Legal Opinion Letter

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202.588.0302

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SCRUTINIZING STATE REGULATIONS: A NECESSARY TASK FOR FREEDOM AND FREE ENTERPRISE

by
The Honorable Robert F. McDonnell

The primary role of government, as eloquently stated in our Declaration of Independence and Constitution, is to secure the rights of our citizens to life, liberty, and property. That duty is fulfilled by the enactment and enforcement of laws. That process, however, can leave some gaps, so our system provides for the enactment of specific regulations to achieve the expressed purpose of our laws. At last count, there are in excess of more than 24,000 pages of regulations in the Commonwealth of Virginia alone.

This labyrinth of rules applies to both business and citizens. While their primary purpose is to supplement the enforcement of our laws, their very cumbersome nature often works against that goal. Our Founding Fathers never contemplated such a massive amount of government intervention in the lives and property of our citizens. Thus it is the responsibility of government to regularly and systematically review the nature, scope, and impact of regulations. As this is done, we should remember the words of Thomas Jefferson: "The organization of [government] may be thought [to entail great difficulties]. But follow principle, and the knot unties itself."

The federal "Regulatory Flexibility Act of 1980" was enacted to relieve small businesses from some of the regulatory obstacles that disproportionately impact them. Since small businesses represent over 97% of the Commonwealth's total business sector, Virginia[1] has adopted a version of the Act.

A significant part of the Commonwealth's Act is the requirement that all regulations under consideration must be evaluated not only for their efficacy, but also for their fiscal impact. This impact is not limited to just the cost of increased government bureaucracy. It embraces the administrative and human resources impact on small businesses and personal and commercial impact on private property. This analysis attempts to accurately gauge the cost and benefit of the regulation, but more importantly advances the principle that regulations exist to serve, not oppress, the taxpayer. This principle is further enshrined in the Act by allowing small businesses to challenge regulations in court within one year of its promulgation.

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[1] *See* VIRGINIA CODE § 2.2-4007.1.

Robert F. McDonnell is Attorney General of the Commonwealth of Virginia.

By its very nature, regulatory action has a tendency to go over board. So many regulations are promulgated, that it is often forgotten whether an agency has the authority to take such actions or whether they conflict with other laws. Additionally, after decades in place, the obvious question is whether there is a better way to get the job done. We have initiated a review of all 24,000 pages of regulations in the Commonwealth. Virginia's effort differs from that of other states in that the review is being conducted by the Attorney General's Office.[2] Thus the issue of authority is subject to rigorous legal analysis as well as the rest of common sense. In addition, this review was undertaken with the support of the Governor of Virginia[3] and the participation of experts in the public and private sectors and citizen advocates. This structure ensured that the proper balance between economic development, consumer protection, and liberty interests is maintained. Any such effort initiated in other states should contemplate inclusion of a similar cross section of ideas and interests.

Another institutional problem is that it is much easier to promulgate regulations than it is to repeal them. To address this, our Task Force recommended and the General Assembly approved a process referred to as "Fast Track." This process has become an important tool to discover and remove unnecessary regulations. Now, regulations can no longer remain the law for years, perpetuating the image that government is inefficient and ineffective, frustrating citizens, and stifling economic growth.

Technology is also the enemy of regulatory creep. There is no reason to require filings and notices in print, when they can be completed and filed on-line. This quickens the rate of compliance and enables consumers to make informed choices. Additionally, making the regulations as well as any proposed amendments to them available from a central website, with links to the particular agency's website, opens the regulatory process to a new era of disclosure, inclusion, and openness.

The scope and purpose of many state regulations is dependant in part upon federal law. Common examples include the regulation of government health insurance or occupational standards. This often leads to parallel state regulations that are either duplicative of federal law and unnecessary, or not consistent with federal law. In either case, a periodic review pinpoints and removes those regulations from the administrative code.

Finally, eliminating regulations benefits a vibrant free market. Inefficient businesses that would not survive in a free market economy often limp along assisted by government regulations. State regulations may act only to protect such businesses from the realities of the marketplace, thus reducing the level of competition and quality choices. Thus, in the final analysis, the issue is again the one established by our Founders: government exists to protect freedom. To the extent regulations advance that duty – in personal life, business operations, or free market economics – they can be a useful and vital part of government. To the extent regulations stifle freedom and property rights, they are rightly subject to modification or repeal. No government has anything to fear from open examination of the books.

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[2]The Virginia Attorney General's Government and Regulatory Reform Task Force was convened in the fall of 2006. A similar review was initiated by the Massachusetts Attorney General's Office in late 2007.

[3]*See* Governor's Executive Order 36 (2006), which requires periodic review by state agencies of regulations and enhances the role of the Attorney General in providing policy and legal advice during that process.

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