

2019

Regulatory Reform at the State Level: A Guide to Cutting Red Tape for Governors and Executive Branch Officials

Justin D. Smith

Follow this and additional works at: <https://scholarship.law.missouri.edu/betr>



Part of the [Law Commons](#)

Recommended Citation

Justin D. Smith, *Regulatory Reform at the State Level: A Guide to Cutting Red Tape for Governors and Executive Branch Officials*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 276 (2019).

Available at: <https://scholarship.law.missouri.edu/betr/vol3/iss2/8>

This Conference Proceeding is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in The Business, Entrepreneurship & Tax Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Regulatory Reform at the State Level: A Guide to Cutting Red Tape for Governors and Executive Branch Officials

*Justin D. Smith**

ABSTRACT

This article provides recommendations for governors and other executive branch officials to consider when implementing regulatory reform. Studies have shown that regulatory reform is needed because of the substantial impact on the economy, consumers, and businesses. Recent technological advances have allowed regulations to be quantified by a metric known as regulatory restrictions, which counts uses of “shall,” “must,” “may not,” “prohibited,” and “required.” Quantifying regulatory restrictions allows for comparison of the regulatory scope between states. State-level regulatory reform directed by governors has primarily occurred in three waves following elections in 1994, 2010, and 2016. These reforms have achieved significant results by reducing the number of regulations and saving money that otherwise would have been spent on regulatory compliance.

In 2017, Missouri Governor Eric Greitens ordered a comprehensive review of all state regulations. In less than one year, Missouri’s review generated thousands more public comments than any comparable review and resulted in the reduction of one out of every five regulatory restrictions. Examples are provided of regulatory changes that resulted from the review. Based on Missouri’s experience, recommendations are provided for future regulatory reform efforts: make reform a priority; empower a strong team; set goals; track progress; provide instruction on regulatory issues to address; communicate; and reach out to other states and experts.

* Justin D. Smith served as deputy counsel to Missouri Governor Eric Greitens. In the Governor’s Office, Mr. Smith led Missouri’s “No MO Red Tape” initiative, an effort to improve and streamline Missouri’s Code of State Regulations. All views expressed here are the author’s own based on independent research and opinions, and do not necessarily represent the views of any Missouri state entity or official.

I. INTRODUCTION

Regulatory reform is a buzzword for many elected officials. Every president since Gerald Ford has implemented some type of regulatory reform at the federal level.¹ Most of the political conversation, lawsuits, and academic studies focus on federal regulatory reform.

Regulatory reform at the state level does not receive the same amount of attention, but it is just as important. State regulations on top of federal regulations add more requirements and costs for regulated entities. Differing standards between states also may greatly increase compliance costs for businesses operating or selling products in multiple states.²

States are the “laboratories of democracy,” and regulatory reform is no different. Reforms at the state level take many shapes, such as who is involved in approving proposed regulations (e.g., legislative oversight committees), what information must be studied and disclosed at the time of the proposed regulation (e.g., cost-benefit analysis), and whether existing regulations are impacted when new regulations are proposed (e.g., two-in, one-out policies or regulatory budgets). Reforms may be implemented by the executive branch, the legislative branch, or independent boards or commissions nominated by the executive or legislative branches.

This article addresses state regulatory reform efforts implemented by governors. Part II examines the burden that regulations have on the economy and how they have grown since the 1970s. Part III discusses governor regulatory reform efforts after the 1994, 2010, and 2016 elections, as well as results reported by the states. Part IV provides a case study of the 2017-2018 Missouri regulatory reform effort initiated by Governor Eric Greitens and completed by Governor Michael Parson. Finally, Part V provides recommendations to governors considering a regulatory reform effort.

1. Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974); Exec. Order 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978); Exec. Order 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Clyde Wayne Crews Jr., *Here's What Happened the Last Time We Tried Donald Trump's Moratorium on Regulations*, FORBES (Aug. 8, 2016), <https://www.forbes.com/sites/waynecrews/2016/08/08/heres-what-happened-the-last-time-we-tried-donald-trumps-moratorium-on-regulations/#711e666b4073>; Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002); Exec. Order 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007); Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Exec. Order 13777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

2. See Anastasia Boden, et al., *Managing the Regulatory Thicket: Cumulative Burdens of State and Local Regulation*, FEDERALIST SOC'Y: REGULATORY TRANSPARENCY PROJECT, (January 14, 2019), <https://regproject.org/wp-content/uploads/RTP-State-and-Local-Working-Group-Paper-Regulatory-Thicket.pdf>. This is not meant to suggest that states should never impose their own standards, but only a recognition that different standards between states increases compliance costs by requiring a company to identify, learn, and comply with each set of standards.

II. THE BURDEN OF REGULATIONS

In 1970, the United States Code of Federal Regulations (“CFR”) contained more than 405,000 regulatory restrictions and 35 million words.³ A regulatory restriction refers to the use of the words “shall,” “must,” “may not,” “prohibited,” and “required” in the regulatory text.⁴ Developed by the Mercatus Center at George Mason University, regulatory restrictions are a helpful measurement of regulatory impact because they “typically mark a specific action either required or forbidden by the regulation.”⁵

Other measurements may not tell the full story of the regulation’s true impact. For example, one state may divide 15 rules into 15 separate regulations, while another state may combine the same 15 rules into a single omnibus regulation. Using the number of regulations as the metric, the first state’s regulations would look 15 times worse than the second state’s, even though they are functionally identical.

Similarly, the number of words or pages in the regulatory code may only identify which states have verbose rulemakers, since a short rule could have a much greater impact than a long, wordy rule. For example, in 2017, Missouri had 465 regulatory chapters containing zero regulatory restrictions, but totaling 183,000 words.⁶ In contrast, just two regulatory chapters existing in 2017 contained 168,000 words, but included 4,215 regulatory restrictions.⁷

Regulatory restrictions have increased at the federal level during every presidential term since the 1970s.⁸ By 2017, the number of words and restrictions had nearly tripled from 1970, now totaling 1.1 million regulatory restrictions and 103.6 million words.⁹ To put the number of words into perspective, an individual would need more than 3.25 years to read the entire CFR.¹⁰

State regulations impose additional words and regulatory restrictions to the federal total. At the time of this article’s final submission, the Mercatus Center had examined the regulatory code of 47 states, counting a total of 6.2 million regulatory restrictions and 420.6 million words.¹¹ California had the most restric-

3. Patrick A. McLaughlin & Oliver Sherouse, *RegData US 3.1 Annual (dataset)*, QUANTGOV, MERCATUS CTR. AT GEORGE MASON UNIV., <https://quantgov.org/regdata-us/> [hereinafter *RegData US 3.1 Annual (dataset)*].

4. Patrick McLaughlin, et al., *RegData 3.0 User’s Guide*, QUANTGOV, MERCATUS CTR. AT GEORGE MASON UNIV., <https://quantgov.org/regdata/users-guide/>.

5. Patrick McLaughlin & Oliver Sherouse, *The Accumulation of Regulatory Restrictions Across Presidential Administrations*, MERCATUS CTR. AT GEORGE MASON UNIV., (Aug. 3, 2015), <https://www.mercatus.org/publication/accumulation-regulatory-restrictions-across-presidential-administrations>.

6. Patrick A. McLaughlin, Oliver Sherouse & Daniel Francis, *RegData Missouri (dataset)*, QUANTGOV, MERCATUS CTR. AT GEORGE MASON UNIV., <https://quantgov.org/state-regdata/>.

7. *Id.* (adding together 10 CSR 20-8 and 10 CSR 40-3).

8. *See* *RegData US 3.1 Annual (dataset)*, *supra* note 3.

9. *Id.*

10. *See* Patrick McLaughlin, Jonathan Nelson, Jim Pagels & Oliver Sherouse, *The Impossibility of Comprehending, or Even Reading, All Federal Regulations*, MERCATUS CTR. AT GEORGE MASON UNIV. (Oct. 23, 2017), <https://www.mercatus.org/publications/regulation/impossibility-comprehending-or-even-reading-all-federal-regulations> (assuming an average reading rate of 250 words per minute, 40 hours per week, 50 weeks per year).

11. Patrick A. McLaughlin, Oliver Sherouse, Daniel Francis & Jonathan Nelson, *State RegData (dataset)*, QUANTGOV, MERCATUS CTR. AT GEORGE MASON UNIV., <https://quantgov.org/state-regdata/>.

tive regulatory code with 395,503 regulatory restrictions, and its 21.2 million words were second only to New York's 22.5 million words.¹² South Dakota had the fewest number of regulatory restrictions, with just under 44,000.¹³ Kansas had the fewest number of words at 3.2 million.¹⁴

These regulatory statistics matter because regulations have economic impact. Current federal regulations are estimated to impose \$1.9 trillion in annual regulatory costs, an amount that would be the world's ninth-largest economy.¹⁵ An industry group studying the regulatory costs incurred by businesses estimated that manufacturers with fewer than 50 employees incurred almost \$35,000 in regulatory costs per employee every year.¹⁶ The Council of Economic Advisors estimated that, in 2015, American businesses spent almost \$17 billion on compliance officers' salaries and \$881 billion on completing paperwork for federal regulations.¹⁷

But regulations do not impose only compliance costs. By stacking new regulations on top of existing regulations (a process known as "regulatory accumulation"), regulations cause substantial economic costs over time. One study found that between 1949 and 2005, regulatory accumulation cost the United States 2% in economic growth each year.¹⁸ Based on a more recent timeframe, another study estimated that if federal regulations had remained unchanged since 1980, the U.S. economy would be more than \$4 trillion larger in 2012.¹⁹ Since these studies only evaluated accumulation of federal regulations, the additional accumulation of state regulations would undoubtedly increase these economic impact estimates.

The costs of regulations are not borne only by the regulated community. Instead, regulations can result in decreased employment opportunities and higher consumer prices.²⁰ One study estimated that a 10% increase in regulations resulted in a nearly 0.7% increase in consumer prices.²¹ Studies have found that the in-

12. *Id.*

13. *Id.* South Dakota had the second-lowest number of words with approximately 3.8 million.

14. *Id.* Kansas had the eighth-lowest number of regulatory restrictions with approximately 71,000.

15. Clyde Wayne Crews Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, COMPETITIVE ENTER. INST. 4 (2019), <https://cei.org/sites/default/files/10KC2019.pdf>.

16. W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, NAT'L ASSOC. OF MFRS. 2 (Sep. 10, 2014), <https://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

17. The Council of Economic Advisors, *The Growth Potential of Deregulation*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES 8 (Oct. 2, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Growth%20Potential%20of%20Deregulation%20FINAL%20JS%20v4c2.pdf> [hereinafter The Council of Economic Advisors]; see also Andrew Hale, David Borys & Mark Adams, *Regulatory Overload: A Behavioral Analysis of Regulatory Compliance* (George Mason Univ. Mercatus Ctr. Working Paper No. 11-47, Nov. 2011), https://www.mercatus.org/system/files/Reg_Overload_HaleBorysAdams_WP1147.pdf.

18. Patrick A. McLaughlin, Nita Ghei, and Michael Wilt, *Regulatory Accumulation and Its Costs*, MERCATUS CTR. AT GEORGE MASON UNIV. 1 (May 4, 2016), <https://www.mercatus.org/system/files/McLaughlin-Reg-Accumulation-EP-v3.pdf>.

19. Bentley Coffey, Patrick A. McLaughlin & Pietro Peretto, *The Cumulative Cost of Regulations* 8 (Apr. 2016) (Working Paper) (on file with George Mason University Mercatus Center), <https://www.mercatus.org/system/files/Coffey-Cumulative-Cost-Regs-v3.pdf>.

20. See Patrick A. McLaughlin, *Regulation's Unintended Consequences Can Hurt Everyone – the Poor Most of All*, MERCATUS CTR. AT GEORGE MASON UNIV. 1–2 (Apr. 2018), https://www.mercatus.org/system/files/mclaughlin_-_policy_spotlight_-_regulations_unintended_consequences_can_hurt_everyone_-_v1.pdf.

21. Dustin Chambers & Courtney A. Collins, *How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation*, MERCATUS CENTER AT GEORGE MASON

creased prices caused by regulations disproportionately impact low-income Americans.²²

III. HISTORIC STATE REGULATORY REFORM EFFORTS

Given the economic impact of regulations, elected officials at the federal and state levels have focused on regulatory reform.²³ These reforms have resulted in positive changes to regulatory policymaking and the regulatory burden.²⁴ Although most regulatory reform literature addresses reform at the federal level, this analysis focuses only on the regulatory reform at the state level. Studying reform at the state level is important since it may be instructive to future reform efforts at the state and federal levels.

Regulatory reform at the state level has primarily occurred in three waves. The first wave began after the 1994 elections, the second after the 2010 elections, and the third after the 2016 elections. While each of these elections is known for electoral victories by Republican candidates, it is important to note that regulatory reform has been implemented by both Republicans and Democrats.²⁵

A. State Regulatory Reform After the 1994 Election

A number of governors elected in 1994 instituted regulatory reforms in their states.²⁶ Governors John Engler (R-Mich.) and George Pataki (R-N.Y.) established regulatory reform offices to oversee the rulemaking process, to require cost-benefit analysis for new or existing rules and to temporarily stop rulemaking that did not satisfy certain criteria.²⁷ Governors Pete Wilson (R-Calif.), Lawton Chiles (D-Fla.), William Weld (R-Mass.), Tom Ridge (R-Pa.), and George Allen (R-Va.) ordered agencies to examine their existing regulations and repeal the unnecessary

UNIVERSITY (Feb. 2016), 20, <https://www.mercatus.org/system/files/Chambers-How-Regs-Affect-Prices-v2.pdf>.

22. The Council of Economic Advisers, *supra* note 17, at 7.

23. *See, e.g.*, Mo. Exec. Order, 17-03, SECRETARY OF STATE (Jan. 10, 2017), <https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2017/17-03.pdf>. (“removing needless and burdensome regulations will make Missouri more attractive to businesses and encourage job growth”); Mass. Exec. Order 562, MASS.GOV (Mar. 31, 2015), <https://www.mass.gov/executive-orders/no-562-to-reduce-unnecessary-regulatory-burden> (“confusing, unnecessary, inconsistent and redundant government regulations inconvenience individuals, encumber cities and towns, stress resources of non-profit organizations, including our health care and educational institutions, inhibit business growth and the creation of jobs, and place Massachusetts for profit enterprises at a competitive disadvantage relative to their out-of-state and foreign competitors”); Az. Exec. Order 2015-01, OFFICE OF THE GOVERNOR (Jan. 5, 2015), https://azgovernor.gov/sites/default/files/2015_01060814.pdf (“burdensome regulations inhibit job growth and economic development”).

24. *See infra* table 2 and Section IV.E.

25. *See infra* notes 32–36 and accompanying text.

26. Everett Carl Ladd, *The 1994 Congressional Elections: The Postindustrial Realignment Continues*, 110 POL. SCI. QUARTERLY 1, 1 (Spring 1995) (after the “Contract with America,” Republican candidates gained 14 governorships).

27. Mich. Exec. Order 1995–6 (Mar. 1995), <http://www.legislature.mi.gov/documents/1995-1996/executiveorder/htm/1995-EO-06.htm>; N.Y. Exec. Order 20, N.Y. COMP. CODES R. & REGS. tit. 9, § 5.20 (1995).

and obsolete ones.²⁸ Other measures focused on the impact to small businesses. Governor Mel Carnahan (D-Mo.) required agencies to determine whether a proposed regulation would cause a direct economic impact on small businesses of \$500 or more.²⁹ Governor Christine Todd Whitman (R-N.J.) required agencies to identify which proposed rules exceeded federal standards and to include cost-benefit analysis demonstrating that the higher state standard was achievable.³⁰ In total, according to a 1996 survey, 25 states reported an ongoing regulatory reform effort.³¹

These reforms generated significant results. California identified more than 3,900 regulations to repeal and 1,700 regulations to modify, which the governor ordered to be done.³² Florida proposed the repeal of between 10,000 and half of its 28,750 regulations.³³ Virginia eliminated 30% and modified 41% of the regulations reviewed.³⁴ New York experienced a 50% decrease in the number of new regulations,³⁵ and by 2002, the state estimated its regulatory reform efforts had saved businesses nearly \$3 billion.³⁶

B. State Regulatory Reform After the 2010 Election

Between 2010 and 2016, 17 governors launched reviews of regulations through executive order.³⁷ This was a bipartisan effort: four of the governors—Jack

28. Cal. Exec. Order 127–95 (Sept. 20, 1995), <https://www.library.ca.gov/Content/pdf/GovernmentPublications/executive-order-proclamation/1302-1303.pdf>; Fla. Exec. Order 95-74 (Feb. 27, 1995), <http://edocs.dlis.state.fl.us/fldocs/governor/orders/1995/95-74.pdf>; Mass. Exec. Order 384 (Feb. 9, 1996), <https://www.mass.gov/executive-orders/no-384-to-reduce-unnecessary-regulatory-burden>; Pa. Exec. Order 1996-1 (Feb. 6, 1996), https://www.oa.pa.gov/Policies/eo/Documents/1996_1.pdf; Va. Exec. Order Nos. 14 & 15 (1994) (due to Virginia's off-year elections, Governor Allen was elected in 1993, but is considered part of the 1994 electoral class for purposes of this analysis).

29. Mo. Exec. Order No. 96-18 (Oct. 17, 1996), https://www.sos.mo.gov/library/reference/orders/1996/eo1996_018.

30. N.J. Exec. Order 27 (Nov. 2, 1994), <https://nj.gov/infobank/circular/eow27.htm> (like Virginia, due to New Jersey's off-year elections, Governor Whitman was elected in 1993, but is considered part of the 1994 electoral class for purposes of this analysis).

31. John D. Graham & Kristin Loevzel, *Regulatory Reform: Moving Forward in the States*, 5 Harvard Center for Risk Analysis 2, 2 (Feb. 1997), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/1273/2013/06/Regulatory-Reform-Feb-97.pdf>.

32. Cal. Exec. Order 131-96 (Feb. 8, 1996), <https://www.library.ca.gov/Content/pdf/GovernmentPublications/executive-order-proclamation/8396-8397.pdf>.

33. Compare Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 436 (1996) with Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 900 (June 2000).

34. Hahn, *supra* note 33, at 911.

35. Press Release, *Governor Pataki: State's Regulatory Reforms Hailed as a Model* (Sept. 19, 2002), https://web.archive.org/web/20061209024532/http://www.gorr.state.ny.us/09_19_02_gorr-washington.htm.

36. Washington Roundtable, *New York: A Model for Regulatory Reform in Washington State* 4 (Aug. 2002), <https://web.archive.org/web/20061005132424/http://www.gorr.state.ny.us/Model%20for%20Regulatory%20Reform.pdf>.

37. See generally Tayler Lonsdale & Maleka Momand, *State of the States: Exploring Top-Down Regulatory Review*, Argive 10–11 (Nov. 2017), <https://static1.squarespace.com/static/586bee97c534a5731df8f6c4/t/5a079c8553450af07c993aea/1510448273617/State+of+the+states+Exploring+top-down+regulatory+review.pdf> (citing executive orders for Arizona, Delaware, Florida, Illinois, Kentucky, Maryland, Massachusetts, Michigan, New Jersey,

States repealed and revised thousands of regulations following these reviews. Argive, a non-profit organization that studies regulations, prepared Table 2 detailing these results.⁴⁴

Table 2. Regulatory Changes Resulting from State Regulatory Reviews.

State	Rules Reviewed	Rules Identified for Repeal	Rules Repealed	Rules Identified for Amendment	Rules Amended
Arizona	-	45	-	3	-
Delaware	385	-	61 (16%)	-	83 (21%)
Florida	21,000	-	4,200 (20%)	-	-
Illinois	-	-	-	63	-
Kentucky	2,208	344 (16%)	182 (8%)	540 (24%)	211 (10%)
Maryland	-	56	-	131	-
Massachusetts	1,723	-	266 (15%)	-	882 (51%)
Michigan	3,573	-	2,136 (60%)	-	-
New Jersey	-	-	31	-	99
Ohio	10,163	-	708 (7%)	-	5,468 (54%)
Rhode Island	1,600	-	48 (3%)	-	206 (16%)
South Carolina	3,100	-	-	50 (2%)	-
Tennessee	-	-	-	122	-
Virginia	1,154	-	42 (4%)	-	416 (36%)
Wisconsin	1,768	40 (2%)	-	178 (10%)	-

C. State Regulatory Reform After the 2016 Election

Since the 2016 elections, four governors have launched regulatory reviews: Governors Brad Little (R-Idaho),⁴⁵ Eric Greitens (R-Mo.),⁴⁶ Pete Ricketts (R-

44. Lonsdale & Momand, *supra* note 37, at 12–13.

45. Idaho Exec. Order 2019–02 (Jan. 21, 2019), <https://gov.idaho.gov/wp-content/uploads/sites/74/2019/01/eo-2019-02.pdf>.

46. Mo. Exec. Order. 17–03 (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

Neb.),⁴⁷ and Chris Sununu (R-N.H.).⁴⁸ In the first six months after launching the review, Governor Sununu's administration identified 1,600 regulations to eliminate.⁴⁹ Because Idaho's regulations automatically sunset and the legislature failed to renew the rules during the 2019 legislative session, all Idaho regulations expired on July 1, 2019, except those temporarily continued by Governor Little.⁵⁰

IV. REGULATORY REFORM IN MISSOURI

Missouri's regulatory process is similar to the federal Administrative Procedures Act.⁵¹ In Missouri, departments and agencies with rulemaking authority file proposed regulations with the Missouri Secretary of State for publication in the Missouri Register.⁵² Proposed regulations must be open for public comment for at least 30 days after the Missouri Register's publication.⁵³ After public comments have been received and considered, the rulemaking authority is required to file the final regulation with the Secretary of State within 90 days after the public comment period closes.⁵⁴ The Secretary of State publishes the final rule in the Missouri Register and then in the Missouri Code of State Regulations.⁵⁵

A. Regulatory Reform Existing Before 2017

Missouri adopted three primary regulatory reforms prior to 2017: (1) the Joint Committee on Administrative Rules; (2) the Small Business Regulatory Fairness Board; and (3) the five-year review. These reforms have been almost entirely driven by the Missouri General Assembly.⁵⁶

i. The Joint Committee on Administrative Rules

Since 1975, the General Assembly has operated the Joint Committee on Administrative Rules ("JCAR").⁵⁷ Under the current process, rulemaking authorities

47. Neb. Exec. Order 1-04 (July 6, 2017), <https://governor.nebraska.gov/sites/governor.nebraska.gov/files/doc/press/Red%20Tape%20Review%20Executive%20Order%202017.pdf>.

48. N.H. Exec. Order 2017-02 (July 20, 2017), <https://www.governor.nh.gov/news-media/orders-2017/documents/2017-02.pdf>.

49. UPDATE REPORT ON GOVERNOR SUNUNU'S REGULATORY REFORM INITIATIVE (July 20, 2017), <https://www.governor.nh.gov/news-media/press-2017/documents/20170720-regulatory-reform-initiative.pdf>.

50. Keith Ridler, *Idaho Governor Has Unfettered Chance to Cut State Rules*, ASSOCIATED PRESS (Apr. 17, 2019), <https://www.apnews.com/3c58858586d9454bbe53a575f2bb82c0>.

51. Compare MO. REV. STAT. §§ 536.010-328 (2016), with 5 U.S.C. § 551 et seq (2018).

52. MO. REV. STAT. § 536.021.1 (2016).

53. *Id.* § 536.021.2(5).

54. *Id.* § 536.021.5.

55. *Id.* § 536.021.8.

56. While legislation requires the signature of the governor to be enacted, the Small Business Regulatory Fairness Board and the five-year review were enacted when the majority party in the General Assembly was the opposite party of the governor. There is no evidence that the governor had adopted these pieces of legislation as his priorities. When the Joint Committee on Administrative Rules legislation passed in 1997, the General Assembly and Governor's Office were controlled by the same parties, but the legislation asserted the General Assembly's role in the rulemaking process. Accordingly, for purposes of this article, the General Assembly will be credited with all three legislative actions.

57. Mo. Coal. For Env't v. Joint Comm. On Admin. Rules, 948 S.W.2d 125, 128 (Mo. banc 1997).

must file proposed rules with JCAR at the same time they are filed with the Secretary of State;⁵⁸ final rules must be filed with JCAR at least 30 days before they are filed with the Secretary of State.⁵⁹ JCAR has the authority to conduct hearings,⁶⁰ make comments,⁶¹ and recommend that the General Assembly disapprove and annul any proposed rule or a portion of a rule.⁶² The General Assembly may disapprove a proposed rule or a portion of a rule if both chambers adopt a concurrent resolution within 30 legislative days.⁶³ The General Assembly also may revoke any existing regulation through a concurrent resolution.⁶⁴ For the disapproval to be effective, either the governor must sign the resolution or the General Assembly must override the governor's veto.⁶⁵

In 1997, the Supreme Court of Missouri struck down the then-existing structure of JCAR, which allowed JCAR to suspend a proposed rule during JCAR's review, prevent a final rule's publication, and suspend and withdraw existing regulations—all as an unconstitutional violation of the separation of powers.⁶⁶ Following the Supreme Court's decision, the executive branch and legislative branch reached a compromise that created the existing JCAR structure.⁶⁷ Under this compromise, the governor allowed JCAR its current role in the rulemaking process in exchange for the General Assembly continuing to delegate rulemaking authority to the executive branch.⁶⁸ Indeed, when the General Assembly has delegated rulemaking authority since 1997, it has included standard language that if JCAR's authority is ever found to be unconstitutional or invalid, “the purported grant of rulemaking authority and any rule so proposed and contained in the order of rulemaking shall be revoked and shall be null, void and unenforceable.”⁶⁹

ii. The Small Business Regulatory Fairness Board

Beginning in 1996, Missouri Governor Mel Carnahan required rulemaking authorities to determine the economic impact on small businesses.⁷⁰ Governor Carnahan's executive order only required that economic impact analysis be performed and certified.⁷¹

In 2004, the General Assembly expanded the role that small business impacts have in the rulemaking process.⁷² The new legislation required rulemaking author-

58. MO. REV. STAT. § 536.024.2 (2016).

59. *Id.* § 536.024.3.

60. *Id.*

61. *Id.* § 536.024.4.

62. *Id.* § 536.028.5.

63. *Id.* § 536.028.7–8.

64. *Id.* § 536.028.12.

65. *Id.* § 536.028.9.

66. Mo. Coal. For Env't v. Joint Comm. On Admin. Rules, 948 S.W.2d 125, 133 (Mo. banc 1997); see also Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 Mo. L. Rev. 1157, 1215–1216 (1992).

67. See Mo. Exec. Order 97–97 (June 27, 1997), https://www.sos.mo.gov/library/reference/orders/1997/eo1997_097.

68. See *id.*

69. MO. REV. STAT. § 536.028.10 (2016).

70. Mo. Exec. Order No. 96–18 (Oct. 17, 1996), https://www.sos.mo.gov/library/reference/orders/1996/eo1996_018.

71. *Id.*

72. See H.B. 978, 2004 Gen. Leg., 92nd Sess. (Mo. 2004); H.B. 576, 2005 Gen. Leg., 93rd Sess. (Mo. 2005).

ities to submit a “small business impact statement” with any proposed regulation that affected small businesses.⁷³ The statement evaluates seven factors relating to the economic impact of the proposed regulation, including the cost and benefits to the rulemaking authority and the small businesses directly affected.⁷⁴ Any proposed rule that does not include this statement is invalid and should not be published.⁷⁵

The General Assembly also created the Small Business Regulatory Fairness Board,⁷⁶ which is composed of members appointed by the governor and by the General Assembly.⁷⁷ The board may hire staff to identify and comment on regulations that adversely affect small businesses, gather input from small business owners and alert them to regulatory actions, and make recommendations to the governor, General Assembly, and rulemaking authorities.⁷⁸ State agencies must respond to complaints forwarded by the board or recommendations submitted by the board within 45 and 60 days, respectively.⁷⁹ Perhaps most importantly, adversely affected small businesses have a right to judicial review of state agency compliance with the small business regulatory requirements.⁸⁰

73. MO. REV. STAT. § 536.300.2 (2016).

74. *Id.* The seven factors for which the agency must provide a reasonable determination consist of:

- (1)The methods the agency considered or used to reduce the impact on small businesses such as consolidation, simplification, differing compliance, or reporting requirements, less stringent deadlines, performance rather than design standards, exemption, or any other mitigating techniques;
- (2)How the agency involved small businesses in the development of the proposed rules;
- (3)The probable monetary costs and benefits to the implementing agency and other agencies directly affected, including the estimated total amount the agency expects to collect from any additionally imposed fees and the manner in which the moneys will be used, if such costs are capable of determination;
- (4)A description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected, except in cases where the state agency has filed a fiscal note that complies with all of the provisions of section 536.205;
- (5)In dollar amounts, the increase in the level of direct costs, such as fees or administrative penalties, and indirect costs, such as reporting, record keeping, equipment, construction, labor, professional services, revenue loss, or other costs associated with compliance if such costs are capable of determination, except in cases where the state agency has filed a fiscal note that complies with all of the provisions of section 536.205;
- (6)The business that will be directly affected by, bear the cost of, or directly benefit from the proposed rules;
- (7)Whether the proposed rules include provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, with an explanation of the reason for imposing the more-stringent standard.

Id.

75. *Id.* § 536.300.3.

76. *Id.* § 536.305.1.

77. *Id.* § 536.305.2. Of the nine-member board, four members are appointed by the governor and four members are appointed by legislative leaders. *Id.* The ninth member is appointed by the Minority Business Advocacy Commission, itself a nine-member board that is composed of three members appointed by the governor, two members of the governor’s cabinet, and four members appointed by legislative leaders. MO. REV. STAT. § 37.014.1.

78. MO. REV. STAT. § 536.310 (2011).

79. MO. REV. STAT. §§ 536.315 (2004), 536.325.1 (2012).

80. MO. REV. STAT. § 536.328 (2005).

iii. The Five-Year Review

In addition to the review provided while a proposed regulation is in the rule-making process, the General Assembly requires every state agency to review its existing regulations once every five years.⁸¹ This review requires agencies to submit a report to JCAR and the Small Business Regulatory Fairness Board that evaluates eight criteria, such as whether the rule is still necessary or if it has become obsolete, whether it could be less restrictive, and whether it should be revised or repealed to reduce regulatory burdens.⁸² It appears that all of a state agency's rules may be voided if the agency that fails to submit its report and does not correct the delinquency after notification is published in the Missouri Register.⁸³

B. Status of Missouri's Regulations in 2017

Despite these reforms, Missouri's regulations continued to accumulate. By 2017, Missouri's regulatory code included 113,112 regulatory restrictions and more than 7.5 million words.⁸⁴ It would take more than ten weeks to read all of Missouri's regulations.⁸⁵

Surprisingly, Missouri's regulatory burden as measured in terms of regulatory restrictions had grown at a faster rate from 2002 to 2016 (25%) than the federal government (22%).⁸⁶ In 2017, Missouri had more regulatory restrictions than 21

81. MO. REV. STAT. § 536.175.1 (2012).

82. *Id.* § 536.175.4–5. The eight factors the agency must review are:

- (1) Whether the rule continues to be necessary, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted;
- (2) Whether the rule is obsolete, taking into consideration the length of time since the rule was modified and the degree to which technology, economic conditions, or other relevant factors have changed in the subject area affected by the rule;
- (3) Whether the rule overlaps, duplicates, or conflicts with other state rules, and to the extent feasible, with federal and local governmental rules;
- (4) Whether a less restrictive, more narrowly tailored, or alternative rule could adequately protect the public or accomplish the same statutory purpose;
- (5) Whether the rule needs amendment or rescission to reduce regulatory burdens on individuals, businesses, or political subdivisions or eliminate unnecessary paperwork;
- (6) Whether the rule incorporates a text or other material by reference and, if so, whether the text or other material incorporated by reference meets the requirements of section 536.031;
- (7) For rules that affect small business, the specific public purpose or interest for adopting the rules and any other reasons to justify its continued existence; and
- (8) The nature of the comments received by the agency under subsection 2 of this section, a summary of which shall be attached to the report as an appendix and shall include the agency's responses thereto.

Id. § 536.175.4.

83. *Id.* § 536.175.5. Although the statute uses the singular tense to refer to “[t]he rule shall be void and of no further effect,” the statute previously used the plural tense “[e]ach agency with rules subject to review.” *Id.* at 536.175.4–5. There is no indication that the General Assembly sought to void only a single rule as penalty for a state agency's non-compliance with the reporting provision, nor is it clear how a single rule would be selected for a state agency that may have dozens or hundreds of rules.

84. James Broughel, Oliver Sherouse & Daniel Francis, *A Snapshot of Missouri Regulation in 2017*, MERCATUS CTR. AT GEORGE MASON UNIV. (July 12, 2017), <https://www.mercatus.org/system/files/broughel-snapshot-missouri-regulation-2017-brief-v1.pdf>.

85. *Id.*

86. E-mail from Patrick McLaughlin, Mercatus Ctr. at George Mason Univ., to Justin Smith, author (Jan. 10, 2018, 1:12 PM) (on file with author).

states, and more than 2.5 times as many as South Dakota's 43,940 restrictions.⁸⁷ These states range from neighbors (Kansas and Nebraska) to growing states (North Carolina and Indiana) to industrial states (Michigan) to traditionally "blue" states (Connecticut and Minnesota).⁸⁸

C. Executive Order 17-03

Because of the rise in regulations in Missouri, Governor Eric Greitens instituted regulatory reform on his second day in office.⁸⁹ Executive Order 17-03 addressed regulations past, present, and future to reduce regulatory burdens and to rein in the administrative state.⁹⁰

Executive Order 17-03 began by addressing rulemaking that was currently underway.⁹¹ Missouri's rulemaking process lasts between six and eight months.⁹² Thus, when Governor Greitens took office, the rulemaking pipeline included regulations approved by the prior administration (which was a different political party) up to eight months earlier. To address this situation, Governor Greitens suspended all rulemaking until the end of the next month.⁹³ State law allowed an executive order to suspend rulemaking without causing the state agency to miss the deadline for filing final rules.⁹⁴ The executive order also provided exceptions for proposed regulations that affected health, safety, or welfare, or were otherwise time-sensitive or required by law.⁹⁵

Executive Order 17-03 then addressed future rulemaking. Going forward, no state agency could propose or adopt new or revised regulations unless approved by the Governor's Office.⁹⁶ This provided the governor with control over the

87. Patrick A. McLaughlin, Oliver Sherouse, Daniel Francis & Jonathan Nelson, *State RegData: Missouri*, QUANTGOV, MERCATUS CTR. AT GEORGE MASON UNIV. (2017), <https://quantgov.org/state-regdata/>.

States with fewer restrictions than Missouri included South Dakota (43,940), Alaska (52,569), Montana (60,086), Idaho (61,848), North Dakota (63,203), Nevada (63,735), Arizona (63,919), Kansas (70,969), South Carolina (78,676), Michigan (83,484), Utah (88,150), Indiana (91,998), Rhode Island (92,522), Connecticut (96,247), Minnesota (98,321), Wyoming (99,566), Nebraska (100,627), Delaware (104,562), Alabama (107,063), Georgia (109,112), and North Carolina (109,350). *See id.* Although the Mercatus Center examined some states' regulations after Missouri, there is no indication that any state with fewer regulatory restrictions than Missouri dramatically decreased its number of restrictions after the Mercatus Center counted Missouri's restrictions in January 2017.

88. *See id.*

89. Kurt Erickson, *Greitens Orders Review of State Rules in Bid to Reduce Regulations*, ST. LOUIS POST-DISPATCH, (Jan. 10, 2017), https://www.stltoday.com/news/local/govt-and-politics/greitens-orders-review-of-state-rules-in-bid-to-reduce/article_aa3a7951-792e-5f36-8d2d-318c2cdc77db.html.

90. Mo. Exec. Order No. 17-03 (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

91. *Id.*

92. John R. Ashcroft, *Missouri State Rulemaking Manual* 5.07B, MO. SEC'Y ST. OFF. (Aug. 2019), <https://www.sos.mo.gov/CMSImages/AdRules/main/manual/EntireRulemanualAug2019Update.pdf>

93. Mo. Exec. Order 17-03, Section 1 (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

94. MO. REV. STAT. § 536.021.5 (2004) ("Such ninety days shall be tolled for the time period any rule is held under abeyance pursuant to an executive order.").

95. Mo. Exec. Order 17-03, Section 1(b) (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

96. *Id.* § 2.

rulemaking process and ensured that proposed rulemaking was consistent with the administration's policy positions.⁹⁷

Finally, Executive Order 17-03 required a review of all existing regulations.⁹⁸ All state agencies were required to conduct a robust public outreach effort and complete a review in approximately 18 months.⁹⁹ Executive Order 17-03 required every regulation to satisfy six criteria, demonstrating that the regulation was (1) essential, (2) cost-beneficial, (3) subject to periodic review, (4) no more restrictive than necessary, (5) based on sound science and economics, and (6) not unduly burdensome to Missouri citizens.¹⁰⁰ Although § 536.175 already required agencies to conduct a five-year review, Executive Order 17-03 included additional criteria and a shorter time horizon so that every state agency would complete review in mid-2018—two years earlier than under the statute.¹⁰¹

D. Overview of the No MO Red Tape Initiative

The Governor's Office called its regulatory reform initiative "No MO Red Tape,"¹⁰² launching a central website to coordinate the initiative. Executive Order 17-03 required each agency to appoint an employee to lead its review.¹⁰³ The Governor's Office named these individuals "Red Tape Cutters," and asked agencies to designate individuals with the seniority, experience, and department support to make the meaningful changes needed.¹⁰⁴ Some departments designated

97. Anecdotal evidence suggests that previous administrations may have had informal policies requiring Governor's Office approval of proposed regulations for some state agencies. However, Executive Order 17-03 is the first formal requirement that Missouri state agencies obtain Governor's Office approval before proceeding with the rulemaking process.

98. Mo. Exec. Order 17-03, Section 3 (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

99. *Id.*

100. *Id.* § 3(c). The six criteria the agency must review were:
 1. The regulation is essential to the health, safety, or welfare of Missouri residents;
 2. The costs of the regulation do not outweigh their benefits, based on a cost benefit analysis;
 3. A process and schedule exist to measure the effectiveness of the regulation;
 4. Less restrictive alternatives have been considered and found less desirable than the regulation;
 5. The regulation is based on sound, reasonably available scientific, technical, economic, and other relevant information; and
 6. The regulation does not unduly and adversely affect Missouri citizens or customers of the State, or the competitive environment in Missouri.
Id.

101. Compare Mo. Exec. Order 17-03 with MO. REV. STAT. § 536.175. Executive Order 17-03 acknowledged the existence of Section 536.175's requirements and allowed agencies to include any applicable results in their completion of Executive Order 17-03's requirements. Mo. Exec. Order 17-03, Section 4 (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

102. Press Release, Eric Greitens, Mo. Governor, Governor Greitens Announces New Website to Help Missouri Citizens Cut Government Red Tape (July 12, 2017) (on file with the Missouri Times at <https://themissouritimes.com/42525/governor-greitens-announces-new-website-to-help-missouri-citizens-cut-government-red-tape/>).

103. Mo. Exec. Order 17-03, Section 3(b) (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

104. PowerPoint Presentation (June 2017) (on file with the author); see also Will Schmitt, *Greitens Wields New Website as Weapon in War on "Red Tape" in Missouri*, SPRINGFIELD NEWS-LEADER, (July 12, 2017), <https://www.news-leader.com/story/news/politics/2017/07/12/greitens-wields-new-website-weapon-war-red-tape-missouri/471958001/>.

their deputy directors to lead the review.¹⁰⁵ The directors of every department strongly supported the regulatory reform effort and empowered their Red Tape Cutters. The positive results of Missouri's effort are due in large part to the hard work of the Red Tape Cutters.

The Governor's Office studied the structure and results of the previous state regulatory reform efforts in the 2010s.¹⁰⁶ Based on this study, they prepared a plan that set three goals for state agencies: (1) obtain at least 100 public comments per agency, (2) complete the required review by the end of 2017, which would be six months ahead of schedule, and (3) reduce regulatory restrictions by one-third within each agency.¹⁰⁷

i. 100 Public Comments Per Agency

The Governor's Office set an ambitious public comment goal to require state agencies to proactively engage with interested parties. Under § 536.175 and other state reviews, state agencies issued press releases, held public hearings, and hosted websites to generate public comments.¹⁰⁸ As previously mentioned, states received between 150 and 1,000 public comments, or an average of about 500 comments per state.¹⁰⁹

Missouri has 16 state agencies.¹¹⁰ If every state agency reached their goal of obtaining 100 public comments, Missouri would far surpass the most public comments any other state reported receiving in their regulatory reform efforts. In light of the data from other states, Missouri state agencies likely could only reach this goal by actively contacting and seeking comments from "private citizens, stakeholders, regulated entities, and other interested parties."¹¹¹

To meet their goal, state agencies attended meetings, emailed listservs, actively promoted their efforts on social media and in the press, and even set up tables at the Missouri State Fair.¹¹² Thanks to the hard work of the Red Tape Cutters and their colleagues in each agency, Missouri received 5,765 public comments.¹¹³ Table 3 shows the number of comments obtained by each agency (see next page).

105. Schmitt, *supra* note 104. For example, the Department of Natural Resources Deputy Director, Dru Buntin, and the Department of Agriculture Deputy Director, Garrett Hawkins, helped lead the review. See *No MO Red Tape*, ARGIVE (Dec. 2018), <https://argive.org/no-mo-red-tape>; *2017-2018 Official Manual State of Missouri: Executive Departments*, MO. SEC'Y ST. OFF. (2017), https://www.sos.mo.gov/cmsimages/bluebook/2017-2018/6_ExecDept.pdf.

106. In addition to reading all publicly available reports produced by these states, the Governor's Office also spoke with several states to ask questions and glean information not published in the reports.

107. See PowerPoint Presentation, *supra* note 104.

108. See, e.g., Schmitt *supra* note 104; Peters *infra* note 112.

109. See *supra* notes 38–43.

110. See *infra* Table 3, which includes all 16 agencies plus the Governor's Office.

111. Mo. Exec. Order 17–03, Section 3(a) (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/eo3>.

112. Benjamin Peters, *No MO Red Tape: Missourians Share Their Thoughts on State Regulations with Mixed Reviews*, THE MISSOURI TIMES (Sept. 6, 2017), <https://themissouritimes.com/43694/no-mo-red-tape-missourians-share-thoughts-state-regulations-mixed-reviews/>.

113. Sarah Teague, *State Official: Nearly 6,000 Comments So Far on How to Minimize Red Tape*, KSMU (Nov. 8, 2017), <https://www.ksmu.org/post/state-official-nearly-6000-comments-so-far-how-minimize-red-tape#stream/0>. Missouri made more than 4,400 of the comments publicly available on the NoMORedTape website. Lucille Sherman, *Of 4,400 Comments on State Regulations, Nearly 2,000 Request No Change*, COLUMBIA MISSOURIAN (Dec. 17, 2017),

Table 3. Number of Public Comments Received by Missouri Agencies.

Department	Comments
Department of Economic Development ¹¹⁴	159
Department of Elementary and Secondary Education	40
Department of Higher Education	15
Department of Health and Senior Services	68
Department of Insurance, Financial Institutions, and Professional Registration	465
Department of Mental Health	26
Department of Natural Resources	226
Department of Corrections	34
Department of Labor and Industrial Relations	139
Department of Revenue	65
Department of Transportation	98
Department of Public Safety	263
Department of Social Services	166
Governor's Office website (nomoredtape.com)	717
Department of Agriculture	2,253
Department of Conservation	923
Office of Administration	108
Totals	5,765

ii. Review Complete by the End of 2017

Executive Order 17-03 required agencies to submit a report to the Governor's Office by May 31, 2018, and complete necessary rulemaking action by June 30, 2018.¹¹⁵ This timeline was consistent with other state reviews.¹¹⁶ The report would

https://www.columbiamissourian.com/news/state_news/of-comments-on-state-regulations-nearly-request-no-change/article_210a9ef8-e113-11e7-961e-375335fe4767.html.

114. This includes 93 comments received directly by the Public Service Commission, which is located within the Department of Economic Development.

115. Mo. Exec. Order 17-03, Sections 3(c), 3(d) (Jan. 10, 2017), <https://www.sos.mo.gov/library/reference/orders/2017/co3>.

116. See, e.g., *Regulation Review Project: The Implementation of Executive Order 562: To Reduce Unnecessary Regulatory Burden* 3 (Mar. 31, 2017), <https://www.mass.gov/files/documents/2017/03/zs/Regulation%2520Review%2520Project%2520-%2520Final%2520Report.docx> (review conducted from Mar. 31, 2015 to Dec. 31, 2016); CSI-Ohio, *Cutting Red Tape, Creating Jobs: Report on Activities* 2 (Feb. 1, 2012),

contain the evaluation of each regulation against the six criteria, the number of public comments received, and the meaningful changes made as a result of the review.

However, Missouri's legislative session runs from early January to mid-May every year.¹¹⁷ Many of the Red Tape Cutters had responsibilities relating to the General Assembly. An earlier deadline ensured that the initial review would be complete before the legislative session began and sought to avoid Executive Order 17-03 receiving little to no attention until the very end. This also would allow for time to prepare the required report and take the necessary rulemaking action. Finally, the earlier deadline sought to limit the loss of momentum the review might experience if stretched out for another six months. Indeed, thanks to the diligent work of the Red Tape Cutters, all state agencies completed their review by the end of 2017.

iii. Reduce Regulatory Restrictions by One-Third

Before Missouri launched its regulatory reform initiative, it looked to goals established by other governmental entities that set a specific goal to reduce regulations. British Columbia was one of the few governmental entities that set a specific goal based on the number of regulatory requirements, and in the process implemented the preeminent regulatory reform initiative at the turn of this century.¹¹⁸ When a new administration took office, it sought to reduce the province's 330,000 regulatory requirements by one third.¹¹⁹

After three years, British Columbia had exceeded its goal and eliminated 37% of its regulatory requirements.¹²⁰ The regulatory reduction is believed to be an important contributor to the turnaround in British Columbia's economy.¹²¹ In the seven years before the regulatory reform effort began in 2001, British Columbia's economic growth was 1.9% *below* the Canadian average.¹²² However, from 2002 to 2006, British Columbia's economic growth was 1.1% *above* the Canadian aver-

<https://governor.ohio.gov/wps/wcm/connect/gov/d65519b7-a38e-484e-960d-138b732393dd/CSI+2011+Annual+Report.pdf?MOD=AJPERES&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid&CVID=mwH4qid> (review conducted from Jan. 10, 2011 to Feb. 2012).

117. MO. CONST. art. III, §§ 20, 20(a).

118. Laura Jones, *Cutting Red Tape in Canada: A Regulatory Reform Model for the United States?*, MERCATUS CTR. AT GEORGE MASON UNIV. (Nov. 2015), <https://www.mercatus.org/system/files/Jones-Reg-Reform-British-Columbia.pdf> [hereinafter *Jones*]; see also *Lessons from the British Columbia Model of Regulatory Reform: Hearing on The Benefits of a Deregulatory Agenda: Examples from Pioneering Governments Before the Subcomm. on Healthcare, Benefits, and Admin. Rules and Subcommittee on Intergovernmental Affairs of the H. Comm. on Oversight and Gov't Reform*, 115th Cong. (Sept. 27, 2018) (statement of Laura Jones, Executive Vice-President and Chief Strategic Officer, Canadian Federation of Independent Business), https://www.mercatus.org/system/files/jones_-_testimony_-_laura_jones_testimony_on_the_benefits_of_a_deregulatory_agenda_-_v1.pdf [hereinafter *Lessons from the British Columbia Model*].

119. *Lessons from the British Columbia Model*, *supra* note 118, at 2.

120. *Id.* at 20. British Columbia has continued reducing its regulatory requirements and has eliminated almost 50% of the number of requirements that existed in 2001. *Id.* at 4.

121. *Id.* at 24.

122. *Id.* at 23.

age.¹²³ Per capita income and the number of new businesses also saw remarkable improvement.¹²⁴

Based on British Columbia's successes, Missouri set a similar one-third reduction goal.¹²⁵ This allowed state agencies to move toward a common goal and decrease the likelihood of vastly different results between agencies. It also gave Missouri the best chance of enjoying similar economic benefits to British Columbia.

When state agencies reported their results to the Governor's Office at the end of 2017, they targeted more than 33,000 regulatory restrictions to eliminate.¹²⁶ This was 30% of the total number of regulatory restrictions in Missouri's Code of State Regulations,¹²⁷ and just slightly under the one-third goal.

E. No MO Red Tape Results

After Governor Michael Parson took office on June 1, 2018, his team continued to implement Executive Order 17-03.¹²⁸ By January 2019, the governor reported that state agencies had eliminated 20% of regulatory restrictions.¹²⁹ The breakdown for each state agency is provided in Table 4 (see next page).¹³⁰

123. *Id.*

124. *Id.*

125. PowerPoint Presentation, *supra* note 104.

126. *Transcript: Gov. Eric Greitens' State of the State*, SPRINGFIELD BUSINESS JOURNAL (Jan. 11, 2018), <https://sbj.net/stories/transcript-gov-eric-greitens-state-of-the-state,57071>.

127. Some regulatory restrictions are contained in regulations promulgated by other statewide officeholders and commissions that were encouraged, but not necessarily required, to follow Executive Order 17-03.

128. Mo. Exec. Order 18-04, June 29, 2018, available at <https://www.sos.mo.gov/library/reference/orders/2018/eo4>; Bob Watson, *State Agencies Still Considering Rules Cutbacks*, JEFFERSON CITY NEWS TRIBUNE (Jan. 14, 2019), <http://www.newstribune.com/news/local/story/2019/jan/14/state-agencies-still-considering-rules-cutbacks/760979/>.

129. 2019 State of the State by Governor Mike Parson (Jan. 16, 2019), <https://www.mo.gov/wp-content/uploads/2019/01/2019-State-of-the-State-Text.pdf>.

130. Data provided to the author by Governor Parson's office.

Table 4. Regulatory Restrictions Targeted in Eliminated by Missouri Agencies.

Department	Original # of Regulatory Restrictions	# of Regulatory Restrictions Targeted for Elimination	Actual # of Regulatory Restrictions Eliminated	Percentage Eliminated
Department of Agriculture	4,776	1,221	714	15%
Department of Economic Development	112	30	30	27%
Department of Elementary and Secondary Education	1,739	307	109	6%
Department of Higher Education	1,238	427	300	24%
Department of Health and Senior Services	15,948	4,524	246	2%
Department of Insurance, Financial Institutions and Professional Registration	21,215	7,623	2,484	12%
Department of Mental Health	5,186	1,730	690	13%
Department of Natural Resources	24,105	9,093	8,873	37%
Department of Corrections	171	65	3	2%
Department of Labor and Industrial Relations	2,388	772	299	13%
Department of Public Safety	7,044	2,348	1,546	22%
Department of Social Services	8,958	848	848	9%
Department of Conservation	1,101	0	15	1%
Department of Transportation	2,694	870	1,545	57%
Office of Administration	1,847	784	730	40%
Department of Revenue	3,203	1,068	647	20%
Total	101,725	31,710	19,079	19%

Table 4 shows that several state agencies exceeded their one-third goal. For example, the Missouri Department of Natural Resources (“MDNR”) had the most regulatory restrictions of any Missouri state agency when the No MO Red Tape initiative began.¹³¹ By the end of the initiative, MDNR had eliminated 37% of its regulatory restrictions—almost 9,000 restrictions. The Missouri Department of

131. Broughel, *supra* note 84, at Figure 2.

Transportation eliminated 57% of its regulatory restrictions, and the Office of Administration eliminated 40% of its regulatory restrictions.

Specific examples demonstrate the importance of eliminating these restrictions. One Missouri regulation required car dealers to have a landline phone.¹³² A car dealer in Bolivar, Missouri contacted the Governor's Office about the regulation because his business did not actually need a landline phone.¹³³ Technology had changed since the regulation was promulgated in the late 1980s, and cell phones had replaced landlines. The Missouri Department of Revenue eliminated the landline phone requirement.¹³⁴

Another Missouri regulation required milk haulers to attend a training session.¹³⁵ This meant that any person interested in becoming a milk hauler had to arrange time in their schedule and travel to an in-person training class. Again, technology had changed, and training could be provided online. To allow online instead of in-person training, the Missouri State Milk Board eliminated the in-person attendance requirement.¹³⁶

To qualify for a manufacturing incentive program, the Missouri Department of Economic Development ("MDED") required an applicant to present a written offer from a different state.¹³⁷ This made Missouri the second bidder in every proposal, and MDED believed that removing the restriction could "potentially [avoid] costly bidding wars with other states."¹³⁸ MDED eliminated the requirement.¹³⁹

F. Overcoming Challenges to Regulatory Reform

While Missouri enjoyed great success in its regulatory reform initiative, it had to overcome several challenges along the way. One of those was the way that some state agencies identified regulatory restrictions to eliminate. As Table 4 demonstrates, some agencies did not eliminate as many restrictions as they had targeted for elimination in December 2017. Some of this may be attributable to changes in agency personnel or leadership. Some also may be attributable to proposed revisions that were not approved by the Governor's Office. For example, in October 2017, the Governor's Office heard rumors that some state agencies would

132. 42 Mo. Reg. 10, 781 (May 15, 2017) (proposing to amend 12 CSR 10-26.010), <https://www.sos.mo.gov/CMSImages/AdRules/moreg/2017/v42n10May15/v42n10a.pdf>.

133. Kurt Erickson, *Greitens Targets Rule Affecting Missouri Car Dealers*, ST. LOUIS POST-DISPATCH (Mar. 31, 2017), https://www.stltoday.com/news/local/govt-and-politics/greitens-targets-rule-affecting-missouri-car-dealers/article_0e5cf3b2-5d9a-5117-8ee0-c40fe81bc1c4.html.

134. 42 Mo. Reg. 16, 1202 (Aug. 15, 2017), <https://www.sos.mo.gov/CMSImages/AdRules/moreg/2017/v42n16Aug15/v42n16b.pdf>.

135. 43 Mo. Reg. 11, 1141 (June 1, 2018), <https://www.sos.mo.gov/CMSImages/AdRules/moreg/2018/v43n11June1/v43n11a.pdf> (proposing to amend 2 CSR 80-6.021).

136. 43 Mo. Reg. 19, 2902 (Oct. 1, 2018), <https://www.sos.mo.gov/CMSImages/AdRules/moreg/2018/v43n19Oct1/v43n19c.pdf>.

137. MO. CODE REGS. ANN. tit. 4 § 80-5.020 (rescinded May 30, 2019), <https://www.sos.mo.gov/CMSImages/AdRules/csr/previous/4csr/4csr0419/4c80-5.pdf>.

138. Bob Watson, *State Agencies Still Considering Rules Cutbacks*, JEFFERSON CITY NEWS TRIBUNE (Jan. 14, 2019), <http://www.newtribune.com/news/local/story/2019/jan/14/state-agencies-still-considering-rules-cutbacks/760979/>.

139. 44 Mo. Reg. 7, 1053 (Apr. 1, 2019), <https://www.sos.mo.gov/CMSImages/AdRules/moreg/2019/v44n7Apr1/v44n7b.pdf>.

attempt to reach their one-third reduction goal through creative wordsmithing, such as by replacing the word “shall” (counted as a regulatory restriction) with the word “will” (not counted as a regulatory restriction). The Governor’s Office issued a memorandum to the Red Tape Cutters informing them that it “disapproves of strategies that replace ‘shall’ with ‘will,’ use colons and bullet points, or otherwise attempt to reduce restriction counts without reducing restrictions.”¹⁴⁰ However, the Governor’s Office still received—and disapproved—revisions replacing “shall” with “will.”

Other regulators objected to the one-third reduction goal by claiming the goal could not be met due to regulations required by the federal government for federally authorized, delegated, or funded programs. In response, the Governor’s Office directed these regulators to states like Idaho and Arizona, who operated under almost all of the same federal rules, but did so with almost half of the regulatory restrictions.¹⁴¹ While the federal government does impose regulatory burdens, it alone was not to blame for the proliferation of regulatory restrictions in Missouri.

Another challenge came in the mandate for new regulations. The number of restrictions eliminated does not necessarily mean that a state agency’s regulatory restriction total could be determined by subtracting its number of eliminated restrictions from its 2017 restriction total. State agencies have issued new and revised regulations since Executive Order 17-03, many of which may have been in response to new legislation. For example, in November 2018, Missouri voters approved a medical marijuana initiative that required the Missouri Department of Health and Senior Services to promulgate regulations.¹⁴² Separately, the General Assembly created a new industrial hemp program that also required new regulations.¹⁴³ These new programs required new regulations, which will necessarily include new regulatory restrictions.

Finally, the regulated community itself sometimes posed challenges. Once a person or business entity has complied with existing regulations, regulations can pose barriers to entry that limit competition or provide competitive advantages.¹⁴⁴ These industries have an incentive to preserve the status quo, and may object directly through the comment process or indirectly through representatives or elected officials.

V. RECOMMENDATIONS FOR GOVERNOR-LED REGULATORY REFORM EFFORTS

Governors evaluating whether to launch their own regulatory reform effort should consider seven recommendations before beginning their review. These

140. Memorandum from Justin Smith to Missouri’s Red Tape Cutters (Oct. 5, 2017) (on file with the author).

141. See McLaughlin et al., *supra* note 87.

142. Alisha Shurr, *DHSS Releases Drafts of Rules for Medical Marijuana Facilities*, THE MISSOURI TIMES (Mar. 15, 2019), <https://themissouritimes.com/58296/dhss-releases-drafts-of-rules-for-medical-marijuana-facilities/>.

143. Alisha Shurr, *Agriculture Department Lays Out Proposed Regulations for Industrial Hemp*, THE MISSOURI TIMES (Jan. 28, 2019), <https://themissouritimes.com/57010/agriculture-department-lays-out-proposed-regulations-for-industrial-hemp/>.

144. See, e.g., Dustin Chambers et al., *Barriers to Prosperity: The Harmful Impact of Entry Regulations on Income Inequality*, 180 PUBLIC CHOICE 165, 187 (2019).

recommendations are directed to governors, but the principles are equally applicable to regulatory reform efforts initiated by state legislatures or federal officials.

First, make the reform a priority. Regulatory reform may be a nice talking point, but it will be most effective if every state agency and its employees recognize that the results are important to the governor and his or her team beyond a mere talking point. In Missouri, both Governors Greitens and Parsons mentioned regulatory reform in their State of the State addresses. Governor Greitens published multiple press releases and Facebook posts highlighting the issue. In addition, the Greitens administration reinforced the importance of regulatory reform in cabinet meetings and hosted monthly Red Tape Cutter meetings in the Governor's Office suite.

Second, empower a strong team to lead the review in each state agency and to make hard decisions. Missouri experienced success because each state agency named a single person to lead the review, and that person was experienced and respected by colleagues. The governor and agency directors communicated to regulators that the Red Tape Cutters had authority to recommend revision or repeal of regulations. Some changes may displease interested parties, and it is important that every Red Tape Cutter knows the administration will not throw them under the bus.

Third, set goals. Missouri's goals resulted in thousands more reported public comments than any other state review, those reviews being completed six months ahead of schedule, and the elimination of 20% of regulatory restrictions. Although Missouri did not eliminate as many regulatory restrictions as intended, the results are likely much better than they would have been without goals. With goals may come the desire for some regulators to take the easy way out by creative rewriting of words or lists. Make it clear that such efforts are unacceptable.

Fourth, track progress. Goals easily set may be hard to reach if proper attention is not given. Every two weeks, Missouri required the Red Tape Cutters to report the number of public comments received and regulatory restrictions targeted for elimination. The Governor's Office then compiled the results and emailed them to all Red Tape Cutters, praising the high performers and encouraging others that good results could be achieved. Missouri also required the Red Tape Cutters to send their regulatory tracking spreadsheet at the two-month and four-month marks, when the review should be one-third and two-thirds complete, respectively. Requiring frequent reports kept the issue from slipping too far down the priority list for the Red Tape Cutters.

Fifth, instruct your team to look for different issues to address in regulations. Missouri primarily looked for five issues:

1. Is the regulation still good law? For example, the underlying statute may have been repealed or significantly modified. Even though the regulations could not be enforced, keeping them in the state regulatory code creates a discovery cost for regulated entities who will have to review the regulation to see if it applies to them, and then research the regulation to determine it is no longer good law. These are the easiest regulations to repeal, and likely will be the first proposals made by the team.
2. Is the regulation duplicative of federal or state statute or federal regulations? For example, the statutory framework for a program may be

copied and pasted into the regulation. Regulators sometimes take this action so that “everything is in one place.” However, a regulated entity may incur a discovery cost for a lawyer by forcing them to compare the regulation to the statute to confirm the regulations are exactly the same. Sometimes, a slight mistake in copying occurs that results in a material difference, and this occurred in Missouri. At the very least, the duplication lengthens the regulation and makes it more difficult to determine what the state agency has added to the legislative act.

3. Is the regulation unclear? Poorly written regulations can force regulated entities to seek legal counsel, may create uncertainty if the lawyer cannot glean with certainty what the state agency meant, may cost the state agency time explaining the regulation when the regulated entity approaches with questions, and may lead to inconsistent results when administrations change. Rewriting may not necessarily remove regulatory restrictions, but it will make it easier for non-lawyers to read and understand, and increase the likelihood of regulatory consistency.

4. Is the regulation still used? Encourage the team to find out what items on a checklist are important and which are “check the box” items. Identify which forms are carefully reviewed and which are filed without anyone ever studying them. If the state does not need the information, the state should not require an inspector to collect it or a regulated entity to provide it.

5. Is the regulation overly burdensome or restrictive? These are the most important changes, and often the most difficult. Look to see if the regulation is within the legislature’s delegation of rulemaking authority. Determine which parts of the regulation exceed what is required by federal law, and ask why those additional pieces are necessary. Review past issues relating to the regulation to determine if requirements are in response to a consistent problem, a one-time problem unlikely to recur, or a hypothetical problem that has not yet occurred. Compare to other states’ regulations on the same issue and look for less restrictive approaches. Study the costs and benefits of the regulation, and listen to regulated entities and other interested parties to fully understand a regulation’s impact.

Sixth, communicate. Raising the profile of the regulatory reform initiative should lead to more public comments. Not every public comment will be helpful, but some will be. In addition to seeking public comments, state agencies should be encouraged to consult with interested parties about proposed changes. Some Missouri revisions and rescissions had to be trimmed or pulled back because interested parties were surprised when they saw large changes proposed in the Missouri Register. This surprise led them to lobby for the status quo, instead of working to find middle ground. Other state agencies saw little, if any, pushback to much larger and more significant regulatory changes because they met numerous times with interested parties.

Finally, reach out to other states and experts. Governor’s offices from several states provided helpful advice when Missouri reached out. Experts on regulatory

reform traveled to Jefferson City at their expense to provide training to the Red Tape Cutters. Many resources are available to be utilized. Sometimes, all a state must do is ask.

VI. CONCLUSION

Regulatory reform has experienced many successes over the past quarter-century. But as British Columbia demonstrated, true regulatory reform is not a short-term project. Instead, it is a long-term project to change the culture in state agencies so that regulation *makers* begin viewing themselves as regulation *managers*.¹⁴⁵ Regulatory reform is an important and necessary endeavor. Thanks to the hard work of many state governors and their teams, it is making meaningful progress.

145. Jones, *supra* note 118, at 19.