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September 21, 2016

RE: Floor vote on H.R. 3438, the REVIEW Act

Dear Representative:

We, the undersigned consumer, small business, labor, good government, financial protection, community, health, environmental, civil rights and public interest groups - **strongly oppose H.R. 3438, the Require Evaluation before Implementing Executive Wishlists Act (REVIEW Act).**

The legislation will make our system of regulatory safeguards weaker by requiring courts reviewing “high-impact” regulations to automatically “stay” or block the enforcement of such regulations until all litigation is resolved, a process that takes many years to complete.

If passed, H.R. 3438 would add several years of delay to an already glacially slow rulemaking process, invite more rather than less litigation, and rob the American people of many critical upgrades to science-based public protections, especially those that ensure clean air and water, safe food and consumer products, safe workplaces, and a stable, prosperous economy.

The legislation would especially have a negative impact on communities of color and low income communities, who often face the biggest public health, safety, and economic threats, and worsen long standing inequity.

This problematic proposal would reverse one of the most fundamental and settled legal principles in our regulatory system. Under current law, courts are allowed to use their discretion to determine if it is appropriate to issue an injunction blocking the enforcement of a regulation while it is being challenged in court.

Generally, courts issue such injunctions when they determine that the parties challenging a regulation are likely to prevail on the merits, and refuse to issue such an injunction when a challenge is unlikely to prevail. H.R. 3438 undermines this sensible use of judicial discretion, undermining the authority of courts by overriding judges’ decision-making and replacing it with a blanket and inflexible rule that all “high-impact” rules must now be automatically blocked whenever challenged in court, irrespective of the merits of the challenge (or lack thereof). By directing the agency to postpone the rule’s effective date until the conclusion of its judicial review, H.R. 3438 ties the hands of not only the agencies but the courts as well.

The dangerous consequences of this legislation are clear and predictable. First, the legislation will lead to more litigation against important new science-based safeguards that benefit working families and consumers by incentivizing corporate special interests to challenge any new “high-impact” regulations. Given the clear benefit to those challenging a “high-impact” rule of delaying compliance with the rule for potentially several years, it makes little sense for opponents of “high-impact” rules to *not* bring challenges in court no matter how meritless and far-fetched the challenge might appear.

Further, well-resourced industry groups will be incentivized to continue appealing the case to higher appellate courts and eventually to the Supreme Court in order to keep delaying the rule from taking effect. H.R. 3438 will thus create the strong potential for litigation designed to delay rules rather than overturn such rules on the merits. Quite simply, the courts are too important a public resource to be abused in this manner.

Additionally, the legislation will make the single biggest problem in our current regulatory process, namely, excessive and out of control regulatory delays, even worse. While anecdotes of missed congressional rulemaking deadlines and decades long rulemakings are increasingly common, a recent groundbreaking empirical study¹ from Public Citizen demonstrates that regulatory delays are indeed substantial and systemic throughout federal agencies. The study also finds that the greatest delays are concentrated in those “economically significant” rules that provide the most economic, health, and safety benefits to the public but which must also comply with the most analytical and procedural hurdles before being finalized.

By ensuring that high-impact rules, a subcategory of economically significant rules, are delayed even further by several years, this legislation makes our regulatory process even more inefficient and ineffective at protecting the public’s health, safety, and economic security.

There is substantial academic literature and expert consensus that heightened judicial scrutiny of agency rulemaking is one of the main drivers of regulatory paralysis. Thus, increasing litigation risk for agency rules, which is exactly what this bill will accomplish by spawning dozens of new lawsuits per year, will mean many more missed congressional deadlines.

This further “chilling” of rulemaking will benefit special interests that will further pressure regulators to carve out loopholes, weaken safety standards, or otherwise obstruct new rulemakings with the greatly enhanced threat of a lawsuit waiting in the wings.

Finally, ambiguity in the legislation makes it likely that the legislation will apply to a wide swath of important new regulatory protections including those that are currently being challenged in court. The legislation defines high-impact rules as those which “impose an annual cost on the economy” of one billion dollars. The legislation does not make clear if that includes just direct costs or also indirect costs and simply leaves the authority and discretion of making the “high-impact” designation with the head of the Office of Information and Regulatory Affairs (OIRA).

Thus, it is plausible that H.R. 3438 could result in dozens of newly designated high-impact rules. Examples of rules currently challenged in court that could result in injunctions under this legislation include oil train safety standards designed to prevent massive explosions due to oil train derailments, energy efficiency regulations, worker protections such as the new rule preventing exposure to the known carcinogen silica, new restrictions on the largely unregulated electronic cigarette market, and Wall Street accountability measures to designate large financial institutions as “systemically important” or too big to fail.

Like numerous other anti-regulatory bills, H.R. 3438 further tilts the regulatory process in favor of corporate special interests by creating more opportunities for the manipulation and abuse of the process to their benefit and at the expense of protecting consumers, working families, and other vulnerable communities.

We strongly urge you to oppose H.R. 3438, the REVIEW Act.

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¹ <http://www.citizen.org/unsafedelaysreport>

Center for Progressive Reform
Consumer Federation of America
Consumers Union
Daily Kos
Demand Progress
Earthjustice
Fight for the Future
Free Press Action Fund
Institute for Agriculture and Trade Policy
International Brotherhood of Teamsters
International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW)
League of Conservation Voters
National Council of Jewish Women
National Employment Law Project (NELP)
National Hispanic Media Coalition (NHMC)
National Partnership for Women & Families
National Women's Law Center
Natural Resources Defense Council (NRDC)
NETWORK Lobby for Catholic Social Justice
New America's Open Technology Institute
Planned Parenthood Federation of America
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Public Knowledge
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