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on Regulatory Reform, Commercial and Antitrust Law

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Mr. Chairman, Mr. Cohen and Members of the Committee,

Thank you for inviting me to testify today on H.R. 2122.

NRDC believes H.R. 2122 is a fundamentally flawed bill. Though designated the "Regulatory Accountability Act (RAA)," the measure might be better named the "Regulatory Atrophy Act" because its primary effect would be to prevent the government from exercising its responsibility and duty to protect the public. The title is also misleading because it implies that the current system lacks checks and balances when, in reality, Congress and the courts already have ample authority to hold agencies to account, and the entire system gives industry and others numerous opportunities, formal and informal, to influence the development of regulations.

But the bill is not designed to codify an objective sense of "accountability," in any event. There is nothing in the bill that would enable anyone to take an agency to task if it failed to recognize a problem or to safeguard the public. No provision of the bill would make an agency more likely to, say, deal with shoddy lending practices that could cause an economic meltdown, or prevent an outbreak of a food-borne illness or limit emissions of a pollutant. H.R. 2122 instead would make it much more difficult and time consuming to address such problems.

Indeed, the bill is a kind of anthology of bad ideas that have already proven to interfere with efforts to protect the public. For example, H.R. 2122 would require agencies to hold formal hearings on many proposals. Formal hearings are a procedure that fell into disuse years ago

because experience showed that they ate up huge quantities of time without contributing much to the quality of regulations. But apparently the potential for inordinate delay is a good enough reason to bring hearings back with a vengeance in H.R. 2122.

Even more pernicious is the reasonable-sounding requirement that agencies "adopt the least costly rule" to deal with a problem. Now, no one objects to the notion that safeguards should achieve their goals as inexpensively as possible, and there are plenty of existing incentives – administrative and political – to do just that. But the bill's language sets up a nearly impossible legal hurdle: for a rule to be upheld, an agency would have to prove that it had carried out an exhaustive analysis of virtually any and every alternative, including any alternative thrown in its way to sidetrack the process.

We don't have to guess what the impact of the bill's language would be because similar wording has already made a dead letter of key provisions of the Toxic Substances Control Act, the law that is supposed to regulate most chemicals. A court ruled that the Environmental Protection Agency (EPA) could not ban asbestos – a material with cancer-causing properties that are beyond dispute – because it could not prove that it had analyzed every alternative.

It's ironic, if unsurprising, that conservatives are embracing alternatives analysis in H.R. 2122, given that at the same time, they are trying to remove the much simpler and more reasonable alternatives analysis from the National Environmental Policy Act. But that's just more evidence that the alternatives provisions in H.R. 2122 are expected to be hurdles to block progress rather than pathways to facilitate reaching a goal.

There are other ironies in H.R. 2122. Conservatives have often made a "whipping boy" of the federal courts, but the bill requires the courts to take on a more activist role, substituting their judgment for the agencies' – even on technical and scientific matters.

And the bill claims to seek transparency – requiring agencies to make public virtually anything they've touched during the regulatory process – but H.R. 2122 shields the involvement of the Office of Information and Regulatory Affairs (OIRA) from scrutiny, even while expanding its role and enshrining it in law. Under the bill, OIRA will likely play the most political and determinative part in the entire regulatory process, yet its guidelines are not subject to comment, and its workings can remain private.

All of this would be inexplicably inconsistent if its overall purpose were not so abundantly clear – to block new safeguards with an ornate process and to slow anything that cannot be stopped entirely. This is not "accountability" – not an effort to ensure that agencies are effectively and efficiently carrying out their legal duties. Rather, this is an effort to amend and weaken existing law and future statutes to boot, by overlaying a suffocating blanket of anti-regulatory bias. The result will be fewer needed safeguards despite public support for protection and study after study showing that the benefits of regulation have far outweighed the costs. Moreover, studies have found regulation to have a neutral to positive impact on employment.

Time prevents me from describing all the problematic provisions of H.R. 2122. But let me close by saying that it's appropriate to hold this hearing during the summer movie season. H.R. 2122 has a plot a bit like a summer suspense movie or novel, where a pleasant-seeming character insinuates his way into a household and slowly but surely begins annihilating it. H.R. 2122 traffics in reasonable concepts and unthreatening language, but its cumulative effects on regulatory law will leave agencies hamstrung and the public exposed.