

Deregulation

Testimony on SB 293 before the Senate Transportation, Commerce & Workforce Committee Zach Schiller

Good morning, Chairman LaRose, Ranking Member Schiavoni 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 293. 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. Asking agencies to cut rules by 30 percent does nothing to change the laws that those rules reflect.

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.

Applying this logic to the Ohio Revised Code reveals some intriguing results. To cite one recent example: Section 5166.37 of the Ohio Revised Code, approved in last year’s 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 approves legislation with these apparently odious words. For example, in the current General Assembly, Rep. Riedel, a primary sponsor of the House companion

bill to SB 293, won approval in March of 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 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.”

Earlier this year, 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?

The seven proponent witnesses who testified for this bill collectively provided just one real-life example of how regulations were creating paperwork and raising costs. You should demand much more than that before supporting this legislation.

House Bill 49, last year’s 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 budget bill. Which of these regulations would you eliminate under the two-for-one rule in SB 293?

Even now, the Joint Committee on Agency Rule Review (JCARR) is approving rules with terms that this legislation would deem offensive. For instance, on May 24 it approved a number of rules, also included in the last state budget, covering [crematory operators](#). Included: Six “shalls,” one “must,” one “may not,” and nine “requires,” usually as part of the word, “requirement.” For example, one rule states that an individual seeking an initial crematory operator permit “shall” submit to the Board of Embalmers and Funeral Directors evidence of completion of a board-approved crematory operation certification program, as House Bill 49 provided. If the General

Assembly believes that is unnecessary, you should repeal that section of the law. Why should the board be required to include this in its identification of “base inventory” when the General Assembly approved this requirement just last year, and it was formally adopted as a rule just two weeks ago? This demonstrates that this legislation is not well thought out.

SB 293 also is crudely drawn in that it treats all agencies the same, from the smallest to the largest, from those that may have recently undergone review of key administrative code sections to those that have not. Both the Ohio Society of CPAs and the Chamber of Commerce in their proponent testimony noted that the proposed 30 percent reduction might be difficult to accomplish. The committee should explore that further, as well as the interplay with federal statutes and rules, before reporting this bill.

You should also examine the costs of SB 293. 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 to comply with the bill.” That includes the addition of professional legal staff.

No doubt there is some language that could be excised from the administrative code - although the General Assembly often asks agencies in legislation to handle issues through rule-making. 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 every day work.

Thank you for the opportunity to testify.