

## Regulatory Sunset Policy Memo

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### Introduction

Regulatory sunseting is an effective tool to reduce the regulatory burden at the state level. A regulatory sunset is when a rule is automatically nullified after a predetermined amount of time. The result of this codified expiration date is a passive de-regulation process which shifts the burden of proof to justifying the continuation of existing regulations. As “even well-intended, seemingly efficient, regulations can create unforeseeable outcomes, unintended consequences, or secondary effects that are only known once the regulation is in force,”<sup>1</sup> it is important to have a process in place which forces regulations to be reviewed and subsequently refined or entirely reconsidered.

The level of justification for continuing a regulation can be raised through sunset review provisions. These review provisions work the same way as normal sunseting, but with an increased onus of justification upon re-introduction. Sunset review provisions are various quantifiable metrics that show whether the regulation is achieving its stated goal in the most cost-effective manner. Sunset review provisions can also include renewed opportunities for public comment, allowing affected parties an opportunity to voice their suggestions or concerns with the regulation. With this mandated review process, agencies can better understand whether their hypotheses have proven effective or ineffective. With the data of, for example, five-years’ worth of active regulatory results, an agency will be able to tweak the regulation to be more effective or choose to scrap it entirely.

### Problem

Most states do not have a codified regulatory sunset, or their existing sunset procedures are neutered and ineffective. When rules are created without an expiration date, it is unlikely that the rules will ever be reviewed, resulting in a lack of accountability for the agency. This hampers efficiency, as old and inflexible regulations stand in the way of new and efficient methods. There are several undesired results which occur without a sunset provision. Namely, four stand out.

Firstly, as reflected in old and ineffective regulations, in states without a sunset provision, rules are inflexible from the moment they are published. Without any mechanism to ensure periodic review, it is very unlikely that any regulation is ever adapted or updated to meet dynamic regulatory environments. A rule that was effective in 2010 will likely be costly, outdated, and ineffective in 2030, yet still be an enforceable regulation. Without any incentive to

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<sup>1</sup> Sobel, Dove (2012) State Regulatory Review: A 50 State Analysis of Effectiveness

create forward-thinking regulations and with thousands of rules in existence, agencies are unlikely to write narrow, specific regulations, instead engaging in runaway rulemaking.

Secondly, without sunset provisions, an agency is freer to pass regulations which are inflexible or lack future proofing, or regulations which inaccurately predict the real cost of compliance for the regulated bodies, whether that be businesses, consumers, workers, or the environment. In regulatory environments where periodic review is not a regular occurrence, agencies are not compelled to draft rules which are tailored, specific and will last a significant number of years as effective regulation. Without sunset provisions, it is unlikely an agency will ever have to reconsider a rule in any other context than the one in which it passed, resulting in inflexible regulation. While regulation that was once efficient can become inefficient, worse still is regulation which is inefficient from the start. Without a sunset provision in place, regulated individuals and businesses may bear costs that are much larger than any estimate may foresee, especially if that estimate is undertaken by the regulating agency itself; worse still is the possibility of regulation which imposes a large cost of compliance without accomplishing its stated goal.

The third consequence is that regulatory bodies and their rules become unaccountable when not subjugated to periodic review. While some states have experimented with a kind of sunset policy, the sunset was targeted against entire agencies and their rulemaking processes but did not consider specific rules. This type of sunset can only act as a check against small and specific agencies, such as a regulator of a specific type of industry. Once, say, the mining operation leaves town, the agency can sunset, and all is well. When this same style of sunset is applied to agencies as large and prescient as a department of motor vehicles, for example, it becomes clear that this is largely ineffective, and historically would result in mostly small procedural recommendations. What this type of sunset does provide, however, is evidence of a demand for oversight of executive agencies within state legislatures.

Finally, unless held accountable, agencies will continue to proliferate new regulations as they see fit without consideration of the long term economic ramifications, leading to increased regulatory bloat and placing unnecessary economic burdens on the market.

## **Solution**

Overregulation pushes commerce into the shadow economy,<sup>2</sup> stifles innovation,<sup>3</sup> and costs small businesses 45% more in compliance costs than large corporations.<sup>4 5</sup> The Cicero Institute aims to emplace free-market incentives where special interests or bad policies cause market inefficiency. Sunset legislation does this, with a nuts-and-bolts approach to government that increases its accountability and efficiency over time, while steadily enhancing free market

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<sup>2</sup> Blueprint for Regulatory Reform

<sup>3</sup> Ibid.

<sup>4</sup> CATO Institute: Why Regulatory Reform? (2014)

<sup>5</sup> SBC (Senate Committee on Small Business and Entrepreneurship) REGULATORY REFORM / BURDEN

principles by creating room for businesses to operate successfully and safely. Cicero's regulatory sunset reform would likely vary slightly by state, but should include the following provisions:

- (1) Periodic expiration of rules, which must thereafter undergo the entire rulemaking process again prior to being renewed. This would occur either on 5-, 10-, or 15-year timelines based on the rule's date of publication. A rule created in 2020 would be subject to expiration in 2025, should the issuing agency choose not to renew it under the standard rulemaking procedure.
- (2) Comprehensive sunset review provisions, to include: (a) a renewed cost-benefit analysis, using data gained from the regulation's time in effect; (b) an opportunity for accountability through a public comment process, usually consisting of a thirty-day window in which affected parties make known their concerns or suggestions for the regulation; and (c) a comprehensive review if the regulation has been hereto effective in achieving its stated goal, if the regulation can be refined or simplified, and if the goal can be accomplished in a manner other than regulation, such as a tax.

## Results

Instituting Cicero's proposed regulatory sunset provision would have dynamic benefits for the states which pass it. The sunset schedule can be seen as a periodic review of existing regulations: because the rule will automatically expire, agencies are incentivized to write more refined regulations, increasing flexibility in the regulatory environment. This process will be abetted by the tangible data gained by the period of active regulation.

Regulatory sunsets and sunset review provisions would also benefit the business environment at all levels. Having an over regulated business sector stifles entrepreneurship by raising the barrier of entry, therefore benefiting large enterprises who can bear the increased cost of a regulatory burden more than a new small business.<sup>6</sup> Decreased competition is destructive for the entire industry, as it is often emergent and small enterprises which experiment with new innovations and methods for increased efficiency. A sunset review provision would measure if the regulation is creating an unnecessary cost on businesses and if consumers are paying as a result.

Another benefit of regulatory sunset provisions would be political accountability. If a political actor or agent within the executive branch institutes a regulatory policy, until there is a comprehensive study to determine whether it has been effective, they can take credit for the regulation on the assumption that it has succeeded in achieving its goals. A regular period of sunseting will hold agencies and other regulators accountable by determining the accuracy and success rate of their regulation, especially with sunset review provisions which can produce factual results after some time in effect.

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<sup>6</sup> CATO Institute: Why Regulatory Reform? (2014)

## States

One state which has had great success in regulatory reform using sunset provisions is Idaho, which eliminated or simplified 75% of the 72,000 pages of rules and restrictions that were in effect in a single year.<sup>7 8</sup> In order to prevent the same regulatory bloat from returning, Idaho's Gov. Little instituted a five-year regulatory sunset provision, in which an agency must review 20% of its regulations per year. If the agency wishes to promulgate a rule, the sunset review provisions call upon the agency to conduct a "retrospective... critical and comprehensive review," which does not seek to "simply reauthorize their existing rule chapter"; the agency must "determine whether the benefits the rule intended to achieve are being realized, whether those benefits justify the costs of the rule, and whether there are less-restrictive alternatives to accomplish the benefits."<sup>9</sup>

A counterargument to regulatory sunset provisions is that the re-approval process pulls energy and resources away from active governance and towards a constant re-justification of existing regulation; studies have found, however, that Texas's regulatory sunset provisions had saved the state \$27 for every \$1 spent on review; in Minnesota, it was as high as \$42 saved for every \$1.<sup>10</sup>

A state which has a form of sunset provision but is effectively neutered is Utah. Although the state code calls for every regulation to expire after a year in effect unless re-authorized by the state legislature, the re-authorization is omnibus, and only requires the legislature to specify which rules will *not* be reauthorized, and subsequently demands a justification for the repeal.<sup>11</sup> This is, in effect, unlikely to constitute a comprehensive review of regulations.

## Partners

States with an intentionally healthy regulatory environment will be inclined towards our reforms if they do not already have a similar reform in place. Legislators working to create long term reform and increase competition in markets will benefit greatly from this suite of reforms. Individuals working at state level OMBs or OIRAs that have been selected or hired to reduce the regulatory burden.

## Opposition

Most states, legislators, special interests and large corporations will be against this reform because it directly results in the automatic termination of regulations which may be hyper-

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<sup>7</sup> <https://gov.idaho.gov/wp-content/uploads/2019/01/eo-2019-02.pdf>

<sup>8</sup> <https://gov.idaho.gov/wp-content/uploads/2020/01/eo-2020-01.pdf>

<sup>9</sup> *ibid*

<sup>10</sup> <https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf>

<sup>11</sup> <https://le.utah.gov/xcode/Title63G/Chapter3/63G-3-S502.html>

beneficial to them and which may have cost tremendous resources to emplace. (Eg. a large housing conglomerate employing an army of lobbyists which has a wide array of regs on the books that stifle small business and promote corporate interest.