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The Regulatory Accountability Act: A Step Toward Reform

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This week, the House of Representatives is expected to vote on legislation to reform the way federal regulations are made. The Regulatory Accountability Act (RAA), sponsored by Representative Lamar Smith (R–TX), would require all federal agencies to examine more thoroughly proposed rules before they are adopted while increasing the ability of federal courts to ensure that such assessments are done properly.

The RAA (H.R. 3010) would not make revolutionary changes in federal rulemaking. Instead, by implementing a number of targeted reforms, it would—especially if combined with other reforms—help limit regulatory burdens placed upon the U.S. economy and individual Americans.

The Constitution of Rulemaking. Since 1946, the regulatory process in the United States has been governed by the Administrative Procedures Act (APA). Often called the "constitution of rulemaking," the APA put into place the basic rules of the game for regulators, including a requirement to provide notice of proposed rules, an opportunity for the public to comment, the publication of final rules, and court review of decisions.

This framework is fundamental to the regulatory process, but the world of 1946 was far different from that of today. The *Code of Federal Regulations*, a compendium of all existing federal rules, totaled just over 30,000 pages in 1946, but by 2010 it topped 165,000 pages. The *Federal Register*, where changes in rules are published and explained, was under 15,000 pages in 1946, compared to over 82,000 pages in 2010.[1]

Outside the APA's statutory framework, however, extensive non-statutory procedures for reviewing and filtering proposed rules have developed. Most notably, starting in 1981, executive branch agencies have been required by presidential executive order (currently E.O. 12866) to assess the costs and benefits of proposed rules, consider alternatives to regulation, and tailor regulations to impose the least cost on society. The same principles were reiterated earlier this year by President Obama in an executive order requiring agencies retrospectively to review regulations.

Key Reforms. The proposed RAA would amend current law in a variety of ways. Among other things, it would:

- Codify many of the requirements now imposed by E.O. 12866 mandating agencies to assess the costs and benefits of proposed rules and to consider alternatives. Giving these requirements the

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force of law ensures that they cannot be rolled back without congressional action and provides the basis for judicial review of agency compliance.

- Subject so-called "independent" agencies, which are outside the direct control of the President, to the same rulemaking requirements. This is a long-overdue and much-needed change. Independent agencies, ranging from the Federal Communications Commission to the Securities and Exchange Commission, are responsible for a large and growing share of the rules on the books today. Yet, by a quirk of their structure, they are now largely exempt from the requirements imposed on executive branch agencies by E.O. 12866.
- Require, for "major" rules ($100 million in impact or more annually), that an advance notice of proposed rulemaking be released to solicit public comment before they are proposed. This provision is meant to prevent agencies from making tentative policy decisions before the public has an opportunity to comment. It is unclear, however, if it will make a real difference, as agencies may simply make informal policy determinations before advance notice is made.
- Require, for "high-impact" rules ($1 billion in impact or more annually), that agencies hold an oral evidentiary hearing involving all affected parties with a full opportunity for cross-examination of witnesses from all sides. The hearing is meant, through adversarial argument, to elicit more and better information on which regulators can base their final decisions. Yet it is unclear exactly how these proceedings would work. Unlike most legal proceedings, there is no clearly definable set of "parties" to a regulatory proceeding. A multitude of interests are potentially affected, each with differing viewpoints and interests. Cross-examination of all representatives by all the participants would be difficult. Moreover, especially where a complex economic or scientific point is at issue, an oral presentation may add little useful information. Despite these limitations, however, such hearings may be worthwhile. Given the potential impact of the mega-rules to which they would apply, the extra procedure would be more than justified even if it provided only a relatively small improvement in the final decision.

Judicial Review. Of course, mandating that agencies make more thorough assessments of proposed rules is one thing; getting them to actually do it is another. Agencies that are intent on pushing through new rules can easily wave through proposals with cursory review and boilerplate findings regarding the necessity of their proposed new rules. That is why judicial review of agency compliance with any such requirement is essential.

Under H.R. 3010, agency assessments of the costs and benefits of their rules could be challenged in court. That is beneficial. Similarly, the legislation provides for judicial review of Information Quality Act claims, a step that may give this currently toothless requirement some bite.[2]

But it is not entirely clear how intensive judicial reviews will be. Under current law, federal courts are typically limited in their scrutiny of regulatory decisions. Courts may overturn an agency's decision only if it is "arbitrary or capricious" or lacks "substantial" evidentiary support. Courts must also defer to an agency's interpretation of its own statute (unless Congress has answered the specific question at issue) and must give even greater deference to an agency's interpretation of its own regulations as well as to certain technical determinations by an agency.

H.R. 3010 would bar courts from granting this deference for cost–benefit analyses and other economic assessments unless the agency complies with Office of Management and Budget guidelines for performing such analyses. H.R. 3010 also eliminates such deference for judicial review of informal guidelines and interim rules.

1. For information on the burden this increased regulation has placed on the economy and consumers, see James L. Gattuso and Diane Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation," Heritage Foundation *Backgrounder* No. 2586, July 25, 2011, at *http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report.*
2. The Information Quality Act (also known as the Data Quality Act) requires agencies to issue guidelines assuring the quality of data used in decision making and to provide opportunities for affected persons to correct the record.

Despite these changes, the standard of review to be used by courts in reviewing agency rulemaking would remain relatively high. The bill could be improved by tightening the review standards to ensure that judicial review is vigorous.

More Needed. On the whole, the Regulatory Accountability Act represents a positive step toward regulatory reform, imposing clear obligations on agencies with review by the courts. It should, however, be considered by Congress as a supplement—not an alternative—to other needed reforms.

Foremost among these are requiring specific congressional approval of new regulations and establishing firm "sunset" dates for new and existing regulations. Only through such a multi-pronged reform effort can excessive regulatory burdens on consumers and the U.S. economy be lifted.

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