



Safety regulation: The lessons of workplace safety rule management for managing the regulatory burden



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ABSTRACT

There is a strong political consensus in a number of countries that occupational safety and health regulation is stifling industrial innovation and development and is feeding a culture of damaging risk aversion and petty bureaucracy. In a number of countries this has led to proposals to repeal regulations and reduce the regulatory burden. The authors were commissioned to prepare a discussion paper on this issue by the Mercatus Center of George Mason University in Arlington, Virginia, aimed particularly at an American audience. This paper is based on that report (Hale et al., 2011).

The paper is based on previous work of the first two authors, developing a framework of occupational safety rule management at the workplace level (Hale and Borys, 2012a,b). Based on a literature study, this paper analyses the similarities and differences between rules at the workplace level and the development, use and enforcement of regulations at the national level to influence and control organisational behavior. It traces the forces encouraging the growth of regulatory detail and hence the bureaucratic burden of compliance and the options open to reduce that burden without loosening control so much that the level of safety declines. The analysis uses the hierarchy of rules from goals, through process (risk management) rules to detailed action rules as framework for predicting the level of ownership and responsibility felt by the regulated.

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1. Scope of the paper

The main focus of this paper is on occupational safety and health regulations, but some examples from related areas such as environmental regulation are also included. We believe however, that the main concepts developed and discussed here could be applied to safety regulation in other spheres and a few of our examples are drawn from these.

We have centred our discussion on the US regulations, contrasting them with the enabling approaches in the United Kingdom and Australia, and with some passing references to the Netherlands. We are aware that the analysis could have extended to the principles of European Union Framework regulation and to the internal control regulations typical of Scandinavia. However, this had to be ruled out because of the limited duration and resources of the project. The readers are referred to Lindøe et al. (2013) for comparisons of the regulations for offshore safety between USA, Norway and the UK and for references to preceding work by the same authors.

2. Introduction

In many countries there have been complaints of the burden imposed by laws and regulations on industry, particularly where those regulations have been of a detailed and prescriptive nature. The following quotes give a flavor of them:

“The first and most fundamental defect... is simply that there is too much law.”

[Lord Robens, 1972]

“Government regulations impose an enormous burden on large and small businesses in America, discourage productivity, and contribute substantially to our current economic woes.”

[Ronald Reagan, 1981]

“We are seeking more affordable, less intrusive means to achieve the same ends – giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses, and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices”.

[Barack Obama, 2011]

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In 2011 USA businesses were required to comply with 165,000 pages of regulations, covering all areas, not just safety. A goal of presidents at least since Lyndon Johnson and continued under Gerald Ford and Richard Nixon has been to reduce the burden of regulation. This effort was expanded during the Carter administration with the elimination of two major regulatory agencies and the creation of the Commission on Price and Wage Stability, which examined the contribution of regulations to the inflation problem. Out of that Commission the Reagan administration created the Office of Information and Regulatory Affairs (OIRA) to conduct economic analysis of all major regulations created by the executive agencies (but not of independent agencies). Presidents Clinton and Obama have both reaffirmed the government's commitment to reducing the burden of regulation, yet despite broad bipartisan support for ensuring that the benefits of regulation justify their costs, the scale of the regulatory burden has not lessened. Instead the number of pages in the Code of Federal Regulation, and the cost imposed by regulation, has increased under every president (Dudley et al., 2010).

There have been two reports in the UK in the last two years one of whose objectives has been to examine whether regulations could be repealed, reduced in size or simplified (Lord Young, 2010; Löfstedt, 2011). Although their recommendations include proposals for some repeals, these are largely of old, forgotten regulations and have not included major reductions in the burden. The Netherlands has gone further in recent years and has set in motion a major revamping of the law by delegating the writing of rules (called Arbocatalogi or Working Conditions Catalogues) to sector parties (employers federations, trades unions, professional bodies), with the promise that, once these are approved and in place, the detailed government regulations will be largely repealed (Baart and Raaijmakers, 2010; Heijink and Oomens, 2011). However, even this major shift in responsibilities may not tackle the issue of the quantity of regulations.

One company level study in Australia received submissions from companies indicating that 25% of senior managers' time was spent on compliance (Australian Chamber of Commerce and Industry, 2005).

In this paper, based on the report to Mercatus (Hale et al., 2011), we will summarise some of the literature indicating the nature of the burden of safety regulations. It will use the distinction according to the style of rules, and the framework of rule management developed for the workplace level (Hale and Borys, 2012a,b), and adapt those to the regulatory level to arrive at suggestions for improvements. These are often ones already applied in Europe and Australia, but are novel to the USA.

3. Responding to new regulations

When a government agency issues a new or modified regulation, companies must spend time discovering whether it applies to them and, if so, whether there is a gap between their current practices and those now mandated by the regulator. If there is no gap, the initial costs of the regulation are limited to this discovery cost (although there may be longer-term costs if the regulation locks in current production or risk-control methods and prevents them being superseded by more effective ones). If there is a gap, companies must determine what else they must do, or do differently, to comply with the new regulations. Compliance may impose costs associated with adopting new methods of production, retraining employees, or buying new materials and equipment. However, this compliance review also gives companies the opportunity to improve their processes so as to achieve gains in productivity or in quality or pollution control, and these improvements mitigate the overall cost of compliance. These activities consume the time and energy of managers and employees, who must devise and

implement the assessments, changes, and notifications, and they divert human resources from other activities. Compliance costs fall disproportionately on small businesses, which lack the ranks of internal management for translating large and complex rules sets. Moreover, regulations are often written with a view to the complex and formal internal procedures of large companies and are ill-suited to implementation by smaller companies. This may put smaller but more flexible companies at a competitive disadvantage and discourage entry into markets by smaller companies. Large firms can absorb the cost of regulation more easily than small firms: there is a minimum amount of time needed to find, interpret, and apply a regulation no matter how small the business and these costs cannot be spread over so much productive time in a small firm as in a large one. Crain and Crain (2010) arrived at a disproportionate cost per employee of 30–36% over big companies. Small firms, which operate on informal communications, are saddled with bureaucratic systems and reporting requirements; regulations do not allow for less commonly occurring technical variations in regulated processes and so innovations in developing potentially beneficial technical variations are discouraged.

Compliance with detailed, prescriptive regulations may build a reactive compliance culture, which stifles innovation in developing new products, processes, and risk control measures. Regulators often respond more slowly than companies to changing market conditions, locking industry into outdated production methods. Additional costs come from the burden of record keeping and reporting to the regulator about compliance. These costs can reduce competition and increase prices for products and services. When every company is forced to adopt the same strategy in detail, it is harder to see whether another strategy would be more effective. Moreover, as each firm must comply with the same detailed rules, there is no competitive advantage for any firm that bears the cost of discovering and implementing more efficient rules. Saji (2003) mentions that there is often a long delay in certifying new equipment in strictly regulated processes. This discourages companies from adopting innovations that depend on yet uncertified equipment.

Against these costs must be set the benefits of the new regulations in terms of safety, health and environment.

4. Dynamics of regulation

There is a dynamic in regulations in which, if existing regulations are seen to fail, new ones are added to plug the gaps. Rules may also be made more specific and detailed to assist in enforcement (Lord Robens, 1972; Gunningham et al., 1998; Gunningham and Johnstone, 1999; Jentoft and Mikalsen, 2004). As Howard (1994) laments:

“We have too easily succumbed to the siren song of regulation or rather... of comprehensive regulation. We are too easily moved by notions of rationalized completeness.”

Banks (2006) describes this as a culture of “regulate first and ask questions later.” Some scholars attribute this to regulatory risk-averseness, as regulators diligently seek to cover every eventuality and produce redundant rules (Beck, 1992; Lord Young, 2010). Regulatory risk-averseness is partially a consequence of the incentives facing regulators: they are more likely to be blamed for a failure to prevent a new problem than for excessive means to control an old problem. Olson (1982) observes that the number of lobbying associations representing companies and industries tends to increase markedly over time. He finds that industry groups lobby for beneficial rules and then other groups lobby for exceptions to those rules. Over time this leads to an accumulation of rules, which

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