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The Senate's Misguided and Wasteful Regulatory Accountability Act

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The Senate's Regulatory Accountability Act purports to be the smart answer to perceived problems with agency rulemaking.[1] While the bill eliminates some of the devastating features of the House's version of the bill,[2] it retains the worst feature of all: it allows regulated entities to delay the implementation of net beneficial rules by several years through the types of wasteful hearings that have been discredited for decades. This Factsheet focuses on this worst feature of the bill.

The bill also contains many other undesirable features. In general, the bill applies a one-size-fits-all approach to very different types of agencies and to very different types of rules. As a result, in many cases it creates nonsensical hurdles. For example, it pushes agencies to consider at least three alternatives for each new proposed rule—even the most routine rule, such as the Internal Revenue Service moving the due date for filing taxes in a given year if it would otherwise fall on a weekend day. The bill would also prevent agencies from advocating in support of a proposed rule. But clearly an agency head should be able to explain the agency's rule and defend its policy choices: communicating with citizens in that manner is an important and salutary

What's in the Bill

- In practice, the bill would require burdensome and ineffective public hearings for all new important rulemakings. Specifically, the bill allows anyone to petition for a trial-like "public hearing" on disputed "scientific, technical, economic, or other complex factual issues."
  - For "high-impact" rules (those with an annual effect on the economy greater than $1 billion), the agency generally must grant the petition.
  - For certain "major" rules (those with an annual effect greater than $100 million), the agency can deny the petition if it determines that a hearing would unreasonably delay completion of the rulemaking.
- At the conclusion of the agency's rulemaking process, anyone could challenge the agency's decision to deny a petition for a hearing.
- The bill's requirement would translate to public hearings on the record for about a hundred agency rulemakings each year.

part of our democratic process. And even provisions of the bill that seem unobjectionable are unnecessary as they simply codify existing features of administrative law. Even these provisions might have the undesirable effect of hindering intelligent judicial responses to changing regulatory landscapes. For these reasons, the Administrative Procedure Act was written in general terms, and it is why the Act has survived to this day. If specific regulatory issues have required additional procedures or safeguards, organic statutes have filled in the blanks with processes that are well adapted to those issues. These problems, however, pale in comparison to the devastating consequence of the Senate bill's hearing requirements.

The bill would delay major net beneficial rules for years.

The Senate bill starts from the false premise that the current regulatory process does not have enough "checks and balances."[3] 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, multiple live hearings, and review by the Office of Information and Regulatory Affairs. Such rules are also required to have benefits to society that justify their costs, to the extent permitted by law. For these reasons, many scholars actually view the current rulemaking process as too burdensome and slow, resulting in "ossification."[4]

The bill would delay the implementation of statutorily authorized, cost-benefit justified rules by essentially requiring agencies to conduct a cumbersome, trial-like "public hearing" for all proposed high-impact and certain major rules.[5] In particular, the bill allows anyone to petition the agency to conduct an oral evidentiary hearing with respect to "genuinely disputed" "specific scientific, technical, economic, or other complex factual issues" in any rulemaking with an annual effect on the economy greater than $100 million.[6] For most high-impact rules (that is, those with annual effects greater than $1 billion), an agency could deny such a petition only if it finds that either there is no genuine dispute as to the factual issues or any dispute would not affect the objectives, costs, or benefits of the rule. At the conclusion of the rulemaking, a court could review the agency's reasons for denying a petition.

One thing is clear, however: such public hearings have been widely known for decades to be complete wastes of time and resources.

1. *Formal hearings are widely known to be a waste of time and resources.*

The type of public hearing contemplated by the Senate bill—with pre-trial conferences, oral argument by affected parties, extensive testimony, opportunity for cross-examination, and rulings on the record and with the burden of proof typically on the agency—is an ineffective and wasteful way to conduct rulemaking.[7] In the most infamous example of an agency's use of this type 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.[8] The Supreme Court, in an opinion written by then Justice Rehnquist, essentially ended this practice in 1973 when it held that a statute would trigger one of these wasteful hearings only if Congress used unambiguous language evincing its desire to trigger such a procedure.[9] In light of this ruling and the widespread knowledge of formal rulemaking's failures, Congress rarely invoked that specific language.[10]

It's easy to see why an oral, trial-type hearing would be a waste of time for the complex factual issues that agencies regularly resolve. Oral testimony and cross-examination—valuable trial techniques for establishing facts unique to individuals and specific disputes—do not aid in uncovering useful information for the types of scientific or technical general factual issues disputed in agency rulemakings. Such disputed factual issues should be resolved based on serious review of sound data and expert analysis.

But this reality, known to all, will not stop regulated entities from petitioning agencies for such hearings. And agencies will face considerable pressures to grant such petitions in almost all cases.

2. *The Senate's bill would essentially require wasteful formal hearings for all major rulemakings, delaying implementation of crucial rules that benefit society.*

If the Senate bill becomes law, regulated entities will almost certainly petition agencies for formal hearings in all major rulemakings. Even if regulated entities foresee that a particular cost-benefit justified rule is inevitable, they will prefer to delay implementation of that rule for as long as possible. To them, delay is valuable.

Although the bill technically allows agencies to deny petitions for public hearings under some circumstances, in practice the agencies are likely to grant the vast majority of such petitions, in part because of the litigation risks of not doing so.

For most high-impact rules, agencies would have almost no discretion to deny petitions for hearings. An agency would have to find that "there is no genuine dispute as to the factual issues raised by the petition" or that any dispute would have no effect on the objectives, costs, or benefits of the rule[11]—a high bar given the controversial and complex issues agency rulemakings regularly implicate. Thus, the bill would essentially guarantee that it would be years before any such rule could go into effect. These high-impact 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).[12] Oftentimes, the benefits of high-impact rules are health or welfare improvements, such as reductions in premature deaths. Delaying implementation of rules that generate such benefits could cost thousands of lives each year.

And even for certain major rules, agencies, in practice, are likely to grant most petitions for public hearings. For such rules, the bill would allow an agency to deny a petition if it reasonably determines that "a hearing . . . would not advance the consideration of the proposed rule by the agency" or "would, in light of the need for agency action, unreasonably delay completion of the rulemaking."[13] Because any denial would be subject to judicial review,[14] agencies will face considerable pressure to grant the vast majority of petitions.

Overall, the bill's provision for petitions for public hearings would implicate about a hundred rules issued each year—typically, the most important and net beneficial rules issued by agencies.[15] The bill would give opponents of rules a valuable tool to delay implementation of such rules for years, without any regard to the harm that delay would impose on the health and safety of the American public.

To learn more about the Senate'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, S. 951, 115th Cong. (2017) [hereinafter S. 951].

[2] *See* Policy Integrity, The Devastating Effects of the House's Regulatory Accountability Act (2017), http://122.72.0.7www.policyintegrity.org/files/media/Regulatory_Accountability_Act_Fact_Sheet.pdf.

[3] *See P*ress Release, Portman, Heitkamp Introduce the Bipartisan Senate Regulatory Accountability Act (Apr. 26, 2017) (quoting Senator Portman's description of the purposes of the bill).

[4] *See, e.g.,* Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. Rev. 1013, 1020-27 (2000); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1387-436 (1992); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 Geo. Wash. L. Rev. 1493 (2012).

[5] *See* S. 951, *supra* note 1, § 3.

[6] *Id.*

[7] As one scholar put it, "Formal rulemaking has a long and disastrous history." Richard J. Pierce, Jr., *A Good Effort, with One Glaring Flaw*, The Reg. Rev. (May 8, 2017), *available at* https://www.theregreview.org/2017/05/08/pierce-good-effort-glaring-flaw/.

[8] *See* Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 Tex. L. Rev. 1132, 1144-45 (1972).

[9] *See, e.g.,* United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 234–38 (1973); *see also* Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 107 (2003) (arguing that courts avoid interpreting statutes to require formal rulemaking because the "impracticalities of formal rulemaking are well known").

[10] *See* Rubin, *supra* note 9, at 107.

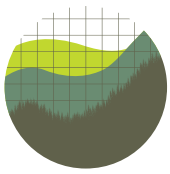
[11] S. 951, *supra* note 1, § 3.

[12] *See* Office of Mgmt. & Budget, OIRA Reports to Congress, https://obamawhitehouse.archives.gov/omb/inforeg_reg-pol_reports_congress/.

[13] S. 951, *supra* note 1, § 3.

[14] *See id.*

[15] *See* OIRA's Review Counts, Reginfo.gov, https://www.reginfo.gov/public/do/eoCountsSearchInit?action=init (counting OIRA's review of about a hundred "economically significant" rules each year).



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