

HOW THE SO-CALLED “REGULATORY ACCOUNTABILITY ACT” WILL ENSURE CONTAMINATED FOOD AND WATER, DIRTY AIR, RISKIER AIR TRAVEL & NUCLEAR PLANTS

The “Regulatory Accountability Act” would make it difficult if not impossible for new rules to take effect. The bill would give those who oppose new rules tools to block them at agencies and in the courts. The result would be to shut down efforts to adopt important new health and safety standards. The bill could block the issuance of new rules to protect the safety of our food; to clean up toxic chemicals in our drinking water; to stop big polluters from contaminating our air, lakes and rivers; or to protect air travelers from equipment failures, exposure to communicable diseases from overseas, foreign maintenance staff who use drugs, and other risks.

The bill effectively amends many laws that require rules in order to be implemented, including fundamental environmental statutes like the Clean Air Act and Clean Water Act; civil rights and disabilities laws; air safety laws implemented by the Federal Aviation Administration (FAA), laws to limit the spread of communicable diseases; consumer protection acts; nuclear power plant safety statutes, and many other laws requiring government safeguards. The bill would tilt the entire regulatory system against anyone who thinks a new rule is needed to protect the public. For many, many urgent problems, no matter who is pushing for a safeguard (including companies), this bill would impose new, almost insurmountable barriers to rulemaking.

Specifically, the bill would:

1. **Raise the legal burden on proponents of rules in agencies and in the courts.** The bill increases the legal burden in several ways. First, for “high-impact” and certain other major rules, the bill basically requires agencies to hold formal trial-like hearings at which the burden of proof is on a rule’s proponents. That means that any time the science, law or other aspects of a regulatory issue are not absolutely certain – which is the case almost all the time – an agency would have a hard time erring on the side of safety. In addition, corporations inherently have the greatest resources to bring to bear on expensive and time-consuming hearings before administrative judges. And it’s unclear if *agencies* are allowed to cross-examine witnesses at the hearings while *corporations* explicitly can. Agencies stopped holding administrative hearings like these decades ago because they added time and expense to the rulemaking process without providing additional useful information.

Second, if an agency still managed to issue a rule, the bill creates new barriers to rules in the courts by raising the legal standard to defend a rule. Today in defending a rule, an agency has to show that it was not “arbitrary and capricious” in issuing it; under the bill an agency would have to meet the tougher standard of showing there is “substantial evidence” in defense of a high impact rule – a term the bill also defines in statute for the first time and in a lopsided way. The bill also takes away the deference courts have long given agencies in interpreting their own rules.

2. **Create new legal paths to challenge rules and emphasize costs over benefits.** The bill requires agencies to fully cost out at least three alternatives to many proposed rules, an expensive and time-consuming process at a time when agencies are under budget pressure. Agencies then have to prove that a rule is the most “cost-effective” approach – a term that is undefined, rarely used in law, and differs from the wording of the longstanding executive orders on costs that the bill’s sponsors cite as its basis. Agencies can choose an approach that is not the most “cost-effective” only by citing the cost of any additional benefit, but it’s unclear when courts would uphold such analysis, especially given the additional heavy new legal burdens cited above. Perhaps even more problematically, the bill requires agencies to consider any “substantial alternatives or other responses identified by interested persons,” meaning agencies could have

trouble upholding a rule in court if it didn't fully cost out industry proposals, which given data limitations will often be difficult or impossible.

3. **Make it all but impossible to adopt protections in emergencies.** For more than 70 years, the law has allowed the government to adopt new safeguards in response to emergencies, enabling agencies to act swiftly for “good cause.” The bill would make it much harder for agencies to take urgently needed actions, and would automatically repeal those safeguards unless agencies quickly go through the all-but-impossible series of procedural and other hurdles the bill places in the way of retaining those protections.
4. **Shift regulatory authority from agencies to a small, ideological office in the White House, and keep that oversight secret.** For the first time, the bill gives the Office of Information and Regulatory Affairs (OIRA, part of the Office of Management and Budget, OMB) statutory oversight and control of the entire regulatory process, increasing its authority and the legal standing of its edicts. Agencies have the mission, statutory responsibility, staff and expertise to protect the public. OIRA (in every administration) has a small staff and its mission and culture center on limiting safeguards and focusing on costs. OMB's lack of expertise was highlighted when the National Academy of Sciences found that its risk assessment guidance was “fundamentally flawed” and should be scrapped. To make matters worse, OMB and other interagency comments are exempt from inclusion in the rulemaking record, so OMB's oversight is likely to remain secret.
5. **Impose a “gag order” limiting what agencies could say publicly about safeguards.** The bill prohibits an agency from “communicat[ing] through written, oral, electronic, or other means, to the public” about a proposed rule once it is proposed. This “gag order” means that agencies may not be able to respond to attacks on a proposed rule, no matter how biased or inaccurate. The language does not just prohibit an agency from working with non-governmental entities, but outlaws statements the agency would make itself.
6. **Apply White House political oversight to Independent Agencies.** Under current law, independent agencies run by commissions, such as the Consumer Product Safety Commission and the Nuclear Regulatory Commission, are insulated from White House political pressure, but the bill would subject these agencies to the same White House political oversight and regulatory review as other agencies.
7. **Impose new hurdles to issuing interpretations of rules and General Statements of Policy.** For more than 70 years, the law has granted agencies the authority to issue interpretations of the statutes they carry out and to issue policy statements (guidance) that don't have the binding effect of law, without going through full-blown rulemaking. The bill would repeal those provisions of the Administrative Procedure Act.
8. **Include carve outs for favored interests, an acknowledgment of how hard it would be to issue rules under the bill.** The bill includes three separate provisions that would exempt major rules that must be issued every three years or more often from its trial-like hearing requirements. This is tacit acknowledgment that the bill would block, or at the very least substantially delay, most new rules. Among those rules that would get a pass under the exemption are updates to the Renewable Fuel Standard.