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Fixing Regulatory Overreach

Why rollback is not the best solution.

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Despite the acrimony among the Republicans who ran for the presidency in 2016, there was actually a fair amount of agreement when it came to their policy proposals. For instance, nearly every candidate put together a major tax reform proposal, and none differed terribly much from the others save for the size of the revenue loss.

The candidates were also in agreement about the need for some sort of regulatory “reform." These plans were usually as vague as the tax plans (although vagueness can be a virtue in campaigns), but they typically called for a comprehensive analysis of current regulations to determine which meet a cost-benefit test, with those that do not pass muster being repealed.

Having worked in the belly of the regulatory beast, I wholeheartedly concur that the government has issued thousands of regulations that would not survive an objective weighing of their costs and benefits. But is it possible to do such a test? Agencies are adept at putting a thumb on the scale in order to achieve their goals, and when that isn't sufficient, they have other ways to avoid the scrutiny of cost-benefit analysis.

For instance, Treasury's recent "emergency" regulations on corporate inversions were given to OMB's Office of Information and Regulatory Affairs, which is tasked with determining whether rules pass a cost-benefit test, for a mere two hours before the White House made its determination. Another trick used by regulatory agencies is to diminish the perceived impact of a regulation to the limits of reason, to ensure that it ends up below the $100 million threshold that triggers an automatic review by OMB.

However, the inchoate promises made by candidates to reform regulatory policy were not only as unrealistic as $10 trillion tax cuts, they also would have done little to reduce compliance costs. The unfortunate reality is that there is no economic gain to be had from reviewing and repealing rules that have been in force for any amount of time.

The problem is that the costs to businesses from these flawed existing regulations have already been sunk: The power plants have installed coal scrubbers or reinforced storage tanks or redone their software or whatever it took to conform to the regulations. In most instances a repeal gains them nothing. Even if the original regulation didn't make sense, repealing that edict usually makes even less sense. In some instances it could disrupt an entire market, and not in a good way.

For instance, if a regulation that required a costly investment to comply with were to be repealed, it's easy to see a scenario in which new entrants could appear, unburdened with the need to make that investment themselves, and drive out the incumbents. In this case nothing would be gained, since the entrants would have close to the same operating costs as the incumbents they drove out, but we would lose whatever benefits resulted from the original regulation, such as lower emissions. While it is a valid point that our government does too much to help entrenched businesses at the expense of businesses yet to be conceived, repealing a costly rule that's already been complied with amounts to sabotage.

In 2011, Cass Sunstein, then administrator of the Office of Information and Regulatory Affairs, announced plans to have federal agencies do a rigorous analysis of rules that could be repealed in a cost-effective way. The analysis ended up with a handful of inconsequential regulations being set aside, the most famous of which was one that required spills from milk trucks to be treated as hazardous waste. It was a welcome change to be sure but represented a minor cost savings for an event that happens infrequently. Sam Batkins, director of regulatory policy for the American Action Forum, estimated that the savings from repealing this regulation added up to less than $146 million a year.

We can and should improve regulatory policy, but there are ways to do so without merely undoing the rules of the previous administration. The most important change would be to remove the agency proposing a regulation from doing the cost-benefit analysis used to determine its worthiness. It's an enormous conflict of interest akin to letting a parent be the judge at a beauty pageant. A separate entity within the executive branch, funded with money clawed back from the agencies, should perform the cost-benefit analysis instead. While it's fair to ponder whether such an office would eventually be subject to regulatory capture itself, it would doubtless be better than the current situation. We should also allow this new entity—and not the agency issuing the regulation—to determine whether a rule should be construed as a "major" one and thus subject to the cost-benefit analysis critique.

But no matter what a new administration might do to reform the issuance of regulations, it's important to recognize that the regulatory battle will never end. Regulators regulate: It's why they joined the agency that employs them, and it's how they get promotions and plaudits from interest groups. Their bias will always be to issue new regulations, and even the most conscientious bureaucrat will have every incentive in the world to push forward on a regulation. We will forever need independent entities to monitor the regulatory bureaucracy, both inside and outside of government.

Students of government and policy can learn a lot from studying the 1986 tax reform. While it wasn't perfect, it created a tax code that removed many of the special-interest deductions, exclusions, and credits that made it maddeningly complicated and forced tax rates to be high in order to collect sufficient revenue. Since passing the 1986 reform Congress has steadily picked apart the code until we have arrived at the state we are in today, where our economy is saddled with a tax code less conducive to economic growth than it was before the 1986 reform.

The regulatory apparatus can never reach such a copacetic state as the tax code's post-1986 honeymoon: By the very nature of our dynamic $18 trillion economy, the government will be constantly adjusting the regulatory framework as new businesses develop, old ones decline, and our citizens' priorities change. We will never be "done" with regulating: As our regulators do their business, the best we can hope for are regulators cognizant of their biases, a new administration willing to remove some of the inherent biases in the regulatory framework, and a Congress that's eternally vigilant about regulatory overreach.

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