Anything but Moderate: The Senate Regulatory Accountability Act of 2017

by James Goodwin (../goodwinJamesbio.cfm)

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Today, Center for Progressive Reform Member Scholars and staff are releasing a comprehensive analysis (http://www.progressivereform.org/articles/RAA-S951_2017_Analysis_Full.pdf) of the Senate Regulatory Accountability of 2017 (S. 951), which Sens. Rob Portman (R-OH) and Heidi Heitkamp (D-ND) introduced last week.

Also from James Goodwin

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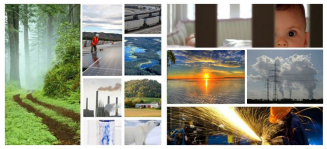

Getting Ready for Conference on

Our analysis explains how S. 951 would drastically overhaul the Administrative Procedure Act, which has successfully guided agency enforcement of public safeguards for over 70 years. A summary of the key findings of the analysis is also available (http://www.progressivereform.org/articles/RAA-S951_2017_Analysis_Summary.pdf).

The bill is the latest legislation to be put forward by conservative members of Congress who want to revamp the process by which the Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, the Consumer Financial Protection Bureau, and others craft the regulations that protect us from physical and financial harm. So, how does Portman and Heitkamp's bill differ from all the rest? They claim theirs is much more "moderate" than the others, particularly when compared to the House's companion version of the Regulatory Accountability Act. In fact, much of the press briefing at which they announced the bill's release was dedicated to defending this claim – a telling sign in and of itself.

In support of their claim, they point at two features of S. 951 in particular. One is what they called the bill's "savings clause," which they claim prevents the legislation from operating as a "supermandate" that overrides and weakens bedrock public interest laws like the Clean Water Act and the Federal Food, Drug, and Cosmetic Act. Other legislation, including previous versions of the Senate Regulatory Accountability Act, would have created such a supermandate and forced the bill's supporters to explain why the laws that have successfully rid our air and water of so much pollution need a major overhaul.

The other allegedly moderating feature of S. 951 is the mandate that agencies consider several regulatory "alternatives" and choose the "most cost-effective" alternative that they consider. This requirement replaces a mandate in earlier versions of the Senate Regulatory Accountability Act, which would have required agencies to choose the "least

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costly" alternative they considered. According to Portman and Heitkamp, this change will enable agencies to better incorporate regulatory benefits into their decision-making.

These claims do not stand up to careful scrutiny, and these provisions in particular will do little, if anything, to blunt the devastating impact the bill would have on federal agencies' ability to protect people and the environment from the risks we face.

The "savings clause" will likely prove ineffective in practice. How will we know whether S. 951's analytical and procedural requirements are consistent with existing statutory provisions that authorize clean air protections or safeguards for our financial security? Only through time-consuming and expensive litigation. In most cases, risk-averse agencies are likely to abide by the requirements rather than take the chance of losing in court and having their rule remanded.

The "cost-effectiveness" language similarly provides little comfort. In practice, federal agencies would be under substantial pressure, from both a political and litigation-prevention standpoint, to muzzle themselves. They would inappropriately limit what qualifies as "effective" so they can choose industry's preferred alternative, with the result that health, safety, and the environment receive sub-par protection.

According to our analysis, the bill contains several other troubling features, including the following:

- **Adversarial hearing procedures for certain "major" rules and all "high-impact" rules.** The public would be hard-pressed to participate in such formal proceedings, which would involve legal counsel to identify witnesses and conduct cross examination.

- **A new requirement for "major" and "high impact" rules requiring calculations of the "indirect" effects a rule**

might have on the nation's economy. This expansion of cost-benefit calculations to include far-fetched and speculative effects will result in the production of lengthy documents that few will read and even fewer will understand.

- **Burdensome new analytical and procedural requirements for "major" guidance documents.** Agencies routinely issue informal opinions to help businesses understand how to comply with regulatory requirements. These communications are critical because they create the certainty that regulated parties typically crave. For the first time, the Senate Regulatory Accountability Act would require that agencies analyze the desirability of such guidance during a process that will be expensive and time-consuming, defeating the goal of achieving a streamlined, nimble regulatory process.

- **Overemphasis on costs and under-emphasis of benefits**. Many of the new analytical procedural requirements are one-sided in nature in that they privilege considerations of costs on regulated industries in agency decision-making, providing well-resourced corporate interests with even more opportunities to seek changes that would weaken the safeguards that rules provide.

- **More authority for the White House "regulatory czar."** The Administrator for the Office of Information and Regulatory Affairs (OIRA) would receive significant new authorities that would enable it to interfere in individual agency rulemakings, especially at the behest of politically powerful corporate interests.

- **Restrictions on the use of scientific research.** The legislation would restrict agencies to the use of the "best" science, allowing endless disputes about what is "good" and what is "bad" science, in stark contrast to the "weight of all evidence" approach traditionally taken by scientific advisors on policy.

- **Transfer of power from agency experts to the judiciary.** For the last three decades, the courts have generally

deferred to agency decisions that require sophisticated technical and scientific analysis. The legislation would empower judges to interfere in such matters despite their lack of relevant expertise.

CPR Member Scholars Thomas McGarity, Sidney Shapiro, and Rena Steinzor worked with me to analyze S. 951. You can find the full analysis (http://www.progressivereform.org/articles/RAA-S951_2017_Analysis_Full.pdf) and the summary (http://www.progressivereform.org/articles/RAA-S951_2017_Analysis_Summary.pdf) on the CPR website.

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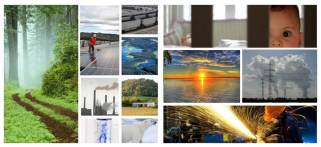

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