REGULATORY REFORM

The Fate of 'Never Needed' Regulations

What happened to regulations that were suspended during the Covid-19 emergency?

BY JOHN BERLAU AND RYAN YOUNG

Parking lots and parking garages have served for decades as venues for clandestine meetings in the movies and often in reality. In the early 1970s, it was a parking garage in Arlington, VA, where *Washington Post* reporter Bob Woodward met several times with FBI deputy director Mark Felt—a.k.a. "Deep Throat"—for crucial information about the Watergate scandal. Those meetings were immortalized in the 1976 classic film *All the President's Men*.

In the last couple of years, many individuals have also gone to parking venues to receive important and potentially life-changing information. But there's a wicked twist that not even the most imaginative moviemaker could have come up with: In these real-life meetings, one of the two parties doesn't go to the garage or parking lot, while the other stays in the car and uses a smartphone. The individuals in question are not investigative reporters or high-level government agents dealing with classified info. Rather, they are doctors and patients navigating a confusing set of telemedicine regulations that became less burdensome during the pandemic but have now partially reverted to the status quo.

"Imagine being told while sitting in your car in a strip mall parking lot that you have a brain tumor, hoping your spotty cellphone service is strong enough to make out what your physician is saying," writes a group of doctors and medical researchers in a 2023 *Boston Globe* op-ed reprinted by Harvard Law School's Center for Health Law and Policy Innovation (Shachar et al. 2023). They add that "these scenarios are becoming increasingly common." As a cause of this strange phenomenon, the op-ed fingers "outdated physician licensure laws" that were relaxed or suspended during the pandemic but now have been partially restored.

The op-ed explains that there was "a thoughtful and necessary regulatory response from federal and state governments during the COVID-19 pandemic, lifting restrictions on telehealth, including often waiving in-state licensure requirements." This deregulation helped create a "telehealth boom."

However, by 2022 according to the telehealth advocacy group Alliance for Connected Care, 42 states and the District of Columbia ended their emergency declarations that contained licensure flexibilities. Medical providers in those states can generally still treat their patients through telemedicine, but as the *Boston Globe* op-ed notes, they must "be fully licensed in the state [where] their patient 'sits.'" Out-of-state patients who are lucky enough to live a reasonable distance from their doctors' state can drive to the closest parking venue across the state line to meet electronically. But other patients who

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live farther away have lost access to the out-of-state medical providers they found during the pandemic.

This "parking lot medicine" phenomenon reported by medical professionals is one of many fascinating and consequential after-effects of regulations that were temporarily repealed during the pandemic and then partially or fully restored when the emergency ended.

Crisis is typically the health of the state (Higgs 1987). Covid was no exception as far as overall growth of government powers. Federal, state, and local governments used the pandemic to declare all sorts of emergency edicts, from lockdowns to supply chain restrictions. But this crisis was slightly different in that governments also gave up some powers, at least temporarily. Federal, state, and local administrators and legislatures loosened more than 800 regulations that were slowing the pandemic response or, at least, reducing consumer welfare, from licenses and permits to the aforementioned telemedicine restrictions (Morales 2020).

Now that the crisis is over, many of those loosened regulations have come back into effect, though others seem to have vanished permanently. A comprehensive count of how many outdated rules have returned and how many remain repealed has not yet been compiled. Nevertheless, a look at the post-pandemic fate of outdated regulations in certain sectors provides many lessons for reformers.

#NEVERNEEDED

In the first weeks after the Covid national and state lockdowns and stay-at-home orders, several free-market organizations gathered around the slogan "Never Needed," or as it was written on many social media sites, #NeverNeeded. The thinking behind this slogan was that if a regulation could be relaxed during the pandemic response, it was probably never needed in the first place. In April 2020, just a couple weeks

after the mid-March lockdowns, we joined our Competitive Enterprise Institute colleagues in a short paper outlining outdated regulations harming the government and private sector responses to Covid and worsening the quality of life for Americans coping with the lockdowns (Murray et al. 2020). Among the rules we highlighted were restrictions on telemedicine, bans on delivery of legal products such as alcohol, and barriers to accessing health products.

Throughout the pandemic, free-market groups published never-needed-themed papers, held events, did grassroots activism, and got a surprising amount of favorable media coverage for deregulation. Many of the reform ideas were the same ones free marketers had been promoting for years, but the simple act of branding them as "never-needed" gave people something to rally around. The branding gained new audiences for regulatory reforms that might have gone unheard otherwise. It also made it easier for like-minded organizations to share ideas, identify regulations to repeal, and pursue their comparative advantages.

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Good branding and marketing, while not a natural skill for most policy wonks, can be an important tool for putting their ideas into action. Yet, getting reforms to stick is an institution-level problem more than a marketing problem. The process for implementing and repealing rules frequently was what made a difference in the staying power of deregulations from the pandemic. A look at the factors involved in telemedicine and other sectors offers instructive lessons on keeping never-needed regulations permanently at bay.

TSA AND HAND SANITIZER

The Transportation Security Administration's (TSA) 3–1–1 rule for liquids is one example of a never-needed regulation relaxed during Covid that was then restored after the pandemic. Implemented in 2006 after reports of an alleged terror plot in Britain to down a plane using liquid explosives, the 3–1–1 rule put sharp limits on the liquids—including hand sanitizer—that US airline passengers can carry onboard. Under the regulation, a passenger can take onto a plane no more than a total of 1 quart of liquids, gels, aerosols, and other toiletries, and they must be in separate containers holding no more than 3.4 ounces in volume of the substance. One quart, one passenger, 3 ounces—hence, by bureaucratic logic, the "3–1–1" name for the rule.

Even before the pandemic, the rule frustrated passengers and was widely seen as lacking a rational basis. Just a few weeks after the plot was reported, British officials told the *New York Times* that initial allegations about the terror plot were embellished and the individuals arrested lacked airline tickets and passports and had never successfully produced any liquid explosives (Van Natta et al. 2006). One expert told the *Times* in 2007 that "the idea that confiscating someone's toothpaste is going to keep us safe is too ridiculous to entertain" (Iyer 2007). The European Union repealed its similar liquid limits rule in 2013.

But in the United States, it took a crisis to get the TSA to even loosen the rule, and then only temporarily. During the pandemic, there was a clamor for hand sanitizer to keep Covid from spreading. After a national emergency was declared in early 2020, the TSA loosened the 3–1–1 rule for hand sanitizer, though not other substances, allowing travelers to carry on one 12-ounce bottle of it.

The TSA tied its relaxation of the 3–1–1 rule to the Department of Health and Human Services' (HHS) declaration that the pandemic was a public health emergency. Had HHS not done so, TSA might have had to undergo the notice-and-comment process for changing a regulation, which typically takes several months.

This convenience had a tradeoff. When the federal emergency was lifted on May 11, 2023, many waived federal regulations tied to it came back into effect, including the TSA's hand sanitizer rule.

There was not a single hand sanitizer–related terror attack during the three years passengers were allowed to carry those bottles onto planes. There is little reason to believe the larger 3–1–1 rule has ever deterred a terrorist attack or had any security benefits (Sharkey 2007).

Since the TSA took the quick and simple route of using an emergency declaration for hand sanitizer and did not bother going through the standard rulemaking process to make this relaxation permanent during or immediately after the emergency period, its common-sense reform turned out to be temporary.

OTHER RULES WAIVED AND THEN RESTORED

Other never-needed rules lifted during the pandemic included some medical paperwork requirements, service area restrictions for ambulances, environmental permits, working hour limits for truckers, and more.

Many of those rules followed a similar pattern. They were waived using emergency procedures and reappeared once the emergency ended. Patients, consumers, and businesses benefited from the lighter regulatory touch, but they were made to suffer again from useless red tape as the regulatory relief was jerked away from them.

In the case of the telemedicine rules, there was at least some effort among states to preserve flexibility. Forty states, the District of Columbia, and Guam now participate in the Interstate Medical Licensure Compact that attempts to streamline the physician licensing process. Yet at the end of the day, each state in the compact still issues its own license, and many still charge physicians hefty fees and have specific criteria for licensure. Therefore, the compact is not nearly as effective in preserving options for doctors and patients as the pandemic-era rules that allowed mutual recognition of licenses from other states. As the doctors and medical researchers noted in the *Boston Globe* op-ed, even with the compact:

> Getting licensed in multiple states is an administrative gantlet. Physicians looking to practice in multiple states have to be fingerprinted again and again, sit through multiple, superfluous tests, and juggle inconsequential differences in medical education requirements. Getting licensed in all 50 states would cost about $90,000 per physician, excluding biannual renewal fees. It is inefficient and to many cost-prohibitive to ask physicians to chase licenses in every state so that they can better help their patients.

As telemedicine is new, there is appropriate debate about its utility in all medical situations, and data on results are needed to fully gauge its effectiveness. Insurers and government programs such as Medicare and Medicaid should indeed be prudent about reimbursement for telemedicine procedures that may not have proven their worth (Zinberg 2024). Yet, regulatory barriers should never be allowed to keep telemedicine from being as effective as it can be.

ALCOHOL DEREGULATION IS LARGELY HERE TO STAY (YAY!)

Interestingly, deregulation advocates have had their biggest successes with rules that served mostly as barriers to convenience for alcoholic beverage consumers.

To soften the blow of the bans on in-restaurant dining that occurred as part of lockdowns, many jurisdictions suspended prohibitions on to-go alcohol. Restrictions on restaurants selling alcoholic beverages to customers as part of carry-out or delivery orders had stayed on the books because of what Bruce Yandle, writing in *Regulation* more than 40 years ago, called a "bootleggers and Baptists" coalition (Yandle 1983). This term describes the dynamic of moral crusaders against a particular product joining—though not always explicitly—with businesses that wish to quash competition in selling the product. The analogy applies to many different industries, but it has its origins with alcohol sales. After full Prohibition ended in the 1930s, the literal bootleggers in the coalition with anti-alcohol crusaders were replaced by a network of alcohol distributors and stores that benefited from restrictions on competitors selling alcohol that customers could take home or have delivered.

As they were debating the lockdown, state and local lawmakers heard from consumers who wanted alcohol as part of their meals and restaurant owners who pointed out that alcohol sales are a main profit center for many restaurants. When people were not allowed to dine in restaurants during the lockdowns, regulations banning to-go drinks threatened to put them out of business. So, lawmakers enacted legislation suspending the to-go alcohol bans.

Once again, these suspensions were intended to be temporary. But unlike many of the measures deregulating telemedicine and travel, they were not necessarily attached to emergency orders and set to expire when the orders did. Colorado, for example, set its expiration date for suspending its to-go alcohol ban to 2025. This gave lawmakers time to hear the public's overwhelming satisfaction with the effects of the deregulatory measure. In May 2024, Colorado Gov. Jared Polis signed legislation making to-go alcohol sales permanent in the state.

Overall, deregulation of to-go alcohol has had much more success becoming permanent than most other Covid-era deregulatory measures. As of mid-2024, 29 states plus the District of Columbia permanently allow to-go alcohol sales. An additional five states still allow it temporarily. Restaurants and bars in 16 states and DC may sell drinks via delivery services like Doordash and Uber Eats, and 21 states allow liquor stores and other retailers to deliver drinks.

In Pennsylvania, liberalization of alcohol sales ended with the pandemic, but then it surprisingly returned. Pennsylvania has stricter liquor regulations than most states because of an especially strong, historical bootleggers-and-Baptists dynamic. Despite public support for the looser regulations, law-and-order types in the legislature joined forces with alcohol distributors (who resented new competition) to end the reforms in 2021. Yet, in 2024, restaurants, alcohol manufacturers, and the public successfully fought back, and lawmakers passed legislation allowing retailers, restaurants, and hotels to sell 16-ounce to-go drinks with an alcohol content of up to 12.5 percent. Shortly after signing the legislation into law, Pennsylvania Gov. Josh Shapiro said, "This is what real freedom looks like."

While these are not exactly life-changing reforms, there is something to be said for using smaller reforms to build a habit in legislatures, so they see that deregulation is possible and can be politically rewarding.

POLICY LESSONS

There are both institutional and cultural lessons from the never-needed experience. Many outdated rules were suspended, easing the burden during the pandemic and generating measurable improvement in people's lives. Yet, despite the acclaim for this deregulation, many of the archaic rules were restored with little debate. The reason is that many waived rules were tied to emergency declarations and executive orders. When the emergency ended, the liberalizations automatically ended with it.

Reformers have major lessons to take away from the pandemic experience. The most important is that institutions matter. It is not enough to just target individual rules; reformers need to look at the rulemaking process itself that generates excessive regulations in the first place.

The first thing to do is change the waiver process so that outdated rules don't automatically return when the waiver expires. Waived regulations at the federal level should undergo the notice-and-comment rulemaking process outlined in the Administrative Procedure Act before they can be reinstated. State and local waived rules should be required to undergo a process similar to the APA, subject to variations of the regulatory process among states, in which the elements of advanced notice and comment from the public are prominent features.

At the federal level, waived rules should also be subject to the Congressional Review Act, so that Congress would have 60 legislative days to block the return of a harmful or outdated regulation. Proper cost–benefit analyses should also be conducted before reinstating waived regulations at all levels of government.

These steps give both agencies and the public a chance to review the rules and ask if they were ever needed in the first place. There is no need, however, to subject a temporary waiving of these rules to this same process. In a free society, a thumb on the scale should favor liberalization that affirms freedom rather than mandates that restrict liberties and potentially violate constitutional rights.

A long-term institutional lesson from the pandemic and other crises—such as the Los Angeles fires occurring as of this writing—is the need to prepare for crises *before* they happen, including by sweeping away regulations that could worsen a crisis and/or prevent an effective response. The pandemic exposed a slew of rules that hampered relief efforts. While temporarily waiving them was helpful, it would have been far better if they had never been on the books to begin with or had been repealed long ago.

There are many ways to accomplish this. One is a commission modeled after the 1990s Base Realignment and Closure (BRAC) commissions that closed unneeded military bases after the Cold War ended. An independent commission could comb the books for never-needed regulations and put them in a package for Congress to vote on up-or-down, without amendment, and within a set period of time.

While a regulatory BRAC commission would help trim the stock of existing regulations, it would not treat the flow of more than 3,000 new federal regulations each year. Automatic sunsets for all new regulations, renewable by Congress, would allow unneeded or harmful rules to expire on their own, with no need for an emergency waiver or even a congressional vote.

A cultural lesson is that both agencies and the public should be more aware of the general never-needed lesson that if a regulation gets in the way during an emergency, then it probably gets in the way during normal times, too. This is not the type of ethos that can be legislated. This type of cultural change is a bottom-up phenomenon that begins with informed citizens, though effective agency leadership that regularly asks the never-needed question can go a long way in instilling that mindset in career staff.

CONCLUSION

It is important for governments to learn the right lessons from the Covid response so that people will be able to more effectively respond to the next crisis, whatever it may be. The lessons from the Covid never-needed experience apply on a smaller scale every time there is a hurricane or other natural disaster. Instead of waiving the Jones Act whenever a hurricane hits Puerto Rico, Congress should repeal it altogether.

The pandemic was the worst crisis of the century so far. Even if the next major crisis is still decades away, officials have no way of knowing that. The time to prepare is now. Purging never-needed regulations and safeguarding against future buildups of regulatory sludge are key parts of that effort. *R*

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