COALITION FOR SENSIBLE SAFEGUARDS

The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections

The innocuous-sounding Regulatory Accountability Act (RAA), co-sponsored in the Senate by Rob Portman (R-OH), Mark Pryor (D-AR), and Susan Collins (R-ME) and in the House by Lamar Smith (R-TX) and Collin Peterson (D-MN), is, in reality, a true threat to environmental, workplace, public health, and finance reform rules. If the bill were to become law, it would virtually halt all rulemakings, leaving people and the environment unprotected against unreasonable risks.

The Regulatory Accountability Act (H.R. 3010, S. 1606) is a drastic overhaul of the Administrative Procedure Act, a cornerstone of the U.S. legal system that has served us well for more than sixty years. The RAA acts as a "super-mandate," overriding the requirements of landmark legislation such as the Clean Air Act and the Occupational Safety and Health Act and distorting their protective focus. The RAA would also greatly expand the kinds of rules that must undergo formal rulemaking procedures – a highly complex process that can easily take more than a decade to complete. Even if a proposed rule somehow manages to survive this new procedural gauntlet, it alters the judicial review standard for most rules, making it easier for special interests and industry to have a rule struck down.

The Regulatory Accountability Act would neither improve nor streamline the rulemaking process, but only pile on additional requirements.

- The RAA mandates agencies to conduct numerous additional analyses, thereby slowing the regulatory process to a grinding halt. These additional mandates include:
    - Determination of "indirect" costs, with no definition of what constitutes an indirect cost.
    - Estimation of impacts on jobs, economic growth, innovation, and economic competitiveness with no similar requirement for estimating public health and safety impacts.
    - Determination of potential costs and benefits of potential *alternative* rules.

The Regulatory Accountability Act overrides decades of health, safety, and environmental laws and makes protecting the public from harm secondary to limiting costs and impacts on businesses and corporations

- The RAA includes a super-mandate that forces agencies to adopt the least costly rule as a default unless they can meet a high threshold showing both a compelling need to protect public health and safety and benefits that justify the additional costs. The bill would override and trump the Clean Air Act, the Occupational Safety and Health Act, the Mine Safety and Health Act, and other laws that make protecting the public or workers the highest priority. The new mandate in the RAA is all but impossible to meet. Based on the federal courts' interpretation of the same requirement in the Toxic Substances Control Act (TSCA), EPA has not been able to regulate a single toxic chemical in decades.

The Regulatory Accountability Act would subject all agencies – including independent agencies like the Securities and Exchange Commission (SEC), National Labor Relations Board (NLRB), Consumer Product Safety Commission (CPSC), and Consumer Financial Protection Bureau (CFPB) – and more agency actions to exhaustive additional requirements.

- All agencies, including independent regulatory agencies, are covered.
- "Major guidance documents" can only be issued if benefits justify the costs, and if they meet guidelines to be established by the Office of Management and Budget (OMB).
- "High-impact rules," or rules found to have costs over $1 billion, are automatically subjected to a lengthy and burdensome "formal rulemaking" process.

The Regulatory Accountability Act establishes a "formal rulemaking" process that gives Big Business and industry far greater access to and influence on the rulemaking process. Formal rulemaking results in even more delays than the current lengthy rulemaking process and incurs higher costs to taxpayers.

- "High-impact rules" (those with an economic impact over $1 billion) automatically trigger the formal rulemaking process. These rules often provide the most benefits to the public but will take the longest to be finalized under this legislation.
- "Major rules" (those with an economic impact over $ 100 million or judged by OMB to have other significant economic impacts) are subject to formal hearings if petitioners request one (unless an agency is able to meet a very narrow exception). Industry can use this provision to challenge agency science, delaying or killing a rule.
    - All rules – even those that are too small to be considered major – qualify for an Information Quality Act (IQA) challenge.[1] For first time ever, agency rejection of an IQA challenge in a formal hearing would be subject to judicial review.

The Regulatory Accountability Act expands and codifies the authority of OMB's Office of Information and Regulatory Affairs (OIRA).

- OIRA must establish mandatory guidelines for agencies to follow:
    - In conducting quantitative and qualitative assessments, *including cost-benefit analyses*.
    - In issuing major guidance.
    - In conducting formal hearings for major and high-impact rules.
- Agency compliance with OIRA guidelines is subject to judicial review, and OIRA determination with respect to agency compliance is entitled to "judicial deference" (no definition for "judicial deference").

The Regulatory Accountability Act expands judicial review of rulemaking in an unbalanced fashion, inviting increased litigation and judicial interference in the rulemaking process.

- Judicial reviewability under the RAA is designed to discourage agencies from acting to protect the public.
    - An agency's decision to *not* develop or issue a rule cannot be reviewed by the courts, but an agency's decision to proceed with a rulemaking is reviewable.
    - Industry can ask that an agency's decision that a rule is not "major" or "high-impact" be reviewed in court, but there is no right for *the public* to challenge the designation of a rule as "major" or "high-impact."
- Hearings held for high-impact rules and major rules will proceed under a less-deferential standard of review than is currently used, requiring courts to second-guess agency experts' understanding of the scientific and technical evidence.

[1] The Information Quality Act (IQA) has already been used by industry to obstruct agencies' work. IQA is a two-paragraph provision that slipped through Congress in late 2000 without debate. It has been used to lodge frivolous information quality challenges, which slow regulatory action and pressure agencies to remove or revise information. For example, chemical and manufacturing companies have used IQA challenges to obstruct research by the National Toxicology Program into whether certain toxic chemicals are carcinogens.