CONSORTIUM FOR CITIZENS WITH DISABILITIES

The Honorable Ron Johnson
Chairman, Committee on
Homeland Security & Government Affairs
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Claire McCaskill
Ranking Member, Committee on
Homeland Security & Government Affairs
340 Dirksen Senate Office Building
Washington DC, 20510

May 15, 2017

Dear Chairman Johnson and Ranking Member McCaskill:

The undersigned organizational members of the Consortium of Citizens with Disabilities (CCD) write to voice our strong opposition to S. 951, the Regulatory Accountability Act (RAA) of 2017, and other regulatory reform measures like it.

The Consortium for Citizens with Disabilities is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. People with disabilities have long faced exclusion and isolation due to discrimination and inadequate access to needed services and supports. Significant progress toward community integration and independent living has been made over the last 50 years due to the passage of federal legislation to ensure the civil rights of people with disabilities (such as the Americans with Disabilities Act, the Rehabilitation Act and the Individuals with Disabilities Education Act) and to expand innovative programs (like home and community based Medicaid waivers and state plan options) that provide people with disabilities with the supports and services they require to live independently in community settings. The promulgation of strong regulations to implement and enforce those statutes has been essential to that progress. The undersigned organizations are concerned that the Regulatory Accountability Act (as proposed in S. 951) would halt and potentially reverse the progress people with disabilities have made by adding new and cumbersome procedures to the rulemaking process, requiring the adoption of "the most cost-effective" alternative in the final rule, and changing the standard for judicial review of agency decisions. We therefore urge you to oppose the RAA.

First, we are concerned that the RAA changes the rulemaking process to require agencies to conduct additional procedures for all rulemaking, including consideration of at least three alternative rules that would all meet the statutory objective, and adds even more procedural

requirements for “high-impact” and “major” rules, including heightened qualitative and quantitative cost-benefit analyses and public hearings. We are concerned that these additional processes would hinder agencies, drawing out the period required to issue rules and discouraging agencies from issuing new regulations, no matter how needed. Regulations implementing civil rights legislation for people with disabilities commonly have sufficient economic impact to be classified as “major” or “high impact”, as would even modest changes in programs which support the independent living of people with disabilities, such as Medicaid. Other rules in programs that support people with disabilities, such as the home and community based settings Medicaid rules, might receive similar designations based on their targeted impact on particular industries. The designation as a major rule would then trigger new onerous procedural requirements that could make promulgating new regulations all but impossible. Agencies currently conduct extensive cost-benefit analyses, consider alternatives, and review and respond to all public comments on proposed rules, an extensive process that often takes years to complete. Additional requirements will only draw out an already exhaustive process and any new procedures should be tailored to address a specific problem.

We also are concerned that the new requirements created by the RAA could divert scarce agency resources from critical agency functions (such as enforcement of civil rights protections) to unnecessary procedural duties required for rulemaking (such as holding public hearings and completing cost-benefit analysis on numerous proposals) and remove transparency in the rulemaking process by shifting authority from mission driven agencies to an ideological office within the Office of Management and Budget and prohibiting judicial review of the decisions made by the Administrator of that office.

Furthermore, we have specific concerns with the RAA’s heightened cost-benefit analysis requirement for high-impact and major rules. Sometimes, the inclusion of people with disabilities in a program or activity includes a cost, such as to ensure equal access to airlines or ensure that technology is accessible, and we have frequently encountered critics of proposed inclusionary regulations who cite the costs of proposed rules or accommodations as reasons not to move forward. By heightening and enhancing agency focus on the costs and benefits of a proposal, the RAA undermines proposed rules that have costs. In addition, many of the benefits of civil rights laws and regulations assisting people with disabilities– such as improved quality of life and equality of opportunity to participate in activities and the economy – are difficult to quantify. Although the RAA does require the formulation of frameworks to take qualitative benefits into account, it is our experience that any attempts to measure the qualitative benefits of civil rights laws invariably fall short and tend to significantly undervalue the benefits while overstating the costs. This stacks the deck against passage of vital regulations by prioritizing monetary costs over the less tangible benefits achieved by civil rights and non-discrimination rules.

For the same reasons, we are also concerned that the RAA's requirement that agencies adopt the most cost effective alternative consistent with the statutory purpose. If qualitative benefits are difficult to calculate, this requirement encourages agencies to settle for proposed regulations that do not, in fact, maximize the independence and community integration of people with disabilities.

Finally, the RAA would unnecessarily make it more difficult and time-consuming for agencies to defend regulations challenged in court by requiring agencies to meet a "substantial evidence" standard for factual findings. This change would inappropriately shift the burden of proof in judicial review of regulations from the challenger to show that the interpretation is arbitrary and capricious to the agency promulgating the regulation. The substantial evidence standard has long been used in judicial review of individual benefit denials, such as for Social Security disability benefits. The substantial evidence standard is appropriate and works well in the Social Security context because the question in those cases focuses on a factual determination - whether an Administrative Law Judge's decision is supported by substantial evidence within a very detailed regulatory framework. No such framework exists in a review of the promulgation of a regulation. The undersigned organizations are concerned that applying this standard would make it extremely time-consuming and nearly impossible for agencies to defend regulations against court challenge.

The role that federal laws and regulations have played in advancing the interests of the 57 million children and adults with disabilities and their families living in the United States cannot be overstated. Prior to the passage of federal laws to prohibit discrimination against people with disabilities, millions of people with disabilities were forced to live in institutions, educated in segregated settings, denied the opportunity to work and contribute financially to their families and communities and excluded from community activities due to inaccessibility of facilities and programs. The passage of landmark civil rights legislation and the expansion of innovative programs to provide supports and services, the promulgation of rules to implement them, and aggressive enforcement of those rules have all been critical to providing individuals with disabilities the opportunity to live independently and be integrated into their communities. The undersigned organizations urge you to oppose S. 951 and any other regulatory reform bill that would hinder the progress toward meeting the goals of the Americans with Disabilities Act – equal opportunity and the ability to participate fully in all aspects of society.

Thank you in advance for taking our views into consideration. We would welcome the opportunity to discuss our concerns further. Please don't hesitate to contact Lisa Ekman, Chair of the CCD Regulatory Reform Task Force, at lisa.ekman@nosscr.org or 202-550-9996 if you have questions or would like more information.

Sincerely,

American Association of People with Disabilities

American Association on Intellectual and Developmental Disabilities (AAIDD)

American Foundation for the Blind

American Music Therapy Association

Association of People Supporting Employment First (APSE)

Association of University Centers on Disabilities

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Center for Public Representation

Council of Parent Attorneys and Advocates

Disability Rights Education and Defense Fund

Institute for Educational Leadership

Justice in Aging

Lutheran Services in America Disability Network

National Association of Councils on Developmental Disabilities

National Association of State Directors of Special Education

National Association of State Head Injury Administrators

National Center for Learning Disabilities

National Center for Special Education in Charter Schools

National Council on Independent Living

National Disability Institute

National Disability Rights Network

National Down Syndrome Congress

National Organization of Social Security Claimants' Representatives

Paralyzed Veterans of America

TASH

The Arc of the United States

The Advocacy Institute