

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
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**MEMORANDUM**

**May 19, 2015**

**To: Subcommittee on Communications and Technology Democratic Members and Staff**  
**Fr: Committee on Energy and Commerce Democratic Staff**  
**Re: Subcommittee Markup of FCC Process Reform Discussion Drafts**

On Wednesday, May 20, 2015, at 2:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will mark up seven discussion drafts regarding Federal Communications Commission (FCC) process reform.

**I. DISCUSSION DRAFTS**

**A. H.R. \_\_, the Federal Communications Commission Process Reform Act of 2015**

The Discussion Draft is substantially identical to H.R. 3675, the FCC Process Reform Act. H.R. 3675 passed the House under suspension in the 113<sup>th</sup> Congress after committee Democrats were able to address several areas of concern with the bill in its introduced form.

The major provisions of the draft would require the FCC to: (1) complete a rulemaking proceeding to adopt procedural rule changes to maximize opportunities for public participation; (2) complete an inquiry on whether and how the FCC should establish procedures where a bipartisan majority of commissioners can place an item on an agenda, as well as other procedural changes including establishing deadlines for application processing; (3) provide information on the FCC webpage regarding budget; (4) create a consumer complaint database; (5) modify FOIA performance; and (6) release annual performance reports.

The Discussion Draft also includes a four-year extension from the Antideficiency Act for the Universal Service Fund and the text of the FCC Collaboration Act (H.R. 1396), which was introduced by Rep. Eshoo. H.R. 1396 would allow for two or more commissioners to discuss FCC business outside of an FCC Open Meeting, but provides sufficient safeguards to protect against abuse.

**B. H.R. - Rep. Ellmers Discussion Draft**

The bill would require the FCC to publish on its website any changes to the Commission's rules not later than 24 hours after adoption.

**C. H.R. - Rep. Kinzinger Discussion Draft**

The bill will require FCC to publish on its website draft documents to be voted on by the Commission three weeks before the open meeting.<sup>1</sup>

**D. H.R. - Rep. Latta Discussion Draft**

The bill requires the FCC to publish information on its website 48 hours before making a decision on "delegated authority." Specifically, notice covering every delegated authority decision made by an FCC bureau or office would be required.

**E. H.R. - Rep. Clarke Discussion Draft**

The bill would require the FCC to report quarterly to Congress – and to post on its website – data on the total number of decisions pending categorized by bureau, the type of request, the length of time pending, as well as a list of pending Congressional investigations and their costs to the agency.

**F. H.R. - Rep. Loeb sack Discussion Draft**

The bill would require the FCC chairman, as the head of the agency, to post the Commission's internal policies and procedures on the FCC website and to disclose any modifications within 48 hours.

**G. H.R. - Rep. Matsui Discussion Draft**

The bill would require FCC to coordinate with the Small Business Administration to develop recommendations to improve small business participation in FCC proceedings.

**II. CONCERNS**

**A. Avoid Conflict of Law and Litigation Risk**

Like the FCC Process Reform bill introduced in the last Congress, the Reps. Ellmers and Kinzinger discussion drafts could conflict with existing provisions of laws already in effect.

The Administrative Procedures Act (APA) has been a successful bedrock of regulatory law in large part because it reaches and applies across federal agencies. As a result of a standard body of case law interpreting the APA, the public and interested stakeholders benefit from increased certainty. This subcommittee has heard extensive testimony from administrative law experts that removing the FCC from the predictability of the APA could lead to years of

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<sup>1</sup> This proposal echoes requests made in a letter that the Republicans sent to FCC Chairman Wheeler in January 2015, asking him to release his draft network neutrality order before the other Commissioners had an opportunity to review it. *See* letter from Reps. Fred Upton, Greg Walden, and Senator John Thune to FCC Chairman Tom Wheeler (Jan. 22, 2015).

litigation.<sup>2</sup> This subcommittee has also heard repeatedly over the past few months that litigation can inject uncertainty into the market and deter investment.

The APA requires an agency to release explanatory text along with any new rules.<sup>3</sup> For each provision that appears in the Code of Federal Regulations, the explanatory text is vital to understanding the actual rules. The Rep. Ellmers discussion draft would separate the two, creating confusion and uncertainty for stakeholders.

Requiring the release of a pre-decisional draft as contemplated in the Rep. Kinzinger discussion draft runs counter to the policy underlying an exemption to the Freedom of Information Act (FOIA) for internal deliberative processes of an agency.<sup>4</sup> By creating a potential conflict of law with FOIA, this bill could increase the risk of litigation for many FCC actions.

Posting draft documents could spark an unending cycle of lobbying on successive draft items. Specifically, any new arguments raised in the record in response to the draft text could force the agency to trigger a new round of notice and comment. These cycles of lobbying could undermine the ability of commissioners, who are in the minority on any given agenda item vote, to negotiate changes in a draft once it has been made public.

Although Democrats were able to negotiate changes to the FCC Process Reform Act last Congress to mitigate some of these concerns, the new Republican proposals head back down the wrong path.

## **B. Avoiding Delay and Confusion for FCC Regulatees**

Delegated authority allows the heads of FCC bureaus and offices to make decisions so long as new legal issues are not presented. As a practical matter, delegated authority is overwhelmingly used to conduct routine agency business, like application processing and issuing public notices. Hundreds of thousands of actions are taken on delegated authority on a yearly basis. These actions are not final until they are released by the FCC, and the FCC can decide not

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<sup>2</sup> See Testimony of Stuart Minor Benjamin before the Committee on Energy and Commerce Subcommittee on Communications and Technology (July 11, 2013) at 2; Testimony of Richard J. Pierce, Jr. before the Committee on Energy and Commerce Subcommittee on Communications and Technology (July 11, 2013) at 2-7.

<sup>3</sup> 5 U.S.C. §553(c) (requiring agencies to “incorporate in the rules adopted a concise general statement of their basis and purpose”); *see also* Federal Register Guidance at [www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (instructing agencies to include a number of explanatory sections along with new rules).

<sup>4</sup> *See* Department of Justice Guide to Freedom of Information Act, 366 (online at [www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5\\_1.pdf](http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5_1.pdf)) (explaining that the Freedom of Information Act protects inter-agency work product to “(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action”).

to take an action at any time before it releases the item.

The actions contemplated in the Rep. Latta draft bill go far beyond the informal policies and practices in place at the FCC. Under FCC's informal procedures, commissioners are notified 48 hours before bureaus take action on items that the Chairman's office believes may be of interest to the commissioners. This procedure is designed to balance the need to keep commissioners informed while not overwhelming them with notice about the thousands of routine actions that are executed at the bureaus level.

Requiring the agency to post a description of all potential actions before they are finalized could create more confusion than transparency and clarity. Generating public lists and notices of actions the agency may not actually take will impose unwarranted administrative burdens on the commission, and increase uncertainty and anxiety unnecessarily among the public and interested commenters. Adding this new notice requirement at the bureaus level could have the perverse effect of slowing down the work of the FCC and dramatically reducing its productivity. Accordingly, stakeholders could also face uncertainty and longer wait times for what previously have been routine decisions.

### **C. The Democratic Package Is a True Alternative, Not a Complementary Approach**

The majority drafts would not remedy administrative and procedural problems perceived and articulated by the majority. At the April 30, 2015, legislative hearing, Democrats raised serious concerns about the fundamental approach underlying the discussion drafts from Reps. Ellmers, Kinzinger, and Latta. Although purported to help increase transparency at the FCC, the practical impact of the drafts would result in delays, uncertainty, and confusion.

In response to the majority's discussion drafts, Democrats offered five bills as an alternative to the Republican discussion drafts. The Democratic bills are designed to keep the FCC fast, efficient, and transparent absent the concerns that Democrats raised about the Republican drafts.

Additionally, Democrats believe that if the issue is transparency, Congress should not exempt itself. For that reason, the Democrats introduced the Keeping Our Campaigns Honest (KOCH) Act and proposed that it be considered for markup in addition to the other FCC reform bills that are under consideration. The KOCH Act simply requires the FCC to modify its existing sponsorship ID rules to include disclosure of the significant donors to entities that purchase issue advertisements. However, the majority left out this key provision of the Democratic alternative package when it scheduled the second legislative hearing on May 15, 2015.