CED Report: Regulatory Changes During the Pandemic Reveal Critical Lessons—and Valuable Opportunities—for Future Regulatory Policy

New York, NY, September 13, 2022...Today, the Committee for Economic Development, the public policy center of The Conference Board (CED), issued a new Solutions Brief, Pandemic Regulatory Changes: Should They Stay or Should They Go? The report—the latest in CED’s Sustaining Capitalism series—examines the regulatory impact on health care policy during the depths of COVID-19, providing insights and recommendations through the lens of a smart regulatory approach, for public and private sector leaders to prioritize as the US emerges from the pandemic.

CED has promoted “smart regulation”—the idea that regulation should achieve the purpose for which it was imposed at the lowest possible cost and with the maximum possible benefits. Specifically, the Solutions Brief assesses three areas, each of which shows the powerful impact of regulation and provides insights into broader guidelines for regulatory policy. Two pertain to waivers that remove regulation or apply regulatory flexibility: pandemic waivers from the Centers for Medicare and Medicaid Services (CMS), and efforts by the Food and Drug Administration (FDA). The third pertains to an added regulation: the Department of Labor’s (DOL) and the Department of Health and Human Services’ (HHS) regulations on employee vaccinations.

“The pandemic showed that well-planned regulatory waivers, considered by Congress in advance, mitigated the fallout from COVID-19—most importantly, saving lives. They also offered US businesses a lifeline to expand beyond the limits of normal operations, both in research and development and in the provision of care,” said Lori Esposito Murray, President of CED. “Now, the US government should take these lessons and work with business leaders to plan for the next public health emergency, and, more broadly, consider other areas in which more regulatory flexibility would help to achieve the maximum possible benefits at the lowest possible cost.”

As the Solutions Brief details, the CMS and FDA initiatives were successful, while the actions from the DOL and HHS tested—and exceeded—the limits of regulation. Highlights from the report’s case studies include:

**The CMS provided reimbursement for an expanded set of health care services, opening pathways to provide services such as telehealth:**
- At the pandemic’s onset, the CMS issued waivers that allowed the agency to reimburse hospitals, physicians, and other providers for services that it would ordinarily not cover.
- Due to CMS waivers, telehealth grew rapidly and has proven both popular and durable. In the pandemic’s first year, over 28 million of all Medicare beneficiaries—43 percent—used a telehealth service of some kind, marking an 88-fold increase over 2019.

**FDA’s use of regulatory flexibility accelerated vaccine development:**
- Because of the public health emergency, in coordination with the FDA, drug companies were permitted to work on different stages of clinical trials for vaccine development in parallel rather than sequentially.
- Taking this approach expedited the timeline for vaccine development and saved lives. Phase 1 and 2 trials were combined, human clinical trials were successful, and Emergency Use Authorizations for COVID-19 vaccines were approved starting on December 11, 2020.
A cautionary tale on vaccine mandate regulations:

- Citing the risks of COVID-19 to workers, the Occupational Safety and Health Administration (OSHA) published an Emergency Temporary Standard (ETS) in November 2021. The ETS mandated that employers with more than 100 employees require either vaccination of their workers, with certain exemptions, or the alternative of wearing a face mask to work and agreeing to weekly testing for COVID-19.

- Reaction from some employers and segments of the public, in addition to legal actions, was swift. While the Court of Appeals for the Sixth Circuit initially permitted the rule to take effect, litigation continued. This culminated in an appeal to the Supreme Court, which agreed that OSHA had exceeded its powers, resulting in the ETS being overturned.

Key Recommendations from the Solutions Brief:

CED calls on policy and business leaders to seize this opportunity by conducting a comprehensive review of overall regulatory policy during the pandemic, as well as applying this approach more broadly to regulatory policy. Doing so will help in determining the scope of regulatory policy going forward. Recommendations featured in the Solutions Brief include:

- Close cooperation between the federal government, state governments, and the private sector for regulation is essential.

- Regulators should take account of the experience of those who would be subject to the regulations. This will promote innovation in regulation and spur US research and development.

- States should move toward reciprocal licensing of physicians and other health care professionals. As an interim step, however, states that are not part of interstate medical licensure compacts should move to join them, to provide greater uniformity to the licensing system for physicians and as a step toward reciprocal licensing.

- The federal government should conduct a study of the use of telehealth and other waivers during the pandemic. Regulations should be considered for possible permanent modification (or not) based on an examination of how they were used during the pandemic and a study of the balancing of benefits and costs.

- The Department of Health and Human Services (HHS), in conjunction with the private sector, should undertake a comprehensive review of the Food and Drug Administration’s exercise of regulatory flexibility during the pandemic to determine how effective it was and whether it can or should be applied more broadly without compromising safety and efficacy, potentially leading to faster approval of new therapies.

- Congress should speak in clear language—as clear as possible—in stating the powers it chooses to delegate and not to delegate to agencies.

- Agencies should ground their regulatory activities firmly and only within those delegations.

- Safe harbors in regulation are appropriate in a number of circumstances, but particularly in areas of great uncertainty and in instances when conditions change rapidly.

- Business leadership should participate actively and robustly in the regulatory process, particularly at the comment stage of notice-and-comment rulemaking.
The new Solutions Brief, *Pandemic Regulatory Changes: Should They Stay or Should They Go?*, can be accessed [here](#).

**Media Contacts**
[adonovan@tcb.org; jdibiasi@tcb.org](mailto:adonovan@tcb.org; jdibiasi@tcb.org)

**About CED**
The Committee for Economic Development (CED) is the public policy center of The Conference Board. The nonprofit, nonpartisan, business-led organization delivers well-researched analysis and reasoned solutions in the nation’s interest. CED Trustees are chief executive officers and key executives of leading US companies who bring their unique experience to address today’s pressing policy issues. Collectively they represent 30+ industries, over a trillion dollars in revenue, and over 4 million employees. [www.ced.org](http://www.ced.org)

**About The Conference Board**
The Conference Board is the member-driven think tank that delivers trusted insights for what’s ahead. Founded in 1916, we are a non-partisan, not-for-profit entity holding 501 (c) (3) tax-exempt status in the United States. [www.conference-board.org](http://www.conference-board.org)