Insight

Fight Executive Action With Policy Riders

DOUGLAS HOLTZ-EAKIN | NOVEMBER 30, 2015

President Obama's **announcement** that "I've got a pen, and I've got a phone" is often taken as the beginning of governing by executive action. In fact, during its roughly 2,500 days of existence, the Obama administration has finalized an average of 1.03 new regulations every day, at a cost of $282 million in private-sector compliance burdens and 191,316 paperwork hours per rule. The cumulative financial burden of $703 billion is no small reason why the private sector has struggled to achieve airspeed and altitude during the recovery.

Viewed from another perspective, this is a tax increase of roughly $100 billion annually — more than $800 per household. It is unimaginable that members of Congress on either side of the aisle would have supported this albatross. Now they have a chance to undo the damage, at least in part, by including so-called policy riders in the bill providing government funding for fiscal year 2016.

Policy riders preclude the use of taxpayer money to pursue executive actions, and there are at least three good candidates for consideration.

First is the National Labor Relations Board's attack on franchising and contracting. In the ***Browning-Ferris* case** this August, the NLRB ruled that a company can be a "joint employer" of a worker even if it exercises no direct control over key decisions such as hiring and firing. This came on the heels of an attempt to **designate McDonald's** as a "joint employer" of all McDonald's workers, despite the fact that the overwhelming majority are hired, paid, and managed by local franchises, not by the parent company. The implications of the new rule are quite broad; "joint employers" can be required to negotiate with unions and can be punished for labor-law violations. It has also been **reported** that the NLRB "is considering designating companies that use temp agencies to be 'joint employers' of the agencies' workers."

This is part of a larger **assault** on the franchise business model. Franchises are major employers and have contributed significantly to the recovery, despite the increasing burdens placed on them. There are over 770,000 franchises that employ over 8.5 million workers. The NLRB's attempts to expand the scope of this wrong-headed policy will inflict damage Congress never intended.

Congress's second major opportunity for a policy rider: If you like your financial adviser, you should be able to keep your financial adviser, but the Department of Labor's recently proposed **"fiduciary rule"** threatens this option. The new **regulation** would hold brokers who offer retirement-account advice to a higher "fiduciary" standard of putting their customers' interests first. The goal makes sense, but the actual rule will ultimately hurt the small investors it aims to protect by effectively excluding them from the investment-advice market, either through higher **overall** costs or through higher minimum balances for investment accounts. From a policy perspective, the proposed rule would be a **costly intrusion** into the financial planning of America's families, an especially large burden on small brokerages, and an open invitation to vast amounts of litigation. Politically, it is a misreading of the public's tolerance for more government intrusion into their lives. Congress can avoid the damage to the quality and availability of financial advice by refusing to fund implementation of any such rule.

Finally, there is the Environmental Protection Agency (and Army Corps of Engineers) **rule** defining the so-called "waters of the United States" (WOTUS) that the agency regulates under the Clean Water Act of 1972. The rule follows a series of Supreme Court decisions that require the EPA to develop a scientific basis for deciding what water bodies are within its jurisdiction. (The law itself grants the authority to regulate "navigable waters.")

Unfortunately, one of the most contentious provisions would provide little scientific clarity: EPA wants the power to decide on a case-by-case basis whether to regulate waters that are not directly connected to streams and rivers but have "a significant nexus to a traditional navigable water, interstate water, or the territorial seas."

Put simply, the controversy is about ditches that may be empty most of the time, but fill and run off periodically during the year. Congress should bar funding for any attempt to implement a rule unless it genuinely generates the clarity that the Supreme Court rulings demand.

There are other possible policy riders, but the general lesson is clear: Congress should pursue alternatives to executive action that deliver better policy and reflect bipartisan consensus.

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