

IMPROVING LEGISLATIVE OVERSIGHT AND ACHIEVING BETTER REGULATION IN PENNSYLVANIA

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Pennsylvania House Committee on State Government

Hearing on State Government Regulations: Potential Solutions to Improving Oversight and Relieving Regulatory Burdens

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Chairman Metcalfe and members of the committee:

Thank you for inviting me to speak about regulatory reform and oversight in Pennsylvania. My name is James Broughel, and I am a research fellow for the State and Local Policy Project at the Mercatus Center at George Mason University.

My testimony today will address ways in which legislative oversight of regulation can be strengthened in Pennsylvania. Specifically, I will demonstrate how a cap on state regulation levels can achieve the following objectives:

1. Empower the Pennsylvania General Assembly with more control over regulation, whilst preserving the role that agency expertise plays in the crafting of regulatory policy.
2. Induce a culture change at regulatory agencies aimed at achieving a reduction in unnecessary “red tape” in Pennsylvania that will lead to greater overall benefits and fewer costs to state residents from justified regulations.

A cap should not be controversial or partisan. The policy has been applied successfully in other countries, like Canada and the United Kingdom, and the goal of a cap is to achieve better regulation and less red tape, as opposed to blanket deregulation.

IMPROVING LEGISLATIVE OVERSIGHT OVER REGULATION

The Pennsylvania General Assembly has recently devoted considerable attention toward strengthening oversight of state regulatory agencies. For example, several recent regulatory reform bills have focused on requiring legislative consent through a vote in the Pennsylvania House and Senate before regulations with significant economic impacts can be enacted.¹ The aim of such legislation is to empower the legislature, which over the years has delegated considerable lawmaking powers to administrative agencies.

¹ Some examples from 2017 are HB1237 and HB911.

While this goal is laudable, there are several reasons to be skeptical that these kinds of procedural changes will improve legislative oversight of agencies. In addition to any potential legal or constitutional hurdles such legislation may face,² having the legislature vote on new regulations may impose an obligation on the legislature that legislators do not want—or worse—are not capable of effectively managing, given their other responsibilities. Legislators delegate lawmaking powers to regulatory agencies in part because those agencies possess expertise that lawmakers lack. Without more information, such as independent analysis of the likely impacts of regulation, it is not clear whether legislators will make better decisions than regulators about the appropriateness of new regulations.

By contrast, a cap on regulation levels will empower the legislature while preserving the role expertise plays at regulatory agencies. A cap looks a lot like something legislators already know well—the budget process. The legislature sets the initial level of the cap, for example by limiting the number of regulations, requirements, or restrictions that agencies can enact. Then in subsequent periods, the legislature has the ability to revisit the level of the cap, which can be allowed to rise, remain constant, or fall over time. Caps can even be set individually for different agencies. In this way, a cap on regulation can be thought of as embodying a kind of regulatory budget. A budget brings rationality to rulemaking; it simply reflects the sensible notion that the costs regulators can impose on society should not be unlimited.

A regulatory cap can also induce a culture change at agencies because it alters regulators’ incentives. Typically, regulators have strong incentives to write new rules; they are promoted or given pay raises for new rules, for example. They may also have the incentive to analyze the potential impacts of new rules due to procedures put in place to avoid ill-informed rulemaking. By contrast, regulators typically have very little incentive to analyze the consequences of old rules. In Pennsylvania, reviews of existing regulations are conducted on an ad hoc basis;³ reviews have not been institutionalized into the regulatory process.

A cap on regulation levels forces more careful consideration of both new and existing regulations. New rules will have to be deemed as being as important as old rules before they can be enacted. When a new regulation is determined to be important enough to put in place, this triggers the reconsideration of old regulations in order to identify rules for modification or repeal. Old rules that are unnecessary—in that they have little or no basis in the public interest—might be called “red tape.” These regulations should be eliminated. Some regulations will have a basis in the public interest, but it will be rare that these rules are achieving the maximum benefit for society relative to cost. Tailoring justified rules to both reduce costs *and* increase benefits is a primary goal of a regulatory cap. Finding this combination of less red tape and greater overall net benefits is what it means to achieve better regulation.

STRIVING FOR BETTER REGULATION SHOULD NOT BE A PARTISAN ISSUE

A regulatory cap should not be a partisan issue. Similar policies have been introduced elsewhere in the world and have avoided partisan rancor. For example, in 2015, Canada became the first country to pass a law requiring that the administrative burdens of each new regulation be offset by amending or repealing at least one existing rule.⁴ The law passed the Canadian parliament overwhelmingly by a margin of 245 yes votes to just one no vote.⁵

² For example, see *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775 (1987).

³ For example, after a rule has been in effect at least three years, the Independent Regulatory Review Committee, as well as members of the public or the General Assembly, can request a rule review. See Pennsylvania Statutes, Title 71 P.S. State Government § 745.8a.8a.

⁴ Red Tape Reduction Act of 2015.

⁵ See the Red Tape Reduction Act of 2015, which passed by the Canadian parliament by a margin of 245–1. Red Tape Reduction Act, Bill C-21, November 17, 2014, <https://openparliament.ca/votes/41-2/273/>.

A similar policy was instituted in the United Kingdom. In 2005, the UK began a Better Regulation initiative, and the country set a 25 percent target for reducing regulatory burdens.⁶ This eventually evolved into a “one-in, one-out” policy that was enacted in 2011,⁷ which became “one-in, two-out” in 2013 and is now a “one-in, three-out” policy.⁸ Under each policy, the costs of new rules have been offset by eliminating equivalent or greater burdens from old rules. The Better Regulation initiative in the UK has remained through the tenures of prime ministers from both the Labour and the Conservative parties in the UK, suggesting it has broad, bipartisan support.

A key reason these reforms have not been controversial is undoubtedly that they have focused on eliminating red tape as opposed to blanket deregulation that also eliminates justified regulations. Justified regulations are improved upon, and sometimes even strengthened, in the process of reviewing old regulations.

GETTING STARTED

The first step toward imposing a regulatory cap is to determine what the appropriate measure of regulation should be in Pennsylvania.⁹ Without a measure, a cap cannot be enforced. Once a measure is settled on, it makes sense to take an inventory of how much regulation exists in Pennsylvania. This will establish a baseline, or initial starting level, of regulation. From here, the legislature can decide if this baseline level should rise, fall, or stay the same over time.

The legislature can also set a target for reducing the level of regulation from this baseline level. A cap should be accompanied by a reduction target when there is evidence that a considerable amount of the regulation on the states’ books is red tape. For example, the fact that Arizona’s administrative code has fewer than half as many restrictions as Pennsylvania’s suggests many restrictions in the *Pennsylvania Code* could be eliminated without jeopardizing health, safety, or the environment.

There should also be an oversight body to help institutionalize the regulatory cap, which is important to bring about a culture change at agencies. In Pennsylvania, the most logical place to house oversight responsibilities is the Independent Regulatory Review Commission (IRRC). The IRRC already reviews proposed and final regulations, and it plays an advisory role with respect to reviews of existing regulations. This commission could be given the task of ensuring that new regulatory burdens are offset by eliminating meaningful old ones and that no gaming of the cap is taking place at the regulatory agencies. The IRRC could also ensure that target reduction goals and deadlines are met, if applicable.

The Mercatus Center has tools available that can help Pennsylvania in these areas. A Mercatus Center project called State RegData uses “regulatory restrictions” as a measure of regulation.¹⁰ Restrictions are instances of the words “shall,” “must,” “may not,” “prohibited,” and “required” that occur in a state’s administrative code. I recommend this measure for being simple and objective.

⁶ Jitinder Kohli and W. Bruce Chew, “How to Implement President Trump’s ‘One in, Two Out’ Regulation Initiative” (Deloitte Center for Government Insights, Deloitte), 4.

⁷ Department for Business and Innovation Skills, “The Ninth Statement of New Regulation: Better Regulation Executive,” December 2014, 2.

⁸ UK Department for Business, Innovation & Skills et al., “Government Going Further to Cut Red Tape by £10 Billion,” March 3, 2016, <https://www.gov.uk/government/news/government-going-further-to-cut-red-tape-by-10-billion>.

⁹ James Broughel, “A Step-by-Step Guide to Using Mercatus Tools to Reduce State Regulation Levels” (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, April 2017).

¹⁰ State RegData is part of a broader project called QuantGov, which seeks to quantify legal text. See Patrick A. McLaughlin and Oliver Sherouse, “QuantGov—A Policy Analytics Platform,” QuantGov, October 31, 2016.

Additionally, an inventory of restrictions in the *Pennsylvania Code* has already been captured as part of Mercatus’s State RegData project. The *Pennsylvania Code* contains 153,661 regulatory restrictions,¹¹ and this count can be broken down by title and by chapter within the code. This information is publicly available on a Mercatus-run website, QuantGov,¹² and it can be used as an inventory system by both the IRRC and by regulators to identify those areas of the state administrative code with the most restrictions.

CONCLUSION

A regulatory cap empowers the legislature in a way akin to the budget process, while leaving the fine-tuning of policymaking to the agencies with the relevant expertise. At the same time, a cap can induce a culture change at agencies by creating stronger incentives to review old regulations. A more institutionalized review process should help to reduce unnecessary red tape in Pennsylvania, and just as importantly, to improve and modernize justified regulations. Achieving more benefits and lower costs for state residents is what better regulation is all about. This should not be a partisan issue—it’s just good governance.

ATTACHMENT

James Broughel, “Spring Cleaning for Regulations,” *InsideSources*, May 24, 2017.

¹¹ James Broughel, Oliver Sherouse, and Daniel Francis, “A Snapshot of Pennsylvania Regulation in 2017” (Policy Brief, Mercatus Center at George Mason University, Arlington, VA, April 2017).

¹² “State Administrative Codes—Pennsylvania,” QuantGov, <http://www.quantgov.org/data/>.



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Spring Cleaning for Regulations

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24, 2017 by James Broughel

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In testimony before the Senate Committee on Banking, Housing, & Urban Affairs last week, Treasury Secretary Steven Mnuchin observed, “the engine of American prosperity has slowed,” in part due to “imprudent regulations crafted in the midst of crisis.” With “historic reforms to both taxes and regulation,” Mnuchin believes GDP growth of 3 percent or more is attainable. The details of this historic agenda are not yet clear, but critical to any reform should be cleaning out the regulatory cobwebs that have been accumulating for seven decades.

A look to our neighbor in the north provides a glimpse of the power of some simple spring cleaning. Since 2001, the Canadian province of British Columbia has cut its regulatory requirements by nearly 50 percent. In terms of real GDP per capita growth, the province went from the worst performing major economy in Canada in the 1980s and '90s to the best in the years since reform was enacted. Alongside this turnaround, British Columbia has maintained a position as one of the healthiest places in Canada, and by some measures, the world.

Contrast this with the United States, where the pendulum of regulatory accumulation swings in just one direction, and economic growth is bitterly disappointing.

A core reason for our troubles may be the near relentless rise of federal regulation. Regardless of which political party controls the White House or Congress, the level of federal regulation has been growing for years. In 1950, the U.S. Code of Federal Regulations (CFR) was under 10,000 pages long. By 1975, it had grown to over 70,000 pages. By 1990—after the “Reagan Revolution” supposedly rolled back big government—it stood at over 125,000 pages. Today the CFR is nearly 180,000 pages long and includes over one million restrictions (words like “shall,” “must” and “prohibited”). The state governments have hundreds of thousands of additional restrictions on their books, too.

At some point, the accumulation of rules is not just costly—it’s absurd. Regulators become like hoarders who refuse to throw away any possessions. They add thousands of new rules to the pile each year, but rarely, if ever, do they take a break to seriously clean up what’s accumulated.

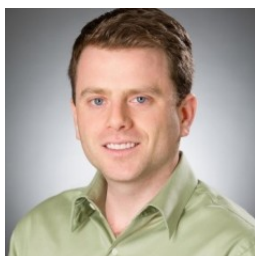
With home décor, a minimalist approach can be the best. For example, some people cap the number of pieces of clothing they allow themselves to own, so every item becomes essential. With each new purchase, items from the past are reviewed to assess which ones are truly needed. This way, the closet never overflows.

British Columbia achieved its regulatory reductions in part by capping the amount of regulation that could be in place at any given time. The Trump administration is now moving in this direction too, with a requirement that at least two rules be identified for repeal for each new one proposed.

A cap on regulations works like a cap on possessions. With every new rule, we reassess the old ones: Which are vital? Which have outlived their usefulness or become passé? Which ones can be modernized with a little tailoring?

The regulatory closet will always need some essential items to protect citizens and maintain a fair marketplace. But at some point, as we add more and more rules without ever cleaning out the old ones, even necessary rules just add to the mess and create confusion, becoming less effective than they should be.

The longer we put off the unpleasant task of addressing old rules, the more work awaits us when we finally get around to cleaning. A permanent cap on rulemaking could make all the difference. This spring, regulators in D.C. and elsewhere should start to appreciate the power of feng shui.



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