



December 18, 2015

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The Honorable Paul Ryan
The Honorable Nancy Pelosi
U.S. House of Representatives

Re: H.R. 1155 – The SCRUB Act of 2015

Dear Representative Ryan and Representative Pelosi,

Advisory Council

Patricia Bauman
Frances Beinecke
Eula Bingham
W. Thompson Comerford, Jr.
Sally Greenberg
John Passacantando
Henry Waxman
Robert Weissman

We are writing, as individual academics who specialize in administrative law and regulatory policy, to express our strong opposition to H.R. 1155, the Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015 (SCRUB Act of 2015).

H.R. 1155 would create a convoluted, complex, and potentially very expensive new bureaucracy to review existing agency rules and make recommendations for the repeal or weakening of those rules with little meaningful oversight, transparency, or public accountability to ensure that these recommendations do not subvert the public interest.

No one denies that agencies should regularly review and assess their regulations, and many already do. Such reviews are arguably more beneficial and productive than the highly speculative *ex ante* cost-benefit analyses that agencies perform for many of their rules.

The lookback process that H.R. 1155 would create has serious defects. First, it risks making government more sluggish by duplicating programs that already exist. Lookback programs of all shapes and sizes already abound in our government. The Regulatory Flexibility Act, for example, requires agencies to review every rule that has “a significant economic impact upon a substantial number of small entities” within 10 years after the final rule is published. Further, Executive Order 13563 requires agencies to conduct similar resource-intensive reviews on an ongoing basis for all significant rules.

The fact that H.R. 1155 would establish an independent third party review of agency programs is hardly novel, as several such mechanisms and procedures already exist. For instance, federal law establishes a network of independent Inspectors General for every major executive and independent agency, which, among other things, audits and evaluates the effectiveness of agencies’ regulatory programs. In addition, Congress created the Government Accountability Office (GAO), an independent agency that works to aid Congress’s oversight of the federal government. A key component of the GAO’s work is to audit and evaluate specific regulatory programs in response to requests from members of Congress.

As part of this effort, the GAO maintains a “High Risk List,” which it updates at the start of each new Congress in order to bring “attention to agencies and program areas that are high risk due to their vulnerabilities to fraud, waste, abuse, and mismanagement, or are most in need of transformation.

Second, H.R. 1155’s lookback process is highly biased. The methodology it would impose on the newly constituted regulatory review commission focuses almost exclusively on ways to reduce regulatory costs with nary a thought on how to improve public protections. Instead of providing an honest accounting of existing rules’ impacts, these lookbacks would likely generate results that are meaningless or unhelpful. After all, many of the regulatory lookbacks that already occur tend to find that existing rules are either not imposing undue costs or indeed need to be strengthened. For instance, a 2011 Center for Progressive Reform white paper reviewed 38 regulatory lookbacks conducted by the EPA and OSHA under the Regulatory Flexibility Act and found that every review concluded that there is a “continued need” for the regulation, meaning that a significant risk to public health, safety, or the environment exists and that the controls called for in the regulation continue to be successful in reducing that risk.¹ Likewise, many regulatory programs end up on the GAO’s High Risk List because they are inadequate and need to be strengthened—not weakened or rescinded. For instance, the GAO included “Transforming EPA’s Process for Assessing and Controlling Toxic Chemicals” because it found that the agency was failing to effectively implement key chemical assessment programs, including the Integrated Risk Information System (IRIS) program and the Toxic Substances Control Act (TSCA).

Third, the “cut-go” process that H.R. 1155 would require for eliminating certain agency rules raises additional concerns. According to this process, agencies could be prohibited from issuing any new rule, no matter how beneficial to the public interest, unless it first eliminates an eligible rule identified by the regulatory review commission that imposes equal or greater costs. In many cases, this process could make society worse off on balance by forcing agencies to eliminate rules that provide net benefits—that is, benefits in excess of costs. Indeed, nothing in H.R. 1155 would prohibit the regulatory review commission for including in its “cut-go” recommendations rules that yield net benefits. Agencies would then face the distasteful choice of either eliminating a rule that makes society better off on average or forgoing a regulatory action that would address a new threat to people and the environment. While sound policymaking would conclude that both regulations should be implemented, H.R. 1155 would foreclose this possibility.

Rather than establishing yet another burdensome, one-size-fits-all regulatory lookback programs, as H.R. 1155 proposes to do, Congress should seek to encourage agencies to conduct more discretionary reviews of their existing programs that can be tailored to fit the unique characteristics of the individual regulations undergoing review. In 2014, Michelle Sager, the Director of Strategic Issues at the GAO, testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs that agencies already conduct discretionary lookbacks of their existing regulatory programs, and that these discretionary reviews were more effective than the mandatory ones in terms of producing meaningful policy changes. As she put

¹ Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), available at http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

it, “discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes.”²

To encourage agencies to conduct more of these kinds discretionary reviews, Congress should consider eliminating some of the existing mandatory programs that are less effective as well provide agencies with the necessary resources for carrying out discretionary reviews. Committing these additional resources would be a sound investment in improving the quality of existing regulatory programs that lead to better results and reduced costs for the private sector.

Thank you for attention to these criticisms of H.R. 1155 discussed above. At your request, we would be happy to discuss these views with you further.

Sincerely,

Robert R.M. Verhick
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CC: The Honorable Bob Goodlatte
The Honorable John Conyers, Jr.
The Honorable Jason Chaffetz
The Honorable Elijah Cummings

² Michelle Sager, Director, Strategic Issues, U.S. Gov’t Accountability Off., Testimony Before the Subcomm. on Efficiency & Effectiveness of Fed. Programs & Fed. Workforce, S. Comm. on Homeland Security & Gov’t Affairs, 113th Cong., Hearing on a More Efficient and Effective Government: Improving the Regulatory Framework, Mar. 11, 2014, available at <http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/a-more-efficient-and-effective-government-improving-the-regulatory-framework> (follow hypertext link “Download Testimony (217.7 KB)” to download testimony).