and significant revision of a rule consistent with section 7(c). Thus, if another law or reauthorization statute requires an agency to undertake a comprehensive review and significant revision of a particular rule, that rule's date of issuance would be the date the most

[27] For an explanation of why an agency might review a rule more frequently than every seven years, see the discussion of sections 7(c)–(e).

recent review and revision was completed. As a result, rules that are regularly reviewed under statutory schemes that are more frequent than every seven years may never have to undergo a sunset review as provided in this bill.

Section 8—Sunset review notices and agency reports

Section 8 lists the required elements of the sunset review notices and agency reports required by section 6(b). As noted in the analysis of section 6(b), it is important that the sunset review notices and reports provide an adequate record and contain the information specified in section 8(a) because they form the basis for public, Administrator, and congressional input as well as the basis for agency action as required by this bill.

Section 8(a) enumerates the mandatory elements of the sunset review notice required by section 6(b)(1). Agencies that are reviewing related rules or different parts of the same rule should publish joint sunset review notices so the public may send in one comment on the entire or regulated regulatory program(s). Each sunset review notice must request comments regarding whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate. If applicable, the sunset review notice must also request comments regarding whether the rule meets the federal cost/benefit and risk assessment criteria that would apply to an analogous new rule. In addition, the sunset review notice must solicit comments about the past implementation and effects of the rule, including twelve specified factors that the agency must consider in reviewing the rule:

(1) Agencies must solicit comments on the direct and indirect costs incurred because of the rule, including the net reduction in the value of private property, and whether the incremental benefits of the rule exceeded the incremental costs of the rule, both generally and with regard to the specific industries and sectors covered by the rule. When an agency first issues a rule, information is not always available upon which to base an accurate cost estimate. As a result, agencies have underestimated the true cost of compliance on many occasions. The information supplied in response to this factor will help agencies assess the actual costs of the rule. It will also help agencies assess the differential costs and benefits of the rule as it is applied to various industries and sectors.

(2) Agencies must also solicit comments on whether the rule as a whole or any of its major features are outdated, obsolete, or unnecessary due to changes in technology, the marketplace, or otherwise. Many federal regulations were first adopted under circumstances that have long since changed. This factor would require federal agencies to take notice of these changes. The FTC appears to have recognized this need, at least in theory, in its recent proposal to sunset certain types of cease and desist orders after 20 years. However, the Department of Justice sunsets similar orders after just ten years. An examination of several FTC orders still in place raises questions about whether they are anti-competitive in today's market. In short, government rules should not act as an impediment to changes in technology or the marketplace.

(3) The agency must solicit comments regarding the extent to which the rule or information required to comply with the rule du-

plicates, conflicts, or overlaps with requirements under rules of other agencies. Many federal rules impose overlapping or conflicting requirements. In some cases, compliance with one rule actually violates another rule. For instance, the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs drew attention to an OSHA rule that requires certain employees to wear masks that fit tightly around the mouth, making it difficult for employees with beards to wear the devices. Equal Employment Opportunity Commission rules, on the other hand, require employers to accommodate an employee who has a beard for religious or health reasons. OSHA falsely denied that it has a respirator rule "that even mentions facial hair," which proves just how badly OSHA needs to review its own rules.[28]

(4) In the case of a rule addressing a risk to health, safety, or the environment, the reviewing agency must solicit information comparing the perceived risk at the time the agency issued the rule with the extent to which risk predictions were accurate. When previous risk perceptions are not consistent with the current realities upon which sound regulations should be based, the whole foundation of the rule is in question. Agency perceptions of risk often differ with the opinion of non-agency experts. In one example, initial over-reaction regarding the crop protection chemical alar caused tremendous economic dislocation in the apple-growing sector with no concomitant environmental benefit—causing the price of apples to fall to their lowest point in years (around $7 for a 420 pound box), well below the $12 break-even point. Washington State apple growers alone lost $135 million for 189, 15 percent of their projected revenue of $875 million.[29]

(5) A reviewing agency also must solicit information about whether the rule unnecessarily impeded domestic or international competition or unnecessarily intruded on free market forces, and whether the rule unnecessarily interfered with opportunities or efforts to transfer to the private sector duties carried out by the government. Recent experience with environmental statutes has demonstrated that agencies can use market mechanisms to achieve results far superior to traditional command-and-control regulations. The acid rain reduction program, which is based on a market trading mechanism, is a notable example because it has dramatically reduced the projected program costs and greatly accelerated the cleanup. When statutes allow it, agencies should embrace market approaches wherever possible in their own regulations.[30]

Agencies also should consider whether the federal government should yield regulatory functions to other levels of government or to the private sector. The Clinton Administration has issued two position statements urging federal agencies to use private sector

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[28] See 29 C.F.R. 1910.134(e)(5) ("Respirators shall not be worn when conditions prevent a good seal. Such conditions may be a growth of beard [or] sideburns"). Moreover, the rule is enforced against workers who wear beards even if they demonstrate that they can safely use a respirator. One worker explained to the Subcommittee that his employer forced him to shave his beard pursuant to the OSHA rule despite proof that his beard did not interfere with his use of a respirator.

[29] Michael Fumento, "Science Under Siege" 19–44 (William Morrow & Co. 1993); see also Timothy Egan, "Apple Growers Brusied and Bitter After Alar Scare," New York Times, July 9, 1991, at A1 (citing similar statistics).

[30] EPA's proposed Open Market Trading Rule for Ozone Smog Precursors, 60 Fed. Reg. 39,668 (July 26, 1995), which capitalizes on the success of the acid rain reduction program, is an important step in the right direction.

standards whenever possible or practicable. OMB Circular A119, 58 Fed. Reg. 57,643 (Oct. 26, 1993), directs federal agencies to review their regulations at least every five years and "replace those for which an adequate and appropriate voluntary standard can be substituted." Administrative Conference of the United States Recommendation 94–1 encourages the use of private sector processes to meet regulatory needs. Examples of private sector regulation include voluntary industry standards, such as various industry codes, and independent laboratory testing which provides consumers with recognized seals of approval.

With respect to international competitiveness, the cost of complying with United States regulations in many cases greatly exceeds any similar cost borne by foreign producers. These costs imposed by our government undermine the ability of domestic producers, even those operating the most efficient facilities in the world, to complete on a level playing field with international competitors. In an increasingly global economy, United States producers are often placed at a significant disadvantage compared to foreign producers. In short, agencies need to focus more on the anti-competitive effects of their regulations.

(6) An agency must also request information about whether, and to what extent, the rule imposed unfunded mandates on, or otherwise affected, State and local governments. Although the recent passage of the Unfunded Mandates Act, Pub. L. No. 104–4, 109 Stat. 48 (1995), will require Congress to evaluate future statutes that impose unfunded mandates on state and local governments, existing regulatory programs account for significant unfunded mandates—often without real benefit. For example, under the Safe Drinking Water Act, EPA generally requires the identical expensive battery of tests for community water systems irrespective of what chemicals are found in each State. Although EPA will permit a State to waive testing requirements for certain chemicals if specific conditions are met, the waiver criteria are difficult to meet and require the State to invest additional technical and financial resources that few States can afford.[31] Efforts should be made to minimize costs imposed upon state and local governments whenever possible.

(7) The reviewing agency also must request information on whether compliance with the rule required substantial capital investment and whether terminating the rule would create an unfair advantage to those who are not in compliance with it. In some instances, companies have made significant investments to bring facilities into compliance with existing regulations. The disruptions caused by standing these investments may be significant and should be considered. Agencies should pay special attention to the competitive effect of terminating rules with which only certain entities have complied. For example, certain oil refiners have invested hundreds of millions of dollars to establish the infrastructure necessary to sell reformulated gasoline (RFG) in those areas of the country where it is mandated. Other oil refiners opted not to make similar investments, and currently, cannot participate in the RFG program. Repealing such a rule soon after it was implemented

[31] See generally 40 C.F.R. §§ 141.21–141.30.

would raise competitive issues that are not directly related to the merits of the original rule.

(8) The agency must solicit information about whether the rule constituted the least cost method of achieving its objective consistent with the criteria of the act under which the rule was issued, and to what extent the rule provided flexibility to those who were subject to it. There is a growing recognition that command-and-control regulations (i.e., when the government dictates the specific approach that citizens must take to comply with the statute as opposed to programs in which the government sets performance standards and allows entities to decide the best method of compliance) are costly and not always the best method of protecting human health and the environment.

Where affected parties are requested to suggest alternative compliance strategies, there is an opportunity for them to develop alternative methods of compliance that can potentially provide superior protection of human health and the environment for less money. The classic example of the effectiveness of this approach was demonstrated in a joint EPA-industry project, exploring source reduction of pollutants from industrial facilities. The Amoco Corporation's Yorktown, Virginia refinery was the test site. One of the key findings was that when there was flexibility to apply innovative approaches to emission reductions, rather than prescriptive regulatory methods, the project achieved significant cost savings. In fact, the results were dramatic. It was shown that about 97 percent of the emission reductions required by regulations could be achieved for about 25 percent of the cost by focusing on overall facility performance rather than following a prescriptive regulatory methodology.[32] If permissible, performance goals should be adopted that allow affected parties the flexibility to determine the best ways to meet those goals.

(9) Agencies must request information about whether the rule is worded simply and clearly, including clear identification of those who were subject to the rule. One of the most common complaints of the citizen witnesses who testified on behalf of H.R. 994 was that federal regulations are simply too long and too complex. Regulations should be concise, simple, and understandable. To satisfy procedural due process requirements in the Constitution and the APA, regulations must—at a minimum—provide fair notice of the conduct proscribed by the regulation.

A recent case illustrates just how unclear and uncertain government regulations can be. EPA sets rigorous standards regarding the distillation and disposal of polychlorinated biphenyls, or PCBs. As a result, a complex and often unintelligible regulatory regime has developed. One federal appellate court found this system so confusing that it said the regulated community could not know what constituted a violation. The court found that EPA's interpretation "could not have fairly informed [the defendant] of the Agency's judgment" because the regulation just as clearly allowed the activity as banned it. Further, EPA was: (1) unable even to identify the applicable portion of the regulation; (2) plagued by internal dis-

[32] Howard Klee, Jr. (Amoco Corp.) and Mahesh Podar (U.S. EPA), "Amoco-USEPA Pollution Prevention Project, Yorktown, Va.," p.v. (Dec. 1991, rev. May 1992).

agreement over the regulation between various EPA offices; and (3) guilty of changing its interpretation even during the course of the case.[33] Administrative agencies can and must provide clearer guidance.

(10) The reviewing agency also must solicit information about whether the rule created negative unintended consequences. As a general matter, the sheer cost of regulations increases the price of food and consumer goods and may force businesses to hire fewer workers or even go out of business. The Food and Drug Administration's elaborate and costly approval process often leads to a serious lag in time between the discovery of a life-saving drug or medical device and its approval. It has been estimated that FDA rules have resulted in tens of thousands of deaths in the United States because patients here do not have access to drugs or medical devices approved years earlier in other countries.[34] Sometimes, compliance with one environmental rule may have an unintended affect on another or related environmental problem. For example, the removal of asbestos from schools and other public buildings may result in exposure to more friable asbestos that can be as much as 100 percent more dangerous.[35]

(11) The agency must request comments on the extent to which the agency can reduce the information requirements under the rule. The purpose of this factor is to help reduce mandatory paperwork burdens. Small businesses in particular do not have the manpower or other resources to comply with needless paperwork burdens and must pass the costs on to consumers. If information sought by one agency is available from other federal agencies, such as the Census Bureau, the Internal Revenue Service, or from nongovernment sources, then it should be gathered from those other sources. In some cases, the information sought by government agencies is not even used. There also is concern that paperwork requirements are excessive and that government forms are overly burdensome. The federal government must try harder to streamline its reporting requirements and eliminate those that are unnecessary.

(12) The final factor requires agencies to request information regarding the extent to which the rule has contributed positive benefits, particularly health or safety or environmental benefits. The reviewing agencies already should be aware of the intended benefits of their rules, but it is important for them to obtain concrete information about how their rules are having a positive effect, especially if that benefit would be lost if a given rule were modified or allowed to terminate. The agencies should also solicit information regarding positive unintended consequences of their rules so that the agencies may consider those benefits when the rule is reviewed.

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[33] *General Electric Co.* v. *U.S. E.P.A.*, 53 F. 3d 1324, 1330–33 (D.C. Cir. 1995).

[34] See e.g., Sam Kazman, "Deadly Overcaution: FDA's Drug Approval Process," 1 "Journal of Regulation & Social Costs," 35 (Aug. 1990) (describing several instances where drug approval delays caused tens of thousands of deaths); David C. Murray, "The Human Costs of Regulation: The Case of Medical Devices and the FDA," Hudson Briefing Paper No. 183 (Hudson Inst. Nov. 1995) (FDA delay in approving medical devices causes thousands of deaths); Carolyn Lochhead, "FDA Assailed for Slow Testing of New Drugs," San Francisco Chronicle, A1 (Oct. 26, 1992) (FDA's nine-year delay in approving beta blockers may have resulted in tens of thousands of needless deaths); Peter Brimelow & Leslie Spencer, "Food and drugs and politics," Forbes, p. 115 (Nov. 22, 1993) (same).

[35] Frank B. Cross, "Asbestos in Schools: A Remonstrance Against Panic," 11 Column. J. Env'tl L. 73, 92 (1986).

Section 8(b) specifies the contents of preliminary reports on sunset reviews, which section 6(b)(2) requires the agency head to prepare. Preliminary reports must request public comments and contain: specific factual findings and legal conclusions of the agency head regarding the application of section 5 to the rule, the continued need for the rule, and whether the rule duplicates functions of another rule; a preliminary determination of whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate; and if the agency recommends consolidation or modification of the rule, the proposed text of the consolidated or modified rule and other relevant information required by law to be contained in a notice of proposed rulemaking under the Administration Procedure Act (APA). Thus, the preliminary report shall serve as or include a notice of proposed rulemaking under the APA if the agency believes the rule should be modified in any way. The preliminary report also shall provide the required notice under the APA if the agency proposes to terminate the rule.[36]

Section 8(c) specifies the requirements of final reports on sunset reviews. Final reports must contain: the final factual findings and legal conclusions of the agency head regarding the application of section 5 to the rule and whether the rule should be continued without change, modified, consolidated with another rule, or allowed to terminate; and in the case of a rule continued without change, modified, or consolidated with another rule, the text of the rule and a notice, consistent with section 6(c), extending the effectiveness of the rule as of the end of the 60-day period beginning on the date of that publication.

Section 9—Designation of agency regulatory officers

The head of each agency shall designate an agency official as the Regulatory Review Officer of the agency. The Regulatory Review Officer shall be responsible for the implementation of the Sunset and Review Act by the agency and shall report directly to the head of the agency and to the Administrator with regard to its implementation. In the case of agencies set forth in section 6(e), the Regulatory Review Officer shall report directly to the head of the agency and to the Administrator to the extent that the Administrator is responsible for supervising the agency's sunset reviews.

Section 10—Relationship to other law; severability

Section 10(a) provides that, unless there is a direct conflict with the provisions of this legislation, nothing in this legislation is intended to supersede the provisions of chapters 5–7 of title 5 of the United States Code, which is commonly referred to as the Administrative Procedure Act (APA). This provision is intended to make clear that a conflict with the APA should not be lightly inferred and that the courts should construe this legislation whenever possible to incorporate APA requirements. There is a direct conflict be-

[36] See also section 10(a), which provides that unless there is a direct conflict with the provisions of this legislation, nothing in this legislation is intended to supersede the APA. Because there is no direct conflict between H.R. 994 and the notice and comment provisions of the APA, nothing in H.R. 994 should be interpreted to supersede the APA notice and comment requirements for the modification or termination of a rule.

tween this legislation and the APA only if it would be impossible to follow the requirements of both laws. The time limitations on the availability of judicial review in subsection 12 (a) and (b) of this bill is a possible example of an exception to the APA because the APA does not provide time limits on the availability of judicial review of agency action. Nevertheless, these time limitations were chosen because they are analogous to provisions in many regulatory statutes.

Section 10(b) provides for the severability of the Sunset and Review Act in the event that any provision of it or the application of any provision to any person or circumstance is held invalid. In such a case, the remainder of the Act, or the application of such provisions to other persons and circumstances, shall not be affected. This expresses the congressional intent that no portion of Sunset and Review Act is so integral to its operation that Congress would want the Act to be struck down in its entirety if any portion of it is held invalid.

Section 11—Effect of termination of covered rule

Section 11(a) addresses the effect of a termination of a covered rule. However, there is no reason why rules that are required by law or that are necessary to protect the public health, safety, or the environment should terminate under this bill without being replaced. The Committee believes that agencies will review their rules according to the timetable provided in the bill and will not allow important rules to terminate without replacing them. President Clinton's directive of March 4, 1995 shows that agencies can expeditiously review their own rules when they are required to do so. Pursuant to that directive, the agencies reviewed every page of their rules and issued reports in three months on which rules should be streamlined or eliminated.

If an agency did allow a rule to terminate for some reason, section 11(a)(1) provides that the Sunset and Review Act shall not prevent the President or an agency from exercising any authority that otherwise exists to implement the statute that authorized the rule. The statute is what supplies the agency's enforcement authority, not the rule. Although a regulation may contain the agency's interpretation of the statute, it is rarely necessary for an agency to prove a violation of a rule in order to prove a violation of statute. Thus, the termination of a rule should not prevent the agency from enforcing the underlying statute.

In addition, this legislation does not affect the agency's authority to enforce related statues and rules, or to issue new rules under the statute at issue—subject to section 6(d). Thus, if a rule terminates, the agency may issue an interim rule or a new rule as specified in section 6(d). The President also has inherent authority under the Constitution and authority under many laws to issue executive orders to address or prevent emergency situations. Nothing in this legislation is intended to infringe or narrow such authority. In short, section 11(a)(1) ensures that the President and an agency can continue to enforce any statute or replace any important rule that has terminated.

Section 11(a)(2) addresses the legal effect of the terminated rule itself. In any agency proceeding or court action between an agency

and non-agency party, the terminated rule has no legal effect (subject to section 11(a)(3) regarding prior conduct) except at the request of the non-agency party. This means that a citizen or other non-agency party may rely on a terminated rule for guidance until the agency promulgates a new rule or standard.

A safe harbor rule issued by the Securities Exchange Commission (SEC) is a good example. Such a rule informs non-agency parties what actions they should take to comply with a securities statute. If such a rule were allowed to terminate and the SEC brought an enforcement action against the non-agency party, the SEC could not invoke the rule to prove a violation of the statute. The SEC would have to prove that the non-agency party violated the statutory standard without reference to the expired rule. In such a case, the court or administrative law judge may not defer the agency's interpretation of the statute found in the rule, but would have to make an independent judgment on what is the best interpretation of the statute. The non-agency party, however, could invoke the provisions of the safe harbor rule to show compliance with the rule and the statute. In short, the court or administrative law judge may not give deference to the interpretation of the statute contained in the rule unless the non-agency party invokes the rule to show compliance with the statute.

An Internal Revenue Service (IRS) interpretive rule or ruling is another good example because many people rely on such guidance documents to compute their tax liability. As discussed in the definitional section, the bill does not cover many IRS interpretive rulings and tax preparation documents. Assuming, however, that the bill covered such a document and it did terminate, taxpayers could continue to rely on the IRS document to compute their tax liability (or for other purposes) until the IRS replaced it. In an agency proceeding or court action, the taxpayer could continue to invoke the guidance document against the IRS to show that he paid the correct amount of taxes. Thus, an agency's failure to extend or reissue any rule will not harm a non-agency party.

Section 11(a)(3) is an exception to section 11(a)(2) and allows an agency to invoke a rule in an enforcement action that is based on conduct that occurred while the rule was in effect. Section 11(a)(3) provides that notwithstanding section 3, this bill shall not be construed to prevent the continuation or institution of any enforcement action that is based on a violation of the rule that occurred before the rule terminated.

Section 11(b) provides for tolling of any regulatory deadline until the agency reissues a terminated rule with such a deadline. In essence, any deadline based on or relating to a terminated rule is suspended until the agency that issued the rule issues a new rule on the same matter, unless otherwise provided by law. Such deadlines include deadlines established by court order implementing any federal rule.

Section 12—Judicial review

Sectin 12(a) provides that a denial or substantial inexcusable delay in granting or denying a petition under section 4(c) shall be considered final agency action for purposes of judicial review. It

also provides that a denial of a congressional request under section 4(d) is not subject to judicial review.

Section 12(b) establishes a time limitation for seeking judicial review of a final agency action. In the case of a final agency action denying a public petition under section 4(c) or continuing without change, modifying, or consolidating a covered rule, an action may not be brought more than 30 days after the effective date of that agency action. This is similar to the time limitation on the review of agency action in many regulatory statutes. In the case of an action challenging a delay in granting or denying a petition for a rule under section 4(c), an action for judicial review of a final agency action may not be brought more than one year after the period applicable to the rule under section 4(c)(4).

Section 12(c) provides that the Congress does not intend to affect the availability or standard of judicial review for agency regulatory action except as otherwise expressly provided in this legislation. Section 12 (a) and (b) provide a limited exception to the availability of judicial review. Nothing else in this legislation is intended to affect the availability or standard of judicial review for agency regulatory action. In short, this bill is fully consistent with the APA and the regulatory statutes that provide for judicial review of regulatory action. It is expected that the relatively limited judicial review allowed under those statutes will continue to have a positive influence on agency fidelity to the underlying law.

Section 13—Definitions

(1) The term "Administrator" means the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget.

(2) The term "agency" has the meaning given that term in section 551(1) of title 5, United States Code. This is a broad definition that includes almost all federal agencies except those in the judicial and legislative branches. However, this definition does not include agencies of the States or the District of Columbia. Because state agencies are not covered by this bill, their rules will not be affected.[37]

(3) The term "appropriate committee of the Congress" is defined, with respect to a rule, as each standing committee of Congress having authority to report a bill to amend the provision of law under which the rule is issued.

(4) Section 13(4)(B) provides that each set of rules designated in the Code of Federal Regulations (CFR) as a "parts" or each set of rules that is comparable to a "part" in the CFR shall be treated as one rule. Thus, if an agency revises a single section of a larger rule, or revises a small part of a larger regulatory program, that is not a separate rule subject to sunset review. Section 13(4)(B) should also be read in conjunction with sections 7(c)–(e), which specify how to determine the effective date of a rule when the agency has issued different parts of it at different times.

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[37] See also the appendix to this report, in which the Congressional Budget Office concludes that: "H.R. 994, the Regulatory Sunset and Review Act of 1995, as ordered reported by the House Committee on Government Reform and Oversight on July 18, 1995 . . . would not impose enforceable duties on state, local, or private parties, nor would its enactment result in direct costs to those entities."

The Committee's intent in sections 7(c)–(e) and 13(4)(B) is to define a rule so that agencies review coherent regulatory programs at the same time. In most cases, a CFR "part" or multiple CFR "parts" represent coherent regulatory programs. Section 6(a)(3) grants the Administrator the authority to group related rules, i.e., related parts of the CFR, for simultaneous sunset review based on their subject matter similarity and functional interrelationships "to ensure comprehensive and coordinated review of such rules." However, the Administrator may not designate less than a CFR part or its equivalent for review. The Committee believes that the scope of a rule needs to be defined in a uniform way to provide administrative certainty and to prevent an agency from breaking apart a rule to affect its status as a "significant rule" under section 4(b) or to affect whether the rule complies with the applicable review criteria. If an agency learns in response to the sunset review notice that only one section of a rule is problematic, then the agency need only address the concerns raised about that section and reissue the remainder of the rule in its current form. In other words, there is no harm in reviewing the entire CFR part. At the same time, commenters might suggest improvements to non-problematic sections of the rule that no one otherwise would have considered.

Section 13(4)(A) supplies the general definition of a rule. Subject to certain generic exclusions, the term "rule" is defined broadly to mean any agency statement of general applicability and future effect, including agency guidance document, designed to implement, interpret, or prescribe law or policy, or describing the procedures or practices of an agency, or intended to assist in such actions. This definition of a rule is similar to the definition in Executive Orders 12291 and 12866.

Although the definition of a rule should be broadly construed in most respects, the type of agency standards that qualify as a rule still must be "of general applicability and future effect." Many agencies, including the Treasury, Justice, and Commerce Departments, issue letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation. These letter rulings are sometimes published and relied upon by other people in similar situations, but the agency is not bound by the earlier rulings even on facts that are closely analogous. Thus, such rulings or opinion letters do not fall within the definition of a rule. IRS private letter rulings are a classic example of this type of agency statement. United States Customs Service letter rulings are another example of agency statements that are not of general applicability and future effect. Although the Customs Service states that the principles in a letter ruling may be cited as authority in transactions involving the same circumstances, such ruling is expressly made subject to modification and revocation without notice to any person, except the person to whom the letter was addressed. It should be noted, however, that even though letter rulings or opinion letters themselves are not rules within the meaning of this bill, the regulations that govern the procedure for considering and issuing such rulings usually will satisfy the definition of a rule.

The Sunset and Review Act also recognizes certain commonsense, generic exceptions to the general definition of a "rule." Although there are no specific agency exceptions, these multi-agency

exceptions exclude certain types of agency actions from the definition of a rule because their sunset review would not further the purpose of the Sunset and Review Act:

(i) Formal rulemaking pursuant to 5 U.S.C. § 556 and 557 is excluded because it is a form of agency adjudication. For this reason, such rules also are excluded from the APA notice and comment provisions.

(ii) Regulations or other agency statements that are limited to agency organization, management, or personnel matters are excluded because they do not affect the rights or benefits of parties outside the government. Such rules also are excluded from the APA notice and comment provisions.

(iii) Regulations or other agency statements related to a military or foreign affairs function of the United States are excluded because they often are an exercise of the President's constitutional authority as Commander in Chief and sole representative in diplomatic relations. Such rules also are excluded from the APA notice and comment provisions.

(iv) Regulations, statements, or other agency actions that are reviewed and usually modified each year (or more frequently), or are reviewed regularly and usually modified based on changing economic or seasonal conditions are also excluded from the definition of a rule. The first clause of this exception covers rules that are reviewed and modified more frequently than the schedule provided in this bill. It would serve little purpose to require rules that already are reviewed and modified each year to undergo a sunset review process that spanned two or more years. The second clause of this exception is intended to exclude a narrow type of agency action that is tied to changing market, seasonal, or economic conditions. Because these types of agency action are based on conditions prevailing at the time the action is taken, the review process provided for in the bill would not be productive: by the time the sunset review was completed, the underlying seasonal or economic conditions would have changed, and the results of the review would be irrelevant to an evaluation of the current policy decision. However, this exemption would not extend to permanent rules that underlie the agency action and are not regularly reviewed, such as definitional rules or rules that set forth the procedures that are followed in making such policy decisions.

Many, if not most, agencies have rules that fit within this exception. IRS tax preparation documents are a good example of agency statements that fall within the first clause of the exception. The IRS reviews most tax preparation documents and usually modifies them each year. The modifications might be based on changes in the tax law, changes in policy, or simply to make the documents more understandable. Although the modifications might not necessarily be based on changing economic or seasonal conditions, documents that are reviewed and usually modified each year (or more frequently) qualify for the exclusion for that reason alone.

Some agency rules might fit both clauses of the exception. Agricultural marketing orders are reviewed and usually modified each year and are based on seasonal or market (economic) conditions. The Department of Interior's hunting and fishing regulations also

satisfy both clauses of the exception because they are "reviewed and usually modified each year" and because they are "reviewed regularly and usually modified based on changing * * * seasonal conditions." The Committee also intends the national and regional fishery management regulations and analogous regulations to fit within this exception. The fishing industry depends on the timely issuance and adjustment of regulations to protect its supply of marine stock. Such rules are reviewed regularly (most are reviewed every year) and usually modified based on changing economic or seasonal conditions. Such decisions are based on conditions prevailing at the time the action is taken, which would render uproductive the review process provided for in the statute.

The Federal Reserve Board's monetary policy tools fall within this exception as well. The Federal Open Market Committee regularly reviews economic conditions and meets several times a year in order to determine the appropriate monetary policy directive, discount rate, and reserve requirements. These decisions obviously are based on changing economic conditions. Other bank regulators make periodic changes in their rules to reflect changing market or economic conditions that are analogous to the Federal Reserve's monetary policy decisions. The financial market regulators might also have rules that fit within this exemption. Although changes in the disclosure requirements for public offerings probably do not qualify under this exception, changes in the margin trading requirements might qualify if the agency reviews them regularly and usually modifies them based on changing economic or market conditions.

(v) Regulations or other agency actions that grant an approval, license, registration, or similar authority, or that grant or recognize an exemption or other actions relieving a restriction, or any agency action necessary to permit new or improved applications of technology or to allow the manufacture, distribution, sale, or use of a substance or product are also excluded from the definition of a rule. This is probably the largest category of agency actions that are excluded. Whether these determinations are made on an individual basis or by category, they are not the proper subject of sunset review for several reasons, including the fact-based nature of the decisions and the need for finality in such matters. Just a few of the examples that fall within this exclusion are product approvals, individual pesticide tolerances, import or export licenses, individual rate and tariff approvals, wetlands permits, grazing permits, plant licenses or permits, drug and medical device approvals, hunting and fishing season take limits, new source review permits, and broadcast licenses.

(vi) Regulations or other agency statements that the Administrator certifies in writing are necessary for the enforcement of the Federal criminal laws are also excluded from the definition of a rule. The Committee intends this exception to be narrowly construed because it believes that few regulations are necessary for the enforcement of the Federal criminal laws. Moreover, the phrase "the Federal criminal laws" does not include every criminal enforcement provision of an otherwise civil regulatory program. "[T]he Federal criminal laws" include the free standing criminal laws codified in title 18, United States Code, and elsewhere that

have analogues in the common law of crime. The Committee also intends to include other free standing criminal statutes, such as the controlled substances laws and the munitions and gun laws, because they are not merely an enforcement mechanism for an otherwise civil regulatory program. One important consideration is whether the statute as a whole is considered to be a criminal law and is enforced primarily through criminal sanctions. Under this test, most if not all regulatory statutes would not be a part of "the Federal criminal laws" within the meaning of section 13(4)(A)(vi). Although there are criminal enforcement provisions in many regulatory statutes, such as the environmental laws, these statutes as a whole generally are considered to be civil laws and criminal sanctions are not the primarily means of ensuring compliance with them. Thus, rules that implement the criminal enforcement provisions of regulatory statutes would have to be reviewed with the rest of the regulatory program. Any other reading of the criminal law exception would undermine the central purpose of the legislation, which is to require a review of significant regulatory programs.

Given the Committee's intent regarding what "the Federal criminal laws" mean, the Committee believes there are few regulations that are necessary for their enforcement. Most criminal indictments are brought solely on the basis of a criminal statute. Generally, no proof is offered at trial as to what the regulations provide. Thus, such regulations are not necessary for the enforcement of the vast majority of criminal laws. Agencies, therefore, would have to review such rules in the same manner as other rules covered by this legislation. The Committee notes one obvious exception. Drug convictions may depend on regulations that list the controlled substances. Examples such as this prompted the Committee to create this narrow exception.[38]

(5) The term "sunset review" means a review of a rule under the Sunset and Review Act.

Section 14—Sunset of this act

Section 14 provides that the Sunset and Review Act will have no force or effect after the ten-year period beginning on the date of the enactment of this legislation unless it is reauthorized by subsequent act of Congress. The first full cycle of sunset reviews will be completed within seven and one-half years after enactment of this legislation. At that time, Congress would be in a good position to reevaluate the effectiveness of the Sunset Review Act and make any changes that are necessary.

V. COMPLIANCE WITH RULE XI

Pursuant to rule XI, clause 2(1)(3) of the Rules of the House of Representatives, under the authority of rule X, clause 2(b)(1) and clause 3(f), the results and findings from committee oversight activities are incorporated in the bill and this report.

[38] The Federal Sentencing Guidelines may also be necessary for the enforcement of the criminal laws, but they are issued by an agency of the judicial branch that is not covered by the bill.

VI. BUDGET ANALYSIS AND PROJECTIONS

This Act provides for no new authorization, budget authority or tax expenditures. Consequently, the provisions of section 308(a) of the Congressional Budget Act are not applicable.

VII. COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 14, 1995.

Hon. WILLIAM F. CLINGER, JR.,
Chairman, Committee on Government Reform and Oversight, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 994, the Regulatory Sunset and Review Act of 1995, as ordered reported by the House Committee on Government Reform and Oversight on July 18, 1995. We estimate that enactment of this bill would result in additional costs to the federal government of at least $4 million annually, assuming appropriation of the necessary funds. This estimate assumes the Administration would use the broad discretion it would be granted under the bill to decide which regulations need to have a sunset review and that an average of at least 50 regulations would undergo such reviews each year.

The bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to H.R. 994.

Bill purpose

H.R. 994 would require the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) to categorize all existing regulations that would be covered by this bill into one of four groups. Regulations in the first group would cease to be effective four years after enactment of H.R. 994 unless reviewed in accordance with procedures that would be established by the bill. Regulations in groups two through four would expire in the fifth, sixth, and seven years following enactment of H.R. 994, unless reviewed. New regulations that would be covered by the bill would expire three years after they take effect unless the agency follows the sunset review procedures outlined by this bill. Certain new rules that involve either negotiated rulemakings or large capital investments would not expire for seven years.

H.R. 994 would apply to all existing regulations and future new rules that are estimated to have an annual impact on the economy of $100 million or more, or would:

result in a major increase in costs or prices for consumers, industries, governments, or geographic regions;

have significant adverse effects on competition, employment, investment, productivity, innovation, or international competitiveness of U.S. enterprises;

change the budgetary impact of entitlements, grants, user fees, or loan programs; or

have an adverse affect on the environment, public health, or safety.

Moreover, Congressional committees and citizens could petition federal agencies to request that other rules be reviewed according to the procedures specified in this bill. If the agencies do not find such petitions to be unreasonable, then they would also carry out the sunset reviews requested by these petitions.

Starting two and one-half years before the expiration of any rule, agencies would have to issue notice to the public and to the Congress of the sunset review, and would solicit comments concerning the cost and effectiveness of the rule. The agencies would then make preliminary and final reports on whether to extend, modify, or consolidate the rule, and would respond to public and Congressional comments.

H.R. 994 does not require that all existing or new rules be subject to a cost/benefit test or risk assessment review. Under section 5 of the bill, however, cost/benefit analysis and risk assessment reviews would be required to extend, modify, or consolidate existing rules if subsequent legislation were to require this kind of regulatory analysis for all new rules.

Section 13 of H.R. 994 would exclude a rule from the sunset provisions if it:

relates to a military or foreign affairs function of the United States;

concerns agency organization, management, or personnel matters;

is reviewed and usually modified each year (or more frequently), or if it is reviewed regularly and usually modified based on changing economic or seasonal conditions;

grants an approval, license, permit, registration, or similar authority; grants or recognizes an exemption or relieves a restriction; is necessary to permit new or improved applications of technology; allows the manufacture, distribution, sale, or use of a substance or product; or

is necessary for the enforcement of a Federal criminal law.

Estimated budgetary impact

Existing formal regulations are collected in about 6,800 parts of the Code of Federal Regulations (CFR). Approximately 1,400 parts of the CFR would be exempt from review because they relate to agency organization, management, personnel matters, or the military or foreign affairs functions of the government. We estimate that most of the remaining 5,400 parts of the CFR would not be covered by this bill, because they are already regularly reviewed, are necessary to enforce Federal Criminal laws, or involve approvals, licenses, permits and registrations. The Administration would have broad discretion in determining which rules would be covered by the provisions of H.R. 994 and, thus, in deciding how many reviews would be conducted.

Enacting H.R. 994 would increase federal costs, subject to appropriation of the necessary amounts, because the bill would require agencies to conduct regulatory reviews that they do not perform under current law. While the number of sunset reviews that would be conducted under the bill is uncertain, CBO believes that relatively few sunset reviews would be required because the Adminis-

tration would have broad discretion over choosing rules for review, and in deciding which rules would be exempt from review.

Based on information from regulatory agencies, CBO believes that the average cost of reviewing an individual rule, as required by H.R. 994, would be small. We estimate that for most rules the cost of publishing a sunset review notice, soliciting public comments, and making preliminary and final recommendations in response to these comments would average about $75,000 per review. CBO cannot predict how the Administration would use discretion granted under this bill to determine which rules should have a sunset review, but assuming that an average of at least 50 rules would be reviewed annually, we estimate the bill would cost at least $4 million per year.

Previous estimate

On June 16, 1995, CBO prepared a cost estimate for H.R. 994 as ordered reported by the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs of the House Committee on Government Reform and Oversight on May 18, 1995. CBO estimated that the earlier version of H.R. 994 would require agencies to conduct 330 to 670 sunset reviews annually at a cost of $25 million to $50 million per year. The difference between our cost estimates for these two versions of H.R. 994 reflects the difference in criteria for exempting regulations from sunset review. As compared to the earlier version of H.R. 994, the bill as ordered reported by the full committee would significantly limit the definition of rules for the purpose of conducting sunset reviews and would provide considerable discretion to the Administration for making decisions about which rules to review.

State and local costs

To the extent that change in a federal rule would mandate change at the state level, the bill could result in direct costs to state governments. However, CBO has not been able to identify any rules in this category. CBO anticipates that most rule changes would not require modification of procedures or regulations by states, although states may choose to do so. Budgets of local governments would not be directly affected by this bill's provisions.

If you wish further details on this estimate, we will be pleased to provide them. The staff contacts are Kim Cawley and Karen McVey.

Sincerely,

JAMES L. BLUM,
(For June E. O'Neill, *Director*).

VIII. INFLATIONARY IMPACT STATEMENT

In accordance with rule XI, clause 2(l)(4) of the Rules of the House of Representatives, this legislation is assessed to have no inflationary effect on prices and costs in the operation of the national economy.

IX. CHANGES IN EXISTING LAW

Clause 3 of the rule XIII of the Rules of the House of Representatives requires that any change in existing law made by the bill, as

reported, be shown with the existing law proposed to be omitted enclosed in black brackets, new matter printed in italic, and existing law in which no change is proposed shown in roman. This provision is inapplicable for the reported bill, which makes no change in existing law.

X. COMMITTEE RECOMMENDATION

On July 18, 1995, a quorum being present, the Committee ordered the bill favorably reported.

Amendment #1 of H.R. 994—Offered by: Mr. Kanjorski

At the end of a bill, add the following new section:

SEC. 14. SUNSET OF THIS ACT.

Passed by voice vote.

Amendment #2 of H.R. 994—Offered by: Mrs. Slaughter

In section 4(b)(1), strike "$50,000,000" and insert "$100,000,000".

Passed by voice vote.

Amendment #3 of H.R. 994—Offered by: Mr. Spratt

In section 13(4)(A), strike "subparagraphs (B) and (C)" and insert "subparagraphs (B), (C), and (D)".

Failed by voice vote.

Amendment #4 of H.R. 994—Offered by: Mr. Spratt

At the end of section 6, add the following new subsection:

(f) PRESERVATION OF INDEPENDENCE OF OTHER SPECIFIED AGENCIES.—

Failed by voice vote.

Amendment #5 of H.R. 994—Offered by: Mrs. Collins of Illinois

In section 3—(1) insert "(a) IN GENERAL.—" before "The effectiveness"; and (2) at the end add the following new subsection: (b) LIMITATION ON TERMINATION OF RULE.—

Failed by voice vote.

Amendment #6 of H.R. 994—Offered by: Mr. Shays

Amendment Language: Page 19, line 22, add "(L) The extent to which the rule has contributed positive benefits, particularly health or safety or environmental benefits."

Passed by voice vote.

FINAL PASSAGE OF H.R. 994—OFFERED BY: MR. McINTOSH

Name	Aye	Nay	Name	Aye	Nay
Mr. Clinger	X		Mrs. Collins—IL		X
Mr. Gilman	X		Mr. Waxman		
Mr. Burto	X		Mr. Lantos		
Mr. Hastert	X		Mr. Wise	X	
Mrs. Morella		X	Mr. Owens		X
Mr. Shays	X		Mr. Towns		X
Mr. Schiff	X		Mr. Spratt		
Ms. Ros-Lehtinen	X		Ms. Slaughter	X	
Mr. Zeliff	X		Mr. Kanjorski	X	
Mr. McHugh	X		Mr. Condit	X	
Mr. Horn	X		Mr. Peterson	X	

FINAL PASSAGE OF H.R. 994—OFFERED BY: MR. McINTOSH—Continued

Name	Aye	Nay	Name	Aye	Nay
Mr. Mica	X		Mr. Sanders		X
Mr. Blute	X		Mrs. Thurman	X	
Mr. Davis	X		Mrs. Maloney	X	
Mr. McIntosh	X		Mr. Barrett	X	
Mr. Fox	X		Mr. Taylor	X	
Mr. Tate	X		Ms. Collins—MI		
Mr. Chrysler	X		Ms. Norton		X
Mr. Gutknecht	X		Mr. Moran		
Mr. Souder	X		Mr. Green	X	
Mr. Martini	X		Mrs. Meek		
Mr. Scarborough	X		Mr. Fattah		X
Mr. Shadegg	X		Mr. Brewster	X	
Mr. Flanagan	X		Mr. Holden	X	
Mr. Bass	X				
Mr. LaTourette	X				
Mr. Sanford	X				
Mr. Ehrlich	X				

Totals: 39 Ayes, 7 Nays.

XI. CONGRESSIONAL ACCOUNTABILITY ACT; PUBLIC LAW 104–1; SECTION 102(B)(3)

This provision is inapplicable to the legislative branch because it does not relate to any terms or conditions of employment or access to public services or accommodations.

XII. APPENDIX

Congressional Budget Office response to request from the Honorable Cardiss Collins, ranking minority member.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 12, 1995.

Hon. CARDISS COLLINS,
Ranking minority member, Committee on Government Reform and Oversight, U.S. House of Representatives, Washington, DC.

DEAR REPRESENTATIVE: As you requested, the Congressional Budget Office has examined the potential costs to state and local governments and the private sector of H.R. 994, the Regulatory Sunset and Review Act of 1995, as ordered reported by the House Committee on Government Reform and Oversight on July 18, 1995, consistent with the requirements of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). CBO believes that H.R. 994 would not impose enforceable duties on state, local, or private parties, nor would its enactment result in direct costs to those entities.

H.R. 994 would require that federal regulations covered by the bill cease to be effective at a specified time unless reviewed in accordance with procedures that would be established by the bill. H.R. 994 would apply to all existing federal regulations and future rules, with certain exceptions. In the cost estimate for the bill prepared on August 14, 1995, CBO estimated that the bill's enactment would result in additional costs to federal agencies totaling about $4 million annually.

Public Law 104–4 establishes a narrow definition of the terms "mandate" and "direct costs." The law defines a mandate as any provision in legislation, statute, or regulation (with certain specific exemptions) that would impose an enforceable duty upon state and local governments or the private sector. Direct costs would be limited to spending directly resulting from implementing provisions of the proposed legislation.

H.R. 994 requires only that certain federal regulations be reviewed or face elimination. It does not require that rules be modified. Nonetheless, we discussed H.R. 994 with a number of federal agencies and organizations representing state interests to understand better the bill's potential effects.

We found that the indeterminate scope of H.R. 994 makes it particularly difficult to predict or estimate impacts at the state, local, and private level. Given the Administration's broad discretion under the bill, we have no basis for identifying which regulations would need to have a sunset review. Furthermore, there is no way to predict the extent or direction of changes, if any, in the federal regulations that would be reviewed. Thus, we cannot specify whether or how state, local, or private interests might be induced to modify their actions as a result of rule changes emanating from H.R. 994. Although some actions resulting from the bill could effect state, local, or private interests, the bill itself does not impose any mandates on such entities.

With regard to the private sector, we estimate that enactment of H.R. 994 would not lead to a significant increase in fees paid to federal regulatory agencies to cover the cost of conducting sunset reviews. Agencies that charge fees would not necessarily bear significant burdens under the bill. For example, two agencies that collect substantial portions of their operating budgets through fees are the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission. It would appear that most of the regulations administered by those agencies could be exempt from the provisions of H.R. 994, because the agencies' mission generally is to regulate permits and issue licenses to private industry, and those kinds of regulations are excluded by section 13 of the bill. Furthermore, in instances in which an agency would face increased costs to conduct a review, H.R. 994 would not require it to cover its costs through fees. Many agencies could choose to meet the costs in a number of ways, such as reducing other costs or requesting additional appropriations. Because the estimated annual cost to the federal government of complying with the bill is only about $4 million, the potential impact on the private sector from additional fees is quite small.

If you have any questions or if there is a specific issue related to H.R. 994's impact on state and local governments or the private sector that you would like us to investigate further, we would be pleased to provide you with more assistance. The CBO staff contact for state and local estimates is Karen McVey. For private sector estimates, the contact is Jan Paul Acton.

Sincerely,

JUNE E. O'NEILL, *Director.*

ADDITIONAL VIEWS

The Regulatory Sunset and Review Act of 1995, H.R. 994, was ordered reported by the Committee with strong bi-partisan support. Clearly, all Committee Members accept the need to conduct reviews of regulations.

The reported bill requires all Federal agencies to conduct periodic reviews of regulations. If a required review of a particular regulation is not completed by its termination date (specified as either 3, 4, 5, 6, or 7 years after the date of enactment), that regulation would automatically sunset under the terms of the reported bill.

While we strongly support the need for agency reviews of regulations, we continue to be concerned about certain provisions of this legislation. These concerns should be addressed, before the bill passes the House.

A major concern we have is that firms and individuals subject to the laws Congress passes could be exposed to greatly increased liability, if regulations, which provide guidance and clarify how to fulfill statutory obligations, were to sunset, while those statutory obligations continue.

Without regulations to identify and to clarify statutory obligations, statutory obligations would have to be identified through court and administrative proceedings on a case-by-case basis.

The reported bill attempts to make a partial solution to this problem. In an agency proceeding or court action between agency and a "non-agency" party, the reported bill permits the "non-agency" party to invoke its continued compliance with a sunsetted regulation, as a legal defense that it is in compliance with statutory requirements.

However, the reported bill does not give a "non-agency" party similar authority in cases where the "non-agency" party is the target of legal action by a private party, not an agency. Therefore, the underlying question remains unanswered: How would a firm or individual demonstrate compliance with statutory obligations, if regulations were to sunset?

There are a large number of statutes under which private parties, as well as agencies, are explicitly given the right to go to court to seek enforcement of a statute. The American Law Division of the Library of Congress' Congressional Research Service (CRS) has compiled lists of over 170 different Federal statutes that all contain private rights of action.

Some of the statutes that CRS identified as providing private rights of action include: the Freedom of Information Act; the Natural Gas Act; the Bankruptcy Act; the Clayton Act; the Privacy Act; the Securities Exchange Act; the National Bank Act; the Atomic Energy Act; the Age Discrimination Act; the Bank Holding Company Act; the Communications Act; the Truth in Lending Act; the Federal Deposit Insurance Act; the Foreign Intelligence Surveil-

lance Act; the Clean Air Act; the Water Pollution Prevention and Control Act; and the Safe Drinking Water Act.

As a result, the potential liability that firms and individuals would face is enormously increased, as a result of the reported bill's failure to permit continued compliance with a sunsetted regulation to be used as a legal defense in all cases.

The reported bill also intrudes upon the independence of certain regulatory agencies. Under the reported bill, the Office of Management and Budget (OMB) has responsibility for identifying, scheduling and prioritizing rules for agency review. In addition, OMB would evaluate, monitor, and certify agency reviews. However, an exception is created in the reported bill for bank regulatory agencies which are exempted from much of the oversight OMB would perform.

In addition to bank regulatory agencies, we believe that the reported bill should also preserve the independent status of agencies, such as the Securities and Exchange Commission, the Commodities Futures Trading Commission, and the Nuclear Regulatory Commission.

Each of these agencies have responsibilities for the protection of investors, the openness and efficiency of markets, economic stability and soundness, and public safety that are no less critical and important than functions of the bank regulatory agencies. Like the situation with bank regulatory agencies, the SEC, the CFTC, and the NRC are not currently subject to OMB oversight or approval in the issuance of regulations.

The following statement of Mary L. Schapiro, Chairman of the Commodity Futures Trading Commission, supports an amendment to preserve the independent status of the CFTC:

"I want to express support for the inclusion of the Commodity Futures Trading Commission within the scope of this amendment. The amendment thus would treat agencies such as the Commission and the Securities and Exchange Commission in a manner equivalent to the treatment afforded to other financial service agencies, and will assure that financial service regulation can be applied to a consistent and coordinated manner."

We also believe there are certain cases where it may not make any sense to require periodic reviews at all. One such case was raised at markup; it was proposed that tax regulations and rules issued by the Internal Revenue Service should be exempt from the requirements of the reported bill altogether.

The Tax Executives Institute, for example, made the following comments in opposition to reviews of tax regulations, like those that would be required by the reported bill:

"We would oppose any rule requiring the "Treasury Department and IRS to review and repromulgate all extent tax rules every few years and to "sunset" those rules not so revalidated. Such a rule would consume an extraordinarily large amount of government resources and no doubt distract the IRS, Treasury, and taxpayers from important tasks. Indeed, a "sunset" rule could have the unintended and counterproductive effect of requiring business taxpayers to spend scarce resources defending longstanding, beneficial, and generally accepted rules that otherwise might find themselves

sunsetted. Such an approach would frustrate rather than further the true goals of regulatory reform."

The reported bill clearly addresses the need many have seen to provide for agency reviews of regulations. The concerns we have raised can and should be addressed, as the process goes forward.

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