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Right Way on Regulation

THE STATED PURPOSE of the regulatory reform bill that Senate Majority Leader Bob Dole has been promoting is to rationalize the regulatory process by requiring that agencies pay more attention to cost. That is a worthy aim. In the last 20 years or so, there has been an enormous and too often heedless expansion of federal regulatory activity. Both Congress and the executive branch have fallen into the easy habit of basking in the glow of benefits while paying too little attention to the cumulative cost of such regulation, and that should change.

But this bill does something different from its stated aim, something harmful. It goes well beyond requiring that in the future, regulatory decisions be better informed. It's a lawyers' bill whose passage would create the handholds for all kinds of future litigation against not just prospective regulations but major rules already on the books. Far from rationalizing the regulatory system, the lawsuits would have the likely effect of tying it up and cutting it back.

Fortunately, the Senate need not pass this or nothing. It has an alternative, a bill by Sens. John Glenn and John Chafee. The measure was brought up last week and lost by only 48 to 52, with five Republicans joining all but three Democrats in support. It too would require greater use of risk assessments and cost-benefit analyses. The requirement would apply only to major regulations, defined as those for which the estimated cost of compliance was more than \$100 million a year. One hundred to 200 regulations a year fall in that category.

The analyses wouldn't govern the regulations, just accompany them. An agency issuing a regulation whose costs appeared to exceed its benefits would have to explain why. Congress, not the courts, would become the place to which appeals would be taken. Rather than taking immediate effect, major regulations would be sent to the Hill. Congress would have the benefit of the cost-benefit analyses and 45 days to block the regulations under expedited procedures if it chose.

That's the right way to do it. These are all essentially political decisions. How much is the society prepared to spend (and of whose money) to achieve some further level of safety or cleanliness in the air, water, workplace, food or whatever else is the subject of the regulation? Courts aren't equipped to make such judgments, nor can a single cost-benefit rule apply to them all. Congress enacted the laws that gave rise to this regulatory activity. Instead of blaming the regulators who are only its hired hands, it should also take political responsibility for—or else kill—the regulations that are the major fruits of those enactments.

That would protect against regulatory excess without creating a regulatory bind and a feast for the litigators. In other contexts, many of those who support the Dole bill have rightly complained that too many issues end up in court in this society. But the Dole bill itself would compound that problem rather than solve it.