CPR CENTER FOR PROGRESSIVE REFORM

Analysis of SCRUB Act of 2014

By James Goodwin, Senior Policy Analyst, Center for Progressive Reform

- Overarching criticisms:
  - Would prevent agencies from carrying out their statutory missions of protecting people and the environment
  - Would increase procedural burdens, wasting scarce government resources
  - Many provisions could be abused to attack agencies that are opposed on political grounds by members of the Commission
    - No clear mechanisms for holding the commission accountable for properly implementing the statute
  - The review process lacks balance—only allowed to examines areas for weakening or eliminating existing regulations
    - A balanced review process would also look for inadequate regulation, and provide recommendations for strengthening existing regulations. For example, inadequate oversight of chemical facilities, as illustrated by recent West Virginia and West, Texas, disasters
  - Based on a false premise: We are experiencing excessive regulation, which is causing various forms of economic harm. False corollary: We can fix our economy by eliminating regulatory safeguards
    - There is no conflict between strong regulations and a strong economy. In fact, strong regulations often benefit the economy while weak regulations harm the economy
    - We are not experiencing excessive regulation. In fact, there are many areas where regulation is obviously much too weak
  - Bad optics:
    - The problem this bill seeks to address is "too much bureaucracy":
      - It's solution is "more bureaucracy":
        - A whole new commission with:
          - Reimbursed commissioners;
          - Mechanisms for acquiring a director, staff, contractor services, and supplies and equipment
    - According to the bill's sponsors, the cause of the problem of excessive regulations is "unaccountable bureaucrats":
      - Yet, the fundamental design of the bill is to entrust even less accountable bureaucrats with extraordinary authority over the safeguards on which Americans depend to protect their health, safety, and the environment
  - Bottom line: This bill will not help the economy, but instead will only help protect the already-large profits of politically connected corporate special interests

by forcing people and the environment to continue to bear the costs of their harmful activities

- Specific criticisms:
  - Title I:
    - Section 101(a): The Retrospective Regulatory Review Commission can only look for places to repeal or weaken regulations. Is improperly prohibited for looking for areas where new or stronger regulations are rightly needed—even if such regulations would have a positive overall benefit on the economy, as most do.
    - Section 101(c)(3): This provision could potentially enable the Commission to harass agencies by making unreasonable information demands that burden the agency and wastes scarce resources
    - Section 101(f)(3): Agencies already lack adequate personnel to carry out their core statutory missions; situation would be worsened if agencies were forced to detail staff to work for the Commission. This provision could also be abused to punish specific agencies that are opposed on political grounds by the Commission.
    - Section 101(h)(2):
      - This review would be largely duplicative of the one that agencies already carry out pursuant to Section 610 of the Regulatory Flexibility Act.
        - That section establishes a detailed process for agencies to review existing regulations, seek public comment on them, and then make necessary adjustments. There is no evidence this section isn't working properly.
        - The new review would waste scarce resources and introduce unnecessary burdens on agencies
      - The criteria for review of existing regulations are highly subjective; would give Commission virtually unfettered freedom to target regulations they dislike on political grounds or based on other improper considerations
        - For example, criterion (G): "Whether the rule or set of rules inhibits innovation in or growth of the United States economy." This criterion lacks any real objective meaning, and can be twisted to cover nearly any regulation
    - Section 101(h)(2)(B): Note that in determining whether an existing regulation's benefits "justify" its costs, the Commission may only consider those benefits "to society within the United States." In other words, Commission couldn't consider benefits outside of the United States
      - Not clear how this geographic limitation would be interpreted or implemented
      - In any event, is clearly aimed at things like greenhouse gas regulations, which Republicans often criticize for primarily benefitting those outside of the United States

- Section 101(h)(4)(B): Absolutely extraordinary that it singles out bigger rules (i.e., "major rules") for elimination or weakening on less than a majority vote (i.e., 4 out of 9 commissioners votes would be sufficient). Fundamentally anti-democratic to allow a minority of non-elected commission members veto a regulation authorized by law that was adopted by the constitutionally mandated process
- Section 101(h)(5)(A)(iv): Clear that industry will take full advantage of this opportunity to provide the Commission with a hit list of regulations they oppose.
    - No doubt that most of the regulations targeted for repeal or weakening will come in response to these industry submissions
    - Yet, no way for interested public to participate in process to defend regulations are the subject of these submissions
- Section 101(j)(2)(C): I'm genuinely confused by this "Resolution of Disapproval" process. The way it reads now, it almost seems like Congress can only disapprove all of the Commission's recommendations for immediate repeal or weakening of regulations at the end of the Commission's three-year term. Is that correct?
- Section 101(l): Extraordinary that this bill would take money from resources-strapped agencies to fund this nonsense.
    - It also seems like this would provide the Commission with hundreds of millions of dollars (i.e., at least $25 million from each agency subject to the review?). How much money does this Commission really need?

- Title II:
    - Section 201(a):
        - Note that this cut-go procedure applies to every new rule—not just bigger ones (e.g., "major" or "economically significant" rules). This would be extremely disruptive of agencies' ability to carry out their statutory missions
            - Agencies do all kinds of small, routine rules that would probably impose modest costs. For example, the FAA's airworthiness directives, the Coast Guard's security zones, NOAA's rules governing fisheries
            - These would all be blocked unless or until the agency repeals or weakens an existing regulation or somehow gets Congress to actually pass resolution of approval overriding the cut-go procedure
            - There really needs to be an exemption for these small, routine rules
        - Note that because cut-go procedures apply to every rule, this means that agencies must now do at least a cost analysis of every rule they issue (used to only have to do this for major and economically significant rules)

- Note that the cut-go procedure involves a comparison of an ex ante cost estimate (i.e., for the new rules that agencies want to issue) and an ex post cost estimate (i.e., conducted by the Commission for existing rules that they recommend be eliminated or weakened)
    - Literature has well established that ex ante cost estimates are systematically too high while ex post cost estimates are more accurate
    - End result is that this would not truly be a "1 for 1" trade. Because the ex ante cost estimate is overstated, agencies would in effect be forced to "overpay" by repealing or weakening too many existing regulations in order to clear space under the regulatory cost cap created by the cut-go procedures before they can issue a new rule. See discussion of this issue on pages 8-9 in CPR's Issue Alert on Regulatory Pay-Go.

- Section 203(c): Cut-go resolution of approval process is fundamentally anti-democratic—it allows one House of Congress to block a regulation to implement a statute enacted through the constitutional lawmaking process. This amounts to an amendment of the statute without going through the constitutional lawmaking process
- Section 204:
    - OIRA is fundamentally anti-regulatory—should not be given so much authority over agency cost rules
        - Lots of evidence of OIRA forcing agencies to recalculate the costs of their pending regulations to make them higher, even though it is well-established that these ex ante cost estimates already systematically overstate costs
    - Implicitly, this gives OIRA to review all agency rules now (i.e., to review the cost estimates). Right now OIRA only reviews bigger or more controversial rules.
    - No limit on how long OIRA can review these cost estimates. OIRA can indefinitely delay rules by refusing to certify the cost estimates

- Title III:
    - Section 301: Redundant of Section 610 of the Regulatory Flexibility Act. This will impose duplicative burdens on agencies, delay crucial safeguards, and waste scarce government resources