

February 2022



POLICY BRIEF

Over-Regulated: Six Reforms to Improve Wisconsin's Regulatory Climate

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Introduction

Recently, the Wisconsin Institute for Law & Liberty released *Wisconsin Regulation in Focus*, a reportⁱ highlighting the scope of Wisconsin's regulatory state. That report helps call attention to the magnitude of Wisconsin's regulations, especially when compared with our neighboring states. It also suggests some simple reforms which could be helpful to rein in our ever-growing regulatory state.

This follow up report adds some detail to those reforms while also suggesting some additional ones which could be implemented in order to ensure Wisconsin's regulatory environment is as efficient and transparent as possible. As discussed herein, we suggest: (1) automatically sunseting regulations over time; (2) independent reporting on regulations before they're promulgated; (3) ensuring all new regulations are net-zero in cost by requiring cost savings whenever new costs are imposed; (4) allowing only one rule per scope statement to be promulgated; (5) reforms to the emergency rulemaking process; and (6) changes to public oversight of regulations, making it easier for private individuals to hold government accountable. The following sections of the report describe each of these proposals in greater detail.

Automatic Sunsetting

Once written, regulations in Wisconsin stay in force in perpetuity until the agency or the legislature repeals or modifies them. As a result, agencies often try to "reinterpret" old regulations to fit modern technology or industry advances. Recently we have seen this play out in the context of state regulation of public swimming pools.ⁱⁱ Wisconsin's public swimming pool regulations were written decades ago, and a state agency tried to use them to effectively shut down a new startup company. After WILL intervened to push back on the agency on behalf of the startup, the agency backed down, but this is a great example of how old regulations needlessly create confusion and increase costs.

The solution to this problem is relatively simple: require that each chapter of regulations expire seven years after it is promulgated. This would be done on a rotating basis, where 20% of the administrative code expires each year. If an agency wishes to readopt or amend a regulation, it would then be subject to a rule-promulgation process, thus allowing for public and legislative input. Some version of this law has already been implemented in 11 states, including Rhode Island, Idaho, Texas, and New Jersey.ⁱⁱⁱ Under this approach, Idaho was able to eliminate or simplify 75% of its regulations in just a year, eliminating over 1,800 pages of administrative

code.^{iv} In 2017, a similar proposal was introduced in Wisconsin’s legislature as 2017 Assembly Bill 384/2017 Senate Bill 295.^v The legislation passed the assembly but failed in the senate.

This reform would ensure that “stale” regulations are off the books, and that Wisconsin’s regulations are as lean and efficient as possible. We note that some regulations are required by federal law, and repealing them could actually establish more regulatory confusion – and so this process should exempt that small subset of regulations.

Sunrise Reports

When rules are promulgated, the only information the legislature receives are reports prepared by the administrative agency that is seeking to promulgate the rule. While the legislature could conduct its own hearings and solicit information, there is no guarantee they’d get a clear independent review of each new proposed regulation.

The solution would be to require an independent information audit of each new rule that gets proposed. This could be performed by the Legislative Audit Bureau, who could review the regulation and prepare its own analysis and summary of the regulation, and any alternative or less restrictive methods of regulation that the legislature should be aware of. Many states already conduct similar sunrise reviews when occupational licensing regulations are proposed.^{vi} An alternative to the Legislative Audit Bureau could be for the legislature to contract out for independently prepared reports from third parties. These reports would be similar to the agency reports currently required under state law (including a plain language description of the rule, comparison with other states, and potentially impacted parties, for example), but would be prepared by someone independent of the agency.

Net-Zero Regulatory Budgeting

Over time, as agencies continuously revise regulations, they necessarily add significant costs upon Wisconsinites. The result is an ever-growing and costly regulatory environment. A 2016 study^{vii} by scholars at the Mercatus Center found that a 10% increase in regulations was related to a .687% increase in the cost of consumer items. While this study was focused on federal regulations, there is little reason to think that states would be exempt from such costly burdens.

To fix this, Wisconsin could require that whenever agencies adopt a regulation that imposes a cost increase on the regulated community, they simultaneously find cost savings to offset the new cost. Texas passed a law like this in 2017. A rule that only imposes and does not offset costs must be affirmatively approved by both houses of the legislature before taking effect.^{viii}

One Rule Per Scope Statement

A “scope statement” is a document which begins the rulemaking process. Before beginning to draft a new rule, an agency must prepare, and the governor must approve, a scope statement. This is a relatively straightforward document which describes the proposed rule, discusses existing policies and new policies that will be proposed, cites statutory authority for the rule, estimates the magnitude of resources that will have to go into developing the rule, describes who may be impacted by it, and compares what is proposed to be done with what other surrounding states have done on similar issues. The purpose is to give the public a general idea that an agency is going to take regulatory action and help the general public participate in that process.

While the statutes require that each rule has a scope statement, they are unclear as to whether or not each rule requires a unique scope statement. As a result, agencies have used a single scope statement to promulgate an emergency rule and a permanent rule on the same topic, or even two permanent rules more than a year apart. The result is that the public has less notice of rulemaking, and is less able to participate in the process.

The answer to close this loophole is simple: Amend the scope statement statute to provide that “An agency may only promulgate one rule from each statement of scope.”

Emergency Rulemaking Reform

When an agency engages in rulemaking it must go through a lengthy process designed to ensure oversight and public input. However, state law acknowledges that in some cases agencies may need to impose a regulation more quickly than the traditional rulemaking process may allow. In these situations, agencies may promulgate what are called “emergency rules.” Specifically, an agency may promulgate a rule “without complying with the notice, hearing, and publication

requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.” Wis. Stat. § 227.24(1)(a).

Unfortunately, state agencies have taken advantage of this as a loophole to promulgate regulations with limited public input in situations where such “emergency rulemaking” is not necessary, or when the agency clearly had enough time to promulgate a permanent rule. For example, an agency may issue a scope statement and then promulgate an emergency rule months or even a year later.

This proposed reform would work in tandem with the one rule per scope statement reform, discussed above, to establish a shorter 6-month expiration date for emergency rule scope statements (under current law, scope statements have a 30-month expiration date).

Increase Public Oversight

Under Wisconsin law, in order to challenge the validity of a rule that was not properly promulgated, a lawsuit must be “brought in the circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business.” All other civil actions against the state (not involving a rulemaking challenge) may be brought in a court designated by the Plaintiff (rather than only the county where they reside or have their principal place of business). Changing this provision to allow challenges in any circuit court would give more Wisconsinites the opportunity to challenge unlawful agency actions.

Another problem under current law is that if a Wisconsinite sues the state to challenge the validity of a rule, and wins, the rule gets struck down—but the individual must still bear the full cost of the lawsuit (including any necessary appeal). This could be solved by providing for a fee shift when agency regulations are successfully challenged. That is, when a Court determines an agency is enforcing an unlawfully adopted rule, the individual challenging that rule would be reimbursed for their legal fees. This would help open the courthouse doors to many more Wisconsinites to help hold agencies accountable.

Conclusion

Our research has shown that Wisconsinites are buried under a mountain of regulations far larger than our neighboring states. These burdensome regulations are particularly harmful to individuals of limited means, for whom the cost of regulation may put something important—from a big purchase to a change of career—out of reach. It is vital for the economic future of Wisconsin that policymakers work to reduce our state’s out of control regulatory environment.

End Notes

ⁱ Broughel, James and Adam Hoffer. 2021. "Wisconsin Regulation in Focus." WILL Policy Report. <https://will-law.org/wp-content/uploads/2021/11/Wisconsin-Regulation-in-Focus.pdf>

ⁱⁱ <https://will-law.org/state-confirms-pool-sharing-start-up-not-subject-to-restrictive-regulations/>

ⁱⁱⁱ “Agency Dynamics: States With Sunset Provisions for Administrative Rules.” Ballotpedia. https://ballotpedia.org/Agency_dynamics:_States_with_sunset_provisions_for_administrative_rules

^{iv} “Idaho Cuts and Simplifies 75 percent of rules in one year, becomes least-regulated state in country.” Idaho Office of the Governor. December 4, 2019. <https://gov.idaho.gov/pressrelease/idaho-cuts-and-simplifies-75-percent-of-rules-in-one-year-becomes-least-regulated-state-in-country/#:~:text=Boise%2C%20Idaho%20%E2%80%93%20Governor%20Brad%20Little,regulatory%20rules%20in%20one%20year.>

^v “Assembly Bill 384.” Wisconsin State Legislature. <https://docs.legis.wisconsin.gov/2017/proposals/reg/asm/bill/ab384>

^{vi} “Sunrise Review Process by State.” The Council of State Governments. December 7, 2020. <https://licensing.csg.org/sunrise-review-processes-by-state/>

^{vii} Chambers, Dustin and Courtney Collins. 2016. "How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation." The Mercatus Center. <https://www.mercatus.org/publications/regulation/how-do-federal-regulations-affect-consumer-prices-analysis-regressive#:~:text=Often%2C%20complying%20with%20regulations%20is,to%20affect%20all%20consumers%20equally.&text=The%20data%20show%20evidence%20of,between%20regulation%20and%20increased%20prices.>

^{viii} Agency Dynamics: States that require administrative agencies to conduct cost-benefit analysis before implementing rules.” Ballotpedia. https://ballotpedia.org/Agency_dynamics:_States_that_require_administrative_agencies_to_conduct_cost-benefit_analysis_before_implementing_rules



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