Insight

Assessing the Stop Corporate Capture Act

DAN BOSCH | JANUARY 11, 2022

EXECUTIVE SUMMARY

- Progressives in Congress introduced the Stop Corporate Capture Act in December 2021.
- While the bill's name implies a goal of eliminating what some view as corporate over-involvement in the rulemaking process, it would go much further as to completely overhaul how rules are made.
- If enacted, agencies would be more likely to regulate to the maximum extent possible, regardless of the economic consequences.

INTRODUCTION

In December 2021, progressives in Congress introduced legislation, the Stop Corporate Capture Act (SCCA), to rewire the regulatory process to advance their priorities. While the name of the legislation implies that its goal is to eliminate what progressives see as corporate over-involvement in the regulatory process, the bill would in fact completely overhaul how rules are made, eliminating parts of the existing regulatory process that may prevent the most aggressive regulatory outcomes possible.

The SCCA includes three broad components: one containing public disclosure requirements, another aimed at disincentivizing corporate involvement in the rulemaking process, and a third focused on maximizing the stringency of regulation. This analysis explains these broad components and explores the implications of each.

INCREASED DISCLOSURE REQUIREMENTS

The first component of the SCCA requires several new public disclosures at various points in the regulatory process. The design of the disclosure provisions suggests that its proponents hope to paint as tainted any information with a connection to a corporate interest. The bill would require disclosures related to providing scientific studies or other research as part of the public commenting phase of the rulemaking process — including whether the researcher received outside funding — which entity provided such funding, whether an entity reviewed or revised information, and the nature of any financial relationship between authors and any persons, businesses, or organizations that may be affected by the rulemaking in question.

While this component could provide transparency to parts of the regulatory process, the wording of the requirement is overly broad. Not only would those submitting scientific information need to disclose information related to the specific study submitted, but as written, they would also need to disclose all funding the researcher received, regardless of its connection to the rulemaking. Similarly, the financial relationship disclosure is so broad as to potentially include companies that may be involved in passively managed investments, like mutual funds.

The purpose of these disclosures is twofold. The first is to establish a direct connection between information provided to agencies and some corporate interest. If such a connection is made, one could argue that information is tainted or biased, regardless of whether it truly is. The second is, even if no such direct connection exists, some could claim that *other* funding sources of the researcher are questionable for one reason or another. It appears the entire purpose of the design is to discredit the source of the information provided to regulatory agencies by impugning the motives of its sources.

The provision would not add meaningfully to the regulatory process. Agencies are already supposed to review any information provided during the public comment period rigorously to ensure it is of good quality. In short, if good-quality information is submitted, it should be considered. If poor-quality information is submitted, it should be discounted. The source of the information should make no difference.

The disclosure requirements in the SCCA are not limited to those submitting information, however. The agency developing the rule must disclose in the proposed or final rule Federal Register notice any information submitted per the requirements above and explain how it was considered. These provisions seem to possess little practical importance — all comments submitted are readily available in the rulemaking docket and agencies typically explain what information they used to justify a regulatory decision — other than to discredit the information.

DISINCENTIVIZING CORPORATE INVOLVEMENT IN THE RULEMAKING PROCESS

The main premise behind the SCCA is that corporate interests have captured the regulatory process and exert undue influence over regulatory decisions. While research is mixed on the extent to which this is accurate, it is true that corporations often have a clear, direct interest in proposed regulations that could affect them. It is also true that they have a right to express their views and present information to regulators and administration officials in the same way any person does. Since the SCCA cannot abrogate those rights, the bill's second component focuses instead on disincentivizing corporate involvement.

The primary means of disincentivizing involvement is through fear of financial repercussions. The SCCA would subject public corporations (but not public interest groups) to substantial fines if they submit "materially false, fictitious, or fraudulent" statements or information as part of the public commenting process. Fines start at $250,000 and double for each subsequent violation. Lest the threat of fines fail to deter public companies from submitting comments on proposed rules, the SCCA also allows anyone to file civil actions alleging that information submitted violates the provision and claim 15-30 percent of any proceeds from successful suits. Since companies are unlikely to submit materially false information because it would obviously reduce the chances of having their policy preferences implemented, it is clear the threat of litigation — even if the submission is factual — is meant to deter corporate submissions in the first place.

MAXIMIZING THE STRINGENCY OF REGULATION

It is in the third component of the SCCA where the bill's true intention becomes clearer. The legislation contains several provisions — many entirely unrelated to corporate involvement in the rulemaking process — designed to ensure that the most stringent regulatory policies are pursued by agencies, regardless of economic consequences.

The SCCA would undermine benefit-cost analysis as a tool for policy evaluation by requiring that agencies prioritize the regulatory option that includes the most total benefits to the public. Currently, agencies seek to maximize *net benefits*, which has the important distinction of taking economic costs into account. To drive home the point that progressives dislike the traditional cost-benefit analysis, the bill also includes a Sense of Congress statement that "agency economic analyses of regulatory actions commonly underestimate the benefits of regulatory actions that protect public health and safety and overestimate the costs of regulatory action to industry."

Further evidence that the SCCA seeks to upend the regulatory process can be seen in the provisions of the bill that would eliminate most negotiated rulemakings. Negotiated rulemakings, while rare, can be an effective means of issuing reasonable rules. The Administrative Conference of the United States, a non-partisan federal advisory body, has found such rulemaking helpful in incorporating public input into regulatory decisions. The process involves forming a committee of interests on all sides of an issue (including private interests such as corporations and non-profits) to develop a consensus regulatory approach. SCCA proponents have arrived at the conclusion that a compromise solution is worse than no solution, and would limit participation on such committees to federal, state, local, and tribal governments.

The SCCA would also curtail the Congressional Review Act (CRA), which allows Congress to nullify rules. The bill would eliminate the CRA provision that prevents an agency from reissuing a substantially similar rule in the future and would do so in a drastic way. Any rule that has been previously repealed via the CRA could be automatically reinstated by its issuing agency within one year of the SCCA's enactment by publishing it anew in the Federal Register. Any future rules nullified by the CRA could be reinstated by going through the normal rulemaking process.

The legislation would go so far as to alter how federal courts can review rules under legal challenge. In an effort to preserve the principle of Chevron deference, in which courts defer to agency interpretation of federal laws when statutes are ambiguous, the SCCA would codify it. Several justices on the current Supreme Court have expressed skepticism of the doctrine, which can make it difficult to get rules overturned even when the agency has unclear authority. The bill would also for the first time define an "unreasonable delay" relating to an agency failing to comply with a statutory requirement to issue a regulation as anything longer than one year, which would require courts to compel agency action — regardless of whether the one year timeframe is reasonable.

The SCCA would also set the deadline for review of significant rules by the White House's Office of Information and Regulatory Affairs (OIRA) at 45 days. That period could be extended once for an additional 45 days. Beyond that deadline, or if OIRA waives review, the agency can publish the rule regardless of whether OIRA has signed off on it. While the OIRA process has some high-profile instances of lengthy reviews, the setting of an arbitrary deadline would only lead to hasty reviews (and suboptimal regulatory outcomes). That said, it is rather unlikely that an official at an executive agency would publish a rule without the backing of the White House.

CONCLUSION

The SCCA would go beyond its title and completely overhaul the existing regulatory process to maximize the stringency of federal regulation without due consideration of economic consequences. While the legislation has yet to move in the House of Representatives — and stands virtually no chance of clearing the Senate — it stands as a marker of how progressives would quickly jettison sound regulatory policy analysis to achieve their desired outcomes.