



The Regulatory Accountability Act of 2011: Legislation Would Override and Threaten Decades of Public Protections

The innocuous-sounding Regulatory Accountability Act (RAA), co-sponsored in the Senate by Rob Portman (R-OH), Mark Pryor (D-AR), and Susan Collins (R-ME) and in the House by Lamar Smith (R-TX) and Collin Peterson (D-MN), is, in reality, **the biggest threat to environmental standards, workplace safety rules, public health, and financial reform regulations** to appear in decades.

The Regulatory Accountability Act (H.R. 3010, S. 1606) is a drastic overhaul of the Administrative Procedure Act, a cornerstone of the U.S. legal system that has served us well for more than sixty years. The RAA acts as a kind of “super-mandate,” **overriding the requirements of landmark legislation such as the Clean Air Act and the Occupational Safety and Health Act and distorting their protective focus.** The RAA would also greatly expand the kinds of rules that must undergo formal rulemaking procedures – a highly complex process that can easily take more than a decade to complete. Even if a proposed standard somehow manages to survive this new procedural gauntlet, the bill alters the judicial review standard for most rules, making it easier for special interests and industry to have a rule struck down.

The Regulatory Accountability Act overrides decades of health, safety, and environmental laws and makes protecting the public from harm secondary to limiting costs and impacts on businesses and corporations.

- Currently, every significant rule requires a cost-benefit analysis, many of which already run hundreds of pages and take long periods to complete. The RAA requires agencies to conduct additional analyses, which would grind the regulatory process to a halt. Moreover, it would force them to adopt the least costly rule unless they can show a compelling need to protect public health and safety and conclusively demonstrate the benefits justify additional costs.
- The bill would override and trump the Clean Air Act, the Occupational Safety and Health Act, the Mine Safety and Health Act, and other laws that make protecting the public or workers the highest priority. The new mandate in the RAA is all but impossible to meet. Based on the federal courts' interpretation of the same requirement in the Toxic Substances Control Act (TSCA), EPA has not been able to regulate a single toxic chemical in decades. Industry knows this. The CEO of SC Johnson, a major consumer products company, has stated that because of the requirements in TSCA (the same requirement included in this bill) “Your child has a better chance of becoming a major baseball player than a chemical being regulated under EPA.”

The Regulatory Accountability Act would force more agencies – including independent agencies like the Securities and Exchange Commission (SEC), National Labor Relations Board (NLRB), Consumer Product Safety Commission (CPSC), and Consumer Financial Protection Bureau (CFPB) – to follow guidelines that would be established by the Office of Management and Budget (OMB)/the Office of Information and Regulatory Affairs (OIRA).

- Besides negating the independence of independent agencies, this would subject agencies' "high-impact" rules to a lengthy and burdensome "formal rulemaking" process. The RAA would also force all agencies to use a one-size-fits-all cost-benefit analysis process, even if that process contradicts existing laws, many of which direct agencies to focus on the considerations which are most relevant to their area of jurisdiction.

The Regulatory Accountability Act establishes a "formal rulemaking" process that gives Big Business and industry far greater access to and influence on the rulemaking process. Formal rulemaking results in even more delays than the current lengthy rulemaking process and incurs higher costs to taxpayers.

- For example, the cross-state air pollution rule has been estimated to have an economic impact of over \$1 billion (thus, it is a high-impact rule and would trigger a formal rulemaking process under the RAA). Under the current rulemaking process, there are multiple opportunities for industry to provide comments to the EPA and OIRA. Under the RAA, the agency would be required to host a formal hearing where anyone interested could testify (and be cross-examined) about the proposed rule and all possible alternatives to it, the underlying science, the costs to industry, and other issues petitioners raise. In addition, industry could demand a separate hearing to challenge some or all of the agency's evidence under the Information Quality Act.¹ Both types of "quasi-judicial" hearings would be highly technical and look much like a legal proceeding, giving deep-pocket industries and special interests an advantage in influencing the proceeding. Conclusions reached at the hearings could be re-litigated in an actual lawsuit. Because legal challenges are expensive and time-consuming, all of this amounts to a special favor for special interests.

The Regulatory Accountability Act would codify a larger role for OIRA.

- Already, many regulatory experts feel OIRA has too much power, given that it can arbitrarily reject rules that have been years in the making (as happened regularly under the Bush administration and happened with the recent ozone rule under the Obama administration). The RAA requires OIRA to establish mandatory guidelines for conducting quantitative and qualitative assessments, issuing major guidance, and conducting formal hearings for major and high-impact rules. This added work, without added staff, would tie up agency resources, lead to more unnecessary delays that would cost the country billions of dollars in additional health care and other costs, and distract agencies from their main mission: protecting the public. In addition, the OIRA guidelines and agency adherence to them could be subjected to judicial review.

¹ The Information Quality Act (IQA) has already been used by industry to obstruct agencies' work. IQA is a two-paragraph provision that slipped through Congress in late 2000 without debate. It has been used to lodge frivolous information quality challenges, which slow regulatory action and pressure agencies to remove or revise information. For example, chemical and manufacturing companies have used IQA challenges to obstruct research by the National Toxicology Program into whether certain toxic chemicals are carcinogens.

The Regulatory Accountability Act expands judicial review in a way that is biased against the public interest, inviting increased litigation, higher costs to taxpayers, and more judicial interference in the rulemaking process.

- Judicial review under the RAA is designed to discourage agencies from acting to protect the public.
 - For example, an agency's decision to *proceed* with a rulemaking is reviewable; an agency's decision to *not* make a rule is not reviewable. This could make landmark cases like 2007's *Massachusetts v. EPA* (where the U.S. Supreme Court ruled that the EPA had to proceed with greenhouse gas rules if it found that such gases posed a danger to public health and welfare) nearly impossible to pursue.
 - Likewise, an agency's decision that a rule does not meet the “major” or “high-impact” definition can be reviewed; an agency's designation that it does meet this threshold cannot be reviewed. This double standard encourages delay and inaction that could prove costly in terms of lives lost, increased medical expenses, disasters like the BP oil spill and the Massey mine explosion, and personal and national financial catastrophes.
- Currently, courts generally defer to the rulemaking decisions that agencies make. However, under the RAA, such deference will no longer be standard practice.
 - For example, if an agency failed to adhere to OIRA's one-size-fits-all cost-benefit analysis guidelines – even if the cost-benefit analysis complied with the law that authorized the rule (like the Clean Air Act or Clean Water Act) – that analysis would be reviewable by a court, which could then substitute its own judgment for the decisions of agency scientists and other experts.