



Deregulation

Testimony on SB 1 before the Senate Government Oversight & Reform Committee Zach Schiller

Good morning, Chairman Coley, Ranking Member Craig and members of the committee. My name is Zach Schiller and I am research director at Policy Matters Ohio, a nonprofit, nonpartisan organization with the mission of creating a more prosperous, equitable, sustainable and inclusive Ohio. Thank you for the opportunity to testify on Senate Bill 1. Unfortunately, this bill is both impractical and unwarranted. You should reject it.

The Ohio Administrative Code (OAC) reflects the laws that were written by the General Assembly. If you want to reduce the OAC by 30 percent, you could accomplish this by repealing 30 percent of the laws you and previous General Assemblies have approved.

The bill requires that agencies examine existing rules and develop a “base inventory” of rules with regulatory restrictions that require or prohibit an action. “Examples of words suggesting that a rule incorporates a regulatory restriction include ‘shall,’ ‘must,’ ‘require,’ ‘shall not,’ ‘may not,’ and ‘prohibit.’” This stems from an [analysis](#) of the OAC by the Mercatus Center at George Mason University.

In its published account and its testimony before this committee, the center did not indicate whether it made any attempt to determine whether state legislatures vary in the extent to which they delegate rule-making to agencies, as the Ohio General Assembly often does. If the General Assembly chooses to write more or fewer rules into the laws it passes, that will drastically affect how many are written into the OAC. Just counting the number of “shalls” in the administrative code does not take that into account.

The Mercatus study raises as many questions as it answers. It finds, for instance, that there are a total of 38,675 industry-relevant restrictions affecting the top 10 industries. But that still leaves more than 200,000 supposed restrictions. This raises a question: How many of these so-called restrictions don’t affect private business at all? And should they be a part of this 30 percent reduction, which is justified on the basis of how regulations affect business? Interestingly, the five states it shows with the greatest number of restrictions are five of the seven largest states; California, the largest state, is not included, along with 20 others. Would we rank Ohio’s unemployment rate or job gains among just 29 states? Mercatus talks about economic growth; did it bother to check and see if there was a clear correlation between the number of restrictions and Gross State Product?

Applying the logic behind the bill to the Ohio Revised Code reveals some intriguing results. To cite one recent example: Section 5166.37 of the Ohio Revised Code, approved in the 2017 budget bill, states, “The Medicaid director *shall* establish a Medicaid waiver component under which an individual eligible for Medicaid on the basis of being included in the expansion eligibility group *must* satisfy at least one of the following *requirements* to be able to enroll in Medicaid as part of the expansion eligibility group:

- A. Be at least fifty-five years of age;

- B. Be employed;
- C. Be enrolled in school or an occupational training program;
- D. Be participating in an alcohol and drug addiction treatment program;
- E. Have intensive physical health care needs or serious mental illness.”

This is otherwise known as the work requirement waiver now pending with the federal government for Medicaid expansion participants. Does the General Assembly want to abolish this because the language includes the words “shall,” “must” and “requirements”?

The General Assembly regularly considers and approves legislation with these apparently odious words. For example, last March it approved Amended House Bill 215. The bill created the Paulding County Municipal Court on Jan. 1, 2020, established a full-time judgeship in that court, provided for the nomination of the judge by petition only, abolished the Paulding County Court on that date, and provided for the election for the Paulding County Municipal Court of one full-time judge in 2019. Altogether, the amended sections of the law contain 369 uses of the word “shall.”

The General Assembly also regularly tells agencies to write new regulations in the bills it passes. That includes priority legislation of the Senate majority. For example, Senate Bill 6, already approved by the Senate, calls for the director of the Department of Job & Family Services to adopt rules to implement a section of the bill (lines 1126-1128). SB 7, which covers temporary occupational licenses for members of the military and their spouses, says that, “Each department, agency or office that issues a license or certificate to practice a trade or profession shall [there’s that word again!] adopt rules under Chapter 119 of the Revised Code as necessary to implement this section” (lines 130-133). Senate Bill 8, which would authorize tax credits for investment in an opportunity zone, says that the director of development services, in consultation with the tax commissioner, may adopt rules “prescribing the manner by which estimated increased tax collections must be calculated” (lines 272-275).

How many more regulations with the words “shall,” “must,” “prohibit,” “require” or “may not” will result from these bills if they are enacted? The Senate is adding to the base inventory even while it tells agencies to subtract from it.

The OAC language on bottled water includes this: “No person shall manufacture or bottle for sale within the state bottled water unless the person has a license as prescribed in section 913.23 of the Revised Code.”

The administrative code also has the protocol for medical examination of sexual assault victims, which reads as follows:

- A. When conducting a medical examination of a victim of an offense under any provision of sections 2907.02 to 2907.06 of the Revised Code for the purpose of gathering physical evidence for a possible prosecution, a hospital, children’s advocacy center, or other emergency medical facility shall follow the protocol designated in this rule and shall only use a sexual assault evidence collection kit that meets that protocol in order to qualify for payment from the reparations fund established pursuant section 2743.191 of the Revised Code. The protocol shall be as follows:
 1. For victims other than children, the hospital or other emergency medical facility shall follow the protocol adopted by the Ohio Department of Health.
 2. For victims who are children, the hospital children’s advocacy center, or other emergency medical facility shall follow the protocol adopted by the committee on child abuse and neglect of the Ohio chapter of the American Academy of Pediatrics.
- B. When a hospital, children’s advocacy center, or other emergency medical facility provides an HIV post-exposure prophylaxis treatment as part of the examination under this section it shall be administered in accordance with the Centers of Disease Control and Prevention’s “Updated Guidelines for Antiretroviral Postexposure Prophylaxis After Sexual, Injection Drug Use, or Other Nonoccupational Exposure to HIV.”

The OAC section of Deceptive Acts or Trade Practices in Connection with Consumer Transactions begins: “It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to use the word ‘free’ or other words of similar import or meaning, except in conformity with this rule. It is the express intent of this rule to prohibit the practice of advertising or offering goods and services as ‘free’ when in fact the cost of the ‘free’ offer is passed on to the consumer by raising the regular (base) price of the goods or services that must be purchased in connection with the ‘free’ offer. In the absence of such a base price a ‘free’ offer is in reality a single price for the combination of goods or services offered, and the fiction that any portion of the offer is ‘free’ is inherently deceptive.”

Last year, then-Attorney General Mike DeWine [filed a lawsuit against DuPont](#) saying that for decades it had released the toxic chemical C8 from its plant on the Ohio River, “despite knowing the risks it caused to Ohio’s citizens and natural resources.” Besides the state’s water pollution control act and nuisance law, the lawsuit specifically cites Section 3745-15-07 of the OAC, prohibiting air pollution nuisances. This section reads:

- A. The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.
- B. The emission or escape into the open air from any source or sources of odors whatsoever that is subject to regulation under Chapter 3745-17, 3745-18, 3745-21, or 3745-31 of the Administrative Code and is operated in such a manner to emit such amounts of odor as to endanger the health, safety, or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

According to the Mercatus study, chemical manufacturing is the Ohio industry with by far the largest number of what it describes as industry-relevant restrictions. If our regulatory environment is so asphyxiating, how is it that Ohio’s chemical industry is the [sixth largest in the nation?](#)

Does the General Assembly believe it is worthwhile for the state to have any regulations regarding air pollution? Bottled water? Protocols for medical examination of assault victims? Are these among the “regulatory restrictions” that the sponsors have in mind to remove if the General Assembly should pass new legislation that calls for new rule-making, such as SB 7, SB 8 or SB 23?

House Bill 49, the 2017 budget bill, is instructive. In it, the General Assembly granted new rule-making authority to a slew of agencies, including the Department of Veterans Services, the Department of Medicaid, the Department of Mental Health and Addiction Services, the Department of Health and the Ohio Board of Pharmacy, among others. HB 49 instructed the director of veterans services to adopt rules to administer a veteran peer counseling network; told the director of mental health and addiction services to adopt rules to implement the requirements that an individual must satisfy to be eligible for payments under the residential state supplement program; mandated the Board of Nursing to adopt rules establishing standards and procedures to be followed by registered nurses in use of FDA-approved schedule III, IV and V drugs; and required the chancellor of higher education to adopt rules that require education preparation programs to include instruction in opioid and other substance abuse prevention. This represents just a sample of the new regulations the General Assembly called for in the last budget bill. Which of these regulations would you eliminate under the two-for-one rule in SB 1?

Even now, the Joint Committee on Agency Rule Review (JCARR) is allowing rules to go forward with terms that this legislation would deem offensive. For instance, take these rules that have gone through the JCARR review process and were filed between Feb. 4 and Feb. 8. There were minimum requirements by the Board of Pharmacy for wholesalers of dangerous drugs, including 57 “shalls,” five “musts,” 14 “requires” and two “shall nots.” Rules regarding how a pharmacy technician should act and what their responsibilities are include 22 “shalls,” eight “musts,” 12 “requires,” two “shall nots” and two “may nots.” That same week’s JCARR filings

also included rules from the Attorney General for peace officer certification (29 “shalls,” two “musts,” 21 “requires” and four “shall nots”) and training (11 “shalls,” 12 “requires,” two “shall nots”); also background check requirements by the Department of Aging for people working in direct-care positions (five “shalls,” 10 “requires”). If the General Assembly believes these rules are unnecessary, you should repeal those sections of the law. Why should these agencies be required to include these in their identification of “base inventory” when they only just went through a review? There is no differentiation in the bill between rules that have recently undergone review from those that have not. This demonstrates that this legislation is not well thought out.

Several of Ohio’s state-wide elected officials have expressed concerns about SB 1 and what it might mean. Attorney General Yost asked whether the measure as written could force his office to shed consumer protection regulations in order to meet a specific target. The Ohio Chamber of Commerce in its proponent testimony noted that the proposed 30 percent reduction might be difficult to accomplish. The committee should take note: This is an arbitrary reduction that does not get at whether rules are accomplishing a useful purpose. Nor does the bill consider the interplay with federal statutes and rules.

Just last session, the General Assembly expanded the definition of adverse business impact, allowing companies to go to JCARR in certain instances over rules that unexpectedly affect them and increase their expenses. Wouldn’t it make sense to see how this and other changes to JCARR are working instead of adopting still additional changes?

You should also examine the costs of SB 1. In its fiscal note, the Legislative Service Commission said that, “The bill may substantially increase state agency workload to review rules, identify regulatory restrictions, and prepare the required annual progress reports, particularly for those having the largest number of rules.” It went on to say that the bill “creates the possibility of additional payroll costs for some agencies.” That includes the addition of professional legal staff. Is this an appropriate use of state resources when some agencies are struggling to provide basic services, such as answering the phone when jobless Ohioans call about unemployment benefits?

No doubt there is some language that could be excised from the administrative code. But a blanket idea that the words “shall” or “prohibit” are somehow bad words; that requiring businesses and residents alike to follow certain rules is bad for business – these are outlandish notions that have no place in legislation.

The Ohio Administrative Code contains regulations that govern the provision of public services. Some of these regulations ensure that we have clean water to drink, air that is fit to breathe and safe and orderly streets. Others ensure that we have sanitary restaurants and public swimming pools, that hospitals are certified or accredited, and that nursing homes are licensed. Some protect investments of taxpayer funds. Regulations are necessary to a civil society and a stable economy. As this testimony has outlined, they are the product of the General Assembly’s everyday work.

Thank you for the opportunity to testify.