



Tangling life-saving regulatory red tape

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“Regulatory reform” is a popular battle cry for congressional Republicans these days, so long as “reform” actually means restricting the ability of agencies to protect the public.

In one of the few efforts with any Democratic support, Sens. Rob Portman (R-Ohio) and Heidi Heitkamp (D-N.D.) have co-sponsored a [Regulatory Accountability Act](#) that made it out of committee on May 17 and is headed to the floor soon. The sponsors may be speaking for corporate interests, playing defense with next year’s elections in mind, or may actually think the bill will improve the regulatory process. But it’s a bad idea – one that will make it harder to clean up our air, water and food. For instance, if this bill passes, it might take years to tighten standards to prevent another Flint drinking-water crisis.

The Heitkamp-Portman bill has myriad flaws, but two stand out in particular. First, it would require agencies to use courtroom procedures for evaluating important rules, complete with cross-examination of witnesses in front of a judge. Nowadays, agencies get evidence and comments in writing, a faster, less expensive, more deliberative process. And second, once a regulation is adopted, the bill would give federal judges hearing challenges more power to second-guess agencies in a number of key areas, including assessing the scientific basis for the agency’s action, the meaning of agency rules, and the economics of agency cost-benefit analysis. Both provisions are steps in the wrong direction.

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The most troubling change is the substitution of live trials for electronic comments. If Heitkamp and Portman had talked to any trial judges, they might have found out why courtroom trials are a bad way to decide complex technical issues. Such trials take an enormous amount of time; they cost the parties a fortune; and the elaborate rituals of questioning experts on the witness stand tend to create as much confusion as clarity. In fact, many judges do everything they can to avoid such trials, try to decide as much of the case as possible on the basis of documents rather than oral testimony, and ruthlessly prune witness lists and the lengths of trials.

In the context of regulation, the trial procedure is an especially bad idea. Major corporations can well afford the extra costs of paying lawyers and expert witnesses for lengthy trials. But public interest groups, seeking to protect workers, consumers and public health, can barely afford the more streamlined procedures in effect today. Their voices would scarcely be heard in the mega-trials that would be required by the bill, if they could afford to participate at all.

Expanding the power of federal courts to review rules is also a bad idea. Judicial review can already cause years of delay. The bill would give industry many new legal arguments against regulations. It asks judges, few of whom have training in economics, to review the substantive economic analysis of new regulations, and it would give them more leeway to second-guess agencies on complex scientific issues far beyond the expertise of most judges. It's completely unknown whether any possible improvement in the quality of the agency decision is worth the added delays and potential errors and misjudgments by judges.

There's an irony here. The bill calls for extreme vetting of important rules to protect public health and the environment. But as Heitkamp and Portman note with some pride, the bill was voted out of committee in just three weeks. Obviously, very little vetting took place. Somehow, what's sauce for the agency goose isn't sauce for the congressional gander. Maybe that's because, when their own policy efforts are involved, the senators realize that the costs of extra procedural hurdles can easily outweigh the benefits.

Unfortunately, in drafting the bill, they were blind to its costs. As a result, the bill would impose needlessly complex procedures that will hamper agency efforts to protect the public interest far more than it will improve agency decision making. And, of course, for many of the bill's supporters, that's exactly the point. Nothing about this proposal is intended to foster safer workplaces, food and consumer, and nothing about it would improve public health or the environment. The purpose is to delay or defeat rules that would accomplish those important objectives.

The stakes for this legislation are high. When regulations are needed to protect the public from pollution or toxic substances, do we really want to let industry lawyers drag out the process for years?

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The views expressed by this author are their own and are not the views of The Hill.

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