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Regulatory ‘Reform’ That Is Anything But

By WILLIAM W. BUZBEE JUNE 15, 2017

After decades of failed efforts to enact “regulatory reform” bills, Congress appears to be within a few votes of approving reform legislation that would strip Americans of important legal protections, induce regulatory sclerosis and subject agencies that enforce the nation’s laws and regulations to potentially endless litigation.

This is not reform. These bills would sabotage agency regulation with legislative monkey wrenches. Key compromises about agency power and procedures, worked out under the 1946 Administrative Procedure Act, would be discarded by these overwhelmingly anti-regulatory bills. And because they would be statutory changes, not mere presidential edicts, these changes would likely long outlive the Trump administration.

It is easy to complain about regulation, of course, and much could surely be improved. But government rules are the foundation of the safety net that protects Americans. Are you ready to abandon protections of your drinking water? What about that school hamburger? Is it O.K. to eat? Can you depend on Medicare or Medicaid? Are toys safe? Can workers fight overtime violations or discrimination? Will government agencies be there to police mortgage, student-loan and retirement-savings abuses? Will the education of special-needs students be protected?

Few members of Congress would dare vote directly to eliminate protections like those. But by imposing a byzantine, burdensome process on all agencies, Congress could dodge accountability but nonetheless derail the implementation of popular laws.

The principal bill in this so-called reform package is the Regulatory Accountability Act, a bipartisan proposal sponsored by Republican Senators Rob Portman of Ohio, Orrin Hatch of Utah and Rand Paul of Kentucky, as well as Democratic Senators Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia.

This measure would subject major rule making by agencies to dozens of new requirements, with a pervasive mandate for cost-benefit and cost-effectiveness analyses. Agencies would also have to periodically review the efficacy of new rules, even if no one was complaining about them. In addition, agencies would have to select a single best regulatory choice measured by monetary metrics and based on “best available” data. As a result, less quantifiable goals behind our protective laws — clean air and water, civil rights, safe drugs and honesty in markets, for example — would fade in importance. Every agency choice about what is “best” or most “cost effective” would become the subject of litigation.

This bill would also grant the Office of Information and Regulatory Affairs — run by the president’s regulatory czar — broad authority to raise and lower regulatory hurdles, allowing further skewing of the law in an anti-regulatory direction. Independent agencies like the Federal Communications Commission, the Securities and Exchange Commission and the Consumer Product Safety Commission, long protected from direct presidential control, would now be subject to this bill’s requirements and oversight by the information and regulatory affairs office.

Agencies should certainly be held accountable for what they do. Nonetheless, much of this bill would just duplicate what is already done, but with far more numerous and onerous analytical mandates. Courts already subject agency actions to a “hard look,” scrutinizing the science justifying rules and rejecting unresponsive or

arbitrary action. And agencies already design regulations so that benefits justify costs whenever possible.

This bill would also allow regulatory opponents to force agencies into lengthy trial-like proceedings over newly proposed rules, similar to formal proceedings that were long ago rejected as unworkable. Faced with these piled-on requirements and near-certain judicial review, many agencies would simply avoid any rule making.

Another bill, the Reins Act, is possibly unconstitutional because of how it would circumvent the Constitution's lawmaking process. Finalized major regulations would need a new round of House and Senate approval. Mere inertia would kill regulations. A third bill, the Midnight Rules Relief Act, would create a legislative fast track that would allow Congress to revoke en masse multiple regulations finalized late in a president's term. With no required explanatory justifications and no judicial review of such actions, politicians could kill multiple regulations at once without accountability.

Under these bills, popular protective laws would still exist, but the regulations needed to make their protections real would in many cases be weakened because of the new, pervasive focus on cost. And new rules would seldom emerge from the regulatory morass and litigation minefield created by this "reform."

President Trump says he favors deregulation, and he has already invalidated over a dozen late-term regulations issued under President Barack Obama and ordered agencies to try to rescind numerous others. He has also ordered agencies to eliminate two regulations for each new one, regardless of the old rules' benefits.

In a paradoxical twist, the Senate's new regulatory-reform bills would further Mr. Trump's deregulatory leanings, but also tie him in knots. All new major regulations would be hamstrung, even business-friendly deregulation. It is hard to imagine why he would so weaken his own presidency. Maybe he has missed this twist. Or maybe the embattled president feels pressure to deliver some kind of legislative victory, especially for anti-regulatory think tanks, long-frustrated Republicans, lobbyists and companies that, like the businessman Mr. Trump, squirm when in regulators' cross hairs.

These bills would be bad for any president. They pose long-term risks to all Americans. They should die in the Senate or be vetoed by the president.

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