COALITION FOR SENSIBLE SAFEGUARDS

September 7, 2016

The Honorable Robert Goodlatte
Chairman
House of Representatives
Judiciary Committee
Washington, DC 20515

The Honorable John Conyers
Ranking Member
House of Representatives
Judiciary Committee
Washington, DC 20515

RE: Mark-up on H.R. 3438 REVIEW Act

Dear Representative:

The Coalition for Sensible Safeguards (CSS), which includes more than 150 diverse labor, consumer, public health, food safety, financial reform, faith, environmental and scientific integrity groups representing millions of Americans, urges members of the Judiciary Committee to oppose the manager's amendment to H.R. 3438, the Require Evaluation before Implementing Executive Wishlists Act (REVIEW Act).

Congress should be looking for ways to strengthen our country's regulatory system by identifying gaps and instituting new science-based safeguards for the public. Unfortunately, this legislation does the opposite by ensuring even more delays in new public health, safety, and financial security protections.

The legislation will make our system of regulatory safeguards weaker by requiring courts reviewing "high-impact" regulations to automatically "stay" or block the enforcement of such regulations until all litigation is resolved, a process that takes many years to complete. If passed, this legislation would add several years of delay to an already glacially slow rulemaking process, invite more rather than less litigation, and rob the American people of many critical upgrades to science-based public protections, especially those that ensure clean air and water, safe food and consumer products, safe workplaces, and a stable, prosperous economy. The legislation would especially have a negative impact on communities of color and low income communities, who often face the biggest public health, safety, and economic threats, and worsen long standing inequity.

This problematic proposal would reverse one of the most fundamental and settled legal principles in our regulatory system. Under current law, courts are allowed to use their discretion to determine if it is appropriate to issue an injunction blocking the enforcement of a regulation while it is being challenged in court.

Generally, courts issue such injunctions when they determine that the parties challenging a regulation are likely to prevail on the merits, and refuse to issue such an injunction when a challenge is unlikely to prevail. The bill undermines this sensible use of judicial discretion, undermining the authority of courts by overriding judges' decision-making and replacing it with a blanket and inflexible rule that all "high-impact" rules must now be automatically blocked whenever challenged in court, irrespective of the merits of the challenge (or lack thereof).

The dangerous consequences of this legislation are clear and predictable. First, the legislation will lead to more litigation against important new science-based safeguards that benefit working families and consumers by incentivizing corporate special interests to challenge any new "high-impact" regulations. Given the clear benefit to those challenging a "high-impact" rule of delaying compliance with the rule for potentially several years, it makes little sense for opponents of "high-impact" rules to ***not*** bring challenges in court no matter how meritless and far-fetched the challenge might appear.

Further, well-resourced industry groups will be incentivized to continue appealing the case to higher appellate courts and eventually to the Supreme Court in order to keep delaying the rule from taking effect. The legislation will thus create the strong potential for litigation designed to delay rules rather than overturn such rules on the merits. Quite simply, the courts are too important a public resource to be abused in this manner.

Second, the legislation will make the single biggest problem in our current regulatory process, namely, excessive and out of control regulatory delays, even worse. While anecdotes of missed congressional rulemaking deadlines and decades long rulemakings are increasingly common, a recent groundbreaking empirical study[1] from Public Citizen demonstrates that regulatory delays are indeed substantial and systemic throughout federal agencies. The study also finds that the greatest delays are concentrated in those "economically significant" rules that provide the most economic, health, and safety benefits to the public but which must also comply with the most analytical and procedural hurdles before being finalized.

By ensuring that high-impact rules, a subcategory of economically significant rules, are delayed even further by several years, this legislation makes our regulatory process even more inefficient and ineffective at protecting the public's health, safety, and economic security.

There is substantial academic literature and expert consensus that heightened judicial scrutiny of agency rulemaking is one of the main drivers of regulatory paralysis. Thus, increasing litigation risk for agency rules, which is exactly what this bill will accomplish by spawning dozens of new lawsuits per year, will mean many more missed congressional deadlines.

This further "chilling" of rulemaking will benefit special interests that will further pressure regulators to carve out loopholes, weaken safety standards, or otherwise obstruct new rulemakings with the greatly enhanced threat of a lawsuit waiting in the wings.

Finally, ambiguity in the legislation makes it likely that the legislation will apply to a wide swath of important new regulatory protections including those that are currently being challenged in court. The legislation defines high-impact rules as those which "impose an annual cost on the economy" of one billion dollars. The legislation does not make clear if that includes just direct costs or also indirect costs and simply leaves the authority and discretion of making the "high-impact" designation with the head of the Office of Information and Regulatory Affairs (OIRA).

Thus, it is plausible that the legislation could result in dozens of newly designated high-impact rules. Examples of rules currently challenged in court that could result in injunctions under this legislation include oil train safety standards designed to prevent massive explosions due to oil train derailments, energy efficiency regulations, worker protections such as the new rule preventing exposure to the known carcinogen silica, new restrictions on the largely unregulated electronic cigarette market, and Wall Street accountability measures to designate large financial institutions as "systemically important" or too big to fail.

The manager's amendment to H.R. 3438 does not improve or streamline a regulatory process badly in need of both. Instead, like numerous other anti-regulatory bills this Committee has passed this Congress, it further tilts the regulatory process in favor of corporate special interests by creating more opportunities for the manipulation and abuse of the process to their benefit and at the expense of protecting consumers, working families, and other vulnerable communities. We strongly urge opposition to the REVIEW Act, (H.R. 3438).

Sincerely,

Robert Weissman

Robert Weissman, President
Public Citizen
Chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

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[1] http://www.citizen.org/unsafedelaysreport