Attorneys General of New York, California, Delaware, Iowa, Maine, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, Washington and the District of Columbia

June 26, 2017

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

Dear Senator McConnell and Senator Schumer,

We, the undersigned Attorneys General, write to express our strong opposition to S.951, the Regulatory Accountability Act of 2017 (the "RAA" or the "Act"). Under the guise of "modernizing" the federal regulatory process, this legislation promises to bring it to a grinding halt and shows a cynical indifference to the protection, health, and safety of the American people. Nor does the RAA advance the laudable goal of promoting effective regulation. Instead, it surrenders agency authority to deep-pocketed special interests, adds needless, unworkable, and costly steps to an already extensive regulatory process, and opens up multiple new doors to endless litigation. Those changes are deeply troubling and would waylay regulations that protect Americans from toxic exposure, predatory market practices, dangerous labor conditions, unsafe food and drugs, and other harmful conditions. In short, this legislation fails to serve the best interests of our residents and the public at large, and we urge you to oppose it.

In particular, we are concerned about the provisions of the Act that would:

(1) increase the likelihood that so-called high-impact rules and major rules will be subject to lengthy and burdensome trial-type hearings;
(2) require proposed rules to undergo cost-effectiveness analysis that will prevent agencies from advancing their missions; and
(3) give the Office of Information and Regulatory Affairs (OIRA) and agencies unreviewable discretion to determine whether a rule is "high-impact" or "major," which determines when the cumbersome new procedural rules may apply.

All of these provisions would introduce unnecessary, unwieldy, and costly impediments into federal rulemaking that would dramatically increase the time necessary to put public safeguards in place, exclude the public from the rulemaking process, and lead to avoidable and prolonged litigation that favors deep-pocketed special interests.

Trial-type hearings. The Administrative Procedure Act currently allows agencies to use "notice and comment rulemaking" except when "rules are required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553. The U.S. Supreme Court has ruled that notice and comment rulemaking accords with the due process clause of the Constitution when an agency promulgates across-the-board standards rather than "adjudicate[s] disputed facts in particular cases." *See United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973).

Although the Regulatory Accountability Act's stated purpose is to modernize the regulatory process, it would amend the Administrative Procedure Act to authorize outdated trial-type hearings long recognized as an ineffective and inefficient means to promulgate regulations. *See* J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 50 Cornell L. Rev. 375, 376 (1974) ("Trial-like adjudication is extremely costly in time, staff, and money[,]" and turns rulemaking into "an advocate's game."). Section 3(e) of the Act would amend 5 U.S.C. § 553 to facilitate requests for formal trial-type hearings for proposed high-impact rules (rules likely to have an annual effect on the economy of $1 billion or more) and major rules (rules that will have an annual effect on the economy of $100 million or more).

Courts and commentators alike have, however, disavowed trial-type hearings like the ones the Regulatory Accountability Act would allow ever since the "peanut butter hearings" in the 1960s. There, in 1959, the FDA proposed that peanut butter be composed of at least 90% peanuts. In response, peanut butter manufacturers demanded a trial-type hearing, which resulted in a rulemaking process that dragged on for more than a decade. *See Corn Products Co. v. Dep't of Health, Educ. & Welfare*, 427 F.2d 511, 513. n.5 (3d Cir. 1970). The industry's interest in delaying the rule was served by its manipulation of the process, to the detriment of consumers. The Second Circuit later cited the "notorious" peanut butter hearings as an example of "the endless delays that have tended to paralyze adjudicatory hearings and render them ineffective as a means of utilizing agency expertise." *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 697-98 & n.8 (2d Cir. 1975).

Formal hearings, by design, also favor special interests with the financial resources to enlist attorneys, hire experts, and put on witnesses, thus allowing such interests to exert undue influence over the process at the expense of ordinary Americans and small businesses. Not only will these procedural mechanisms thus delay rulemaking, they will make it even more difficult for members of the public who lack those same financial resources to participate in rulemaking processes that are intended to protect and benefit them. That is a result that unjustifiably and unfairly elevates well-funded private interests over public interests and runs directly counter to the Administrative Procedure Act's rulemaking procedure's core purpose—"guarantee[ing] to the public an opportunity to participate in the rule making process." *See* Attorney General's Manual on the Administrative Procedure Act 26 (1947).

Cost-effectiveness. In Section 3(f), the bill mandates that agencies issue final rules that represent the "most cost-effective" alternative. This would also incentivize litigation. Federal agencies are currently required to conduct a cost-benefit analysis for proposed significant rules, unless required otherwise by statute, and to explain how that analysis informed their final agency decision. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993). That longstanding Order directs agencies, "[i]n deciding whether and how to regulate," to "assess all costs and benefits of regulatory

alternatives, including the alternative of not regulating." "Costs and benefits[,]" the Order goes on, "shall be understood to include both quantifiable measures (to the fullest extent these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." *Id*. Establishing a "most cost-effective" standard will unduly hamstring agencies from advancing their missions and applying their expertise—especially in areas where valuable benefits may not be easily quantifiable—and spawn new litigation to test the term's limits in the courts.

As an example of the regulatory gridlock and litigation that would result from enactment of a "most cost-effective" standard, one need look no further than the litigation over the Environmental Protection Agency's (EPA) application of the "least burdensome alternative" standard in the Toxics Substances Control Act (TSCA) to its proposed rule regulating asbestos over two decades ago. In 1989, after studying the issue for over ten years and amassing a 100,000-page administrative record, EPA announced a final rule banning virtually all asbestos-containing products over a period of years. The asbestos industry and its supporters filed a lawsuit challenging EPA's action. In *Corrosion Proof Fittings v. Environmental Protection Agency*, the Fifth Circuit vacated EPA's asbestos rule, finding that even though EPA found that "asbestos is a potential carcinogen at all levels of exposure," EPA had failed to demonstrate that it had selected the "least burdensome alternative" as required by TSCA. 947 F.2d 1201, 1207, 1229-30 (5th Cir. 1991). The court's interpretation of the least-burdensome alternative requirement effectively stopped EPA from undertaking any further chemical regulation under the statute, resulting in Congress passing important reforms to TSCA in 2016 removing this ill-defined and prohibitive requirement. *See*, *e.g*., S. Rep. No. 114-67, at 2 (2015); 162 Cong. Rec. S3511, 16-17 (daily ed. June 7, 2016); 162 Cong. Rec. E821 (2016) (statement of Rep. Ellison of Minnesota); 162 Cong. Rec. S3534 (2016) (statement of Sen. Leahy of Vermont).

The RAA's "most cost-effective" standard is similarly ill-defined, and would invite the same litigation from special interests seeking to block, delay, and weaken proposed federal regulation. Although the Act contains a savings clause in Section 3(g) that preserves rulemaking requirements of an authorizing statute that conflict with the Act's provisions, the application of that clause will only invite additional litigation from special interests, once again delaying important protections to ordinary Americans and small businesses.

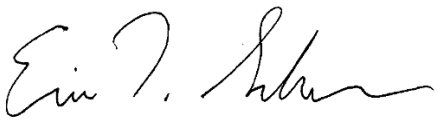
Designation of a regulation as major or high-impact. Finally, we strongly oppose Section 4(c) of the legislation, which would preclude judicial review of a decision by OIRA or an agency regarding whether a proposed rule is "major" or "high-impact." As discussed above, Section 3(e) of the legislation would enable parties to request trial-type hearings for regulations designated as major or high-impact. In light of the President's stated desire to loosen federal regulation across the board, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (requiring agencies to identify two regulations for elimination when a new regulation is proposed), we are very concerned that OIRA and federal agencies could improperly shield actions rolling back protections from burdensome hearings, while at the same time employing the very same obstacle to delay the adoption of important safeguards for consumers, public health and the environment. Federal agencies are capable of deciding for themselves when it would be useful to hold *informal* public hearings to solicit additional public feedback. And, in contrast to the *formal* trial-type procedures

this bill would authorize, those informal public hearings facilitate broad involvement by both the general public and special interests.

For those concerned with improving the regulatory process and reducing unnecessary regulation, the RAA is not a solution. Through its many ill-conceived and reckless provisions, the bill would serve to bollix, stymie, and derail the implementation of popular and necessary laws. As a result, the residents of our states and those across this country who expect the federal government to meet its obligations to safeguard their health and well-being would be left without critical protections.

We strongly oppose S.951, the Regulatory Accountability Act of 2017 and urge you to oppose its passage.

Sincerely,



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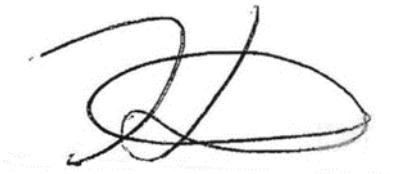

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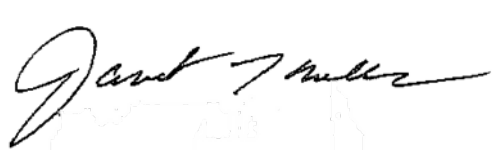

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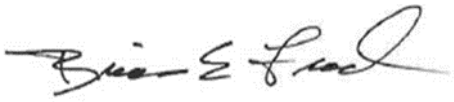

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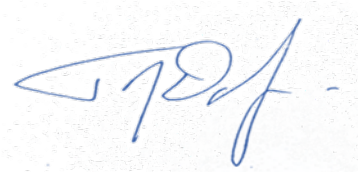

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cc: Hon. Ron Johnson, Chairman, Committee On Homeland Security and Governmental Affairs
Hon. Claire McCaskill, Ranking Member, Committee On Homeland Security and Governmental Affairs
Hon. Maria Cantwell
Hon. Benjamin L. Cardin
Hon. Thomas R. Carper
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