

A key part of Romney's attack on "over-regulation" is his proposed regulatory cap. If an agency wanted to issue a new regulation, a cap would require an agency to repeal a regulation (or package of regulations) with equal cost. To make this work, Romney would need new legislation from Congress, not just an executive order. So long as the Democrats have at least 40 votes in the Senate, such new legislation is unlikely.

Libertarian law professor Jonathan Adler has pointed out some of the problems with a cap ([here](#)):

It's a clear and simple way to control regulatory costs, but perhaps too simple. As already noted, many new regulations are required by existing statutes. In other cases, agencies may be constrained in what they may consider when developing a new rule and offsetting the costs of a new regulation by reducing the costs of another may well be off the table. . . .

Adler adds: "It's one thing to cap those costs that, say, consumer protection rules ultimately impose on consumers, but quite another to limit the costs of a rule that protects one group against the wrongful or risk-enhancing behavior of another." That's one reason why libertarians may not like the cap as much as business does.

Adler is right to question the legality of a cap. The key point is that agencies pass regulations because Congress has enacted a law establishing some public policy and told the agency to implement the policy. A regulatory cap is a barrier to the ability of the agency to follow the legislative command.

There are actually two legal problems with a cap. First, the agency can't repeal regulations on a whim. It has to be able to point to a valid reason why the regulation fails to pass muster. So the agency would not merely need to find a regulation with lower priority; it would have to find a regulation that affirmatively fails to advance the statutory goal. That may be hard to do.

Second, if the agency can't find a legally defective regulation to eliminate, the cap says it can't issue the new regulation. But if someone files a petition to start a rule making, the agency needs a valid reason — meaning a reason that relates to the statute — in order to say no. A presidential order to control regulatory costs won't cut the mustard.

Thus, it is unlikely that Romney would be able to implement a regulatory cap by executive order. And it is also unlikely that he can legislative approval, as he presumably knows. Legally speaking, the regulatory cap is a non-starter.

