

## CUTTING RED TAPE IN NEBRASKA

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Nebraska Government, Military and Veterans Affairs Committee

October 25, 2019

Chairman Brewer and members of the committee:

Good morning. Thank you for granting me the opportunity to speak today. My name is James Broughel, and I am a senior research fellow at the Mercatus Center at George Mason University in Arlington, Virginia, and an adjunct professor at the Antonin Scalia Law School at George Mason University. My research focuses on state regulatory institutions, economic growth, and the economic analysis of regulations.

I will be touching on three topics today:

1. Regulation is necessary in some cases. It can be justified to protect health, safety, and the environment. The accumulation of regulation, however, has a real cost, which needs to be kept in mind.
2. How much regulation is there? The Mercatus Center is involved in an effort to quantify regulation across the 50 states using modern technology to provide long sought-for answers.
3. Finally, among the most innovative efforts to reform regulatory procedures in the states right now are three reforms specifically that I will emphasize: red tape reduction efforts, a regulatory reset (which involves repealing the entire regulatory code and replacing it with a simpler and more streamlined version), and economic analysis requirements.

### THE COSTS OF REGULATORY ACCUMULATION

The accumulated body of regulations in a state has an effect on the economy that is greater than the sum of the effects of each individual regulation.<sup>1</sup> The effect of regulation on the economy can be thought of as akin to dropping pebbles in a stream.<sup>2</sup> The first pebble is insignificant, a thousand pebbles may slow the flow, but a hundred thousand pebbles could dam the stream even when that last pebble was, by itself, also insignificant.

The empirical connection between regulation and economic growth has been documented many times in the peer-reviewed academic literature:

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<sup>1</sup> James Broughel, *Regulation and Economic Growth: Applying Economic Theory to Public Policy* (Arlington, VA: Mercatus Center at George Mason University, 2017).

<sup>2</sup> Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically Viable Approach to US Regulatory Reform" (Washington, DC: Progressive Policy Institute, 2013).

- A 2013 study in the *Journal of Economic Growth* estimates that federal regulation slowed the growth of the US economy by 2 percentage points per year on average from 1949 to 2005.<sup>3</sup> This estimate suggests that, had regulation remained at its 1949 level, 2011 GDP would have been about \$39 trillion larger, or 3.5 times larger, than it actually was.<sup>4</sup>
- A study published by the Mercatus Center estimates that economic growth has been slowed by 0.8 percentage points per year on average by federal regulations implemented since 1980.<sup>5</sup> That number suggests that had the federal government imposed a cap on regulation levels in 1980, then by 2012 the economy would have been \$4 trillion larger, which amounts to \$13,000 per person in the United States.
- Researchers at the World Bank estimate that the economies of countries with the least burdensome business regulations grow 2.3 percentage points faster annually than countries with the most burdensome regulations.<sup>6</sup>
- The authors of one study, published in the *Quarterly Journal of Economics*, a top-ranked economics journal, say the following about gains (or lack thereof) from more stringent regulation: “We do not find that stricter regulation of entry is associated with higher quality products, better pollution records or health outcomes, or keener competition. But stricter regulation of entry is associated with sharply higher levels of corruption, and a greater relative size of the unofficial economy.”<sup>7</sup>

A few lost percentage points in annual growth may not sound like a lot, but consider this: Nebraska’s real GDP grew at an annual rate of 3.4 percent in the first quarter of 2019.<sup>8</sup> This was an impressive rate, but some states, such as West Virginia, were growing as fast as 5.2 percent,<sup>9</sup> highlighting how much faster growth is indeed possible. Indeed, in 2018, Nebraska real GDP grew at a much slower rate, of just 1.5 percent, while the national growth rate over 2017–2018 was 2.9 percent.<sup>10</sup> If the past decade is a good indicator, it will take about 40 years for the state’s economy to double in size, growing at an annual rate of 1.8 percent.<sup>11</sup>

By contrast, if Nebraska’s economy were to grow 3 percent per year consistently, it would take just 24 years for its real GDP to double. Growth rates of 3 percentage points or more per year are plausible and are being achieved in some states right now, as the most recent data for Nebraska make clear. States with slower growth will see incomes and wages for state residents that are much lower than they could otherwise be. Reversing this trend would bring increased employment opportunities for Nebraskans and improve living conditions for state residents now and in the future.

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<sup>3</sup> John W. Dawson and John J. Seater, “Federal Regulation and Aggregate Economic Growth,” *Journal of Economic Growth* 18, no. 2 (2013): 137–77.

<sup>4</sup> Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, “Regulatory Accumulation and Its Costs: An Overview” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, 2018).

<sup>5</sup> Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, “The Cumulative Cost of Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).

<sup>6</sup> Simeon Djankov, Caralee McLiesh, and Rita Maria Ramalho, “Regulation and Growth,” *Economics Letters* 92, no. 3 (2006): 395–401.

<sup>7</sup> Simeon Djankov et al., “The Regulation of Entry,” *Quarterly Journal of Economics* 117, no. 1 (2002): 1–37.

<sup>8</sup> Bureau of Economic Analysis, Contributions to Percent Change in Real GDP (dataset), accessed October 15, 2019, <https://apps.bea.gov/iTable/iTable.cfm?reqid=99&step=1#reqid=99&step=1>.

<sup>9</sup> Bureau of Economic Analysis, Contributions to Percent Change in Real GDP.

<sup>10</sup> Bureau of Economic Analysis, “BEARFACTS” (Nebraska), September 24, 2019, <https://apps.bea.gov/regional/bearfacts/statebf.cfm>.

<sup>11</sup> Nebraska real GDP grew at a compound annual rate of 1.8 percent from 2008 to 2018. Bureau of Economic Analysis, BEARFACTS (Nebraska).

### INTRODUCING STATE REGDATA

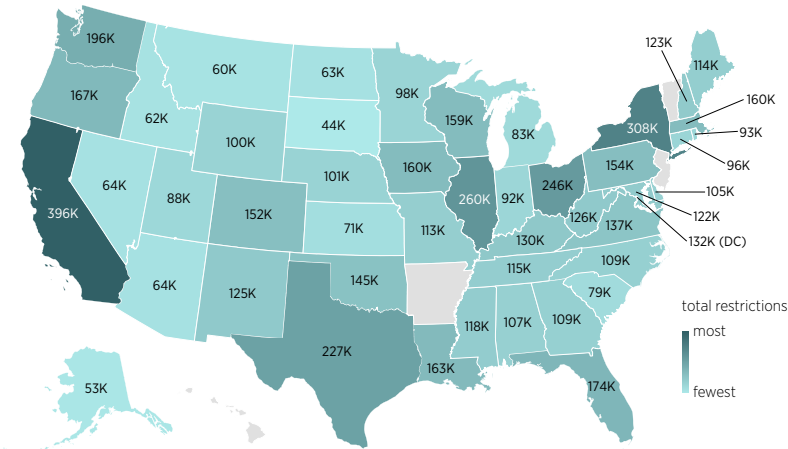
Generally speaking, state regulatory codes are too large for any single individual to read from start to finish. For example, the online version of the Nebraska Administrative Code (NAC) contained 7.5 million words in 2017.<sup>12</sup> It would take an ordinary person about 418 hours—or 10 weeks—to read the entire NAC, assuming the person reads regulations 40 hours per week as a full-time job.<sup>13</sup>

At the Mercatus Center, my colleagues and I have launched State RegData, a first-of-its-kind effort to quantify regulation across the 50 states.<sup>14</sup> State RegData uses text analysis technology to scan through bodies of legal text—in this case state administrative codes. Modern technology is allowing us to overcome barriers traditionally associated with parsing millions of words of regulatory text.

As part of our project, we pull key information from state codes, including word counts and counts of regulatory restrictions, which are instances of the terms *shall*, *must*, *may not*, *prohibited*, and *required*. These restrictions can signify legal constraints and obligations of various kinds.<sup>15</sup> Using machine-learning algorithms, we are also able to estimate which industries are most targeted by state regulation and assess which types of regulation are most prevalent.

Nebraska had 100,627 regulatory restrictions in its administrative code as of mid-2017.<sup>16</sup> To put that in context, the average state has roughly 131,000 restrictions, putting Nebraska somewhat in the middle of the pack. Nebraska has roughly 56,000 more restrictions in its regulatory code than South Dakota, the least regulated state by our measure. California, the most regulated state by our measure, has nearly four times as many regulatory restrictions as Nebraska (see figure 1).

FIGURE 1. STATE-LEVEL REGULATORY RESTRICTIONS



Note: State RegData includes data on 46 states and the District of Columbia that were gathered and analyzed between June 2015 and August 2019. Uncolored states are those for which the number of regulatory restrictions has not been calculated. Source: Patrick A. McLaughlin, Oliver Sherouse, Daniel Francis, Jonathan Nelson, Thurston Powers, Walter Stover, and James Broughel, State RegData (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, accessed September 9, 2019, <https://quantgov.org/state-regdata/>; Bing Maps (data), © GeoNames, HERE, MSFT.

<sup>12</sup> James Broughel and Daniel Francis, “A Snapshot of Nebraska Regulation in 2017” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, July 2017).  
<sup>13</sup> This assumes the person reads 300 words per minute for 40 hours per week.  
<sup>14</sup> Patrick A. McLaughlin et al., State RegData (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, accessed October 16, 2019, at <https://quantgov.org/state-regdata/>.  
<sup>15</sup> Restrictions can also occur in legal text for other purposes, such as for definitional purposes. At times, restrictions may relate to government employees, rather than the private sector.  
<sup>16</sup> Broughel and Francis, “A Snapshot of Nebraska Regulation in 2017.”

In addition to being useful in academic research into the causes and consequences of regulation, we believe State RegData has a practical policy use as well. For example, in recent years a number of states have instituted “red tape” cutting reforms and used measures based on Mercatus data tools to track their progress. These have been primarily governor-led efforts to review the stock of rules in their states to identify outdated or unnecessary regulatory clutter. For example, Idaho Governor Brad Little issued an executive order kicking off a red-tape-cutting effort in early 2019.<sup>17</sup> His administration already claims to have cut more than 19,000 regulatory restrictions, with more to come.<sup>18</sup> Ohio is an example of a state that passed regulatory reform legislation in 2019; the legislation references metrics similar to the RegData restriction count metric.<sup>19</sup>

### THREE REFORMS WORTH CONSIDERING

A number of states have been engaged in innovative regulatory reform efforts in the past several years. These states can serve as a model for Nebraska reform. However, even states leading the charge in this area could go further. In that sense, Nebraska is well-positioned to become a leader in regulatory reform and a model for other states. Moving toward that end, Nebraska policymakers should consider the following reforms.

#### RED TAPE REDUCTION

In recent years, several states have been experimenting with the creation of a regulatory budget, which places caps on the overall amount of regulation agencies can issue. Most observers acknowledge that it would not be sensible to allow regulatory agencies unlimited license to spend taxpayer dollars without constraint—that’s why fiscal budgets exist. But the same lessons have not carried over to regulations, and most agencies are given free rein to “spend” seemingly unlimited amounts of public money through regulation.

A regulatory budget helps address this issue, and two states in particular are making significant progress in this area. In 2018, Virginia passed a law called the Regulatory Reduction Pilot Program.<sup>20</sup> The law first requires two state agencies, the Department of Criminal Justice Services and the Department of Professional and Occupational Regulation, to produce a count of all regulatory requirements under their purview. The agencies published their initial counts in 2018 and had roughly 6,000 requirements between them.<sup>21</sup> After that, the agencies were given three years to reduce their requirements by 25 percent, or roughly 1,200 requirements. This month, the two agencies announced that they have each cut 10 percent of existing requirements, meaning they are ahead of schedule.<sup>22</sup> In 2020, all state agencies subject to the state Administrative Process Act will have to produce a count of

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<sup>17</sup> Executive Department, State of Idaho, Exec. Order No. 2019-02 (January 21, 2019).

<sup>18</sup> Cynthia Sewell (@CynthiaSewell), “Idaho @GovernorLittle announces more regulatory cuts on the horizon in Idaho. Goal: 55%-60% may be cut by end of year. #IDpol #IDleg,” Twitter, July 19, 2019, <https://twitter.com/CynthiaSewell/status/1152270706714894336>.

<sup>19</sup> H.B. 166, 133rd Gen. Assemb. (Ohio 2019), title 1, § 121.95(B): “a state agency shall review its existing rules to identify rules having one or more regulatory restrictions that require or prohibit an action and prepare a base inventory of the regulatory restrictions in its existing rules. Rules that include the words ‘shall,’ ‘must,’ ‘require,’ ‘shall not,’ ‘may not,’ and ‘prohibit’ shall be considered to contain regulatory restrictions.”

<sup>20</sup> H.B. 883, Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>21</sup> Letter from Aubrey L. Layne Jr., Va. Secretary of Finance, to members of the Va. House of Delegates and Senate (Oct. 22, 2018), available at <https://gallery.mailchimp.com/e8c66a6ccb254adb5e21e438b/files/7ba34af5-8103-436d-b2a8-19e7aedbf20d/20181025105757192.pdf>.

<sup>22</sup> Virginia Secretary of Finance, “Progress Report on the Regulatory Reduction Pilot Program,” October 1, 2019, <https://rga.lis.virginia.gov/Published/2019/RD403>.

their requirements. Eventually, the pilot program may be extended to require reductions in regulatory burdens at these other agencies.<sup>23</sup>

Ohio passed similar legislation this past July.<sup>24</sup> That legislation requires that departments across the state produce a count of their regulatory restrictions. This initial count will then form the basis for tracking the progress of a deregulatory effort, which mandates the removal of two regulatory restrictions for each new one added until mid-2023.<sup>25</sup>

#### A REGULATORY RESET

A regulatory reset involves repealing the entire state regulatory code and starting from scratch. The idea is that the code becomes so burdensome and overwhelmingly complicated that policymakers simply throw the whole administrative code away and start over from square one. It sounds dramatic, but two states undertook the process in the last year. For example, Idaho has a sunset provision that sunsets all state regulations on July 1 of each year, unless extended by an act of the legislature. This year, the legislature opted not to extend the existing code. As a consequence, 19 percent of rule chapters, 10 percent of pages, and 19,000 regulatory restrictions were allowed to expire.<sup>26</sup> Remaining rules were extended through the issuance of emergency regulations promulgated by the executive branch.

This has all gone incredibly smoothly. The only area where perhaps Idaho's reform could have gone better is with respect to time. The Little administration had only a little more than two months to determine which rules to keep and which to scrap before the reset. That's why states might want to consider a reform closer to Rhode Island's. Rhode Island initiated a reset, but agencies were given far more advance time to review their rules and were able to cut more red tape as a result.

In 2016, Rhode Island put an expiration date on its entire code, set to occur on December 31, 2018.<sup>27</sup> This was done as part of an effort to create an online code, but it was also meant to be a red tape cutting exercise.<sup>28</sup> After the reset, the state had eliminated 31 percent of its total rule volume.<sup>29</sup>

The benefit of forcing a one-time reset is that sunset provisions like Idaho's are usually not triggered; rules are simply reauthorized. Even when a sunset expiration provision is triggered, giving agencies ample time to identify rules to cut or modify is important. In general, the benefit of a reset approach is that it switches the burden of proof. Without a reset, regulations are kept by default unless regulators repeal them through the regulatory process; with a reset, regulations are discarded by default unless regulators go through the regulatory process to keep them. Clutter is thereby removed quickly and easily.

#### ECONOMIC ANALYSIS

The effectiveness of any red-tape-cutting effort or regulatory reset will be limited without being supplemented by high-quality information about the effectiveness of various regulations and programs.

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<sup>23</sup> According to a recent news article, "Eventually, the plan is to drop 25% of regulatory requirements, and to roll out a similar effort for another 41 state agencies." Dave Ress, "Shad Plank: A Quiet Virginia Regulatory Reform Makes Progress," *Daily Press*, October 8, 2019.

<sup>24</sup> James Broughel, "A Dark Day for Red Tape in the Buckeye State," *Wall Street Journal*, August 3, 2019.

<sup>25</sup> H.B. 166, 133rd Gen. Assemb. (Ohio 2019).

<sup>26</sup> Cynthia Sewell (@CynthiaSewell), "Idaho @GovernorLittle announces more regulatory cuts on the horizon in Idaho. Goal: 55%-60% may be cut by end of year. #IDpol #IDleg," Twitter, July 19, 2019, <https://twitter.com/CynthiaSewell/status/1152270706714894336>.

<sup>27</sup> S. 3015 Gen Assemb., Jan Sess. (R.I. 2016).

<sup>28</sup> State of Rhode Island General Assembly, "Governor Signs Bill to Improve Rhode Island's Regulatory Climate for Businesses," press release, July 1, 2016, [http://www.rilin.state.ri.us/pressrelease/\\_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31%2D3c10%2D431c%2D8dcd%2D9d9bbe21ce3e9&ID=12078&Web=2bab1515%2D0dcc%2D4176%2Da2f8%2D8d4beebdf488](http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRelease.ListStructure/Forms/DisplayForm.aspx?List=c8baae31%2D3c10%2D431c%2D8dcd%2D9d9bbe21ce3e9&ID=12078&Web=2bab1515%2D0dcc%2D4176%2Da2f8%2D8d4beebdf488).

<sup>29</sup> Rhode Island Office of the Governor, "Governor Raimondo Announces Largest Successful Regulatory Reform Effort in State History," press release, October 15, 2018, <https://www.ri.gov/press/view/34428>.

Without such evidence, policymakers will often opt to maintain the status quo, as this is the path of least resistance. The federal government has experimented with requirements for cost-benefit analysis for regulations going back to the 1970s, and such analysis generally enjoys widespread bipartisan support.<sup>30</sup> However, the federal process leaves a lot to be desired, primarily since agencies analyze their own rules, which represents an obvious conflict of interest. Agencies have strong incentives to produce analysis flattering of their own programs while downplaying any negative aspects.

As a result, Nebraska may want to look at states that have more promising analytical institutions. For example, New Hampshire has a requirement for a “fiscal impact statement” for proposed regulations.<sup>31</sup> In addition to looking at the budgetary impacts of rules on state government finances, the analysis must also include some assessment of costs and benefits to the public. Importantly, analysis is produced independently by a legislative budget assistant in the legislature. The Joint Legislative Committee on Administrative Rules also reviews regulations and the accompanying analysis. Both the production and the review of analysis take place outside of the executive branch, in the legislative branch, which is a stark departure from how analysis is produced in Washington, DC. It is critical that whatever body is tasked with producing analysis enjoys widespread trust by members of the legislature.

Agencies in Nebraska currently have some minimal requirements to consider fiscal impacts of their regulations,<sup>32</sup> but these requirements are fairly weak and not transparent.<sup>33</sup> If Nebraska opts to supplement or replace its current analytical requirements, New Hampshire could serve as a potential model. Critically, it is important that the state invest in the personnel capable of producing analysis competently. If analysis saves the economy even a fraction of a percentage point of growth annually, this could pay for the analyst’s salary many times over. In other words, sometimes it takes money to save money.

## CONCLUSION

If Nebraska can consistently increase its economic growth rate each year, this would have profound implications for the opportunities available to state residents, both in the near term as well as into the future. This testimony has presented three reforms that would represent smart steps toward achieving this goal. These are red tape cutting reforms, a regulatory reset, and economic analysis requirements. Nebraska is well-positioned to adopt any or all of these reforms. Should it do so, the state would certainly be a leader in regulatory reform and a model for other states to follow.

Furthermore, Mercatus Center data are available and are actively informing efforts in states across the country as they seek to reduce regulatory burdens. Thank you again for your time and for the opportunity to submit this testimony. I am happy to answer any questions you may have.

## ATTACHMENTS (4)

James Broughel and Daniel Francis, “A Snapshot of Nebraska Regulation in 2017” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, July 2017).

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).

James Broughel, “Idaho Repeals Its Regulatory Code,” *The Bridge*, May 9, 2019.

James Broughel, “A Dark Day for Red Tape in the Buckeye State,” *Wall Street Journal*, August 2, 2019.

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<sup>30</sup> James Broughel and Patrick McLaughlin, “Principles for Constructing a State Economic Analysis Unit” (Mercatus Policy Primer, Mercatus Center at George Mason University, Arlington, VA, 2018).

<sup>31</sup> N.H. Rev. Stat. Ann. § 541-A:2 (2010) and § 541-A:13(IV)(d) (2011).

<sup>32</sup> Neb. Rev. Stat. § 84-906.01(h) (2005).

<sup>33</sup> A 2010 report gave Nebraska a “D” grade on its regulatory procedures, which include impact analysis procedures. Jason Schwartz, “52 Experiments with Regulatory Review” (Report No. 6, Institute for Policy Integrity, New York, 2010), 292.



## A Snapshot of Nebraska Regulation in 2017

100,627 Restrictions, 7.5 Million Words, and 10 Weeks to Read

by James Broughel and Daniel Francis

July 2017

It would take an ordinary person more than three years to read the entire *US Code of Federal Regulations* (CFR), which contained more than 112 million words in 2017.<sup>1</sup> The sheer size of the CFR poses a problem not just for the individuals and businesses that want to stay in compliance with the law, but also for anyone interested in understanding the consequences of this massive system of rules. States also have sizable regulatory codes, which add an additional layer to the enormous body of federal regulation. A prime example is the online version of the *2017 Nebraska Administrative Code* (NAC).<sup>2</sup>

A tool known as State RegData<sup>3</sup>—a platform for analyzing and quantifying state regulatory text—was developed by researchers at the Mercatus Center at George Mason University. State RegData captures information in minutes that would take an ordinary person hours, weeks, or even years. For example, the tool allows researchers to identify the industries most targeted by state regulation by connecting text relevant to those industries with counts of words known as regulatory restrictions. These are words and phrases like “shall,” “must,” “may not,” “prohibited,” and “required” that can signify legal constraints and obligations.<sup>4</sup> As shown in figure 1, the top three industries with the highest estimates of industry-relevant restrictions in the 2017 NAC are ambulatory healthcare services, nursing and residential care facilities, and chemical manufacturing.

State RegData also reveals that the NAC contains 100,627 restrictions and roughly 7.5 million words. It would take an individual about 418 hours—or more than 10 weeks—to read the

1. “The QuantGov Regulatory Clock,” QuantGov, accessed May 24, 2017.

2. Nebraska Secretary of State, *Nebraska Administrative Code*, accessed June 7, 2017.

3. State RegData is a 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.

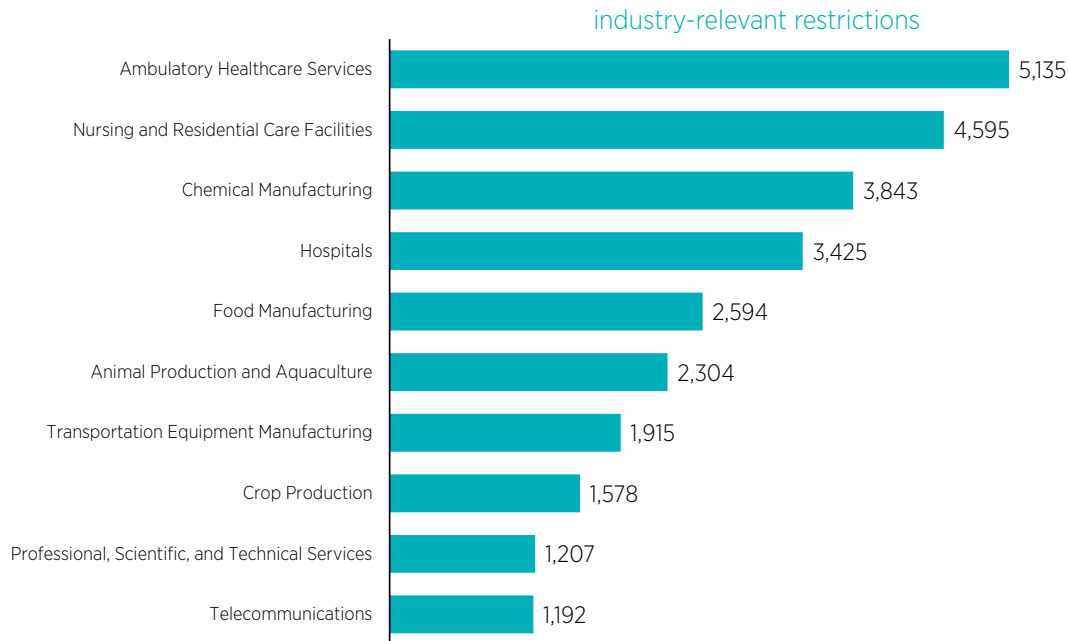
4. Restrictions can also occur in legal text for other purposes, such as for definitional purposes. At times, restrictions may relate to government employees, rather than the private sector.

For more information, contact

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entire NAC. That’s assuming the reader spends 40 hours per week reading and reads at a rate of 300 words per minute. For comparison, in 2017 there were more than 1.15 million additional restrictions in the federal code.<sup>5</sup> Individuals and businesses in Nebraska must navigate all of these restrictions to remain in compliance.

Figure 1. The Top 10 Industries Targeted by Nebraska State Regulation in 2017



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

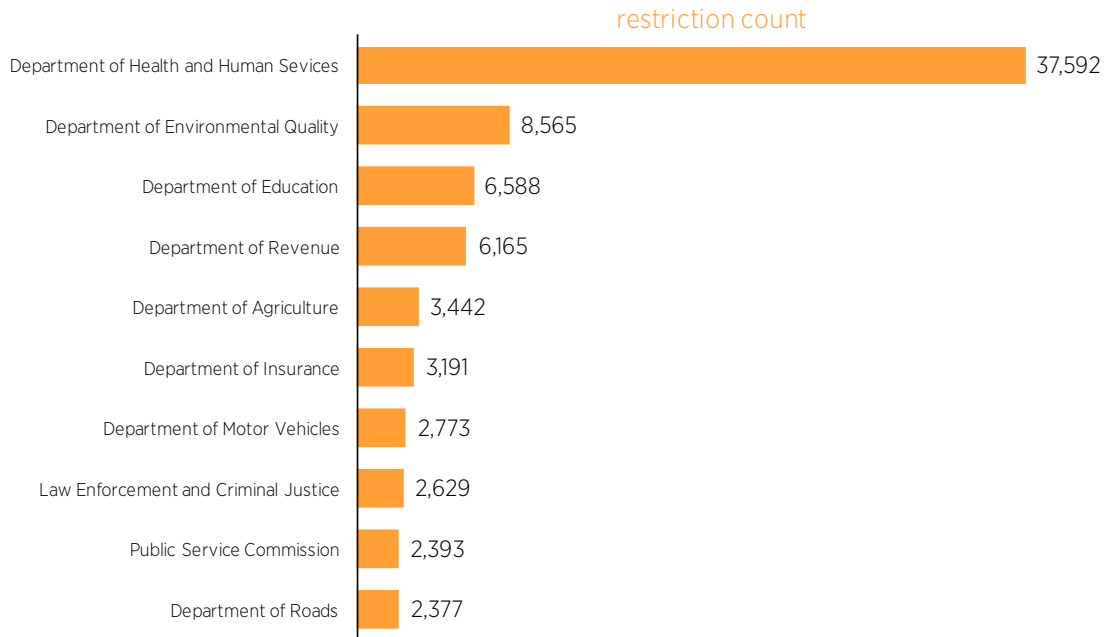
The rules in the online NAC are organized based on the state agency, department, or commission that has written them. Figure 2 shows that in 2017, rules from the Department of Health and Human Services contained more than 37,000 restrictions. By this measure, this is the biggest regulator in Nebraska. The Department of Environmental Quality is the second biggest regulator with more than 8,500 restrictions.

Federal regulation tends to attract the most headlines, but it is important to remember that the more than 112 million words and 1.15 million restrictions in the federal code are just the tip of the iceberg when it comes to the true scope of regulation in the United States. States like Nebraska write millions of additional words of regulation and hundreds of thousands of additional restrictions. State-level requirements carry the force of law to restrict individuals and businesses just as federal ones do.

5. “The QuantGov Regulatory Clock,” QuantGov.



Figure 2. The Top 10 Regulators in Nebraska in 2017



Source: "State Administrative Codes—Nebraska," QuantGov, <http://www.quantgov.org/data/>.

Researchers are only beginning to understand the consequences of the massive and growing federal regulatory system on economic growth and well-being in the United States.<sup>6</sup> Meanwhile, the effects of state regulation remain largely unknown. If this snapshot of Nebraska regulation in 2017 is a good indicator, then the states are also active regulators, suggesting the true impact of regulation on society is far greater than that of federal regulation alone.

6. For example, see Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, "The Cumulative Cost of Regulations" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).

#### ABOUT THE AUTHORS

James Broughel is a research fellow for the State and Local Policy Project at the Mercatus Center at George Mason University. Broughel has a PhD in economics from George Mason University. He is also an adjunct professor of law at the Antonin Scalia Law School.

Daniel Francis is a research programmer at the Mercatus Center. He received his BS in economics and mathematics from Florida State University.

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# MERCATUS ON POLICY

## A Step-by-Step Guide to Using Mercatus Tools to Reduce State Regulation Levels

James Broughel

April 2017



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### FOR STATES WISHING TO CUT EXCESSIVE “RED

tape,” that is, to reduce unnecessary regulatory burdens, designing a process to accomplish this goal can be a daunting task. This guide offers state policymakers a fairly simple and straightforward process for achieving this objective using tools developed by the Mercatus Center at George Mason University. Although the process outlined here is not the only path to reducing regulatory burdens, it has some advantages, including its relative simplicity, cost-effectiveness, and transparency. Some aspects of the approach have also been tested, and proven successful, in previous regulatory reform efforts.

### STEP 1: DEFINE REGULATORY BURDEN

The first order of business for states wishing to reduce their level of regulation is to determine precisely what they want to reduce. Regulatory burden can be measured in a number of ways. For example, it can be measured in terms of the number of pages in the state administrative code, the number of final rules published by agencies, or paperwork, compliance, or social costs that rules impose on the public.

There are merits and drawbacks to each of these approaches. Because resources tend to be limited in states, this guide recommends using a relatively simple metric: the total count of restrictive words (also known as “regulatory restrictions”) found in a state’s administrative code. Restrictive words include legal obligations and prohibitions on the public and are signified by words and phrases such as “shall,” “must,” “may not,” “prohibited,” and “required.” Resources permitting, policymakers who wish to develop a more comprehensive measure of regulatory burden could look beyond the state administrative code to agency

notices, memoranda, guidance documents, and other agency releases.<sup>1</sup>

**STEP 2: ESTABLISH A BASELINE**

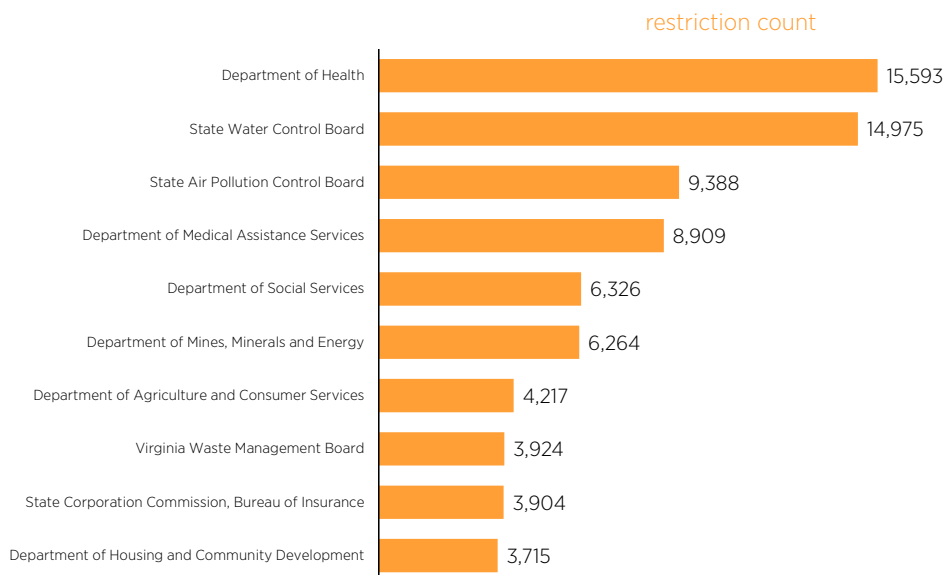
Before a state decides how much regulation it wants to cut, it must first know how much regulation it has and decide whether that amount seems excessive. If regulation is defined as the number of restrictive words appearing in the state administrative code, then a baseline, or initial starting point, can be established using Mercatus’s State RegData tool,<sup>2</sup> which is a computer program that scans bodies of state regulatory text and counts the number of restrictive words.<sup>3</sup> When run through a state’s administrative code, State RegData can establish each of the following: the total number of restrictive words on the books at a given point in time, the growth in the number of restrictions across time (if the administrative code is available for multiple years), the industries most targeted by state regulation, and the regulatory

agencies with the most restrictive words on the books. Figure 1 provides an example of how tallying restrictions according to the regulatory agencies that produce them is possible for a state like Virginia.

**STEP 3: SET A TARGET REDUCTION GOAL AND A DEADLINE**

After establishing a baseline, the governor, state legislature, or some other body will set a goal for how much the code should be reduced. This will be largely a political decision, since it is difficult to know the “right” amount of regulation in any state. A 2013 survey of small businesses in the United States and Canada reported that respondents thought the burden of regulation could be reduced by about 30 percent without compromising the public interest.<sup>4</sup> However, the perception of how much unnecessary regulation exists will vary by time and by place as well as across populations affected.

**Figure 1. Top Ten Regulatory Agencies in Virginia**



Source: James Broughel and Oliver Sherouse, “A Snapshot of Virginia Regulation in 2016” (Policy Brief, Mercatus Center at George Mason University, Arlington, VA, January 19, 2017).

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## Before a state decides how much regulation it wants to cut, it must first know how much regulation it has and decide whether that amount seems excessive.

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It may make sense to target a level of regulation close to levels found in similar or nearby states that are experiencing strong economic performance. One model to follow might be the Canadian province of British Columbia, which in 2001 set a goal of reducing its number of regulatory requirements (a metric similar to restrictive words) by one-third in three years.<sup>5</sup> By 2004, 37 percent of regulatory requirements in British Columbia had been eliminated, and more have been eliminated in subsequent years. As of 2016, 47 percent of the regulatory requirements had been eliminated since 2001.<sup>6</sup>

Rather than focus on the aggregate number of restrictive words found in the entire code, states may want to task different regulatory agencies with different reduction targets, since not every agency contributes to unnecessary regulatory burdens equally. Whatever target level and method of reduction policymakers choose, it is advisable to set a clear goal and a deadline for when the goal is to be met. Without clear objectives, reformers will have difficulty measuring the progress of their efforts, which

could result in a lack of accountability and a lower probability of success.

### STEP 4: CREATE AN OVERSIGHT MECHANISM

Oversight over the red tape reduction process is needed and can come in many forms, and it does not have to be complicated or expensive to be effective. The body providing oversight can be an existing committee in the legislature or an office within the executive branch. A state may already have a body providing third-party review of regulations, which could be a logical place to house oversight functions since it presumably already possesses considerable expertise on state regulatory matters. Alternatively, if resources permit, a governor, via executive order, or the legislature, via statute, could set up a red tape reduction commission. The purpose of such a commission is to establish a process for reviewing the administrative code in a state, to ensure the successful and timely achievement of target goals, and to report back to the governor and the legislature regarding the progress of reform efforts.

The commission should also focus on communication with the public to ensure the benefits of regulatory reform, such as smarter and more efficient government, are well understood. The commission's staff should comprise a diverse group of individuals representing multiple viewpoints, including the viewpoints of consumers, industry, and government officials. Possible models for a red tape reduction commission include the Base Realignment and Closure system that recommended federal military bases for closure<sup>7</sup> and previous state red tape reduction commissions.<sup>8</sup>

**Table 1. Steps to Reduce Regulation Levels in a State**

STEP 1	Define regulatory burden
STEP 2	Establish a baseline
STEP 3	Set a target reduction goal and a deadline
STEP 4	Create an oversight mechanism
STEP 5	Establish a process to review the code and get buy-in from regulators
STEP 6	Institutionalize a regulatory budget

## STEP 5: ESTABLISH A PROCESS TO REVIEW THE CODE AND GET BUY-IN FROM REGULATORS

The next step is to review the regulatory code itself to identify red tape for elimination or modification. Input from the public can be helpful in this task, but it is important to get feedback from as many sources as possible so as not to limit responses to a narrow range of interests. Public feedback can also result in unexpected reform ideas that fall outside the scope of reformers' original plans. For example, during public hearings held as part of a 2010 New Jersey reform effort, members of the public complained about how prevailing wage requirements had raised the cost of public projects and prevented citizens from donating their services to their communities.<sup>9</sup> Although this sort of information might not be what reformers intended to gather at public hearings, such information is nonetheless valuable.

As for the actual review of the state code, this could conceivably be the responsibility of a red tape reduction commission or a legislative committee; however, it is probably more practical and economical to have regulatory agencies review their own portfolios of rules. First, regulators will be more familiar with their own rules than most other parties will be, so there is less of a learning curve. Second, this may require no additional state resources since presumably regulators are already monitoring program effectiveness to varying degrees. Resources and priorities simply have to be reallocated from a focus on rule writing to a focus on rule improvement and management.

Regulators also possess valuable information, and it is important that they perceive they are part of the reform effort and don't feel unfairly targeted with criticism. The risk of the latter is not negligible, since rules being eliminated are ones that regulators promulgated. If regulators are not invested in the reform, it is likely to fail. To enlist agency assistance and obtain agency buy-in, the oversight body may want to direct each agency to reduce its own restrictions by a predetermined amount and then give agencies wide latitude to decide how best

to accomplish this goal. A formal policy requiring agencies to remove multiple old restrictions for every new one introduced is a way of motivating agencies to reduce regulatory burdens—by changing their incentives—while also giving regulators the flexibility to decide which requirements should stay and which should go. Such a policy is known as a regulatory budget. At first, the budget should be established to reduce regulation levels, but over time budget allowances might evolve toward keeping regulation levels constant or possibly growing at a certain rate.

If an agency is responsible for reducing its own regulatory burdens, the job of the oversight body will be primarily to check in with agencies periodically to make sure the effort is on track. With a clear metric to measure success, it will be fairly easy to determine whether regulatory agencies are succeeding. The oversight body can then focus on public relations, writing evaluative reports, and making recommendations to the state legislature (for example, when statutory action is needed to make regulatory changes).

## STEP 6: INSTITUTIONALIZE A REGULATORY BUDGET

Once a state has succeeded in reducing its level of regulation to the desired level, maintaining the reduction should be a priority. There is a natural tendency for the level of regulation to rise over time—a phenomenon known as regulatory accumulation.<sup>10</sup> This is true in part because regulators are typically rewarded for issuing regulations, but not rewarded for withholding or eliminating regulations. Therefore, once the code has been streamlined, it makes sense to encourage a permanent culture change at agencies to prevent regulatory accumulation from recurring.

A regulatory budget is one such means to control the amount of regulation that can be issued and to change the culture at agencies.<sup>11</sup> After its initial goal had been met, British Columbia institutionalized a form of regulatory budget that ensures that the level of regulation stays roughly constant (as measured by the number of regulatory requirements)

over time. States that want more flexibility might allow the regulatory code to grow over time, but only at a specified rate.

The key question will again be how to define the cap on regulatory burdens for the purpose of implementing a regulatory budget. Policymakers could frame the budget in terms of compliance or social costs that agencies may impose on the public or, to keep things simple, could again limit the total number of restrictive words each agency or all agencies may have on the books at any one time. The latter form of budget may prove easier to implement and enforce, because estimating costs can be time consuming and expensive. Cost analysis is also prone to gamesmanship by agencies, which can use their expert knowledge of an issue to over- or underestimate costs in economic analysis.<sup>12</sup> To guard against such manipulation, there needs to be third-party oversight over agency economic analyses, which is itself costly.<sup>13</sup> In contrast, a count of restrictive words is easy to calculate and difficult to manipulate.

## CONCLUSION

The process outlined here is one way a state might go about reducing, and maintaining the reduction of, regulation levels. It is far from the only way. However, if any of the steps presented here are missing, there is a likely chance that the goals of reform efforts will not be met. Furthermore, there are several reasons to think the process described here is likely to be effective. First, it is simple. Setting a target reduction in the number of regulatory restrictions in a state's administrative code is straightforward, easy to monitor and assess, relatively inexpensive (given limited state resources), and difficult to manipulate. Second, similar reform efforts have been successful in the past, most notably in the Canadian province of British Columbia. Finally, analytic tools, such as State RegData from the Mercatus Center at George Mason University, are available to assist in this type of regulatory reform effort.

## NOTES

1. Requirements found in these kinds of documents form a kind of stealth regulatory activity. See John D. Graham and James Broughel, "Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act," *Harvard Journal of Law & Public Policy, Federalist Edition* 1, no. 1 (2014): 30–54.
2. Visit [www.regdata.org](http://www.regdata.org) and [www.quantgov.org](http://www.quantgov.org) for more information.
3. Patrick A. McLaughlin and Oliver Sherouse, "QuantGov—A Policy Analytics Platform," QuantGov, October 31, 2016.
4. Laura Jones, Nina Gormanns, and Queenie Wong, *Canada's Red Tape Report with U.S. Comparisons* (Toronto: Canadian Federation of Independent Business and KPMG Enterprise, 2013).
5. Laura Jones, "Cutting Red Tape in Canada: A Regulatory Reform Model for the United States?" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2015).
6. B.C.'s Regulatory Reform Initiative, "Achieving a Modern Regulatory Environment: Fifth Annual Report, 2015/2016," Province of British Columbia, 2016.
7. Closing military bases, although very different from reducing red tape, faces a similar challenge. Narrow interest groups that benefit from a policy will resist its elimination, even if it is in the public interest, as will legislators who represent those interest groups. Third-party commissions can help overcome these kinds of political barriers. See Joshua Hall and Michael Williams, "A Process for Cleaning Up Federal Regulations: Insights from BRAC and the Dutch Administrative Burden Reduction Programme" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2013).
8. For example, the Red Tape Review Group and the subsequent Red Tape Review Commission were both created in New Jersey in 2010. See New Jersey Exec. Order No. 3, January 20, 2010; and New Jersey Exec. Order No. 41, September 23, 2010.
9. New Jersey Red Tape Review Group, "Findings and Recommendations," April 19, 2010, 16.
10. Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2014).
11. For more information about regulatory budgets, see James Broughel, "Regulatory Reform 101: A Guide for the States" (Mercatus on Policy, Arlington, VA, December 2016).
12. Interviews with US agency economists reveal that these kinds of problems are common in the federal government. See Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2008).
13. The cost of analysis is one reason why, at the federal level, economic analysis tends to be required only for the most economically significant regulations.

### About the Author

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The Bridge

Expert Commentary

May 9, 2019

## Idaho Repeals Its Regulatory Code

### Authors:

James Broughel, Senior Research Fellow [@JamesBroughel](#)

Something rather remarkable just happened in Idaho. The state legislature opted to—in essence—repeal the entire state regulatory code. The cause may have been dysfunction across legislative chambers, but the result is serendipitous. A new governor is presented with an unprecedented opportunity to repeal an outdated and burdensome regulatory code and replace it with a more streamlined and sensible set of rules. Other states should be paying close attention.

The situation came about due to the somewhat unconventional nature of Idaho's regulatory process. Each year, the state's entire existing body of regulations expires unless reauthorized for an additional year by the legislature. In most years, reauthorization happens smoothly, but not this year.

Instead, the legislature wrapped up an acrimonious session in April without passing a rule reauthorization bill. As a result, come July 1, some 8,200 pages of regulations



containing 736 chapters of state rules will expire. Any rules the governor opts to keep will have to be implemented as emergency regulations, and the legislature will consider them anew when it returns next January.

Governor Brad Little, sworn into office in January, already had a nascent red tape cutting effort underway, but the impending regulatory cliff creates some new dynamics. Previously, each rule the governor wanted cut would have had to be justified as a new rulemaking action; now, every regulation that agencies want to keep has to be justified. The burden of proof has switched.

The new scenario creates multiple touch points when rules could end up on the cutting room floor. First, when regulations expire on July 1, many will not be refiled. Second, the public will have the opportunity to comment on regulations that are resubmitted. In some cases, public hearings are likely to take place, presenting another opportunity to reshape, and cut, some regulations. Finally, when the legislature returns next year, it will need to pass a reauthorization bill for those regulations Governor Little's administration wants kept. Even more red tape can be trimmed then.

Of course, many regulations serve a justified purpose. The challenge for the Little administration will be to hone in on those rules that add costs disproportionate to any benefits produced, whilst preserving and perhaps even strengthening any rules that are working well.

The Idaho case also highlights the power of sunset provisions—or automatic expiration dates built into laws or regulations. In the past, academic research has found that sunset provisions are sometimes ineffective. Legislatures and agencies often readopt regulations without much thought. To work well, sunsets may need to be structured such that large swaths of rules expire simultaneously, with reauthorization responsibilities falling to the legislature rather than regulators. Sunsets are perhaps most useful when rules are allowed to lapse and then forced back through the rulemaking process all over again. That way they can be subjected to public scrutiny, cost-benefit analysis, and perhaps even court challenges.

The main constraint now facing Idaho state agencies is time—they could use more of it.

Regulators have just two months to decide which rules should stay and which should go. With more time, they might be able to tweak and modernize those

regulations deemed necessary; instead, many rules may simply be readopted without changes.

Nevertheless, whether intentionally or not, Idaho deserves credit for advancing the frontier of regulatory reform in a new and innovative way. Any state without a sunset provision should consider setting one up, modeled after the Idaho approach. Forcing a fresh start by repealing the entire regulatory code may be the newest arrow in the red tape cutter's quiver. Time will tell whether Governor Little and company's aim is true.

*Photo credit: The White House/flickr*

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# *A Dark Day for Red Tape in the Buckeye State*

Ohio's government will start cataloging—and cutting—its hundreds of thousands of regulations.

By James Broughel

Aug. 2, 2019 5:40 pm ET



The Ohio Statehouse in Columbus, June 17, 2018. PHOTO: GETTY IMAGES

Ohio Gov. Mike DeWine signed a two-year budget after a hard-fought battle last month between legislators in the Ohio House and Senate. The local media has focused on the 4% income-tax cut and increased spending for education and children's services. Less noticed has been the most ambitious and innovative part of the budget—a regulatory-relief provision.

Regulations are legal mandates that require or forbid people and companies to perform particular actions. While policy makers love to pass new regulations—often in response to a highly visible public problem—they are rarely inspired to remove rules once they are no longer needed. Over time, suffocating regulations can smother an economy like a blanket over a campfire. One study from the Mercatus Center estimated that the total cost of regulation on the U.S. economy was \$4 trillion in 2012 alone.

Ohio is one of the most highly regulated states in America. According to an unofficial count by the Mercatus Center, the state's administrative code contained 246,852 regulatory restrictions as of 2018—some 100,000 more than the average state. Buried in Ohio's more than 2,000-page budget is a provision requiring state agencies to develop an inventory of regulatory restrictions. Cataloging these burdens might seem elementary, but governments rarely bother to do it, which is how an agency like the Ohio State Lottery Commission can end up with more

than 30,000 individual restrictions. Even when reformers cut obsolete rules, agency regulators continue adding new ones, counteracting the effect. To prevent regulatory creep, lawmakers should place caps on the overall amount of regulation so it can't grow without limit.

Fortunately, Ohio's new budget also includes a provision stating that for each restriction added, agencies must remove two others. This "one-in, two-out" policy will be in place for the next four years and ought to bring some much-needed relief to Ohioans.

Other states are taking similarly aggressive action to reduce red tape. In 2018 Virginia created its own inventory of regulatory requirements and even required a 25% cut at agencies involved in occupational licensing and criminal justice. Rhode Island set an expiration date for its entire code at the end of 2018, forcing agencies to review all existing rules and refile those they want to keep. The state eliminated 31% of its rule volume in the process. Idaho allowed its entire regulatory code to sunset on July 1. Gov. Brad Little's administration issued a new, streamlined code to replace it, eliminating 20% of its chapters in the process.

Under President Trump, the federal government has also tried to ease the regulatory burden. Like Ohio, the administration imposed a one-in, two-out requirement on regulators. But these federal reforms have been limited in scope compared with state-level reforms.

Ohio's actions are bolder and more aggressive for several reasons. First, Mr. Trump's directive came via executive order, whereas the Ohio reforms were legislated, which makes them more enduring and binding. Second, the U.S. Office of Management and Budget has carved out numerous exceptions to the president's one-in, two-out policy, allowing more than 90% of new federal regulations to escape the offset requirement. Only those rules that undergo OMB's review process require an offset. Ohio allows for far fewer exemptions.

Mr. Trump has succeeded in slowing the growth of regulation, but he hasn't been nearly as successful at reducing the existing stock of outdated and unnecessary federal rules that have built up during the past century. But a diverse group of states is now showing that the wet blanket of regulation can be lifted, and the White House has taken notice. A group of Mr. Trump's top advisers recently sent a letter to governors around the country seeking input on how to lift burdensome regulations from the economy.

Sometimes Washington leads and the states follow. But when it comes to regulatory reform, states like Ohio are leading the way.

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