The Jungle of Red Tape and How to Beat It Back

Introduction

Other than "tax increase," few terms rile up Americans more than "red tape." Like a vine or weed that spreads out of control, the idea of red tape conjures up visions of a fast- and ever-growing jungle of rigid, excessive, and bureaucratic rules or regulations that can bring action grinding to a halt. While red tape is common in corporations or other large organizations, it's most often found in government circles. Over the past 50 years, the number of regulations federal government agencies enforce has increased from 400,000 to over one million.[1] And these regulations have consequences: for example, the national average regulatory cost for a new business in its first year is more than $83,000.[2]

But this byzantine maze of regulations is not confined solely to the federal government. In addition to the more than one million federal requirements, businesses, organizations, and individuals must also comply with state regulations. Here in Tennessee, it would take an individual spending 40 hours a week for 11 weeks to read all of Tennessee's 114,000-plus regulations, totaling more than eight million words.[3] In fact, Tennessee's General Assembly has declared state regulations on citizens, businesses, and industries are "increasing at an alarming rate."[4]

These regulations are created through a process called rulemaking. The rulemaking process here is laid out in the Uniform Administrative Procedures Act (UAPA), which is modeled after the federal Administrative Procedure Act. The UAPA covers not only how regulatory bodies can create regulations, but also the process for resolving disputes resulting from the enforcement or interpretation of said rules.

It is important to note that the regulatory agencies that create these rules and regulations have not always existed. While the United States government has been creating regulatory agencies since 1824, they did not become widespread until the Progressive Era. At the federal level, President Woodrow Wilson and other progressive leaders began creating them quickly because in their view, governments must be planned by "experts" because voters and legislators were incapable of such precision.[5]

1. "What is Regulatory Accumulation?" QuantGov. Mercatus Center. 2020. https://www.quantgov.org/regulatory-accumulation/.

2. "2017 NSBA Small Business Regulations Survey." National Small Business Association. January 17, 2017. https://web.archive.org/web/20220121130108/https://www.nsba.biz/wp-content/uploads/2017/01/Regulatory-Survey-2017.pdf.

3. James Broughel and Jonathan Nelson, "A Snapshot of Tennessee Regulations in 2018." Mercatus Center. April 2018. https://www.mercatus.org/system/files/broughel_and_nelson_-_policy_brief_-_a_snapshot_of_tennessee_regulation_in_2018_-_v1.pdf.

4. Tenn. Code Ann. § 4-29-102(a).

5. John Marini and Ken Masugi, Unmasking the Administrative State: The Crisis of American Politics in the Twenty-First Century. New York: Encounter Books. 2019.

It is important to create a regulatory environment that is clear, not burdensome, and where disputes are resolved fairly and quickly. Otherwise, Tennesseans could fall victim to an onerous administrative state whether they are trying to obtain occupational licenses or starting innovative businesses. Take the story of Tennessee entrepreneur Adam Jackson, for example:

Adam Jackson is a highly trained former soldier who helped provide electronic security for a U.S. embassy and installed systems on overseas military bases. After retiring from the military, Adam and his partners developed groundbreaking facial-recognition software that can instantly scan the face of someone appearing on security cameras and search for matches in databases of known offenders to strengthen the defenses of the most vulnerable locations, such schools or shelters for abused women and children.

Standing in Jackson's way was Tennessee's Alarm Systems Contractors Board, which told him he could not distribute his product until he obtained a license to install alarm systems—even though his product is nothing like an alarm. What Jackson made is simply software that enhances the capability of existing systems.

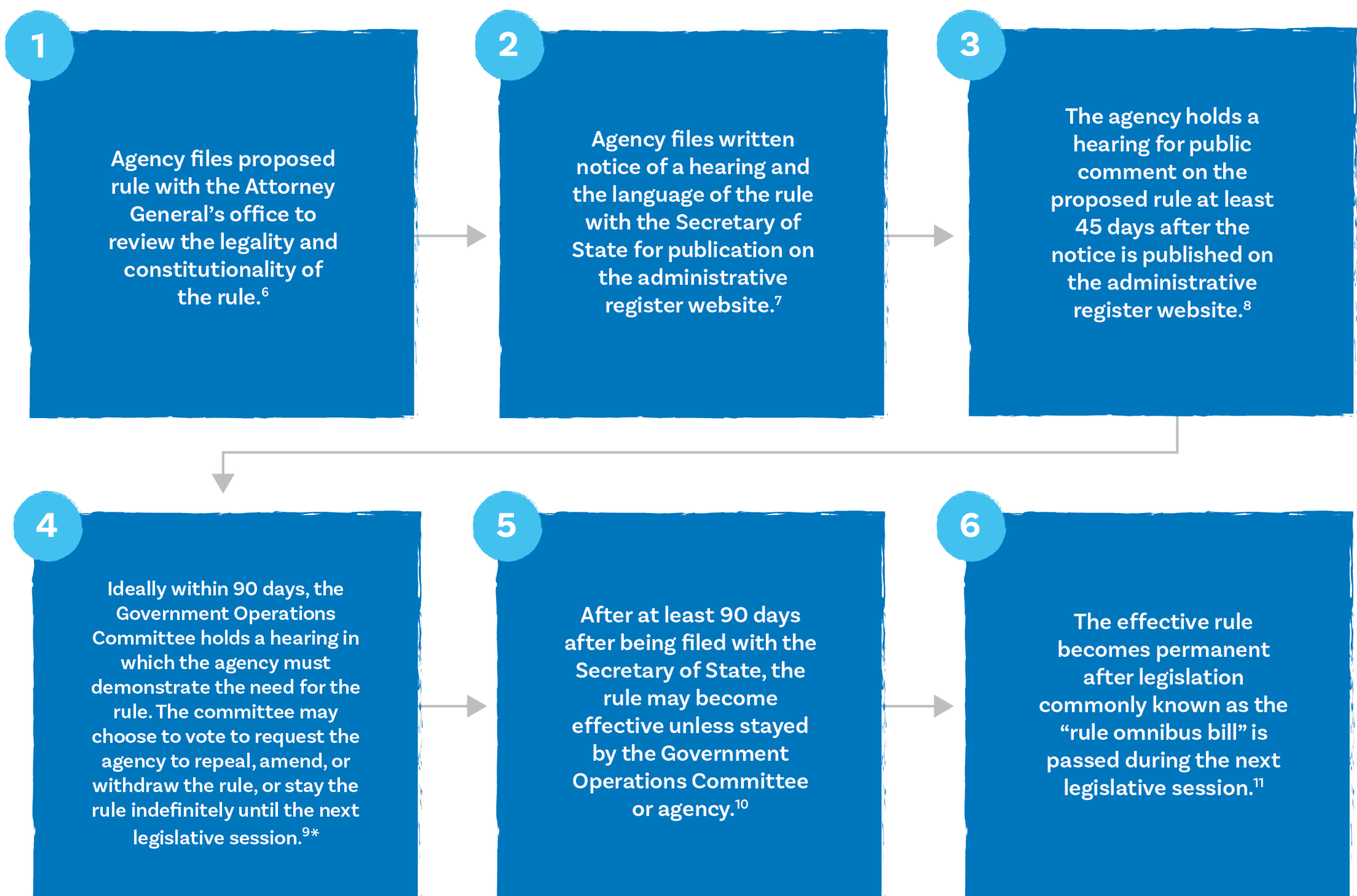
After learning of Tennessee's restrictions, Jackson appeared before the alarm board to explain how his system worked even though he does not install alarms. To his surprise, the board told him he was in a "gray area" and ought to get a license. That ruling essentially shut Jackson down because at the time, the statute required an alarm company to have either a board-approved manager with a bachelor's degree in an engineering field and two years of experience in the alarm industry, or to have a manager with five years of experience in the alarm industry. While Jackson would ultimately prevail over the board's ruling eight months later, in the interim his seed funding dried up and he was unable to launch his business.

In recent years, Tennessee policymakers have sought to place some guardrails on rules and regulations to protect small businesses and everyday citizens. However, for those looking not just to curtail the growth, but reverse the administrative state to protect Tennesseans and create an environment that fosters economic growth and innovation, a host of potential reforms are available to both implement new protections and enhance the tools already in law. By taking a "Count, Cap, and Cut" approach, providing additional regulatory flexibility, and further shifting the burden of proof to the government, Tennessee can not only contain, but cut down the growing jungle of red tape and reduce the impact of bureaucracy in Tennessee.

Count, Cap, and Cut

Count

While the state may have thousands of rules and regulations on the books, that does not mean the process of creating a regulation is quick or easy. Generally, when a Tennessee agency wishes to promulgate, or create a rule, it goes through the following steps:



6. Tenn. Code Ann. § 4-5-211.

7. Tenn. Code Ann. § 4-5-203(a)(1)(A).

8. Tenn. Code Ann. § 4-5-203(b).

9. Tenn. Code Ann. § 4-5-226(c);
Tenn. Code Ann. § 4-5-226(j)(1);
Tenn. Code Ann. § 4-5-215(b).

**While Tenn. Code Ann. § 4-5-226(j)(1) also grants authority to the committee to "veto" a rule and allow it to expire, state Attorney General Opinion has declared that portion unconstitutional.
https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2001/op01-086.pdf.

10. Tenn. Code Ann. § 4-5-207.

11. Tenn. Code Ann. § 4-5-226(a).

The process for creating a regulation is arduous, for good reason. However, once approved, rules can stay on the books forever with no review or sunset—even though the existence of every agency is up for sunset reviews every few years, as required by the Government Entity Review Law.[12] This lack of review and accounting is what has allowed the state's regulations to accumulate to more than 100,000 today. Fortunately, Tennessee will soon have its first comprehensive review of all rules and regulations. Public Chapter 328, passed during the 112th General Assembly, requires all departments to provide the Government Operations Committee a report by December 1, 2023, and every eight years thereafter, that covers:

1. **The history of all the department's rules, including its creation date and when the rule was last amended;**
2. **A recommendation for each rule to either:**
    a. Be amended or repealed;
    b. Be subjected to further review; or
    c. Continue without amendment; and
3. **Show how the rule either does or does not comply with state and federal law, case law, or any other standard that impacts it.[13]**

Essentially, this pending report signals the first "count" of regulatory burdens within the state. It is difficult to undertake broad regulatory reforms without a holistic approach to all regulations the state currently enforces.

Public Chapter 328 can serve as model for the first step of a "Count, Cap, and Cut" approach by producing a base inventory of red tape. It also could be applied to other areas besides promulgated rules, such as:

Count the General Burdens	Count Favoritism Protections
Permitting systems	Monopoly protections
Government fees	Subsidy/loan guarantees
Paperwork burdens	Protections from competition
Labor-market restrictions	Noncompetitive contracts
Environmental regulations and requirements	Other "captured" regulations

12. Tenn. Code Ann. § 4-29-101-124.

13. Tennessee 112th General Assembly. Public Chapter No. 328. https://publications.tnsosfiles.com/acts/112/pub/pc0328.pdf.

Once departments provide the reports required by Public Chapter 328, the legislature should look to cap the burden of the administrative state on Tennesseans. Currently, the Regulatory Flexibility Act requires agencies looking to promulgate rules to conduct a regulatory flexibility analysis to determine if a proposed rule will impact small businesses. If the agency determines that the proposed rule does impact small business,[14] it must include an economic impact statement to estimate the regulatory and fiscal costs of the rule, as well as state whether a less-restrictive means of regulation exists.[15] However, a conflict of interest arises when an agency has to determine the impact of its own proposed rule. In fact, Beacon calculated that of the 899 rule filings since 2018, in only 189 (21 percent) did agencies admit that the proposed rules might have some impact on small businesses. Compare this to legislation introduced in the General Assembly, where the Fiscal Review Committee conducts an independent analysis of the proposed impact of legislation—not just on the state's finances, but on commerce for some legislation.[16] To eliminate any conflict of interest, an independent review of a proposed rule's impact on small businesses should be conducted.

Recommendation

The General Assembly should require an independent economic analysis of the impact of proposed rules on small businesses to strengthen the Regulatory Flexibility Act.

In addition, a "look back" on previously created rules would provide an opportunity to assess their economic impact and compliance costs more accurately. In Wisconsin, the Joint Committee for Review of Administrative Rules (the state's equivalent of Tennessee's Government Operations Committee) can direct an agency to conduct a retrospective economic analysis on already-approved rules, including information gleaned from consulting with businesses and individuals.[17] This review can provide a more accurate assessment of a rule's burden and produce better analyses in the future.

Recommendation

The General Assembly should allow the Government Operations Committee to direct agencies to conduct a retrospective review of existing rules.

Additionally, when the Government Operations Committee serves as the standing committee for the creation of new entities or agencies that will be promulgating rules, state law should be changed to require Fiscal Review to conduct an analysis of a proposed legislation's impact on commerce as is currently required for all bills referred to the Commerce Committee.

Recommendation

The General Assembly should amend TCA 3-2-107(a)(2)(B)(ii) to require Fiscal Review to calculate the impact of proposed legislation on commerce when the Government Operations Committee serves as a standing committee.

14. Tenn. Code Ann. § 4-5-402.

15. Tenn. Code Ann. § 4-5-403.

16. Tenn. Code Ann. § 3-2-107(a)(2)(B).

17. Wis. Stat. § 227.138.

The previous recommendations serve as “soft caps” on the growth of the state’s regulatory burden by acting as a check on the approval of new regulations and statutes without first understanding their costs. For stronger protections against regulatory accumulation, state policymakers should explore “hard caps.” The first example is an idea popularized by the proposed federal Regulations from the Executive in Need of Scrutiny Act, or “REINS” Act. The REINS Act would require Congressional approval for regulations with a $100 million impact on the economy.[18] While some states have introduced similar proposals, Wisconsin was the first to pass a state-level REINS Act in 2017, requiring approval from the legislature and governor for regulations with an impact of over $10 million in a two-year time period.[19] One interesting note about Wisconsin’s REINS Act is that legislators anticipated the conflict of interest of agencies calculating the impact of their proposed rules by allowing the chairman of the Joint Committee for Review of Administrative Rules to request an independent economic impact analysis of an agency’s rules and internal review. If the independent analyst concludes that a regulation’s implementation or compliance costs vary from the agency’s estimate by 15 percent or more, or if they disagree with the agency’s determination that there will be no costs, the agency must pay for the costs of their independent review.[20]

It is important to note that a REINS Act does not impede an agency’s ability to implement minor rules but is narrowly tailored to increase legislative oversight of major regulations. In Florida, which passed a regulatory reform law with some REINS-like provisions in 2010, legislative review of only 36 of the state’s 8,535 rules took place in the first four years of the law’s implementation.[21]

While a REINS Act-style bill was introduced in Tennessee in both the 110th and 111th General Assembly that required legislative authorization for rules or regulations that cost over $3 million over a three-year period, the bills ultimately were not passed.[22] The General Assembly should reconsider a REINS Act to provide additional legislative oversight of onerous regulations. Additionally, a REINS Act would incentivize policymakers to reconsider statutes that serve as the impetus for those proposed rules that trigger the REINS Act provisions.

18. “Regulations from the Executive in Need of Scrutiny Act of 2021.” S.68. 117th Cong. 2021. https://www.congress.gov/bill/117th-congress/senate-bill/68/text?q=%7B%22search%22%3A%5B%22S.68%22%5D%7D&r=1&s=3.

19. Bonner Cohen, “Wisconsin Legislature Passes First State REINS Act.” The Heartland Institute. August 8, 2017. https://www.heartland.org/news-opinion/news/wisconsin-legislature-passes-first-state-reins-act.

20. Wis. Stat. § 227.137(4m)(b).

21. Eric H. Miller and Donald J. Rubottom, “Legislative Rule Ratification: Lessons from the First Four Years.” Florida Bar Journal, Volume 89, No. 2. February 2015. https://www.floridabar.org/news/tfb-journal/?durl=%2FDIVCOM%2FJN%2Fjnjournal01.nsf%2FArticles%2F85BA6ABCD1D3571185257DD400580751.

22. Tennessee 110th General Assembly. House Bill 1739. https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB1739&ga=110; Tennessee 111th General Assembly. House Bill 89. https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0089&GA=111.

An additional policy reform to cap the growth of regulations in Tennessee is often referred to as a "one-in-one-out" requirement, which requires that for every rule agencies propose, they must identify another rule (or some multiple) to eliminate. A related concept is a "pay-go" cap, which requires the elimination of old regulations when new ones are adopted, based on their compliance burden.[23]

For the best example of how reducing regulatory burdens can unleash innovators and small businesses, look to our neighbors in the north: After a poor economic decade in the 1990s, the Canadian province of British Columbia decided to try something drastic. Starting in 2001, for every new proposed rule, regulators had to repeal at least one regulation—with the goal of reducing regulatory requirements by one-third within three years. The province exceeded that goal, cutting regulations by roughly half.[24] The result was that the province's economy transformed from lagging Canada's as a whole to its fastest growing province since 2002.[25]

While the idea of a "one-in-one-out" cap on regulations was introduced in the 110th General Assembly, the bill gained little traction.[26] Policymakers should give some kind of "one-in-one-out" or "pay-go" arrangement a second consideration to incentivize regulators to think twice about proposing additional or unnecessary rules and to serve as a hard cap on the growth of regulatory accumulation. One important note is that a "pay-go" cap would require a more robust economic analysis of each proposed rule (and existing rules) as discussed earlier, making the "one-in-one-out" a more straight-forward approach. Even if an exemption is given for rules promulgated for newly enacted statutes, a modified cap of either style would ensure existing statutory authority is not continually used to promulgate an ever-growing number of rules. One considerable advantage of either of these methods over other regulatory reforms is that hard caps make it easy to track whether the policy is effective.

23. James Broughel, "Regulatory Reform 101: A Guide for the States." Mercatus Center. December 2016. https://www.mercatus.org/system/files/broughel-regulatory-reform-101-states-mop-v1.pdf.

24. Patrick McLaughlin, "Policy Spotlight Regulatory Accumulation: The Problem and Solutions." Mercatus Center. September 2017. https://www.mercatus.org/system/files/mclaughlin_-_policy_spotlight_-_regulatory_accumulation_-_v1.pdf.

25. James Broughel, "Can the United States Replicate the British Columbia Growth Model?" Mercatus Center. May 25, 2017. https://www.mercatus.org/publications/urban-economics/can-united-states-replicate-british-columbia-growth-model.

26. Tennessee 110th General Assembly. House Bill 1737. https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1737&GA=110.

Cut

Ultimately, reform-minded policymakers should not be content simply with capping the state's regulatory burden but cutting it. Currently, few tools allow them to quickly do so. Arguably, it is easier for legislators to eliminate entire agencies under the Government Entity Review Law than eliminate old and outdated regulations. As noted previously, the legislature can make a proposed rule expire or ask the agency to repeal, amend, or withdraw it—but these actions are limited to new rules. While the legislature cannot easily review an existing rule, the UAPA does make it easier for agencies to cut red tape by allowing them to skip a public hearing when repealing an existing rule, or to eliminate or reduce fees of existing rules.[27] Additionally, as a result of the U.S. Supreme Court case *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, department commissioners can remand a rule proposed by a regulatory board if the commissioner believes it is inconsistent with state policy or law and could unreasonably restrain trade.[28] However, according to recent open records requests to the main departments with attached regulatory boards (Commerce & Insurance, Health, and Environment & Conservation), this authority has never been used.

One reform to cut regulations on a systematic level would be to require rules, in addition to their regulatory agencies, be subject to sunset requirements. The previously mentioned Public Chapter 328 that requires each department or agency to write a report on its entire spectrum of rules and its recommendations concerning whether a rule should be repealed could be expanded either to say rules are automatically sunset at the next review cycle in eight years or when the promulgating entity itself is up for sunset review. While the results of sunsetting entire agencies are mixed, sunsetting rules and regulations would face fewer political challenges.[29] This would give lawmakers authority and regular opportunities to enact wholesale regulatory reform, an otherwise difficult task. Lawmakers could look to Idaho as an example; Idaho must reauthorize its entire regulatory code each year. When Idaho allowed its entire regulatory code to sunset in 2019, state lawmakers had to reauthorize each rule the following session.[30] As a result of the reauthorization process and several executive orders from Governor Brad Little, 95 percent of the state's regulations were either cut or simplified.[31]

Earlier this year, Ohio's legislature passed a law requiring state agencies to reduce their regulatory requirements by 30 percent.[32] New rules and regulations are already subject to a "sunset-light" in that they expire the following year unless passed in the rule omnibus bill. A true sunset would just make rules and regulations subject to a second look and require their justification for renewal.

By following a "count, cap, and cut" approach, state lawmakers can take a holistic approach to identifying regulatory accumulation, reducing the impact of onerous regulations, and preventing future growth of the administrative state.

27. Tenn. Code Ann. § 4-5-202(a)(2)(B).

28. Tennessee 110th General Assembly. Public Chapter No. 230. https://publications.tnsosfiles.com/acts/110/pub/pc0230.pdf.

29. Brian Baugus and Feler Bose, "Sunsetting Government Waste." U.S. News. September 1, 2015. https://www.usnews.com/opinion/economic-intelligence/2015/09/01/sunset-clauses-leads-to-political-power-plays-but-some-good-government.

30. Keith Ridler, "Idaho governor has unfettered chance to cut state rules." Associated Press. April 17, 2019. https://idahonews.com/news/local/idaho-governor-has-unfettered-chance-to-cut-state-rules.

31. "Governor Little signs two new executive orders reducing regulatory burdens on Idahoans." Office of the Governor. January 31, 2019. https://gov.idaho.gov/pressrelease/governor-little-signs-two-new-executive-orders-reducing-regulatory-burdens-on-idahoans/.

32. Gretchen Baldau and Jakob Haws, "States Removing Regulatory Roadblocks." American Legislative Exchange Council. August 18, 2022. https://alec.org/article/states-removing-regulatory-roadblocks/.

Regulatory Clarity & Flexibility: Letters and Sandboxes

While the UAPA creates processes and procedures to protect Tennesseans and restrict unilateral actions by regulatory agencies, regulators do need tools to create a more responsive and flexible environment. For example, in an era of ever-increasing technological change and innovation, the rulemaking process can be inadequate and inefficient to address unique situations, changes in the market, and regulatory ambiguity.

To solve this problem, state regulators should utilize no-action letters (NALs) and interpretive letters. NALs are created when an agency declares in writing that it will not pursue action against the petitioner if he or she engages in some course of action. NALs provide clarity around the legality of certain actions or exemptions when strict enforcement may not fit the spirit of the law or is impractical. Similarly, interpretive letters allow regulators to provide clarity to individuals or businesses wondering if an activity is subject to a rule or regulation. For example, federal agencies like the Securities and Exchange Commission have used these tools to provide businesses with clarity and exemptions regarding certain regulations under specific circumstances, as with digital assets like cryptocurrencies.[33] Paul Watkins, the former director of the Consumer Financial Protection Bureau's Office of Innovation, states that a strong NAL and interpretive letter program has five key elements:[34]

33. "Division of Corporation Finance No-Action, Interpretive and Exemptive Letters." U.S. Securities and Exchange Commission. https://www.sec.gov/corpfin/corpfin-no-action-letters;
Eric Sibbitt, Robert Plesnarski, and Sydney Ryan, "O'Melvney & Myers Discusses the SEC's Most Recent No-Action Letter on Digital Assists." The Columbia Law School Blue Sky Blog. December 7, 2020. https://clsbluesky.law.columbia.edu/2020/12/07/omelveny-myers-discusses-the-secs-most-recent-no-action-letter-on-digital-assets/.

34. Paul Watkins and Chris Beckman, "A Network of Innovative States." Patomak Global Partners. https://ciceroinstitute.org/wp-content/uploads/2021/12/Network-of-Innovative-States-12.16.21.pdf.

Currently in Tennessee, several departments do provide tools that serve as quasi-interpretive letters, such as the Department of Financial Institutions and Department of Revenue.[35] However, they are not necessarily specific to an individual's or business' situation. While the Department of Revenue does publish tax rulings, they are expressly not considered general guidance or policy.[36]

However, the UAPA provides agencies the power to issue declaratory orders to determine the "validity or applicability of a statute, rule or order within the primary jurisdiction of the agency."[37] While declaratory orders are available to any agency (universality) and are posted on the Secretary of State's website (transparency), the process can be improved.

- **First, declaratory orders are essentially contested case hearings and mirror legal proceedings, with many petitioners for declaratory orders retaining legal representation. Ideally, NALs and interpretive letters provide a quick and low barrier to regulatory clarity.**

- **Second, while they are publicly available online, declaratory orders are listed amongst all publications on the Secretary of State's website and provide little detail without digging through each application.[38] Contrast this with the SEC, which lists its NALs and interpretive letters by regulation, alphabetical, and chronological order.[39] An entrepreneur with a new innovative business model or an out-of-state business looking to expand that is concerned about compliance in different jurisdictions would be required to read all an agency's postings to find any relevant material, an onerous and burdensome process.**

- **Additionally, while each agency must create by rule the form and procedures for requesting a declaratory order (consistency), requiring petitioners to undergo a hearing and present before administrative law judges is not the most streamlined procedure.**

While declaratory orders do technically meet the first three requirements of a robust NAL and interpretive letter process, albeit not well, they do not meet the other two requirements. Declaratory orders should expressly provide a good faith defense for individuals and businesses seeking to act within a similar scope of a third party who received a declaratory order. Additionally, agencies should, as much as possible, seek to proactively accept other states' NALs and interpretive letters to simplify the patchwork of regulations expanding businesses face. Making these changes would strengthen the process and provide additional resources for regulatory flexibility and clarity. However, the strongest aspect of Tennessee's declaratory order process is that, if an agency refuses to issue an order or petitioners receive a denial, the action can be appealed to Davidson County Chancery Court.[40]

Recommendation

State lawmakers should reform the declaratory orders process to make them more streamlined, generally applicable beyond the scope of the original petitioner, and create a presumption of reciprocity with other states. Additionally, agencies should strive to make their programs more visible and easily navigable.

35. "Bulletins/Memos." Tennessee Department of Financial Institutions. https://www.tn.gov/tdfi/mortgage-consumer-lending/mort-lending-bulletins.html; "Important Notices." Tennessee Department of Revenue. https://www.tn.gov/content/tn/revenue/tax-resources/legal-resources/important-notices.html.

36. "Tax Rulings." Tennessee Department of Revenue. https://www.tn.gov/revenue/tax-resources/legal-resources/tax-rulings.html.

37. Tenn. Code Ann. § 4-5-223(a).

38. "Announcements." Tennessee Department of State Division of Publications. https://tnsos.org/rules/Announcements.php.

39. "Division of Corporation Finance No-Action, Interpretive and Exemptive Letters." U.S. Securities and Exchange Commission. https://www.sec.gov/corpfin/corpfin-no-action-letters.

40. Tenn. Code Ann. § 4-5-223(a).

State lawmakers should also look to the newest policy innovation to provide greater regulatory flexibility. Increasingly popular and widespread, regulatory sandboxes make it easier for entrepreneurs to start and grow their companies and create jobs by fast-tracking new businesses through bureaucratic red tape and giving them regulatory flexibility. Often through working with specialized regulators, a regulatory sandbox is a program set up to assist innovative entrepreneurs and small business owners as they test and launch new technologies and products by temporarily removing archaic regulations that have nothing to do with health and safety and that make it difficult or impossible for those entrepreneurs to get their products or businesses off the ground.[41] A regulatory sandbox not only offers regulatory relief, flexibility, and clarity to an innovative company, but can also protect them from getting caught in bureaucratic delay. Studies have shown that companies that participate in a regulatory sandbox program are more likely to obtain investment funding, bring products and services to market quickly, and stay in business.[42] While there is no silver-bullet policy to create a regulatory environment that fosters a climate of innovation, the strongest first step Tennessee lawmakers could take would be to create a regulatory sandbox.

The General Assembly should create a universal regulatory sandbox to provide a tool for regulators to work with innovative companies to create additional flexibility allowing entrepreneurs to better bring innovative products and services to market.

41. Ronald Shultis, "Back to the Future Getting Tennessee in the Game of Today's Innovation Economy." Beacon Center of Tennessee. November 2, 2021. https://www.beacontn.org/wp-content/uploads/2021/11/BCN_InnovationReport_Proof2-1.pdf.

42. Ibid.

Shifting the Burden Where it Belongs

The final layer of comprehensive regulatory reform would be to shift the burden of proof for the necessity of regulations more onto regulators. That would create a check and higher standard to expand or create new rules and regulations and make it easier for individuals and businesses to challenge them.

Tennessee has already taken one giant step in this regard by ending judicial deference. A basic principle of our judicial system is that both parties in court are on equal footing. However, historically courts have been required to defer to the executive branch when it is prosecuting or defending its own actions. The two most common and pervasive doctrines are Chevron and Auer deference. Chevron requires courts to accept an agency's interpretations of ambiguous statutes, and Auer requires courts to defer to an agency's interpretation of its own regulations.[43] In 2018, Arizona became the first state to eliminate judicial deference,[44] and in 2019, the Tennessee General Assembly passed a resolution urging state and federal courts to refrain from applying it.[45] Just a few years later, the General Assembly passed legislation that effectively ends both Chevron and Auer deference in the Volunteer State.[46]

While eliminating deference puts individuals and agencies on equal footing, more should be done to place the burden on administrative bureaucracies. The Tennessee Supreme Court has written that the right to earn a living is exactly that: a fundamental constitutional right.[47] If we are to treat it as such, the burden to prove the health and safety rationale behind regulations should rest on the government's shoulders. One way to achieve this would be to expand the scope of the state's existing Right to Earn a Living Act. For example, lawmakers could require licensing boards to explain upfront why their rules and regulations are necessary to protect public health and safety. Additionally, if someone challenges a licensing law in court, the burden should shift to the government to prove that the law in question is necessary to protect consumers' health and safety.

Recommendation:

Lawmakers should expand the scope of the existing Right to Earn a Living Act to require agencies to state the health and safety rationale for rules and regulations. Additionally, if someone challenges a licensing law in court, the burden should shift to the government to prove that the law in question is necessary to protect consumers' health and safety.

43. Jon Riches and Timothy Sandefur, "Confronting the Administrative State." Goldwater Institute. April 29, 2020. https://www.goldwaterinstitute.org/wp-content/uploads/2020/04/Confronting-the-Administrative-State_web.pdf.

44. Ibid.

45. Tennessee 111th General Assembly. House Joint Resolution 140. https://publications.tnsosfiles.com/acts/111/resolutions/hjr0140.pdf.

46. Tennessee 112th General Assembly. Public Chapter No. 883. https://publications.tnsosfiles.com/acts/112/pub/pc0883.pdf.

47. See Livesay v. Tennessee Bd. of Exam'rs in Watchmaking, 322 S.W.2d 209, 213 (Tenn. 1959) (calling it a "fundamental" right); Harbison v. Knoxville Iron Co., 53 S.W. 955, 957 (Tenn. 1899) (the liberty protects "the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession.").

This requirement would also prevent "regulatory creep," through which bureaucracies seek to expand their scope. Take, for example, the story of Martha Stowe and Laurie Wheeler, Tennesseans who were threatened with criminal penalties by the state veterinary board for massaging horses.

When an abused horse was found abandoned in a field near Franklin, Tennessee, Laurie Wheeler agreed to adopt him. She took him to Martha Stowe's Blazer Farm for boarding and saw firsthand the healing effects massage therapy had on her horse.

Laurie decided she wanted to learn this technique as well and began completing certification classes to work on horses with Martha. It wasn't long before her friends were asking her to massage their horses, too. Laurie made the difficult decision to go back to school, and she and her husband scraped up the money to pay for her education. After a grueling schedule and more than eight months of intensive work, Laurie graduated from massage school and sent in her licensing application to the state. Shockingly, instead of receiving her massage therapy license, Laurie received a cease-and-desist letter from—of all agencies—the state Board of Veterinary Medical Examiners. The letter informed her that animal massage was considered veterinary medicine, and she was illegally practicing it.

Martha Stowe also received this letter. Both women were dumbstruck. It turns out that a couple of years ago, the veterinary board quietly passed a regulation that defined "animal massage" as a form of veterinary medicine, despite the absence of consumer complaints. Now the veterinary board has used this little-known regulation to shut down these hard-working women's businesses. Luckily, state lawmakers halted the rule during the 2017 legislative session and permanently repealed the rule by law in 2018.[48] If the veterinary board had been required to provide the health and safety justification for requiring a veterinary degree in order to massage animals, it likely never would have been implemented.

Similarly, to the Right to Earn a Living Act, another way to shift the burden would be to codify new innovators and technologies as "innocent until proven guilty." That would switch the burden of proof to opponents of innovations who are looking to regulate or expand their scope as was the case for the Alarm board and Adam Jackson or Laurie Wheeler and Martha Stowe and the Veterinary Board for example. Adam Thierer of the Mercatus Center has called this idea the "Innovator's Presumption" and would require those who oppose a new technology or service have the burden to demonstrate that such proposal is inconsistent with the public interest.[49] Such a default position would ensure that agencies do not expand beyond their existing authority to regulate new technologies and innovations, a decision best left to policymakers.

Recommendation:

Lawmakers should create a stautory "Innovator's Presumption" where those looking to regulate or oppose a new technology or service bears the burden of proof that the innovation is inconsistent with the public good and in need of regulation.

48. Tennessee 110th General Assembly. Public Chapter No. 679. https://publications.tnsosfiles.com/acts/110/pub/pc0679.pdf.

49. Tenn. Code Ann. § 4-5-502(c)(2)(D).

If expanding the existing Right to Earn a Living Act or creating an "Innovator's Presumption" proves too politically difficult, additional opportunities exist to flip the burden to regulators by strengthening existing limitations within the UAPA. As mentioned previously, department commissioners can remand a rule proposed by a regulatory board if the commissioner believes it is inconsistent with a "clearly articulated state policy." While this authority has never been used by the four departments with the most regulatory boards attached to them, one possible reason is because what is "clearly articulated state policy" is not defined, providing no guidance when commissioners or department heads should exercise their duty to remand a rule for restraining trade. State lawmakers should define state policy as rules that "minimize the impact on private industry and citizens, are narrowly tailored to a public health or safety component and are executed in the least restrictive way possible." A least restrictive means test is already located within the Right to Earn a Living Act, and could be used to define state policy.[50]

Similarly, as part of the Government Entity Review Law, when legislation proposes to create a new department, board, agency, etc., for the purposes of regulating an occupation or professional group, the sponsor of the legislation is supposed to shoulder the burden of presenting the following information to the Government Operations Committee:

1. **That the unregulated practice of the occupation or profession may be hazardous to the public health, safety, or welfare;**
2. **The approximate number of people who would be regulated and the number of persons who are likely to utilize the service of the occupation or profession;**
3. **That the occupational or professional group has an established code of ethics, a voluntary certification program, or other measures to ensure a base quality of service;**
4. **That other states have regulatory provisions similar to the one proposed;**
5. **How the public will benefit from regulation of the occupation or profession;**
6. **How the occupation or profession will be regulated, including qualifications and disciplinary procedures to be applied to practitioners;**
7. **The purpose of the proposed regulation and whether there has been any public support for licensure of the profession or occupation;**
8. **That no other licensing board regulates similar or parallel functions;**
9. **That the educational requirements for licensure, if any, are fully justified; and**
10. **Any other information the committee considers relevant to the proposed regulatory plan.[51]**

However, as with the issue of "clearly articulated state policy," this test is rarely used and some of the requirements are vague. By clearly and narrowly defining "public health, safety, or welfare" would make this existing statutory tool to prevent regulatory growth and accumulation stronger and more useful.

Recommendation

Existing statutes that provide a check on regulations that restrain trade or unnecessarily grow the size of the administrative state with additional boards and agencies should be given more specific criteria to better assess if proposed rules or statutes satisfy existing law.

Too often reforms are short-lived. Just as when someone goes on a fad diet to lose weight but soon gains it back due to a lack of permanent changes, if lawmakers focus on solely cutting red tape, the number of onerous regulations will return to normal or even worsen in due time. Policymakers should be sure to include mechanisms that prevent onerous and arbitrary rules and regulations from being proposed in the first place by placing the burden of proof of a regulation's necessity on the government.

50. Tenn. Code Ann. § 4-29-118(b)(3).

51. Ibid.

Conclusion

By the General Assembly's own admission, "state regulation of its citizens, businesses and industries is increasing at an alarming rate." With more than 114,000 state regulations, individuals and businesses can easily be ensnared by the vines of an ever-expanding administrative state's red tape. These regulations are created through the state's UAPA, which sets in place the process for creating, implementing, and enforcing regulations. While in recent years lawmakers have created processes and checks within the UAPA to slow the growth of rules and regulations, many of these tools are virtually toothless, providing little pushback. If Tennessee lawmakers wish to engage in broad regulatory reform, they will be rewarded. The example of British Columbia shows that while regulatory reform is unlikely to grab headlines, it can transform economies in just a few short years.

A holistic regulatory reform agenda will include many layers of reform. First, make it easier to "count" the number and cost of current regulations. From there, state lawmakers should seek to "cap" either the total number or cost of the regulations. Ideally, this cap would be lower than the current total, forcing a strategic review of all regulations and "cutting" those that are too onerous or outdated.

From there, lawmakers should seek to provide additional tools to regulators to provide clarity and flexibility. When all you have is a hammer, everything looks like a nail. NALs, interpretive letters, and regulatory sandboxes provide additional tools to regulators to provide the clarity and flexibility people need, especially businesses in a highly innovative world.

Finally, state lawmakers should expand upon existing reforms and place the burden of proving the necessity of rules and regulations on government agencies wherever possible. By doing so, lawmakers can ensure that not only is the number of regulations ideal, but that they are specific and narrowly tailored to fulfill the legitimate purpose of protecting public health and safety. With this three-tiered approach, lawmakers can beat back the jungle of red tape, permanently reform and reduce the administrative state, and unleash prosperity for Tennesseans like never before.

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