

S. 951: THE REGULATORY ACCOUNTABILITY ACT OF 2017

Promoting transparency, accountability, and common sense in the regulatory process

Sponsored by Senators Rob Portman and Heidi Heitkamp

We need smart regulations to promote priorities like ensuring workplace safety and protecting our environment. But regulators sometimes make mistakes, follow the wrong path, or simply fail to take into account the real world impact when they develop rules.

Congress hasn't significantly reformed our regulatory process in 70 years. It is critical that our nation improve its regulatory process to better assess regulatory costs and benefits so that businesses have the certainty they need to create jobs and agencies can protect public health, safety, and the environment.

The Regulatory Accountability Act (RAA) would modernize the regulatory process. It's based on executive orders from Presidents Reagan, Bush, Clinton, and Obama, and it would result in a more transparent regulatory process that would yield more effective regulatory outcomes for American businesses, their workers, and their families.

RAA Key Provisions

1. Greater Transparency

- *Early public outreach.* This legislation heeds calls for “public participation and open exchange” *before* a rule is proposed. (Exec. Order 13,563). Prior to proposing any major rule (\$100M+/year), agencies would be required to issue a simple notice that explains the problem they intend to address and invite the public to submit information on the need for a new rule and potential options the agencies should consider.
- *Better scientific and technical data.* To improve the quality of new rules, agencies would be required to use the “best reasonably available” scientific, technical, and economic information, when such information is required in rulemaking. This is consistent with the calls to regulate “based on the best available science.” (Exec. Order 13,563).
- *Better use of guidance documents.* This legislation would improve agency use of guidance documents by adopting the good-guidance practices issued by OMB in 2007 (under then-Director Portman) and ensure that agencies do not use guidance to skirt the public input required to write new rules.

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2. Cost-Benefit Analysis

- *Cost-Benefit Analysis.* This legislation builds well-recognized best practices for regulatory analysis, including cost-benefit analysis, into each appropriate step of the rulemaking process. These principles are drawn from the longstanding, bipartisan Executive Order framework created by the Reagan and Clinton Administrations and reaffirmed by President Obama in January 2011.
- *Most Cost-Effective Option.* This legislation requires agencies to adopt the “most cost-effective” regulatory alternative that would achieve the policy goals set out by Congress. It permits agencies to adopt a less cost-effective approach only if the agency explains what additional benefits that approach accomplishes and the costs of those benefits. This is consistent with the instruction to federal agencies to “minimize regulatory costs”¹ and the President’s directive to “tailor regulations to impose the least burden on society” (Exec. Order 13,563).

3. More Thorough Process for High-Impact Rules

- *Hearings for High-Impact Rules.* For high-impact rules (\$1B+/year), the cost of getting the underlying facts wrong is substantial and warrants additional scrutiny. This bill would allow parties affected by billion-dollar rules access to an administrative hearing to test the accuracy of the evidence and assumptions underlying the agency’s proposal. The scope of the hearing would be limited to “genuinely disputed” factual issues. Parties affected by major rules (\$100M+) also would have access to hearings, unless the agency concludes that the hearing would not advance the process or would unreasonably delay the rulemaking.
- *Substantial Evidence Review of High-Impact Rules.* The factual underpinnings of high-impact rules would be reviewed under a slightly higher standard in court—substantial evidence review. This standard is still highly deferential, but it allows a court reviewing high-impact rules to ensure that an agency’s justifications are supported by “evidence that a reasonable mind could accept as adequate to support a conclusion based on the record as a whole.”

4. Retrospective Review

- *Automatic Review of Rules.* Over time, rules can become outdated and ineffective. The RAA expands and strengthens retrospective review requirements so that agencies will regularly assess whether rules are meeting their objectives.

¹ Cass Sunstein, *Washington Is Eliminating Red Tape*, The Wall Street Journal (Aug. 23, 2011) (referring to White House memorandum to federal agencies).