AMERICAN LUNG ASSOCIATION.

January 10, 2016

Dear Representative:

The American Lung Association urges you to oppose H.R. 5, the Regulatory Accountability Act of 2017. Despite its name, the bill does not ensure regulatory accountability; rather, it represents a sweeping attack on the federal government's ability to set lifesaving public health protections.

Standard of Least Costly for Industry Jeopardizes Health of Americans

H.R. 5 directs federal agencies to default to adopting the least costly standard for industry – not the standard that best protects health, even though existing statues require the latter. This is a dangerous giveaway to polluters and the tobacco industry that penalizes the American people.

Costs are already appropriately addressed in the Clean Air Act. Forty-seven years ago, Congress intentionally wrote requirements in the Clean Air Act for the U.S. Environmental Protection Agency (EPA) to set standards that indicate what level of pollution is harmful to human health, based solely on health and medical science. Congress required that EPA work with states to implement cost-effective cleanup measures to meet those standards. H.R. 5 would distort this process and could force EPA to prioritize costs to the industry over scientific evidence.

With the Family Smoking Prevention and Tobacco Control Act, Congress tasked the Food and Drug Administration (FDA) with protecting the public from the proven dangers of tobacco use, including death from lung disease, cancer and heart disease, based on what is appropriate for the protection of the public health – not the tobacco industry. H.R. 5 could force FDA to make decisions based on the cost to the tobacco industry instead of the public health – ignoring the tremendous human and economic toll tobacco inflicts on our nation each year.

Additional Unnecessary Requirements Delay Health Protections

H.R. 5 would also impose dozens of procedural requirements that would increase costs of critical safeguards, or worse, delay or completely block lifesaving protections. Federal rules already go through extensive review, expert input, and public comment before they are finalized. The numerous additional analysis, reporting, and planning requirements imposed by this bill duplicate many existing requirements and amount to red tape that will hinder agencies from setting safeguards under the law to protect the public.

H.R. 5 would also automatically halt enforcement of "high-impact" rules until all litigation on them is resolved. This unnecessary provision could delay lifesaving health protections, including against tobacco and outdoor air pollution, for years.

The courts already have the ability to stay a rule being litigated if they determine that the party opposing the rule is likely to succeed on the merits. Automatically staying enforcement of all

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"high-impact" rules creates an incentive for frivolous lawsuits, even if the suit is unlikely to succeed, to avoid having to comply with the rule – potentially for years.

Repeal of Judicial Deference to Agency Expertise

H.R. 5 would also reverse a longstanding and well-established court decision, additionally delaying critical health protections for the public. When Congress writes a statute with unmistakable terms that reflect a clear policy intent, executive branch agencies are required to follow those terms and intent exactly. However, sometimes Congress intentionally writes a statute to be flexible or ambiguous, recognizing that it does not have the expertise to anticipate or address every contingency – especially for a statute that is designed to be flexible and effective over time, with changing circumstances. Agencies have extensive experience with the statutes they administer, as well as superior expertise on the scientific and technical matters that are at the heart of the actions carried out by the agencies.

In 1984, the United States Supreme Court upheld this approach, confirming that when Congress is silent or ambiguous, deference is given to agencies for administrative interpretations.[1] HR 5 would abandon this longstanding and well-established framework by mandating that the courts give less judicial deference to agencies with the relevant subject matter expertise. The bill would require a de novo standard of review – allowing the court to substitute its own judgement – for all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.

For example, FDA's Center for Tobacco Products has hundreds of scientists, epidemiologists, public health professionals, communications experts and others on staff to implement the Family Smoking Prevention and Tobacco Control Act. FDA has been directed by Congress to make science-based decisions that are "appropriate for the protection of the public health." Inherent in the standards established by Congress, public health expertise is both necessary and required in order to carry out the law over time – expertise that the judicial branch is unlikely to possess in almost all cases.

In the Clean Air Act, Congress intentionally directed the EPA to set limits on specific air pollutants so that the limits "protect public health with an adequate margin of safety." EPA has established a multi-year process to review the thousands of health and medical studies that must inform that decision. During that process, EPA produces detailed analyses of the science and policy implications, which are reviewed multiple times by an independent panel of outside scientists and physicians. EPA further incorporates public comment on these analyses as scores of EPA researchers and, ultimately, the Administrator makes the final determination.

If passed, this bill would require judges to make decisions far outside their areas of expertise and with limited access to information, rather than continue to defer to the professional and

[1] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

informed decisions of scientists, physicians, economists, engineers, and other professional experts that work within these agencies. This is an unprecedented and dangerous move away from traditional judicial deference that has been successful and effective for more than three decades.

We urge you to oppose H.R. 5. This bill would make it harder to protect the health of Americans from the dangers of unhealthy air and tobacco by imposing years of delays, rejecting science, and burying federal agencies in unnecessary red tape.

Sincerely,

Harold P. Wimmer
National President and CEO
American Lung Association