Consumer Federation of America

May 16, 2017

U.S. Senate Committee on Homeland Security and Governmental Affairs
The Honorable Ron Johnson, Chairman
The Honorable Claire McCaskill, Ranking Member
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Johnson, Ranking Member McCaskill, and Members of the Committee:

We write to urge you to oppose the Regulatory Accountability Act (RAA) of 2017 (S. 951). The RAA would handcuff all federal agencies in their efforts to protect consumers. It prioritizes regulatory costs over regulatory effectiveness, adds burdensome new analytical requirements, and makes the rulemaking process more adversarial, favoring those powerful special interest groups with the resources to make the system work to their benefit. As such, the RAA would override important bipartisan laws that have been in effect for years, as well as more recently enacted laws to protect consumers from unfair and deceptive financial services, unsafe food and unsafe consumer products.

The RAA problematically amends the Administrative Procedure Act (APA), adding obstacles to the regulatory process that would delay or impede the promulgation of consumer protections. The RAA prioritizes costs over benefits by requiring all agencies to adopt the most "cost effective" alternative when issuing "major" or "high impact" rules and it gives the Office of Information and Regulatory Affairs (OIRA) Administrator discretion to categorize rules. A regulatory approach narrowly focused on costs would not give adequate consideration of the impact on public health and safety or the impact on our financial marketplace. Moreover, the term "cost effective" is not defined, leaving this critical requirement ambiguous and up to the courts to determine. This would significantly thwart the promulgation of critical rules and would preempt agencies that protect consumers.

The RAA requires extensive new analysis that would paralyze agencies. The RAA would create dozens of new analytical and procedural requirements that all agencies must conduct before issuing protective safeguards. The RAA not only creates new analytical requirements for new "major" or "high impact" rules and regulations but also for "major" agency guidance on existing rules. Agencies would have to calculate direct, indirect and cumulative costs and benefits associated with any "major guidance," submit the guidance document to OIRA for review, and comply with yet to be promulgated OIRA guidelines for issuance of "major guidance." The resulting delays in agency guidance would harm consumers because the added delays would mean increased exposure to identified health and safety threats.

These threats include unsafe food. In 1993, an outbreak of *E. Coli* O157:H7 associated with Jack in the Box restaurant hamburgers sickened over 600 people. Some 150 people—mostly children—required hospitalization, 37 developed Hemolytic Uremic Syndrome and suffered associated long-term health impacts, and four young children died. In response, USDA's Food Safety and Inspection Service announced that it would begin testing ground beef for *E. Coli* 0157:H7 and treating it as "adulterated" under the Federal Meat Inspection Act if it tested positive. The meat industry filed a lawsuit challenging the new policy, but a federal court held that the USDA's decision to consider *E. Coli* 0157:H7 an "adulterant" was an "interpretive rule" or "guidance," not subject to notice-and-comment rulemaking requirements.[1] In the years since, the rate of *E. coli* illnesses has fallen by nearly 50 percent, according to CDC estimates.

The RAA poses a similarly grievous threat to child safety protections. For example, important protections required by the Consumer Product Safety Improvement Act of 2008 (CPSIA) may have never been implemented had the RAA been law. Between 2007 and 2011 the Consumer Product Safety Commission (CPSC) recalled 11 million dangerous cribs. These recalls followed 3,584 reports of crib incidents, which resulted in 1,703 injuries and 153 deaths.[2] As directed by the CPSIA, the CPSC promulgated an effective mandatory crib standard that requires stronger mattress supports, more durable hardware, rigorous safety testing, and stopped the manufacture and sale of drop-side cribs. If the RAA were implemented, such a lifesaving rule could have been delayed for years or never promulgated at all, at countless human and financial cost.

Existing regulatory requirements already result in a rulemaking process at the Securities and Exchange Commission (SEC) that is often glacially slow. Indeed, congressionally mandated rules related to root causes of the financial crisis, including some rules governing asset-backed securities and securities-based swaps, have still not been completed nearly seven years after the Dodd-Frank Act was signed into law. The RAA likely would have prevented the Consumer Financial Protection Bureau (CFPB) from implementing the provisions of the Dodd-Frank Act designed to ensure that consumers are protected from unsafe and predatory mortgage lending practices that flourished before the financial crisis and were a major contributing factor to it. The ability-to-repay and qualified mortgage (QM) rule issued by the CFPB has significantly improved the quality and sustainability of mortgage lending since its implementation in 2014. This rule went through a rigorous review and comment process under current APA rules in which consumer and financial industry stakeholders had a full opportunity to opine on its strengths and weaknesses. The resulting rule is regarded by consumer advocates and finance industry leaders alike as a significant improvement in the mortgage finance system. It is a very good example of how the current rulemaking process already promotes the full and careful consideration of interests that must be balanced for rulemaking to withstand scrutiny.

If the RAA were in effect, these and other critical reforms of our financial markets adopted to make our financial system more secure would likely never be adopted, or would be adopted in such a watered down form as to render them useless in preventing the next crisis.

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[1] *See Texas Food Industry Ass'n. v. Espy*, 870 F.Supp. 143 (W.D. Tex. 1994).

[2] http://www.consumerfed.org/pdfs/crib-standards-press-release-6-28-11.pdf

For all agencies, the RAA would make the rulemaking process more adversarial and less accessible. The bill would make it harder for the public to participate in the rulemaking process by requiring adversarial hearing procedures or "formal rulemaking" for the most significant rules. This formal rulemaking would require legal counsel, the identification and inclusion of witnesses and the implementation of cross examination. The cost, time and potentially adversarial dynamic could stifle the involvement of smaller, less well funded entities from engaging in federal rulemaking proceedings and drain critical time and resources away from agencies. On the contrary, such an approach is likely to strengthen the hand of those seeking to make rules as weak and ineffective as possible.

The RAA also makes independent agencies less independent, undermining their expertise. Independent agencies, such as the U.S. Consumer Product Safety Commission, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau, were specifically created to be outside of the political cabinet-level agency structure for the purpose of ensuring that the expertise of those agencies, rather than political considerations, would guide decision making. This bill would minimize the independence of these agencies by applying all analytical requirements regardless of their mission. The bill would centralize more power in the Administrator of the White House's OIRA that could result in more delays and interference to the promulgations of protections.

The RAA would create more opportunities for those opposed to consumer protections to intervene, delay, or thwart the rulemaking process by providing more opportunities to sue the agency. We are concerned that the RAA would undermine the deference that judges have generally afforded to agencies, and concerned that more litigation and more frivolous litigation will result.

We urge you to oppose this significant threat to consumer protection, a fair marketplace, health, and safety posed by S. 951. If adopted, this proposal would waste federal resources, minimize the ability of federal agencies to do their jobs, grind rulemaking to a halt, and infuse the regulatory process with roadblocks that prevent the protection of the public and ultimately putting American consumers at risk.

We strongly urge you to oppose this harmful bill.

Sincerely,

Rachel Weintraub
Legislative Director and General Counsel
Consumer Federation of America

CC: Members of Senate Homeland Security and Governmental Affairs Committee