Policy Matters Ohio

TESTIMONY
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Deregulation

Testimony on Senate Bill 9 before the Senate Committee on Government Oversight and Reform

Zach Schiller

Chair Roegner, Ranking Member Craig and members of the committee: Thank you for the opportunity to testify. My name is Zach Schiller and I am research director at Policy Matters Ohio, a nonprofit, nonpartisan research institute with the mission of creating a more prosperous, equitable, sustainable and inclusive Ohio. We urge you to reject Senate Bill 9. It is both impractical and unwarranted.

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 and air that is fit to breathe. 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. Moreover, they are the product of the General Assembly's everyday work.

This bill is based on a study by the Mercatus Center at George Mason University that analyzed the number of times that the words shall, must, may not, prohibited and required are used in administrative codes in 44 states across the country. It found more than 274,000 such "regulatory restrictions" in Ohio. Interestingly, a study by the same center in 2018 found just under 247,000 such uses of these words. So, according to Mercatus, Ohio's agencies apparently have increased the number of such words by 27,000 or more than 10% since 2018. Has there been a sudden move to add "shall," "must" or other such odious words? Rather, this suggests how arbitrary this study is — and how the objective of reducing the use of such words by 30%, as Senate Bill 9 would require, is capricious.

If the General Assembly wants to reduce the Ohio Administrative Code by 30%, why doesn't it repeal that percentage of the laws you and previous General Assemblies have approved?

The impracticality of this bill is reinforced by a review of the 2020 report by the Joint Committee on Agency Rule Review (JCARR) to the Senate president and House speaker on the base inventory of such regulatory restrictions required under the last budget bill, House Bill 166. Based on reports it checked from 27 agencies, JCARR tabulated 155,073 restrictions (the report notes that some agency rules were exempt, and it tabulated the use of these terms in 27 agencies). More than half of that total were required under state

law; some 32,297 were required under federal law. Under half of the total restrictions — 77,065 in all — could be changed without a state or federal law change. Yet as described by the Legislative Service Commission, Senate Bill 9 calls for the elimination of 46,523 restrictions, or 60% of those that can be changed without a state or federal law change.

The three agencies with the greatest number of "regulatory restrictions" identified in the 2020 JCARR report were the EPA, the Public Utilities Commission and the health department. The report describes for each agency which single rule has the largest number of such "restrictions." At each of the three agencies, to remove any of the hundreds of "restrictions" in that rule would require a change in state or federal law (the PUCO did find one of the 598 that could be removed without a change in state law).

The sponsors of Senate Bill 22, the bill setting new rules governing public health emergencies, don't seem to think there's anything wrong with the use of these words. As I count it, that bill as passed by the Senate uses the word "shall" 22 times (though to be fair, it also deletes three "shalls"). It seems that what's good for the goose is not good for gander.

The arbitrariness of this word counting becomes clear when one starts examining the issue more closely. For example, Senate Bill 17, a bill currently pending in committee that would restrict access to food aid, Medicaid and unemployment benefits, says the director of job and family services "shall do all of the following," and then lists three bullet points, each with different directives. Presumably, this counts as just one "shall." Another section of the bill similarly says the JFS director "shall prepare a report that includes all of the following information," and then lists six bullet points. One can easily imagine the additional "shalls" that could have been used.

By the same token, we have no indication of whether the Mercatus Center made an 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 this into account.

The bill "requires" (there's that word again!) state agencies to review their base inventories of rules containing so-called regulatory restrictions and determine if they should be amended or rescinded to reduce such restrictions if they do any of a number of things. These include that it has an adverse impact on business or an adverse impact on "any other person or entity." Almost by definition, a restriction could be seen as having an adverse impact on someone. This is a standard so far reaching that it defies common sense.

Moreover, this list also includes this criterion: "Imposes a more severe duty or liability than restrictions in neighboring states in order to accomplish the same goal." Under this kind of standard, if neighboring states choose not to regulate pollution or protect their drinking water, our EPA would be encouraged to do the same. Ohio policymakers should aspire to protect our residents to the greatest extent that is reasonable, not engage other states in a race to the bottom.

The bill also allows for the Common Sense Initiative Office to review any rules containing "regulatory restrictions" in the inventory and notify the agency it must eliminate such a restriction, in which case the agency must eliminate it. It can appeal to JCARR but must eliminate the rule if JCARR agrees. Among the bases upon which the CSIO could make such a decision is that the restriction "is no longer useful or beneficial." This grants power to these bodies that goes far beyond what should be allowed.

The Legislative Service Commission in its analysis of SB 9 notes that, "No agency may adopt a regulatory restriction if that restriction would cause the state to exceed the cap on restrictions. It is not clear how an agency is to proceed if another law requires the agency to adopt a restriction that would result in the state exceeding the cap." This is one more of the many defects in the bill.

In previous testimony on the predecessor to this bill, Senate Bill 1 in the last session, we noted that the administrative code used some of the verboten terms in language on bottled water, on the protocol for medical examination of sexual assault victims, on deceptive acts or trade practices in connection with consumer transactions and in public nuisances created by air pollution. As that suggests, an arbitrary reduction in the number of supposedly offensive words does not get at whether such rules are accomplishing a useful purpose.

In its fiscal note, the LSC notes that, "The bill may increase state agency administrative costs to review rules for potential amendment or rescission and prepare annual progress reports in meeting the bill's target of a 30% reduction in regulatory restrictions over three years. Any such costs may vary widely by agency depending on the scale of work and the staff resources state agencies use to accomplish the bill's required tasks." Is this an appropriate use of state resources when some agencies are struggling to provide basic services, such as timely payment to jobless Ohioans of their unemployment benefits?

The 2019 state budget bill included language that agencies "may not" (another usage of apparently offensive language) adopt a new regulatory restriction unless it simultaneously removed two or more other existing regulatory restrictions. An analysis of the effect of this existing requirement should be conducted before new regulation caps are adopted.

A blanket idea that the words "shall" and "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.

We urge you to reject Senate Bill 9. Thank you for the opportunity to testify.