

Submission to the Treasury Board Secretariat's Request for Stakeholder Comments on Regulatory Modernization

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THANK YOU FOR the opportunity to comment on the current phase of the Treasury Board of Canada's regulatory modernization programme. The Canadian Centre for Policy Alternatives is an Ottawa-based policy research institute with offices across the country. Our work is rooted in the values of social justice and environmental sustainability, which have guided our research over the past 30 years on the intersection of regulation and international trade policy.

Regulations are an integral aspect of democratic governance. They are necessary tools to implement laws enacted by Parliament to protect Canadians and the public interest, including in important areas such as workplace safety, employment standards, food safety, animal welfare, transportation safety, environmental protection, financial stability, consumer protection and other vital matters.

Despite their essential role, public interest regulations have been, for many decades now, relentlessly attacked and misrepresented by corporate lobbyists and their think-tanks as "burdens" and "red tape." It is disheartening to see how deeply this



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hostile and mistaken attitude toward public interest regulations pervades Treasury Board's approach to "regulatory modernization."

Regulations will frequently involve costs and administrative requirements for businesses. It is essential to always consider these costs of compliance in relation to the larger benefits to Canadians. By focusing too narrowly on reducing costs to business, or putting too much emphasis on the trade impacts of new safety standards and rules, the modernization process risks diminishing the overarching purpose of regulation, which is to protect the public.

It is also mistaken to assume that reducing or weakening regulations at the behest of commercial interests will necessarily enhance Canada's long-term competitiveness. Regulatory failures such as those leading to outbreaks of listeria and other foodborne illness like BSE, or the Boeing 737 MAX crashes and grounding, can be extremely costly and disruptive not only in terms of human lives and suffering, but in their financial impacts on the companies and workers affected.

The Treasury Board proposals, however, by insisting that all government departments regulate with a view to enhancing economic "competitiveness," would create additional risk for the public by making precautionary or more protective rules more difficult to enact and enforce.

In almost every important regulatory matter there will be competing or conflicting interests at play – between employers and workers, communities and companies, large and small firms, resource extraction and Indigenous rights, maximizing profit and protecting the environment, etc. While common ground should be sought, Treasury Board's most recent regulatory consultations have been slanted heavily toward commercial "stakeholders." There is little evidence this input is being balanced out by other societal interests.

There is an unavoidably adversarial element to regulation that ensures that businesses and corporate lobbyists will never be fully satisfied with even a fair and balanced regulatory framework. Moreover, corporations and businesses, which are under constant pressure to increase profits and returns to shareholders, cannot be trusted to self-regulate. Government oversight and vigilance to protect the public and establish a level playing field is required and will frequently generate tension with the regulated parties.

To construct a regulatory modernization project around the goal of assuaging commercial interests by reducing red tape and the alleged regulatory burden is misguided and dangerous. To compel government departments to regulate in this way through cabinet directives or new legislative mandates creates unwarranted inflexibility in our regulatory system and unnecessary risk to the public. The duty to protect should be paramount.

Targeted regulatory reviews (Round 2)

The first round of targeted regulatory reviews beginning in 2018 touched on areas where regulatory approaches and priorities are highly contested, including aquaculture, pesticides, food labelling, medical devices, pharmaceuticals, hazardous products, and transportation of dangerous goods, to name just a few.

The consultation process for discussing regulatory reforms in these areas, however, strongly favours industry perspectives over those of other groups. As a result, and likely by design, the recommendations for “modernization” rarely stray from prioritizing competitiveness, growth, and a regulatory system that “moves at the speed of commerce” over other public welfare interests.¹

Agriculture and aquaculture lobby groups, for example, emphasized the need to loosen restrictions on the use of new chemical fertilizers, reduce the volume of products requiring pre-market approvals, align feed safety rules with key trading partners, and apply a “risk-based” approach to approvals for new veterinary drugs for livestock animals. In response, the government is pursuing “novel regulatory approaches” that closely integrate industry and department officials in the development and monitoring of new regulations, based on the use of “behavioural science” and “blockchain technologies” somehow meant to encourage businesses to play by the rules, share more information with government, and generally do the right thing.

While it may be true, as suggested in the targeted review document, that businesses have a “vested interest to ensure risks are well managed,” experience shows those risks are frequently misjudged or understated, especially when the costs of adequately addressing them hurt short-term profits and the long-term, or systemic, risks are borne by others. Light-touch regulation of complex financial markets contributed directly to the 2007-08 financial crisis, for example. Rail safety deregulation and harmonization with weaker U.S. standards were contributing factors in the deadly Lac-Mégantic derailment and explosion.

The CCPA has no comment, at this time, on the chosen areas for subsequent review (clean technology, digitalization of regulatory approvals processes, and incorporation of international standards). However, we would like to reiterate that in each of these areas an overemphasis on the demands of commercial interests is likely to undermine, rather than enhance, the level of public protection. Even in areas such as clean technology, where there is a clear public and environmental protection interest in rapid adoption, focusing too narrowly on accommodating the needs of commercial interests (e.g., in the siting and licensing of renewable energy projects) can undermine broader community acceptance and have counterproductive results.

We are also concerned about the role and secrecy of the External Advisory Committee on Regulatory Competitiveness, which selected these priorities to begin with. It is unclear, for example, how the government chose members of the committee, which

is currently chaired by a vice-president of the anti-regulation Canadian Federation of Independent Business. While the committee is not entirely comprised of business representatives, it is weighted in favour of commercial interests. The consensus basis of decision-making is therefore unlikely to produce recommendations for regulatory reviews that would strengthen environmental, worker or public health protections.

The Red Tape Reduction Act

The goal of the Red Tape Reduction Act — to control the “administrative burden” of regulations, meaning essentially any costs a company incurs to show compliance with the rules — undermines the broader public interest goals of regulation. There is no evidence that an optimal level of “administrative burden” exists that should be strictly fixed, or reduced, over time.

The one-for-one rule is particularly objectionable. Requiring departmental officials to scour the books for an existing regulation to scrap every time they want to introduce a new one is a waste of time for all concerned. It also makes the regulatory system more inflexible, contrary to the stated goals of the modernization process.

Instead of further pandering to an arbitrary and incoherent anti-regulation ideology, the act and the one-for-one rule should be abolished.

Exploring options to legislate changes to regulator mandates

According to the Gazette notice, “TBS is considering the development of key principles related to efficiency and economic growth that would become part of the *required* analysis that regulators *must perform* as part of the regulatory development process” (emphasis added). CCPA opposes the weakening of regulator’s mandates to explicitly include concerns about efficiency and competitiveness. Instead, we support calls for the strengthening of regulatory mandates to include the precautionary principle.

This completely unnecessary “modernization” would duplicate and reinforce the flawed requirements in Canada’s regulatory impact assessment (RIA) process, and the Cabinet Directive on Regulation more broadly, to consider how all new regulations affect trade, competitiveness and the global regulatory environment.

To illustrate, Canada’s RIA process requires lead regulatory agencies to perform a two-step screen of all proposed rules. According to a favourable OECD summary of the process, in the first step regulators must determine if a technical regulation, conformity assessment procedure or food safety measure is found to have likely impacts on trade or to diverge from international standards or rules. If the answer is yes, “stakeholders — Canadians, foreign governments or international organizations — must be allowed to provide comments for an extended consultation period of 75 days.”²

Canadian regulators are, as part of the RIA process, further required to do a cost-benefit analysis of all new regulations, which attempts to monetize the impacts of new rules over a projected time period on business stakeholders, the Canadian labour market and other factors. RIAs have been criticized for in some cases papering over politically motivated deregulation with a veneer of scientific rigour.³ What's more, despite being favourable to the use of RIAs that integrate trade impacts, the OECD acknowledges these tools can produce "RIA overload," adding "there seems to be a gap between the theoretical use of RIAs enshrined in RIA guidelines and the reality."

In summary, the federal government already adequately, and we would add excessively, accounts for the effects of new regulations on commerce. Legally requiring departments to "integrate the assessment of regulatory efficiency and economic growth as an integral part of regulators' mandates," as proposed, is overkill.

More importantly, it would make the enactment of more protective rules — for example, benefiting the environment, workers, human health or animal welfare — even more difficult to enact than they currently are. This direction should be abandoned.

Suggestions for the next annual Regulatory Modernization Bill

We agree with TBS that Canada needs to "keep regulations current, to better reflect the realities of today's fast-paced environment." Canadian regulators must be "agile and responsive" if we are to adequately address the climate emergency, protect the food chain, vulnerable populations including children, and the environment from harmful plastics and chemicals, and rebalance our economy so that it enhances the welfare of all and not just those at the top of the income spectrum. We propose the following changes toward these ends.

Enhance public involvement in the regulatory process: As long as the government treats "regulated parties" and business as one and the same group, regulatory "modernization" efforts will overprioritize the limited private interests of business over larger concerns about public welfare. Departmental regulators should be required to consult widely outside of the business sector on important new rules and regulatory processes and to demonstrate that non-business voices and feedback have been heard and seriously considered.

Too often, industries such as tobacco, pharmaceuticals, fossil fuel, or fast food may hide scientific evidence about the harm their products do while non-industry groups and independent experts may expose it. Truly flexible regulation would be responsive to all credible evidence and concerns.

Enhance the transparency of regulatory "modernization" discussions: TBS and other government departments involved in regulatory "modernization" have published extensive summaries of discussions since 2018 to reform rule-making across

a number of economic areas. However, the deliberations of advisory groups remain off-limits to the public.

Similar lack of transparency exists for international regulatory co-operation efforts (with the U.S. and European Union, for example). Regulations — and how the government regulates — go to the heart of what government does and should be carried out in an open, democratic fashion.

Replace the Cabinet Directive on Regulation: TBS has been given relatively free rein over consecutive governments, to develop an unreasonably rigid framework for departmental rule-making that prioritizes commercial interests over public welfare objectives, straps public regulators with overly burdensome RIAs and cost-benefit analyses (which also favour business interests, who have superior resources and greater clout than other civil society actors).

Claims that the directive applies a scientific method to government rule-making — in the interests of consistency, making sure new rules are limited and purpose-built, etc. — are disingenuous, hiding a political project hostile to the precautionary principle and public-interest regulation. The directive and its component parts, including the one-for-one rule and RIAs, should be rebuilt from the bottom up with broad public and political engagement.

Notes

- 1 Canadian Food Inspection Agency. Targeted Regulatory Review: Agri-food and Aquaculture Roadmap. Last accessed September 5, 2019: <http://www.inspection.gc.ca/about-the-cfia/acts-and-regulations/forward-regulatory-plan/agri-food-and-aquaculture-roadmap/eng/1558026225581/1558026225797>.
- 2 Robert Basedow and Céline Kauffmann (2016). International Trade and Good Regulatory Practices: Assessing the Trade Impacts of Regulation. France: OECD Working Paper, p. 30.
- 3 Associated Press, “Trump administration underestimated benefit of better brakes on trains with explosive hauls,” December 20, 2018.



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