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IMPACTS OF THE PROPOSED "JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995" (H.R. 9)

A Report by the

Environmental Law Institute

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EXECUTIVE SUMMARY

The Contract With America contains an omnibus bill called the Job Creation and Wage Enhancement Act (JCWEA), which was introduced in the House on January 4, 1995 as H.R. 9. The JCWE is a sweeping proposal that purports to indirectly affect jobs and wages by adding substantial new government procedures. The bill would likely increase litigation and add to delay of governmental action. The procedural and substantive changes proposed in H.R. 9 would substantially affect environmental policy and law. This report identifies provisions that would change existing law, identifies the purposes of the provisions, and analyzes the effectiveness of the provisions and certain alternatives for achieving the bill's stated purposes. The JCWEA contains 12 Titles which are essentially independent statutes. This report analyzes Titles III-IX, which are those primarily relevant to environmental policy and law.

Title III will affect every law that EPA administers. It is broadly written, and its findings indicate that it is intended to have wide reach. Every time EPA uses risk assessment, or communicates with the public regarding risk, Title III will govern. It will also require that risk assessment and cost analyses be conducted in certain circumstances. If enacted, Title III would initiate policy changes on two levels. First, it would force EPA to follow certain risk assessment, characterization and communication principles and develop "guidelines" and "guidance" to implement them.

Second, Title III would require that EPA prepare risk assessments and cost/benefit analyses for every "major rule." The definition of major rule in the Act sets a low threshold. It is likely that a considerable number of EPA's proposed and final regulations would require risk assessments and cost/benefit analyses. In addition, a significant subset of these analyses would require peer review by an external panel of experts.

In particular, if enacted in its present form, it is likely that Title III could:

- substantially increase the resource burden on the Agency by requiring the preparation of risk assessments and cost/benefit analyses for "major rules," and mandating peer review for a substantial subset of such rules;

- substantially increase the resource burden on the Agency by requiring that risk assessments are carried out according to the risk assessment, characterization and communication principles contained in the Act that the Agency must implement through "guidelines" and "guidance";

- decrease the flexibility of risk assessment practice, impede its ability to incorporate new scientific findings, and thus diminish its value as a policy tool;

- create significant delay by requiring demanding, but technically inconsequential, analysis of alternatives and assumptions; and

- make Agency economic and risk analyses more easily challenged in court, obligating lawyers and judges, not scientists, to become the ultimate arbiters of risk assessment methodologies.

Title IV would require all departments and agencies of the federal government and the Congress to conduct extensive new studies into how much it costs the private sector to comply with all regulations. The bill would then require Congress to consider how to reduce the private costs of compliance with regulations. Congress would be required to do this as part of its annual struggle to pass a budget each year. Under the bill Congress would not consider the benefits provided by government regulations, or the costs avoided by having regulations in place.

Title V would increase the authority of the Director of OMB to oversee federal efforts to collect information. In carrying out that responsibility, the Director could waive the applicability of an agency's regulations after providing notice to the public and Congress.

Title VI could force agencies to spend considerable resources attempting to predict the indirect effects of proposed rules on one group of those affected by the rules -- small businesses.

Title VII would add substantial new steps to the process by which the federal government adopts regulations. One provision could require agencies to hold public hearings even if no member of the public requests a hearing or desires to speak at the hearing

Title VIII would substantially constrain all of EPA's inspection, compliance, investigatory, and enforcement activities, as well as subject its employees and officials to personal liability. Title VIII consists of two distinct subtitles:

Subtitle A creates 6 new "rights" for any person that is the "target" of an inspection, investigation or other official proceeding. Although the list of rights initially resembles those applicable to criminal defendants, the legislation actually creates new rights and extends them to a broad range of non-criminal proceedings and to the investigative phase of criminal enforcement. They are [1] *A new right to silence.* EPA may be unable to use statements in inspections, investigations and other proceedings. Corporations would gain a new right to silence, allowing them to withold discharge monitoring reports and hazardous waste facility operating records. [2] *A new right to advice about search warrants.* Suppression of information based on failure to advise would be possible. [3] *A new right to a Miranda warning.* The constitutional right to a warning is limited to custodial interrogations. The proposed legislation would require that such a warning also be delivered upon the *initiation* of any inspection, investigation, or other official proceeding. This provision would require such a warning by federal criminal investigators even for noncustodial interrogations - a significant expansion of criminal suspects' rights. The right to a warning would apparently apply even if there were no questions asked to the target. By analogy to constitutional practice, failure

to warn might lead to exclusion of evidence. [4] *A new right to presence of attorneys and accountants.* An inspection, investigation, or other proceeding would be unlawful without the presence of attorneys and accountants. The new right would apparently apply even if there is no intent on the Government's part to interview the target or review the target's records -- for example, during a sampling inspection or visual inspection. The government might be required to supply an attorney and an accountant. [5] *A new right to information on the scope and purpose of investigations and other proceedings.* [6] *A new right to personal presence.* The proposed legislation would establish a new right to presence "upon the initiation of" inspections, investigations, and other proceedings. The right to be present would apply whether or not the target is the entity being inspected. For example, the Government would be prohibited from conducting an inspection of a hazardous waste generator as part of the investigation of an unrelated disposal facility unless the target disposal facility and any of its target employees were present. The right to be present "at" any "investigation" creates a right for the target (and the target's attorneys and accountants) to accompany government investigators as they interview offsite informants, make telephone calls, follow leads, or conduct analysis of documents; the right is not limited to particular premises. Both the rights to personal presence [6] and to the presence of accountants or attorneys [4] mean that in instances where the required person or representative is unavailable, government inspections, investigations, and other proceedings would need to be halted. Thus, the legislation requires virtually all inspections to be pre-scheduled.

Subtitle B protects "any person subject to Government regulation" from any "prohibited regulatory practice." This subtitle applies not only to federal agencies, but also to any agency of *state government* that carries out a federal law or implements a state program approved by a federal agency. Prohibited regulatory practices are defined as any government employee taking or failing to take, recommending or directing others to take or fail to take, approving of others taking or failing to take, or threatening to take or fail to take any regulatory action "because of any disclosure by...*any person*" of various forms of governmental inconsistency or waste. A governmental action is "deemed" to be caused by the disclosure if the disclosure "was a contributing factor to the decision." The "disclosure" does not have to relate to the agency or the matter at issue. For example, a person may charge that an agency's action is the result of disclosures regarding the behavior of some other agency.

The commission of a "prohibited regulatory practice" gives rise to four consequences: (a) It provides a complete defense to any "administrative or judicial action or proceeding, formal or informal, by an agency to create, apply or enforce any obligation, duty or liability" against the person. If the existence of a prohibited regulatory practice is found, the person may be required to comply but only "to the extent compliance is required of and enforced against other persons similarly situated, but no penalty, fine, damages, costs, or other obligation" may be imposed. (b) Any agency and any agency employee that engages in a prohibited regulatory practice may be assessed a civil penalty of up to $25,000 per practice, per day. (c) Any person "injured or threatened by" a prohibited regulatory practice may bring a citizen suit. The court may restrain the agency or agency employee, order

cancellation of any fine, order recission of any settlement entered into by the parties because of the practice, order the issuance of any permit or license, and require the *agency or agency employee to pay damages (including loss of business), legal fees and other expenses, and punitive damages in the amount of $25,000 per practice per day.* (d) Any person may refer any suspected prohibited practice to the Special Counsel of the Merit Systems Protection Board.

The primary effect of this subtitle will be to promote inconsistency in application and enforcement of government rules and regulations. If any person discloses "inconsistency" or "mismanagement," any action taken by the government agency or its employees to restore consistency or correct management is -- because taken in response to the disclosure -- a prohibited regulatory practice. Because the penalty for taking such action is personal liability of up to $25,000 per day, plus other damages, government employees will be effectively prohibited from restoring consistency to a program or eliminating mismanagement.

Title IX would require the federal treasury to pay for any reduction in the value of property of ten percent or greater resulting from a federal limitation or condition on a *use* of property (or a state or local limitation based on a federal law). The bill would excuse the U.S. from payment only where the use would constitute a violation of State or local law, including zoning ordinances and nuisance law; where the President determines that the use poses a "serious and imminent threat to public health and safety;" or where the use would interfere with navigation. The bill provides an expedited claims procedure, requiring agencies to make decisions on claims within 180 days, and binding arbitration by the American Arbitration Association. Payments of claims would come out of the agency's annual budget.

Title IX changes the constitutional standard, providing a financial incentive for claimants to propose more damaging uses of property in order to receive payment in return for a less intensive use. Also real estate markets often fluctuate by 10 percent or more over short periods of time. Determining whether a specific governmental action produced the loss in value may be quite difficult -- especially as the legislation does not specify a particular time period for the loss.

The legislation would require the federal government to pay for the actions of state and local governments, opening up EPA to liability for actions over which it lacks direct control. For example, a state pollution control agency might deny a permit to a proposed waste incinerator, applying or purporting to apply federal standards. The denial would fall within the terms of the legislation, and the permit applicant could obtain compensation from EPA, even though the federal government lacks any ability to compel the state to issue the permit.

The legislation commits to a private arbitrator legal issues that are not within the competence of such arbitration: what is a state law nuisance, interpretation of zoning laws,

defining the federal navigation servitude. The legislation makes the arbitrator's awards *binding and unreviewable in the courts.*

The bill may resurrect the practice of sequestration of appropriated funds by requiring that, notwithstanding any other law, payments must come from agency appropriations. It authorizes the head of the agency to transfer or reprogram "any funds available to the agency." This provision means that Congressionally authorized and appropriated funds will not be spent for the purposes for which they were provided.

EPA will need to pay enterprises not to pollute. Several years ago EPA set an effluent limitation for gold mining operations, restricting their discharge of pollution into streams. Most gold mines rapidly complied with the limitation, but one mine operator filed suit seeking governmental compensation on the ground that if it complied, the mine would be unprofitable. The discharge -- absent the effluent limitation -- was otherwise lawful. The case eventually settled out of court with no payment by the government. Under the proposed legislation, however, the government would need to pay such operators for any loss in value. Not all "pollution" is unlawful or a "nuisance" under state and local law.

IMPACTS OF THE PROPOSED "JOB CREATION AND WAGE ENHANCEMENT ACT OF 1995" (H.R. 9)

INTRODUCTION

The proposed Job Creation and Wage Enhancement Act of 1995 (H.R. 9) is a sweeping proposal that purports to affect job and wages by adding to government procedures, requiring government studies, and focussing government attention on certain special interests. In addition to this focus on the legislative and administrative procedures, the bill would make many substantive changes in law from the tax code to property law. These procedural and substantive changes are also intended to extend beyond the federal level to state and local governments and to the private sector and individuals.

The changes in both procedural and substantive law proposed in H.R. 9 would substantially affect environmental policy and law. This report identifies provisions which would change procedural or substantive law or institutions in ways that could affect environmental policy, identifies the purposes of the proposal, identifies cost categories affected by the proposals, evaluates whether the legislation would accomplish its stated purposes and identifies alternatives for achieving the stated purposes.

The Job Creation and Wage Enhancement Act of 1995 contains twelve Titles, many of which are essentially independent statutes. This report analyzes each Title in order, with references to related provisions in other Titles where appropriate. Review of Titles I Capital Gains Reform, II Neutral Cost Recovery, XI Taxpayer Debt Buy-Down, and XII Small Business Incentives revealed no apparent effects on environmental law or policy. These titles are therefore not included in the analysis that follows.

TITLE III -- Risk Assessments

Description of Legislation

The House Republican Conference Legislative Digest of September 27, 1994 states that the JCWEA will "enhance economic liberty and make government more accountable for burdens it imposes on American workers" by "requir[ing] federal agencies to assess the risk and cost of each imposed regulation." The Bill's sponsors assert that this legislation is intended to "break down unnecessary barriers to entry created by regulations, statutes and judicial decisions."

Title III is an amalgam of several risk assessment bills introduced before the 103d Congress. The Bill contains five findings:

- Federal regulations to protect human health and the environment have led to dramatic improvement in human health, but have been costly;
- Public and private resources, which are not unlimited, need to be allocated wisely to address the greatest needs in a cost-effective manner;
- Regulatory priorities should be based on "realistic" risk considerations;
- Risk assessment, which is a useful decision-making tool, needs improvements in quality of assessments and communicating assessments to the public in an unbiased and objective manner; and
- Public stakeholders must be fully involved in the risk decision-making process.

Title III houses two distinct, but related legal strategies. The first reforms the practice of risk assessment and risk communication. The second requires that risk assessments and cost analyses be prepared under certain circumstances and that a subset of these analyses be peer reviewed. If enacted, Title III would initiate policy changes on two levels. First it would force the development of risk assessment "guidelines" and "guidance" that agencies would be required to follow when carrying out risk assessments or communicating with the public about risk.[1] The broad scope and nature of these guidelines

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[1] Title III states that "[w]ithin 15 months after the date of enactment of this subtitle, the President shall issue guidelines consistent with the risk assessment and risk characterization principles stated in sections 3104 and 3105 and shall provide a format for summarizing risk assessment results. In addition, such guidelines shall include guidance on at least the following subjects: criteria for scaling animal studies to assess risks to human health; uses of different types of dose-response models; thresholds; definitions, use, and interpretations

and guidance are laid out in sections 3104, 3105 and 3106 of the Bill. Generally, these provisions impose legislative judgments about the way risk assessment and risk communication should be practiced on executive branch agencies.

Second, Title III would require all federal agencies that implement programs to protect human health, safety and the environment prepare risk assessments and cost-benefit analyses for every "major rule," which is defined as a regulation that is likely to result in one or more of the following:

- An annual effect on the economy of $25 million or more;
- A major increase in costs or prices for consumers, individual industries, federal, state or local governmental agencies or geographic regions; or
- Significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of companies to compete abroad.

This definition is very similar to the definition of "major rule" contained in President Reagan's Executive Order 12291 (now revoked, but which would be enacted as law under Title VII, infra), which required regulatory impact analyses (RIAs) on all major proposed and enacted rules. The Reagan Executive order, however, had a much higher dollar threshold value ($100 million or more), and required only that economic analyses were performed.

A subset of risk assessments and cost-benefit analyses (those producing an annual effect of $100 million or more, or meeting one or more of the other criteria listed in the legislation) must be reviewed by an independent external peer review panel, which shall report to the agency that prepared the analyses regarding the technical, scientific and economic merit of the data and methods used, discuss the assessment and cost/benefit methodology, and list any considerations not taken into account. The agency is required to respond to this report. Additionally, the Office of Management and Budget (OMB) must

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following subjects: criteria for scaling animal studies to assess risks to human health; uses of different types of dose-response models; thresholds; definitions, use, and interpretations of the maximum tolerated dose; weighing of evidence with respect to extrapolating human health risks from sensitive subspecies; evaluation of benign tumors, and evaluation of different human health endpoints." §3106(a) The guidelines shall be developed after notice and comment. §3106(d)

It is not clear whether the "guidance" and "guidelines" described in this Act rise to the level of "regulations." The process by which these guidelines and guidance are to be developed, and their purpose, could be interpreted to imply that Congress intended the Agency to engage in a rulemaking process.

order a peer review for any major risk or cost assessment that may have a significant impact on public policy decisions.[2] Although the language of the Bill is hard to interpret, it seems to make peer review a condition precedent to issuing regulations for "major rules" and any other regulations that fall under its peer review provisions.

Title III is based on the assumption that risk assessments and cost/benefit analyses can provide a "realistic" estimate of risks, costs and benefits. The Bill does not acknowledge that both risk assessment and cost/benefit methodology are relatively young, crude and value-laden policy instruments that can, at best, illustrate only a portion of the costs and risks associated with complex regulatory programs. By making risk assessment and cost/benefit analysis the premier tools for evaluating regulations, the Bill effectively marginalizes other valid and potentially significant methods of examining the effectiveness and appropriateness of rules.

Potential Effects on Current Policies and Process

Title III is broadly written, and its findings indicate that it is intended to have wide reach. It has the potential to substantially impact every law that EPA administers. As explained above, every time EPA uses risk assessment, or communicates with the public regarding risk, Title III will govern. It will also require that risk assessment and cost analyses are conducted in certain circumstances. The most significant features of Title III are discussed in the following paragraphs.

A. Because of its broad reach, Title III potentially could effect every law that EPA administers.

Title III contains detailed provisions about how risk assessments must be carried out and how risk must be communicated to the public. EPA pioneered the use of risk assessment, and frequently utilizes risk assessment methodology in making regulatory and non-regulatory decisions. In addition, the Agency engages in frequent risk communication campaigns. By requiring that the Agency adopt Congressionally determined guidance and guidelines governing these activities, the Bill is likely to have a meaningful effect on the day-to-day business of EPA.

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[2] The Bill (§3301(b)) contains the following language: "[OMB] shall order that peer review be provided for any major risk assessment or cost assessment that may have a significant impact on public policy decisions." (Emphasis added.) The underlined terms, which could be broadly interpreted, are not defined in Title III. Thus this clause vests in OMB substantial discretion to define when a "major risk assessment or cost analysis" has a "significant impact on public policy decisions." If OMB elects to interpret these terms on a case-by-case basis, it could result in inconsistent application of the peer review process and back door opportunities to challenge assessments.

For example, EPA (in consultation with the Department of Housing and Urban Development) is required by law to prepare a booklet explaining lead hazards and risks to potential home buyers for use in home purchases and sales.[3] The draft of this 13-page booklet, entitled "Protect Your Family From Lead in Your Home," is written in a user-friendly, elementary style that quickly and simply conveys information.[4] Because this booklet describes risk and will be made available to the public, Title III would apply to it if enacted. Thus, EPA would be required to comply the risk communication principles set forth in the Bill and implementing guidance. In this case, compliance with the risk communication dictates of Title III would make the booklet longer, more technical and less accessible to average citizens, arguably subverting the purpose of the underlying law which commanded its preparation.

B. Title III will substantially increase the resource burden on the Agency by requiring the preparation of risk assessments and cost/benefit analyses for "major rules."

During the Reagan and Bush presidencies, Executive Order 12291 required agencies to perform RIAs (cost/benefit analyses only) for all proposed and final "major rules." A second Reagan Executive Order (12498) required federal agencies to adopt principles contained in the President's Task Force for Regulatory Relief. One principle stated that "regulations that seek to reduce health or safety risks should be based upon scientific risk assessment procedures, and should address risks that are real and significant rather than hypothetical or remote."[5] The definition of "major rule" in the Bill seems to be modeled on the Reagan Executive Orders, but casts a broader net. Title III has a lower dollar "trigger" and additional analytical requirements. The resources needed to meet these requirements are likely to be substantial.

Consider the costs of only the cost/benefit analyses incurred as a result of Executive Order 12291. Between 1981 and 1992, EPA issued 1,594 proposed rules and 1,686 final rules, including 92 major proposed rules and 60 major final rules. Formal cost-benefit analyses were prepared for approximately 80% of the major final rules (approximately 2.8% of all final rules [48/1686 x 100]).[6] According to an EPA report, between February 1981 and February 1986 the cost of preparing a formal analysis of a major rule ranged from

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[3] See 15 U.S.C. §2686.

[4] EPA, Protect Your Family From Lead in Your Home (Docket No. OPPTS-62133), August, 1994.

[5] Congressional Research Service, Risk Analysis and Cost-Benefit Analysis of Environmental Regulations 23-5 (December 2, 1994).

[6] Data is unavailable regarding the number of analyses performed for proposed rules. Id. at 26.

$210,000 to $2,380,000 and averaged $675,000.[7] Assuming that the cost-benefit analyses of 48 major rules cost an average of $675,000 each, the Agency spent approximately $32.4 million to meet its requirements to conduct economic analyses. Comparable figures regarding the number carried out, and cost of, risk assessments are not available.

Assuming that the information contained in the EPA report is applicable to Title III, the Agency will be required to devote considerable resources to carrying out required cost/benefit and risk assessment examinations. The cost threshold for "major rules" in Title III is one-quarter the cost threshold set forth in Executive Order 12291. Additionally, because Title III requires that EPA carry out its risk analyses according to certain principles (see below), additional data and analytical resources will be needed. Finally, costs associated with establishing and maintaining a peer review panel, and responding to its concerns, must be added for all major rules with an annual effect on the economy of more than a $100 million, or that have a significant impact on public policy decisions. (See the peer review discussion below.)

C. *Title III will substantially increase the resource burden on the Agency by requiring that risk assessments are carried out according to the risk assessment, characterization and communication principles contained in the Bill.*

If enacted, subtitle A of Title III would require EPA to apply certain Congressionally determined principles to all risk assessments and risk communication documents. These principles impose on the Agency legislative judgments about science and the way it should be practiced. In particular, these principles require the Agency to:

- Distinguish scientific findings from other considerations (presumably policy determinations);
- Insure that risk assessments are scientifically objective and unbiased;
- Consider and discuss both laboratory and epidemiologic data;
- If an assessment contains a significant assumption, inference or model, explain all plausible and alternative assumptions, inferences and models;
- Identify all policy and value judgments;
- Provide "best estimates" of the specific population(s) at risk;

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[7] Id. at 26-7, citing a report prepared by the EPA's Economic Studies Branch of the Office of Policy Analysis entitled EPA's Use of Cost-Benefit Analysis 1981-1986 (August 1987).

- Provide a statement of any significant substitution risks;
- Explain the reasonable range of scientific uncertainties; and
- Compare the risks with other risks that are "fairly and routinely encountered by the general public." [8]

The Agency will be required to issue "guidelines" consistent with these principles and establish a form for summarizing risk assessment results.[9] In addition to the principles listed above, the guidelines will be required to cover certain science policy issues, such as application of interspecies scaling factors, use of different dose-response models, threshold determinations and use and interpretation of maximum tolerated dose. These guidelines must be developed after notice and opportunity for public comment.

The principles outlined above and the guidelines that the Agency will be forced to issue will impose a substantial analytical burden on the Agency. To the best of our knowledge, no quantitative data currently exists to examine this burden more fully. However, if Title III is enacted, it is very likely that risk assessment science and risk communication will become more process-oriented, rigid and time-consuming. This may lead to delay in promulgating rules and carrying out other Agency business in which risk assessments are involved.

D. The practice of risk assessment is likely to be less flexible; Agency economic and risk analyses could be more easily challenged in court; and lawyers will become the ultimate arbiters of risk assessment.

Generally, Title III adopts a "top down" approach to risk assessment. As explained above, Congress will dictate the contours of the assessment and how it is communicated, and delegate to EPA and other federal agencies the responsibility for preparing "guidelines" and "guidance" that implements Congress' will.[10] As currently carried out, risk assessment practice is "bottom up." The Agency has developed guidelines that create a safe harbor for the general practice of risk assessment, but risk assessors have the freedom to deviate from them when scientific evidence and professional judgement dictate. For example, if the guidelines incorporate a no-threshold linearized dose-response model but biological evidence indicates that a non-linear threshold model is more applicable, a risk assessor can use this alternative paradigm. If Title III were enacted, risk assessors could find it much more difficult to deviate from the "guidelines" and "guidance" promulgated by the Agency.

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[8] See §§ 3104 & 3105.

[9] See supra, note 1, discussing the terms "guidance" and "guidelines."

[10] See supra, note 1, discussing the terms "guidance" and "guidelines."

The specificity of the risk assessment, characterization and communication principles in Title III incorporate into law certain scientific principles and precepts. Legislating science is troublesome for at least three reasons. First, by adopting specific scientific models, the development of risk assessment science is suspended. In other words, it will be extremely difficult to change or alter the principles contained in the law, even if new scientific evidence indicates that they are inadequate or wrong. The flexibility necessary to advance risk techniques will be lost, and its effectiveness as a policy tool diminished.

Second, it may force assessors to use methodologies that are inapplicable or misleading. For example, Title III requires that assessors calculate a "best estimate" of risk (i.e., a measure of central tendency or a blended estimate of several different scenarios). While occasionally appropriate in circumstances that have little to do with examining health risks, average or central estimates have slight utility in environmental health where uncertainty is large, data gaps abound, sensitive and/or highly exposed subpopulations must be protected, systems do not conform to linear rules and prevention is the core of most rules. Although Title III would not prohibit assessors from preparing and communicating risk assessments with other measures of risk, it would not relieve them of the responsibility for conveying these best estimates which dissipates resources and would be confusing to risk managers and the public.

Third, Title III could substantially reduce the ability of assessors to exercise their professional judgment about the information and conclusions their assessments incorporate. For almost every "significant assumption" (and there are many in every risk assessment), the Bill requires risk assessors to explain their reasoning, explore alternatives and identify policy and value judgments. For example, Title III demands that if a risk assessment involves selection of

> "any significant assumption, inference, or model, the [EPA] shall (A) prepare a representative list and explanation of plausible and alternative assumptions, inferences, or models; (B) explain the basis for any choices; (C) identify any policy or value judgments; (D) fully describe any model used in the risk assessment and make explicit the assumptions used in the model; and (E) indicate the extent to which any significant model has been validated."[11]

In addition to creating longer, unnecessarily complex assessment documents, this requirement could obscure the ultimate message of many risk assessments.

Because these risk assessment and risk characterization principles are contained in the Bill and subject to notice and comment, and because EPA is required to issue "guidance" and "guidelines" to implement them, parties may be able to mount a challenge to assessments by bringing suit alleging that EPA has not fulfilled its responsibilities pursuant

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[11] §3104(b)(3).

to this Bill, or has deviated substantially from required principles. At present, risk assessments and cost-benefit analyses cannot be challenged in this manner.

If Title III is enacted, it is very likely that interpretations of risk assessment terms and procedure will be moved out of the scientific arena and into the legal domain. As Title III is implemented by agencies through "guidance," and interpreted in courts, lawyers will become the final arbiters of risk assessment practice and theory.

E. An undetermined (but substantial) subset of Agency risk assessments and cost/benefit analyses will be subject to external peer review.

A subset of risk assessments and cost-benefit analyses (those producing an annual effect of $100 million or more, or meeting one or more of the other criteria listed in the Bill) must be reviewed by an independent external peer review panel. Panel members shall be "independent and external experts," which may exclude Agency scientists. The Bill states that panel members shall not be excluded merely because they represent entities that have a potential stake in the outcome. Presumably this language would not exclude an expert hired specifically to participate on the peer review panel.

The panel shall report to the agency that prepared the analyses about the technical, scientific and economic merit of the data and methods used, discuss the assessment and cost/benefit methodology, and list any considerations not taken into account. The agency is required to respond to this report. Neither the peer review or the agency response are subject to time limitations.

Although they are difficult to interpret, sections 3201(5)(A) and 3301(b) seem to make the completion of the peer review process a condition precedent to issuing regulations for "major rules" and any other regulations that fall under its peer review provisions. Therefore, rules could be delayed as a result of the peer panel's examination and the need for an agency response. Additionally, as discussed above, OMB must order a peer review for any major risk or cost assessment that may have a significant impact on public policy decisions.[12] The Bill vests OMB with substantial discretion to determine if a risk assessment or cost/benefit analysis is major and if it has a significant effect on public policy. This authority appears to be unconnected to the "major rule" requirements in the Bill.

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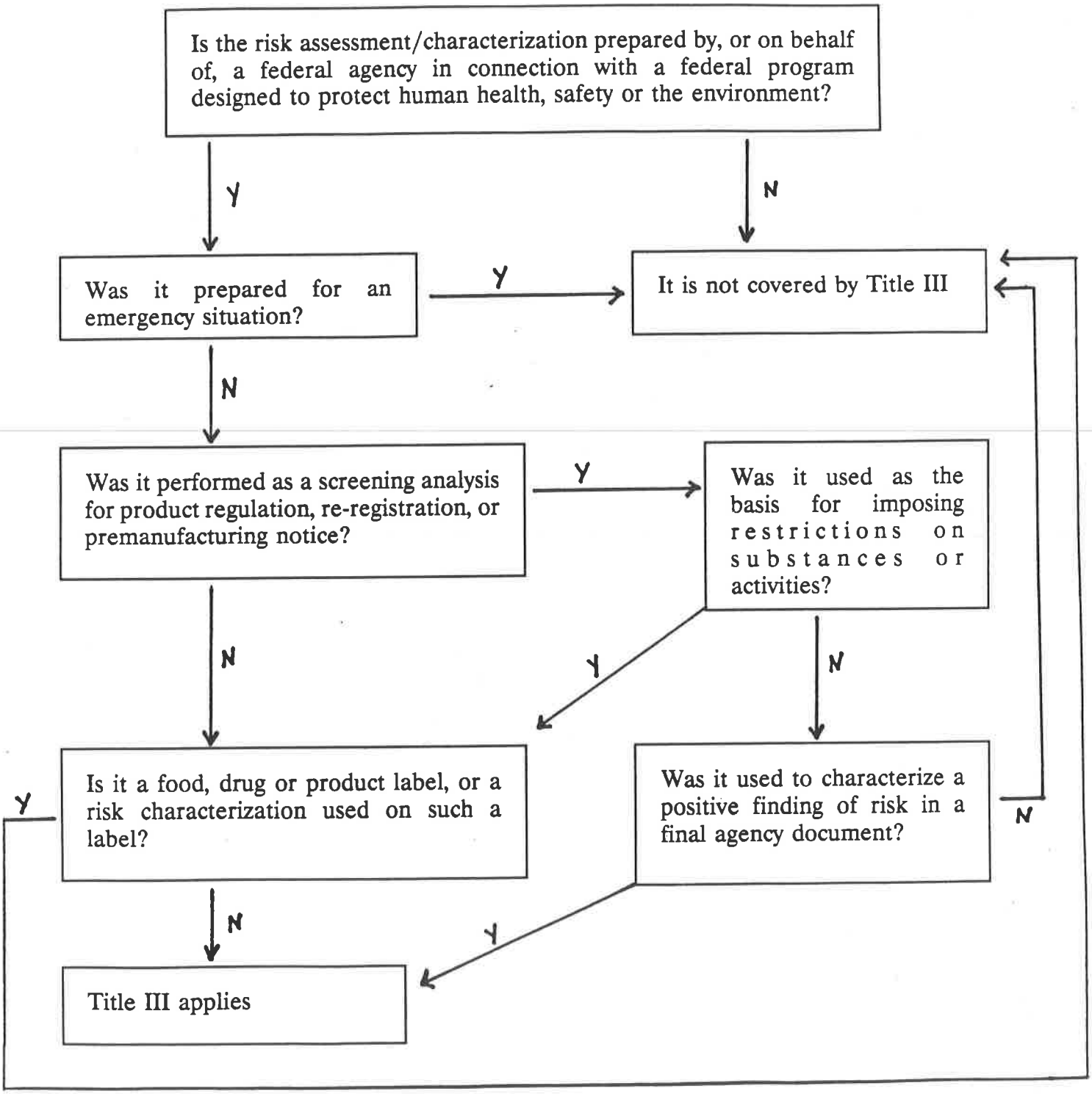
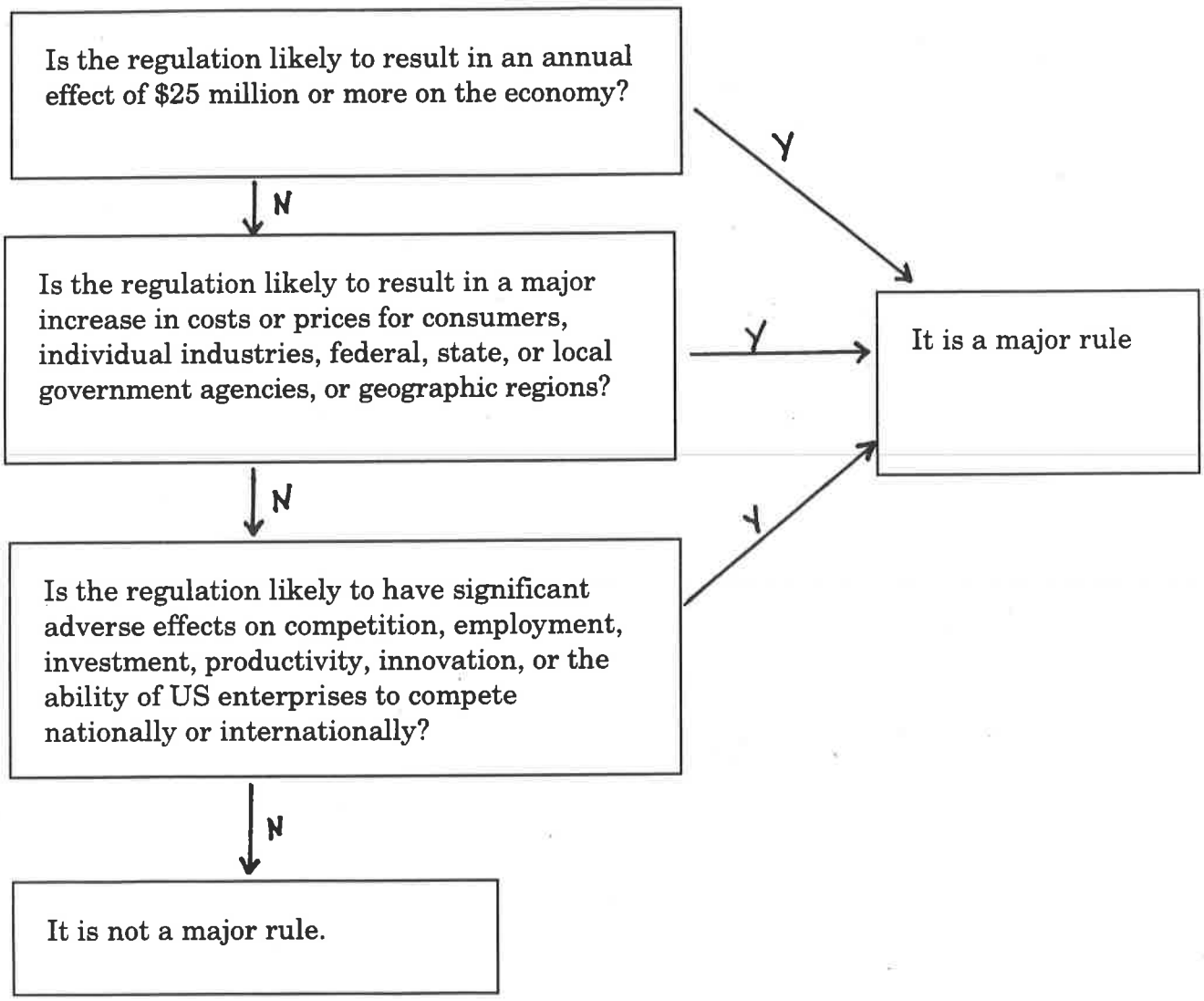
[12] See supra note 2.

APPLICABILITY FLOW CHART -- TITLE III
(§ 3103(B))



WHAT IS A "MAJOR RULE?" FLOW CHART -- TITLE III
(§ 3201(C))



TITLE IV -- Establishment of Federal Regulatory Budget Cost Control

Description of Legislation

Section 4001, Amendments to the Congressional Budget Act (Budget Act) adds a new Part B to the Budget Act, entitled *Federal Regulatory Budget Cost Control*. New Section 321 of the Budget Act provides for OMB-CBO Reports to the President and both houses of Congress. One year after enactment (and every five years thereafter), OMB and CBO are required to issue a joint report including:

(1) A projection of the aggregate direct cost to the private sector of complying with all Federal regulations and rules in effect immediately before issuance of the report....

(2) A calculation of the estimated aggregate direct cost to the private sector of compliance with all Federal regulations and rules as a percentage of the gross domestic product (GDP).

(3) The estimated marginal cost (measured as a reduction in estimated gross domestic product) to the private sector of compliance with all Federal regulations and rules in excess of 5 percent of the gross domestic product.

(4) The effect on the domestic economy of different types of Federal regulations and rules.

(5) The appropriate level of...savings that should be achieved...by Federal agencies...through the reduction of such aggregate costs to the private sector by equal percentage increments in the 6 years following the budget year until the aggregate level of such costs does not exceed 5 percent of the estimated gross domestic product....

Within 30 days after enactment of the bill, OMB and CBO would also be required to issue jointly a baseline report. This report would be a "projection of the aggregate direct cost to the private sector of complying with all Federal regulations and rules in effect immediately before issuance of the report...." The two agencies would be required to prepare a new aggregate regulatory baseline for each fiscal year, adjusting it each year for the estimated growth in the GDP that year.

The bill would also add to what must be included in any concurrent resolution on the budget. New Section 323(a) of the Budget Act would require a concurrent resolution on the budget to specify:

(1) Changes in laws and regulations and rules necessary to reduce the aggregate direct cost to the private sector of complying with all Federal regulations by 6.5 percent for the budget year...and by equal percentage increments for each

of the out-years (until the aggregate level of such costs does not exceed 5 percent of the estimated gross domestic product for the same fiscal year as the estimated costs that will be incurred) for Federal agencies that issue regulations or rules producing direct costs to the private sector; and

(2) Changes in laws necessary to achieve reductions in the level of...overhead and to achieve programmatic savings...of the following:

- In the first outyear, one-fourth of the percent of reduction...from the aggregate regulatory base.
- In the second outyear, one-third of the percent of reduction...from the aggregate regulatory base.
- In the third, fourth, fifth, and sixth years following the budget year, one-half of the percent of reduction in regulatory authority from the aggregate regulatory base.

Section 323 would also add the following requirements:

(b) ALLOCATION OF TOTALS

(1) The Committees on the Budget...shall each allocate aggregate 2-year regulatory authority among each committee of its House and by major functional category....

(2) ...Each committee shall subdivide its allocation among its subcommittees or among programs over which it has jurisdiction.

(c) POINT OF ORDER

(1) It shall not be in order in the House of Representatives or the Senate to consider any bill or resolution, or amendment thereto, which would cause the appropriate allocation made under subsection (b) for a fiscal year of regulatory authority to be exceeded.

(2) Waiver -- The point of order...may only be waived by three-fifths of the Members voting....

* * * *

(e) EXCEEDING ALLOCATION TOTALS

(1) Whenever any Committee of the House of Representatives exceeds its allocation...any Member...may offer a bill in the House...which shall only prohibit the issuance of regulations and rules by any agency under the

jurisdiction of that committee for the fiscal years covered by that allocation until that committee eliminates its breach.

New Section 324 of the Budget Act would address analysis of regulatory costs by the Congressional Budget Office (CBO):

CBO shall prepare for each bill...reported by any committee of the House or the Senate, and submit to such committee --

(1) An estimate of the costs which would be incurred by the private sector in ...complying...; and

(2) a comparison of the estimate of costs...with any available estimates of costs made by such committee or by any Federal agency.

New section 325 contains two definitions which are particularly important:

(3) The term "regulatory authority" or "regulatory cost" means the direct cost to the private sector of complying with Federal regulations and rules.

(4) The term "direct costs" means...all expenditures occurring as a direct result of complying with Federal regulation, rule, statement, or legislation...

A final significant provision of Title IV, § 4002, would require the President to include within the annual budget submitted to Congress, "a regulatory authority analysis of the aggregate direct cost to the private sector of complying with all current and proposed Federal regulations and rules and proposals for complying with section 323 (above) for the budget year and the outyears."

Changes in Law

This Title primarily affects how Congress conducts its business of adopting the budget, although § 4002 could add substantially to agencies' burdens to analyze the effects of their programs. Other changes in law include a requirement that when Congress passes the budget it specify laws and regulations that must be changed to reduce private costs of compliance by 6.5% (each year until total costs do not exceed 5%). Section 4003 amends the Regulation Flexibility Act to add costs to small entities and individuals of complying with proposed rules.

Analysis

The focus of this Title is solely on the costs of compliance, with no consideration of the benefits of regulations. The joint reports by OMB and CBO could be significant changes in current practice because they could shift the nature of the Congressional debate away from the reasons why regulations are needed to focus primarily on the costs of complying with those regulations. Many questions are raised by the elements of the joint

reports. For example, § 321(a)(4) requires the report to include the "effect on domestic economy of different types of federal regulations."

Q - does this mean qualitative?
Q - would this include benefits? It should -- as an "effect."
Q - what does "different types of regulations" mean?

Paragraph (5) is very strange; this is a "report" but the paragraph seems to be setting a standard for the reduction by agencies of costs to the private sector of federal regulations, i.e., -- "reduction of such aggregate costs...by equal percentage increments in the 6 years...until costs do not exceed 5% of gross domestic product." This seems to require deregulation based solely on costs -- no benefit calculation, with an arbitrary standard of costs to be achieved equal to 5% of GDP. But this is merely a report to Congress, which cannot impose such substantive requirements.

Section 4002 is a significant change in information that must be reported by the Executive Branch. The President's Budget must include an analysis of the total direct costs to the private sector of complying with all current and proposed regulations. This would essentially require EPA to perform an annual update of its "Cost of Clean" study and to include the costs of complying with proposed regulations. All federal agencies would be required to prepare similar reports, which might be a substantial new responsibility for many agencies if they have not previously prepared reports similar to "Cost of Clean."

TITLE V -- Strengthening of Paperwork Reduction Act

Description of Legislation

The Paperwork Reduction Act would be amended to give added authority to the Director of OMB (through OIRA). Section 5301(9), 44 USC 3504(c), the Director's authority over information collection, is amended to add paragraph (9). 44 USC 3504(a) states that "The authority of the Director under this section shall be exercised consistent with applicable law." But a new subsection (c)(9) authorizes the Director to initiate and conduct, "with selected agencies and non-federal entities on a voluntary basis," pilot projects to test the feasibility and benefit of changes or innovations in Federal policies, rules, regulations and agency procedures to improve information management practices and related management activities "(including authority for the Director to waive the applicability of designated agency regulations or administrative directives after giving timely notice to the public and Congress regarding the need for such waiver)."

§ 5303 Decreases OMB review time from 60 to 30 days and stipulates that an information request may not be disapproved by OMB after 60 days.

§ 5306 Creates a new procedure allowing any person to request OMB review of any information collection by or for an agency, i.e., private enforcement of information collection procedures (even though there is no judicial review).

Changes in Law

Paragraph (c)(9) would give the Director of OMB potentially significant power. The parenthetical phrase appears to give the Director sole authority to waive any regulations as part of a pilot to test the feasibility or benefits of changes to improve information management and related activities.

Any member of the public, including those required to respond to information requests, would be allowed to initiate OMB review of agency information efforts.

Analysis

Depending on how the Director interpreted the new authority to waive regulations, it could be far-reaching.

TITLE VI -- Strengthening Regulatory Flexibility

Description of Legislation

The Regulatory Flexibility Act would be amended as follows:

§ 6002 States that agency determinations of significant impact of proposed rules on a substantial number of small entities must consider direct and indirect effects of a rule.

§ 6003 Adds a procedure for sending an agency's Regulatory Flexibility Analysis and proposed rule to the Chief Counsel for Advocacy of the Small Business Administration and, if the Chief Counsel objects, to publish the Chief Counsel's statement of opposition along with the proposed rule.

§ 6004 States the "Sense of Congress" that the Chief Counsel be given amicus status in any rule challenge.

Changes in Law

The only significant change would be that agencies would be required to predict the indirect effects of a rule on small businesses, non-profits and governments. The agency would then be required to consider those indirect effects in making the threshold determination of whether the rule would have a significant impact on a substantial number of small entities.

Analysis

Predicting the indirect effects of proposed rules on small entities could impose a substantial burden on agencies. This would also require the entire government to focus on the indirect effects of rules on only one special interest group, while potentially ignoring such effects on others.

TITLE VII -- Regulatory Impact Analyses (RIA)

Description of Legislation

Title VII would amend the Administrative Procedure Act (APA).

§ 7002 Adds a new procedural step to rulemaking -- it requires a "notice of intent" to be published 90 days before publication of a proposed major rule. A major rule is defined in § 7004(b) as one that would affect greater than 100 people or would result in a compliance cost of more than $1 million for any single person. The notice of intent shall include, to the extent possible, the information required to be in an RIA, as newly specified in § 7004.

§ 7003 Adds a new procedure: a public hearing is required on any proposed rule if greater than 100 interested persons, acting independently, submit comments.

Section 7003 also requires agencies to extend the comment period for 30 days if in the first 30 days one hundred people individually ask for an extension, and the agency may not adopt a rule until after that extension.

§ 7003(c) Major change to the APA but no change to existing practice -- requires agencies to publish responses to the substance of the comments received.

§ 7004 Codifies E.O. 12291 but establishes 23 new standards for the contents of an RIA, including:

(1) A statement that describes and, to the extent practicable, quantifies the risks to human health or the environment to be addressed by the rule.

(2) A demonstration that the rule provides the least costly or least intrusive approach for meeting its intended purpose.

(3) A description of any alternative approaches considered by the agency or suggested by interested persons and the reasons for their rejection.

(4) An estimate of the nature and number of persons to be regulated or affected by the rule.

(5) An estimate of the economic costs of the rule, including those incurred by persons in complying with the rule.

(6) An evaluation of the costs versus the benefits derived from the rule....

(7) Whether the rule will require onsite inspections.

(8) Whether persons will be required...to obtain licenses, permits, or other certifications, and the fees and fines associated therewith.

(9) Whether persons will be required...to disclose information on materials or processes, including trade secrets.

(10) Whether persons will be required to report any particular type of incidents.

(11) Whether persons will be required to adhere to design or performance standards.

(12) Whether persons may need to retain or utilize any lawyer, accountant, engineer, or other professional consultant in order to comply....

(13) An estimate of the costs to the agency of implementation and enforcement of the regulations.

Changes in Law

Under current law, the APA requires a notice of proposed rulemaking with a comment period and a notice of the final rule including a statement of the purpose and authority for the rule. Title VII would add substantial new steps to this process. A notice of intent, currently a voluntary procedure used by some agencies to increase public awareness and participation, would be required for all major rules. The threshold of "major rule" would become quite low since few federal rules would affect fewer than 100 people. Thus, the new step of publishing a notice of intent would apply to virtually all rules. In addition, the bill would, for the first time, establish requirements for the contents of a notice of intent, requiring it to include the information to be included in the RIA.

Section 7003 would increase the use of existing procedures, requiring an agency to hold a public hearing if more than 100 persons submit comments, and to extend the comment period for 30 days if requested by more than 100 persons. Section 7003(c) would amend the APA to require agencies to publish in the Federal Register their responses to comments on the proposal. This is current practice, but is not codified.

Section 7004 establishes detailed requirements for RIAs, expanding on what agencies currently include in an RIA.

Analysis

The new requirement, to include in the notice of intent the 23 items of information required to be in an RIA, changes the timing of the RIA in the rulemaking process. Thus, in practical terms, the RIA must be completed 90 days before the agency can publish a proposed rule.

The new public hearing requirement could increase opportunities for the public to participate in rulemaking. But it arguably goes beyond that laudable purpose by requiring

a public hearing if a rule engenders comments from more than 100 persons, even if no commenter wants a hearing. Most people submit comments at the end of the comment period, so agencies will not know if this standard is met until the last few days. But this could then require reopening the comment period for the hearing and the agency will need a Federal Register notice of that and 15 days notice of the hearing. This will likely add at least 3 weeks to any rulemaking, which already takes longer than 1 year (with the new 90 days added to the front end it would take even longer).

The bill makes the standard 100 persons "acting individually," which could mean that persons and groups that join in another person's comments will not be counted. This seems to be intended to discount such grouped comments, but could presumably be countered by persons submitting the same comments individually. It could thus be seen as requiring groups of people with similar interests to waste paper, and add to the agency's filing burden, by submitting multiple copies of similar comments. This could be read in conjunction with the new agency requirement to respond to comments as placing a greater burden on agencies.

Most agencies currently respond to the substance of comments, but they typically group comments that are similar and may not respond specifically to every comment (also typically do not respond if the comment is insignificant). This language raises the question whether grouping would still be allowed -- agencies will no doubt spend legal time analyzing this and may decide not to chance it, thus adding some time and busy work to rulemaking (no extra benefit to government, regulated entities or public) or they will not do so and be challenged and litigate the issue.

The new requirements for what an RIA must contain are largely analyses or information than an agency would undertake and provide to the public in some form as part of the rulemaking process. Thus, they may not impose a significant new burden on agencies. But including them in the notice of intent may impose a burden to collect such information and complete the analyses much earlier in the rulemaking process than is currently done.

Some of the RIA requirements do, however, impose new standards. The requirement that the RIA demonstrate that the rule uses the least costly or least intrusive approach is a new substantive standard for all rules to meet. This standard could conflict with some statutes that state that costs are not be considered in setting rules for achieving the statutory purpose. The meaning of "least intrusive" promises to be a fruitful area for litigation. Agencies can expect persons affected by their rules to challenge them on the grounds that they are not the least intrusive possible rules. This could cause significant litigation and delay in achieving statutory purposes.

TITLE VIII -- Protection Against Federal Regulatory Abuse
Subtitle A -- Citizens' Regulatory Bill of Rights

Description of Legislation

Section 8101, the Citizens' Regulatory Bill of Rights, provides that:

> each person that is the target of a Federal investigative or enforcement action shall, upon the initiation of an inspection, investigation, or other official proceeding directed against that person, have the right --
>
> (1) to remain silent;
>
> (2) to be advised as to whether the person has a right to a warrant;
>
> (3) to be warned that statements can be used against them;
>
> (4) to have an attorney or accountant present;
>
> (5) to be informed as to the scope and purpose of the agency action;
>
> (6) to be present at the inspection, investigation, or proceeding;
>
> (7) to be reimbursed for unreasonable damages;
>
> (8) to be free of unreasonable seizures of property or assets; and
>
> (9) to receive attorney's fees and other expenses from the Government when the Government commences a frivolous civil action against such person...

Each of these requirements does not apply "if compliance with the requirement would substantially delay responding to an imminent danger to person or property; or substantially or unreasonably impede a criminal investigation."

Each agency of the Federal Government must make rules within 90 days after enactment to implement the regulatory bill of rights "in the context of that agency's functions."

Changes in Law

The list of rights initially resembles those that currently apply to criminal defendants. However, the legislation would expand these, create a number of new rights, and extend them to a broad range of non-criminal proceedings as well as to investigative phases of criminal enforcement.

The legislation would create six new rights not recognized under current law --

[1] *A new right to silence.* The current constitutional right to remain silent limits only the Government's ability to use statements (or draw adverse inferences from silence) in criminal prosecutions. The legislation would create a new right to silence in inspections, investigations, civil proceedings, and other events.

Because it applies to each "person that is the target of a Federal investigative or enforcement action," the legislation would also create a new right to silence for corporations, which do not now have a constitutional right to silence. Pollution discharge monitoring reports, hazardous waste facility operating records, aircraft safety reports and maintenance records, SEC disclosure documents, and other legally-mandated reports could be legally withheld by corporations fearing inspection, investigation, or civil or criminal liability.

[2] *A new right to advice about search warrants.* There is now no Fourth Amendment right to be "advised" as to whether a person has a right to a warrant -- an issue which often requires a complex legal determination by a judge. Under current law, if a person denies entry by law enforcement officials, the officials ordinarily seek a warrant absent fact-specific exceptions to the warrant requirement -- such as permissive entry, pervasively regulated entity, plain view, and exigent circumstances. Currently, the failure to obtain a warrant where one is required results in the exclusion of the evidence obtained from use in criminal prosecution of the person with the Fourth Amendment right. The legislation would create a new right to advice. It does not specify whether evidence would be excluded from civil, administrative, or other proceedings in the absence of advice, or what would occur if wrong advice were given.

[3] *A new right to a Miranda warning.* The existing constitutional right to a warning about the right to remain silent is limited to custodial interrogations. These are situations where an individual has been detained and reasonably believes he or she is not free to depart. The proposed legislation would require that such a warning also be delivered to any target upon the *initiation* of any inspection, investigation, or other official proceeding. (This provision would require such a warning by federal criminal investigators even for noncustodial interrogations - a significant expansion of criminal suspects' rights). The right to a warning would apparently apply even if there were no questions asked to the target. It is not clear what the consequences of a failure to warn might be; by analogy to constitutional practice, it might be exclusion of evidence from subsequent proceedings.

[4] *A new right to presence of attorneys and accountants.* Under current law any person is permitted to have an attorney, accountant, or any other person present for virtually any event -- except for grand jury testimony, where only the witness may be inside the grand jury room. However, the existing permissive ability to have another person present is different from a right. By defining the presence of an attorney or accountant as a "right," the legislation signifies that an inspection, investigation, or other proceeding is unlawful without the presence of the required person or a knowing, intentional, and uncoerced waiver of such presence.

There is an existing constitutional right only to an attorney - not an accountant - and only in two specific instances: custodial interrogations and criminal trials. These two events cannot be conducted without the presence of an attorney or waiver of the right. The legislation would expand the right to an attorney to include presence at inspections, investigations, and other "official" proceedings, and would create a new right to an accountant at all of these events. The legislation does not limit the new rights to attorneys and accountants to instances in which the Government is seeking to deal with legal or accounting functions. Indeed, the rights would apparently apply even if there is no intent on the Government's part to interview the target or review the target's records -- for example, during a sampling inspection or visual inspection.

Under current law if a person has a constitutional right to an attorney, the government must provide one if the person is unable to afford one. By creating a new statutory right, the legislation may conceivably be construed to require the government to pay for an attorney and an accountant in various circumstances. Several other implications of the rights to an attorney and accountant are discussed below under [6].

[5] *A new right to information on the scope and purpose of investigations and other proceedings.* A right to be informed of the scope and purpose of agency actions exists under current law for regulatory *inspections* under virtually every regulatory statute, including all of those that EPA administers. However, no such right currently exists for the commencement of civil or criminal investigations or grand jury proceedings - until a target is actually interviewed or subpoenaed for interview. Thus, a suspected drug dealer or hazardous waste dumper is not now entitled to know that an investigation has been commenced. Under the proposed legislation such notice would be required.

[6] *A new right to personal presence.* There is no current constitutional right of a target to be present at any official proceeding other than at arraignment and criminal trial. The proposed legislation would establish a new right to presence "upon the initiation of" inspections, investigations, and other proceedings. This has at least five implications:

> First, the right to be present would apparently apply whether or not the target is the entity being inspected. For example, the Government would be prohibited from conducting an inspection of a hazardous waste generator as part of the investigation of an unrelated disposal facility unless the target disposal facility and any of its target employees were present.
>
> Second, the right to be present "at" any "investigation" appears to create a statutory right for the target (and the target's attorneys and accountants) to accompany government investigators as they interview offsite informants, make telephone calls, follow leads, or conduct analysis of documents; the right is not limited to particular premises.

Third, because the right to be present is not confined to particular premises (such as those owned by the target or by the government), the right to be present during the course of investigations and inspections will create difficult issues where the property owner does not consent to targets entering its property with government inspectors or investigators.

Fourth, the new right to be present at other "official proceedings" would prohibit prosecutors from conducting grand jury proceedings without the target or targets being present.

Fifth, both the rights to personal presence [6] and to the presence of accountants or attorneys [4] may also mean that in instances where the required person or representative is unavailable, government inspections, investigations, and other proceedings would need to be halted. Thus, the legislation may require all inspections to be pre-scheduled at the convenience of the person and the person's attorney and accountant, and to be cancelled and rescheduled if any of these persons becomes unavailable (absent imminent danger or the substantial or unreasonable impedance of a criminal investigation).

Proposed rights [7], [8] and [9] already exist under current law.

Analysis

The exceptions from the new rights where their exercise would "substantially delay responding to an imminent danger" or "substantially or unreasonably impede a criminal investigation" raise the difficult issue of how and when such a determination may be made. Can law enforcement agencies grant themselves a blanket exemption? Must the determination be made case by case? Must it be made before or after the fact? This issue is extremely important, especially because the legislation does not expressly provide any mechanism for enforcement of the rights created.

However, it can be expected that both affirmative litigation and use of each right in defense of administrative, civil, and criminal enforcement actions will occur. If the constitutional model is followed, the violation of any of these rights would invoke the "exclusionary rule" -- viz. any evidence obtained in violation of these rights, or discovered as a result of information obtained in violation of any of these rights, would be excluded from use against the person. Whether or not "good faith" defenses would be available to law enforcement personnel would presumably be left up to the courts to decide. On the other hand, because this subtitle contains no enforcement provisions or judicial review provisions, it may be intended to create no enforceable rights or defenses.

Fact-based legal judgments will need to be made by each agency in advance of -- and during the course of -- each inspection, investigation, or other "official proceeding" potentially triggering the "regulatory bill of rights." Such judgments will include (1) whether

and at what point any person becomes a "target," (2) what events require agencies to give advice or honor any of the other new rights, (3) whether a warrant is required, and (4) whether a given occurrence constitutes a situation where the observance of the rights would "substantially delay responding to an imminent danger."

The proposed legislation will require an enlarged bureaucracy to administer. Cost categories include:

(1) Costs for the development of regulations for each federal agency to implement the regulatory bill of rights,

(2) Costs for additional agency counsel to provide legal advice during each inspection, investigation, or other event,

(3) Costs for scheduling and rescheduling of inspections and other events occasioned by the absence of a target, accountant, or attorney with right to be present,

(4) Possible costs for provision of attorneys and accountants to indigent targets,

(5) Costs for agency counsel or assistant U.S. attorney to be present at events where target is represented by counsel and the government inspector or investigating agent is not (unless government is to be unrepresented),

(6) Costs for agency counsel, Department of Justice counsel, and assistant U.S. attorneys to defend litigation brought against government by alleged targets,

(7) Costs for agency counsel, Department of Justice counsel, and assistant U.S. attorneys to litigate alleged rights issues raised by defendants in enforcement proceedings,

(8) Costs for U.S. judicial system to handle enlarged caseload resulting from litigation over rights.

(9) Social costs include the swamping of federal trial and appellate courts with "rights-based" claims with respect to every regulatory action, criminal investigation, or other proceeding; competition with crimes litigation; hampering of federal criminal investigations; increased litigation costs and risk of loss due to new corporate privilege against self-incrimination; loss of self-reporting; loss of deterrence from unscheduled inspections; and substantial litigation uncertainty until these complex rights issues are decided by the evolution of case law -- a process that may take many years.

The establishment of this array of new "rights" is likely to drive up private legal costs for American industry, threatening its international competitiveness.

TITLE VIII - PROTECTION AGAINST FEDERAL REGULATORY ABUSE
Subtitle B - Private Sector Whistleblowers' Protection

Description of Legislation

This subtitle provides for the protection of "any person subject to Government regulation" from any "prohibited regulatory practice." This subtitle applies not only to federal agencies, but also to any agency of state government that carries out a federal law or implements a state program approved by a federal agency; this would include state pollution control agencies, worker safety agencies, health and welfare agencies, transportation agencies, fish and wildlife agencies and others.

Prohibited regulatory practices are defined as any government employee taking or failing to take, recommending or directing others to take or fail to take, approving of others taking or failing to take, or threatening to take or fail to take any regulatory action

> "because of any disclosure by a person subject to the action, or by any other person, of information that the person believed indicative of --
>
> (I) violation or inconsistent application of any law, rule, regulation, policy, or internal standard;
>
> (II) arbitrary action or other abuse of authority;
>
> (III) mismanagement;
>
> (IV) waste or misallocation of resources;
>
> (V) inconsistent, discriminatory or disproportionate enforcement;
>
> (VI) endangerment of public health or safety;
>
> (VII) personal favoritism; or
>
> (VIII) coercion for partisan political purposes;

by any agency or its employees."

A governmental action is "deemed" to be caused by the disclosure if the disclosure "was a contributing factor to the decision." The "disclosure" does not have to relate to the agency or the matter at issue. For example, a person may charge that an agency's action is the result of disclosures regarding the behavior of some other agency.

The commission of a "prohibited regulatory practice" gives rise to four different consequences:

(a) It provides a complete defense to any "administrative or judicial action or proceeding, formal or informal, by an agency to create, apply or enforce any obligation, duty or liability" against the person. If the existence of a prohibited regulatory practice is found, the person may be required to comply but only "to the extent compliance is required of and enforced against other persons similarly situated, but no penalty, fine, damages, costs, or other obligation" may be imposed.

(b) Any agency and any agency employee that engages in a prohibited regulatory practice may be assessed a civil penalty of up to $25,000 per practice, per day. This penalty is to be assessed through an administrative process to be devised by the President by regulation.

(c) Any person "injured or threatened by" a prohibited regulatory practice may bring a citizen suit in the U.S. district court of any district where either the practice or the injury occurred. The court may restrain the agency or agency employee, order cancellation of any monetary fine or other assessment, order recision of any settlement entered into by the parties because of the practice, order the issuance of any permit or license delayed or denied as a result of the practice, and require the agency or agency employee to pay damages, legal fees and other expenses, and punitive damages in the amount of $25,000 per practice per day.

(d) Any person may refer any suspected prohibited practice to the Special Counsel of the Merit Systems Protection Board for investigation.

Changes in Law

The proposed legislation makes several significant changes in current law:

(1) The legislation disables government agencies from correcting mismanagement, misallocation of resources, or inconsistent applications of laws, rules, policies or internal standards. Taking any action in response (even partially in response) to a disclosure, is a prohibited regulatory practice.

If the SEC promulgated a rule and a business group charged that the rule was being administered inconsistently and was interfering with the operation of markets. If the SEC thereafter proposed either to change the rule to make it more acceptable to businesses, or to change its administration of the rule, it would be guilty of a prohibited regulatory practice. The SEC and its employees could be sued by any person allegedly injured by the change in the rule or its administration. The person (or group, or class action) would be entitled to injunctive relief, damages, punitive damages, and payment of its fees and expenses.

If an airline safety group disclosed that the Federal Aviation Administration has failed to inspect all U.S. air carriers, despite a "policy" or "internal standard" to do so, and the FAA thereafter conducted an inspection of all air carriers prompted by the disclosure, any resulting enforcement action against an air carrier would be a "prohibited regulatory practice." Any air carrier charged with violations would be excused from any penalty or sanctions and the FAA and its employees would be liable both to the federal treasury and to the air carrier for up to $25,000 per day, plus the attorneys fees and any other damages including loss of business or business opportunities or value of business (stock price) due to the enforcement action.

(2) The proposed legislation purports to create financial liability for state agencies and personal liability for state employees based on their performance of governmental functions. The imposition of liability for the performance of governmental functions by states and their employees may violate the 10th Amendment to the United States Constitution as construed by the Supreme Court. It would also constitute an unfunded mandate unless the federal government indemnifies the state and its employees.

(3) The proposed legislation would make the motives of agencies and employees dispositive in deciding the validity of government actions. The motives of governmental agencies or officials are not now legally relevant in determining the duties of private individuals or regulated entities to comply with laws, obtain permits, or pay fines and penalties. (Indeed, even in criminal prosecutions, the defense of "selective prosecution" is extremely limited in scope and difficult to make).

(4) The legislation would eliminate financial liability for companies and individuals who are, in fact, guilty of violations, if a contributing factor to the decision to take enforcement action were "disclosure" by "any person" of inconsistency or mismanagement by any agency. For example, if a governmental action were based *primarily* upon the person's violation of law or endangerment of the public, but was triggered in part by some disclosure, the legitimate basis for the action must be disregarded and the illegitimate basis controls the disposition of the case.

(5) The threshold for liability created by the legislation is lower than any in existing law. Under existing law protecting *governmental* whistleblowers, 5 U.S.C. §2302(b)(8) defines "prohibited personnel practices." It prohibits "any employee who has authority to take, direct others to take, recommend, or approve any personnel action" from exercising that authority to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of...any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences --- (i) a *violation* of any law, rule, or regulation, or (ii) *gross* mismanagement, a *gross* waste of funds, an *abuse* of authority, or a *substantial and specific* danger to public health and safety." The law does not protect employees where disclosures are specifically prohibited by law or are of classified information.

In addition to extending the concept of prohibited personnel practices to the private sector by applying it to most interactions between governments and "any person", the proposed legislation adds new categories of conduct. It removes the modifying adjective "gross" from mismanagement and from waste, and the modifying adjectives "substantial and specific" from endangerment to public health or safety. It adds to the list of disclosable items -- "inconsistent application of any law, rule, regulation, policy, or internal standard," violations not just of laws and regulations but also of "any...policy or internal standard," any "arbitrary action," "misallocation of resources," "inconsistent, discriminatory or disproportionate enforcement," and "personal favoritism." There is no exception for unlawful disclosures or disclosures of classified information.

(6) The legislation does not define "disclosure." A press release (or anonymous letter to the editor) may be sufficient. There is no requirement to notify any government official. Nor does the legislation state when the disclosure must occur in order to serve as the basis for a claim. Accordingly, a person may claim that disclosures made 10 years ago are still serving as a basis for unfavorable agency action or inaction. Conversely, a person may make a disclosure after receiving a warning letter, subpoena, or notice of violation, in order to provide a basis for challenging any subsequent formal enforcement action.

> For example, the target of an investigation by the FBI might issue a press release charging inconsistent application of investigatory standards. If the FBI subsequently took action, the target could allege that the action was due, in part, to the disclosure, in an effort to escape all fines, penalties, and prison time. Even if the claim were without merit, the target would have the opportunity to litigate over the FBI's decisionmaking process and to discover internal records forming the basis for the decision to prosecute.

(7) Government agencies and their employees now have qualified immunity from financial liability for actions taken within the course of their employment. This immunity is partly based on statute and partly based on the constitutional doctrine of separation of powers. This qualified immunity would be abolished, so they could be sued for damages. The legislation would make agency employees personally liable to citizen groups, corporations, and other entities.

The legislation creates new and complex issues of when federal employees are entitled to Department of Justice representation for claims made against them in their personal capacity, when federal employees are entitled to payment of their legal fees for outside counsel, and when federal employees are entitled to be indemnified for actions resulting in awards against them. None of these are addressed. The states will also need to address these issues in the context of state constitutional and statutory limitations and proscriptions.

(8) The legislation provides potentially powerful incentives for federal and state officials to remain complicit in concealing ongoing violations in order to avoid personal liability for a change in course.

Suppose a company falsifies safety records and successfully conceals the falsification with the aid of a corrupt federal official. If someone later discloses official malfeasance, the agency cannot act against the company, because the disclosure would be a contributing factor to the decision to act. If the agency subsequently initiates enforcement action, the company is entirely immune from liability for the past violations (having only the duty of present compliance). However, the agency and its officials all would owe penalties of up to $25,000 per day plus punitive damages to the company.

(9) The legislation provides a defense to liability for any person where a "related entity" has suffered a prohibited regulatory practice. Corporate affiliates, parents or subsidiaries, officers, directors, or employees may be deemed such entities. At a minimum, the issue of who is "related" enough to qualify for the immunity will raise complex questions for litigation.

If disclosure of agency mismanagement or failure to protect public health and safety leads to an investigation that results in action against a corporation, not only is the corporation insulated from liability, but so is any person related to the corporation. This could prevent law enforcement techniques whereby persons that are more culpable than others are sanctioned more strongly.

(10) The legislation eliminates financial liability and criminal sanctions. The legislation provides that the only obligation that can be enforced is prospective compliance, and even that can be enforced only "to the extent compliance is required of and enforced against other persons similarly situated." Penalties, fines, damages, costs and "other obligation[s]" are explicitly barred. Because "compliance" is expressly listed as the only remedy allowed, the undefined ban on any "other obligation" appears to bar any prison sentence, probation, or other criminal penalty.

(11) The legislation will create a new basis to influence and attack the adoption or amendment of any rule. The legislation specifically provides that parties may assert a prohibited regulatory practice as defense to an agency decision to "create" an obligation. This provision would apply to the promulgation of any rule and create a new basis to assert the invalidity of a rule and the right to damages.

For example, any group that has charged "inconsistent" application of agency policy during the course of a rulemaking, will have the basis to assert personal liability against any government official involved in the promulgation of the rule, as well as liability against the agency.

(12) The catalogue of awardable compensatory damages is broader than that generally awardable in damage actions under existing federal and state law. It includes not only attorney and consultant fees, but also speculative damages such as "business foregone." It also provides that the government agency and/or agency officials may be compelled to pay for the plaintiff's "costs of compliance, where appropriate." Punitive damages would be payable to plaintiffs even absent any actual damages, because they are provided for in a separate subsection.

(13) The legislation provides for injunctive relief as well as damages. The legislation also allows any party to seek recision of a settlement alleged to result from a disclosure; thus a group could reach a settlement with an agency and then attack the settlement in court.

(14) The legislation would create procedural changes including some complex jurisdictional issues. The legislation would allow plaintiffs to choose either the district court where the prohibited regulatory action occurred or where the injury was suffered. Currently, most monetary claims against the federal government must be litigated in the Court of Federal Claims unless they are under $10,000, in which case they may be litigated in district court; although claims against the United States for money damages (regardless of amount) may be litigated in the district court for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" but only if a private person would have been similarly liable for such act. 28 U.S.C. § 1346. This legislation would expand causes of action in the district courts.

The legislation may produce jurisdictional conflict where the lawsuit in question seeks issuance of a permit or review of a regulation. Under jurisdictional statutes (as well as many agency statutes) these issues are generally within the exclusive jurisdiction of the Courts of Appeals rather than the district courts. The jurisdictional conflict created by the proposed legislation might require dismissal of a case if it is brought in one or the other court, or the severance of claims where some are reviewable only in the Court of Appeals, others only in the district court.

The legislation does not state whether and to what extent civil discovery will be allowed. Nor does it indicate whether there is to be a trial or merely a judicial decision based on review of the administrative record compiled by the agency. In general, the fact that the legislation makes motive relevant will require both discovery and trial. This means that in contrast to most regulatory actions and disputes, a federal court trial will be required.

Analysis

The proposed legislation would produce unintended results. Although it would provide remedies where a government agency or official uses governmental powers in a discriminatory fashion as a reprisal for disclosure of embarrassing information, it would also have the unintended effect of reinforcing existing corruption and mismanagement. This unintended effect arises because government agencies and officials are personally liable if they take any action even partly in response to disclosure of government mismanagement; thus, the correction of such governmental abuses is actually rendered a "prohibited regulatory practice."

As a result, the proposed legislation is likely to promote inconsistency in application and enforcement of government rules and regulations. If any person discloses "inconsistency" or "mismanagement," any action taken by the government agency or its employees to restore consistency or correct management is -- because taken in response to the disclosure -- a prohibited regulatory practice. Because the penalty for taking such action

is personal liability of up to $25,000 per day, plus other damages, government employees would be effectively prohibited from restoring consistency to a program or eliminating mismanagement.

In addition, because the threshold for invocation of this subtitle is quite low, it is likely to produce substantial private litigation and a multiplicity of claims in garden variety governmental enforcement, permitting, rulemaking and other actions. The most likely outcome of enactment would be a burgeoning federal court docket, and a substantial and remunerative target for the plaintiffs' bar -- who could recover an array of damages not presently recoverable at common law or under existing federal and state law, plus attorneys fees, witness fees, and consultant fees.

The constitutionality of this subtitle as applied to state employees carrying out governmental functions is highly doubtful.

Governmental cost categories added by the legislation include:

(1) costs for development and administration of regulations for the administrative penalty assessment process;

(2) costs for agency attorneys and Department of Justice attorneys to advise agencies and employees on avoiding "prohibited regulatory practices";

(3) costs for internally investigating claims of prohibited regulatory practices;

(4) costs of continued waste, misallocation, and other conduct that cannot be corrected because to do so would be a "prohibited regulatory practice;"

(5) increased litigation costs for governmental defense of citizen suits, counterclaims in enforcement proceedings, challenges to regulations, and other proceedings;

(6) litigation costs and attorneys fees for agency employees accused of prohibited regulatory practices; and indemnification of agency employees for damages if actions were within the scope of their duties;

(7) increased costs of recruiting and retaining qualified government employees because of the exposure to personal liability for official actions.

(8) compensatory damages, punitive damages, and attorney, consultant, and expert witness fees payable by the government to regulated entities and other citizen plaintiffs;

(9) loss of fines and penalties that would have been payable to the government but for the legislation;

(10) costs to administer the administrative penalty assessment process;

(11) costs for Special Counsel investigations;

(12) costs for state implementation (and likely costs for constitutional challenges to the law's applicability to states).

Social costs would include the limitation on the practical ability of governmental agencies to take enforcement actions, or to issue or deny permits, because of potential threats of damage claims; requirements of multiple sign-offs and verifications within agencies to avoid potential exposure to liability; likely substantial litigation delays relating to any enforcement action, permit denial or issuance, and other governmental actions; the weakening of deterrence because of the ability of a new defense and the creation of substantial monetary counterclaims to any governmental action; and continued official complicity in waste, fraud, and abuse where it already exists because disclosure would provide the basis for substantial personal liability and agency liability.

Alternatives are available to serve the intended objectives without the defects or additional costs of this legislative draft. Proposed legislation could be narrowly targeted by simply prohibiting governmental agencies from retaliating against a person where that person has disclosed gross waste, fraud, or violations of law. The categories could be drawn from existing governmental whistleblower legislation. Proof of retaliation could be required, not merely that a disclosure contributed to a governmental decision. Personal liability should not be part of the legislation, nor should exemption from criminal liability, nor recovery of exorbitant and punitive damages. Finally, such legislation probably cannot be applied directly to the states and to state employees.

TITLE IX - PRIVATE PROPERTY RIGHTS PROTECTIONS AND COMPENSATION

Description of Legislation

The proposed legislation "entitle[s]" private property owners to "compensation from the United States" for "any agency infringement or deprivation of rights to property." The legislation defines property as "land" or "the right to use or receive water." § 9004(6).

"Agency infringement or deprivation of rights to property" is defined as "a limitation or condition that -

> (A) is imposed by a *final agency action* on a *use* of property that would be lawful but for the agency action, and
>
> (B) results in a reduction in the value of the property equal to ten percent or more." § 9002(a)(2).

"Use" is defined as "a prior, existing, or potential utilization of property, by the private property owner, which is -- (A) predictable; and (B) consistent with the utilization of property of the same general type or with property usage in the geographic area in which the property is located." § 9004(8).

"Final agency action" is defined by incorporating the definition in 5 U.S.C. § 551(13): "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." (The terms within (13) are defined within other subsections of §551 to include the grant of money, assistance, licenses, exemptions, recognition of rights, and other actions including the consequences of enforcement actions, and the making of binding decisions.) Section § 9004(4) explicitly includes among final agency actions the denial of a permit, issuance of a cease and desist order, issuance of a "jeopardy opinion" under the Endangered Species Act, issuance of a permit with conditions, and commencement of a civil or criminal proceeding arising out of failure to secure a permit.

Thus, a limitation or condition on use of land or a right to use or receive water that reduces the value of the land or use of water by 10 percent or greater is compensable.

Limitations or conditions are considered to be the action of federal agencies if they are imposed by a state or local government pursuant to federal agency action binding on the state or local government. § 9002(a)(5).

The bill identifies three instances in which compensation shall not be provided [§ 9002(a)(3)]:

(1) where the action that is limited by final agency action "would constitute a violation of applicable State or local law (including an action that would violate a local zoning ordinance or would constitute a nuisance under any applicable State or local law."

(2) where the limitation is "imposed pursuant to a determination by the President that the use poses a or would pose a serious and imminent threat to public health and safety or to the health and safety of workers, or other individuals, lawfully on the property."

(3) where the limitation is "imposed pursuant to the Federal navigational servitude."

The bill provides that "within 90 days after receipt of notice of an agency action with respect to which compensation is required" the affected owner may submit a written request for compensation to the agency. The agency must, within 180 days after receipt of the request (1) determine whether the private property owner has demonstrated entitlement to compensation, and (2) if so, offer to compensate the property owner for the reduction in the value of the property. Reduction in value is defined as the difference between the fair market value of the property if the agency action were not implemented, and its fair market value if the agency action were implemented.

The property owner has 60 days from receipt of the offer to accept or reject it. If the agency determines that no offer shall be made, or if the property owner rejects the agency's offer, the owner may submit the matter for *binding* arbitration by an arbitrator appointed by the head of the agency from a list of arbitrators submitted by the American Arbitration Association (AAA). The arbitration must be conducted "in accordance with the real estate valuation arbitration rules of [the AAA]."

Any compensation must be paid by the agency not later than 60 days after the owner's acceptance of the agency's offer or the decision of the arbitrator. Funds for the payment must come out of the annual appropriation of the agency; in the absence of such sufficient funds the Comptroller General shall identify "the most appropriate Federal source of funds" and payment shall be made by the President from such source. In lieu of payment, the President may enter into an agreement with the property owner for a land exchange, provided that the properties to be exchanged are of equal value under the Federal Land Policy Management Act. 43 U.S.C. § 1716(d).

The bill expressly preserves any other rights to compensation under the Constitution or any other law, including claims related to personal property. It also specifies that submission of a request for compensation or receipt of compensation under this title is not a condition precedent for any other remedy. Double recoveries for the same reduction in value are prohibited and must be offset.

Changes in Law

(1) *The bill would dramatically expand what is a compensable government action.*

Under current constitutional provisions, property owners are entitled to compensation from the federal government for two types of actions. They must be compensated for:

(1) condemnation of their property for public use, and for

(2) government regulation of property that (in the words of a 1922 Supreme Court decision) "goes too far" -- a category commonly called "regulatory takings."

Property owners are not currently entitled to compensation for:
(3) agency actions that commence or eliminate programs or that redirect federal spending or policy decisions.

The proposed legislation would create a new right to compensation for many more regulatory actions (2) than does current constitutional law. It would also require compensation for some non-regulatory actions (3) that are not now compensable, including the grant of money, assistance, licenses, exemptions, and other actions where the result is a limitation or condition on the use of property.

For example, changes in federal rules for flood insurance may make a given lot unbuildable; this could occur where such insurance is required for local approval. Such a change would constitute a limitation that, under the proposed legislation, could require the federal government to compensate the landowner for loss in value. Such a change would not require compensation under Constitutional takings standards.

(2) *Ten percent is not the constitutional standard.*

Supreme Court decisions have dictated that so-called "regulatory takings" claims must be evaluated on a case-by-case basis. In general, courts considering regulatory takings have declined to award any compensation unless most of the property's value has been destroyed by the governmental limitation. This is because "takings" doctrine is a last resort to adjust societal burdens which fall too heavily on a particular property owner; it is not an entitlement to be free of any social costs. Indeed, Justice Oliver Wendell Holmes wrote, in the case which first established the doctrine of regulatory takings, that "government could hardly go on if to some extent values incident to property could not be diminished without paying for every...change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

The new right to compensation for any loss of 10 percent or more of a property's value inverts the existing rule of thumb for regulatory takings; in the absence of a physical

invasion of the property by the governmental action such takings are rarely found unless the diminution in value is 90 percent or more. A recent federal court decision reflects the current view: "Plaintiffs fail to allege any facts which show that the value of their real property has been destroyed or that all uses to which it might productively be dedicated have been prohibited. They simply allege that defendants have denied them an opportunity to exploit more lucratively a particular use of their property. That regulatory action deprives property of its most beneficial use does not render it unconstitutional." DeFeo v. Sill, 810 F. Supp. 648, 657 (E.D. Pa. 1993).

> The low threshold for compensation presents significant problems in this regard. For example, suppose that a landowner is currently farming a parcel of land but desires to build condominiums on it. Suppose further that because of wetlands on the site, the Corps of Engineers will issue a permit that only authorizes the development of individual residential houses. Under this legislation the owner would be compensated for the difference in value of the projected use and the permitted use even though both uses are profitable.
>
> Moreover, under this legislation, if the Corps of Engineers *grants* a permit to fill a wetland, any conditions on that permit, such as mitigation requirements, may give rise to a right to compensation.

Some practical difficulties arise from the low threshold for compensation. Real estate markets often fluctuate by 10 percent or more over short periods of time. Determining whether a specific governmental action produced the loss in value may be quite difficult -- especially as the legislation does not specify a particular time period for the loss.

(3) *The legislation would require the federal government to pay for the actions of state and local governments.*

The requirement that the federal government pay compensation for the actions of state and local governments carrying out federal programs is unprecedented and would open up the government to liability for actions over which it lacked direct control. For example, a state pollution control agency might deny a permit to a proposed waste incinerator, applying or purporting to apply federal standards. The denial would fall within the terms of the legislation, and the permit applicant could obtain compensation from the federal government, even though the federal government lacked any ability to compel the state to issue the permit.

(4) *The legislation expressly authorizes multiple actions by property owners in different forums to recover moneys from the government for the same governmental action.*

Section 9002(g) provides that the remedies provided in this title do not limit other rights to pursue claims for compensation. Section 9002(h) explicitly states that moneys awarded under this title may be credited against any judgment rendered in a court action

"that arises from the same reduction in the value of the same property." The only reasonable construction of these two provisions is that property owners may submit to "binding" arbitration or accept an offer under this title, but if they are dissatisfied with the award they are free to pursue other statutory and constitutional remedies in an effort to receive more money. In contrast, if the Government is dissatisfied with the arbitrator's decision, it has no recourse because the decision is binding.

(5) *The legislation commits to a private arbitrator legal issues that are not within the competence of such arbitration.*

The scope of the arbitration raises significant issues of concern to both states and the United States. The AAA arbitrator will rule on:

- what uses would or would not violate an applicable state or local law, including zoning laws,

- what constitutes a public or private nuisance under state law,

- what constitutes a Presidential determination of serious and imminent threat to public health and safety, and

- the scope and applicability of the federal navigation servitude.

The arbitrator will also need to address the following mixed issue of law and fact:

- whether the limited use is "a prior, existing, or potential utilization of property" that is "predictable and consistent with the utilization of property of the same general type or with property usage in the geographic area."

The difficulty with arbitrating legal issues is exacerbated in this legislation by the fact that the legislation makes the arbitrator's awards *binding and unreviewable in the courts*. This insulates any error of law by the arbitrator -- even where such error contradicts the law of the state or the Supreme Court.

The incorporation of AAA rules into the bill by reference also presents constitutional difficulties. If the association changes its rules -- which it is free to do without notice and comment rulemaking, and without judicial review -- such a change will amend federal law and increase (or decrease) the liability of the federal government for its actions without any intervening Act of Congress.

(5) *Agencies will need to establish new or expanded institutions for evaluating claims and making offers.*

The bill will require mechanisms for appraisals, investigations, and other processes for agencies that are not currently involved in real estate related claims. In addition, agencies will need to assess whether or not a claimed use is consistent with surrounding uses, local zoning, and other highly localized factors.

(6) *The bill may resurrect the practice of sequestration of appropriated funds.*

The bill requires that, notwithstanding any other law, payments must come from agency appropriations. It authorizes the head of the agency to transfer or reprogram "any funds available to the agency." This provision means that Congressionally authorized and appropriated funds may not be spent for the purposes for which they were provided. Because certain funds cannot be reprogrammed because they are used to carry out mandatory duties enforceable by third parties in court, such transferring and reprogramming is most likely to come from grants and project funds. Thus, federal agencies may be able to cancel programs or construction projects intended by Congress to be carried out.

(7) *The legislation raises complex issues of compensable property interests.*

By mandating compensation for reductions in the value of "the property," the legislation requires difficult determinations concerning the issue of the relevant parcel of property. Is value determined simply based on reduction in value of the specific portion of the property where the agency limitation applies, or is it the entire parcel including that to which the limitation applies? This "relevant parcel" question has long bedeviled the federal courts, which have resolved it case-by-case.

By defining as property the "right to use or receive water" the legislation at least raises the possibility that changes in contracts and rates for water users from federal water projects may create a compensable event. The definition does not appear to be restricted to "water rights" as understood under the doctrine of prior appropriation and water rights adjudications.

(8) *Notice requirements are ambiguous.*

The proposed legislation raises some uncertain issues concerning the "notice" to private property owners which triggers the time for submitting a claim. The legislation does not spell out the terms under which a notice must be provided; indeed it does not <u>direct</u> any agency to provide a notice. It simply <u>implies</u> a notice requirement by linking filing deadlines to the receipt of notice. Even if a notice is required, must an agency send a notice to every potentially affected property owner when a regulation is promulgated? And when does the time for a claim begin to run? For example, wetland regulation may have no effect on many properties that are not currently slated for development; is notice required to thousands of property owners who may own wetland property? How are they to be identified, given that there is no national registry of property owners? Moreover, how can persons be notified (or make claims for that matter) if a loss in value is based upon their

future intent to use land? If a governmental action forecloses a future possibility, how will the government know that a given landowner should have been notified?

Also left unclear by the legislation is when a claim accrues. It may be difficult to determine whether the claim accrues when a regulation first becomes applicable to a piece of property, or when a specific loss in value is experienced. Indeed, the legislation does not specify what kind of notice is required to trigger the 90 day period. Is publication in the Federal Register sufficient, or is individual notice required? If the agency believes no compensation is due, does it give no notice? These issues present substantial procedural questions that may need to be resolved in the courts.

(9) *The proposed legislation presents the possibility that government agencies may need to pay enterprises not to pollute.*

For example, several years ago EPA set an effluent limitation for gold mining operations. Most gold mines rapidly complied with the limitation, but some miners in Alaska filed suit claiming that if they complied with the limitation their mine would be unprofitable. The land use -- absent the effluent limitation -- was otherwise lawful. Thus they sought compensation for the "taking" of the value of the gold. The case eventually settled out of court with no payment by the government. Under the proposed legislation, however, the government would need to pay for any loss in value -- even though all other gold mines in the U.S. complied with the law and are continuing to mine.

The exception from the compensation requirement for limitations imposed pursuant to a determination by the President concerning serious and imminent threats raises the issue of what form such a determination must take in order for the exception to be recognized; the law does not say. In addition, the exception applies only to serious and imminent threats to health and safety; threats to the environment are excluded.

> If a coal operator mines without a permit or in violation of its permit, any enforcement action could give rise to a right to compensation. Coal mining without reclaiming the surface may be "otherwise lawful" under state and local law, and not constitute a nuisance under state law. Thus, compensation would be due even though a violation had occurred.

(10) *The legislation does not make it clear whether the government actually acquires any interest upon payment of compensation.*

Under current constitutional law, the government receives title to property in inverse condemnation cases. Where the award is for a 10 percent or other taking, it is not clear what the government receives, if anything. If the government receives nothing, it may be difficult to prevent claims from successive owners for similar, but unrelated, limitations on proposed uses. On the other hand, if the government receives an easement or other property interest, the definition of the interest may be quite difficult. Moreover, the result

may be the proliferation of recorded easement interests on land titles throughout the United States related to health, safety, environmental quality, land use, navigation and other uses, thus clouding the alienability of land.

Cost categories for Title IX include:

(1) Costs for establishing and administering claims review mechanisms in each federal agency -- including the retention of appraisers and experts on local land uses and state and local zoning and nuisance laws for the purposes of developing offers and denying claims;

(2) Costs for payment of claims;

(3) Costs for arbitrating claims;

(4) Costs for relitigating claims where litigants were dissatisfied with the arbitration award;

(5) All of the same costs with respect to claims engendered by state or local action;

(6) Costs for agency review of proposed actions to determine whether or not claims are likely to arise;

(7) Costs for provision of notice to all property owners that the agency is able to identify who may be entitled to such notice.

Social costs include the difficulty in taking any governmental action without giving rise to claims by one or another party for diminution in value, given the low threshold involved. A potential social cost may also arise to the extent to which the rights created by this title are confused with -- or regarded as -- constitutional rights guaranteed by the 5th and 14th amendments; such confusion may lead to loss of respect for judicial decisions based on constitutional claims. Social costs also include the costs of diverting taxpayer funds to purposes other than those for which they were appropriated -- allowing both claimants and agencies to subvert decisions made by Congress as the representative body of the republic.

Alternatives that could meet the objectives of Title IX could include requiring agencies annually to assess their history of claims in the administration of their ongoing programs and to adjust their programs accordingly (within the limitations and prescriptions provided by Congress); requiring agencies to assess the potential impacts of their prospective actions by including property impacts in their cost-benefit or other analyses; retaining the existing constitutional standards for just compensation; and/or providing simplified mechanisms for recovery of just compensation (in the district courts or Court of Federal Claims) without changing the existing threshold for compensation.