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RSC THE REPUBLICAN STUDY COMMITTEE

H.R. 5 – Regulatory Accountability Act of 2017 (Rep. Goodlatte, R-VA)

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FLOOR SCHEDULE:

Expected to be considered on January 11, 2017 under a structured rule.

TOPLINE SUMMARY:

H.R. 5 would continue efforts to restore Article I authority to Congress, and would include several previously passed or introduced House bills aimed at curbing the regulatory state including:

Title I – Regulatory Accountability Act, which would require agencies to choose the least costly method of regulation;

Title II – Separation of Powers Restoration Act, which would reign in the Executive Branch by scaling back *Chevron*-based deference to federal agencies, by requiring *de novo* review of agency actions for all relevant questions of law, including Constitutional and statutory interpretation. It would place judicial review back in the hands of the Judiciary, and make clear the lines between judicial interpretation of law and executive enforcement of the law;

Title III – Small Business Regulatory Flexibility Improvements Act, which would expand the Regulatory Flexibility Act (RFA), which requires regulatory agencies to account for the impact on small businesses in their rulemaking. It would require agencies to include the indirect impact of regulations on small businesses, not just the direct impact. It would also require agencies to have a small business advocacy panel to review major regulations;

Title IV – REVIEW Act, which would require a federal agency to postpone the effective start date of any high-impact rule, defined as a rule that has an annual negative economic impact of more than $1 billion, for either 60 days, or the period delineated by the authorizing statute, if provided, pending judicial review;

Title V – ALERT Act, which would require agencies to provide detailed disclosures on regulations; and

Title VI – Providing Accountability Through Transparency Act, which would require each agency to include a 100-word, plain-language summary of a proposed rule when providing notice of a rulemaking.

COST:

A Congressional Budget Office (CBO) estimate is not yet available.

CONSERVATIVE CONCERNS:

There are no substantive concerns.

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

DETAILED SUMMARY AND ANALYSIS:

TITLE I

Title I, the Regulatory Accountability Act would define a "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose:

- An annual negative impact on the economy of $100,000,000 or more, adjusted annually for inflation;
- A major increase in costs or prices for consumers, individual industries, Federal, State, local, or tribal government agencies, or geographic regions;
- Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; or,
- Significant impacts on multiple sectors of the economy.

A "high-impact rule" is defined as any rule that the Administrator of the Office of Information and Regulatory Affairs determines is likely to impose an annual negative impact on the economy of $1,000,000,000 or more, adjusted annually for inflation.

A "negative-impact on jobs and wages rule" is defined as any rule that the agency that made the rule or the Administrator of the Office of Information and Regulatory Affairs determines is likely to:

- In one or more sectors of the economy that has a 6-digit code under the North American Industry Classification System, reduce employment not related to new regulatory compliance by 1 percent or more annually during the 1-year, 5-year, or 10-year period after implementation;
- In one or more sectors of the economy that has a 6-digit code under the North American Industry Classification System, reduce average weekly wages for employment not related to new regulatory compliance by 1 percent or more annually during the 1-year, 5-year, or 10-year period after implementation;
- In any industry area in which the most recent annual unemployment rate for the industry area is greater than 5 percent, as determined by the Bureau of Labor Statistics in the Current Population Survey, reduce employment not related to new regulatory compliance during the first year after implementation; or
- In any industry area in which the Bureau of Labor Statistics projects in the Occupational Employment Statistics program that the employment level will decrease by 1 percent or more, would further reduce employment not related to new regulatory compliance during the first year after implementation.

Guidance is defined as an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy agenda.

"Major guidance" is defined as any guidance that:

- Imposes an annual negative impact on the economy of $100,000,000 or more, adjusted for inflation;
- Results in a major increase in costs or prices for consumers, government agencies, or individual industries;
- Has significant adverse effects on competition, employment, investment, innovation, productivity, or the ability for U.S. companies to compete globally; or
- Has significant impacts on multiple sectors of the economy.

Section 3 of the title would revise procedures for rule making by amending Section 553 of title 5, United States Code to require a federal agency, in the rule making process, to make all preliminary and final factual determinations based on evidence and to consider:

- The legal authority under which a rule may be proposed, including whether a rule making is required by statute, and if so, whether by a specific date, or whether the agency has discretion to commence a rule making;
- Other statutory considerations applicable to whether the agency can or should propose a rule or undertake other agency action;
- The specific nature and significance of the problem the agency may address with a rule (including the degree and nature of risks the problem poses and the priority of addressing those risks compared to other matters or activities within the agency's jurisdiction), whether the problem warrants new agency action, and the countervailing risks that may be posed by alternatives for new agency action;
- Whether existing rules have created or contributed to the problem the agency may address with a rule and whether those rules could be amended or rescinded to address the problem in whole or part;
- Any reasonable alternatives for a new rule or other response identified by the agency or interested persons, including not only responses that mandate particular conduct or manners of compliance.

In the case of a rule making for a major rule, a high-impact rule, a negative-impact on jobs and wages rule, or a rule that involves a novel legal or policy issue arising out of statutory mandates, an agency must publish an advanced notice in the Federal Register within 90 days before a notice of proposed rule making, which shall

- Include a written statement identifying, at a minimum: (1) the nature and significance of the problem the agency may address with a rule; (2) the legal authority under which a rule may be proposed; (3) preliminary information available to the agency concerning the other considerations specified in the bill; (4) in the case of a rule that involves a novel legal or policy issue arising out of statutory mandates, the nature of and potential reasons to adopt the novel legal or policy position upon which the agency may base a proposed rule; and, (5) an achievable objective for the rule and metrics by which the agency will measure progress toward that objective;

- Solicit written data or views from individuals concerning the information and issues addressed in the advance notice; and,

- Provide at least 60 days for interested persons to submit such written data, views, or argument to the agency. Members of the public would be able to petition for a hearing within 30 days of publication of notice.

This title specifies the minimum amount of information that must be included in an advance notice of a proposed rule making by requiring an agency to consult with the Administrator of the Office of Information and Regulatory Affairs before it determines to propose a rule.

Following notice of a proposed rule making, receipt of comments on the proposed rule, any petitioned-hearing, and before adoption of any high-impact rule, a Federal agency shall hold a hearing, unless such hearing is waived by all participants in the rule making other than the agency. An agency would be required to provide a reasonable opportunity for cross-examination. The hearing would be limited to specified issues of fact. The agency must publish notice specifying the proposed rule and any issues to be considered at least 45 days in advance.

Title I requires the Administrator of the Office of Information and Regulatory Affairs to issue guidelines to promote coordination, simplification and harmonization of agency rules during the rule making process. In order to adopt a final rule, the agency must consult with the administrator, using the best available scientific or technical evidence, that is the least costly rule that meets all objectives.

In adopting a final rule, the agency must post notice of a final rule making, which includes the rule's purpose, an explanation for its need, the costs and benefits, and reasons for not adopting an alternative rule. The agency would be required to publish plans for periodic review of high impact, major, and negative impact rules.

This section would allow agencies in circumstances of public urgency to issue interim-final rules, which require a prompt rule making process to follow.

Each agency would be required to give interested persons the right to petition for amendment or repeal of the rule.

Nothing in Section 3 applies to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

Section 4 of the title would impose new requirements for issuing any major guidance or guidance that involves a novel legal or policy issue arising out of statutory mandates, in order to curb abuse of non-binding guidance. A Federal agency shall:

- Make and document a reasoned determination that assures that such guidance is understandable and complies with relevant statutory objectives and regulatory provisions; summarizes the evidence and data on which the agency will base the guidance; identifies the costs and benefits; describes alternatives to such guidance and their costs and benefits;

- Confer with the Administrator of the Office of Information and Regulatory Affairs on the issuance of such guidance to assure that the guidance is reasonable and consistent with relevant statutory and regulatory provisions or practices of other agencies, and does not produce costs that are unjustified by the guidance's benefits.

- Any guidance that involves a novel legal issue shall be published by electronic means.

Section 5 of the title would provide for electronic access to transcripts of testimony, exhibits, and other information filed in a rule-making proceeding, consistent with existing APA requirements. The section would require the record of decision in a rule-making proceeding to include information from a hearing under the Information Quality Act or on a high-impact rule.

The title would also require an agency to grant a petition for a hearing in the case of a major rule, unless the agency determines that a hearing would result in an unreasonable delay or would not advance consideration of the rule. Nothing in section 5 applies to rule makings that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

Section 6 provides that an agency's denial of an Information Quality Act (section 515 of Public Law 106–554) petition, or a failure to grant or deny such petition within 90 days, is reviewable by a court as a final action. The section provides for immediate judicial review of interim rules issued without compliance with the notice requirements of the bill, other than in cases involving national security interests.

Section 7 would clarify that courts may review agency actions in the event of violations of the Information Quality Act. It would prohibit deference to agency interpretations of regulations made outside of the scope of a rulemaking, determination of the costs and benefits or other economic or risk assessment if the agency failed to conform to guidelines on such determinations and assessments established by the Administrator. It would permit agency denials of petitions for hearings to be reviewed to determine if there was an abuse of discretion.

Section 8 defines "substantial evidence" as relevant evidence a reasonable mind could accept as adequate to support a conclusion, taking into account whatever in the record detracts from the weight of the evidence relied upon by the agency to support its decision. This definition is consistent with that provided in *Universal Camera Corp v. NLRB*.

Section 9 provides that provisions of the bill do not apply to any rule makings pending or completed on the bill's enactment date.

A committee report from the 113th Congress can be found here. A past RSC legislative bulletin can be found here. The House passed this legislation on January 13, 2015, by a vote of 250-175.

Title II

Title II, the Separation of Powers Restoration Act, would alter the scope of judicial review of agency actions to allow courts reviewing those actions to decide *de novo* (without reference to previous legal conclusions or assumptions) any relevant questions of law, including those pertaining to the interpretation of constitutional and statutory provisions and rules.

The *Chevron* doctrine is used by the Judicial Branch in matters concerning statutory interpretation, requiring courts to defer to the interpretations of the federal agencies tasked with enforcing the statutes, so long as the interpretations are reasonable. *Chevron* applies if Congress has given interpretive authority to the agency as it pertains to the statute in question, and given the authority, typically when the agency issues a formal ruling on the interpretation. When *Chevron* applies, the court looks to the reasonableness of the interpretation and whether the statute in question unambiguously addresses the issue at hand; that is, whether Congress has "directly spoken to the precise question at issue," with clear intent and in an unambiguous fashion. If the statute is unambiguously addressed, Congressional intent stands. If the statute is found to be ambiguous, the court examines whether the agency's interpretation of the statute is based on a permissible interpretation of the statute that is not "arbitrary, capricious, or manifestly contrary to the statute." This "permissible" standard is a relatively low standard, meaning the party opposing the agency action typically has a largely uphill battle to climb, and generally loses these challenges.

Critics of *Chevron* assert that the doctrine is frequently used as a tool to defer to executive branch interpretations when judicial authority is more appropriate. According to a past Committee Report, the *Chevron* doctrine has vastly increased the power of federal administrative agencies, with many believing that the doctrine is inconsistent with the basis for judicial review founded within *Marbury v. Madison* and inconsistent with the Framer's intent for the separation of powers.

Many find the *Chevron* doctrine to provide far too much leeway to administrative agencies, giving them broad scope in interpreting Congressional action. Moreover, agency interpretation of their own regulations they themselves promulgated has also come under fire for having many of the same separation of powers issues, and for allowing agencies to purposefully issue vague rulings to maximize their power.

A past RSC legislative bulletin can be found here. This text passed the House in the 114th Congress, by a vote of 240-171.

Title III

Title III, the Small Business Regulatory Flexibility Improvements Act would amend the Regulatory Flexibility Act to require regulatory agencies to better account for the impact of rules on small businesses. The title would require federal agencies to prepare a regulatory flexibility analysis for a regulation the agency determines that it would have a "significant impact on a substantial number of small entities." The term impact would be defined to include both direct and indirect effects, such as compliance costs and effects on revenue.

The title would require the analysis to include alternatives to the proposed regulation that would minimize adverse impacts or to maximize beneficial impacts. It would expand the information that an agency must include in the regulatory flexibility analysis such as: (1) the reason why a rule is being considered; (2) the legal basis of the rule; (3) the estimated number of small entities that would be affected; (4) overlapping or duplicative regulations; (5) description of any disproportionate impact on small entities or specific classes of small entities; and, (6) the impact on the access to credit for small entities.

It would require the Forest Service and the Bureau of Land Management to comply with the RFA when developing or modifying land management plans, and would require the Internal Revenue Service (IRS) to comply with the RFA for regulations that impose a recordkeeping requirement.

Title III would include small tribal organizations of less than 50,000 members in the definition of small entities. The legislation would exclude from the RFA regulations related to the rights and benefits of veterans or rules related to only one identifiable entity.

For major regulations that would have an annual negative impact on the economy of $100 million or more, the bill would require all agencies to obtain input from small entities or representatives of small entities as well as the Small Business Administration (SBA) Office of Advocacy prior to publication in the Federal Register. The report issued by the review panel would include an assessment of the economic impact of the regulation on small entities and would become a part of the rulemaking record.

Title III would require the Chief Counsel for Advocacy of the SBA to issue regulations that govern compliance with RFA for other agencies. The title would further require the GAO to issue a report to examine if the chief counsel has the capacity and resources to carry out these duties.

Title III would transfer the ability to determine size standards defining "small business" from the SBA Administrator to the SBA Chief Counsel for Advocacy for purposes other than the Small Business Act and the Small Business Investments Act of 1958. It would require the adoption of plans for agencies to periodically review regulations that have a significant impact on small entities. It would also require the

Comptroller General to issue a report on whether the Chief Counsel for Advocacy of the SBA has the resources necessary to carry out the legislation.

Similar language was included in H.R. 4, the Jobs for America Act, which passed the House on September 18, 2014, by a 253-163 vote; as well as H.R. 2804, the ALERRT Act of 2014, which passed the House on February 27, 2014, by a 236-179 vote. Identical language passed the House on January 4, 2015 by a vote of 260-163.

It would also provide clarification for agencies to conduct periodic regulatory reviews, and would provide for ready access to judicial review when an agency publishes a final rule.

A past RSC legislative bulletin can be found here. A one pager can be found here, and a section-by-section, here. A past committee report can be found here.

Title IV

Title IV, the REVIEW ACT, would require a federal agency to postpone the effective start date of any high-impact rule, defined as a rule that has an annual negative impact on the economy of more than $1 billion, for either 60 days, or the period delineated by the authorizing statute, if provided, pending judicial review.

Following the 60-day delay, if no one seeks judicial review, a high-impact rule could then take effect. The Office of Information and Regulatory Affairs would be responsible for assessing the annual economic impact of a rule.

According to a past committee report, though courts have the ability to issue judicial stays preventing regulations from taking effect when challenged by the public, they are increasingly reluctant to do so, with summary denial of requests frequently issued. Because courts are hesitant to issue stays, it reduces the disincentive for agencies not to issue overly costly or burdensome rules. Presently, pending judicial review, courts will allow agencies to continue to require rule compliance. This creates a burdensome situation under which agencies are able to use the threat of overwhelming compliance costs during judicial review to force regulated entities to effectively accept a costly rulemaking, regardless of the underlying merits. Regulated industries frequently comply, as they are unable to invest in updating infrastructure and processes to meet compliance requirements and challenge ill-conceived rules.

Allowing for the possibility of a stay pending judicial review is consistent with past Executive Orders, including a Clinton-era Executive Order which highlighted the need for care when considering rules amounting to over $100 million per year.

This legislation comes in response to major regulatory agency actions costing tax payers billions of dollars. Though in the past billion dollar regulations were a rarity, under the Obama Administration these mega-rules have become more frequent, imposing annual costs of up to $65.1 billion.

A past Committee Report can be found here. A past RSC legislative bulletin can be found here. This title passed the House in the 114th Congress, by a vote of 244-180.

Title V

Title V, the ALERT Act, would require agencies to provide detailed disclosures on regulations. It addresses the requirement for the Executive Branch to make semiannual and annual disclosures about planned regulations and overall regulatory costs. These disclosures help America's job creators so they can plan for the impacts of new regulations on their budgets, hiring, and operations. This Administration has frequently failed to release these disclosures on time. In 2012, the Administration made neither disclosure until after

the general election, issuing them in December. Further, even when made on time, current disclosures do not provide real-time information on when regulations will be issued, and what costs they impose.

This title addresses the issues relating to semiannual and annual disclosures by requiring agencies to provide more details about planned regulations, their expected costs, final rules, and cumulative regulatory costs and economic effects. It would require monthly online updates of information regarding planned regulations and their costs, so those affected have timely information so they can plan for their impacts. These updates would be submitted to the Office of Information and Regulatory Affairs (OIRA) and would include a summary, legal basis, objectives, cost, economic effects, update on the status of the rulemaking, and other pertinent information, including a schedule for completion. The first publication would require the cost-benefit analyses for all proposed and final rules within the last 10 years. This section would prevent new regulations from becoming effective unless disclosures are made within the six months prior to the issuance of a regulation.

Past Committee Reports for the ALERT Act can be found here and here. A past RSC legislative bulletin including the ALERT Act can be found here. This title passed the House as part of the Sunshine for Regulatory Decrees and Settlements Act in the 114th Congress, by a vote of 244-173.

Title VI

Title VI, the Providing Accountability Through Transparency Act would require each agency to include a 100-word plain language summary of a proposed rule, when providing notice of a rulemaking.

A past committee report can be found here. A section-by-section from the Judiciary Committee can be found here.

AMENDMENTS:

1. Rep. Goodlatte (R-VA) – This amendment would amend Title II of the legislation to prevent courts from making unwanted interpretations of vague statutes or statutory gaps, to stave off implied delegations of rulemaking authority, and to prevent ambiguous statutes from expansively extending agency authority.
2. Rep. Chaffetz (R-UT) – This amendment would establish a timeline by which the Office of Information and Regulatory Affairs must issue Title I guidelines.
3. Rep. Chabot (R-OH) – This amendment would require an agency to include an economic assessment when the agency certifies that a proposed rule will not have "significant economic impact on a substantial number of small entities," per the Regulatory Flexibility Act, so that certification of a rule is supported by data.
4. Rep. Velazquez (D-NY) – This amendment would strike Title III of the legislation (Small Business Regulatory Flexibility Improvements Act) and replace it with the Small Business Regulatory Improvement Act of 2017, to require a detailed and lengthy regulatory flexibility analysis. This replacement would not include the requirement that the U.S. Forest Service and Bureau of Land Management should perform regulatory flexibility analyses on their management plans.
5. Rep. Peterson (D-MN), Rep. Goodlatte (R-VA) – This amendment would prohibit agencies from impartially communicating with the public to garner support or opposition for a proposed rule.
6. Rep. Graves (R-LA), Rep Cuellar (D-TX) – This amendment would provide for agency accountability by requiring retrospective review and reports in the case of major rules.
7. Rep. Young (R-IA) – This amendment would require at least 90 days be provided for affected entities to take steps to comply with issued guidance.
8. Rep. Castor (D-FL) – This amendment would exempt rules pertaining to the protection of public health and welfare from this legislation.
9. Rep. Cicilline (D-RI) – This amendment would exempt rules that pertain to the prevention of foodborne illnesses or those that pertain to assisting domestic and foreign food facilities to meet preventative-control requirements.

10. Rep. Johnson (D-GA) – This amendment would exempt from this legislation any rules aimed at improving employment and retention or increasing wages amongst the workforce, with an emphasis on those with barriers to employment, including disabilities or limited proficiency in English.
11. Rep. Ruiz (D-CA) – This amendment would exempt rules pertaining to the safety of children's toys or products from this legislation.
12. Rep. Scott (D-VA) – This amendment would exempt rules that pertain to workplace health and safety, and those pertaining to the reduction of traumatic injury, cancer or lung disease at mining facilities, and those that are subject to the Occupational Safety and Health Act from this legislation.
13. Rep. Tonko (D-NY) – This amendment would exempt rules made pursuant to the Frank R. Lautenberg Chemical Safety for the 21st Century Act from this legislation.
14. Rep. Grijalva (D-AZ) – This amendment would strike text that would require the U.S. Forest Service and Bureau of Land Management to perform regulatory flexibility analyses on their management plans.
15. Rep. Nadler (D-NY) – This amendment would require any analyses conducted under Title III to include direct and indirect costs and benefits. Many rules proposed by the Obama administration have been justified based on ambiguous or spurious assumed benefits, such as mitigation of the impacts of carbon dioxide. This amendment would further such spurious justification practices
16. Rep. Posey (R-FL) – This amendment would require federal agencies to issue reports on influential scientific information and peer reviews that are, or will be, disseminated in a rulemaking process.

OUTSIDE GROUPS IN SUPPORT:

Americans for Prosperity (Key Vote)
Competitive Enterprise Institute
FreedomWorks (Key Vote)
U.S. Chamber of Commerce (Key Vote)

COMMITTEE ACTION:

H.R. 5 was introduced on January 3, 2017, and referred to the House Committees on the Judiciary, Small Business, and Oversight and Government Reform.

ADMINISTRATION POSITION:

A Statement of Administration Policy is not yet available.

CONSTITUTIONAL AUTHORITY:

Congress has the power to enact this legislation pursuant to the following: Article I, Section I, Clause I; Article I, Section 8, Clauses 1-17; Article I, Section 9, Clauses 1, 2, 4, and 7; Article I, Section 8, Clause 18; Article III, Section 1, Clause I; Article III, Section II, Clause 1 and 4; Article III, Section II, and Clause 2; and Article IV, Section 3, Clause 2.

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