Smart Regulation in a Post-COVID-19 Economy

The COVID-19 pandemic has put regulation issues front and center in every American’s life. Within a few short weeks, 41 out of 50 states have issued stay-at-home orders, and regulations governing many other aspects of all Americans’ public lives are now imposed because of COVID-19. Among a long list of constraints, nonessential businesses, many of them small businesses, have been required to cease or sharply curtail their services. Schools have been closed, access to parks and outdoor spaces has been restricted, and other staples of all Americans’ public lives, including large gatherings, have been restricted.

On the other hand, and more than ever before, Americans have seen other regulations lifted rapidly, particularly in the heavily regulated health care sector. Constraints on testing, laboratories, out-of-state health care workers, vaccine R&D, telemedicine, ventilator production, and infrastructure expansion have been relaxed. Even more extensive relief has addressed the unprecedented havoc that COVID-19 has unleashed on American society, public health, and the economy. Restrictions on work at home, online courses at colleges and universities, the transport of food and alcohol, and hours truck drivers can be on the road are all being lifted or relaxed to meet the demands of the crisis. Restrictions on the production of hand sanitizer and the amount that the Transportation Security Administration (TSA) allows passengers to carry on airplanes have also been relaxed.

In 2020, the American public’s awareness of the direct linkage between regulation and both public safety and the economy has never been put into such stark relief. The practical problems that we face are new in our lifetimes. But the pandemic also highlights enduring challenges that regulations bring, and addressing those problems will require applications of principles and long-standing techniques to the enduring problems of measuring and weighing costs and benefits under conditions of enormous uncertainty. As America grapples with the challenge of combatting the health crisis, easing strain
on the health industry, and reopening the economy, many of these problems will rest most heavily on small businesses which employ almost 50 percent of the workforce, and it is here that policy consideration may be most difficult and most important. Prior to 2020, small businesses had their own unique problems, but now they face new and unprecedented burdens without the economies of scale to devote specialists to deal with rapidly changing regulations. The COVID-19 economy and its aftermath will have a severe impact on small businesses.

The following Solutions Brief provides background on regulation and examines its impact on two of the sectors most heavily impacted by COVID-19: health care and small business. It delineates key considerations for our nation’s leaders in the private and public sectors as they combat the COVID-19 crisis and establish smart regulations for a post-COVID-19 economy. These tasks will require a comprehensive reassessment and overhaul of regulations to determine how to address urgent, complex issues, including how to shorten technology cycles, accelerate R&D for cures, provide infrastructure to address changing needs, aid business and individuals in a rapidly changing environment, and provide job flexibility.

ORIGINS OF ECONOMIC REGULATION

US regulation originated in the nineteenth century. In those early days, railroad freight haulers were widely seen as a destructive monopoly. Railroads violated the fundamental assumption of economics: “perfect competition,” in which the presence of many buyers and many sellers ensures that no one buyer or seller can control the market, and collusion to control the market is impossible. This competition drives prices down to the lowest feasible level and maximizes output. In contrast, with monopoly or oligopoly, one seller or a few sellers control a market, raise prices (even at the cost of reducing sales somewhat), and increase profits at the expense of consumers. In fact, the railroads were a particular kind of monopoly—a “natural” monopoly—because it would not be feasible for another firm to build a second, parallel set of tracks to compete against the “first mover.” In the 19th century, the monopoly position of the railroads seemed unassailable. They used their “deep pockets” and “crony capitalism” to influence legislation and regulation to protect their monopoly power, harming small-business customers in the process.

There is a key lesson for today. Technology can intensify competition and reduce the power of any individual firm to monopolize a wide range of markets. Apart from perhaps a few local markets, no one today would think of railroad freight haulers as a powerful monopoly. Instead, they struggle to satisfy customers under intense competition from other modes of transportation. Their monopoly fell in the face of rapid technological and economic change with the rise of vigorous competitors in truck and air transportation. Similarly, online retailers have revolutionized the retail industry and driven prices down, challenging the positions of brick-and-mortar firms that were once powerful in local markets.

Technology is not the only variable in the economy and the society; other conditions or events may affect business conditions and hence regulation. The COVID-19 pandemic changes the economy, especially for smaller businesses. These changes are a crucial part of the outlook for regulation, and by their very nature, they entail enormous uncertainty.
REGULATION CHANGES: SOCIAL REGULATION

Traditional economic regulation dates back to the nineteenth century. But a new strain of “social” regulation has progressed rapidly from its emergence in the 1970s to a major place in US regulation today. “Social” regulation is not always clearly distinguishable from “economic” regulation. It is often labeled “health, safety, and environmental” regulation—and it is an essential part of life today.

Unlike economic regulation, social regulation’s benefits are not easily measured directly in dollars. For example, economic regulation of, say, electric power generation, is imposed to tame a natural monopoly (it wouldn’t make economic sense to build a second power grid and duplicate plants), increase the production of electric power, and lower its price. The lower price and greater output have clear monetary benefits. But the aim of simultaneous social regulation of electric power is to reduce emissions of pollutants (like sulfur dioxide) and carbon. This social regulation’s aim is to improve health and safety for years and even decades into the future.

A key problem in social regulation is the uncertainty and nonmonetary nature of the benefits. Consider the example of the requirement of seatbelts in automobiles. Some lives are saved. How much are those lives worth, in dollars? (Working people? Children? The elderly?) Some injuries and associated pain and suffering may be avoided or lessened. What is that worth? Then the truly complex or speculative: Are any accidents caused by restraint on drivers’ movements, or by a sense of invulnerability because drivers are wearing seatbelts? Are the costs of seatbelt regulations worthwhile, considering that there are other potential life-saving uses of those same dollars (as well as uses with purely economic value)? Solid answers to these cost-benefit questions are elusive. Complete data gathering and careful analysis are essential, both of which cost money.

The novel coronavirus outbreak raises troubling tradeoffs between safety and economic activity, with enormous uncertainty about the choices. Keeping the economy shut down saves lives; reopening it saves livelihoods; when is the right time to reopen the economy, and how should it be done? Small businesses will be among the most intensely affected. But the most important regulatory decisions in all dimensions must begin with the public health threat.

COVID-19: THE TRADEOFF BETWEEN SOCIAL BENEFITS AND ECONOMIC COSTS

Today’s COVID-19 pandemic is at the epicenter of an intense, multidimensional, society-wide challenge. And yet, what we do not know about this public health problem is crippling. The virus is “novel” because it has never appeared before, and so there are no known cures or a preventive vaccine. In time, there is no question we will develop them. But for now, COVID-19 presents a public health challenge of the highest order.

Given all of these characteristics, this outbreak has been described as a “black swan,” or a “once-in-a-century pathogen.” Whether the world will see another virus pandemic soon is subject to enormous uncertainty, but it is highly material to the choices we must make going forward.
In short, the classic lessons of regulatory policy remain crucial: The comparison of costs and benefits, and managing uncertainty, are key for making sound decisions in this trying time.

COVID-19 and Health Care Regulations

The COVID-19 pandemic has pushed the delivery of health care up against a long list of regulations that have previously been accepted without question as essential to public safety and integrity. Here are a few examples:

Lifting regulations for hospitals Hospitals are at the epicenter of this trying environment. Because any missteps in hospital procedure or administration could have tragic impacts on public health, hospitals are subject to extensive regulation. Under the current circumstances, many of those regulations have been reconsidered with feedback from hospitals themselves, in real time. Under the pressure of the COVID-19 outbreak, the massive patient load has required the “construction” of temporary hospitals—some in temporary structures, others in temporarily repurposed permanent buildings that could not have been used as hospitals under normal conditions (to prevent “fly-by-night” or uncaring institutions). Some small facilities with limited physical capacities (such as ambulatory facilities) were previously not permitted to deliver advanced levels of care. Such restrictions have been relaxed. One application of this regulatory relief has been to loosen the standards that limit the conditions for Medicare reimbursement. In such instances, private insurers are likely to follow suit.

It has become essential to separate potentially contagious patients with COVID-19 symptoms from others. Thus, some hospitals have become all-COVID-19 or non-COVID-19, as patients have been sent to newly specialized institutions. (Other hospitals have used the increased freedom to establish new temporary facilities to separate patients among their buildings.) This separation has raised another regulatory issue: hospitals had been required in normal times to see and stabilize indigent patients before releasing them or sending them to public institutions. That requirement today runs afoul of the need for separation. So regulations have been loosened, so that a patient with, say, an injury who arrives at a COVID-19 institution can be transported without treatment to an institution without coronavirus patients to avoid spreading the disease.

Care providers gain more flexibility Volunteer personnel, notably retired health care professionals, have been pressed into immediate service, without recertifications that were required previously, thanks to regulatory relief. Professionals who previously have been allowed to practice certain skills only under in-person supervision have been allowed to work with remote supervision or no supervision (including the practice of home health care). Medicare had previously restricted the extent to which it will reimburse for services provided by non-Medicare-participating physicians. Under the pressure for emergency care, Medicare has loosened those restrictions.

The outbreak has clearly raised the need for interactions between the many sick people and medical personnel. At the same time, the outbreak has increased the risk for those medical personnel, and indirectly for society at large, because every interaction raises
the odds that the next interaction will spread the disease. In response, regulations have eased on indirect delivery of medical care. Medicare will pay for more telemedicine services. For the elderly without computer and internet connections, telemedicine can be practiced by phone. Medicare is now more lenient as to the degree of prior contact between a patient and a telemedicine physician; in urgent situations, an unfamiliar doctor can practice telemedicine with a Medicare patient. To keep a patient at home rather than out and possibly exposing others, medical personnel can perform in-home tests, which previously were not permitted. Such internet-based services have been restricted in part out of fear of data privacy violations. But under the pressure of the outbreak, data sharing is much less restricted in the interest of learning more about the virus and its spread.

Other regulatory easing Regulations have been eased in many other respects. Requirements for written provider policy statements, audits, filings for quality ratings, and prior written Medicare approval have been eased. What were perceived to be ethical restrictions—limits on the sizes of doctor-owned hospitals and on the provision of personal benefits to hospital personnel—have been eliminated. A policy has been announced to ease the intensity of the enforcement of regulations.

WILL TEMPORARY EASING BECOME PERMANENT?

All of this comes back to the fundamental tenets of regulation: the comparison of cost and benefit and the management of uncertainty. Some of the easing of regulations seems clearly intended for the current emergency only and will almost certainly be rescinded when the pandemic ends. But other steps may be seen by some experts as tests of deregulation that should continue even beyond this emergency.

One example of such potentially permanent deregulation might come in the field of pharmaceuticals. Although the virus has no known treatments—precisely because the virus is novel—there are medications that are known to be safe for treatment of well-understood ailments that have some commonalities with the virus. Under normal circumstances, the use of an existing drug to treat a new disease would require an extended period of clinical trials, which might cause a delay of a year or more. Such trials are mandated under existing regulations to ensure that the drug is safe in that application, and less ominously, that it actually is beneficial. The same is true of the earliest attempts at vaccines. Some say that prescribing such drugs without completed trials could save lives; others fear that using them could even cost lives or postpone better treatments. In the current pandemic, regulations are being altered and stretched to allow the use of potentially helpful drugs without the previously accepted regulatory protections. What degree of regulatory easing is appropriate, given the enormous uncertainty?

Similar easing has been seen with testing regulations—who can develop the tests and what labs can perform the tests. Testing will be at the center of the effort to reopen the economy, and questions about whether to reimpose stricter regulations or allow easing permanently are important.
A second relevant field is telehealth. Utilization has been restrained because of fears about data security, as well as the possibility of error because of the lesser information available to remote practitioners. Could the experience in this emergency be reviewed in calmer times to make more precise judgments as to the costs and benefits of greater use of telemedicine under normal circumstances after the outbreak?

And more broadly: the world has gone decades without a pandemic, certainly without one of this virulence. Regulatory easing during the emergency is clearly warranted. But once this outbreak is over, what can our expectations be for future episodes: is this a harbinger of repeated infections or a once- or twice-per-century event? In the past, vaccines have been generated within two years or so. This coronavirus appears to have been stable (that is, it has not mutated), and so a vaccine will likely be available. But there is uncertainty. Will this virus circulate around the world, and then come back even after the infection has apparently ended here? Will a vaccine be available by that time? With current experience, will we be able to restrain the spread of a reinfection? And what are the implications for the longer-term desirability of all of the regulatory changes undertaken thus far?

**COVID-19 AND SMALL BUSINESS**

The coronavirus is transmitted through interpersonal contact (though the precise means is unclear), meaning that service businesses are a primary issue. And many (but not all) service businesses are small businesses. The economic fallout is difficult to manage precisely because it encompasses so many small units—in contrast to the financial crisis, which impacted only financial institutions, and at least did not prevent people from convening to conduct business.

Uncertainty is key for the regulation of small business as the pandemic ends. To what degree must “social distancing” be maintained, given that we can only estimate the likelihood that this virus will return or another virus of equal virulence will appear?

Consider the quintessential small-business restaurant. The measure of success is usually the degree to which the house is full. The capacity of the house is determined by local or state regulation, often in reference to fire safety. A common recent local regulatory restriction, before total lockdown, has been reducing the permitted capacity of restaurants by 50 percent. If such a restriction were to be deemed permanently necessary, it would change the economics of the industry forever. For all manner of retail establishments, stiffer requirements for disinfection will have economic implications.

Social distancing does not apply solely to restaurants; it is also relevant for public entertainment, for example. What will happen to theaters and concert halls? Will social distancing within such facilities need to be permanent, or can we have confidence that at some nonremote date, with a vaccine, COVID-19 will no longer pose a threat (like polio or smallpox), and there is no reason to expect another similarly dangerous virus to appear? This same issue applies outside of services. Even manufacturing can require close proximity of people, to an extent not safe in this pandemic. How should manufacturing activity be organized in the winding down of this pandemic, given the potential for reinfection or the rise of a new pathogen?
Several key issues of small-business regulation will be important going forward:

- Small businesses lack the economies of scale and specialized regulatory talent that larger firms can muster. Regulators must be conscious of that vulnerability throughout their work.

- Small businesses continue to report that regulations are written in language for fellow regulators, not nonspecialist business persons. Plain-language regulation must be more widely and effectively practiced.

- Regulators should be conscious of “regulatory overload” on small businesses and consider the incremental increase in the mass of regulations as a cost in cost-benefit analysis. Such consideration could not only minimize compliance cost but also improve compliance itself.13

- Currently, “economically significant” regulations—those that have impacts of $100 million or more, or raise important policy issues—must undergo a cost-benefit analysis. This condition should extend to regulations potentially burdensome to small businesses, where even smaller dollar costs may be critical.

- Where possible, “safe harbors” should be created, such that compliance can be assured and penalties waived if small businesses take clearly defined steps and provide appropriate certifications.14

- Regulations do not remain necessary or pertinent forever in times of rapid change. Systematic, retrospective review should prioritize and give early attention to regulations that are particularly burdensome to small business.

And airlines, though not small businesses, require a thought. The “Black Death” (or Bubonic Plague, 1347–1351) spread around the known world without mass transcontinental transportation. The “Spanish Flu” (1918–1919) was driven by the rush of post-World War I travel. But jet air transportation today can spread an infection far faster. What regulation will be needed to reduce such disease transmission with respect to sanitation and information sharing? And what about requiring social distancing by reducing the number of passengers or “load factors” on an aircraft at enormous economic cost versus other technologies such as breathing or filtering equipment that might reduce the potential transmission of disease among passengers? And how far would such restrictions need to go, given the uncertainty of another infection, after the end of a “once-a-century pathogen?”
REGULATION AND COVID-19: FACING NEW CHALLENGES ARMED WITH ENDURING PRINCIPLES

The COVID-19 crisis has clearly demonstrated today’s enormous and almost totally new regulatory challenges. It has made clear that a comprehensive regulatory overhaul must be undertaken to prepare for an uncertain future. The race for cures, the need for rapid infrastructure expansion, and the need for flexible work environments are just a few of the lessons that have been learned in just the few weeks of the COVID-19 shock in the US.

However, the tools with which they must be addressed are not new, and are fundamental.

The fundamental tool of regulatory evaluation is cost-benefit analysis. Regulation is worthwhile for society as a whole if benefits exceed costs, but even regulation that passes a cost-benefit test can leave some businesses and individuals worse off. And measuring benefits and costs is exceedingly complicated. The coronavirus outbreak offers a stark example, as costs and benefits may change over a matter of days; health care providers and product suppliers need quick action, negating cautions once deemed essential.

The regulatory challenge today, as always, is to maximize society’s well-being by capturing opportunities and avoiding contingencies. This must be done while minimizing compliance costs and recognizing the impact of regulation on households and businesses, both large and small. Regulators must weigh costs and benefits—especially when a rapidly evolving environment continuously changes the equation. And they must anticipate a future that was never knowable, but today is far more uncertain than before with the unprecedented complexity of reopening an economy that is dependent on public health.

But perhaps most importantly, the unprecedented challenges that COVID-19 has unleashed demand smart regulation that is reviewed and revised continuously. And that requires bipartisan support and collaboration between the public and private sectors.

Adapting tested, decades-old regulatory tools to these new challenges will be a crucial task in the months and years to come and must be a part of the nation’s calculus as it moves forward in this decision year.
Endnotes

1. In some instances these are advisory, while in others they have the force of regulations if not the name.


3. In greater detail, no buyer or seller has more knowledge of the product or the market than any other, and the goods or services are relatively uniform and are sold through simple bidding.

4. Collusion by multiple firms toward this end is called “price fixing.” One or a few buyers also sometimes could exercise enough power in a market to be able to hold prices down. Market domination by buyers, rather than sellers, such as in the case of large employers’ holding wages down in local markets, is known in the textbooks as “monopsony” or “oligopsony.”


6. Sam Peltzman wrote a controversial paper in 1975, arguing that drivers became more aggressive because of the apparent safety in wearing seatbelts, and so had more accidents (though these resulted in fewer fatalities because of the protection afforded by the seatbelts). He comments on his finding in “Sam Peltzman Thinks You Should Belt Up,” Chicago Booth Review, November 27, 2016.”


12. The remarkable robustness of the nation’s food supply in this pandemic is perhaps a vivid reminder that the farmer on his tractor is perhaps a paradigm of “social distancing”—noting that farming does require other interpersonal interaction and associated public health risks.

13. OSHA has a “Compliance Assistance Quick Start” tool aimed especially at new and small businesses. OSHA also offers on-site, no-cost, confidential reviews with priority to high-hazard worksites. The EPA has “Compliance Assistance Centers,” including plain-language materials and internet tools. These are clearly among the most important regulatory issues for typical US businesses, but there is much less evidence of such outreach from other agencies.

14. Penalties for regulatory violations can be severe. For example, OSHA imposes a penalty of $13,494 per “serious” violation, with the same amount per day for “failure to abate,” and 10 times that amount for “willful or repeated” violations. Differences of perspective can conceivably lead to existential issues for small businesses.
SUSTAINING CAPITALISM

Achieving prosperity for all Americans could not be more urgent. Although the United States remains the most prosperous nation on earth, millions of our citizens are losing faith in the American dream of upward mobility, and in American-style capitalism itself. This crisis of confidence has widened the divide afflicting American politics and cries out for reasoned solutions in the nation’s interest to provide prosperity for all Americans and make capitalism sustainable for generations to come. In 1942, the founders of the Committee for Economic Development (CED), our nation’s leading CEOs, took on the immense challenge of creating a rules-based post-war economic order. Their leadership and selfless efforts helped give the United States and the world the Marshall Plan, the Bretton Woods Agreement, and the Employment Act of 1946. The challenges to our economic principles and democratic institutions now are equally important. So, in the spirit of its founding, CED, the public policy center of The Conference Board, will release a series of 2020 Solutions Briefs. These briefs will address today’s critical issues, including health care, the future of work, education, technology and innovation, regulation, China and trade, infrastructure, inequality, and taxation.