

## **Eisner Comments on ACUS Draft Recommendation on Retrospective Review of Agency Rules**

*Recommendation numbers refer to the [redline](#) containing proposed amendments for consideration at the Plenary Session, posted on the ACUS website on December 2, 2014.*

**Recommendation 1.** This recommendation addresses a significant concern of those inside and outside the government – the need for agencies to have an effective program for periodically reviewing their existing regulations, for having a process for “systematic review.” It notes a goal to “move away from a model of retrospective analysis as an episodic, top-down reporting and compliance obligation.” I agree. But I question why there is no recommendation that the White House or others not require the “top-down” processes. Agency officials who have tried to establish periodic, systematic reviews have been frustrated with the additional top-down reviews. They take away already limited resources from existing reviews. They compound the problems of implementing a systematic, existing program for review with the common complaint from agency staff: “I just reviewed **all** of our rules in response to the recent EOP directive; why should I review the rules scheduled for this year or any time in the next few years under our systematic process.” Indeed, some agency staff may avoid including very effective analyses of existing rules in the systematic program because of the inevitable overlaps with the recurring EOP or OMB requests; it increases their workload, and they expect they will be pushed to rush their projects for EOP purposes. And then they worry that they will be asked to do too many status reports on their progress.

A “top-down” review may have a legitimate objective. But agencies can have one approach or the other if we want the reviews to be effective. Not both, especially when the “top-down” reviews become routine. We should have a specific recommendation against top-down reviews if we want systematic reviews. And ACUS should clearly recommend that agencies coordinate any systematic review program with the EOP and any other affected agencies. I recommend deleting the second sentence in recommendation 1 and adding the following language as recommendation 13: “Agencies that establish systematic reviews of their existing rules should coordinate the process and substance of those reviews with OMB and other affected agencies. The EOP and OMB should not impose ad hoc, top-down review programs on agencies that establish systematic review programs.”

**Recommendation 2.** While the recommendation recognizes that one size does not fit all and that each agency must tailor its procedures, and while it is filled with “as appropriate” caveats, it sets forth a basic, detailed framework that will not work for many agencies. As a result, too many agencies will be asked too often to explain why these recommendations are not appropriate. It also includes a number of recommendations for actions that are already required or that do not appear related to the subject of the recommendation.

For example, in recommendation 2, there is an apparent underlying assumption that agency reviews should be conducted on final rules, and that is often not an effective way to review “existing” rules. Many agency final rules amend existing rules. The FAA, for example, may issue a final rule changing the definition of an “air carrier”; this rule may indirectly result in a modification of the coverage of existing rules applying to manufacturing, training, operations, and reporting requirements for air carriers, their aircraft, and their crews. It might not make sense for the agency to review the final rule changing the definition but, rather, to consider the effect of that rule and many others when it reviews its manufacturing or training standards, etc. Discussing the rigor of the analysis and the methodology setting time frames or discussing public participation in a future review in the proposed and final rule would also be inappropriate and would be more effective if the process for determining those things was set forth in a general description of the agency’s review program.

Recommendation 2 also says agencies should state the rule’s intended effect, provide measurable outcomes, and identify key assumptions and uncertainties. This recommendation covers all “new regulations.” The great majority of new rules are “rules of the road” that set forth “informational requirements” – you drive on the right side of the road and stop at red lights. You need to know where to turn to follow a runway approach or the deadline for an application. Most of these types of rules have no measurable outcome, assumptions, etc.; at a minimum, they do not warrant even the need for more standard form statements about reviews of the rule. In addition, the recommended actions are already requirements for a well-done analysis and should be addressed in the rulemaking documents. Furthermore, agencies are already required to explain how the rule’s benefits would justify its costs. For many if not most agency analyses, the framework for any review would be somewhat the same. If the agency justifies the rule’s costs by saying it will save 1,000 lives or lower environmental emissions by 1 part per million, that should be what the review looks at – were those benefits achieved and were the projected cost estimates accurate. It is not clear what the recommendation is seeking that is not already in a final rule.

I recommend adding a paragraph at the end of recommendation 2 stating the following: “Agencies that have systematic review plans available on the internet that set forth the process and a schedule for their review of existing rules may address the recommendations in subparagraphs (a) – (e), as appropriate, by reference to their plans.”

**Recommendation 3.** I agree that it is important for OMB to help agencies gather the necessary information to evaluate the effectiveness of an existing rule, but it is not clear whether this recommendation is suggesting by “accounts separately” that the paperwork burdens would not be a cost of the rule. If the burden is a result of what will be a required submission or recordkeeping requirement, the agency will have to impose that burden in the subject rule or issue another rule to require that. The latter option would be an inefficient approach. This recommendation should be clarified, and if OMB agrees that it is not a burden imposed by the

rule, I recommend that a statement to that effect be added to the preamble of this ACUS recommendation

**Recommendation 4.** This recommendation is somewhat vague in that it is directed at writing new rules rather than reviewing an existing rule. Good rules use performance standards where possible and avoid requirements that limit competition or entry to markets. As a result, it is not clear what is sought by the first sentence. The last two sentences are also already required, good-rulemaking practices. The sentences apply to new rules, not to the review of rules. Perhaps adding the following language in line 142, after “allow” would help: “alternative approaches in the rule that could help the agency, in a subsequent review of the rule, determine whether there are more effective approaches to implementing its regulatory objective. For example, agencies could allow for experimentation, innovation...”

**Recommendation 8.** This recommendation is troubling from a budget perspective. I am aware of one agency – and there may be many – that created a separate office to conduct reviews as recommended. After a while, staff started being pulled away to work on higher priorities, generally the issuance of new rules. Eventually, the office disappeared because of a lack of resources. Many agencies know what good retrospective review processes should include, but they cannot get the resources. To recommend this and add that the agency should “ensure” that the office is “adequately resourced” is inappropriate. The pressure will be on the agency to create the office, even though the ability to obtain the necessary resources is often controlled at a higher level than the agency. I recommend deleting the “and” clause on lines 192 – 193 and adding in lieu of that: “if adequate resources are available.”

**Recommendation 9.** We should have a general recommendation that agencies evaluate their reviews to identify common problems found during reviews. For example, are they finding that their rules are so complex that they are frequently being asked for interpretations or having enforcement problems, or are they routinely underestimating costs or benefits in their economic analyses. I recommend adding the following: “Agencies should periodically evaluate the results of their retrospective reviews and determine whether they are identifying common problems with the effectiveness of their rule development and drafting that should be addressed.”