COALITION FOR SENSIBLE SAFEGUARDS

March 16, 2017

The Honorable Ron Johnson
Chairman
U.S. Senate
Homeland Security & Governmental Affairs Committee
Washington, DC 20515

The Honorable Claire McCaskill
Ranking Member
U.S. Senate
Homeland Security & Governmental Affairs Committee
Washington, DC 20515

RE: Mark-up of S. 951, the Regulatory Accountability Act of 2017

Dear Senator:

The Coalition for Sensible Safeguards (CSS), which includes more than 150 diverse labor, environmental, consumer, public health, food safety, financial reform, faith, and scientific integrity groups representing millions of Americans, strongly urge you to oppose S. 951, the Regulatory Accountability Act of 2017 (RAA).

The RAA will further paralyze the regulatory process and further tilt this process in favor of corporate interests and their deregulatory agenda. The devastating impacts of this legislation, which covers guidance documents as well as rulemakings, would be felt in every area of public interest policymaking – potentially impacting women's health, consumer protection, civil rights, food safety, financial reform, labor, environmental protection, disability rights, and more.

The current rulemaking process is already plagued with lengthy delays, undue influence by regulated industries, and wasteful litigation. The RAA will make each of these problems substantially worse. If passed, it would undermine our public protections and jeopardize public health by threatening the safeguards that ensure our access to clean air and water, safe workplaces, untainted food and drugs, and safe toys and consumer goods.

Reintroduced in this Congress, the RAA does not improve or streamline our current regulatory process. In fact, it does the exact opposite as it's designed to block or weaken regulations that protect the public. It requires federal agencies to adopt "the most cost-effective" rule for corporations. While the meaning of this vague requirement will require decades of litigation to untangle, its intent is clear: to prioritize corporate profits ahead of the public interest. This is a profound change and effectively creates a "super-mandate" for all actions of executive and independent agencies that would override virtually every public interest law that is implemented and enforced through regulations, including the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, and the Consumer Product Safety Improvement Act. These laws prioritize public health, safety, and economic security, not the cost concerns of regulated entities.

S. 951 introduces new requirements for federal agencies to conduct nonsensical estimates of all the "indirect" costs the rule might have on the nation's economy. This expansion of cost-benefit calculations to include far-fetched and highly speculative effects will result in the production of lengthy documents that could open the agency to a court challenge. Additionally, it would significantly increase the demands on already constrained agency resources to produce the analyses and findings that would be required to finalize any new rule.

Currently, the overemphasis on costs and the under-emphasis on benefits in cost-benefit analysis already biases these analyses in favor of industry while skewing the results against the broader benefits to society. Under the RAA that scale would further tip in industry's favor. Many of the new analytical procedural requirements are one-sided in nature in that they favor considerations of costs on regulated industry in agency decision-making, thus providing well-resourced corporate interests with even more opportunities to seek changes that would weaken the safeguards that protect the public.

While the bill contains a so-called "savings clause" language, this provision does nothing to clarify whether and how specific authorizing statutes would be impacted by the bill's various onerous requirement and thus is certain to generate years of expensive and wasteful litigation.

The RAA takes a rulemaking process that is already broken due to unacceptable delays and makes it much worse. It currently takes agencies an entire Presidential term on average to produce and finalize the regulations that provide the greatest benefits to Americans. For some agencies, it takes nearly a decade to issue significant rules. The bill adds up to 53 new analytical requirements to the Administrative Procedure Act. Those new requirements have already been shown to lead to significant additional delays.

Under the RAA the White House's 'regulatory czar,' the Administrator for the Office of Information and Regulatory Affairs (OIRA), would receive significant new authority to interfere in individual agency rulemakings especially at the behest of politically powerful corporate interests. This new power could be used to further tilt the balance of public protections towards the least costly alternative for industry rather than the most protective standard for the American public.

Moreover, the RAA expands OIRA's authority to independent agencies in unprecedented and dangerous fashion. Under the bill, OIRA would be empowered to set guidelines for compliance with the RAA for all agencies including independent agencies and places OIRA in the position of overseeing independent agency compliance with the requirements in the RAA. This sacrifices these agencies' independence from the executive branch in profound ways. As the Committee recognized last Congress,[1] it is critical to maintain the independence of independent agencies, including notably financial agencies such as the Consumer Financial Protection Bureau that ensure Wall Street is accountable to Main Street.

The RAA reintroduces the discredited idea of "formal rulemaking" which involves the use of adversarial, trial-type hearings to resolve complex policy questions in order to inform the development of important public protections. These adversarial hearings would allow any interested person to petition the agency to hold a hearing on any "genuinely disputed" scientific or factual conclusions underlying the proposed rule. This provision would invite well-resourced industries to overwhelm agencies with tens of thousands of pages of extraneous studies, data, and testimony – all with the goal of delay, obfuscation, and distraction. Regulatory experts at the Administrative Conference of the United States (ACUS) agree that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact".

S. 951 rigs the process so it is even more easily captured by corporate special interests. The numerous requirements that the RAA adds to the rulemaking process means that corporate special interest voices have even more opportunities to influence rulemakings. Adversarial hearings, at a minimum, would involve legal counsel, the identification and inclusion of witnesses and intensive cross examination. This system shuts out the public while favoring corporate lobbyists who have the resources to hire lawyers to use these new requirements to block or weaken regulations. This is designed to cut the public out of the rulemaking process and puts corporate special interests in the driver's seat.

Complicating the process even further, the bill would expand the scope of judicial review, encouraging a dangerous move away from traditional judicial deference to agency experts toward a system in which courts are given freer rein to interfere in highly technical, expertise-driven agency decisions. Unlike federal agencies, generalist judges lack the specialized scientific or technical expertise to effectively assess the need for or impact of a rule. This new and inappropriate role for the courts is a recipe for increased litigation, endless delays, and more uncertainty for business and the public.

Furthermore, the RAA ignores intellectual property, academic freedom and personal privacy concerns. The bill includes harmful language similar to the House-passed HONEST Act (previously known as the Secret Science Reform Act) and applies it to every agency. It would require agencies to publicly make available "all studies, models, scientific literature, and other information" that they use to propose or finalize a rule. This would make it more difficult for agencies to rely on the best information to propose and finalize a rule, as it would discourage many independent scientists and technical experts to share their research with regulators. Additionally, S. 951 gives OIRA the power to establish one set of

[1] https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-how-the-white-house-bowled-over-fcc-independence

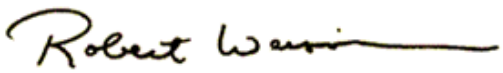
guidelines for risk assessments for all of the federal science agencies; a one-size-fits-all solution would wreak havoc with individual agencies. These agencies need the ability to set their own guidelines for the risk assessments they conduct because they operate in different issues areas that require different kinds of analysis, as well as the ability to continuously update them to account for cutting edge scientific developments. Along with the involvement of OIRA, the RAA increases the potential for political interference in agency science, and since OIRA is filled with economists who are not scientific experts, their findings would be improperly preoccupied with concerns over industry profits rather than giving fair consideration for the most protective public health and environmental standards.

Finally, agency guidance documents will also be weakened and delayed, or even outright blocked, in the same way as rules under the RAA. Consistent with decades of practice, during the Obama Administration, agencies relied on guidance as a means for effectively responding to a wide variety of pressing matters related to protecting the public, including guidance to address the spreading opioid addiction epidemic; combat discrimination based on race, gender, and sexual orientation; strengthen lead testing of drinking water; and restrict debt collection practices by financial firms that harm consumers. The RAA would subject a new category of guidance documents, "major" guidance, to cost-benefit analysis even though the non-binding nature of these documents technically means they impose no costs on their own. This will create significant delays in issuing new guidance to resolve regulatory uncertainty, and will lead to weaker guidance that is less protective of the public. In particular, agencies will find it more difficult to issue guidance in areas where the benefits of the guidance are difficult or impossible to quantify, such as the benefits of preventing discrimination, sexual assault on college campuses, and addiction to illicit substances such as opioids.

The costs of deregulation should be obvious by now: the Wall Street economic collapse, the Flint, Michigan water crisis, various food and product safety recalls, and numerous environmental disasters including the BP Deepwater Horizon explosion all demonstrate the need for a regulatory system that protects the public, not corporate interests. We cannot let the RAA permanently cripple federal agencies' ability to enforce critical bedrock laws through strong and sensible safeguards that protect the public.

We strongly urge opposition to S. 951, the Regulatory Accountability Act of 2017.

Sincerely,



Robert Weissman
President
Public Citizen
Chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.