Solution

Targeted Regulatory Reform: Centers for Medicare and Medicaid Services

MAY 5, 2015

Despite more than a generation of regulatory reform and attempts to instill a strong cost-benefit framework among cabinet agencies, many regulators routinely take shortcuts that can lead to bad policy. Although laws and executive orders demand rigorous accounting of costs and benefits, agencies often willfully ignore settled regulatory reform principles. Additionally, many independent agencies have no cost-benefit requirements at all.

The examples are perhaps too numerous to lists, but compliance with the Paperwork Reduction Act (PRA) is a good start. The PRA requires every federal agency to provide estimates for the time and money it takes to comply with federal requirements. The White House must approve these estimates before the public is required to comply. Despite its name, the PRA is more of a paperwork tracking act. It is a violation of the PRA to force individuals or business to give the government information without a "control number," which includes information on the time and cost of compliance. It's also a violation to continue collecting private information after that control number has expired. However, every year the White House self-reports hundreds of agency violations of the PRA. In what might not be a surprise, the Department of Health and Human Services (HHS) committed 80 violations in fiscal year 2013. A distant second place was the Department of Defense, with 23 violations.

For regulatory analysis broadly, HHS is no better. According to the "Regulatory Report Card," a project of the Mercatus Center, the average HHS rulemaking receives a report card score of just 36 percent. This is out of 100, so the agency is easily in failing territory. The report card examines the regulatory impact analysis (RIA) of agencies to determine if it identified the problem, considered regulatory alternatives, and properly evaluated costs and benefits.

There was no better illustration of the administration failing the broad goals of regulatory analysis than when it released its botched Medicare Part D proposal last year. Generally, Part D was created to fill the gap in health care financing for seniors: insurance for the costs of outpatient prescription drugs. In 2014, the Centers for Medicare and Medicaid Services (CMS) decided to drastically change the program by interfering with plans' ability to negotiate prices, decreasing access to services, and creating incentives to crowd out employer insurance. The rule would have decreased options for seniors and driven up prices.

Thankfully, for seniors, and the regulatory system as a whole, backlash forced CMS to withdraw the rule. What's telling about the discarded Part D proposal is the incomplete and shoddy analysis. The 157-page proposal covers countless topics, but it doesn't explain the full economic impact of the rule. In total, CMS estimated it would cost Part D sponsors $8.9 million annually from 2015-2019, or $44.5 million in the aggregate. However, the rulemaking did little to explain how CMS interference in prescription drug prices would benefit consumers or force them into plans that are more expensive. Already, plans have enough leverage with their high number of potential beneficiaries to negotiate effectively.

The Part D rule isn't the only example of the failings at CMS. Several years ago, it released a 473-page rulemaking for Medicaid and CHIP, stating that it would "have no meaningful impact on state programs." It repeated this phrase five times throughout the proposal, even though it estimated $521 million in costs and the final rule imposed $1.3 billion in annual costs. Furthermore, both the proposal and the final measure failed to quantify benefits and some costs. For example, some "state implementation costs" were excluded from the overall cost-benefit calculus.

Proposed Solution

Reforming the regulatory state in general and CMS in particular, shouldn't have to be a radical exercise. Initially, tremendous gains could be achieved through forcing the agency to follow the laws already on the books. Elevating the status and the responsibilities of CMS's Chief Actuary could accomplish the goal of transparency and a heightened focus on the costs and benefits of any regulatory action. Because HHS issues countless guidance documents, the Chief Actuary should also be responsible for ensuring guidance documents are included in a comprehensive accounting.

Ideally, the Chief Actuary would have to 1) certify and prepare a detailed analysis of any proposed regulation that conforms to the Office of Management and Budget (OMB) guidance, 2) include the direct and indirect benefits and costs of any rulemaking or guidance, and 3) publish a regulatory impact analysis for guidance, proposed, and final rules.

Of course, agencies should already comply with the requirements listed above, but they don't. HHS has routinely flouted executive orders on regulatory reform and the Paperwork Reduction Act. Agencies generally ignore the law because it rarely contains sanctions for non-compliance. With any CMS-specific reform, this should change. Ideally, reform would include strong judicial checks. Any party affected by a CMS regulation should be able to bring suit to vacate a regulation that doesn't adhere to the reform principles outlined here. There is strong evidence that judicial oversight can inform and correct agency action. Regulatory reform with a judicial oversight component could ensure that CMS publishes sound cost-benefit analyses in a timely manner. AAF called for enhanced judicial review in testimony earlier this year.

For example, legislative language could ensure that an action brought in a federal court could vacate any federal rule that was promulgated in violation of the law. Several other regulatory reform bills have judicial remedies for noncompliance.

Conclusion

Regulatory reform has enjoyed the support of the past three Republican and Democratic administrations. Adherents to comprehensive cost-benefit analysis are even more widespread. There is no reason that all agencies, including CMS, should refrain from publishing complete regulatory impact analyses and providing transparency for agency guidance. The reforms outlined here could correct the mistakes of the past and provide some clarity to the nation's regulatory muddle.