Backgrounder

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Reviving Formal Rulemaking: Openness and Accountability for Obamacare

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Abstract: *The Patient Protection and Affordable Care Act (PPACA) is not so much a set of norms to regulate conduct as an authorization to administrators to produce norms to regulate conduct. Implementation of the Act will require many years and literally thousands of administrative regulations that will determine its substantive content and coverage. Under current law, those regulations will be promulgated through so-called informal rulemaking procedures, which offer very limited opportunities for public input. A recently introduced bill, H.R. 1432, proposes that rulemakings under the PPACA be conducted using formal rulemaking procedures that enhance the transparency and accountability of the rulemaking process. The idea deserves serious consideration. While formal rulemaking has largely disappeared from the modern administrative scene, it offers some significant advantages in the right setting, and the PPACA may very well be the right setting.*

Talking Points

- As is true of many major laws, Obamacare is not so much a set of norms to regulate conduct as an authorization for administrators to write such norms: Its implementation will require many years and thousands of administrative regulations.
- H.R. 1432, the Creating Sunshine, Participation, and Accountability for Our Nation Act, introduced by Representative David Schweikert (R–AZ), would require all regulations pursuant to Obamacare to be made on the record after opportunity for a public hearing presided over by an officer confirmed by the Senate.
- The bill would ensure that administrative regulations be developed in the open and be subject to public scrutiny and accountability.
- While this process will be more time-consuming than allowing the administrators to work in secret and without accountability would be, the importance of the health care law demands public knowledge and a slower pace.

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During the debate over the Patient Protection and Affordable Care Act (PPACA), then-Speaker of the House Nancy Pelosi (D–CA) was famously quoted as saying that "we have to pass the bill so that you can find out what is in it." The statement has often been taken a bit out of context; Representative Pelosi was saying only that reliable public information about the content of the bill was most likely to emerge after heated partisan exchanges died down.[1]

As it happens, however, Representative Pelosi's comment was more literally accurate than she may

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have realized, although her timing was slightly off: We will not actually know what is "in" the PPACA for years to come, even after it has passed and become law.

As is true of most modern legislation of any consequence, the PPACA is not so much a set of norms to regulate conduct as an *authorization to administrators* to produce norms to regulate conduct. A Congressional Research Service study identifies more than 40 provisions of the PPACA that confer significant rulemaking authority on implementing officials,[2] and hundreds of provisions of the statute make some kind of reference to administrative authority (primarily of the Secretary of Health and Human Services).

Passing the Patient Protection and Affordable Care Act did not tell us what is in it; it simply began the process by which law under it will emerge.

Implementation of the PPACA will require many years and literally thousands of administrative regulations, and those regulations will ultimately determine the substantive content and coverage of the law. Passing the bill did not tell us what is in it; it simply began the process by which law under it will emerge.

That law will not emerge from the constitutional process for lawmaking, in which the House and Senate vote on bills and then present them to the President for signature or veto. Rather, the operational law of the PPACA will emerge from administrative rulemakings by unelected—and in many instances largely unknown—agency officials.

In that context, H.R. 1432, the Creating Sunshine, Participation, and Accountability for Our Nation Act, introduced on April 7, 2011, by Representative David Schweikert (R–AZ), is potentially a very important piece of legislation. The bill provides that any rule issued pursuant to the PPACA or its amendments "shall be made on the record after opportunity for an agency hearing" and that such hearings shall be "(1) open to the public, including to radio and television coverage; and (2) presided over by an officer confirmed by the Senate."[3]

Limits of Informal Rulemaking

H.R. 1432 must be understood in the context of ordinary federal rulemaking procedures. The vast majority of federal rulemakings over the past four decades have been conducted in accordance with the so-called informal rulemaking procedures of the Administrative Procedure Act (APA), occasionally supplemented by specific procedural provisions in agency organic statutes.

Under those APA procedures, after an agency gives notice of a proposed rulemaking in the *Federal Register*, interested members of the public may file written comments with the agency. Oral proceedings, cross-examination, discovery, and other procedural mechanisms occur only at the discretion of the agency; absent a specific provision in an organic statute, there is no public right to such procedures in informal rulemaking.

Importantly, although a few decisions from the 1970s suggest that *ex parte* contacts between the agency and members of the public are inappropriate in informal rulemakings, there is nothing in the APA that actually forbids such private communications during the informal rulemaking process, as more recent court decisions recognize. Once the agency adopts a rule through informal procedures, the agency may defend the rule in court by using

1. Representative Pelosi's full statement was: "But we have to pass the bill so that you can find out what is in it, *away from the fog of controversy*." See David Freddoso, "Pelosi on Health Care: 'We Have to Pass the Bill So You Can Find Out What Is in It…,'" *Washington Examiner*, March 9, 2010, at *http://washingtonexaminer.com/blogs/beltway-confidential/pelosi-health-care-039we-have-pass-bill-so-you-can-find-out-what-it039* (July 20, 2011). Emphasis added.
2. Curtis W. Copeland, "Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148)," Congressional Research Service *Report for Congress*, April 13, 2010, p. 1, at *http://www.shrm.org/hrdisciplines/benefits/Documents/Regulations.pdf* (July 20, 2011).
3. H.R. 1432, Creating Sunshine, Participation, and Accountability for Our Nation Act, 112th Cong., 1st Sess., April 2, 2011, at *http://www.opencongress.org/bill/112-h1432/text* (July 20, 2011).

any materials that were actually before the agency during the proceeding.

Developments in administrative law doctrine since the late 1960s make these informal procedures considerably more muscular than were contemplated by the APA's drafters in 1946. In particular, the substantive requirement that agencies explain their reasoning to reviewing courts forces agencies to compile a "record" of materials that can support its decision. But the participatory rights of the public under informal rulemaking are quite strictly limited, and the agency's decision-making process is subject to scrutiny only if the rule is challenged in court, and then only to make sure that the agency took a serious look at the problems involved and did not entirely shirk its responsibilities.

Partly because judicial doctrine has effectively raised the procedural requirements for informal rulemakings, there have been no serious congressional efforts to restore formal rulemaking to its pre-1972 status, much less to expand its use.

Reconsidering Formal Rulemaking

H.R. 1432, by requiring that rules under the PPACA must be made "on the record after opportunity for agency hearing," calls into play the so-called formal rulemaking provisions of the APA. Those provisions require rules to be made using relatively rigorous procedures, including a presumptive right to oral proceedings and cross-examination, a trial-type setting presided over by an administrator with judge-like authority, limitations on *ex parte* contacts with agency officials, and a requirement that the ultimate agency decision be based solely on evidence formally presented during the proceeding. Apart from the absence of an Article III judge, a jury, and strict rules of evidence (the APA excludes evidence in formal proceedings only when it is irrelevant or a waste of time), formal APA proceedings strongly resemble judicial trials.

These kinds of formal rulemaking procedures were commonplace in the quarter-century after enactment of the APA, but they largely disappeared from the legal world following two extraordinarily ill-reasoned Supreme Court decisions in 1972 and 1973 that effectively construed all but a tiny handful of federal rulemaking statutes (in practice, those statutes that contain precisely the "on the record after opportunity for an agency hearing" language included in H.R. 1432) to require only informal rulemaking procedures.

Partly because of concerns that formal rulemaking was unduly cumbersome, partly because judicial doctrine has effectively raised the procedural requirements for informal rulemakings, and partly because administrative procedure seldom attracts legislative attention, there have been no serious congressional efforts to restore formal rulemaking to its pre-1972 status, much less to expand its use. H.R. 1432 is an excellent opportunity to reconsider the possible benefits of formal rulemaking procedures.

Formal Rulemaking Promotes Transparency and Accountability

The most obvious benefits of formal rulemaking are transparency and openness, which in turn promote agency accountability. Because informal rulemakings are ordinarily conducted entirely on paper, through submission and consideration of written public comments, the agency decision-making process in informal rulemaking is something of a black box. The agency in such cases must issue an explanation for any rule that is ultimately adopted, and it must defend that rule and accompanying explanation in court, but it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning process.

The public does not necessarily get to see, much less affect, the actual development of the agency's reasoning throughout the process of informal rulemaking. Also, the agency can communicate with whomever it wishes during the rulemaking and gather information from wherever it pleases. Informal rulemaking procedures are designed to facilitate agency discretion, not to facilitate agency accountability.

In a formal rulemaking, by contrast, all of the relevant materials relied upon by the agency must be formally introduced through public rulemak-

ing procedures and placed on a transparent record that must serve as the exclusive ground for agency decisions. H.R. 1432 reinforces this requirement by specifying that the public procedures under the PPACA must be open to the electronic press. Moreover, formal rulemakings are subject to the APA's limitations on *ex parte* contacts with agency officials.

Finally, the APA's presumptive requirements of oral proceedings and cross-examination help ensure that the basis and rationale of agency rules are developed in the open and are subject to full public scrutiny. Formal rulemaking is a much better tool for agency accountability than is informal rulemaking.

Time for a Trial Run?

The chief objection to formal rulemaking is that it is costly and time-consuming. That can no doubt be true. Just as trials are generally more costly than plea bargains or arbitrations, formal rulemakings are generally more costly than informal rulemakings. The adversarial character of formal rulemakings allows more opportunities for interested parties to be heard, and all else being equal, that will slow down the regulatory process. If the goal is to produce as many rules as fast as possible, informal rulemaking is the superior option.

For a number of reasons, the Patient Protection and Affordable Care Act may be an ideal setting in which to give formal rulemaking a try.

For a number of reasons, however, the PPACA may be an ideal setting in which to give formal rulemaking a try.

First, the sheer importance of the subject matter cries out for openness, transparency, and public involvement in the production of rules that will significantly affect almost everyone. The Act's requirements are already being phased in gradually over a period of years, so it is hard to see why trading a potentially modest amount of regulatory delay for a potentially large dose of accountability would be a major crisis.

Second, if certain rules need to be promulgated more quickly than full compliance with formal rulemaking procedures would allow, the APA permits agencies to bypass these procedural requirements when it can show (subject to judicial review) "good cause" to do so. If there is not "good cause" for dispensing with transparency and accountability, then why dispense with it?

If the object of H.R. 1432 is to ensure that individuals more accountable than administrative law judges will preside over formal rulemakings, it should specify a wider range of HHS officials who are eligible to perform that function.

Third, many of the costs associated with formal rulemaking, such as the costs generated by oral presentations and cross-examination by multiple parties, can be controlled by the presiding official, because the APA permits the agency to limit such party participation in rulemakings when it can do so without prejudice to anyone's interests. Moreover, if someone would be prejudiced by being denied oral presentation or cross-examination, that would seem to be a very good reason for having oral presentation or cross-examination.

Fourth, because there have been almost no formal rulemakings in the federal system for four decades, there is need for hard data on the actual effects of such procedures on the rulemaking process.

Administrative Law Judges As Presiding Officers

H.R. 1432 proposes to alter the normal operations of formal rulemaking in one potentially problematic way. Under the APA, formal rulemakings must be conducted either by one or more of the agency heads or by an administrative law judge (who is not really a judge but is an agency employee with judge-like authority and some modest statutory independence from the employing agency). In practice, agency heads almost never personally preside over formal proceedings.

H.R. 1432 provides that formal rulemakings under the PPACA must be "presided over by an officer confirmed by the Senate." While this is an understandable extension of the impulse toward

transparency—Senate-confirmed officials are more accountable than administrative law judges—it is likely to prove unworkable in practice.

The vast majority of rulemakings under the PPACA will be conducted by the Department of Health and Human Services. Because administrative law judges are not Senate-confirmed officials, those rulemakings will have to be conducted by the agency head, meaning the Secretary of Health and Human Services. It is inconceivable that the Secretary will be able personally to conduct all of the rulemakings required under the statute. If the object of H.R. 1432 is to ensure that individuals more accountable than administrative law judges will preside over formal rulemakings, it should specify a wider range of HHS officials who are eligible to perform that function.

A Good Start

It is hard to imagine a context in which the benefits of openness, transparency, and accountability will be as high as with the PPACA. If not now, when? Congress should give H.R. 1432 very serious consideration—and should even consider whether formal rulemaking might have benefits in other contexts as well. It would be useful for Congress to:

- **Determine** how many rules that will be needed to implement the PPACA are time-sensitive but would not qualify for the APA's "good cause" exemption from rulemaking procedures;
- **Estimate** the actual costs of conducting formal rulemakings versus informal rulemakings;
- **Think** about the range of officials who might appropriately preside over formal rulemakings; and
- **Consider** whether the dominance of informal rulemaking over the past four decades has come at an unacceptable cost in terms of agency transparency and accountability.

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