



State of West Virginia  
Office of the Attorney General

Patrick Morrissey  
Attorney General

(304) 558-2021  
Fax (304) 558-0140

October 12, 2017

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, D.C. 20510

Re: **A communication from the States of West Virginia, Arizona, Arkansas, Colorado, Kansas, Louisiana, Montana, Nebraska, Nevada, South Carolina, Texas, Utah, and Wisconsin in support of Senate Bill 951, the Regulatory Accountability Act**

Dear Majority Leader McConnell:

As the chief legal officers in our States, we write to strongly support S. 951, the Regulatory Accountability Act (the "Act"), which is awaiting full floor consideration in the Senate. The Act provides a bipartisan and much-needed framework to reform the Administrative Procedure Act ("APA"), the statute that sets forth the requirements for lawful executive agency action.

The APA has not been materially amended for decades and, for several reasons, is in desperate need of reform. *First*, the prior administration's executive overreach demonstrates that existing Congressional, judicial, and other structural checks on the regulatory state have proven inadequate. *Second*, the growth of the modern administrative state has resulted in a vast unelected bureaucracy that is unaccountable to the people that the executive branch is bound to represent. The Act will help promote more public participation and accountability in the administrative state. *Third*, administrative overreach and disregard for the rule of law creates regulatory uncertainty and fosters burdensome and unlawful regulations that ultimately hurt the economy. The Act will introduce more regulatory stability and produce smarter and more efficient rulemaking, which will ultimately reduce costs, create jobs, and grow the economy.

Regrettably, some Attorneys General have written to urge the Senate not to pass the Act—a bipartisan bill with both Democratic and Republican co-sponsors. We urge the Senate to put partisan politics aside to pass regulatory reform that will restore the rule of law and bring much needed economic relief to the American people.

## **I. The Senate Should Promptly Consider and Pass S.951**

It is past time that Congress review and update the APA to account for the massive growth in the size, breadth, and power of administrative agencies since it was enacted. Congress enacted the APA to help ensure that executive agencies do not act outside of the parameters of authority lawfully delegated to them by Congress and to protect the people’s Fifth Amendment right not to be deprived of liberty or property without due process of law. Unfortunately, the APA has not fully lived up to its initial promise. Over time, and especially over the course of the prior administration, the APA has proved to be an insufficient check on regulatory overreach and inadequately protective of the people’s due process rights.

To be sure, the U.S. Supreme Court has taken some steps to reinvigorate the original meaning of the APA. For example, the Court, led by the late Justice Antonin Scalia, made clear that cost-benefit analysis is an essential component of “reasoned decisionmaking” when the EPA determines whether new rules are necessary and appropriate. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). But too often the courts have abdicated their responsibility to police the limits of agency power under the APA. Moreover, only Congress can enact legislation that will deal comprehensively with the failure of agencies to abide by the law, rather than leave such determinations to courts on a case-by-case basis.

We thus urge the Senate to make regulatory reform a top legislative priority and to schedule S. 951, the Regulatory Accountability Act, for consideration on the floor as soon as possible. Regulatory reform will help protect the people’s liberties and property and unleash America’s economic potential, which too often has been at the mercy of agencies wielding vast regulatory powers without adequate oversight. Congress should consider regulatory reform to be as vital a component of Congress’s agenda for economic growth as tax policy or healthcare reform.

## **II. The Act Advances A Much-Needed Pro-Growth Regulatory Reform Agenda**

In several key ways, the Act either codifies longstanding principles of administrative law that courts have routinely ignored or else raises the standard that unelected bureaucrats must meet to justify and impose regulations. These provisions of the Act will help ensure that agencies are held accountable and that the public has a meaningful opportunity to participate in especially costly rulemakings. Ultimately, the Act will help promote a climate of regulatory certainty that will reduce costs and grow the economy.

**Formal Rulemaking Hearings.** The Act will make formal hearings mandatory for certain particularly costly rules, which will require agencies to resolve complex and controverted factual questions through a rigorous adversarial process. Under the current APA, Congress must specifically identify each and every rulemaking for which formal hearings are required with

language indicating that a rule must be adopted “on the record after opportunity for an agency hearing.” 5 U.S.C. § 553(c). Congress rarely exercises this authority, however, with the result being that agencies are hardly ever called to use formal adjudication to enact significant new rules.

The Act takes a significant step toward reversing this trend. While the costs of formal hearings may not be justified for all rulemakings, the Act takes a practical approach by providing that the public can demand formal hearings for all billion-dollar rulemakings and certain other highly significant rules for which the costs of hearings are obviously trivial in comparison to the costs of the rules under consideration. This approach will not grind agency action to a halt: Even under the prior administration, only a handful of rules had projected costs exceeding \$1 billion. But for rules with that or a similar degree of impact on the American economy, the public ought to be able to demand that federal agencies subject contested factual questions to the rigors of live testimony and cross-examination before a final rule is issued. That will ultimately produce smarter and more effective rulemaking on matters of great national importance.

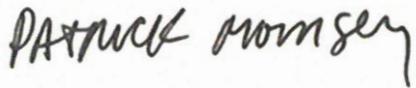
**Cost-Effectiveness and Alternatives.** The Act also helps clarify existing law that already requires agencies to enact only those rules whose intended benefits exceed their expected costs and consider meaningful alternatives that could produce the same benefits at reduced cost. The Act also requires agencies to adopt the most cost-effective rule among reasonable alternatives that meet statutory objectives, unless additional benefits justify additional costs. Building on Justice Scalia’s decision in *Michigan v. EPA*, similar cases, and prior executive orders issued by Presidents of both parties, the Act codifies and strengthens these basic and fundamental principles of administrative law. The Act will help eliminate any lingering confusion in the courts as to the application of what should be well-settled requirements of any rational rulemaking.

**More Meaningful Judicial Review.** The Act also takes important steps to restore power to courts to engage in meaningful review of agency action, rather than reflexively deferring to the results of an agency process that too often disregards constitutional or statutory requirements. For example, the Act would establish a substantial-evidence standard of review for all rules whose estimated costs exceed \$1 billion. The Act also will help ensure that courts have a meaningful record on which to make determinations as to whether agencies have exceeded their statutory authority, failed to conduct a meaningful cost-benefit analysis, or failed to adequately consider potential alternatives to a rule.

**Less Reliance On Guidance Documents.** The Act will also help reduce the regrettable practice among agencies of relying on informal guidance documents to set national policy. Too often, agencies have used these documents, issued without public comment, to make regulatory policy and then relied on such documents in pursuing enforcement actions as if such policies had the force of law. As a result, regulated parties lack certainty as to their legal obligations and often assume unnecessary costs to comply with informal policies as a matter of caution. The Act will require agencies to state on the face of guidance documents that they are not legally binding and, consistent with the APA, prohibit agencies from using guidance documents to foreclose consideration of important policy issues.

**More Certainty During Presidential Transitions.** The Act also takes a significant step towards reducing regulatory uncertainty during presidential transitions by limiting the power of an outgoing President to enact “midnight” regulations either during a lame-duck second term or after having lost an election. Specifically, the Act would empower agencies to delay rules that have not yet become effective before the inauguration of a new President to allow time to obtain public comment on whether any such rules should be amended or rescinded.

Sincerely,



Patrick Morrisey  
West Virginia Attorney General



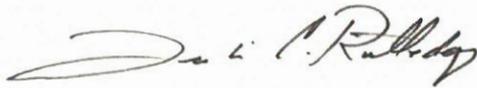
Jeff Landry  
Louisiana Attorney General



Mark Brnovich  
Arizona Attorney General



Timothy Fox  
Montana Attorney General



Leslie Rutledge  
Arkansas Attorney General



Douglas J. Peterson  
Nebraska Attorney General



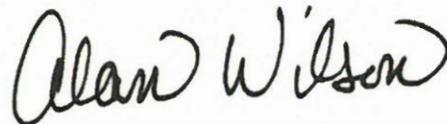
Cynthia Coffman  
Colorado Attorney General



Adam Paul Laxalt  
Nevada Attorney General



Derek Schmidt  
Kansas Attorney General



Alan Wilson  
South Carolina Attorney General

Honorable Mitch McConnell

October 12, 2017

Page 5

A handwritten signature in black ink that reads "Ken Paxton". The letters are cursive and fluid.

Ken Paxton  
Texas Attorney General

A handwritten signature in black ink that reads "Sean D. Reyes". The signature is cursive and somewhat stylized.

Sean D. Reyes  
Utah Attorney General

A handwritten signature in black ink that reads "Brad D. Schimel". The signature is cursive and appears to be written in a dark ink.

Brad D. Schimel  
Wisconsin Attorney General

cc: Minority Leader Charles Schumer