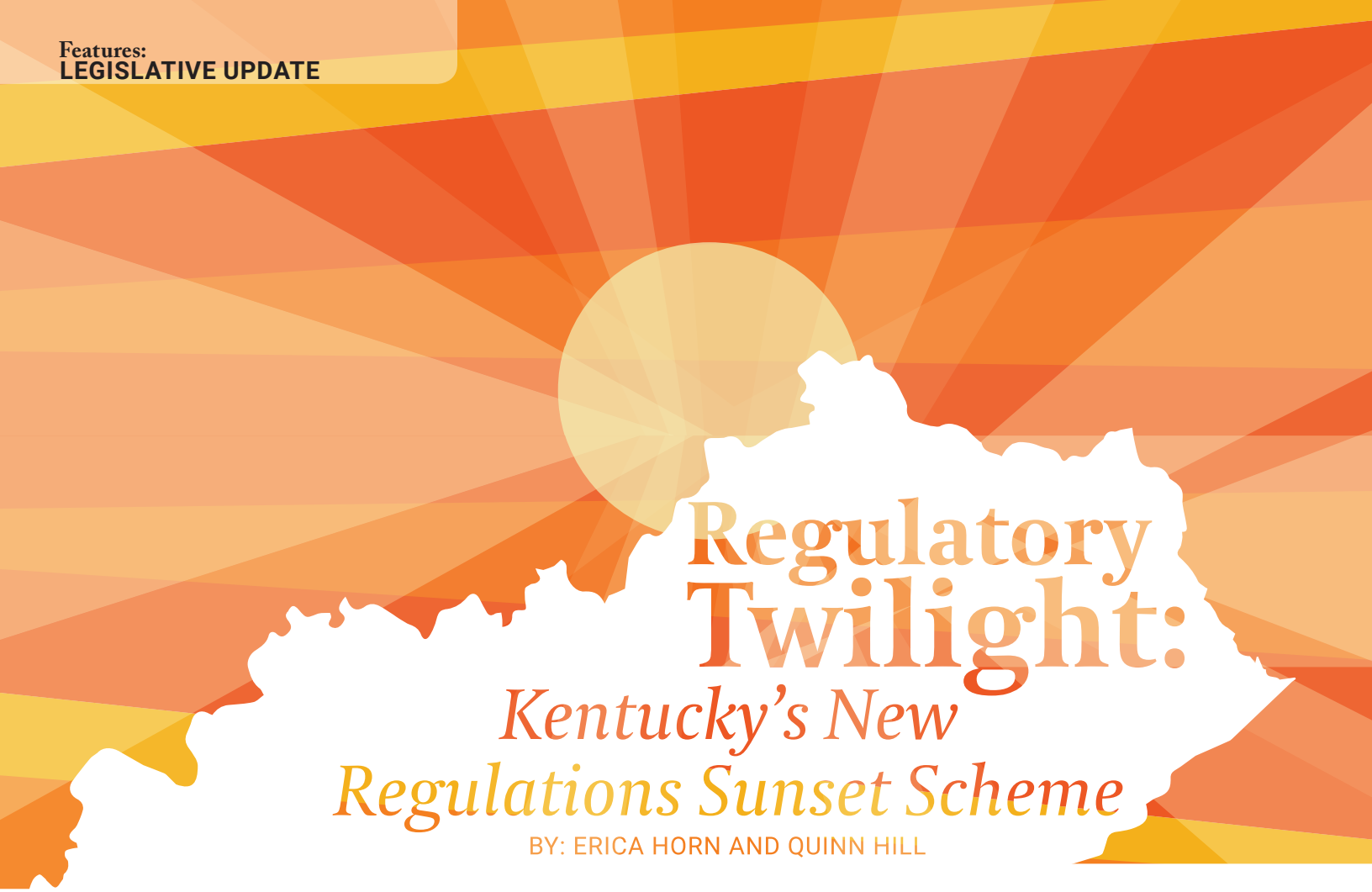

Regulatory Twilight: *Kentucky's New Regulations Sunset Scheme*

BY: ERICA HORN AND QUINN HILL

Fact: Regulations are in the crosshairs. Regardless of their history, applicable industries or agencies, or initial justifications, regulations are running headlong into a de-regulation firing squad. No matter your particular political leanings or feelings on the subject, it cannot be denied that the zeitgeist opposes too many regulations and regulators; popular sentiment views regulations as the kudzu suffocating the life out of American industry and the American worker.

Public sentiment partly explains the swath of politicians waving the de-regulation banner. And those politicians are currently on a bit of a winning streak. During the presidential campaign, then-candidate Trump repeatedly lambasted government regulations and promised to rein them in. Within weeks of taking office, the regulation roll-back was officially underway, beginning with President Trump's Executive Orders requiring federal agencies to establish "Regulatory Reform Task Forces" to eliminate so-called red tape in the form of "costly and unnecessary regulations," and to nix two regulations for every new one promulgated by any federal agency.[1] The idea behind the de-regulation fervor is simple: regulations act as a hurdle to the regulated industries, cramping those industries' ability to grow and develop, which means fewer jobs and stagnant wages for the affected workers.

As terms, however, "regulation" and "de-regulation" are vague, and Americans are not so certain about the propriety of a wholesale reduction in regulations once the details come into view. Americans are sharply divided on whether "business regulations" as a general matter do more harm than good, and even fewer Americans approve of reducing environmental regulations in particular.[2] Of course, ask an American worker whether he or she supports the regulations that apply to his or her industry, and you can predict the response.[3] In other words, as with so much else, the devil is in the details.

Kentucky is no exception to the national trend. Former Kentucky Governor Steve Beshear fought back against the Environmental Protection Agency's perceived heavy-handedness when it came to regulating Kentucky's fragile and faltering coal industry, even going so far as to sue the EPA for blocking permits pursuant to enforcement of the Clean Water Act.[4]

Kentucky's current Governor, Matt Bevin, has embraced a broader skepticism vis a vis government regulations. Shortly after entering office, Bevin unrolled his "Red Tape Reduction" aimed at eliminating unnecessary, duplicative, and excessively costly regulations in an effort to spur Kentucky's economic growth.[5] According to the Red Tape Reduction website, Kentucky has over 4,700 regulations, with "approximately 85 percent of them" having never undergone a review concerning their effectiveness.[6] Not only do those potentially ineffective regulations cost businesses time and money, but there is no comprehensive mechanism for submitting for review those regulations that may no longer be necessary or are obsolete.[7]

If one complaint behind Governor Bevin's initiative is that there is no tool available for the systematic review and repeal of costly and unnecessary regulations, then the Kentucky legislature took a

giant leap toward filling the toolbox on March 21, 2017, when it passed House Bill 50. Proffered as Kentucky's "Sunset" legislation, HB 50 implements two very broad, and very powerful, de-regulation devices: first, it requires that administrative bodies continually review current regulations to determine whether they shall remain in effect as written, or be amended or repealed; second, it mandates that all regulations not affirmatively designated to remain on the books and in force shall automatically expire after a pre-determined time period.

If all goes according to plan, then there will be a drastic reduction in the number of regulations on Kentucky's books. For supporters of blanket de-regulation, that's a welcomed development. But because a regulation automatically expires only if the administrative agency tasked with promulgating, amending, and enforcing that regulation fails to trigger HB 50's savings provisions, there will still be much wrangling and discretion when determining which particular regulations go the way of the dinosaur.

HOUSE BILL 50'S LEGISLATIVE HISTORY

Representative Kenny Imes, R-Murray, sponsored HB 50. While bringing the bill forward in committee, Rep. Imes indicated that Kentucky's "regulatory authorities [had] kind of gone overboard," and that the resultant copious regulations had worked to hurt small businesses in the Commonwealth.[8] He further noted that some of Kentucky's regulations "have been on the books since 1974," and that the bill was primarily an attempt to require administrative agencies to "be more diligent and review their process" for maintaining and enforcing their promulgated regulations.[9] After describing its general workings, the bill passed through committee by a 14-1 vote.

HB 50 took a similar path in the Senate subcommittee, where it was stated at the outset that the bill was part of Governor Bevin's Red Tape Initiative and marked a definitive step toward ridding the Commonwealth of unneeded regulations.[10] Although there was slightly more discussion than in the House Committee, with one Senator making clear that he thought there was a place for administrative regulations, and another stating that he felt that "final authority of administrative regulations should lie with the legislative body," the bill eventually passed by a 10-1 vote.

When brought for an official vote, HB 50 received overwhelming —and bipartisan—support, garnering an 80-9 vote in the House and a 37-0 vote in the Senate. The comments from both the House and Senate subcommittee hearings were echoed on the floor of each Chamber. In the House, it was stated that the bill would reduce regulations that had been on the books and not reviewed for decades, and impose greater accountability on administrative agencies to review their regulations.[11] It was also commented that the bill would save precious resources by streamlining a regulation's amendment and renewal by circumventing the standard review process.

In the Senate, Rep. John Schickel, R-Union, spoke on the bill to note that his constituents were very worried about regulations, and that a mandatory and predictable review process would help adapt to changing business operations over time.[12] Senate President Robert Stivers, R-Manchester, likewise reiterated that the bill was designed to help businesses, stating that regulations often create unnecessary and egregious litigation costs when an administrative agency attempts to enforce a regulation against a citizen or corporation and that citizen or corporation consequently sues to prevent the enforcement. It is unclear how HB 50 addresses that predicament, because an administrative body will continue enforcement of the regulations that remain effective.

HB 50's eliciting nearly unanimous support from both parties clearly evidences the trend in favor of reducing the number of purported unnecessary, outdated, and costly regulations.

H.B. 50'S PLAIN LANGUAGE AND MECHANICS

Essentially, HB 50 amends KRS Chapter 13A to establish an automatic sunset provision for regulations that reach a certain age. More particularly, the bill creates a new section of Chapter 13A, which mandates:

1. An ordinary administrative regulation with a last effective date on or after July 1, 2012, shall expire seven (7) years after its last effective date, except as provided by the certification process in Section 5 of this Act.
2. An ordinary administrative regulation with a last effective date before July 1, 2012 shall expire on July 1, 2019, except as provided by the certification process in Section 5 of this Act.

The bill further directs the regulations compiler to delete the expired regulations from the Kentucky Administrative Regulations Service and add them to a list of ineffective administrative regulations. The compiler is directed to update the list of expired regulations every six months.

The bill likewise creates a new provision in Chapter 13A that acts as a savings clause for regulations that are scheduled to expire but that the administrative agency feels are still necessary or, in the least, should not yet see their twilight. This savings clause provides:

1. If an administrative body does not want an administrative regulation to expire under Section 4 of this Act, the administrative body shall:
   a. Review the administrative regulation in its entirety for compliance with the requirements of KRS Chapter 13A and current law governing the subject matter of the administrative regulation; and
   b. Prior to the expiration date, file a certification letter with the regulations compiler stating whether the administrative regulation shall be amended or remain in effect without amendment.

If an administrative agency determines that the regulation should remain in effect as is, the certification letter will provide a statement to that effect, along with some brief comments in support. Likewise, if an agency determines that the regulation should be

amended, the certification letter will state that the agency intends to amend the regulation. If an administrative agency chooses to amend the regulation, it has 18 months to do so after the filing of the certification letter. The regulation remains in effect during the amendment process, but will expire immediately if that process is halted or the amendment withdrawn. Finally, the compiler is directed to update the regulation's last effective date to reflect either the date the administrative agency provides a certification letter stating that the amendment shall remain in effect or the amended regulation finishes going through the regulation process. Thus, amending a regulation or certifying that it is to remain on the books effectively provides it a seven-year renewal. After seven years, the process begins anew.

A few elements of HB 50's mechanics are worth noting. First and fundamentally, the bill provides the executive branch and agencies with sole authority to determine the fate of administrative regulations—that is, the agencies' own regulations. An agency faced with an expiration of its own regulation, and thus its own power to regulate, will have only to file a certification letter stating that the regulation shall remain effective for the agency's regulative power to remain intact.

Second, the bill's automatic sunset provision establishes a very streamlined process for eliminating regulations that an agency deems unnecessary or past their time. An agency's refusal to act once it receives notice that a regulation is set to expire will result in that regulation's expiration.

Third, given that each agency is tasked with determining whether its regulations shall sunset, remain, or be amended, the new scheme places great responsibility upon each agency to maintain a constant audit of its regulations to determine their efficacy and necessity. On one hand, this means that an agency will be forced to consistently account for its regulations and determine whether and why they should or should not remain in effect. On the other hand, it also creates a very simple scheme for an administrative agency to simply keep its regulations effective by filing a certification letter. Consequently, if an administrative agency is not incentivized to reduce its unnecessary regulations, then the scheme may cost more than it's worth due to the administrative burden of having to file a letter every few months to let the Commonwealth know that the agency is not changing or eliminating the regulation.

Fourth, it is important to note the complete absence of the public and the legislature from HB 50's sunset scheme. As the ultimate arbiter of an agency's regulatory authority, the legislature's place in crafting the Commonwealth's body of government regulations is anything but abolished. However, for purposes of HB 50's particular sunset provisions, the legislature and the public are bypassed, seemingly in favor of a simpler, more efficient mechanism of ridding the books of unnecessary regulations without the wrangling that might accompany the process were others involved.

OTHER STATES' SUNSET PROVISIONS

It should come as no surprise that Kentucky is not the first state in the country to implement some legislative mechanism for sunsetting regulations. Colorado was the first state to do so as far back as 1976.[13] Also, Texas has a "sunsetting" statute, but it is far more aggressive than the type of sunsetting contemplated by HB 50. In Texas, an entire administrative agency or program may sunset. Texas's scheme is worth expounding upon, since it has a relatively well-documented history and track record and may be a precursor of things to come.

Pursuant to the Texas Sunset Act,[14] every administrative agency and program is subject to periodic review by the Sunset Advisory Commission (SAC), a 12-member review board comprised of five members of each house and two public appointees.[15] The Commission will review an agency's performance and the ongoing need for its services or programs according to pre-established criteria, and recommend that it be abolished, continue as is, or improved.[16] Once the Commission publishes its initial findings, the public is permitted to comment either through live testimony or in writing regarding the Commission's report.[17] The Commission may then revise its report and submit its final recommendations to the legislature.[18] The legislature drafts a bill in accordance with the Commission's recommendations, and that bill proceeds just as any other bill. If the bill recommends improvements to an agency and passes the legislature, the agency continues with the improvements. If the bill fails, the agency is abolished.[19]

According to the SAC, Texas's Sunset Act has resulted in the abolishment of 37 agencies and programs, saving state taxpayers an estimated $980 million over the life of the program, or $23 for every $1 spent on administering the Act.[20] Savings in dollars and cents may be hard to quantify exactly and fail to tell the whole story. For instance, according to the SAC, after a review of the Texas Department of Criminal Justice in 2007 resulted in the SAC's recommending diverting funds from new prison construction to offender treatment and rehabilitation programs, the state realized a $210 million savings in the year after implementation and the first ever closing of a state prison.[21] Assuming the treatment and rehabilitation programs continue to bear fruit, the savings to those who may have been victims of crime without the SAC's recommended and adopted plan of action is perhaps immeasurable.

CONCLUSION

Inevitably, both the federal and state governments, Kentucky included, will experience varying levels of success by implementing mechanisms for the automatic elimination of regulations. Kentucky's particular scheme could perhaps be stronger if three areas were addressed.

First, HB 50 is executive-centric. There is little to no role for the public or the legislature in providing input or oversight concerning the regulations scheduled to sunset. The administrative agency alone is the final arbiter of whether a regulation expires.

Second, HB 50 gives additional power to administrative agencies. As the legislature has provided no guidance or rubric that each administrative agency is to follow when determining whether to

keep, amend, or allow to expire a particular regulation, that agency has wide latitude in making its determination. Indeed, although Governor Bevin's Red Tape Initiative is designed to eliminate "costly" regulations, there is no requirement that an administrative agency actually determine a regulation's cost prior to deciding its fate.

Third, HB 50 sets up an ostensibly apolitical expiration process. Legislators are elected and subject to the desires of their constituents. Legislators are also subject to the heavy lobbying and rent-seeking that occurs at all levels of government. Administrative agencies, however, are not—at least not to the same extent. Though they may be subject to removal by the executive, administrative agencies are by and large insulated from the vast sea of special interests. On one hand, this is good because it means that administrative agencies are more inclined to make rational decisions regarding the good of the Commonwealth instead of satisfying a particular group. On another hand, it means less public oversight and accountability, and assumes that the administrative agency knows what is good for the Commonwealth and will act accordingly.

It will take time, of course, to know how Kentucky's sunset scheme will be implemented and whether it will translate into real results. This is especially true when it comes to ascertaining dollars saved by virtue of de-regulation. But, it is clear that, whatever "de-regulation" means, Kentucky is on board. B&B

ABOUT THE AUTHORS

Attorney **ERICA HORN** is a member of Stoll Keenon Ogden's Tax and Public Benefit Corporation Services Practices. She has represented clients with regard to nearly all of Kentucky's taxes and fees, including income, sales and use, property and severance. Horn has successfully appealed assessments issued by taxing authorities and pursued refund claims for her clients, saving them millions of dollars in Kentucky taxes. She is a licensed CPA, prolific author and frequent speaker on state and local tax topics.

QUINN HILL is an associate attorney in Stoll Keenon Ogden's Business Litigation, Tort, Trial and Insurance Services, and Criminal Law Practices. His focus is commercial litigation and white-collar criminal defense.

ENDNOTES

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A link to an additional article, "*HB 309 Public-Private Partnerships: A Primer for Kentucky Lawyers*," by *James C. Seiffert* has been placed on the KBA website under the Hot Topics page.

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