May 15, 2017



Chairman Ron Johnson
Ranking Member Claire McCaskill
U.S. Senate Committee on Homeland Security and Governmental Affairs

**Re: Concerns with S. 951**

Dear Chairman Johnson and Ranking Member McCaskill,

As individual academics who specialize in administrative law and regulatory policy, we are writing to express our concerns with S. 951, the Senate Regulatory Accountability Act, which would drastically overhaul the Administrative Procedure Act (APA) in ways that significantly undermine the ability of federal agencies to fulfill their mission of protecting public health, safety, environmental integrity, and financial security through the enforcement of such bedrock public interest laws as the Clean Water Act, Safe Drinking Water Act, Federal Food, Drug, and Cosmetic Act, and the Dodd–Frank Wall Street Reform and Consumer Protection Act.

Among other things, S. 951 would create dozens of new analytical and procedural requirements that all agencies – including independent regulatory agencies – must satisfy before issuing new protective safeguards. The burdensome, one-size-fits-all requirements would do little, if anything, to improve the quality of agency regulatory decision-making, but would come at a tremendous cost to the public's interest in seeing that regulatory safeguards are enforced in a timely and effective manner. In addition, nearly all of these requirements are designed to privilege considerations of costs on regulated industries in agency decision-making, and they would thus provide well-resourced corporate interests with even more opportunities to seek changes that would weaken the safeguards that rules provide.

Under the current convoluted rulemaking process, it can already take four to eight years for agencies to complete their most complex rulemakings, and in some cases the process can last more than a decade, spanning potentially four different presidential administrations. Complying with S. 951 would make this dire situation worse and could be expected to add several months, if not years, onto the rulemaking process, particularly as agencies must satisfy these requirements at a time when their resources continue to shrink in real terms.

## Specific Concerns with S. 951

The following discussion highlights seven of the most troubling aspects of S. 951.

### *1. A requirement of a trial-like, adversarial hearing for many "major" rules and all "high-impact" rules that will likely lead to inefficient and undemocratic rulemaking.*

Compared to the other provisions in S. 951, this requirement has the greatest potential to create excessive delays, waste scarce agency resources, and shut out ordinary citizens from participating meaningfully in the development of new regulations. These hearings would be functionally identical to the "formal, on-the-record" hearings already provided for under the APA, which were all but dispensed with decades ago because they were impracticable, wasteful, and resulted in lengthy delays of pending rules.

Ordinary Americans and small businesses would lack the resources to participate meaningfully in these "public hearings." Instead, they would be dominated by well-resourced corporate special interests. The highly skewed participation rates are especially concerning because these "public hearings" are intended to significantly influence the substance of pending rulemakings.

The expense of conducting S. 951's "public hearings" would limit agencies' ability to carry out their statutory missions, especially at a time when agencies face severe resource shortfalls. The "public hearings" requirement would be so onerous to overcome that most agencies would likely respond by abandoning any rulemakings for which they might be required. The few rulemakings in which an agency does attempt to satisfy the "public hearings" requirement would likely be marked by extensive delays, leaving the public unprotected against the very risks of harm that the rulemaking is intended to address, while regulated industry could continue avoiding responsibility for imposing those risks through their dangerous products or behavior.

The move to introduce more frequent use of trial-like, adversarial hearings into the rulemaking process seems particularly strange when every other area of the law where such hearings are common – namely, civil and criminal litigation – have notably minimized their use. In recent decades, the trend has been to resolve criminal cases through plea bargaining and civil cases through settlements or on the basis of pre-trial motions. This movement away from adversarial hearings in the criminal and civil law contexts has largely been compelled by broad agreement that these hearings are a highly inefficient and ineffective means for resolving cases. If anything, these types of concerns apply with greater force in the administrative law context, where these "public hearings" would be charged with the task of resolving sweeping questions of great social import.

### *2. A vague and misplaced requirement that agencies choose the most "cost-effective" regulatory approach they considered.*

Under S. 951, "cost-effectiveness" would become the key litmus test for all "major" and "high-impact" rules, and yet nowhere does the bill even attempt to define this concept. Given the high stakes involved, though, fights over the meaning of this vague term are certain to result in years of costly and wasteful litigation.

What seems clear, though, is this requirement is meant to put a statutory "ceiling" on the protections that agencies can provide through the enforcement of regulatory safeguards. The most likely practical effect of this requirement is that agencies will inappropriately diminish their definition of what qualifies as an "effective" approach for accomplishing the statutory objective of the regulation to help justify choosing approaches that would impose minimal burdens on regulated industries. This approach to regulatory decision-making would improperly prioritize concerns for industry profits at the expense of the public interest, with the inevitable result that agencies will issue final rules that provide inadequate protections for public health, safety, and the environment.

### *3. An Ineffective "Savings Clause."*

According to S. 951's "Applicability" subsection, the bill's various analytical and procedural requirements are not meant to operate as "supermandates" that serve to override the substantive provisions of popular public interest laws such as the Clean Water Act and the Federal Food, Drug, and Cosmetic Act. In practice, however, this provision will have little meaningful effect.

As written, this subsection exempts agencies from carrying out requirements only insofar as they are inconsistent with the requirements of the statute that authorized a particular rulemaking. It would take years of costly litigation, however, to sort out when and whether S. 951's so-called "savings clause" actually applies. Industry opponents of particular rules will likely argue that various procedural and analytical requirements are consistent with the underlying authorizing statutes and thus do not implicate the savings clause. In other cases, risk-averse agencies will likely seek to avoid such litigation by undertaking these procedural and analytical requirements in situations where it is unclear if the savings clause would apply.

Even in situations where an agency is clearly not obliged to carry out an analytical and procedural requirement, that requirement still can subtly influence agency decision-making. For example, existing executive orders requiring cost-benefit analysis – even though not legally enforceable in court – still induce agencies to issue weaker rules under statutes that specifically prohibit the use of cost-benefit analysis to guide decision-making.

### *4. Increased and unwarranted politicization of agency science.*

Several provisions in S. 951 would invite inappropriate interference into agency use of science to inform their regulatory decision-making. For example, S. 951 would require that all proposed and final rules be based on the "best reasonably available scientific, technical, or economic information." This requirement would provide regulated industries with another basis for challenging particular rules in court. In such cases, reviewing judges would be empowered to second-guess an agency's determination that the science it relied upon was the "best" that was "reasonably available."

S. 951 would also authorize the White House Office of Information of Regulatory Affairs (OIRA), which has long operated as a conduit for introducing political interference into the rulemaking process, to establish guidelines that agencies must follow in developing

risk assessments in support of their rules. These guidelines would dictate how agencies approach such complex scientific matters as the selection of studies and models, the evaluation and weighing of evidence, and the conduct of peer reviews, matters on which OIRA is likely to have less expertise than the agencies it will supervise. Prior OIRA attempts to interfere in agency risk assessments have already raised considerable controversy, as these guidelines were designed to cause delay in agency rulemakings and increase industry influence over how science is used to inform agency decision-making.

### *5. Increased litigation over agency rules and new opportunities for judicial interference in agency decision-making.*

One of the overarching results of S. 951 is that it will significantly transfer decision-making power regarding the implementation of public interest laws from federal agencies to judges. The dozens of new analytical and procedural requirements that S. 951 would create would provide corporate interests with powerful new avenues for challenging regulations they oppose. The resolution of these legal challenges would empower reviewing judges to shape whether and how agencies carry out their statutory missions through the implementation and enforcement of new regulatory safeguards.

Compounding this problem, S. 951 would overhaul the APA's judicial review provisions to invite more intrusive scrutiny of agency decision-making, which could lead to judges substituting their own judgement on complex policy or science matters for that of the expert agencies. For example, one provision would direct courts to apply a "substantial evidence" standard of review when reviewing the factual findings related to "high-impact" rules. To the extent that the "substantial evidence" standard of review is more stringent than the "arbitrary and capricious" standard of review that applies in most situations for judicial review of agency rulemakings, as many administrative law scholars view it to be, this provision is clearly designed to invite greater judicial interference on these matters.

Another provision of S. 951 would direct courts to use a less deferential standard, known as *Skidmore* deference, when reviewing agency interpretations of their own rules, instead of the more deferential standard, known as *Auer*/*Seminole Rock* deference, that courts now apply in these situations. By directing courts to be less deferential to agency decision-making, the practical effect of this provision is to invite greater judicial interference in the implementation of agencies' rules.

These new avenues for judicial interference are problematic because agencies tend to have much greater expertise on the technical issues implicated by their rules than do generalist judges. In addition, as compared to non-elected judges, agencies are more politically accountable, since they must ultimately answer to a democratically-elected president.

### *6. Excessive and dangerous concentration of power within the White House Office of Information and Regulatory Affairs.*

S. 951 would endow the OIRA Administrator with extraordinary new powers to control how agencies develop new rulemakings. For example, S. 951 would give the OIRA

Administrator the unreviewable authority to determine which rules and agency guidance are "major." This power is significant, because the status of a rule or guidance as major would dictate whether or not those agency actions are subject to S. 951's most burdensome analytical and procedural requirements. Because the definition of what constitutes a "major" rule or guidance is vague, the OIRA Administrator would have considerable leeway to apply this definition to nearly any agency action as he or she saw fit.

One entire subsection of S. 951 is dedicated to assigning to the OIRA Administrator the responsibility of issuing sprawling new guidelines that govern nearly every aspect of agency regulatory decision-making. These guidelines would address how agencies comply with many of S. 951's various burdensome analytical and procedural requirements, including the analysis of a rule's costs and benefits, determinations of a rule's cost-effectiveness, and the conduct of risk assessments. Thus, through these guidelines, the OIRA Administrator could wield considerable authority over the substance of agency rules.

### *7. Convoluted requirements that will make issuing important guidance documents all but impossible.*

S. 951 would impose several new burdensome analytical and procedural requirements that agencies must satisfy before they issue guidance documents that qualify as "major." For example, the agency would have to subject these guidance documents to a formal cost-benefit analysis and submit them to OIRA for centralized review.

Many of the required analyses and procedures would be burdensome and expensive to carry out and would unduly delay the issuance of affected guidance documents. These delays would likely harm regulated business the most, since the most common purpose of guidance documents is to alleviate regulatory uncertainty by clarifying applicable compliance responsibilities for relevant regulations. Indeed, these guidance documents are often produced in response to industry requests.

## ***Conclusion***

Simply put, S. 951 represents an entirely wrong approach to reforming the regulatory system. Agencies already face too many barriers that prevent them from carrying out their statutory missions of protecting people and the environment through the implementation and enforcement of new regulatory safeguards. As the forgoing discussion confirms, the effect of S. 951 would be to make this dire situation even worse.

To truly improve the regulatory system, we need reforms that would make it *easier* for agencies to issue new safeguards, or update existing ones, in a timely and effective manner. These reforms would involve eliminating the unnecessary and duplicative analytical and procedural requirements that are already littered throughout the rulemaking process.

We urge this Committee to abandon S. 951 and other bills that would similarly undermine the regulatory system. Instead, we encourage this Committee to explore reforms that would truly simplify and streamline the rulemaking process.

Sincerely,


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