

The Washington Times

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Empower the Regulated

By Richard W. Rahn

Published August 23, 2011

It is widely recognized that excessive regulation is unnecessarily killing jobs. The question has been what to do about it. President Obama may inadvertently have helped lead to a solution in his debate last week with an Iowa farmer who was complaining about excessive costly regulation. In his reply to the farmer, Mr. Obama said: “[A] lot of times we are going to be applying common sense. If someone has an idea, if we don’t think it’s a good idea, if we don’t think there is more benefit than cost to it, we are not going to do it.” Nice statement, but it is untrue in all too many cases, whether the president knows it or not.

The president previously has endorsed the concept of cost-benefit analysis in regard to regulation and even has issued an executive order, as other presidents have done, to require executive departments to do cost-benefit analyses on regulations that would have a “major” (often defined as costing more than \$100 million) impact. Officials often just ignore the requirement to do cost-benefit analyses with excuses such as that the regulation is not “major” (which they cannot know without doing the analysis) or that they don’t have the time to do it, etc. etc. The president suggested to the farmer that he talk to the Department of Agriculture about his complaint, but reporters who tried to contact the department about the farmer’s grievance got the same bureaucratic runaround and buck-passing that is characteristic of government - good luck, Mr. farmer.

Now the president is telling us he is trying to do everything possible to create jobs. Members of his administration have acknowledged that regulations that do not meet a cost-benefit test cost jobs - as everyone with a basic understanding of economics realizes. We also know from decades of experience and “public choice” theory that the regulatory agencies are unlikely to clean up their acts because they have vested interests in creating more regulations to administer - the economy be damned. Many of the cost-benefit studies that are done by these regulatory agencies are little more than jokes, with grossly incomplete and incompetent analyses. Cass Sunstein, who claims to be in favor of cost-benefit analysis, is Mr. Obama’s regulatory czar. But action - or inaction - speaks louder than words. Some agencies, such as the Internal Revenue Service and Treasury, often just refuse to do serious cost-benefit analysis, yet their rulings often cost hundreds of billions of dollars and hundreds of thousands of jobs.

Nancy A. Nord, a member of the U.S. Consumer Product Safety Commission (CPSC), has lists of many businesses that have been needlessly destroyed by the failure of her commission to do proper cost-benefit analysis. She has written that “these are real people who have lost real jobs and who are being forced to pay more for products with no real safety benefit.”

There is a solution. First, as a matter of law, Congress should pass a requirement that before any regulation (not just major ones) is promulgated by any government department (including the IRS) or independent agency, the department or agency must have done a competent, complete and independent cost-benefit study. In order to make the law self-enforcing so it is not just ignored, any party or collection of parties who were adversely affected by the regulation would be allowed to bring suit to have it overturned if they could show that the costs of the regulation exceed its benefit (i.e., the preponderance of evidence). If the plaintiffs win, they would be entitled to have both their legal costs and the costs of their cost-benefit study reimbursed by the agency that issued the faulty regulation. Currently, in some limited circumstances, affected parties may bring suit to overturn destructive regulations. The U.S. Court of Appeals for the D.C. Circuit just struck down the Security and Exchange Commission’s “proxy access rule,” with Judge Douglas H. Ginsburg’s devastating critique of the incompetent cost-benefit analysis by the SEC.

Despite these limited successes, the goal is to re-establish balance by making it much easier for those injured by regulations that do not meet a reasonable cost-benefit test to obtain redress. Frivolous suits should not be much of a problem because the plaintiffs would have to go to the considerable expense of funding a competent cost-benefit study and showing before going to court that the government’s study was either nonexistent or flawed. One of the founding fathers of the field of law and economics, Henry G. Manne, dean emeritus of the George Mason University Law School, said he expects that my proposed solution would result in significantly more litigation; even so, he said he thinks it probably is well worth doing. Eventually, the regulatory agencies will realize that excessive regulation is costly to them, and thus they will become more responsible.

Again, the president said he is for cost-benefit analyses for regulations, and he also has said we must create more jobs. Republicans in Congress are searching for their own ways to create jobs, so requiring cost-benefit analyses for regulations should have great popular appeal. If properly drafted and explained, the requirement would be difficult for the president and the Democrats in Congress to oppose. If they are smart, they even could take credit for signing it into law.

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