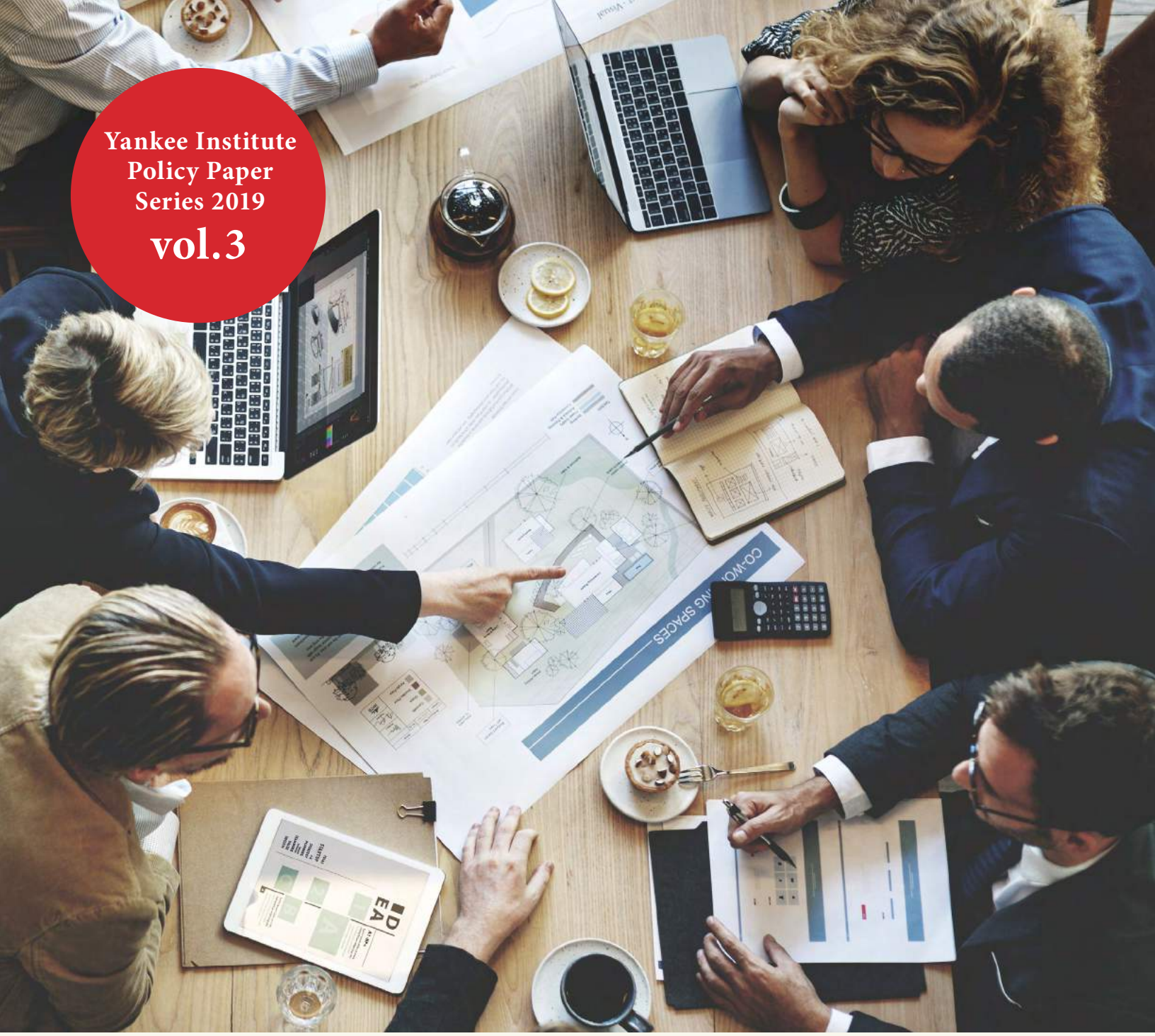

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Regulatory Reform

Opening Connecticut Back up to Business

By Scott Shepard

YANKEE INSTITUTE
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Executive summary

In volume 1 of the Yankee Institute's 2019 policy paper series, we designated regulatory reform as one of our top priorities for the current legislative session, given the make-up of Connecticut's current government and the size and content of the problems the state faces.

In this paper we explore our regulatory reform proposal in greater detail. The purpose of the proposal is straightforward: to reduce the costs of living and of doing business in Connecticut. That we must reduce these costs could not be clearer: Connecticut has lost businesses and residents to lower-tax, lower-cost states for decades now. The process has sped up materially in the wake of significant tax increases in 2011 and 2015 and by a series of governments that have shown themselves unwilling to come meaningfully to grips with the key drivers of run-away costs: namely, pension and other retirement benefit promises to generations of government employees.

The current government has shown no more stomach for reducing those costs than has its predecessors. This unwillingness precludes the possibility of effective tax reduction. As a result, we must all look for other ways to cut the costs and burdens of living and working in Connecticut. One of our responses is regulatory reform.

Our regulatory reform proposal has four components.

- First, we propose that some current state workers be reassigned to a new office that will be given the task of reviewing current regulations, with an eye toward revising or eliminating regulations that are out-of-date, duplicative, unnecessary or otherwise inappropriate.

- Second, we propose that every agency be required to undertake a thoughtful and detailed analysis of the total costs and total benefits expected to be created by any new regulations. Agencies should be permitted to promulgate only those rules for which the demonstrated total benefits outweigh the fully considered total costs.

- Third, we propose that agencies be required to catalog their current regulations in a manner easily accessible to businesses and residents in Connecticut, so that they can easily know what the law expects of them. These regulation catalogs should then create safe-harbors. Entities in compliance with cataloged rules will face no enforcement action until they are given reasonable time to comply with requirements not included in the catalogs at the time of enforcement.

- Fourth, we propose the appointment of an objective arbiter to whom regulated entities could resort when they feel they have been faced with excessive or inappropriately motivated inspection, enforcement, penalties or other regulatory responses. This arbiter should be empowered to review complaints and to order adjustments to regulator behavior or enforcement measures.

These are modest, thoughtful reforms designed to reduce the costs of living and doing business in Connecticut without endangering the public good. The only target of these reforms is wasteful inefficiency. Regulations that do more harm than good should never be promulgated. Where they have been, they should be reviewed and revised or withdrawn. The state and municipalities should be expected to let citizens know, in clear and simple ways, what is expected of them. Government should not be permitted to penalize businesses or residents who are acting diligently and in good faith to follow the law because they failed to comply with some regulations that they had no good reason to know about. And government – the authorized user of force in society – should never be able to use that force capriciously or improperly against any member of the public it is sworn to represent.

Everyone, of every political persuasion, should be ready to get on board with these reforms.

Introduction

Connecticut is worse than broke; it started 2019 with a $1.7 billion structural budget deficit that is forecast to rise steadily in coming years. The state's economic plight arises in large part because it has raised taxes so much that businesses and individual taxpayers are heading for more friendly states. General Electric, Rogers and other big corporations warned the state in 2015 that if it raised the corporate tax rates as proposed, they would leave.[1] It raised them; they left.[2]

Connecticut must make itself a more attractive – read: less expensive – business location if is to retain the tax base that remains, or hope to attract vibrant new businesses. If it will not in this session do so by lowering net taxes, it must do it by other means. One readily available method is regulatory reform.

Regulatory reform is a way to make the state a more attractive business location on the cheap. Regulation is an inevitable feature of the modern state; many business and private activities have spillover effects that modern governments have elected to police by regulation. Thoughtful, sensible and carefully constrained regulation can be a positive good. But overbroad, confusing and punitively-enforced regulation does significant and lasting harm by crippling enterprises that provide jobs, paychecks, benefits, goods and services. Like those they regulate, regulators are capable of error, and the regulatory process – like the fields it regulates – is hardly infallible; all are susceptible to errors, flaws and faults. They benefit from the guidance provided by thoughtfully-constructed regulatory rules and processes. For too long, these rules and processes have been either overlooked or underdeveloped in Connecticut. The proposals below seek to rectify that oversight.

Proposal

Our package has four features. They are aimed at reviewing already enacted legislation to ensure its propriety and effectiveness; evaluating proposed regulations to ensure they will do more good than harm; compiling and publishing regulatory rules in easily accessible ways to minimize the costs and burdens of compliance; and establishing protections to avoid unfair, capricious or otherwise inappropriate regulatory enforcement. Each provision is reviewed in some detail below.

Establish an office of regulatory review with the power to revise or repeal inapt regulations

Whenever a business or individual in Connecticut must waste time or money to comply with unnecessary, overbroad, outdated, vague or otherwise inappropriate regulations, our state is mistreating its people. Whenever a potential entrant declines to move to Connecticut because of its unfavorable regulatory regime and the costs it engenders, that is a missed opportunity for our state's economy to grow. Whenever hiring is stifled or a current resident leaves the state, the economy declines. Bad regulation hurts everyone in Connecticut.

At present, Connecticut lacks a sufficiently effective mechanism through which residents and businesses can seek reliable relief from bad regulation. Connecticut's Administrative Procedure Act[3] provides that parties can petition for repeal or amendment of regulations in the same way they may petition for their promulgation.[4] This mechanism, though, is insufficient. Agencies prefer to promulgate new regulations rather than to amend or withdraw the regulations it has enacted. As neighbor-

ing[5] and sister states[6] and the federal government have all realized,[7] careful regulation that protects the public while maintaining a good business environment and standard of living for all residents requires the primary responsibility for culling ill-advised or over-extensive regulations should be placed in an agency other than the one that promulgated those regulations.

Connecticut should create within the executive branch an Office of Regulatory Review (ORR). The ORR would be tasked with reviewing and—when appropriate—revising or revoking flawed regulation.

This regulatory-review process should be responsive to pressing public concerns while undertaking a systematic and comprehensive review of the state's entire regulatory regime. It could open itself to public participation by receiving and acting upon reasonable petitions by members of the public seeking regulatory reform, as well as reviewing any petitions for reform made to other agencies.[8] These petitions would identify the regulation(s) challenged, the reasons for the challenge and any evidence supporting the challenge. The ORR would review these petitions in a timely, statutorily-defined manner and period.

If it found the petition plausible under a generally accepted, court-approved standard, the ORR would undertake a notice-and-comment process and either issue a revised regulation or repeal the regulation, as it deemed appropriate at the end of the review process.[9] Any failure to participate meaningfully by an agency within a reasonable, established period should result in a suspension of the regulation until the agency complies and participates fully. Alternatively, or in addition at its discretion, the ORR could be authorized to institute a contested case[10] between the petitioner and the agency that had promulgated the regulation, with an ORR representative as the hearing officer and the fate of the regulation determined by the proceedings.

As for a systemic review, the ORR should be tasked with reviewing all existing regulations to see whether they achieve their stated purposes effectively and efficiently. Where regulations are inefficient or unnecessary, they should be revised or withdrawn, under the appropriate review of the Legislative Regulation Review Committee.[11] A similar effort in Rhode Island encompassed a complete consolidation of the regulatory code of the state and resulted in the withdrawal of more than 5,300 pages of regulations within just a few years.12

This office could also be empowered to review Connecticut law to identify legal reforms that would boost the state's competitiveness or attractiveness to business or other investment without adding to state spending. The office would conduct its own studies into potential reforms and undertake a comment process, after which it would, if appropriate, propose draft legislation to revise the relevant statute(s). This proposed legislation would be referred to the relevant legislative committee for consideration, along with a report in support of the reforms written by the ORR. The office's remit in this field would be limited to proposed statutory reforms that would demonstrably improve the business climate in Connecticut by reducing the overall cost of living or doing business in the state and would either decrease state spending or have no impact on it.

Require mandatory cost/benefit analyses for all new regulations

The ORR then would have the task of reviewing already existing regulations to weed out errors and inefficien-

cies. It would also, along with Connecticut's other executive agencies, play a central role in ensuring any new regulations passed in Connecticut were likely to provide a net benefit. It would achieve this by supervising a new obligation on agencies to conduct cost/benefit analyses of any proposed regulations, and to promulgate only those regulations the agency and the ORR independently found to be of more value than expense to the state, using objective and neutrally applied measurement criteria.[13]

Connecticut would not have to develop cost/benefit metrics on its own. A variety of good, well-tested models abound. These include the Washington State model, developed by the Washington State Institute for Public Policy,[14] a non-partisan organization instituted by the Washington state government in 1982. That Institute is endorsed by the Pew Charitable Trusts and the MacArthur Foundation.[15] Connecticut has worked extensively with those organizations through the Pew-Macarthur Results First Initiative, earning high praise and improving results in some narrow areas of state administration, especially in bringing proven, evidence-based programs to criminal and juvenile justice.[16] The Institute has developed and regularly updates free documentation describing the computational procedures used by the Institute in its cost/benefit analyses.[17]

The federal government can also provide useful models and guidance. The Office of Information and Regulatory Affairs was established within the Office of Management and Budget in 1980.[18] Since 1981, through repeated changes in administration, it has been conducting cost/benefit analyses on proposed and standing regulations, rejecting or modifying those that have or would result in a net loss to American society.[19] This office's function through decades provides a wide range of useful models and experience.

While many design options are available for adoption or modification, a few central tenets should guide the development of the ORR's cost/benefit analysis capacity. The office should have both a mandate and an obligation to review all proposed regulations and, per the last section, any extant regulations for which reasonable petitions for modification and withdrawal are received. It should determine whether the public good will be enhanced or undermined by the promulgation or continued application of the relevant legislation. This review should occur, for proposed regulations, before those regulations are presented to the attorney general for review of legal sufficiency,[20] so that regulations deemed more costly than beneficial by the ORR would never reach the attorney general's office. This cost/benefit analysis portion of the regulatory review process should be subjected to the same review and comment obligations required at other stages.[21] Where possible, the analysis should include consideration of a variety of options for achieving the regulatory goal, and an explanation of which option is preferred on a cost/benefit basis. Where more than a single option is not available, then the promulgating agency should be required to explain why no other options can be considered; in these cases, the cost/benefit analysis should be performed against the *status quo*. When the regulation reaches the attorney general, that office should include in its review of legal sufficiency an evaluation of whether a cost/benefit analysis has been undertaken, though without having to scrutinize the technical details of an actually conducted analysis. The attorney general should reject as unlawfully submitted any regulations that have not successfully passed such analysis.

In undertaking its analysis, the ORR should be required to establish objective metrics about how to value various aspects of cost and benefit, and most importantly, to apply the same methods and values when calculating

costs and benefits. If cost calculations are constrained to immediate effects, then benefit calculations must be similarly constrained. If the cost or benefit calculations consider tertiary, long-term or hard-to-quantify effects, then the other calculation must be similarly sweeping. All values must be given the same weight and economic significance "on each side of the equals sign" each time an analysis occurs. Only then can the analysis meaningfully determine whether a regulation is really in the best interest of the state and its people. Finally, if ORR finds itself unable to conduct a sufficient cost/benefit analysis because of lack of information, the regulation should be repealed or withdrawn and sent back to the proposing or promulgating agency to provide sufficient information to allow credible and valuable analysis.

While establishing both the ORR and the cost/benefit analysis process, the legislature should take the opportunity to strengthen other aspects of the regulatory review process. Most vitally, it should withdraw the "deemed-approved" provisions from both the attorney general's review process[22] and the Legislative Regulation Review Committee.[23] These legal and legislative reviews are vital steps that should be taken seriously and conducted consciously, not occasionally and in the breach. The state should not be using its monopoly on power to force its citizens to do anything that no state lawyers have actively determined the state has the right to require. Respect for the legislative nature of regulation creation, and therefore for both the separation of powers and the responsibility of the legislature to affirm and take ownership of any state acts with legislative content, is demonstrated and preserved by actual legislative review and action. It is not achieved by meaningless, ownership-avoiding "deemed-approved" mechanisms. In fact, "deemed approved" processes are worse than useless; they provide the veneer of review and of legal and legislative propriety where none has been earned.

Establish regulatory safe harbors

Regulatory agencies should be expected to have a solid sense of what sort of regulations they have promulgated, how those regulations work together and how they affect the regulated community. They should be required to conduct an audit of all of their regulations. As a first step, and in keeping with and advancement of the two previous proposals, the agencies should independently review their regulatory portfolios for duplication, antiquation, overbroadness, vagueness and other weaknesses, and voluntarily revise or withdraw any that are unnecessary or defective.

Having completed its audit and weeded out the most troublesome regulations, each agency should then make public access to information about the agency's regulatory rules as easy as possible. It should publish to the web a complete list of all regulations enforced by the agency, including a title, short explanation of the regulation, and a link to the relevant language and any supporting or explanatory authority.

Then it should compile "safe-harbor" regulatory-compliance worksheets. Ultimately, a regulated entity should be able to go to the agency's website, identify the type of regulated entity that it qualifies as, and be presented with a list of regulations to which it is subjected by that agency. The regulated entity would then have been put, or be construed at law to have been put, on reasonable notice that it must comply with all of the listed regulations. A failure to comply with those safe-harbor regulations could reasonably result in enforcement actions, penalties and other appropriate sanctions.

For regulations that do not appear on a regulated entity's safe-harbor list, though, immediate penalties for non-compliance are not appropriate. Businesses should not be expected to be more familiar with an agency's regulations than that agency itself is. If the agency has not identified a regulation as applicable in the relevant safe-harbor list, then the regulated entity is not reasonably on notice about that regulation. Once identification occurs, as by the agency pointing out the regulation to the regulated entity and/or adding the regulation to the list and informing relevant parties of the addition, then enforcement *begins* to *become* appropriate. Enforcement starts only after giving the regulated, and now notified, entity a reasonable period in which to efficiently and cost-effectively comply with the regulation.

Here is an illustration of how this process might work. An agency that regulates building codes might initially write a single safe-harbor list for all of its regulated businesses. Then, as time permits, it might break that initial safe-harbor list down into food-serving businesses and non-food-serving businesses. Then it might make a new list for organizations that open themselves to the public but do not conduct business. As the opportunity permits, the agency can make the lists increasingly specialized and specific to various types of regulated entities.

Meanwhile, when trying to figure out with which regulations it must comply, a regulated entity would go to the agency's website, identify the activities it undertakes and receive one or more safe-harbor regulation lists. It would then be obliged to follow those regulations to the extent they have been described on the safe-harbor list. They could also sign up to receive notifications any time new, more specific lists pertinent to them were published, or new regulations were added to their safe-harbor list. Upon these notifications, they would have a reasonable period in which to comply with the newly identified regulations.

An exception to the safe-harbor list enforcement-and-penalty rule could be established with regard to regulations that would be common sense even without appearing on a list or without notification. Compliance with these common-sense mandates should only be required to the extent that common sense also dictates the response. In other words, common sense tells the average business owner that it would be a violation to have bare wires exposed to employees or customers, and that bare wires might result in an immediate penalty. Common sense, however, would not put a regulated party on notice that wires must be ensconced in any particular thickness of covering. A regulation specifying some specific thickness of covering would have to be included on the safe-harbor list before penalties could be levied for failure to comply with that specific detail of the rule.

It would be sensible to suspend an agency's non-emergency regulation-promulgation power until it had completed its regulatory audit and published a reasonable base set of safe-harbor lists.

A regulatory ombudsman

Agencies enforcing regulations of which regulated entities have not reasonably been made aware is unfair. Unfairness can also arise from overzealous enforcement, or overlarge penalties for compliance failures even when some enforcement and penalty are appropriate. Regulators should be required to be both objective and measured in ensuring entities follow state regulations. Overenforcement against any regulated entity, whatever the motivation, does a wrong to the entity and to the people of Connecticut by making the state a less amenable place for imaginative and innovative economic

development, or for rising and increasingly lucrative employment. No one wins from out-of-control regulation. A simple way to decrease overzealous regulatory enforcement is to empower some neutral arbiter or office within the executive branch to receive and review claims of inappropriate enforcement. It would adjust penalties or instruct regulators to modify their enforcement behaviors. This neutral arbiter could optimally be included as an official within ORR, but could find a role in another office.

In structuring a role for this arbiter, the state can look to the U.S. Small Business Administration, which not only has instituted an Office of National Ombudsman to provide some of these services to small businesses at a national level, but has also provided model legislation for creating similar posts at the state or local level.[24]

Conclusion

Connecticut must find ways to regain its station as an attractive place to build and locate businesses and to start lives and raise families. We have accumulated in past decades financial obligations that many other states have not; paying those off is a burden those states do not face. Our state lacks some urban features that are drawing cards for two of our closest neighbors, and we have no way to develop such features. We must recognize these challenges, and make ourselves competitive and attractive in other ways. One way – sensible, necessary and achievable – is to push Connecticut's regulatory costs below those of neighboring and competitor states, without undermining our state's standard of living. We can do it. This policy paper explains how to start.

Yankee Institute strives to contribute constructive, concrete proposals to address the real and growing challenges confronting our state. The priorities we have set forth here are ones that we think are consonant with the tenor of the times, and are designed to achieve practical results. We remain committed to working with everyone who shares our dedication to ensuring that Connecticut can prosper and all its people thrive. We invite the governor, legislators and concerned citizens to reach out to us at any time. We report regularly on our work and on the state of the state throughout the legislative session and beyond on our web site: YankeeInstitute.org. Meanwhile, keep an eye out for additions to Yankee Institute's 2019 Policy Paper Series in coming weeks and months.

Endnotes

[1] *See* Suzanne Bates & Mark Guis, *No Way to Do Business*, YANKEE INSTITUTE POLICY PAPER SERIES 2019:2 (March 2019).
[2] *See id.*
[3] *See* Conn. Ann. Stat. Title 4, Chapter 54
[4] *See* Conn. Gen. Stat. § 4-174.
[5] *See, e.g.,* Gina M. Raimondo, Governor, *Improving Rhode Island's Regulatory Climate to Create Opportunity,* Rhode Island Executive Order 15-07 (Feb. 17, 2015), *available at* http://www.omb.ri.gov/documents/reform/regulatory-review/07_Regulatory_Climate.pdf. *See also Office of Regulatory Reform*, State of Rhode Island Department of Administration Office of Management and Budget, *available at* http://www.omb.ri.gov/reform/.
[6] *See* Independent Regulatory Review Commission, *available at* http://www.irrc.state.pa.us/; *What is IRRC?, available at* http://www.irrc.state.pa.us/contact/what_is_IRRC.cfm ("The Commission's mission is to review regulations to make certain that the agency has the statutory authority to enact the regulation and determine whether the regulation is consistent with legislative intent. IRRC then considers other criteria, such as economic impact, public health and safety, reasonableness, impact on small businesses and clarity. The Commission also acts as a clearinghouse for complaints, comments, and other input from the General Assembly and the public regarding proposed and final regulations."); Michigan Office of Regulatory Reinvention, *available at* https://www.michigan.gov/opt/0,5880,7-338-87827---,00.html, which has "reduced … 3,188 rules [] since 2011" (list of rules affected *available at https://www.michigan.gov/documents/lara/Rescinded_Rules_Log_407751_7.pdf*); John Hood, *Why State Regulatory Reform is Working*, GREENSBORO NEWS & RECORD (Jan. 20, 2019) *available at* https://www.greensboro.com/opinion/columns/john-hood-why-state-regulatory-reform-is-working/article_ce4770ee-f624-5a69-94e4-632e603b8a18.html; James Broughel & Catherine Konieszny, *Arizona is a Model for Red Tape Reduction*, ARIZONA DAILY STAR (July 26, 2018), *available at* https://tucson.com/opinion/local/broughel-and-konieczny-arizona-is-a-model-for-red-tape/article_d251294a-177d-5096-9dca-33fbb78330ce.html; Tamela Baker, *Maryland Panel Recommends Reforming 600 Regulations*, HAGERSTOWN HERALD-MAIL (Dec. 28, 2017), *available at https://www.heraldmailmedia.com/news/annapolis/maryland-panel-recommends-reforming-regulations/article_70f3eb46-ec16-11e7-af46-7f92fa2ce1aa.html*; John Reitmeyer, *As Name Suggests, Red Tape Review Commission Tries to Ease Doing Business in NJ*, NJSPOTLIGHT (Sept. 8, 2015), *available at* https://www.njspotlight.com/stories/15/09/07/as-name-suggests-red-tape-review-commission-tries-to-ease-doing-business-in-nj/.
[7] *See infra at* 6 (discussion of OIRA).
[8] *See* Conn. Gen. Stat. § 4-174 ("Any interested person my petition an agency requesting the promulgation, amendment or repeal of a regulation.").
[9] *See* Conn. Gen. Stat. § 4-168.
[10] *See* Conn. Gen. Stat. §§ 4-177 *et seq*.
[11] *See* Conn. Gen. Stat. § 4-170.
[12] *See also Office of Regulatory Reform*, State of Rhode Island Department of Administration Office of Management and Budget, *available at* http://www.omb.ri.gov/reform/.
[13] *See, e.g., States' Use of Cost-Benefit Analysis, Improving Results for Taxpayers* 9, PEW-MACARTHUR RESULTS FIRST INITIATIVE (July 2013) ("Cost-benefit analysis is an analytical approach that evaluates the costs of public programs relative to the benefits they achieve for taxpayers. By projecting and assigning current dollar values to the predicted outcomes, ideally including all direct and indirect effects, and comparing those with the costs, cost-benefit analyses determine whether each program would generate a net positive benefit to society. The results are usually reported as a benefit-cost ratio. For example, a 5.4-1 ratio indicates $5.40 of net value for taxpayers for every $1 in funding.").

[14] *See, e.g., www.wsipp.wa.gov/BenefitCost*.
[15] *See* Pew-Macarthur Results First Initiative, STATES' USE OF COST-BENEFIT ANALYSIS, IMPROVING RESULTS FOR TAXPAYERS 26-28 (July 2013), *available at* https://www.pewtrusts.org/en/research-and-analysis/reports/2013/07/29/states-use-of-costbenefit-analysis.
[16] *See, e.g.*, Pew-Macarthur Results First Initiative, HOW STATES ENGAGE IN EVIDENCE-BASED POLICY-MAKING: A NATIONAL ASSESSMENT 6, 20, 24 (Jan. 2017), *available at* https://www.pewtrusts.org/en/research-and-analysis/reports/2017/01/how-states-engage-in-evidence-based-policymaking.
[17] *See* Washington State Institute for Public Policy, BENEFIT-COST TECHNICAL DOCUMENTATION (Dec. 2018).
[18] *See, e.g.*, Office of Management and Budget Information and Regulatory Affairs, *OIRA Pages*, Whitehouse.gov, *available at* https://www.whitehouse.gov/omb/information-regulatory-affairs/.
[19] *See id.*; Exec. Order No. 12291, 46 Fed. Reg. 13 §§ 1(b), 3(f), *available at https://www.archives.gov/federal-register/codification/executive-order/12291.html*; Exec. Order No. 12866, 58 Fed. Reg. 51, 735 (Oct. 4, 1993), *available at* https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.
[20] *See* Conn. Gen. Stat. §4-169.
[21] *See* Conn. Gen. Stat. §4-168(b).
[22] *See* Conn. Gen. Stat. §4-169.
[23] *See id*. §4-170(c).
[24] *See* U.S. Small Business Administration, Small Business Ombudsman Model For State and Local Governments, *available at* https://www.sba.gov/sites/default/files/ombudsman/Small%20Business%20Ombudsman%20Model%20for%20State%20and%20Local%20Governments.pdf.

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