

STRENGTHENING LOUISIANA'S DEMOCRACY THROUGH LEGISLATIVE REVIEW OF REGULATIONS

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Louisiana House and Governmental Affairs Committee

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Chair Stefanski, Vice Chair Duplessis, and members of the committee:

Thank you for the opportunity to submit this written testimony on House Bill (HB) 390,¹ which establishes a one-year sunset provision for regulations enacted in Louisiana. My name is James Broughel, and I am a senior research fellow at the Mercatus Center at George Mason University and an adjunct professor of law at the Antonin Scalia Law School. My research focuses on regulatory procedures, cost-benefit analysis, and the effect of regulations on economic growth. At the Mercatus Center, I conduct independent nonpartisan analysis, employing economic scholarship to assess regulations and their effects on economic opportunity and societal well-being.

My prepared statement makes three points:

1. Sunset provisions are routinely used in the states as well as other countries. More than a third of states have them, and four have one-year sunset provisions similar to the one envisioned in HB 390.
2. Sunset provisions can be leveraged as a tool of legislative oversight over regulators. Such oversight should be viewed as the primary aim of HB 390.
3. Concerns sometimes expressed about sunset provisions, such as concerns about the accidental expiration of regulations or the creation of regulatory uncertainty, tend to be overblown.

Consequently, a sunset provision like that in HB 390 is likely to extend legislative oversight over new rules created by administrative agencies without significantly disrupting business in Louisiana. Most importantly, the legislation would restore some power to the legislative branch of government, thereby pushing back somewhat on the tendency in American government toward concentration of power in a hierarchically managed executive branch. That said, HB 390 could be improved with, for example, stronger economic analysis requirements, which would give legislators better information upon which to base their decisions and votes.

1. H.B. 390, 48th Reg. Sess. (La. 2022).

SUNSET PROVISIONS ARE COMMON

In soon-to-be-released research, my coauthors and I review each state's administrative procedure act and find that 17 states have some form of sunset provision for regulations.² This diverse set of states includes Indiana, Kentucky, New Hampshire, and New Jersey. Just fewer than half of Organisation for Economic Co-operation and Development member countries have some form of sunset arrangement in place.³ Australia, France, Germany, South Korea, and the United Kingdom are all examples of countries that rely on sunset provisions.⁴ Thus, sunset provisions are a mainstream feature of regulatory processes throughout the world, in both common law and civil law countries.

SOME SUNSET PROVISIONS ARE INTENDED TO STRENGTHEN LEGISLATIVE OVERSIGHT

In many cases, sunset provisions are intended to spur retrospective review. For example, when regulations are set to expire, say, 7 or 10 years after enactment, the sunset provision can force an agency to check on its regulations to determine whether they are working as intended and are still needed. It is well-known that even when there is a periodic review requirement in place, regulatory agencies often fail to take the review seriously.⁵ Sunset provisions can be used to enforce periodic reevaluation of existing regulations by imposing a penalty for noncompliance.⁶

However, sunset provisions can also serve other purposes. Four states, for example, have sunset provisions of a year or less after enactment. These states are Colorado, Idaho, Tennessee, and Utah.⁷ One year or less is probably not enough time to assess the effects of a regulation, but the short duration allows legislators to have the final word on whether a regulation should be enacted or not. The one-year sunset provisions in Utah and Idaho apply to all regulations, meaning that legislators must reauthorize all state regulations every year. Meanwhile, HB 390 more closely resembles the sunset provisions in Tennessee and Colorado, which are more narrowly targeted and apply only to newly filed regulations.

In this regard, HB 390 is similar to reforms such as the Regulations from the Executive in Need of Scrutiny Act of 2021,⁸ which requires affirmative legislative approval of major regulations. Wisconsin and Florida both have legislative vetoes of this sort in place.⁹ These states prohibit the enactment of regulations whose effects exceed a certain cost threshold, unless permission is granted from the legislature through the passage of an authorization bill. West Virginia also requires legislative approval of most new regulations.¹⁰ Thus, if HB 390 were to become law, it would put Louisiana in the company of states like these that require legislative authorization of regulations.

STABLE, PREDICTABLE REGULATORY SYSTEMS UTILIZE SUNSET PROVISIONS

Sometimes it is argued that sunset provisions create unnecessary uncertainty that can impede business plans. However, the actual experience of jurisdictions with sunset provisions suggests otherwise. For example, there is no evidence that accidental expiration of regulations is a significant problem in

2. Brian Baugus, Feler Bose, and James Broughel (forthcoming), "A 50-State Review of Regulatory Procedures" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, forthcoming).

3. Organisation for Economic Co-operation and Development, *Reviewing the Stock of Regulation: OECD Best Practice Principles for Regulatory Policy*, 2020, 25.

4. Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (January 19, 2021).

5. Curtis W. Copeland, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act* (Washington, DC: Congressional Research Service, 2005).

6. Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in *New Perspectives on Regulation*, ed. David Moss and John Cisternino (Cambridge, MA: Tobin Project, 2009), 121.

7. IDAHO CODE ANN. § 67-5292 (2019). UTAH CODE ANN. § 63G-3-502(2) (LexisNexis 2019); TENN. CODE ANN. § 4-5-226(a) (2019); COLO. REV. STAT. § 24-4-103(8)(c) (2019).

8. Regulations from the Executive in Need of Scrutiny Act of 2021, S. 68, 117th Cong. (2021)

9. WIS. STAT. § 227.139 (2022); FLA. STAT. § 120.541(3) (2021).

10. W. VA. CODE § 29A-3-9 (2022).

jurisdictions that have sunset provisions.¹¹ Moreover, even in states that have leveraged sunset provisions to great effect—by sunseting large swaths of their regulatory code in a deliberate manner—these reforms have tended to operate smoothly with little pushback from the business sector or disruption to residents’ everyday lives.¹² In fact, regulations themselves create uncertainty, especially new regulations (which are the focus of the legislation before this committee). Thus, the uncertainty created by removing regulations must be balanced against the uncertainty created by adding regulations. Finally, dynamism itself creates uncertainty. A vibrant, dynamic economy involves businesses and entrepreneurs experimenting with different modes of serving consumers. Some of these experiments will pan out, and others will not. This dynamism creates uncertainty, given that the evolution of the market is difficult to forecast, but this uncertainty is also necessary for progress.

CONCLUSION AND RECOMMENDATIONS FOR IMPROVEMENT

The legislation being considered before this committee is well within the regulatory mainstream. More than a third of states have some form of sunseting arrangement for regulations. A few also have legislative approval requirements that are similar to the system envisioned by HB 390.

That said, it is important that state legislators—if they are to take on an increased oversight role—also have information they need to make informed decisions. Although Louisiana agencies do perform some basic regulatory impact analysis,¹³ the quality and objectivity of this analysis could likely be improved. West Virginia is a model in this regard. It recently created an office in the legislature to provide economic analysis of regulations as well as of legislation.¹⁴ Louisiana may want to consider reforms that move analytical responsibilities out of regulatory agencies and into an independent legislative office, such as the state Legislative Fiscal Office. Such a change would also strengthen legislative oversight of administrative agencies.

The legislation before this committee is likely to increase democratic accountability in the Pelican State. That is a good thing for those who are concerned about the concentration of power in the executive branch and the long-run viability of representative democracy in America.

11. James Broughel, “Evidence-Free Policymaking at the Department of Health and Human Services” (Public Interest Comment, Mercatus Center at George Mason University, Arlington, VA, December 15, 2021).

12. See the cases of Rhode Island and Idaho, for example, in 2018 and 2019. James Broughel, “The Regulatory Budget in Theory and Practice: Lessons from the U.S. States” (CSAS Working Paper no. 21-47, C. Boyden Gray Center for the Study of the Administrative State, Arlington, VA, October 2021).

13. LA. REV. STAT. tit. 49, § 953(A)(3)(a)-(b) (2021).

14. “Division of Regulatory and Fiscal Affairs,” Joint Committee on Government and Finance, accessed March 24, 2022, <https://www.wvlegislature.gov/Joint/fiscal-regulatory.cfm>.