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6 Ways Chairman Pai Can Stop FCC Overreach

by

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Upon being named the new chairman of the Federal Communications Commission on Jan. 21, Ajit Pai swiftly made clear his intent to reverse the agency's recent pattern of regulatory overreach. To his credit, Pai already has moved quickly to shift the FCC's primary focus from imposing new restrictions on broadband services to encouraging more broadband availability for all Americans by employing less heavyhanded interventionist means.

It is anticipated Pai will take significant steps to eliminate obsolete regulations, many of which were adopted during the era when Ma Bell dominated and three TV networks ruled the airwaves. As he said last December, "We need to fire up the weed whacker and remove those rules that are holding back investment, innovation and job creation."

Here are six reforms we have proposed since the beginning of the year that the FCC can implement, using its current authority, to weed out regulations that are no longer necessary due to technological advancements and/or increased competition and consumer choice:

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1. [Fix the FCC's forbearance process](#). Section 10 of the Communications Act states the FCC "shall forbear" from applying any regulation or statutory provision to a telecommunications service if the agency determines enforcement is not necessary to ensure charges or practices are just and reasonable or necessary to protect consumers.

The FCC should make Section 10 the deregulatory tool Congress intended by adopting a procedural rule placing the burden in forbearance decisions on those advocating continued enforcement of old rules. So, absent clear and convincing evidence to the contrary, the FCC should presume Section 10's substantive consumer protection criteria are satisfied regarding the regulation at issue and forbear from enforcing it.

2. [Breathe life into the FCC's periodic regulatory reviews](#). Section 11 of the Communications Act requires the FCC to review telecommunications regulations on a periodic basis and to repeal or modify those determined to be "no longer necessary in the public interest as a result of meaningful economic competition."

Like the Section 10 forbearance provision, Section 11 retrospective reviews have been substantially underutilized to give effect to their deregulatory purpose.

Thus, as with Section 10, the FCC should adopt a procedural rule embodying a deregulatory evidentiary presumption: "Absent clear and convincing evidence to the contrary, the Commission shall presume that regulations under review are no longer necessary in the public interest as a result of meaningful competition among providers of such service."

3. [Review and reduce rules impacting small businesses](#). Section 610 of the Regulatory Flexibility Act requires the FCC to review rules "within ten years" of adoption "to minimize any significant economic impact of the rules upon a substantial number of such small entities."

The FCC's last completed Section 610 review was for rules adopted in 2000. To relieve small businesses from disproportionate regulatory burdens, the FCC should comprehensively review all such rules adopted through 2012.

Going forward, the FCC should conduct timely Section 610 reviews pursuant to a procedural rule that places the evidentiary burden on those seeking continued enforcement.

4. [Encourage new technologies and services](#). Section 7 of the Communications Act provides that any party opposing the offering of a new technology or service bears the burden of demonstrating it is inconsistent with the public interest. And when a new technology or service is proposed, Section 7 requires the FCC to make a decision concerning the proposal within one year.

The FCC should rely more on Section 7 than it has in the past to fulfill Congress's intent to encourage innovative services and technologies. For example, Section 7 may well be relevant as the commission considers applications relating to deployment of next-generation 5G wireless networks.

5. [Overhaul the FCC's video competition policy](#). In view of today's competitive video marketplace, the FCC should comprehensively reassess its entire bucketful of video service regulations.

For example, it should close its flawed proceeding to impose new regulations on video devices and apps and start to eliminate old set-top box rules. Its proceeding to extend legacy regulations to online subscription video services should be terminated. Broadcast TV regulations such as network non-duplication and syndication exclusivity rules should be repealed.

6. "[Trial](#)" [FCC process reforms](#). The FCC should improve the transparency and accountability of its administrative processes. Reforms considered potentially problematic can be implemented on a trial basis and then reviewed after a period of time.

Commendably, Pai already is "trialing" some process reforms, such as publicly releasing draft items to be voted on at FCC open meetings. To the extent warranted, the FCC can trial other process reforms, for example, relating to the way its staff acts on delegated authority and the way so-called "editorial revisions" are made by staff after the commission votes on items.

Under Chairman Pai's leadership, the new FCC can implement these and similar market-oriented reforms. It's time for the FCC proactively to curtail unnecessary, costly regulations. This will spur more investment and innovation — benefiting not only the nation's economy but also its consumers.

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Series of Proposals for Reforming Communications Policy - 2017

Randolph J. May and Seth L. Cooper, "[A Proposal for Improving the FCC's Regulatory Reviews](#)," *Perspectives from FSF Scholars*, Vol. 12, No. 1 (January 3, 2017).

Randolph J. May, [A Proposal for Trialing FCC Process Reforms](#), FSF Blog, January 9, 2017.

Randolph J. May and Seth L. Cooper, "[A Proposal for Improving the FCC's Forbearance Process](#)," *Perspectives from FSF Scholars*, Vol. 12, No.4 (January 17, 2017).

Randolph J. May and Seth L. Cooper, "[A Proposal for Improving the FCC's Video Competition Policy](#)," *Perspectives from FSF Scholars*, Vol. 12, No. 5 (February 8, 2017).

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Regulations Impacting Small Businesses](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 6 (February 13, 2017).

Randolph J. May and Seth L. Cooper, “[A Proposal for Spurring New Technologies and Communications Services](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 7 (February 21, 2017).