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Report

Taking stock of COVID-19 deregulation

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Editor's Note:

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So much has happened in the last three months that it sometimes feels impossible to keep up. A number of recent articles take aim at such anxieties and suggest that the Trump administration has pulled a fast one, pushing through its deregulatory agenda while the nation is distracted. Condemning this opportunism as an example of the “shock doctrine,” some commentators suggest that the Trump administration is using our national emergency to advance corporate interests.

The Trump administration has rarely aimed for root-and-branch removal of regulatory programs—that is, they have eschewed the kind of deregulation that turned the airline and financial industries loose from government control in the 1970s and 1980s. But throughout the president’s first term, they have sought to make regulatory requirements easier to comply with, often explicitly seeking to reverse Obama administration policies.

(Brookings’ Deregulation Tracker offers a detailed look at the deregulatory actions of the last three-and-a-half years.)

Even against this background, the highly unusual political moment of COVID-19 has seen an uptick in government actions with deregulatory effects. Many such actions are specifically targeted at helping our country beat back the novel coronavirus or cope with the difficulties of living under lockdown. Some changes, including in enforcement policies, have simply been adjustments to reflect limitations in the government’s capacity during the pandemic; they are “deregulatory” only in the sense that restaurant layoffs are degustatory. It is important to note that at both the federal and state levels, most

deregulatory changes have been instituted on a temporary basis, though there are certainly cases where groups will push to make deregulation permanent—sometimes with good reason.

Here we attempt to untangle the various deregulatory developments of the past few months, without any claim of comprehensiveness. We believe it is especially important to sort out what has merely happened *during* the pandemic, and what has happened *because* of the pandemic. We offer four different categories of COVID-19 deregulation.

1. Deregulation finalized during the pandemic, but not related to it

From its earliest days, the Trump administration has aggressively pursued a deregulatory agenda, with a special emphasis on reversing some of the Obama administration's most ambitious environmental initiatives. This has never been a secret—indeed, the administration has sometimes overstated just how much deregulation it has accomplished, even as it has shut down new regulatory activity to an unprecedented degree.

For a few important policies, deregulatory efforts have seen business as usual during the pandemic response. That is, changes long under development came to fruition during this time, with little or no adjustment made to account for COVID-19.

The most noteworthy case in this category is the loosening of auto tailpipe emission standards through the Safer Affordable Fuel-Efficient Vehicles rule promulgated jointly by the Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA), the final rule of which was announced at the end of March and published in the Federal Register on April 30. In reducing the stringency of fuel efficiency requirements relative to those put in place at the end of the Obama administration, the Trump administration was delivering on one of its long-held policy goals. The move hardly went unnoticed. Unsurprisingly, it was highly controversial; environmentalists lost no time in denouncing the move as damaging to public health and exacerbating climate change, suing to challenge the policy as insufficiently justified.

Nor was it rushed through because of the distraction provided by coronavirus. Rather, the administration is up against a deadline imposed by the Congressional Review Act (CRA). Because of the CRA, any rule that they finalize too late—the exact deadline, based on the number of legislative days held in each chamber of Congress, is as yet unknown—could be overturned at the beginning of a Democratic administration in 2021 with bare majorities in both the House and Senate. In other words, if Democrats retake the White House and Senate, they would be able to quickly wipe out any Trump administration policy enacted in late 2020. That has meant that the administration is eager to finalize all of its most important regulatory priorities in the last few months, even as many agencies have had to turn their attention to the coronavirus. Other rules finalized early in 2020, presumably with an eye toward meeting the CRA-imposed deadline, include a Department of Labor financial reporting rule for unions, the EPA’s final Waters of the United States replacement rule, and its final Mercury and Air Toxic Standard revised analysis.

2. Direct Adaptations to COVID-19 and Lockdowns

Many changes that have been interpreted as “deregulatory” during the pandemic are better understood as fairly normal attempts to adapt to the unusual and risky conditions. Government agencies are, after all, human enterprises that must work to safeguard their employees’ health and wellbeing just like private firms. When faced with the risk of contracting (or spreading) a deadly virus, they will often decide it is best for their workers to stay home.

That sometimes leads to internal policy changes that all observers are likely to see as basically benign, such as the Office of Management and Budget’s March 15 guidance to federal agencies encouraging as much telework as possible, or its March 17 guidance to minimize face-to-face interactions. But it also sometimes leads to a diminution of normal functions.

One example is a March 26 EPA Memo on enforcement discretion, which critics have characterized as giving a free pass to polluters for the duration of the pandemic. The memo (which does not apply to any criminal activity) acknowledges that the EPA will forego seeking civil penalties for firms’ failures to perform normally required sampling,

monitoring, reporting, or training, if such failures directly result from the pandemic and lockdowns. The agency is acknowledging the reality that regulated firms may be forced to alter their work conditions, leading to difficulties in performing the normal functions of compliance. At the same time, it is tacitly acknowledging that its own enforcement capabilities are likely to be diminished for now. As long as such decisions are only temporary (as they announce themselves to be), they ought not be viewed as especially problematic.

3. Deregulation Targeted at Fighting the Pandemic

Much more important are deregulatory changes designed to help people prevent the spread of the virus or cope with the living conditions that its spread has made necessary. Attempts at comprehensive lists run into the hundreds, so here we only gesture at a small portion of federal deregulatory activities.

Unsurprisingly, most of the changes have to do with the practice of healthcare. The Center for Medicare and Medicaid Services (CMS) adopted temporary waivers allowing service providers to make use of facilities typically used for non-medical purposes, expand their workforces to meet the exigencies of the pandemic, and put aside paperwork requirements when necessary. CMS also conferred new flexibilities on long-term care facilities, including allowing new patients to receive coverage without previous hospitalization. The Department of Health and Human Services (HHS) has provided limited waivers of the privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA) and recommended enforcement discretion.

Among the most high-profile deregulatory moves are those that have facilitated an expansion of telemedicine. Both CMS and HHS have made temporary changes making it easier for doctors and patients to meet with each other via videoconferencing, even where there is no preexisting relationship and when doctor and patient may not be in the same state. The agencies have also allowed billing to mirror in-person appointments. By making it possible for more people to seek medical help without having to brave an office visit, these changes helped reduce the spread of coronavirus while enabling more treatment. A

recent Brookings report on telemedicine argues, “The novel coronavirus was an unlikely accelerant for telehealth use in the U.S.,” and makes the case for making permanent many of the changes adopted in response to the pandemic, both at the state and federal level.

Plenty of changes have gone beyond the medical system. The Department of Transportation has enabled certain truck drivers to extend their licenses without following normal procedures, as well as exempting them from various hours-of-service limitations if they are directly engaged in shipping emergency relief supplies. Similar relief has been offered to air carriers.

Arguably, federal agencies did not deregulate fast enough in the face of the pandemic’s unforgiving timeline. As Justus Myers and I detailed in our timeline of federal actions during the crucial months when the coronavirus spread in the United States, the Food and Drug Administration (FDA) erected barriers to private testing throughout February 2020 that look disastrous in retrospect. Producers also had a difficult time entering the business of producing personal protective equipment, including masks, because of regulatory barriers, although in the Families First Coronavirus Response Act (Section 6005) Congress waived a prohibition that prevented protective masks produced for industrial purposes from being repurposed for medical use. The Department of Education has proposed—but not finalized—rules that would make it easier for colleges and universities to offer online classes. And FDA regulations initially shut down an innovative home-testing program, impeding attempts to track and arrest the virus’s spread, although apparently they have now allowed it to proceed.

As the crisis dragged on, the Trump administration has focused some of its attention on what is arguably the most important effort to deliver us from COVID-19: development, testing, and mass distribution of a vaccine. In creating “Operation Warp Speed,” a public-private partnership meant to coordinate federal government activities and ensure that vaccine development can ramp up rapidly once testing approval is secured, the administration has created a coordinated program to push through regulatory barriers while still maintaining sound safety procedures. Of course, it is too soon to say whether these efforts will bear fruit, and criticism abounds; some argue the program should be even

more ambitious, while others allege the project allows too much corporate influence. But this does seem to be a case where the Trump administration has, belatedly, prioritized the right thing.

In a few other areas, it is easy to imagine how ambitious regulatory reform programs might have helped keep the virus in check, but these opportunities have mostly not been realized. For example, delivery services using autonomous drones remain frustrated by Federal Aviation Administration (FAA) rules. The FAA did authorize one firm to use drones to deliver medical supplies in North Carolina and issued some encouraging guidance, but its restrictive rules continue to make widespread commercial deployment of drone delivery impossible. To take another case, the oil and gas industry has sought a waiver from the Jones Act to grant greater flexibility in shipping. But the law, which prevents foreign-flag vessels from transporting goods between U.S. ports, remains in place.

The past few months have also seen an unprecedented level of temporary deregulatory activity in the states. As with federal changes, many state actions were focused on expanding access to medical care and ensuring medical professionals otherwise barred from practicing in certain cases could help during the crisis. Countless states waived telehealth restrictions and allowed out-of-state medical professionals to provide telemedical services. Other states allowed mental health professionals who had graduated but were not yet licensed to practice through telemedicine. Arizona and Colorado even permitted telemedicine for pets. Other states allowed medical professionals with expired licenses to practice. Professional scope of practice was expanded in many states, which allowed various medical professionals to provide more types of care. States including Alabama, Colorado, Florida, and Virginia allowed medical professionals licensed in other states to practice in their state. A few states even went so far as to allow doctors licensed in other countries to practice. Many of these reforms were geared towards beefing up medical staff as well as making sure medical professionals could practice where needed, particularly in the epicenters of the pandemic.

Some other state deregulation was focused on making daily life easier for individuals and businesses while keeping them safe. Waiving parking regulations in cities such as Los Angeles allowed people to stay inside and reduce the spread of the virus. Permitting

alcohol to be delivered from restaurants enabled businesses in many states to increase revenue at a time at which they were closed for dine-in service and struggling. Temporary reforms such as these, while not so direct as medical regulatory reforms, were still aimed at slowing the spread and helping struggling businesses.

4. Permanent deregulation inspired by COVID-19 experience

How many of the deregulatory changes made over the last three months will end up being permanent? That remains an open question. A vast majority of the changes in question are framed as temporary; many have clear expiration dates and require extensions, while others are designed to coincide with the duration of the public health emergency.

But there are certainly efforts of various kinds to make changes permanent. On May 19, President Trump issued Executive Order 13924, in which he urged agency heads to issue waivers not just to combat the virus, but to aid in a rapid economic recovery. The order declares: “The heads of all agencies are directed to use, to the fullest extent possible and consistent with applicable law, any emergency authorities that I have previously invoked in response to the COVID-19 outbreak or that are otherwise available to them to support the economic response to the COVID-19 outbreak.” Unusually, it also reaches into enforcement and adjudication, encouraging agencies (including independent commissions) to adopt a kind of “tie-goes-to-the-runner” mentality in deciding whether compliance efforts have been adequate, given the unusual circumstances. Although the order includes, as a matter of course, several provisions emphasizing that it in no way authorizes agencies to disregard their legal duties, critics worry that it is simply a signal that the Trump administration will be abandoning regulatory enforcement for the foreseeable future.

Some in Congress would like to see all of the coronavirus waivers become permanent. They argue that if our medical system or transportation system has functioned well while waivers have been in place, this shows that the underlying policies should be permanently repealed. Representative Chip Roy (R-TX) has introduced a bill that would do just that, while also creating issue-specific commissions to recommend needed re-regulation. It is unlikely to receive consideration in the House, though.

Of course, for all these federal questions, all bets are off if there is a new occupant in the White House in January. Few of the deregulatory changes made to date (excepting those in the first category above) would be difficult for a new administration to reverse quickly.

In the states, too, most changes have also been temporary. Occupational licensing reform was a cause with some momentum even before the pandemic, and various bills are still making their way through state legislatures. Still, while proponents of licensing reform have been heartened by temporary reforms that were once completely off the table in many states, the future of reforms is unclear. There are a few instances, such as to-go alcohol regulations in [Michigan](#) and [Oklahoma](#), where states are clearly pursuing making temporary changes permanent, but we do not yet know how widespread this trend will be.

Conclusion

Deregulation has been one of the Trump administration's clearest and most consistent goals since the president's inauguration. The novel coronavirus brought a new impetus for deregulatory moves, and some have accused the administration of opportunism in its recent actions. But many of the instances they cite clearly precede the coronavirus and have little to do with it, while others are perfectly natural adaptations to difficult conditions. Deregulatory changes have clearly been an important part of coping during the pandemic, both at the state and federal level. In fact, there are many instances where it seems deregulation did not come fast enough. It nevertheless remains to be seen whether the administration might push to retain deregulatory changes beyond what the public health conditions warrant.

Correction: This piece has been updated to properly reflect the relevant industries and politics around Jones Act waivers.

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