

Musings on Burdensome Regulation  
January 7, 2012

In the abstract, almost everyone is opposed to “burdensome regulation.” But when it comes to specific regulations, very few regulations are deemed so burdensome that they are eliminated. And perhaps few are. Many individual regulations are not so onerous in themselves. Rather, the cumulative impact of ever more rules creates the impression of smothering regulation and overbearing government intervention. And then there are the “big ones” – the highly controversial regulations that impose significant costs but that also seek to accomplish important policy goals. These regulations may be recognized as burdensome, but the benefits are judged to outweigh the costs by sizable numbers of supporters.

As a consequence, efforts to streamline or whittle down regulation do not make much progress. The truly burdensome regulations usually address big policy issues. The costs are real and these costs are often recognized, even if not acknowledged; but the political process has concluded that the objectives warrant the pain. Those bearing the burden of regulation are unlikely to find much relief until the political sentiment shifts. At the same time, when the multitude of lesser regulations, which impose less pain and achieve lesser goals, are viewed one by one, they do not seem so oppressive that their elimination would make a noticeable difference to the regulated while it would likely anger a committed set of advocates. Thus, the number of regulations and the burden of regulation mount.

In [\*Red Tape Rising: A 2011 Mid-Year Report\*](#), the Heritage Foundation takes issue with the sharp increase in the number and cost of regulation under President Obama’s administration. What I found as striking as the increase was just the sheer number of major federal regulations, defined as those costing \$100 million or more, that have come out every year. And these are just the federal regulations. States and local governments also impose regulations.

Interestingly, it is possible to have rather fundamental “de-regulation” at the same time as the number of regulations continues to rise. The financial services industry is a case in point. During the 1990s, major restrictions on banking activity were relaxed or eliminated. In 1994, Congress over-ruled state laws restricting bank mergers across state lines; and in 1999, Congress removed the last separation between commercial and investment banking. These were major changes and had profound effects on the structure of banking. Additionally, two bills were passed in the 1990s with the specific purpose of reducing the regulatory burden on the banking industry. Yet it is doubtful that the banking industry felt that the burden of regulation had been significantly reduced. Another set of bills passed in response to the savings and loan crisis of the 1980s established new supervisory standards and capital requirements, new reporting requirements for mortgage loans, and new prohibitions on insider trading and other fraudulent activities. In 2001, the USA

Patriot Act imposed new reporting requirements on financial transactions in an effort to prevent the funding of terrorist organizations; and in 2002, in the wake of the Enron and other accounting scandals, the Sarbanes-Oxley Act imposed additional financial reporting and auditing requirements on all public corporations, including banks. Thus, even as the federal government made a major effort to loosen restrictions on banking activities, it faced a series of problems that called forth additional rules and regulations.

This dilemma is unlikely to be solved any time soon. We are continually confronted with challenges that seem to demand a government response and, in many instances, that response is new regulations.

Sometimes the problem is not so much the regulation itself, but the enforcement. Sometimes those responsible for enforcement (the regulators) take a hostile view of the regulated – environmental agencies see the businesses and others who come before them as polluters and revenue departments see taxpayers as potential tax cheats. Admittedly, the opposite – regulatory capture, in which the regulators are more solicitous of those they regulate than the public they are trying to protect – is also a very real phenomenon, and probably a more dangerous one. But in thinking about ways of stimulating economic activity, addressing the antagonistic or unhelpful attitudes of those responsible for enforcing regulations is both a challenge and an opportunity. It is a challenge because of the incentives facing regulators. Oftentimes, regulators are drawn to their professions because they believe strongly in the mission – protecting the environment or ensuring equal opportunity for workers of all races and nationalities. In some cases, there are financial rewards or professional kudos for uncovering mistakes in tax filings or accounting disclosures. And this is all to the good. But as with anything, there can be too much of a good thing.

Even when the regulator is not antagonistic, there is often little reward for being helpful or exercising judgment. In most bureaucracies - and regulatory agencies are often bureaucracies - following normal procedures will not get you in any difficulty, even if it means delays and inconvenience for those who are regulated, while doing something helpful but out of the ordinary is likely to expose you to criticism if anything goes wrong. And if things go well and a desirable outcome is achieved and the regulated entity saves time or money in the process, there is no personal upside for the regulator.

The point is that regulation is a much more complex issue than customarily portrayed, by those on the right and by those on the left. There are three elements: the big controversial issues that shape the direction of the economy; the web of rules that govern daily activities; and the enforcement of both the big policy issues and the daily rules. My personal instinct is that the web of rules and the enforcement contribute disproportionately to perceptions about regulatory burden. As an example, almost everyone agrees that the tax code is overly complex and

burdensome and that it should be simplified, but there is considerable disagreement about what the overall level of taxes should be, especially on higher income groups.

The Commonwealth of Massachusetts is taking steps to improve its regulatory environment. This effort warrants watching; if it has a meaningful impact, it may offer lessons for other states and the federal government. These steps include a systematic review of new regulations, with business input, to assess their effects on small business; identification of existing regulations whose small business impacts could be mitigated; appointment of a senior official as an internal regulatory “ombudsman” to assist the business community on regulatory matters; and training for regulatory staff on how to reduce the impact of regulation on small business. These are described in the report of the Massachusetts Economic Development Planning Council, *[Choosing to Compete in the 21<sup>st</sup> Century, An Economic Development Policy and Strategic Plan for the Commonwealth of Massachusetts](#)*.