

Opinion | Process | Mar 29, 2017

The Misguided Regulatory Accountability Act

Martha Roberts



Bill aimed at regulatory reform would reintroduce burdensome administrative requirements.

Many of the features of the [Regulatory Accountability Act](#) render it a disastrous piece of legislation for public health, safety, and the environment. By tying up essential safeguards in enormous amounts of [red tape](#), the legislation would covertly [undermine](#) longstanding protections for child safety, food safety, auto safety, and

other broadly shared values.

But the key problem is not just that the Regulatory Accountability Act would **impose** needlessly convoluted, burdensome requirements on federal agencies: it is that it would impose needlessly convoluted, burdensome requirements that we know have failed in the past.

00001-3-e1488835368971 (1)



The Regulatory

Accountability Act would

resurrect many of the

worst features of the

former, failed **Toxic**

Substances Control Act (TSCA). TSCA was supposed to protect the public from dangerous chemicals, but for many years—before the recent enactment of reforms aimed at curing its substantial defects—it made regulatory decision-making so burdensome, that it effectively prevented regulators from doing their jobs.

The **U.S. Environmental Protection Agency's** (EPA) failed attempt to regulate asbestos under the pre-reform TSCA offers a telling example of how important safeguards are stymied under this decision-making framework. Over 25 years ago, EPA had tried to employ TSCA to protect the public from asbestos. The Agency **spent** 10 years analyzing asbestos' effects on health and considering policy options along with their economic implications. After this exhaustive investigation, **documented** in over 45,000 pages of supporting materials, EPA issued a **final rule** that called for a phased-in ban on the use of asbestos in commercial products.

But EPA's efforts to protect the public were rejected. Asbestos manufacturers sued, **contending** that EPA's meticulous decision-making was still inadequate to meet the onerous standards of TSCA. A court **agreed**, vacating the rule in 1991 on the basis that "EPA failed to muster substantial evidence to support its rule" under TSCA's mandates—despite the Agency's voluminous record justifying a phase-out of asbestos. **Following this ordeal, EPA all but gave up, never again trying to ban a chemical under the old TSCA.**

In the years following the asbestos fiasco, broad agreement began to **emerge** that TSCA was a failure due to its inability to protect Americans and to provide certainty to businesses. In a bid to address these deficiencies, Congress finally **reformed** TSCA last year through legislation that was passed with overwhelming bipartisan support.

The Regulatory Accountability Act would reverse this progress, with implications far beyond TSCA—major aspects of the Regulatory Accountability Act would **resurrect** features of the pre-reform, failed TSCA and apply them to all federal safeguards. That bears repeating: passage of the Regulatory Accountability Act **would** impose requirements similar to those that had doomed the old TSCA and extend those requirements to *all* federal agencies, with detrimental implications for the development of new food safety requirements, veterans' care standards, pollution controls, and other essential protections for public health, safety, and the environment. I discuss two key examples below.

First, the Regulatory Accountability Act would **impose an unworkable, cost-based decision standard, setting up agencies for paralysis by analysis that would obstruct protections for Americans.**

The pre-reform TSCA **demanded that EPA prove it had selected the "least burdensome" regulatory option when promulgating a rule. If EPA had wanted to adopt an option any more burdensome than the "least burdensome" one—for example, banning the sale of asbestos, instead of just labeling asbestos-containing products—TSCA **required** that the Agency perform a full risk analysis and cost-benefit analysis of every less burdensome alternative, and prove each alternative was **insufficient to address the risk.** These requirements **imposed** evidentiary and analytic burdens on EPA that proved impossible to meet, effectively tying the Agency's hands**

with respect to protecting the public from hazardous chemicals.

The newly reformed TSCA **eliminated** all of these problems in the service of regulatory efficiency and certainty. Under the reformed statute, EPA is required to **demonstrate** that it has considered key factors—including costs and risk—and has reached a rational conclusion. But it is not required to prove that its decision meets a specific cost-based decision metric, as it was under the pre-reform TSCA.

Yet the Regulatory Accountability Act would revive the pre-reform TSCA approach, imposing an onerous analytic cost-based standard for major protections. All federal agencies generally **would be required** to prove that their rule met the specific analytic standard laid out in the Act. The Act would also **require** agencies to consider and analyze substantial alternatives or other responses identified by interested persons, without imposing any clear limit on how many alternatives that would entail, and regardless of whether information concerning those alternatives was **reasonably available**. In addition, for major or high-impact rules, agencies would have to conduct formal cost-benefit analysis and other analyses on each such alternative. Any deviation from these nitpicky procedures, meanwhile, could prompt a court to toss out the promulgated regulation, regardless of the threat to the public as result of the regulation's demise.

A second example of how the Regulatory Accountability Act would resurrect failed features of the pre-reform TSCA law would be through **its imposition of a requirement on agencies to hold needless, burdensome public hearings**. The pre-reform TSCA **allowed** any person to request a hearing on any rule. These hearings **allowed** for witnesses, cross-examinations, oral presentations, and other onerous, unnecessary hearing procedures to resolve material issues. This feature of the statute created a powerful opportunity for critics to slow down the rulemaking process, and it duplicated many other aspects of the law that already provided ample opportunity for the public to comment and provide feedback. **Not surprisingly, this requirement was thoroughly rejected** and excised from the new, reformed TSCA.

Nevertheless, the Regulatory Accountability Act would **reinstate** this failed requirement and apply it broadly to the development of all government safeguards. Under the bill, any person would be able to request a hearing on any major or high-

impact rule, except in certain narrow circumstances. EPA would have to hold a hearing if any factual issue was in dispute—which is virtually always the case for someone. With this approach, attorneys would argue over science-based determinations made by agency scientists in needless show trials. Any individual seeking to delay a rulemaking could use this provision to draw out and delay protections for Americans.

The Regulatory Accountability Act may sound innocuous, but it puts our health, safety, and environment at risk. Imagine a world where efforts to update food safety requirements in the face of a pressing health threat were stymied. Or attempts to establish new protections after a disaster like the Deepwater Horizon oil spill were thwarted. Or efforts to protect the public from asbestos were derailed.

This is the world that the Regulatory Accountability Act would create, across all areas of government. This blandly titled bill is deeply flawed and deeply problematic—a sneak attack on essential protections.



Martha Roberts is an attorney in the U.S. Climate Legal and Regulatory Program at the Environmental Defense Fund.

This essay is part of a series, entitled [Assessing the Regulatory Accountability Act](#).

Chart is from Martha Roberts, “Misguided Regulatory Accountability Act Will Increase Red Tape, Obstruct Vital Safeguards for Millions of Americans,” Environmental Defense Fund (Mar. 2017).

Tagged: [Environmental Protection Agency](#), [Environmental Regulation](#), [EPA](#), [Regulation Analysis](#), [Regulatory Reform](#), [Toxic Chemicals](#)

