

The Devastating Effects of the House's Regulatory Accountability Act

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The Regulatory Accountability Act, passed by the House on January 11, 2017, combines six misguided regulatory reform bills into one devastating package.¹ The bill purports to increase transparency and accountability. What it actually would do, however, is elevate the interests of regulated entities over the interests of the public by (1) delaying the implementation of cost-benefit justified rules through wasteful proceedings, (2) undermining federal agencies' ability to consider all relevant information when making important decisions about protecting public welfare and the environment, and (3) removing judicial deference to reasonable agency determinations of issues that Congress delegated to agencies.

What's in the Bill

- The bill would essentially eliminate the notice-and-comment rulemaking procedures that agencies have used almost exclusively to issue their rules.
 - For all new rules, the bill would require agencies to make burdensome findings, such as addressing all alternatives proposed by regulated entities, and would allow anyone to request cumbersome trial-like hearings on underlying data.
 - For “high-impact” rules (those with annual costs greater than \$1 billion), the bill would require rulemaking to proceed through cumbersome and ineffective hearings.
- It would postpone the effective date of a high-impact rule until all court challenges are fully settled—reversing a fundamental feature of the regulatory process and delaying rules for years, depriving the American public of important, often overwhelmingly cost-benefit justified, protections.
- In many cases, it would require agencies to choose the lowest-cost regulatory option and not the option that maximizes net benefits to the public.
- It would remove the deference that courts typically give to federal agencies on issues Congress delegated to agencies, which could lead to inconsistent decisions and policymaking by judges.

The House bill would delay the implementation of critical rules that benefit society

The bill starts from the false premise that the current regulatory process is not sufficiently deliberative. In fact, agencies regulate only when authorized to do so by statute. Congress has entrusted agencies with ensuring the safety of our workplaces and our roads, protecting the quality of the air we breathe and the water we drink, and addressing many other issues. Agencies do not take their duties lightly. Important proposed rules are accompanied by draft regulatory impact analyses that discuss the expected costs and benefits of the rules. All interested persons have at least one opportunity to comment on proposed rules. For major rules, this typically includes advance notice through the annual regulatory agenda, a comment period, and multiple live hearings. Such rules are also required to have benefits to society that justify their costs, to the extent permitted by law.

The bill would delay the implementation of statutorily authorized, cost-benefit justified rules by requiring agencies to address all alternatives proposed by regulated entities, to hold hearings on underlying science, and, for some rules, to engage in a cumbersome, trial-like “formal” rulemaking process.² These hearings and formal procedures—involving pre-trial conferences, oral argument by affected parties, extensive testimony, opportunity for cross-examination, burdens of proof, and rulings on the record—are widely known to be ineffective and wasteful. In the most infamous example of an agency’s use of formal rulemaking, the FDA amassed more than 7,736 pages of hearing transcript (with little useful information) and, in total, took almost ten years to determine whether peanut butter should consist of 87.5 or 90 percent peanuts.³

These procedures are especially ill-suited to seriously debating the quality of underlying data and science. But the bill would allow anyone to petition for a hearing to determine whether the agency’s data “fails to comply with the Information Quality Act,”⁴ which directs the Office of Management and Budget to require agency guidelines on “ensuring and maximizing the quality, objectivity, utility, and integrity” of agency data.⁵ At the hearing, the agency would have the burden of proving that its data complies with these vague guidelines, including whether the data is presented in a clear and complete manner and whether, substantively, it is accurate and unbiased.⁶

In addition, the bill would postpone the effective date of any “high-impact” rule that imposes more than \$1 billion in costs until all court challenges are fully settled.⁷ Currently, a final rule goes into effect unless a court grants a preliminary injunction, an extraordinary remedy granted only if opponents show that, among other things, an injunction is in the public interest. The bill would reverse this fundamental feature of the regulatory process, basically guaranteeing that it would be years before any such rule goes into effect. These rules, however, already undergo substantial scrutiny and are often overwhelmingly cost-benefit justified. Between 2010 and 2015, high-impact rules imposed about \$30 billion in costs—but produced more than \$150 billion in benefits (and that includes only the monetized benefits).⁸ Oftentimes, these benefits are health or welfare benefits, such as reductions in premature deaths. In those cases, delayed implementation could cost thousands of lives each year.

Taken together, the bill’s requirements would give opponents of rules valuable tools to delay implementation for years, without any regard to the harm that delay would impose on the health and safety of the American public.

The House bill could undermine agencies' consideration of the collateral benefits of regulation and other relevant information

Every rule has collateral consequences, and a regulator must take such indirect effects into account in order to accurately assess whether a rule would do society more good than harm. For this reason, courts and agency guidance documents have long required agencies to consider indirect effects, and agencies have done so under presidents of both parties and across three decades.⁹

The bill recognizes that indirect costs are a necessary component of total costs by requiring agencies to identify the “least costly” regulatory alternative after considering indirect costs.¹⁰ But the bill does not treat indirect benefits (often called “co-benefits”) in the same way. Instead, under the bill, an agency could implement a costlier rule that maximizes net benefits to society only if it “explains its reason for doing so based on interests of public health, safety or welfare *that are clearly within the scope of the statutory provision authorizing the rule.*”¹¹ Opponents of regulation will undoubtedly seize on this vague language to argue that indirect benefits can be considered only when explicitly authorized by statute. Such a restriction would severely limit an agency’s discretion. Instead of maximizing net benefits to society, agencies would be required to leave benefits on the table.

But there is no logical reason for agencies to treat indirect benefits differently than indirect costs.¹² We would not want an agency to pursue a regulation that would have an overall negative effect on the American public once severe collateral consequences on industry, human health, or the environment were considered. We also would not want an agency to ignore real, indirect benefits that accrue from its rulemakings.

The House bill would eliminate judicial deference to reasonable federal agency determinations of issues that Congress delegated to agencies

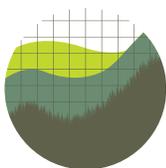
Federal agency decisions are difficult, involving scientific, economic, and pragmatic considerations within the agency’s statutory discretion. When Congress has not spoken clearly on an issue related to agency decisionmaking, courts have long deferred to the agency’s interpretation of the issue, as long as that interpretation is reasonable. This deference strikes a balance between the court’s role in ensuring that agency action is within its statutory authority (and otherwise not arbitrary) and society’s need for consistency, expertise, and accountability when the government makes these important and sometimes controversial decisions.¹³

The bill would eradicate this careful balance, requiring courts to decide how to interpret ambiguous statutory text without giving any deference to an agency’s reasonable interpretation.¹⁴ This requirement will result in uncertainty and inconsistent decisions, as judges take various approaches to interpret ambiguous statutory language. At worst, it will result in policymaking by judges on highly technical issues outside of their expertise.

To learn more about the House’s Regulatory Accountability Act, please contact the Institute for Policy Integrity at the New York University School of Law—derek.sylvan@nyu.edu.

Endnotes

- ¹ See Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) [hereinafter Act]. Senator Rob Portman has introduced a different version of the Regulatory Accountability Act in the Senate, *see* S. 951, 115th Cong. (2017), which we do not address.
- ² *See id.*, tit.1, § 103(b). In particular, the Act requires formal rulemaking for all high-impact rules, *see id.*, and allows any person to petition the agency for such procedures for any major rule, *see id.* § 105.
- ³ See Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1144-45 (1972).
- ⁴ Act, *supra* note 1, tit. 1, § 103(b).
- ⁵ Treasury and General Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 App. C, 114 Stat. 2763A-153 (2000); *see also* Office of Mgmt. & Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002); Environmental Protection Agency, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency (Oct. 2002), <https://www.epa.gov/sites/production/files/2017-03/documents/epa-info-quality-guidelines.pdf>.
- ⁶ See Environmental Protection Agency, Guidelines, *supra* note 5, at 15.
- ⁷ See Act, *supra* note 1, tit. 4, § 402.
- ⁸ See Office of Mgmt. & Budget, OIRA Reports to Congress, https://obamawhitehouse.archives.gov/omb/info-reg-pol_reports_congress/.
- ⁹ See Policy Integrity, The Importance of Evaluating Regulatory “Co-Benefits” (2017), http://policyintegrity.org/files/media/Co-Benefits_Factsheet.pdf. This discussion about co-benefits draws from this factsheet.
- ¹⁰ Act, *supra* note 1, tit. 1, § 103(b).
- ¹¹ *Id.* (emphasis added).
- ¹² See Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1793 (2002).
- ¹³ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
- ¹⁴ See Act, *supra* note 1, tit. 2, § 202.



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