

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—117th Cong., 2d Sess.

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.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Ms. SINEMA

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

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”.

7 **SEC. 2. INCORPORATING RETROSPECTIVE REVIEW INTO**
8 **NEW MAJOR RULES.**

9 (a) IN GENERAL.—Subchapter II of chapter 5 of title
10 5, United States Code, is amended—

11 (1) in section 551—

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

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

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

6 “(15) ‘Administrator’ means the Administrator
7 of the Office of Information and Regulatory Affairs
8 of the Office of Management and Budget established
9 under section 3503 of title 44 and any successor to
10 that office; and

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

14 “(A) an annual effect on the economy of
15 \$100,000,000 or more;

16 “(B) a major increase in costs or prices for
17 consumers, individual industries, Federal,
18 State, or local government agencies, or geo-
19 graphic regions; or

20 “(C) significant adverse effects on competi-
21 tion, employment, investment, productivity, in-
22 novation, health, safety, the environment, or on
23 the ability of United States-based enterprises to
24 compete with foreign-based enterprises in do-
25 mestic and export markets.”; and

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

3 “(f) MAJOR RULE FRAMEWORKS.—

4 “(1) IN GENERAL.—On and after the date that
5 is 1 year after the date of enactment of this sub-
6 section—

7 “(A) with respect to a proposed rule pub-
8 lished by an agency in the Federal Register
9 that the agency reasonably expects would meet
10 the definition of a major rule, the agency shall
11 include a potential framework for assessing the
12 implemented rule, which shall include a general
13 statement of how the agency intends to measure
14 the effectiveness of the rule; and

15 “(B) with respect to a final major rule
16 published by an agency in the Federal Register,
17 including a major rule that the agency did not
18 initially reasonably expect would meet the defi-
19 nition of a major rule under subparagraph (A),
20 the agency shall include a framework for assess-
21 ing the major rule under paragraph (2), which
22 shall include—

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

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

3 “(ii) the methodology by which the
4 agency plans to analyze the qualitative and
5 quantitative outcomes of the major rule so
6 that the agency can assess—

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

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

14 “(iii) a plan for gathering data, in-
15 cluding public input, regarding the meth-
16 odology described in clause (ii) on an ongo-
17 ing basis or at periodic times; and

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

24 “(2) ASSESSMENT.—

1 “(III) the major rule needs to be
2 expanded, streamlined, or otherwise
3 modified in order to accomplish the
4 regulatory objective of the major rule;
5 and

6 “(IV) other alternatives to the
7 major rule or a modification of the
8 major rule could better achieve the
9 regulatory objective of the major rule
10 by increasing the benefits of the
11 major rule or imposing a smaller bur-
12 den on society, or both, taking into
13 consideration any changes in the regu-
14 latory environment that may have
15 made the major rule more or less nec-
16 essary or effective, and any cost al-
17 ready incurred.

18 “(B) DIFFERENT METHODOLOGY.—If an
19 agency uses a methodology other than the
20 methodology set forth in paragraph (1)(B)(ii)
21 to assess data under subparagraph (A), the
22 agency shall include notification of the revised
23 methodology and an explanation of the changes
24 in circumstances that necessitated the use of

1 that other methodology as part of the notice re-
2 quired under subparagraph (D).

3 “(C) SUBSEQUENT ASSESSMENTS.—If,
4 after an assessment of a major rule under sub-
5 paragraph (A), an agency determines that the
6 major rule will remain in effect with or without
7 modification, the agency shall, in consultation
8 with the Administrator, include with the assess-
9 ment produced under subparagraph (A) a list of
10 circumstances or events that would necessitate
11 a subsequent review in accordance with sub-
12 paragraph (A) to ensure that the major rule
13 continues to meet the regulatory objective of
14 the major rule.

15 “(D) PUBLICATION.—Not later than 180
16 days after the date on which an agency com-
17 pletes an assessment of a major rule under sub-
18 paragraph (A), the agency shall publish promi-
19 nently on the website of the agency the results
20 of the assessment, including the circumstances
21 or events that would necessitate a subsequent
22 assessment of the major rule under subpara-
23 graph (C).

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

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

3 “(B) ensure that the results of each as-
4 sessment conducted under paragraph (2) are
5 published promptly in accordance with para-
6 graph (2)(D).

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

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

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

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

20 “(i) the agency did not issue a notice
21 of proposed rule making for the major rule
22 in order to provide a timely response to an
23 emergency or comply with a statutorily im-
24 posed deadline, in accordance with para-
25 graph (6)(B); or

1 “(ii) the Administrator determines
2 that—

3 “(I) the major final rule falls
4 within a category of major rules that
5 are routine or periodic in nature, in-
6 cluding those issued on an annual
7 basis in order to put in place annual
8 spending programs; or

9 “(II) for any other reason, the
10 conduct of an assessment would be
11 impracticable, unnecessary, or con-
12 trary to the public interest; and

13 “(D) extend the deadline specified by an
14 agency for an assessment of a major rule under
15 paragraph (1)(B)(iv) or paragraph (2)(C) for a
16 period of not more than 90 days if the agency
17 justifies why the agency is unable to complete
18 the assessment by that deadline.

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

21 “(A) the authority of an agency to assess
22 or modify a major rule of the agency earlier
23 than the end of the time frame specified for the
24 major rule under paragraph (1)(B)(iv); or

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

4 “(6) APPLICABILITY.—

5 “(A) IN GENERAL.—This subsection shall
6 not apply to—

7 “(i) a major rule of an agency—

8 “(I) that the Administrator re-
9 viewed before the date of enactment of
10 this subsection;

11 “(II) for which the agency is re-
12 quired to conduct a retrospective re-
13 view under—

14 “(aa) section 2222 of the
15 Economic Growth and Regu-
16 latory Paperwork Reduction Act
17 of 1996 (12 U.S.C. 3311);

18 “(bb) section 170(d) of the
19 Financial Stability Act of 2010
20 (12 U.S.C. 5370(d)); or

21 “(cc) any other provision of
22 law with requirements that the
23 Administrator determines—

24 “(AA) include robust
25 public participation;

1 “(BB) include signifi-
2 cant agency consideration
3 and analysis of whether the
4 rule is achieving the regu-
5 latory objective of the rule;
6 and

7 “(CC) meet, are sub-
8 stantially similar to, or ex-
9 ceed the requirements of
10 this subsection;

11 “(III) for which the authorizing
12 statute of the rule is subject to peri-
13 odic authorization by Congress not
14 less frequently than once every 10
15 years; or

16 “(IV) for which the authorizing
17 statute of the rule requires the pro-
18 mulgation of a new or revised rule not
19 less frequently than once every 10
20 years; or

21 “(ii) interpretative rules, general
22 statements of policy, or rules of agency or-
23 ganization, procedure, or practice.

24 “(B) GOOD CAUSE EXEMPTION.—In the
25 case of a major rule for which the agency has

1 not issued a notice of proposed rule making, the
2 agency shall publish the framework required
3 under paragraph (1)(B) in the Federal Register
4 not later than 6 months after the date on which
5 the agency publishes the final major rule.

6 “(7) JUDICIAL REVIEW.—

7 “(A) IN GENERAL.—Judicial review of
8 agency compliance with this subsection—

9 “(i) shall be strictly limited to—

10 “(I) whether an agency published
11 the framework for assessment of a
12 major rule described in paragraph (1);
13 or

14 “(II) whether an agency pub-
15 lished the assessment or subsequent
16 assessment of a major rule described
17 in subparagraphs (A), (C), and (D) of
18 paragraph (2); and

19 “(ii) shall not include a substantive
20 review of the framework, assessment, or
21 action of an agency under this subsection.

22 “(B) REMEDY AVAILABLE.—In granting
23 relief in an action brought under subparagraph
24 (A), a court may only issue an order remanding
25 the major rule to the agency to comply with

1 paragraph (1) or subparagraph (A), (C), or (D)
2 of paragraph (2), as applicable.

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

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

11 (b) AUTHORIZATION OF APPROPRIATIONS.—There
12 are authorized to be appropriated such sums as may be
13 necessary to carry out the amendments made by sub-
14 section (a).