



THE COMMITTEE ON ENERGY AND COMMERCE

INTERNAL MEMORANDUM

November 22, 2011

TO: Members, Committee on Energy and Commerce

FROM: Committee Staff

RE: Full Committee Markup

Beginning on Tuesday (opening statements only), November 29, 2011, at 4:30 p.m. and continuing on Wednesday, November 30, 2011, at 10:00 a.m., in 2123 Rayburn House Office Building, the Committee on Energy and Commerce will mark up:

1. H.R. 1633, the Farm Dust Regulation Prevention Act of 2011;
2. H.R. 1173, the Fiscal Responsibility and Retirement Security Act of 2011: legislation to repeal the Community Living Assistance Services and Supports Act (CLASS Act);
3. H.R. 3309, the Federal Communications Commission Process Reform Act; and,
4. H.R. 3310, The Federal Communications Commission Consolidated Reporting Act.

Members must submit any amendments they may have two hours before they are offered during the markup. Members may submit amendments by email to: peter.kielty@mail.house.gov. Any information with respect to an amendment's parliamentary standing (e.g., its germaneness) should be submitted at this time as well.

I. H.R. 1633, FARM DUST REGULATION PREVENTION ACT

The Farm Dust Regulation Prevention Act of 2011 was introduced on April 15, 2011, by Representatives Noem, Hurt, Boswell, and Kissell. An Amendment in the Nature of a Substitute (AINS) was offered and favorably reported by the Subcommittee on Energy and Power on November 3, 2011. The bill, as amended by the AINS, includes the following provisions:

Section 1: This section provides the short title of "Farm Dust Regulation Prevention Act of 2011."

Section 2: Section 2 prohibits EPA from proposing, finalizing, implementing or enforcing any regulation revising the National Ambient Air Quality Standards applicable to coarse particulate matter for one year from the date of enactment.

Section 3: Section 3 provides that "nuisance dust" shall not be subject to regulation under the Clean Air Act, except to the extent that nuisance dust in a geographic area is not currently

regulated by state, tribal or local law, and the Administrator of the Environmental Protection Agency (EPA) finds: (1) nuisance dust causes substantial adverse public health and welfare effects at ambient concentrations; and (2) the benefits of applying standards and requirements of the Clean Air Act to nuisance dust outweigh the costs (including economic and employment impacts) of applying the standards.

Section 3 defines “nuisance dust” to mean particulate matter that (1) is generated primarily from natural sources, unpaved roads, agricultural activities, earth moving, or other activities typically conducted in rural areas; (2) consists primarily of soil, other natural or biological materials, or some combination thereof; and (3) is not emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes.

If you need more information regarding H.R. 1633, please contact Mary Neumayr at (202) 225-2927.

II. CLASS ACT REPEAL

The Subcommittee on Health held two hearings on the CLASS program this year. The first hearing was on March 17, 2011, and the most recent hearing was on October 26, 2011, after the U.S. Department of Health and Human Services (HHS) announced it was not moving forward with the implementation of the CLASS program “at this time.”

AN OVERVIEW OF THE CLASS ACT

The intent of the CLASS Act was to develop a federally run voluntary insurance program for purchasing community living assistance services and supports in order to provide individuals with functional limitations with tools that will allow them to maintain their personal and financial independence.

However, both before and after passage of the Patient Protection and Affordability Care Act (PPACA), opponents of the CLASS program questioned its long-term sustainability and raised concerns about the program’s affordability for consumers and potential impact on the nation’s deficit if premiums were never actually collected. Many of the concerns were raised by Members of both parties and unbiased actuaries such as the American Academy of Actuaries (AAA) and the actuary for the Centers for Medicare and Medicaid Services (CMS). Those concerns were also raised within HHS before PPACA was signed into law.¹

The long-standing concerns were reiterated on Friday, October 14, 2011, when HHS Secretary Sebelius announced the Department had suspended work on the CLASS program,

¹ In September 2011, a bicameral Repeal CLASS Working Group issued “CLASS’ Untold Story: Taxpayers, Employers, and States on the Hook for Flawed Entitlement Program,” which included documents obtained through a bicameral Congressional investigation revealing the Obama Administration’s Department of Health and Human Services was aware that the program was unsustainable as early as the spring of 2009.

saying "...despite our best analytical efforts, I do not see a viable path forward at this time." On the same day, the Department issued a comprehensive analysis of its work on the CLASS program entitled "Report on the Actuarial, Marketing, and Legal Analyses of the CLASS Program."

CBO ANALYSIS OF H.R. 1173

Prior to the October 14 announcement by the Secretary of HHS, the Congressional Budget Office (CBO) assumed the CLASS program would be implemented and any legislation to repeal it would have increased federal budget deficits by \$83 billion over the 2012–2021 period because of lost federal revenue from projected premium collection. Because of the Administration's recent decision to halt program implementation after it was unable to achieve a sustainable actuarial model, however, CBO has decided that legislation, such as H.R. 1173, to repeal the CLASS program will have no budgetary effect.

If you need more information regarding HR. 1173, please call Ryan Long or Monica Popp at (202) 225-2927.

III. FCC PROCESS REFORM LEGISLATION

BACKGROUND

The communications marketplace is one of this country's most vibrant sectors. Poor process at the Federal Communications Commission (FCC or "Commission") can jeopardize that vibrancy, especially in this economy. The two bills at issue are the product of the Subcommittee on Communications and Technology's May 13, 2011, and June 22, 2011, hearings on the need to reform the processes of the Commission. Those hearings sought feedback from the Chairman and Commissioners, as well as from members of industry, public-interest groups, and the academic community on draft legislation. The legislation has been refined to respond to the feedback provided at the hearings as well as additional discussions with stakeholders and Members from both sides of the aisle. The legislation draws on principles contained in the President's January executive order, which only applies to executive agencies and does not bind the Commission. To avoid micromanaging the agency, many of the provisions simply require the Commission to set its own process rules and then live by them. Although Chairman Genachowski has made good progress in improving process, only statutory changes can ensure that best practices continue from one administration to the next. Moreover, even with recent progress, we have just witnessed in the Universal Service Fund proceeding further examples of why process reform is needed. The Commission added hundreds of pages of documents into the record at the last minute, giving parties almost no time to respond. And the Commission did not release the text of the adopted order for three weeks, providing Washington insiders ample time to lobby to the Commission for further changes to the order after its "adoption."

H.R. 3309, THE FEDERAL COMMUNICATIONS COMMISSION PROCESS REFORM ACT

Section 1. Short Title.

Section 2(a). Adds section 13 to the Communications Act

New Section 13(a)—Rulemaking Reforms. Section 13(a) requires the Commission to survey the marketplace before initiating a new rulemaking, with exceptions for deregulatory rulemakings and for good cause. It requires Notices of Proposed Rulemaking to follow within three years of Notices of Inquiry (to ensure that the information relied upon is current), include specific text of proposed rules, and include at least 30 days each for comments and replies. It requires adopted rules to follow within three years of Notices of Proposed Rulemaking and be a “logical outgrowth” of the proposed rules. For economically significant rules—those rules that will have an annual effect of \$100 million or more on the economy—the Commission is required to identify the problem it is trying to solve and make a reasoned determination that the benefits of the adopted rule justify its costs. It requires the Commission to develop performance measures for its program activities, defined as each program of the Commission listed in the federal budget as well as each program through which the Commission collects or distributes \$100 million or more. When possible, the Commission should adopt measures that are based on data it already collects.

New Section 13(b)—Ensuring Deliberation by Commissioners. Requires the Commission to establish internal procedures to inform Commissioners of a reasonable number of options available for resolving a proceeding, to provide adequate time for Commissioners to deliberate pending orders, and to ensure time for the public to read orders before open meetings.

New Section 13(c)—Nonpublic Collaborative Discussions. Section 13(c) allows a bipartisan majority of Commissioners to meet for collaborative discussions if they disclose such meetings within two business days and comply with Office of General Counsel oversight. Section 13(c) also applies to meetings of Federal-State Joint Boards.

New Section 13(d)—Initiation of Orders by Bipartisan Majority. Section 13(d) requires the Commission to establish procedures to allow a bipartisan majority of Commissioners to direct staff to draft an order, to put such an order on the Commission’s agenda, and to require that the Commission vote on any order.

New Section 13(e)—Public Review of Reports and Ex Partes. Section 13(e) requires the Commission to seek public comment on reports and to establish procedures that provide the public an opportunity to evaluate *ex parte* filings before the Commission may rely on them in their decisionmaking.

New Section 13(f)—Pending Item Publication. Section 13(f) requires the Commission to establish rules regarding the publication of the status of open rulemaking proceedings as well as a list of the draft items the Commissioners are currently considering.

New Section 13(g)—Shot Clocks. Section 13(g) requires the Commission to establish “shot clocks” that set time frames for Commission action in each type of proceeding it oversees.

New Section 13(h)—Release of Documents and Reports. Section 13(h) requires the Commission to establish a schedule for the release of its required reports and to release all orders within seven days of adoption. The Commission must report to Congress whenever it misses its own deadlines.

New Section 13(i)—Biannual Scorecard. Section 13(i) requires the Commission to report every six months regarding its progress in meeting its shot clocks as well as how it has used administrative law judges and independent studies.

New Section 13(j)—Transaction Review Standards. Section 13(j) preserves the Commission's ability to review transactions but requires conditions to be (a) narrowly tailored to remedy harms that arise as a direct result of the transaction and (b) within the Commission's general authority. Section 13(j) applies the same requirements to "voluntary" commitments.

New Section 13(k)—Access to Budget Information. Section 13(k) requires the Commission to provide direct access from the homepage of its website to budget, appropriations, and performance information.

New Section 13(l)—Online Publication. Section 13(l) requires the Commission to publish the documents and reports specified in this section on the Commission's website.

New Section 13(m)—Definitions. Section 13(m) defines several terms used in the Act, including the terms "economically significant impact" and "program activity."

Section 2(b). Section 2(b) establishes the effective date of new reporting obligations to be 2013 and the effective date of the remainder of new section 13 to be six months after enactment. Section 2(b) requires the Commission to conduct rulemaking to implement the new section 13 within one year of enactment.

Section 3. Section 3 specifies that the Act does not alter the general framework established by the Administrative Procedures Act and related laws, except where it does so explicitly (*i.e.*, with regard to allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards).

H.R. 3310, THE FEDERAL COMMUNICATIONS COMMISSION CONSOLIDATED REPORTING ACT

Section 1. Short Title.

Section 2. Section 2 adds section 13 to the Communications Act.

New Section 13(a)—Communications Marketplace Report. Section 13(a) requires the Commission to publish and submit to Congress a communications marketplace report synched to the two-year Congressional cycle.

New Section 13(b)—Contents. Section 13(b) requires the Commission to assess the state of competition in the communications marketplace, the state of deployment including the deployment of advanced telecommunications capability, and regulatory barriers to market entry and competitive expansion. It requires the Commission to identify the issues it plans to address over the next two years as a result of this assessment and to report on its progress on those issues previously identified.

New Section 13(c)—Special Considerations. Section 13(c) requires the Commission to consider intermodal, facilities-based, and Internet-based competition among other forms of competition and to compile a list of geographical areas that are not served by any provider of advanced telecommunications capability. It specifically empowers the Commission to consider international and demographic data in making its assessments and requires the Commission to consider market entry barriers to small businesses in conducting its analyses.

Section 3. Section 3 eliminates the ORBIT Act Report, the Satellite Competition Report, the International Broadband Data Report, the Status of Competition in the Market for the Delivery of Video Programming Report, the Report on Cable Industry Prices, Triennial Report Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, the Section 706 Report, and the Report on the State of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, all of which are consolidated into the Communications Marketplace Report. It also strikes from the Communications Act outdated or already repealed reports, including the Report on Competition between Wire Telephone and Wire Telegraph Providers, the 1997 Report on Spectrum Auctions, and several reports repealed by the Federal Reports Elimination and Sunset Act of 1995.

Section 4. Section 4 specifies that this Act does not alter the authority of the Commission in any way.

If you need more information regarding the FCC legislation, please call David Redl or Nick Degani at (202) 225-2927.