COMPETITIVE ENTERPRISE INSTITUTE

WEBmemo

July 9, 2020 **No. 57**

How to Make Sure Reformed #NeverNeeded Regulations Stay That Way

Reform the Rulemaking Process, Not Just the Rules

*By Ryan Young**

Policy makers at all levels of government have waived more than 600 regulations in response to the COVID-19 crisis.[1] Those rules were harming access to medical care and worsening the economic shock. Repealing these types of never-needed regulations is important work, but it is arguably even more important to enact system-level reforms to the rulemaking process that lets those rules through in the first place. Without systemic reform, regulatory sludge will build back up and harm the next emergency response.

This paper suggests two institutional safeguards that would have substantial long-term benefits, as well as immediate benefits for fighting COVID-19. They are an independent Regulatory Reduction Commission and automatic 10-year sunsets for all new regulations.

Though these reforms focus on the federal level, they can also be applied at the state and local levels. While executive orders can do much to implement them, Congress needs to be involved, especially with the Regulatory Reduction Commission. Ideally, all aspects of these reforms would be enacted through congressional legislation. Executive orders can be undone or ignored by each new administration, whereas legislation is, for most practical purposes, permanent. But if Congress fails to act, some reform is better than none.

As with many other regulatory reform proposals, these should apply in full to independent agencies, which comprise roughly three quarters of all rulemaking agencies.

Regulatory Reduction Commission. This idea is modeled on the Base Realignment and Closure (BRAC) commissions from the 1990s, which successfully saved billions of taxpayer dollars after the Cold War ended. Many military bases were either no longer needed or could be substantially downsized. While most members of Congress agreed with the larger goal of closing bases to save resources, no individual member was willing to vote to close the base in his or her district. Congress turned out to be institutionally incapable of taking an action that it needed to take, and knew it. The solution was an institution-level reform—and it worked.

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In this case, the institutional change was to outsource the tough base closure decisions to an independent commission. Its members compiled their recommendations and sent them to Congress in a comprehensive package to be voted up or down, without opportunity for amendments.

The BRAC commission changed members' incentives in a way that allowed them to enact needed reforms that would not have passed otherwise. Members whose districts were affected could vote for the good of the whole nation and shift any local blame to the BRAC commission, away from themselves.

A regulatory version of the BRAC idea has been around since at least the early 1980s, when former Sen. Phil Gramm (R-TX) proposed it in legislation.[2] It has reappeared several times since. Most recently, Rep. Josh Gottheimer's (D-NJ) Regulatory Improvement Act, first introduced in 2017, proposed a BRAC-inspired Regulatory Improvement Commission.[3]

There are many possible ways to structure a BRAC-style Regulatory Reduction Commission. This paper offers one suggestion.[4]

Pruning the Code of Federal Regulations. The *Code of Federal Regulations* (CFR) was 185,984 pages long at year-end 2019.[5] This is a bit much to take on in one go. So, a regulatory and COVID-focused version of BRAC would go through five of the *Code's* 50 titles each year in a set rotation, starting with the titles most relevant to health care and economic recovery.

Each year's package would cover five different Titles. A good first-year reform package would include rules from:

- **Title 13**, Business Credit and Assistance;
- **Title 21**, Food and Drugs;
- **Title 29**, Labor;
- **Title 42**, Public Health; and
- **Title 44**, Emergency Management and Assistance.[6]

The Regulatory Reduction Commission's design must reflect the fact that legislation is passed by the Congress we have, not the Congress we want. Each year's package would be required to be submitted by a given date, such as June 1. To prevent death by neglect, Congress would then be required to hold a prompt up-or-down vote on the package within 30 legislative days or the end of a congressional session, whichever comes first.

No amendments would be allowed to be attached the package to prevent behind-the-scenes vote-trading or weakening of the package's reforms. If amendments were allowed, the package would likely devolve into something similar to the coronavirus stimulus packages, which had many provisions unrelated to the pandemic response added during negotiations.

While the Commission itself can be established via executive order, for constitutional separation of powers reasons, the voting deadline and no-amendment rules would require legislation from Congress in order to have teeth—and legitimacy.

It is important to keep the committee small to reduce bargaining costs and make consensus easier to reach. It would also be bipartisan, so neither party can stack the deck when it is in power. At a maximum, Amazon founder Jeff Bezos's two-pizza rule for meetings should apply—two pizzas should easily feed everyone in the room.[7] A good size is a five-member committee with no more than three appointees coming from the same party. To avoid lining up with election cycles, members' terms should be staggered, with one term expiring each year, similar to the Federal Communications Commission's design.

There should also be a public comment period for each year's repeal package, ending 30 calendar days before the commission's annual deadline to send it to Congress. This would allow the general public, affected entities, and policy experts to contribute their repeal recommendations or defend rules they believe should be kept. In addition to adding public accountability, this would add to the committee's research capacity and expertise without increasing its size, budget, or internal bargaining costs.

The commission would begin a new rotation every 10 years. In the intervening decade, some new rules will almost certainly have become obsolete, which would make it worthwhile to make the Regulatory Reduction Committee permanent.

This is far from the only way to set up an effective Regulatory Reduction Commission. However, any effective institutional design must account for bureaucratic inertia, Congress' tendency to make behind-the-scenes deals, resistance from bootlegger-and-Baptist coalitions of rent-seekers and ideological opponents of regulatory relief, and the difficulty of decision making by consensus.[8]

Automatic Sunsets for New Regulations. Regulators have learned a lot recently about how health care, shipping, food, and business permitting regulations affect people during a crisis. The waiving of more than 600 regulations so far is a healthy response. But all of that activity looks small in the larger context of the 185,984-page *Code of Federal Regulations*, plus its state and local equivalents. While a Regulatory Reduction Commission would do much to address this existing *stock* of regulations, it would not address the *flow* of new regulations, which exceeds 3,000 final rules in most years.[9] That is where automatic sunsets come in.

Just as every gallon of milk has an expiration date, so should regulations. Automatic 10-year sunsets for all new regulations, renewable by Congress, is a reform with the long view in mind. Regulations often become obsolete over time. When obsolete rules remain on the books, they can slow growth and make it more difficult for new innovations to become widely adopted. For example, when regulators wrote rules favoring compact fluorescent light bulbs, they nearly prevented the rise of superior LED lights.

As time passes and more such regulations block innovation and growth, people have fewer resources and less advanced technology to adapt to new crises than they would have otherwise. Economists familiar with the power of compound interest have been making this point for some time.[10] Now that COVID-19 is making the same argument in plainer language, policy makers should finally respond to it.

Quarantining and social distancing have always been difficult, and the 2020 pandemic lockdown has been no exception. But new technology has made this go-around much easier to endure than during past pandemics. People in the 1918 Spanish flu pandemic did not have access to telemedicine, video conferencing, streaming movies, online grocery ordering, social networks, or 24-hour news.[11] Go back another century, and germ theory did not exist. Another century still, and there was no inoculation.

The hope is that, a century from now, there will have been so much improvement that our descendants will wonder how our generation made it through our era's pandemic with such primitive technology—much as we marvel at how our ancestors survived pandemics without even knowing that regular handwashing is a good thing to do.

Regulatory reform is an important part of this generations-long project. One of those reforms, automatic sunsets, is an especially powerful way to prevent a fresh buildup of post-COVID regulatory sludge from gumming up progress and growth.

One of the most difficult aspects of regulatory reform is that nobody can predict which regulations will hinder which technologies, let alone what the next emergency will be, and how to respond to it. Because it is impossible to target only the "right" rules, it is especially important for automatic 10-year sunsets to apply to all rules.

For example, in 2018, the United States got rid of recently adopted net neutrality rules. Critics argued that the rules reduced incentives for Internet service providers to invest in improving their networks. When the rules were repealed in 2018, it was easy to predict that U.S. Internet speeds would increase quickly, but nobody had any idea that this fresh growth would be essential for a pandemic response. The extra bandwidth that the repeal of net neutrality made possible helped millions of people stuck in lockdown to almost seamlessly use Zoom conferences, access remote education, order groceries online, get entertainment from Netflix, and keep up with news about the pandemic and how to stay safe, all without straining network capacity. Europe's more regulated networks had to require throttling and reduced quality for many of its online services.

This was a lucky accident for Americans. Because the net neutrality rules had no sunsets, they would still be on the books were it not for the rare reform effort that succeeded. Nobody knows what other such rules might block a lifesaving breakthrough, say, 20 years from now. But if that rule is on the books now, without a sunset it will probably still be there when it could do the most harm.

Sunsets would hardly mean the end of all regulations. Congress would be able to renew rules that prove worthwhile. But sunsets would provide a regular requirement for agencies and Congress to update rules to reflect changing real-world conditions. Agencies would have an incentive to adapt their regulations to the changing times if they want to keep them away from Congress' sunset axe. Agencies rarely do this necessary work under the current rulemaking process; institutions need to be changed to ensure that they do.

Sunsets would also allow harmful rules to die of natural causes with minimum political pain. Rather than having to anger vested interests with a politically painful vote, Congress could make the country more resilient against future crises by simply doing nothing. All of these institutional changes would be healthy for the regulatory state, for democratic institutions such as the separation of powers, and literally healthy for people during future emergency responses.

Sunsets have several precedents and variations from which to draw. Idaho's entire regulatory code sunsets annually unless the state legislature reauthorizes it. Such a sunset happened in 2019, and the sunsetted code was replaced with something slightly more streamlined. This is a healthy thing to do every now and then, and federal policy makers should consider it.[12]

Not only should individual rules have sunsets, so should many agencies. Federal agencies such as the Export-Import Bank and the U.S. Development Finance Corporation (formerly the Overseas Private Investment Corporation, or OPIC) have long had built-in sunsets.[13] If they are not reauthorized by Congress by a given deadline, the agencies cease to operate.

That also applies at the state level. Texas maintains a Sunset Advisory Commission for its rulemaking agencies, rather than individual rules. The commission's homepage boasts that its process has "abolished 41 agencies, consolidated another 51, and had an estimated positive fiscal impact of $1 billion, returning $19 for every $1 spent on Sunset."[14]

Conclusion. The recovery from the coronavirus health crisis and the deep economic recession it has caused will require more than getting rid of never-needed regulations. It will require reforming the rulemaking process that continually generates those regulations.

An independent Regulatory Reduction Commission would help to reduce the large existing stock of regulations. Automatic sunsets for all new regulations would help to keep the long-term flow of new regulations at a more reasonable level. These two reforms would have short-term benefits against the current crisis. And the right institutional reforms can help Congress and regulatory agencies overcome their aversion to change. Just as importantly, these reforms would yield long-term benefits in helping us to be better prepared against future crises.

Notes

[1] As of June 10, 2020. Americans for Tax Reform keeps a running tally at https://www.atr.org/rules.
[2] "An American Renaissance of Growth, Freedom, and Opportunity," Gramm for President economic plan, 1996. Wayne Crews, Jr. and Ryan Young, "Federal rules cost $10,000 per employee," *Washington Times*, December 18, 2012, https://www.washingtontimes.com/news/2012/dec/18/federal-rules-cost-10000-per-employee/. Clyde Wayne Crews, Jr., "Reining in the Executive Branch Bureaucracy, Part 10: Congress

Should Create an Annual Regulatory Reduction Commission," *OpenMarket*, Competitive Enterprise Institute, March 6, 2014, https://cei.org/blog/reining-executive-branch-bureaucracy-part-10-congress-should-create-annual-regulatory-reduction.

[3] Office of Rep. Josh Gottheimer, "Josh Gottheimer Introduces Bill to Cut Out of Date, Burdensome Regulations," news release, February 8, 2017, https://gottheimer.house.gov/news/documentsingle.aspx?DocumentID=45. The most recent version of the bill is the Regulatory Improvement Act of 2019 (H.R.3269), 116th Congress, June 13, 2019, https://www.congress.gov/bill/116th-congress/house-bill/3269/text.

[4] Ryan Young, "Prepare for the Next Pandemic with a Commission to Kill #NeverNeeded Regulations," *Washington Examiner*, April 1, 2020, https://www.washingtonexaminer.com/opinion/prepare-for-the-next-pandemic-with-a-commission-to-kill-neverneeded-regulations.

[5] Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2020: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, May 2020, Table 2, p. 29, https://cei.org/10kc2020.

[6] The full list of Code of Federal Regulations Titles and all of their contents are searchable at Cornell University's Legal Information Institute, https://www.law.cornell.edu/cfr/text.

[7] Courtney Connley, "Jeff Bezos' 'Two Pizza Rule' Can Help You Hold More Productive Meetings," *CNBC*, April 30, 2018, https://www.cnbc.com/2018/04/30/jeff-bezos-2-pizza-rule-can-help-you-hold-more-productive-meetings.html.

[8] Adam C. Smith and Bruce Yandle, *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics*, (Washington: Cato Institute, 2014).

[9] Crews, *Ten Thousand Commandments 2020*, p. 96.

[10] John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth*, February 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2223315.

[11] A minor historical note: The Spanish flu did not come from Spain. It most likely originated in Haskell, County, Kansas. It then likely "traveled east across the state to a huge army base, and from there to Europe." John M. Barry, *The Great Influenza: The Story of the Deadliest Pandemic in History*, (New York: Penguin, 2004), p. 92.

[12] James Broughel, "Idaho Repeals its Entire Regulatory Code," *The Bridge*, Mercatus Center, May 9, 2019, https://www.mercatus.org/bridge/commentary/idaho-repeals-its-regulatory-code.

[13] Ryan Young, "Ex-Im Bank Reauthorization: Lesson in Institutional Design," *Open Market*, Competitive Enterprise Institute, September 23, 2019, https://cei.org/blog/ex-im-bank-reauthorization-lesson-institutional-design. Ryan Young, "The Case Against the Overseas Private Investment Corporation: OPIC Is Obsolete, Ineffective, and Harms the Poor," *OnPoint* No. 208, Competitive Enterprise Institute, September 24, 2015, https://cei.org/content/case-against-overseas-private-investment-corporation.

[14] Texas Sunset Advisory Commission, https://www.sunset.texas.gov/.