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Legislative Bulletin…… . July 25, 2012

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H.R. 4078 – Regulatory Freeze for Jobs Act of 2012

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(Griffin, R-AR)

Order of Business: The bill is scheduled to be considered on Wednesday and Thursday, July 25-26.

Summary: This legislation would prohibit federal agencies from taking most significant regulatory actions until the unemployment rate falls to 6 percent or less.

H.R. 4078 would allow exemptions for certain significant regulatory actions if the President determines via an executive order that the action is necessary for one of four reasons: (1) to respond to an imminent threat to health or safety, (2) to enforce criminal laws, (3) to protect national security, (4) to implement an international trade agreement.

Midnight Rules
This legislation also prohibits "any midnight rule" by an agency that the Office of Management and budget finds is likely to result in an annual cost to the "economy of $100,000,000 or materially affect the economy, "a sector of the economy," or state and local governments.

Principles for Future Regulation
This bill would change how agencies create and implement regulation. Section 201: Regulatory Process and Principles, establishes that each agency shall assess the effects of Federal regulatory actions on State and local governments and the private sector in accordance with the following principles:

"(1) Each agency shall identify the problem that it intends to address including, if applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."

"(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively."

‘‘(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.”

“(4) If an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.”

“(5) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation, unless expressly prohibited by law, only upon a reasoned determination that the benefits of the intended regulation justify its costs.”

“(6) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.”

“(7) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.”

“(8) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.”

“(9) Each agency shall tailor its regulations to minimize the costs of the cumulative impact of regulations.”

“(10) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”

Retrospective Analysis of Existing Federal Regulations
Agencies shall conduct a retrospective analysis of existing regulation promulgated by their agency. Each agency shall submit a report containing:
“(1) a copy of the Federal regulation;”

“(2) the continued need for the Federal regulation;”

“(3) the nature of comments or complaints received concerning the Federal regulation from the public since the Federal regulation was promulgated;”

"(4) the extent to which the Federal regulation overlaps, duplicates, or conflicts with other Federal regulations, and, to the extent feasible, with State and local governmental rules;"

"(5) the degree to which technology, economic conditions, or other factors have changed in the area affected by the Federal regulation;"

"(6) a complete analysis of the retrospective direct costs and benefits of the Federal regulation that considers studies done outside the Federal Government (if any) estimating such costs or benefits; and"

"(7) any litigation history challenging the Federal regulation."

Financial Services Regulation
The legislation would require the Security and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) to conduct cost-benefit analyses of all new regulatory proposals, and for the SEC to conduct a similar analysis of its existing rules. The following summarizes the Financial Service Regulation highlights.

The legislation requires that before issuing a regulation under the securities laws, the SEC shall:

- Clearly identify the nature and source of the problem that the proposed regulation is designed to address, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted;

- Utilize the Chief Economist to assess the costs and benefits, both qualitative and quantitative, of the intended regulation and propose or adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify the costs of the regulation;

- Identify and assess available alternatives to the regulation that were considered, including modification of an existing regulation, together with an explanation of why the regulation meets the regulatory objectives more effectively than the alternatives; and

- Ensure that any regulation is accessible, consistent, written in plain language, and easy to understand and shall measure, and seek to improve, the actual results of regulatory requirements.

In deciding whether and how to regulate, the SEC is required to assess the costs and benefits of available regulatory alternatives, including the alternative of not regulating, and choose the approach that maximizes net benefits. Specifically, the Commission shall:

- Consistent with the requirements of section 3(f) (15 U.S.C. 78c(f)), section 2(b) of the Securities Act of 1933 (15 U.S.C. 77b(b)), section 202(c) of the Investment

Advisers Act of 1940 (15 U.S.C. 80b-2(c)), and section 2(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(c)), consider whether the rulemaking will promote efficiency, competition, and capital formation;

- Evaluate whether, consistent with obtaining regulatory objectives, the regulation is tailored to impose the least burden on society, including market participants, individuals, businesses of differing sizes, and other entities (including State and local governmental entities), taking into account, to the extent practicable, the cumulative costs of regulations; and

- Evaluate whether the regulation is inconsistent, incompatible, or duplicative of other Federal regulations.

The legislation also requires that in addition, in making a reasoned determination of the costs and benefits of a potential regulation, the SEC must, to the extent that each is relevant to the particular proposed regulation, take into consideration the impact of the regulation on investor choice, market liquidity in the securities markets, and small businesses. Also the SEC must explain in its final rule the nature of comments that it received, including those from the industry or consumer groups concerning the potential costs or benefits of the proposed rule or proposed rule change, and shall provide a response to those comments in its final rule, including an explanation of any changes that were made in response to those comments and the reasons that the Commission did not incorporate those industry group concerns related to the potential costs or benefits in the final rule.

The Legislation requires that not later than 1 year after the date of enactment of the SEC Regulatory Accountability Act, and every 5 years thereafter, the SEC must review its regulations to determine whether any such regulations are outmoded, ineffective, insufficient, or excessively burdensome, and shall modify, streamline, expand, or repeal them in accordance with such review. The legislation requires that whenever the SEC adopts or amends a regulation designated as a "major rule" within the meaning of section 804(2) of title 5, United States Code, it shall state, in its adopting release, the following:

- The purposes and intended consequences of the regulation.

- Appropriate post-implementation quantitative and qualitative metrics to measure the economic impact of the regulation and to measure the extent to which the regulation has accomplished the stated purposes.

- The assessment plan that will be used, consistent with the requirements writing in this Act and under the supervision of the Chief Economist of the SEC, to assess whether the regulation has achieved the stated purposes.

- Any unintended or negative consequences that the Commission foresees may result from the regulation.

Commodity Futures Trading Commission

The legislation requires the CFTC to conduct a cost-benefit analysis of financial regulatory proposals. The legislation requires that before promulgating a regulation under this Act or issuing an order, the CFTC, through the Office of the Chief Economist, shall assess the costs and benefits, both qualitative and quantitative, of the intended regulation and propose or adopt a regulation only on a reasoned determination that the benefits of the intended regulation justify the costs of the intended regulation (recognizing that some benefits and costs are difficult to quantify). It must measure, and seek to improve, the actual results of regulatory requirements. Therefore, in making a reasoned determination of the costs and the benefits, the CFTC shall evaluate:

- Considerations of protection of market participants and the public;
- Considerations of the efficiency, competitiveness, and financial integrity of futures and swaps markets;
- Considerations of the impact on market liquidity in the futures and swaps markets;
- Considerations of price discovery;
- Considerations of sound risk management practices;
- Available alternatives to direct regulation;
- The degree and nature of the risks posed by various activities within the scope of its jurisdiction;
- Whether, consistent with obtaining regulatory objectives, the regulation is tailored to impose the least burden on society, including market participants, individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), taking into account, to the extent practicable, the cumulative costs of regulations;
- Whether the regulation is inconsistent, incompatible, or duplicative of other Federal regulations;
- Whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits (including potential economic, environmental, and other benefits, distributive impacts, and equity); and
- Other public interest considerations.

Additional Provisions

- The legislation establishes a "framework and procedures to streamline, increase the efficiency of, and enhance coordination of agency administration of the regulatory review, environmental decision-making, and permitting process for projects undertaken, reviewed, or funded by Federal agencies."

Background: According to Heritage's Red Tape Rising: Obama-Era Regulation at the Three Year Mark report, the Obama Administration has imposed new regulations costing $46 billion annually, with nearly $11 billion more in one-time implementation costs. That is about five times the cost of regulations imposed during the first three years of President George W. Bush's administration. Heritage argues that the "red tape of the past three years helps explain why the economic recovery has been so slow and job creation so anemic."

Several of the provisions in this legislation are similar to Representative Ribble (R-WI)'s "Regulation Moratorium and Jobs Preservation Act" (H.R. 2898) and the Republican Study Committee's "Jobs Through Growth Act" introduced by Representative Garrett (R-NJ).

Committee Action: This legislation was introduced on February 17, 2012, and referred to the House Oversight and Government Reform Committee and the House Judiciary Committee. The bill was reported out of the House Judiciary on April 27, 2012 (H. Rept. 112-461) and was reported out of the House Oversight and Government Reform Committee on July 19, 2012 (H. Rept. 112-461).

Administration Position: The White House released a statement that, "Passage of H.R. 4078 would seriously undermine the existing framework. H.R. 4078 would also add layers of procedural burdens that would interfere with agency performance of statutory mandates, unnecessarily delay important public health and safety protections, and undermine and potentially delay important environmental reviews. For example, H.R. 4078 would create excessively complex permitting processes that would hamper economic growth. It would also spawn excessive regulatory litigation, and introduce redundant processes for litigation settlements. It also addresses numerous problems that do not exist, such as a moratorium on 'midnight' rules.

In these ways and many others, the Regulatory Freeze for Jobs Act would impede the ability of agencies to protect public health, welfare, safety, and our environment, as well as to promote economic growth, innovation, competitiveness, and job creation."

Cost to Taxpayers: The CBO estimates that "enacting this legislation would have no significant impact on the federal budget and would not affect direct spending or revenues."

Does the Bill Expand the Size and Scope of the Federal Government?: Decreases the size and scope of the federal government.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Contain Earmarks?: No.

Constitutional Authority: According to its sponsor, "Congress has the power to enact this legislation pursuant to the following: Article I, Section 1 of the U.S. Constitution, and Article I, Section 8 of the U.S. Constitution, including, but not limited to, Clauses 1, 3 and 18."

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Amendments:

1. **Connolly (D-VA)** This amendment would require Congress to respond to a regulatory submission by the President no later than seven days after receiving the proposal. If Congress does not respond within seven days, the ban on significant regulatory action would not apply, and the regulation could be legally implemented.

2. **Conyers (D-MI)** This amendment exempts any and all regulatory actions pertaining to privacy from the definition of prohibited regulations. Conservatives may be concerned that this rule is extremely broad and would enable the President to initiate a wide array of significant regulatory actions, weakening the purpose of the bill. Representative Blackburn's dear-colleague letter on this

3. **Fitzpatrick (R-PA), Garrett (R-NJ)** This amendment would require that the SEC take into account the large burdens of regulation that subjects issuers with a public float of $250 million or less to the attestation and reporting requirements of the Sarbanes-Oxley Act of 2002 when considering whether the regulation shall be streamlined or eliminated.

4. **Hastings (D-FL)** This amendment would exempt any regulations dealing with the safety of drinking water from the ban on significant regulatory action.

5. **Johnson (D-GA)** This amendment would exempt settlement agreements pertaining to the Affordable Care Act from the ban on significant regulatory action. Conservatives may be concerned that this amendment would help the President implement portions of the ACA.

6. **Kucinich (D-OH)** This amendment would exempt any regulation dealing with limiting oil speculation from the ban on significant regulatory action. Some conservatives may be concerned that this amendment is too broad and would prevent the legal practice of oil speculation.

7. **Lipinski (D-IL)** This amendment would provide a broad exception applying to any regulations intended to promote energy efficiency from the ban on significant regulatory action. Conservatives may be concerned that this amendment would give the President unlimited authority to introduce new regulations limiting energy consumption, which could affect families and small businesses negatively.

8. **Loebsack (D-IA)** This amendment would exempt any actions that are intended to lower prices for gasoline, diesel, oil, or other motor fuels from the ban on significant regulatory action. Conservatives may be concerned that this amendment gives no standard of how an agency could judge whether a proposed regulation would lower motor fuel prices.

9. **Lummis (R-WY)** This amendment, also called the "Tracking the Cost to Taxpayers of Federal Litigation Act" would add a new Title to the bill that would require the tracking and reporting of all payments issues pursuant to the Equal Access to Justice Act which allowed for legal fees to be paid to the prevailing party in a lawsuit against the US government. This amendment would establish an online database to access information about these payments and the parties involved in the case.

10. **Lummis (R-WY)** This amendment would amend the Equal Access to Justice Act to require a consistent net worth limit and would also ensure that parties eligible for an EAJA payment have a direct and personal interest in the case. The amendment would establish an online database to access the information relating to EAJA payments.

    According to its sponsor, "At issue is which lawsuits qualify to have legal costs reimbursed by the Federal government. Congress has been clear that people with personal financial disputes with the government, such as getting correct retirement or veteran's benefits or correcting a wrongly-charged penalty, should get help hiring a lawyer. EAJA, originally passed by Congress in 1980, is a promise that these citizens can have their costs repaid if government is found in the wrong. Congress has also made clear that anyone who discovers a violation of environmental law should get help with the costs of hiring a lawyer. Environmental laws like the Clean Water Act and Endangered Species Act explicitly grant this authority – but payment for these lawsuits do not come from EAJA."

    "The Lummis Amendment. . . restores the original Congressional intent that EAJA payments be reserved for individuals, small businesses, veterans and seniors. Scholarly journals from Virginia Tech and Notre Dame, the Government Accountability Office, and reviews of tax records and open court documents all show that EAJA - contrary to Congressional intent - reimburses groups for environmental litigation. Most of the nation's environmental laws, like the Endangered Species Act and the Clean Air Act, already grant the ability for groups to sue, settle, and recover their costs. EAJA, by contrast, is a social safety

net program. Sadly, these environmental groups are paid not because they find an environmental violation, but because they dispute the paperwork or procedure by which the government reached a decision the environmental groups oppose. In short, it is a back door approach to altering environmental laws."

11. **Maloney (D-NY)** This amendment would mandate that Title VI (SEC Regulatory Accountability) would not take into effect until the Chairman of the SEC certifies to Congress that implementing the provisions of the title would not "divert resources from the Commission's mission to protect investors…".

12. **Manzullo (R-IL), McIntyre (D-NC)** This amendment would require each Federal agency to obtain approval from the Office of Science and Technology on guidelines for ensuring the quality, objectivity, utility, and integrity of scientific information used by the agency in formulating new regulations. The amendment includes provisions for peer-reviewed work, data that is quantifiable and reproducible, and public comment on all relevant scientific findings.

13. **Markey (D-MA)** This amendment would exempt regulations that protect the public from extreme weather events (including drought, flooding, and catastrophic wildfire) from the ban on significant regulatory action.

14. **McKinley (R-WV)** This amendment would redefine "significant regulatory action" from regulations resulting in an annual cost of $100 million to any regulation with an annual cost of $50 million or more. This amendment would decrease the number of regulations that could be implemented (subject to the terms of the legislation).

15. **Miller (D-CA)** This amendment would exempt any regulations that would prevent or reduce injuries caused by the ignition of combustible dusts in the workplace from the ban on significant regulatory action.

16. **Nadler (D-NY)** This amendment would exempt regulations relating to safety protections at nuclear power plants from the ban on significant regulatory action.

17. **Posey (R-FL)** This amendment would require that any awarded attorney's fees for small businesses in a civil action arising out of an agency's violation of H.R. 4078 be paid directly out of the administrative budget of the offending agency. This amendment could help deter agencies from issuing questionable regulations for fear that their budgets will pay the legal costs associated with a violation of H.R. 4078.

18. **Posey (R-FL)** This amendment would allow any party adversely affected by a rule or regulation to seek damages against a federal employee who exceeded their regulatory authority by implementing a regulatory action that violated H.R. 4078.

19. **Posey (R-FL)** This amendment is designed to stop a planned Treasury rule that its sponsors believe "has the potential to drain tens of billions of dollars from U.S. financial institutions.

    On January 1, 2013, Treasury's proposed rule will take effect, which would require that all U.S. banks report to the IRS the amount of interest paid to nonresident alien depositors even though these interest payments are not subject to U.S. taxation. According to the sponsors, "some foreign depositors, particularly those from countries where corruption is rampant, appreciate the confidentiality offered to them by the U.S. Yet this policy change will drive them to withdraw their deposits from the U.S. Indeed, in the past several months, over $300 million has already left the United States according to an assessment by the Florida International Bankers Association.

    This amendment would make it clear that the definition of "significant regulatory action" would include new Treasury regulations regarding these foreign deposits. This means that the Treasury regulations could not go into effect until unemployment falls below six percent.

20. **Richardson (D-CA)** This amendment would allow for regulation "necessary to properly implement" the provisions of the Patient Protection and Affordable Care Act and the health provisions of the Health Care and Education Reconciliation Act of 2010 can be carried out.

21. **Richardson (D-CA)** This amendment would allow regulations under the Fair Credit Reporting Act.

22. **Schweikert (R-AZ)** This amendment would add that in determining the annual cost to the economy for proposed regulation, the agency shall take into account any expected change in revenue of businesses that will be caused by such regulatory action, as well as any change in revenue of businesses that has already taken place as businesses prepare for the implementation of the regulatory action.

23. **Waters (D-CA)** This amendment would authorize appropriations 1) to enable the SEC and CFTC to carry out the additional cost/benefit analysis requirements under the bill; 2) for costs of litigation incurred by the Commissions related to the requirements under the bill.

24. **Watt (D-NC)** This amendment would exempt for regulatory actions that are regulatory actions by the U.S. Patent and Trademark Office that streamline the application process for patents and trademarks.

25. **Woolsey (D-CA)** This amendment would exempt a rule that would prevent or reduce the number of works suffering electrocutions or other fatalities associated with working on high voltage transmission and distribution lines.