

117TH CONGRESS  
1ST SESSION

# S. 2801

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

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22 (legislative day, SEPTEMBER 21), 2021

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

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## A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

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

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

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

5 (1) in section 551—

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

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

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

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

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

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

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

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

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

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

7 “(f) MAJOR RULE FRAMEWORKS.—

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

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

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

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

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

1 cluding metrics by which the agency can  
2 measure—

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

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

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

17 “(iv) a specific time frame, as appro-  
18 priate to the major rule and not more than  
19 10 years after the effective date of the  
20 major rule, under which the agency shall  
21 conduct the assessment of the major rule  
22 in accordance with paragraph (2)(A).

23 “(2) ASSESSMENT.—

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

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

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

10 “(ii) to determine whether—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

16          “(6) APPLICABILITY.—

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

19                 “(i) a major rule of an agency—

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

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

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

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

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

11           “(AA) include robust  
12           public participation;

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

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

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

1 less frequently than once every 10  
2 years; or

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

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

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

20 “(7) JUDICIAL REVIEW.—

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

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

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

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

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

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

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

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

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