



September 6, 2018

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Honorable Elizabeth Warren
United States Senate
317 Hart Senate Office Building
Washington, DC 20510

Dear Senator Warren:

We write to you express our support for the Anti-Corruption and Public Integrity Act. What makes this bill so important is that it reaffirms the essential role that good government plays in our society. And this vision is especially critical at a time when economic and political elites have come to completely dominate our policymaking processes, leaving ordinary Americans feeling more disconnected from their government than at any time in our country's history. The bill would make good on this vision by introducing a comprehensive set of reforms that would help to once again restore the principles of government "of the people, by the people, and for the people" to our policymaking institutions.

In particular, we would like to highlight our support for Title III of the Anti-Corruption and Public Integrity Act, which addresses the critical topic of "Regulatory Reform." Title III appropriately recognizes that our regulatory system is a vital and legitimate component of our government, and that implementation of congressionally enacted laws through development and enforcement of regulations is essential to the democratic process of translating our values into meaningful action.¹ This Title of the bill provides an invaluable blueprint building a regulatory system for the 21st century that works for everyone, not just those with the most political or economic power.

Reducing Improper Politicization from White House Oversight of the Rulemaking Process

The process of developing new regulations has become inordinately complex and involves numerous procedural steps and obstacles. One of the consequential steps in the process is the centralized review that the White House Office of Information and

¹ Alejandro Camacho et al., *Memo to the Next President: A Progressive Vision of Government and Protective Standards* (Ctr. for Progressive Reform, CPR Paper 1606, 2016), available at http://progressivereform.org/articles/CPR_Memo_to_Next_Pres_Prog_Vision_1606.pdf.

Regulatory Affairs (OIRA) performs for many draft proposed and final rules. OIRA wields significant authority over the substance of these rules, and indeed whether they ever see the light of day. A series of executive orders stretching back to the Reagan administration have empowered OIRA to review draft rules and their supporting economic analyses and to demand changes to them. Because agencies cannot formally issue a proposed or final rule without OIRA approval, they typically accede to these demands. In practice, these changes operate as a “one-way ratchet,” leading to weaker safeguards.²

OIRA’s influence over the rulemaking process is augmented by another of its institutional features – namely, its woeful lack of transparency. Indeed, OIRA’s centralized review process is the least transparent step in the rulemaking process, enabling changes to be made with little or no documentation or policy justification.

Unsurprisingly, OIRA has become a prime target for economically and politically powerful corporate interests to influence the outcome of pending rulemakings and even to try to stop them in their tracks. According to OIRA, it operates under an “open door” policy in which it will accept any request from outside stakeholders (*i.e.*, entities not employed by the executive branch) for a meeting to discuss a rule while it is undergoing review. (Recently, however, OIRA has denied meetings requested by environmental organizations regarding Environmental Protection Agency rules that were undergoing review).³ An empirical analysis of OIRA’s sparse records for these meetings confirms that representatives of corporate interests opposed to stronger regulatory protections meet far more frequently than do representatives from public interest groups that favor stronger regulatory protections.⁴ This massive imbalance in meetings no doubt has contributed to OIRA’s anti-safeguard tilt.

Several provisions included in Title III of the Anti-Corruption and Public Integrity Act are aimed at promoting greater transparency and accountability in OIRA’s centralized review process and are a welcome reform. Under Executive Order 12866, OIRA and the relevant rulemaking agency are charged with disclosing any changes that were made during the centralized review process. This commonsense mandate is routinely ignored, however. Section 303 would remedy this problem by legislatively requiring rulemaking agencies to disclose these changes and identify the entity that suggested the change.

Agencies and OIRA have also sought to evade Executive Order 12866’s disclosure requirements by having the agency “withdraw” a rule, rather than having it clear OIRA’s

² David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLORADO L. REV. 335, 365 (2006) (examining 25 rules identified by the GAO as “significantly changed” by OIRA between June 2001 and July 2002, and concluding that for 24 of the 25 rules, OIRA’s suggested changes “would weaken environmental, health, or safety protection”).

³ See, e.g., Maxine Joselow, *White House Approves Regulatory Overhaul, Shuts Out NRDC*, E&E NEWS PM, June 6, 2018, <https://www.eenews.net/eenewspm/2018/06/06/stories/1060083691> (last visited July 24, 2018).

⁴ Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 2011), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

centralized review process.⁵ Under that order, if OIRA rejects a rule, then it must “return” it to the agency along with a public letter explaining the legal or policy basis for its rejection. If, however, an agency “voluntarily” withdraws the rule, OIRA is not required to make any disclosures and the public remains uninformed about why OIRA thought the agency’s work was deficient. This dual standard creates a strong incentive for collusion between OIRA and a rulemaking agency to have the agency “agree” to end the review by withdrawing the rulemaking. Section 304 would close this loophole by requiring the agency to issue a public statement explaining basis for the rulemaking’s withdrawal and, if applicable, to identify who requested the withdrawal.

These transparency measures would be reinforced by other provisions in Title III of the Anti-Corruption and Public Integrity Act that would prevent OIRA from serving as a conduit for improper political interference in agency rulemakings. Section 306 would abolish OIRA’s practice of holding meetings or otherwise communicating with individuals who are not employed by the executive branch regarding rules that are undergoing review. In order to make their views on these rules known, these individuals would instead have to avail themselves of the public comment process, which is considerably more transparent and accountable, that is afforded by the Administrative Procedure Act and other rulemaking statutes.

Section 306 would also bar OIRA from communicating with agencies regarding their pending rules prior to the time when an agency has formally submitted such rules to OIRA for its centralized review process. This provision would prevent OIRA from attempting to unduly influence these rulemakings when they are still in their early formative stages. Critically, by limiting OIRA contacts with agencies to the review periods, this prohibition would ensure any changes that OIRA requests to rules are subject to the disclosure requirements provided for in Executive Order 12866 and in Section 303 of the bill.

Reducing the Delays Caused by OIRA’s Centralized Review Process

OIRA review has long been recognized as a source of delay in the rulemaking process, with some reviews lasting up to a year or more.⁶ Executive Order 12866 imposes some weak time limits on these reviews, but these are routinely ignored. Section 306, which would impose enforceable and meaningful time limits on OIRA’s centralized review process, is especially important. Empirical analysis of OIRA meeting records reveals the meetings it held with outside groups were a significant factor in OIRA’s longest rule reviews.⁷ Consequently, section 306’s bar on these outside meetings and communications should also serve to make OIRA’s review process move more expeditiously.

⁵ James Goodwin, *Transparency Withdrawn: A New Tactic for Shielding OIRA’s Regulatory Review Activities?*, CPRBLOG, Sept. 18, 2013, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=31D6C986-C3A6-6822-D4F31AC111043A76> (last visited Sept. 5, 2018).

⁶ Steinzor et al., *supra* note 4.

⁷ *Id.*

Protecting Scientific Integrity Against Corporate Conflict of Interest

Since science is the bedrock of many regulatory initiatives, it is vital that agencies that protect the public have a transparent and reliable process for evaluating the scientific evidence in front of them. Understanding this need, an agency typically convenes a group of respected scientists from inside (and often outside) the agency to advise it. In assessing available scientific research, the agency and scientists consider whether the study has been peer reviewed and published in a reputable scientific journal, both of which verify that other scientific experts have vetted the study and assessed its methodology as reliable and reasonable. The scientific information that is reviewed in this process is typically produced by scientists who work for universities, nonprofit hospitals, or other nonprofits. Because of the nature of their employment, these scientists do not have a conflict of interest in producing the information because they do not work for any party that may have a financial interest in a rule that is based on their work.

But this is not true of all of the scientific information that can become part of the rulemaking process.⁸ Section 301 of the proposed legislation would address this problem by clarifying whether a party with a financial interest in the outcome of a rulemaking has sponsored a study that has not been published in a peer-reviewed publication and whether the researchers were paid by that sponsor to conduct the study.⁹ Section 302 would make independent peer review a prerequisite for an agency to consider a study or research that has been submitted by an entity with a substantial financial interest in the outcome of the rulemaking. This step is necessary to establish the reliability of studies that are sponsored or arranged for by parties that have an interest in the outcome of a rulemaking if the party had the capacity to influence a study in the ways that section 302 identifies.

Balancing the Rulemaking Process by Amplifying the Voices of Ordinary Americans

The rulemaking process depends on unfettered public participation for its quality and legitimacy. It achieves this goal of participation by, among other things, inviting the public to file rulemaking comments and to engage face-to-face with persons interested in the outcome of a rulemaking in public hearings.

The assumption is these opportunities create an advocacy process that will debate proposed rules and assist the agency in building a better final rule. Experience indicates, however, that this assumption is seriously flawed. In many rulemakings, nearly every step of the process is dominated by regulated entities. Regulated entities and their trade associations file far more rulemaking comments than groups representing persons who would benefit from

⁸ For examples of the dangers of corporate-funded science on regulatory decision-making, see Rena Steinzor & Wayland Radin, *Cozying Up: How the Manufacturers of Toxic Chemicals Seek to Co-opt Their Regulators* (Ctr. for Progressive Reform, White Paper 1211, 2012), available at http://www.progressivereform.org/articles/Cozy_Chems_1211.pdf.

⁹ Rena Steinzor, Wendy Wagner, & Matthew Shultz, *Saving Science from Politics: Nine Essential Reforms of the Legal System* (Ctr. for Progressive Reform, White Paper 805, 2008), available at <http://www.progressivereform.org/articles/SavingScience805.pdf>.

a proposed regulation or individuals. Likewise, the same imbalance exists at OIRA, which as indicated earlier can exert crucial influence concerning the outcome of a rule.¹⁰

The imbalance exists because public interest groups that represent the beneficiaries of standards and safeguards do not have the same “deep pocket” financial resources of regulated entities and their allies. Moreover, individuals lack the time and financial resources to become involved if they are not represented by a public interest group.

The imbalance between the public and regulated entities can tilt the outcome of a rulemaking away from protecting the public and toward the less stringent protections favored by industry interests – or even no rule at all. Section 309 would help to remedy this imbalance by establishing an Office of Public Advocacy to participate in rulemakings and otherwise assist individuals with dealing with regulatory agencies.

Section 313 would similarly help to redress the imbalance in the federal rulemaking process by requiring agencies to respond to a petition signed by 100,000 persons for rulemaking. This provision would help empower the public to demand that an agency take some affirmative action to advance its protective mission, either by issuing a regulatory safeguard or by providing an official explanation, subject to judicial review, why it declined to do so.

Strengthening Protections Through Citizen Enforcement

The Anti-Corruption and Public Integrity Act recognizes another important but overlooked source of imbalance between industry and agencies that works to the disadvantage of persons protected by rules adopted by an agency. After an agency promulgates a rule protecting individuals, the agency must enforce the rule or individuals will not receive the protection that they are due. Yet, when agencies are controlled by administrations friendly to industry interests, or “captured” by those interests, they often deemphasize regulatory enforcement. Reductions in regulatory enforcement are especially prevalent during presidential administrations that seek to advance a deregulatory agenda.

But weakened enforcement can also take place during presidential administrations that favor stronger protective measures. Since the 1980s, Congress has cut the budgets of protective agencies time and time again, and agency supporters have been unable to restore these budget cuts. Because their budgets have been cut so drastically, some agencies simply lack the resources to go after as many violators as they should. Congress has addressed this problem in some protective legislation by authorizing private persons to sue regulated entities that violate a final rule, and it has made legal fees available to the plaintiffs if they succeed in proving a violation.

Section 310 would broaden this system of “private attorney generals” to enforce protective laws across the government. The use of private lawsuits has been effective in

¹⁰ Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA’s Toxic Air Regulations*, 63 ADMIN. L. REV. 99 225 (2011); Steinzor et al., *supra* note 4.

increasing compliance with protective rules where it exists, and it would be effective in doing this across the government after section 310 becomes law.

Ensuring Accountability for Agency Inaction

Administrations hostile to promulgating protective rules can also pursue a deregulatory agenda by simply slow-walking rulemakings they are required by law to undertake. Section 311 usefully calls agencies into account for this process by establishing judicially enforceable deadlines for the completion of such a rule if the legislation that authorized the rule does not already contain rulemaking deadlines.

Undoing the Damage of the Congressional Review Act

Over the past two years, we have witnessed the full extent of destruction that can be achieved through reckless misuse of the Congressional Review Act (CRA). In that time period, conservatives in Congress have worked with the Trump administration to repeal 16 vital regulatory safeguards covering a broad and diverse range of protections related to public health, safety, the environment, and financial security.¹¹ These rollbacks took place with little regard for the damage they would cause or the broad public support for the rules that were targeted. Rather, these were nakedly partisan acts undertaken by narrow partisan majorities acting on behalf of politically powerful interests.

To make matters worse, the damage that was done through with these CRA-enabled repeals is likely to be permanent. Once an agency rule or guidance has been repealed using the CRA, the law bars an agency from issuing another rule “in substantially the same form” without first receiving specific congressional authority to do so.¹² Section 314 would amend the CRA to remove this “salt the earth” provision. With this amendment, agencies would be able make another attempt at issuing a rule that was repealed using the CRA by making necessary improvements. In this way, the agency would be able to address the underlying concerns with the original rule while still fulfilling its mission to protect the public interest.

Conclusion

We applaud your efforts to strengthen the regulatory system through Title III of the Anti-Corruption and Public Integrity Act. The provisions in that title contain several commonsense reforms that should receive widespread support.

¹¹ James Goodwin, *CRA by the Numbers: The Congressional Review Act Assault on Our Safeguards* (Ctr. for Progressive Reform, Issue Alert 1705, 2017; Updated 2018), http://www.progressivereform.org/CRA_numbers.cfm#CRANumber (last visited Sept. 5, 2018).

¹² Thomas O. McGarity et al., *The Congressional Review Act: The Case for Repeal* (Ctr. for Progressive Reform, CPR Report 1801, 2018), available at http://progressivereform.org/articles/CRA_Repeal_Case_050218.pdf.

Thank you for your attention to the thoughts we have outlined above.

Sincerely,

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