Regulatory Reform

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Regulatory Reform

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The COVID-19 pandemic changed a lot of things. One of those things is regulation. People quickly realized that regulations were making life under lockdown more difficult than it needed to be. Policy makers at all levels of government responded by waiving more than 800 regulations that were hindering the virus response and the economic recovery. These regulations included bans on telemedicine, licensing and permit regulations that made it difficult for workers and businesses to adapt to the new conditions, and rules that made remote education more difficult. As of this writing, the Food and Drug Administration is allowing more reasonable approval times for potential COVID-19 treatments, and fast-tracked approval of recently developed vaccines.

A good policy-making rule of thumb is that if a regulation is not needed during a crisis, then it was probably never needed in the first place. The worry is that those harmful rules will simply return, with reinforcements, once the worst of the crisis passes.

Throughout 2020, the Competitive Enterprise Institute pursued a #NeverNeeded campaign to give policy makers ideas for reining in never-needed regulations that were harming the virus response and the economic recovery. The policy recommendations cover a wide variety of areas, from technology, health care, and energy to the regulatory process itself—just like this document does. But while the virus response and economic recovery will last far beyond 2020, so must the push for needed regulatory reforms. The new Congress has a lot of work to do.

Suspending never-needed rules at all levels of government during the COVID-19 crisis was the most substantial regulatory reform push in America since the Carter and Reagan years. But 800 regulations are not very much when one considers that the *Code of Federal Regulations* contains more than 185,000 pages and features more than 1.1 million individual regulations. This chapter lays out some general principles for sound COVID-relevant regulatory reform, and gives a brief overview of the extent of the federal regulatory state. It then applies those principles to a broad range of system-level regulatory reforms. The rest of this volume contains issue-specific reforms that also follow from these principles.

Principles of Sound Regulatory Reform

- If a rule was not needed during the COVID-19 crisis, it was probably never needed in the first place.
- Getting rid of specific regulations is not enough. Congress must also reform the systems that create those regulations.
- Congress—not just the executive—needs to be involved in reform.
- Congress should require agencies to be more transparent about the regulations they issue and their cost.
- Remember that regulations are made and enforced by the real-world government we have, not the ideal government we want.

Each of these principles deserves attention. During good times, a growing economy can take on more regulatory burdens in the same way that a larger dog can host more fleas. That changes when the dog becomes sick—almost literally, in the case of the COVID-19 crisis. When unemployment spikes into double digits and people fall behind on the rent, there is no case for keeping regulations that prevent people from entering a new line of work or working from home. Moreover, the harms those regulations are causing during COVID-19 should never have come into being. If a regulation does not help during a crisis, it was probably never needed.

The Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Unfortunately, Congress has done little to date to lift never-needed regulations. The White House issued several executive orders encouraging agencies to waive regulations harmful to the virus response and economic recovery, using emergency powers, if necessary. This action is in addition to pre-COVID-19 executive orders requiring agencies to eliminate two regulations for each new one they enact and to improve disclosure of "regulatory dark matter"—guidance documents and other agency issuances that do not go through the rulemaking process yet carry regulatory weight.

Executive orders can be undone by the next administration. Lasting reform requires congressional action. It is important for this Congress to be more assertive than the last one, and to ensure that beneficial COVID-19 reforms stay in place, so the country can remain resilient when the next crisis strikes.

Part of the problem is transparency. Agencies are required to conduct cost–benefit analysis for many of their rules, but do so for fewer than 1 percent of rules. Congress should hold agencies to a higher standard to ensure that they execute legislation that Congress passes clearly and unambiguously.

Finally, federal regulation is not an appropriate solution for all problems. Regulations are made and enforced by the government we have, not the government we want. Many well-intentioned policies fall prey to bureaucratic bungling, regulatory capture (whereby regulated entities wield outsized influence on the regulatory process in an effort to disadvantage competitors), or both. It is important to remember what a real-world government is capable of—and what it cannot do.

Restraint is a virtue in approaching reform. A cardinal rule of politics is not to give yourself powers you would not want your opponent to have. In a democracy such as ours, where power regularly changes hands, this is an important lesson for Congress to keep in mind as it passes legislation to address the problems of the day.

Moreover, a federal response is not always appropriate. America's federal system has multiple levels of government, with different strengths and weaknesses. That flexibility is crucial for allowing public policy to respond to a rapidly unfolding crisis, especially in a country as large and diverse as the United States. Some policy matters are truly nationwide, and deserve a federal response. Other policy areas can be more effectively addressed by state and local governments that are closer to the problem. COVID-19 affected different states in different ways. A uniform federal policy for lockdowns, school closures, and large gatherings would likely have produced unnecessary public backlash and failed to adapt to diverse local needs and to changing circumstances. In any trial-and-error process, errors can be fixed as they are discovered. That is far easier to do at the state and local levels than at the federal level.

Finally, governance does not always require government. Regulation is one tool among many for achieving policy goals. Because of its slow pace, resistance to change, enforcement problems, and proneness to special-interest capture, government regulation should be a last resort rather than a default option. These principles hold in COVID-relevant areas as diverse as competition policy, minimum wages, price gouging, health care treatment decisions, and more, as later chapters in this volume will show.

The Extent of Federal Regulation

Most people who follow politics have a rough idea of how much the government spends, how much it collects in taxes, and the size of its budget deficit. In 2020, those numbers were $6.5 trillion, $3.13 trillion, and $3.3 trillion, respectively. Total federal debt—the cumulative result of decades of chronic deficit spending—also surpassed $26.9 trillion in 2020, exceeding the U.S. gross domestic product. The COVID-19 pandemic made those numbers even larger. But few people, even experts, know how much regulation exists. This lack of knowledge is a major obstacle to reform.

One reason regulatory reform is so difficult is that many people have no idea it is such a big problem. Agencies have an incentive to release as little regulatory information as possible. Few regulations receive proper cost–benefit analysis. Regularly scheduled reports often appear late, or not at all. The Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions—in which all rulemaking agencies list their upcoming planned regulations—appeared four months late. During the Obama administration, multiple editions of this legally required twice-yearly document were never published at all. The Competitive Enterprise Institute's Wayne Crews compiles the annual *Ten Thousand Commandments* report in an effort to fill the gap. A few of his key findings follow.

Key Facts about Federal Regulation

- Based on data that agencies have disclosed, the total cost of federal regulation is somewhere around $1.9 trillion per year, or roughly $14,455 per household.
- Regulatory costs are equal to nearly half of all pre-COVID-19 federal spending. Almost none of these costs appear in the federal budget.

- The *Code of Federal Regulations* is more than 185,000 pages long and contains about 1.1 million regulatory restrictions.
- If the federal regulatory state were its own country, it would have the world's eighth-largest economy, ranked between Italy's and Brazil's.
- Over the past decade, federal agencies have issued an average of 28 regulations for every bill Congress has passed.
- 2019 was the first year with fewer than 3,000 new regulations since record keeping began in the 1970s. It missed the mark by just 36 regulations.

Most individual rules are small. By themselves, they might be harmless enough. But their sheer number means that most families spend more on costs arising from regulatory compliance than they do on food, clothing, utilities, and education. The only common household expense that costs more than federal regulation is housing—which itself is made artificially expensive by government policies, such as zoning rules, financial regulations, and tariffs on construction materials like lumber and steel.

Experts: Clyde Wayne Crews Jr., Ryan Young

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PLAN REGULATORY REFORM FOR THE LONG TERM

Each Congress lasts for two years. Few members of Congress have a time horizon longer than that to pursue effective, long-lasting systemic reforms. The deregulation of the airline and trucking industries that occurred in the 1970s and 1980s was the culmination of years of effort; even then, it required a perfect storm of circumstance, politics, and personnel. A large, ideologically diverse coalition of economists and reformers had spent years pointing out that the existing regulatory model had turned the airline and trucking industries into government-protected cartels. When the public discontent over 1970s economic malaise grew, politicians became interested in reform. Figures as diverse as Sen. Ted Kennedy (D-MA), left-liberal economist Alfred Kahn, and Presidents Carter and Reagan took existing reform ideas and implemented them as practical policy. They succeeded because the ideas were well-known, so when the political winds turned in the right direction, they could act.

However, it is not enough to improve or remove harmful regulations. Congress also needs to reform the process the generates them in the first place, or bad rules will keep returning. It is one thing to treat a symptom, and another to treat the root disease. Institutions and incentives matter. The rulemaking process needs to require agencies to confine their rulemaking to areas where Congress has authorized it. Agencies should strictly follow transparency requirements. Institutional rules need to incentivize agencies to remove obsolete or harmful rules. And Congress needs to be more assertive about defending the separation of powers and checks and balances against an executive branch that has grown too powerful.

Congress should:

- Pursue regulatory reform as part of a long-term process that takes longer than an election cycle.
- Prepare reform legislation and have it ready to pass when the time is right.
- Keep improving and reintroducing reform bills every session of Congress.

A similar story to Carter- and Reagan-era deregulation happened with antitrust regulation. Since the Sherman Act passed in 1890, enforcement policy has gone back and forth between breaking up big companies such as Standard Oil and creating cartels to preserve them, as happened during the New Deal and with AT&T.

This instability has largely resulted from the fact that the Sherman Act, the 1914 Clayton Act, and the Federal Trade Commission Act never defined key terms such as "monopoly," "restraint of trade," and "unfair or deceptive acts and practices." That means that these terms were defined and enforced almost purely at the discretion of judges and regulators. And their discretion changed with the times.

Starting in the 1960s, a growing movement of economists and attorneys devised a better, more stable enforcement standard: the consumer welfare standard. It took two decades of debate, advocacy, and favorable political appointments, but eventually it became standard practice to enforce antitrust penalties only in cases where there was proof of consumer harm. There is currently a bipartisan push to return antitrust policy to a purely discretionary standard (which will be addressed in a later chapter).

For reforms to have staying power, Congress must pass legislation. Many of the reform ideas in this volume are unlikely to pass anytime soon. Members of Congress committed to reform should introduce reform legislation anyway. Windows of opportunity are rare and short. It is important to have legislation ready that can be quickly enacted and—unlike hasty "flash policies" such as stimulus, bailouts, and the PATRIOT Act—that has been carefully thought through, debated, and vetted.

Congress has already passed up two such opportunities for regulatory reform in recent years: in 2017–2018 and again during the 2020 COVID-19 crisis. Republicans held both chambers of Congress for the first two years of the Trump administration, which had signaled interest in regulatory reform early on. It issued executive orders capping regulatory costs and requiring agencies to get rid of two old regulations for each new one they enacted. Reformers had the votes and the president's attention, but they misread the situation. The Trump administration turned out to have a short attention span. Administration officials soon turned to other issues, such as trade, immigration, infighting, and attacking political opponents. They figured they had done enough, and Congress largely agreed.

Republicans then lost the House in 2018, and with it any chance of passing regulatory reform legislation. While the administration would issue further executive orders to improve disclosure of guidance documents and, after COVID-19 hit, to get rid of rules hindering the response to the pandemic, those can be overturned at any time.

One thing congressional reformers did right in 2020 was to introduce several regulatory reform bills despite their having little chance of passing. The following sections discuss these proposed reforms and others:

- Greater transparency for agency guidance documents and other "regulatory dark matter"
- Regular report cards from agencies disclosing important information about the regulations they issue
- An independent commission to assemble repeal packages of obsolete or harmful rules
- Automatic sunsets for new rules
- A requirement for Congress to hold votes on major new regulations
- A regulatory budget similar to the spending budget Congress is supposed to pass each year.

We do not know when the political environment will be favorable for systemic reform, so it is important to have legislation already written. Reintroducing the bills every session will keep the ideas alive. Reformers can come up with ways to continually refine and improve the bills and build public support for enacting them. Congress should think long term and be ready to act quickly.

Experts: Clyde Wayne Crews Jr., Iain Murray, Ryan Young

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REFORM THE RULEMAKING PROCESS

It is not enough to reform this or that individual regulation. Lasting reform must also address the underlying process that generates harmful rules in the first place. Without systemic reform, regulatory sludge—as Harvard law professor Cass Sunstein calls it—will build back up and harm the next emergency response. Although the repeal of net neutrality regulations in 2018 made the country more resilient ahead of time by enabling people to more easily work and take classes at home using teleconferencing apps like Zoom and to stream video on a scale never before seen, other regulations on the books slowed down the health care system at the worst possible time, while making it harder for the newly unemployed to find work. Those regulations need to be permanently repealed before they do more harm during the next crisis.

The rulemaking process as we know it today was established by the Administrative Procedure Act (APA) of 1946. It has been amended several times over the years, but the basic framework remains in place. Before an agency can promulgate a new rule, it has to publish a draft version called a notice of proposed rulemaking, or NPRM. The proposed rule must be published in the *Federal Register*, which is published every workday. This opens up a public comment period, usually either 60 or 90 days in length. During this time, anyone can submit comments to the rulemaking agency, which is required to take the comments into account. Only after this period may the agency issue the final version of the rule, which must also be published in the *Federal Register* and contain a date on which it is to take effect.

The public comment period is an essential transparency and accountability measure. Sometimes, an agency will alter or even withdraw a rule because of comments it receives from the public.

Other institutional safeguards exist. Twice each year, the Office of Information and Regulatory Affairs (OIRA) inside the Office of Management and Budget (OMB) must publish a Unified Agenda of Regulatory and Deregulatory Actions that lists all upcoming planned regulations from each agency. Rules are subdivided into categories, such as long-term and short-term actions. The Trump administration added another category to distinguish deregulatory actions from rules that add new regulations.

OIRA also must publish both a draft and a final version each year of a *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*.

Some rules must also go through cost–benefit analysis, especially those with an estimated economic impact of $100 million or more per year.

Although these safeguards are better than nothing, regulations have grown continuously for decades, regardless of which party is in power. Part of the problem is that safeguards are not strictly enforced. Only about 1 percent of all regulations undergo both a cost and a benefit analysis, and even then, agencies often fudge assumptions and other variables to make their rules appear less costly. As many as one-third of regulations never go through the required notice-and-comment process. Congress and the judiciary also exercise little oversight over executive agencies.

Agencies often take advantage of their lack of supervision to pass regulations that have no authorizing statutes from Congress or that directly contradict statutory language. Courts routinely defer to agency interpretations of rules, essentially leaving large parts of the executive branch without any checks or balances. The result is a federal regulatory state that now costs nearly $15,000 per household per year.

For regulatory reforms to have staying power, Congress needs to get involved to restore a proper separation in the lawmaking process. The last several administrations have taken little interest in enforcing existing transparency measures, such as the Unified Agenda and the *Report to Congress*. Therefore, Congress needs to intervene and ensure that the law is followed and institute additional disclosure requirements.

Current regulatory institutions make it easy to pass new regulations, but difficult to remove old ones. The result is that the *Code of Federal Regulations* now exceeds 185,000 pages and contains more than 1.1 million regulations. This existing stock is supplemented by a flow of more than 3,000 new regulations nearly every year.

Effective regulatory reforms make it easier to reform both the stock of existing regulations and the ongoing flow of new regulations. A reform program that trims the stock but ignores the flow will simply see a return of the same old regulatory sludge over time. Similarly, a reform program that slows the flow of new rules but leaves the existing stock untouched will see a regulatory code that does not shrink, and grows progressively more obsolete. Both shortcomings will leave America less resilient against the next emergency. The rest of this chapter contains institutional reforms that address both stock and flow.

Experts: Clyde Wayne Crews Jr., Iain Murray, Ryan Young

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ACCOUNT FOR AND CURB REGULATORY DARK MATTER

As many as one-third of federal regulations currently enforced have never been through the required notice-and-comment rulemaking process. They include agency guidance documents, memoranda, bulletins, blog posts, press releases, and other "non-rule" documents. Thousands of such documents are issued annually—far more than the number of actual rules. Such "regulatory dark matter" can amount to off-the-books regulation, especially since courts nearly always defer to regulatory agencies' interpretations of rules.

The Administrative Procedure Act—which established the notice-and-comment rulemaking process—has a huge loophole that regulators often exploit. Agencies can avoid notice and comment for "good cause," as determined by the agencies themselves. As a 2016 Congressional Research Service report noted:

> While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute's "good cause" exception permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and bypass its 30-day publication requirement if good cause exists.

That allows agencies a lot of leeway to avoid scrutiny of a wide array of rules. Agencies' declarations face insufficient oversight, yet are binding. Congress has several options for commanding adherence to the APA and affirming the separation of powers.

Over the years, Congress has amended the Administrative Procedure Act in order to subject complex and expensive rules to additional analysis. Those reforms include:

- Paperwork Reduction Act of 1980 (Pub. L. No. 96-511, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501–3521)
- Regulatory Flexibility Act (to address small business impacts, Pub. L. No. 96-354)
- Congressional Review Act, which enables Congress to vote on a resolution of disapproval to reject agency regulations (5 U.S.C. §§ 801–808)

Congress should:

- Pass legislation containing reforms similar to the ones in the Guidance Out of Darkness (GOOD) Act (S. 380, 116th Congress) and Executive Order 13891, "Promoting the Rule of Law through Improved Agency Guidance Documents." These would require agencies to publish their guidance documents in a central location in a searchable format, or they would have no effect.
- Amend the Administrative Procedure Act so its notice-and-comment requirements apply to rules with heightened force.
- Abolish, downsize, reduce the budgets of, and deny appropriations to agencies, subagencies, and programs that pursue regulatory actions not authorized by Congress. Congress has the power of the purse, and should use it.
- Repeal or amend enabling statutes that sustain regulatory programs that have proved harmful or have become obsolete.
- Subject regulatory dark matter, alongside ordinary rules, to more intense review by the Office of Management and Budget. By exposing the costs of guidance, this step can provide a public record for future legislative reforms of guidance-as-regulation. President Reagan's Executive Order 12291 provides a model to follow in that it put the burden of proof on agencies to demonstrate the need for a new rule. Guidance should be held to the same standard.
- Pass legislation to expand the Congressional Review Act's (CRA) 60-day resolution of disapproval process to apply to guidance, as well as formally promulgated rules.
- Introduce bills to repeal guidance as appropriate throughout the congressional session, given that agencies can easily time controversial guidance documents to avoid CRA actions.

In addition, various presidential executive orders govern central review of rules by the OMB to address cost–benefit analysis for some rules. Ronald Reagan's Executive Order 12291 set up central review of agency rules by OMB. President Clinton's E.O. 12866, however, restored "primacy" to agencies, thereby weakening the process. President Obama issued several orders to ostensibly streamline regulation; however, his underlying "pen and phone" approach to policy making eclipsed any regulatory curtailment.

Moreover, the APA's "good-cause"-weakened requirement to publish notice of proposed rulemaking and allow public comment does not even apply to agency guidance, memoranda, and other "regulatory dark matter."

> Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organiza-

> tion, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. (Pub. L. No. 79-404, §553)

With respect to "significant guidance," some executive (not independent) agencies comply with a 2007 OMB memo on "Good Guidance Principles"—in effect, guidance for guidance. "Significant" guidance includes those agency issuances with an estimated annual economic effect of $100 million or more, similar to the definition for significant and major rules. With conspicuous exceptions—such as the Departments of Energy, Housing and Urban Development, and Health and Human Services—some agencies continue to invoke the 2007 OMB memo and follow its directive of maintaining Web pages devoted to their "significant guidance." Unfortunately, the directive is a suggestion rather than a command. It allows, for example, for the Food and Drug Administration (FDA) to report no "significant guidance," even though it has issued hundreds of thousands of pieces of acknowledged final guidance documents since the 1970s.

Experts: Clyde Wayne Crews Jr., Ryan Young

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IMPROVE DISCLOSURE BY REQUIRING AGENCIES TO PUBLISH REGULATORY REPORT CARDS

Agencies are required to disclose to the public information about their regulatory requirements, costs, benefits, budgets, and other important items. But that information is scattered so widely that it is difficult to piece together an accurate picture of what agencies are up to, and how burdensome their rules are. Agencies seem content with this arrangement, and do not appear eager to improve transparency on their own. Congress should step in by requiring all rulemaking agencies to publish annual report cards. These report cards should appear in one centralized location, in an easily searchable format, and with historical data on how agencies have performed over time.

Easily accessible regulatory report cards would go a long way toward increasing transparency. Transparency is especially important, particularly now, when a crisis has forced policy makers to evaluate which regulations are helpful to the COVID-19 response and which are not. Current institutional structures do not give them, or the public, the information they need to properly address the crisis.

Since the early 1980s, regulatory oversight has been governed primarily by the semiformal central review of economic, environmental, and health and safety regulations by the OMB's Office of Information and Regulatory Affairs. The process is insufficient, as OMB review captures a fraction of the regulatory enterprise; fewer than 1 percent of rules have "audited" cost–benefit analysis. By requiring a periodic publication summarizing available but scattered data, Congress could make complex regulatory data more user-friendly and encourage public accountability.

Whatever its format, a federal regulatory transparency report card should include the following:

- Tallies of economically significant, major, and non-major rules by department, agency, and commission
- Tallies of significant and other guidance documents and memoranda by department, agency, and commission
- Numbers and percentages of rules and guidance documents affecting small business
- Depictions of how agencies' regulations accumulate as a business grows

Congress should:

- Require agencies to present data regarding regulation and guidance to Congress and the public in a format comparable to the federal budget's Historical Tables.
- Require streamlined, one-location online disclosure of economically significant guidance from both independent and executive agencies, augmenting what a few agencies already voluntarily publish on the basis of the 2007 OMB memorandum to agencies.
- Require centralized disclosure of the thousands of guidance documents issued annually that do not rise to agencies' reckoning of "significant." Currently, disclosure of those documents is enforced only by an executive order that could be repealed at any time.

- Numbers and percentages of regulations that contain numerical cost estimates
- Tallies of existing cost estimates, including subtotals by agency and grand total
- Rules for which weighing costs and benefits is statutorily prohibited.
- Numbers and percentages lacking cost estimates, with reasons for the absence of cost estimates other than weighing costs and benefits being statutorily prohibited
- Aggregate cost estimates of regulation: grand total, paperwork, economic (possibly divided by sector, such as social, health and safety, environmental)
- *Federal Register* analysis, including numbers of pages and proposed and breakdowns of final rules by agency
- Number of major rules reported by the Government Accountability Office in its database of reports on regulations
- Rankings of the most active executive and independent rulemaking agencies
- Identification of agency actions that are deregulatory
- Rules and guidance purported to affect only internal agency operations
- Number of rules new to the Unified Agenda
- Number of rules that are carryovers from previous years
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch options to address them
- Percentages of rules reviewed by the OMB and action taken

Regulations fall into two broad classes: (a) those that are economically significant—costing more than $100 million annually—and (b) those that are not. However, many rules that technically fly below the $100 million "significant" threshold can still be highly significant in the real-world sense of the term. Congress could require agencies to break cost categories into tiers more descriptive of their real-world costs. Table 1.2 presents one possible itemization.

Table 1.2 Proposed Breakdown of Economically Significant Rules

Category 1	> $100 million < $500 million
Category 2	> $500 million < $1 billion
Category 3	> $1 billion < $5 billion
Category 4	> $5 billion < $10 billion
Category 5	> $10 billion

Such additional disclosure is also needed for regulatory guidance documents, memoranda, and other regulatory dark matter that have been neglected in the regulatory oversight process.

Experts: Clyde Wayne Crews Jr., Ryan Young

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ESTABLISH A REGULATORY REDUCTION COMMISSION TO REPEAL OUTDATED AND OBSOLETE RULES

The concept for a regulatory reduction commission is modeled on the Base Realignment and Closure (BRAC) commissions of the 1990s, which successfully saved billions of taxpayer dollars after the end of the Cold War. Many military bases either were no longer needed or could be substantially downsized. Although 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 action, and knew it. The solution was an institution-level reform—and it worked.

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 amendment.

Congress should:

- Establish an independent commission to go through the *Code of Federal Regulations* on a 10-year cycle and vote on its annual recommendations of outdated or harmful regulations to repeal.

The BRAC Commission changed members' incentives in a way that allowed them to enact needed reforms that would have been politically impossible 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 then-Sen. Phil Gramm (R-TX) proposed it in legislation. It has reappeared several times since. More recently, Rep. Josh Gottheimer's (D-N.J.) Regulatory Improvement Act (H.R. 3269, 116th Congress) proposes the creation of a BRAC-inspired regulatory improvement commission that would take a one-time pass through selected titles in the *Code of Federal Regulations* (CFR). In 2020, Rep. Virginia Foxx (R-NC) introduced the Pandemic Preparedness, Response and Rapid Recovery Act (H.R. 8038), which would establish a BRAC-style commission aimed at rules that harm the COVID-19 response and economic recovery.

A regulatory BRAC commission could be designed in various ways. The design proposed here is just one practical option.

The *Code of Federal Regulations* (CFR), at more than 185,000 pages, 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 CFR'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 the following:

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

Keeping in mind the importance of institutional design that was stressed earlier in this chapter, 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 to 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 to them during negotiations.

While the commission itself can be established by executive order, for reasons of constitutional separation of powers, 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. It also should 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. 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.

Each year's repeal package should have a public comment period , ending 30 calendar days before the commission's annual deadline for sending it to Congress. This period would allow the general public, affected entities, and policy experts to contribute their repeal recommendations or defend rules they believe should be kept. It would increase public accountability and contribute to the commission'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 Commission permanent.

Experts: Clyde Wayne Crews Jr., Ryan Young

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IMPOSE AUTOMATIC SUNSETS FOR ALL 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 800 regulations in the wake of COVID-19 is a healthy response. But all of that activity looks small in the larger context of the 185,000-page *Code of Federal Regulations*, plus its state and local equivalents.

Congress should:

- Impose automatic 10-year sunsets on all new federal regulations.

Just as every gallon of milk has an expiration date, so should regulations. Automatic 10-year sunsets for all new regulations, reviewable by Congress, are a reform with the long view in mind. If Congress were to decide to keep an existing regulation in place, it would need to delay the sunset to a later date. This delay might allow some rules to stay on the books much longer than first intended; however, it would place the burden of proof on Congress to affirmatively renew the rule. Rules would no longer survive, zombie-like, by inertia.

Regulations often become obsolete over time. When obsolete rules remain on the books, they can slow economic 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. 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 in past pandemics. During the 1918 Spanish flu pandemic, people did not have access to telemedicine, videoconferencing, video streaming, online grocery ordering, social networks, or 24-hour news. 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, so much improvement will have occurred 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 increased investment in bandwidth that the repeal of net neutrality made possible helped millions of people in lockdown to, almost seamlessly, communicate via Zoom teleconferences, access remote education, order groceries online, access 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 were required to throttle—deliberately slow the speed for some content in order to conserve bandwidth—and thereby reduce quality for many online services.

That repeal was a lucky accident for Americans. The net neutrality rules had no sunsets, so 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 life-saving 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. As noted, 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 Congress to keep them alive. Agencies rarely do this 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 help the country become more resilient against future crises by simply doing nothing. All of these institutional changes would be healthy for the regulatory state, healthy for democratic institutions like the separation of powers, and literally healthy for people during future emergency responses.

Experts: Clyde Wayne Crews Jr., Ryan Young

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REQUIRE CONGRESS TO VOTE ON SIGNIFICANT NEW REGULATIONS

Congress is supposed to hold all legislative powers. Yet for every bill Congress passes, agencies issue nearly 30 regulations. This ratio—which we call the Unconstitutionality Index—has remained stable for the past decade under presidents from both parties. Agencies have taken advantage of this lax oversight to issue regulations that Congress never authorized by statute, on issues ranging from cap-and-trade regulations for carbon dioxide emissions to health insurance policy. Undoing these rules requires expensive and lengthy litigation, which does not always succeed. Over time, this makes it easier for agencies to expand their activity into areas for which they have not received statutory authority—and to pay less attention to their assigned tasks. Such tempting distractions left agencies like the Centers for Disease Control flat-footed when COVID-19 hit.

At the very least, Congress should hold votes on new regulations that qualify as "economically significant," defined as having at least $100 million of annual economic impact. Those are only a small fraction of the 3,000 or so rules agencies issued each year. During the Obama administration, there were usually 40 to 50 such rules, and about one-third that many during the Trump administration. This additional check and balance on executive power is a minor burden on the congressional calendar.

The Regulations from the Executive in Need of Scrutiny (REINS) Act (H.R. 3974, S. 92, 116th Congress) would implement this needed accountability measure. It has been introduced for several Congresses running, and has passed the House several times.

Congress should:

- Pass the Regulations from the Executive in Need of Scrutiny Act, which would require Congress to vote on major rules with annual costs of $100 million or more before they become effective.
- Expand the REINS Act to cover any controversial rule, whether tied to a cost estimate or not.
- Expand the REINS Act to cover guidance documents and other agency decrees.

Experts: Clyde Wayne Crews Jr., Ryan Young

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PUBLISH A FEDERAL REGULATORY BUDGET

Federal spending, taxes, and the deficit receive plenty of attention. But it is equally important to monitor and reduce non-tax government expenditures. A periodically published regulatory budget could help incentivize other reforms like cost analysis and sunsets. It would also allow Congress to allocate regulatory cost authority among agencies and better distinguish between categories like economic, health and safety, and environmental regulations.

During a crisis, when government has limited resources and agencies need to have their priorities straight, a regulatory budget is a useful tool to ensure that agencies always focus on their core missions.

Congress should:

- Require agencies to present annual regulatory cost projections to Congress as part of the appropriations process. This would enable Congress to better decide the level of regulatory burden it is willing to impose on a given industry or region.
- Require a "one in, one out" procedure for new rules.

The concept of regulatory budget is both bipartisan and not new. For example, then-Sen. Lloyd Bentsen (D-TX) proposed an "annual regulatory budget" in 1979. Recent legislative offerings include Sen. Marco Rubio's (R-FL) National Regulatory Budget Act (S. 2153, 113th Congress) and Sen. Mike Lee's (R-UT) Article I Regulatory Budget Act (S. 2982, 114th Congress). President Trump's 2018 executive order requiring agencies to have zero net new regulatory costs serves as a kind of informal regulatory budget. However, as with all executive orders, it can be easily repealed.

Like the regulatory reduction commission, the "one in, two out" procedure, or something similar, holds bipartisan appeal. For example, Sen. Mark Warner (D-VA) has recommended offsetting every new rule by eliminating an existing one. Such a "one in, one out" system amounts to a status quo regulatory "budget," or a freeze at current levels.

A comprehensive regulatory cost budget should include individual tallies from agencies, paralleling the fiscal budget. Congress should specify the total cost budget for which it is willing to be held accountable and divide it among agencies. Budgeting would force agencies to "compete" to ensure that their rules save more lives per dollar or correct some alleged market imperfection better than those of other agencies. That should improve decision making and adherence to congressional intent.

A comprehensive budget poses political risks, so limited versions should be implemented first. Agencies should concentrate on assessing costs, much as the fiscal budget focuses on costs, not just benefits. Benefits are what Congress must supervise in the first place via its lawmaking and budgetary authority. Although compliance cost calculations are difficult to determine, they would be easier to manage than separate cost and benefit calculations for every single rule—which is not being done anyway. Agencies regulating recklessly could lose the squandered budgetary allocation to a rival agency, or even face elimination.

Pitfalls of regulatory budgeting include (a) the risk of creating perverse incentives to expand the size of government due to the elevation of utilitarianism over individual rights in the pursuit of "social" benefits; (b) the reality that apart from raw compliance, cost calculations are subjective and involve mere estimations; and (c) the temptation to generate an illusory "net benefit" budget. The latter would mean no end to regulation, as it would give agencies fodder to argue that cutting their regulatory budgets costs lives.

Regulatory transparency; a regulatory reduction commission; rule sunsetting; one-in, one-out approaches; and congressional approval of rules would all lay the needed foundation for more comprehensive versions of a regulatory cost budget. Budgeting can only really work atop a solid foundation of regulatory control and accountability. In particular, an accountable Congress that answers for uncalculated regulatory costs is a prerequisite for a properly functioning regulatory budget.

Experts: Clyde Wayne Crews Jr., Ryan Young

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ABOLISH COUNTERPRODUCTIVE ANTITRUST LAWS

> Deregulators appear to be of two minds about antitrust. They denounce the actual practice of its enforcement. Yet, almost without exception, they endorse it in principle.
>
> —Fred L. Smith, 1982

The founder of the Competitive Enterprise Institute wrote those words almost 40 years ago, and they remain true today. The recent push to expand antitrust law has mainly focused on so-called Big Tech companies. With renewed vigor, regulators and antitrust advocates are considering how to apply existing antitrust law to cover companies' use of customer data, privacy practices, content moderation, and even general social inequality. The stark contrast between this mostly academic and political agenda, on the one hand, and consumers' overwhelmingly positive real-world experience with those same companies during the COVID-19 lockdown, on the other hand, makes this a good time to initiate a frank debate about the merits of antitrust regulations.

In the United States, the stated aim of antitrust law is to preserve competition in the marketplace to the benefit of consumers. In reality, antitrust law prioritizes competitors over consumers. Today's body of antitrust laws is the culmination of over 100 years of unclear objectives, contradictory interpretations, and controversial court decisions. At its most basic, antitrust regulation restricts certain business arrangements and decisions in the name of preserving competition.

The earliest impulses toward federal antitrust legislation grew out of dissatisfaction with the railroads of the late 19th century, which were government-granted monopolies. When the problematic results of that arrangement—including state-sponsored cronyism—began to surface, so did political alliances to call for corrective federal action. To that end, rate discrimination was outlawed with the passage of the Interstate Commerce Act in 1887. By 1888, both major political parties' platforms included pro-antitrust planks.

Congress passed the Sherman Act in 1890. Yet the intent of the legislators who passed the law has been the subject of debate ever since. Was their goal to promote consumer welfare, outlaw certain business practices, prevent cartels, or block mergers? Much of this confusion arises from the wide-ranging nature and vague language of the statute.

For instance, Section I of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade or commerce. Section II outlaws monopolization, conspiracies, and attempts to monopolize. The Act also has criminal consequences for violations and obligations for federal officers to institute equity proceedings on behalf of the public good. Yet the statute does not define any of these broad terms. Instead, it leaves it up to judges and regulators to define them however they want—which they have done, often without rule or reason.

A series of court cases with contradictory reasoning followed: *United States v. Trans-Missouri Freight Association*, *Standard Oil Company of New Jersey v. United States*, and, much later, *United States v. Alcoa*. The Democratic Congress of 1914 made a two-pronged attempt to strengthen antitrust policy. The House created the Federal Trade Commission, while the Senate took the lead in passing the Clayton Act that same year. The Act attempted to provide clarity to the courts by expressly naming prohibited practices and forbade tying and exclusive dealing in situations where those practices could significantly reduce competition. Tying is the practice of selling a product under the condition that the buyer purchase an additional product. Exclusive dealing occurs when a seller agrees to sell all or a substantial amount of its products to a buyer, or, the reverse, a buyer agrees to purchase all or a substantial amount of product from a seller.

The next century saw continued ambiguity and action in antitrust law. Cases included numerous suits against IBM, the breakup of the national Bell telephone system into so-called Baby Bells by consent decree, and the case against Microsoft in the late 1990s.

Since the true aim of antitrust law has been unclear from the start, it is difficult to claim that the policy has been a success. The real cost of antitrust is the innovation it prevents, and it is hard to quantify the extent and specifics of its harmful, unintended consequences. But undeniably, the looming threat of antitrust action has hindered business decisions by entrepreneurs that might have proved beneficial for consumers and wealth accumulation.

Antitrust laws have also cost taxpayers plenty in public enforcement. Antitrust laws introduced a public choice problem in that regulators may exercise their powers to promote their own preferred policies. This dynamic leads to intense lobbying by regulated entities for relief from antitrust regulation and for the imposition of barriers to entry that limit competition from new entrants into the market.

Congress should:

- Repeal the Sherman Act, as amended.
- Repeal the Clayton Act of 1914.
- Repeal the Federal Trade Commission Act of 1914, as amended, including the Celler-Kefauver Act of 1950 and the Hart-Scott-Rodino Act of 1976.

Agencies and courts should:

- Decline to bring new cases.
- Failing that, require proof of consumer harm before bringing a case.

Creative destruction in an open marketplace protects consumer benefit much better than clumsy antitrust law. Economist Joseph Schumpeter aptly identified it as the positive force that drives innovation and raises standards of living for consumers. It was this process of creative destruction in the marketplace, not antitrust law, that allowed innovative competitors to displace long-established incumbent players—such as Kodak, Blockbuster, Myspace, local taxi monopolies, and many more—with alternative offerings that consumers preferred.

The Kodak example is especially illustrative. The company—which has struggled since the rise of digital photography—secured a $765 million federal loan to convert itself into a pharmaceutical company to aid with the COVID-19 response. Company officials bought up tens of thousands of stock shares before making the announcement public, likely in the hope of benefiting from an artificially boosted share price. The loan was quickly put on hold after a wave of bad publicity, and company executives were sued by both investors and the Securities and Exchange Commission.

Markets move faster and have better information than regulators. They are far more effective at fighting poverty and injustices. Markets constantly work to erode competitive advantage. It takes government to maintain cartels and monopolies. No depth of expert knowledge can rival the price signals and incentives of the marketplace. Markets are also more reliably objective than the whim of regulators or politicians. Federal Trade Commission regulators and Department of Justice lawyers are only human and therefore vulnerable to biases and opinions, as well as to regulatory capture.

Capitalism has lifted more people out of poverty than any other socioeconomic system ever attempted. The World Bank defines absolute poverty as an income of less than $1.90 per day. Before COVID-19 hit, an average of 137,000 people rose out of absolute poverty every day—for the past 30 years. A few years ago, the share of global population living in absolute poverty fell below 10 percent for the first time in history. The importance of this world-historical process is on par with the Agricultural Revolution or the invention of fire. Antitrust regulation slows this engine of growth, which could be moving even faster. If progressives and populist conservatives succeed in ramping up enforcement, it will be more difficult for people to access new and existing technologies that could help them recover. The tech companies that regulators have in their sights are mostly headquartered in the United States, but their impact is global.

The Competitive Enterprise Institute advocates abolishing antitrust law, removing all remaining government monopolies, and preventing the creation of new ones. Regulatory barriers that prevent the creative destruction of the marketplace from enabling a more productive allocation of resources should be removed. For example, eliminating the financial regulations that make launching an initial public offering of stock prohibitively expensive would spur more creative destruction in the marketplace, and thus more innovation and wealth creation.

On the flip side of the coin, new regulation of today's Big Tech firms would do more to entrench their dominance of the marketplace than to restrain them. If today's FAANG companies—Facebook, Amazon, Apple, Netflix, and Google—have to operate curtailed by antitrust rules that act as barriers to entry to new competitors, innovation will slow and consumers will suffer. Let the lawyers stamp out fraud and let the market do its job.

Experts: Clyde Wayne Crews Jr., Iain Murray, Ryan Young,
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