

A Fresh Start: How to Address Regulations Suspended during the Coronavirus Crisis

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As the COVID-19 crisis intensified, policymakers at the federal, state, and local levels started suspending or rescinding laws and regulations that hindered sensible, speedy responses to the pandemic. These “rule departures” raised many questions. Were the paused rules undermining public health and welfare even before the crisis? Even if the rules were well intentioned or once possibly served a compelling interest, had they grown unnecessary or counterproductive? If so, why did they persist? How will the suspended rules be dealt with after the crisis? Are there other rules on the books that might transform from merely unnecessary to actively harmful in future crises?

In many cases, rule departures or partial deregulations undertaken during the crisis are tantamount to an admission by policymakers that some policies that were intended to serve the public interest fail to do so. “The explanation for many of these problems is that outdated 20th-century rules stymie 21st-century innovation,” noted former Florida Governor Jeb Bush in a recent *Wall Street Journal* editorial.¹ “In an emergency, many of those rules can be waived by executive order. After the crisis, there will be momentum to challenge the stale rules that hindered our response. This is likely to go well beyond dealing with pandemics,” he argued. Similarly, lawyer and commentator Philip K. Howard has asserted that “the same kind of energy and resourcefulness will be needed to get America’s schools, businesses, government agencies and nonprofits up and running again” and has suggested the need for a “temporary Recovery Authority with a broad mandate to identify and waive unnecessary bureaucratic hurdles to recovery.”² In addition, *Wall Street Journal* columnist and Brookings Institution Senior Fellow William A. Galston has called for a “Coronavirus 9/11 Commission” to study the governance failures witnessed during the crisis, arguing that “the immediate effects of Covid-19 are bad enough. Failing to learn from it would be criminal negligence for which future generations won’t forgive us.”³

This special edition policy brief is intended to promote effective ideas among key decision-makers in response to the COVID-19 pandemic. It has been internally reviewed but not peer reviewed.

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The crisis has been a stress test for American institutions. It has laid bare the outdated, overlapping, and often contradictory morass of rules that make it difficult for public and private organizations to respond to changing circumstances. In many cases, these rules persist not because they protect the public from danger but because they protect organized interest groups from new competition.⁴ Rules also persist because agencies rarely prioritize retrospective reviews aimed at eliminating unnecessary or potentially harmful rules. On the contrary, agencies typically have a vested interest in maintaining regulations that often took years to generate.⁵ Agency employees who have developed expertise in those rules, just like their counterparts in the private sector, have a financial interest in preserving these rules. In this way, “Agencies are stakeholders with respect to their own regulations.”⁶

Once the COVID-19 crisis subsides, there is likely to be considerable momentum to review the rules that have slowed down the response. Some of those rules should probably be permanently repealed and others amended to allow for more flexible responses in the future. To this end, we propose in this brief an approach based on the successful experience of the Base Realignment and Closure (BRAC) Commission. Our proposed “Fresh Start Initiative” would implement the following actions:

1. identify and study all the rules revised or suspended during the crisis,
2. formulate a set of recommended regulatory reforms for each of those rules, and
3. craft a plan and timetable for automatically sunseting or comprehensively reforming those policies or programs as part of a single reform package.

EXAMPLES OF POLICIES SUSPENDED DURING THE CORONAVIRUS CRISIS

The Mercatus Center and many other organizations have been tracking rules that have been relaxed or suspended during the coronavirus crisis. Rules are being shed or frozen at such a rapid rate that it is becoming challenging to track all of the activity happening at the federal, state, and local levels. As summarized below, the Fresh Start Initiative would create an authoritative inventory of all the rules relaxed or paused during the crisis. That list would then become the basis of a report recommending either more reforms or sunsets for questionable rules and programs.

Here are a few illustrative examples of suspended rules:

- *FDA approval process.* One of us criticized the FDA for limiting flexible testing and treatment options as the crisis unfolded.⁷ These errors contributed to delays of COVID-19 testing by six critical weeks.⁸ But since then, the FDA has loosened restrictions on tests and various types of regulated devices. Although many people were surprised to learn that the FDA regulated mundane things such as hand sanitizer and face masks,⁹ the agency eventually took steps to relax rules on both those fronts. It also took steps to allow more flexible responses to the shortages of ventilators and drugs.¹⁰

- *TSA limits on hand sanitizers.* The Transportation Security Administration (TSA) waived its 3.4 ounce limit on liquids and gels for hand sanitizers on airplanes, a rule that had been in effect for 14 years.¹¹
- *Tariffs.* In mid-March, the United States Trade Representative issued tariff exemptions for various medical equipment and supplies, such as medical gloves, gowns, and goggles.¹² Later in the month, Trump administration officials told reporters that the administration would suspend the collection of customs duties for three months.¹³ Later that day, the president called the report “fake news.”¹⁴ The fate of this suspension remains uncertain.
- *Restrictions on telemedicine.* The US Department of Health and Human Services recently announced that it will allow doctors who participate in federal health programs to be paid for offering telemedicine services in states where they do not hold a license.¹⁵ In many places, however, state laws make this federal policy change moot. As of 2015, 36 states and the District of Columbia required a provider to have a face-to-face interaction with a patient before writing any prescription.¹⁶ In Arizona, Governor Doug Ducey has suspended this rule.¹⁷ Other states are likely to follow.
- *Restrictions on scope of practice for nurse practitioners.* The National Academy of Medicine recommends that nurse practitioners be permitted “full practice authority,” meaning that they should be allowed to evaluate patients and initiate treatment without physician approval. Given that there is only 1 practicing physician for every 500 Americans, following this recommendation would permit patients to access more caregivers and would free up physicians to focus on the most demanding cases. Research suggests that full practice authority would expand access to care without jeopardizing patient safety.¹⁸ As of a few weeks ago, however, only 23 states permitted this level of authority.¹⁹ Maryland has now granted all healthcare professionals the authority to work beyond their current scope of practice, and eight other states (Idaho, Maine, Michigan, Missouri, New Hampshire, New York, Pennsylvania, and Texas) have moved to waive or modify their scope-of-practice requirements.²⁰
- *State certificate-of-need laws.* Certificate-of-need (CON) laws require healthcare providers to first obtain permission before they may open or expand their facilities. Researchers find that these rules are associated with higher costs,²¹ lower quality,²² and—above all—more limited access to care.²³ When the pandemic hit, 28 states required providers to obtain certificates of need before adding, or in some cases even moving, acute hospital beds.²⁴ Nationwide, the United States has only 2.77 beds per 1,000 residents, far fewer than Italy (3.18), China (4.34), or South Korea (12.27).²⁵ Yet the states that require certificates of need for acute hospital beds have even fewer beds—1.31 fewer beds per 1,000 residents—than other states.²⁶ As of March 31, 15 states had suspended or somehow modified their CON laws to allow providers greater flexibility to deal with the pandemic.²⁷

This list is not comprehensive; more suspended rules at the local, state, and federal levels are coming to our attention on a daily basis. This is not surprising, simply because so many rules have

accumulated over the past 50 years. This regulatory accumulation has been well documented by the RegData Project, which, among other variables, measures the number of regulatory restrictions contained in US federal regulation. According to the project’s most recent dataset (RegData 3.2), the volume of federal regulations has increased by more than 150 percent in the past 50 years.²⁸ In 1970, there were about 400,000 regulatory restrictions on the books. Today, there are more than 1,000,000 regulatory restrictions in effect.

Concentrated and organized interest groups benefit from these rules and have successfully fought to preserve them.²⁹ They were able to do this, in part, by ensuring that reform remained off the agenda and out of the public discussion.³⁰ In many cases, this was an easy task given the technical and obscure nature of many rules. Large hospital systems, for example, tend to benefit from little-known CON laws because they limit competition from new hospitals and nonhospital providers.³¹ Similarly, physicians are reliably opposed to efforts that might give nurse practitioners more independent authority.

LEARNING FROM THE BRAC COMMISSION REFORM MODEL

For much of the 20th century, military installations deemed obsolete by military experts remained open because parochial special interests managed to thwart any efforts to close them. Yet the BRAC Commission overcame these obstacles to successfully close 350 outdated bases over five rounds since 1988.³² The lessons from BRAC suggest that successful efforts to roll back regulatory privileges require the following elements:³³

1. Policymakers must be allowed to cast a conspicuous vote in favor of the general interest. That is, there must be an opportunity for them to go on record in support of the general proposition that markets should be open, competitive, and free of regulatory privileges that benefit concentrated interest groups.
2. Some separate institution—perhaps a panel of experts or perhaps an executive-branch authority—should be charged with deciding which particular rules should be permanently eliminated. This separation gives some “cover” to policymakers worried about catching flack for eliminating a special interest’s lucrative privilege.
3. It should be difficult to ignore or countermand the recommendations of this institution. It might be that elected officials agree to accept the institution’s recommendations in whole or not at all (as is the case with “fast-track trade negotiating authority”), or it might be that the institution’s decisions automatically take effect and only an affirmative act of the legislative body can reverse it (as was the case with BRAC).³⁴
4. The institution’s progress toward the general goal should be measured and frequently reported to the public.³⁵ This requirement, again, allows policymakers to take credit for serving the general interest.

“FRESH START INITIATIVE”: GOALS AND STRUCTURE

Once the coronavirus crisis subsides, lawmakers should consider devising a BRAC-style reform model for laws and regulations that defy common sense and undermine public health. The goal of this Fresh Start Initiative would be to evaluate the experience with the rules suspended during the crisis and then recommend comprehensive reforms or outright repeal. If federal or state policymakers have already identified various laws and regulations that needed to be relaxed or suspended to help fight the coronavirus, this is a clear signal that reforms of these policies or programs are likely both necessary and also politically possible.

The blueprint for a Fresh Start Initiative would be as follows:

- Any rules suspended or modified during the pandemic would remain in suspension until it was plausibly demonstrated that reinstating them would serve a legitimate public purpose.
- Congress would authorize the Office of Management and Budget (OMB) to form a Fresh Start Initiative made up of 12 to 24 independent academic experts. Government officials or corporate parties with a direct interest in maintaining the suspended programs or policies would not be allowed to be members of the commission.³⁶ Alternatively, Congress could direct an executive-branch official to take on these same regulatory review functions, as was successfully done in the Canadian province of British Columbia.³⁷ Either way, the reforms will last longer if they enjoy broad and bipartisan support.
- The authorizing legislation would also require the Fresh Start Initiative to undertake a three- to six-month study inventorying all the laws and regulations frozen or temporarily repealed during the COVID crisis. The Fresh Start Initiative would also collect and summarize relevant academic literature or government reports relating to the effectiveness of programs or policies being considered.
- After evaluating the evidence as well as the experience during the time the rules were frozen, the Fresh Start Initiative would identify which of those rules could remain suspended permanently and which should remain in effect longer, albeit with significant modifications or an eventual sunset plan.
- The Fresh Start Initiative would then issue a final report that would bundle together all of these laws and establish a timetable for repeal or reform. As with the BRAC Commission, and pursuant to the authorizing statute, the Fresh Start Initiative’s reform package would take effect automatically unless both houses of Congress passed and the president signed a resolution rejecting the package proposal. No amendments to the reform proposal would be allowed. Of course, Congress or state legislators would always be free to reconsider and reinstate programs and policies that they believed might still serve an important purpose.
- Finally, the Fresh Start Initiative could consider formulating a similar “fresh start” reform model for state governments to consider because many state governments have paused many regulations of their own. While the initiative obviously would not have the authority

to require state or local governments to repeal or replace such policies, the group could at least identify the effect of continuing those regulations and potentially even help devise model legislation for reforming or repealing them.

To improve the likelihood of success, the Fresh Start Initiative should follow the BRAC Commission blueprint. Specifically, the initiative must remain focused on a clear and limited mission guided by clear implementation criteria. The purpose should not be to evaluate every federal program or rule. The objective should be to review only those laws and regulations that were paused or partially repealed as part of the federal effort to address the coronavirus. This goal will provide the initiative and Congress with a clearly defined and limited range of policies to consider. A longer list of reform objectives would become politically unworkable, and the entire effort would likely be derailed.

Of course, the Fresh Start Initiative could identify other policies that were not suspended during the crisis but that potentially undermine public health or welfare in some fashion. But those rules (or the agencies that enforce them) could be addressed in subsequent reform efforts. A focused effort will improve the chance that policymakers can achieve concrete, lasting reforms of the most counterproductive laws and regulations.

State policymakers should also consider Fresh Start Initiatives of their own. Mercatus researchers have previously explained how a BRAC-like approach might be tapped to reform occupational licensing laws, CON laws, and other accumulated regulations.³⁸ An impartial commission or executive-branch official can review a state's existing licensing laws to determine which ones can be discarded without risking public health or safety.³⁹ As with the federal Fresh Start Initiative, the bodies or officials leading the effort should not include government or corporate officials with a vested interest in preserving the rules under consideration.

CONCLUSION

Policymakers and special interests have long fought to preserve the regulatory status quo that benefits them, and commonsense reforms that should have happened years ago were never undertaken. COVID-19 has afforded citizens and policymakers everywhere a rare opportunity to see the often-obscured costs associated with these restrictions. And it may permit reform-minded policymakers an opportunity to achieve what has heretofore been so difficult: the permanent removal of anticompetitive regulations that benefit small but well-organized interest groups at the expense of the public.

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