Regulatory Modernization: Lessons from Idaho and Virginia

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To cite this paper: A. Adams and R. Bull, "Regulatory Modernization: Lessons from Idaho and Virginia," released by the Regulatory Transparency Project of the Federalist Society, May 10, 2024 (https://rtp.fedsoc.org/paper/regulatory-modernization-that-works-lessons-from-idaho-and-virginia/)

10 May 2024

I. Introduction

Late last year, the Biden Administration launched what likely amounts to the biggest overhaul of federal regulatory policy in almost 50 years under the banner of "modernizing regulatory review." Its proposed revisions to the Office of Management and Budget's Circular A-4, which sets forth how federal agencies decide whether and how to regulate, represent a sea change in economic analysis of federal rules.

As state government officials who specialize in regulatory analysis, we find the Biden Administration's new initiative misguided. It moves away from the evidence-based approach of the original Circular A-4, a George W. Bush era document that enshrines basic regulatory economic principles that date to the Johnson Administration, and instead seemingly promotes a handful of liberal pet projects. It abandons impartial regulatory impact analysis by, among other things, encouraging agencies to favor certain groups over others and using an excessively low discount rate to make extremely costly regulatory interventions seem more favorable. It also appears to minimize the important role states play and centralize ever more power in the already bloated federal regulatory state.

That said, we welcome the opportunity to rethink the regulatory process. The previous version of Circular A-4 worked well but it had a handful of limitations. Among its most important drawbacks was its nearly exclusive focus on how agencies decide whether to issue *new* regulations, paying short shrift to the equally important process of revisiting *old* regulations.

The states where we work, Idaho and Virginia, have recently adopted a variety of initiatives that represent a more promising approach to regulatory modernization. Unlike the Biden Administration, the Governors of our states have sought to *reduce* excessive regulatory burdens to free up individual initiative and promote economic growth. And in contrast to the traditional federal approach, our offices focus as much on *existing* regulations as new regulations.

II. The Idaho Model

In Idaho, Governor Brad Little made regulatory reform an early priority of his administration. Shortly after taking office, Governor Little mirrored President Trump's one-in, two-out policy via executive order to begin tackling the buildup of 736 chapters of existing regulations, spanning nearly 8,300 pages.

Over time, Governor Little's approach evolved into "zero-based regulation" (ZBR) – patterned off zero-based budgeting – in which state agencies must review their existing regulations on regular cycles and start with the presumption that the existing regulations are unnecessary and that, when regulation is necessary, the least restrictive alternative should be chosen.

ZBR started auspiciously. The state's Administrative Procedure Act (APA) contained a provision that all regulations expire at the end of the fiscal year unless extended by the legislature. This "kill switch" was activated, establishing a sunset date for all existing regulations on June 30, 2019. All executive branch agencies had to re-promulgate regulations they intended to keep as temporary rules

by this date for them to remain in full force and effect. Alternatively, an agency could choose *not* to re-promulgate a regulation, allowing it to expire by default with no additional action necessary from the agency. This one-time sunset date quickly purged 1,800 pages of regulations – reflecting an approximate 20% cut statewide – and cleared out drawers of obsolete and unenforced provisions, some on the books unchanged since the 1960s.

Contrary to what some may expect, Idaho's executive agencies leaned into this process and embraced regulatory reform. Governor Little set a clear tone for Idaho's regulatory priorities, and agency leaders reinforced this direction throughout their organizations. Regulatory tracking measures were routinely discussed at agency gatherings and embedded in performance reports.

Following the success of this sunset process, Governor Little signed a new executive order to institutionalize the process of regularly reviewing regulations on five-year increments to ensure they do not become stale over time while also ensuring regulations achieve their intended outcomes. Approximately 20% of an agency's regulations are reviewed each year, and agencies repeal and, when *necessary*, replace them prior to their review date. The ZBR executive order paired proven elements of regulatory reform with these cyclical reviews:

1. Regulatory budgets, specifically asking each agency that re-promulgates a rule to target a word count reduction of approximately 20% where possible. This addressed the volume of regulations that naturally accumulates over time, while giving agencies an incentive to avoid new regulations and eliminate old ones.

2. Regulatory analysis, specifically requiring that agencies use a standardized regulatory impact analysis to guide their policy choices toward the least restrictive alternative. This prevents agencies from cutting regulations to just meet their volume targets while leaving the heaviest regulatory burdens in place. The standardized analysis makes the default the least restrictive choice adopted by another jurisdiction, unless the promulgating agency can present credible evidence that Idaho has a unique case that compels more stringent regulation.

3. Independent review, specifically empowering the state's equivalent of the Office of Management and Budget to serve as both a gatekeeper and counselor to ensure proposed agency regulations are in line with expectations of the ZBR executive order. This centralized independent review can screen regulations before they are published in the state's administrative bulletin to ensure both conformity and consistency.

When consistently applied, these elements flip the script on regulations. No longer do agencies have to expend significant effort to eliminate a regulation; rather, regulations are eliminated by default and agencies must instead take effort to keep regulations while fairly justifying them as the least restrictive alternative. As a result, Idaho has seen year-over-year reductions in both regulatory volume and burden in the five years Governor Little has overseen regulatory reform.

III. The Virginia Model

Regulatory modernization efforts in the Commonwealth of Virginia share the same set of goals of those in Idaho: they seek to promote freedom and economic growth by cutting back unnecessary

red tape and reducing burdensome requirements while maintaining important public health and safety protections. But the Virginia approach has many unique features.

The differences are largely a result of each state's unique approach to modernizing regulations. Whereas Idaho has relied primarily on statutory sunsetting and review requirements, Virginia has traditionally used a "periodic review" process. Under Virginia's Administrative Process Act (APA), agencies are required to reexamine each of their regulations on a four-year schedule and decide which regulations to eliminate or amend.

Periodic review helped ensure that Virginia agencies look both forward and backward, but the lack of any enforcement mechanism historically limited the value of the exercise. Periodic reviews often consisted of little more than box-checking, with agencies summarily affirming that they thought about their regulations and decided they were still needed. And agencies often skipped periodic review entirely.

As a result, in 2018 the Virginia General Assembly implemented a pilot program in which two agencies, the Department of Professional and Occupational Regulation (DPOR) and the Department of Criminal Justice Services (DCJS), were tasked with counting all their regulatory requirements and reducing them by 25%. All other executive branch agencies were required to count their regulatory requirements but did not receive a reduction target.

When Governor Glenn Youngkin took office in 2022, he immediately took action to pull together the different regulatory modernization initiatives scattered throughout the statutory code and create an integrated, comprehensive system.

One of the primary initiatives involved building upon and standardizing the 2018 pilot program. In Executive Directive 1 and, later, in Executive Order (EO) 19, Governor Youngkin extended the 25% regulatory requirement reduction to *all* executive branch agencies. EO 19 also created an Office of Regulatory Management (ORM) to oversee the Governor's regulatory modernization work. Shortly after its creation, ORM issued a Regulatory Reduction Guide, which created a standardized approach by which agencies would re-count all their regulatory requirements and measure reductions in pursuit of the 25% target.

EO 19 also brought together and built upon various other existing statutory initiatives. Prior to Governor Youngkin's reforms, the APA and other statutes required agencies to consider the effects of their regulations on certain groups, such as local governments and small businesses. Many rules also underwent a limited cost-benefit analysis known as an "economic impact analysis" (EIA) that was conducted by the state's Department of Planning and Budget (DPB). The EIA considered certain economic implications of proposed regulations, such as whether they affected real estate costs, but did not involve a comprehensive cost-benefit analysis. And the EIA only applied to new regulations rather than periodic reviews of existing regulations.

EO 19, by contrast, requires a full cost-benefit analysis of all new regulations and guidance documents. It also requires agencies to consider regulations' effects on small businesses, families, and local governments. It covers periodic reviews as well as new regulations. And it authorizes ORM to review all regulatory actions and work with agencies to ensure that they conduct proper analysis and consider a full array of regulatory alternatives.

In connection with this process, ORM issued the Regulatory Economic Analysis Guide, which is a state-level equivalent of OMB Circular A-4. It is by far the most comprehensive resource that any state has produced and has been extensively praised by some of the nation's foremost regulatory economic analysis experts.

IV. Lessons Learned

There are many paths to regulatory reform, and there is no single right way of accomplishing it. As Idaho, Virginia, and other jurisdictions demonstrate, there is a menu of options available to regulatory reformers with various advantages and disadvantages. Some may be accomplished solely through executive action; others may require legislative collaboration.

Regardless of which options are chosen, we contend there are three common elements of regulatory reform that are likely necessary if a state wishes to meaningfully combat the inertia of addressing the accumulation of decades worth of regulations.

First, states need to establish a reduction-forcing mechanism. Years of experience shows that passive "retrospective reviews" have proven ineffective because agencies have little incentive to eliminate existing regulations, even when those regulations are known to be unnecessary or unworkable. A forcing mechanism can prompt agencies to act and eliminate obsolete, unnecessary, ineffective, or overly burdensome regulations. Forcing mechanisms can take the form of sunsets (Idaho), clearly articulated reduction targets (Virginia), or one-in, two-out policies like the Trump Administration's policy that forced federal agencies adopting new regulations to simultaneously eliminate old ones.

Second, a clear metric for success must be established. It is critical to define upfront what the goals of a regulation are, to create a metric for determining if those goals are being achieved, and to apply that metric on a periodic basis.

Third, it is important to establish a mechanism for centralized review. At the state level, regulatory authority is often decentralized across dozens of agencies, boards, and commissions. Agencies may lack the big-picture focus to review their own regulations and may fail to see how their individual agency actions contribute to a cumulative, statewide regulatory burden. Some oversight body must exist, and it should be politically accountable (either to the legislature or the executive). Idaho utilized its state OMB equivalent and Virginia created an Office of Regulatory Management to serve in this capacity. Both are empowered by their governors to serve as a gatekeeper to ensure regulatory reform objectives are achieved and to enhance the consistency of regulations across state agencies.

These sorts of reforms should not be politically controversial: helping small business, saving consumers money, and promoting a freer, self-determined society are bipartisan goals. But they will not be easy, since someone always stands to benefit from the status quo, even if it harms society overall. Thus, it is imperative that states construct a regulatory system that effectively leverages these three elements so that eliminating regulations is the default and agencies must expend energy to fairly justify the regulations they intend to keep.

V. What's Next

Justice Louis Brandeis famously described the U.S. states as "laboratories" in which different jurisdictions could test different approaches. Even when Justice Brandeis was writing (1932), the federal government had already taken over many of the functions traditionally performed by states. Since that time, federal power has grown in leaps and bounds, and states have far less room to maneuver in the regulatory space than they once did.

But that may be changing. With endless gridlock at the federal level, many state governments have stepped up and taken a more active role in shaping their regulatory frameworks. Some states, most notably California, have chosen to ratchet up their regulatory protections by layering more and more new restrictions on top of the already very strict federal requirements. Other states, like ours, have sought to streamline regulatory restrictions in the areas they do control, maintaining important public health and safety protections but clearing out unnecessary or overburdensome rules.

These latter efforts have already borne fruit. Idaho's reforms have made it the least regulated state in the nation, with an emphasis on removing occupational licensing barriers that has led to some of the greatest migratory and job creation benefits in published research on the topic. Virginia agencies have already saved citizens of the Commonwealth hundreds of millions of dollars as they work towards the 25% reduction target.

Past studies demonstrate that these types of initiatives work. A study of a British Columbia regulatory reduction initiative similar to that undertaken in Virginia showed a 1% increase in GDP tied to those efforts. Larger studies have shown that excessive regulation both stifles small business creation, leading to increased market concentration, and disproportionately burdens low-income citizens, exacerbating wealth inequality.

Of course, each state is different, and what works in one may not be an option in others. But the Idaho and Virginia experiences show that states can accomplish similar goals using very different approaches. States should look at the full menu of options, considering which of the existing approaches might work and tailoring the rollout to suit their needs.

And we're hopeful that states across the political spectrum will show interest. Regulatory modernization should not be a partisan issue: it reduces costs, grows the economy, levels the playing field for small business, and combats income inequality.

Finally, as these state-level experiments succeed, we also hope that the federal government will eventually follow suit. The Biden Administration's regulatory policy is moving in the wrong direction, but its willingness to revisit longstanding assumptions presents an opportunity to rethink regulatory priorities. When federal regulators get serious about right-sizing regulatory burdens, Idaho and Virginia provide two models of what's possible.