Administrative Conference Recommendation 2014-5

Retrospective Review of Agency Rules

Adopted December 4, 2014

Executive Summary

The following recommendation is intended to provide a framework for cultivating a "culture of retrospective review" within regulatory agencies. It urges agencies to remain mindful of their existing body of regulations and the ever-present possibility that those regulations may need to be modified, strengthened, or eliminated in order to achieve statutory goals while minimizing regulatory burdens. It encourages agencies to make a plan for reassessing existing regulations and to design new regulations in a way that will make later retrospective review easier and more effective. It recognizes that input from stakeholders is a valuable resource that can facilitate and improve retrospective review. Finally, it urges agency officials to coordinate with other agencies and the Office of Management and Budget to promote coherence in shared regulatory space.

Preamble

Traditionally, federal regulatory policymaking has been a forward-looking enterprise: Congress delegates power to administrative agencies to respond to new challenges, and agencies devise rules designed to address those challenges. Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities. As a consequence, Presidents since Jimmy Carter have periodically undertaken a program of "retrospective review," urging agencies to reassess regulations currently on the books and eliminate, modify, or strengthen those regulations that have become outmoded in light of changed circumstances. [1] Agencies have also long been

[1] Joseph E. Aldy, *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design & Implementation of Regulatory Policy* 3 (Sept. 17, 2014), *available at*

subject to more limited regulatory lookback requirements, including the Regulatory Flexibility Act, which requires agencies to review regulations having "a significant economic impact upon a substantial number of small entities"[2] within ten years of issuance, and program-specific retrospective review requirements erected by statute.[3]

Though historical retrospective review efforts have resulted in some notable successes,[4] especially in those instances in which high-level leadership in the executive branch and individual agencies has strongly supported these endeavors,[5] retrospective review of regulations has not been held to the same standard as prospective review, and the various statutory lookback requirements apply only to subsets of regulations. President Barack Obama has sought to build on these initiatives in several executive orders. On January 18, 2011, he issued Executive Order (EO) 13,563,[6] which directed executive branch agencies regularly to reassess existing rules to identify opportunities for eliminating or altering regulations that have become "outmoded, ineffective, insufficient, or excessively burdensome."[7] Shortly thereafter, he issued another order encouraging independent regulatory agencies to pursue similar

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http://www.acus.gov/sites/default/files/documents/Aldy%20Retrospective%20Review%20Report%20CIRCULATED%209-17-2014.pdf.

[2] 5 U.S.C. § 610.

[3] Aldy, *supra* note 1, at 3.

[4] *See generally* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985).

[5] *See generally* John Kamensky, National Partnership for Reinventing Government: A Brief History (Jan. 1999), *available at* http://govinfo.library.unt.edu/npr/whoweare/history2.html (highlighting the successes of the Clinton Administration's National Performance Review and emphasizing the importance of high-level executive branch and agency leadership).

[6] 76 Fed. Reg. 3821 (Jan. 21, 2011).

[7] *Id.* § 6.

regulatory lookback efforts (EO 13,579[8]) and yet another order providing a more detailed framework for retrospective review in executive branch agencies (EO 13,610[9]).

The Administrative Conference has long endorsed agencies' efforts to reevaluate and update existing regulations. In 1995, the Conference issued a recommendation stating that "[a]ll agencies (executive branch or 'independent') should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or revoked" and offering general guidance by which agencies might conduct that analysis.[10] In addition, in early 2011, shortly after the promulgation of EO 13,563, the Conference hosted a workshop designed to highlight best practices for achieving the EO's goals.[11]

Administrative law scholars and other experts have debated the effectiveness of existing retrospective review efforts. EO 13,610 touts the elimination of "billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens" achieved under the EO 13,563 framework and promises additional savings.[12] Cass Sunstein, the former Administrator of the Office of Information and Regulatory Affairs (OIRA), has suggested that these initiatives have yielded billions of dollars in savings.[13] Nevertheless, many criticize the existing system of

[8] 76 Fed. Reg. 41,587 (July 14, 2011).

[9] 77 Fed. Reg. 28,469 (May 14, 2012).

[10] Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[11] Administrative Conference of the United States, Retrospective Review of Existing Regulations, Workshop Summary (Mar. 10, 2011), http://www.acus.gov/sites/default/files/documents/ACUS%20Retrospective%20Review%20Workshop%20Final%203-21.pdf.

[12] Exec. Order No. 13,610, § 1, 77 Fed. Reg. 28,469, 28,469 (May 14, 2012).

[13] CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 180–84 (2013) (highlighting successful retrospective review efforts, including a Department of Health and Human Services reform to reporting requirements saving $5 billion over five years and a Department of Labor rule to harmonize hazard warnings with the prevailing international practice saving $2.5 billion over five years); *see also* Memorandum from President Ronald Reagan on the Review of Federal Regulatory Programs (Dec. 15, 1986) (describing the results of the Presidential Task Force on Regulatory

regulatory lookback as inadequate, especially insofar as it relies upon individual agencies to reassess their own regulations and provides few incentives for ensuring robust analysis of existing rules.[14] From the opposite perspective, many criticize current retrospective review efforts as inherently deregulatory, possessing a strong bias in favor of eliminating or weakening regulations rather than strengthening regulations that may be insufficiently protective.[15]

Ultimately, a system of "self-review," in which individual agencies are responsible for evaluating their own regulations and, to the extent permitted by law, modifying, strengthening, or eliminating those that are deemed to be outdated, can only succeed if agencies promote a "culture of retrospective review."[16] Without a high-level commitment, any regulatory lookback initiative runs the risk of devolving into an exercise of pro forma compliance. This might not be an inevitable outcome, however. If the relevant agency officials, including both those conducting retrospective reviews and those drafting new rules, come to view regulation as an ongoing process whereby agency officials recognize the uncertainty inherent in the policymaking exercise and continually reexamine their regulations in light of new information and evolving circumstances, a durable commitment can emerge.[17] Regulatory review should not only be a backward-looking exercise; rather, it should be present from the beginning as part of an on-going culture of evaluation and iterative improvement. Planning for reevaluation and regulatory improvement (including defining how success will be measured and how the data

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Relief, which included "substantial changes to over 100 existing burdensome rules" that "sav[ed] businesses and consumers billions of dollars each year").

[14] *See, e.g.*, Reeve T. Bull, *Building a Framework for Governance: Retrospective Review & Rulemaking Petitions*, __ ADMIN. L. REV. __ (forthcoming 2015); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57A, 60A (2013); Michael Mandel & Diana G. Carew, Progressive Policy Institute Policy Memo, *Regulatory Improvement Commission: A Politically Viable Approach to U.S. Regulatory Reform* 13 (May 2013).

[15] *See, e.g.*, Michael A. Livermore & Jason A. Schwarz, *Unbalanced Retrospective Regulatory Review*, PENN PROGRAM ON REGULATION REGBLOG, July 12, 2012, http://www.regblog.org/2012/07/12-livermore-schwartz-review.html; Rena Steinzor, *The Real "Tsunami" in Federal Regulatory Policy*, CPRBLOG, May 22, 2014, http://www.progressivereform.org/CPRBlog.cfm?idBlog=2480725C-9CC8-717D-E8DE6C4C4A5FF6EB.

[16] Aldy, *supra* note 1, at 39–40; Coglianese, *supra* note 14, at 66A.

[17] Aldy, *supra* note 1, at 40.

necessary for this measurement will be collected) should be considered an integral part of the development process for appropriate rules. This culture of evaluation and improvement is already part of many government programs, but not yet of most regulatory programs.

This recommendation aims to help agencies create such a culture of retrospective review. To promote robust retrospective analysis, agency officials must see it as critical to advancing their missions. To obtain this "buy-in," these officials must have a framework for performing the required analysis and possess adequate resources for conducting the necessary reviews (such that doing so is wholly integrated into agencies' other responsibilities rather than serving to displace those existing responsibilities). Given the costs of performing robust retrospective analysis, it is critical that agencies have adequate resources such that conducting retrospective review does not detract from other aspects of their regulatory missions. Thus, the recommendation sets forth considerations relevant both to identifying regulations that are strong candidates for review and for conducting retrospective analysis.[18] In addition, the recommendation encourages agencies to integrate retrospective analysis into their policymaking framework more generally, urging them not only to reevaluate existing regulations but also to design new regulations with an eye towards later reexamination and to consider the cumulative regulatory burden. In doing so, agencies should identify data collection needs and consider other regulatory drafting strategies that can help them later determine whether the regulation achieved its purpose.[19] Finally, the recommendation

[18] In 2011, the Conference recommended that agencies periodically review regulations that have incorporated by reference material published elsewhere in order to ensure that they are updated as appropriate and contain complete and accurate access information. Administrative Conference of the United States, Recommendation 2011-5, *Incorporation by Reference*, ¶¶ 6–10, 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012).

[19] Some scholars propose the use of experimental methods and data-driven evaluation techniques in order to identify the actual impacts caused by regulations and determine whether they are achieving their intended outcomes. John DiNardo & David S. Lee, *Program Evaluation & Research Designs*, *in* 4A HANDBOOK OF LABOR ECONOMICS 463–536 (2011); *see also generally* JOSEPH S. WHOLEY, HARRY P. HATRY, & KATHRYN E. NEWCOMER, HANDBOOK OF PRACTICAL PROGRAM EVALUATION (3d ed. 2010). This might include, among other things, taking the opportunity of pilot projects and regulatory phase-ins to test different regulatory approaches. Some scholars also propose the use of alternative regulatory mechanisms and other innovative approaches designed to lessen regulatory burdens while ensuring appropriate levels of regulatory protection.

identifies opportunities for conserving agency resources by taking advantage of internal and external sources of information and expertise. In many instances, stakeholders may be able to furnish information to which agency officials otherwise lack access.[20] In other cases, overseas regulators may have confronted similar regulatory problems, and incorporating these approaches would have the double benefit of avoiding duplication of effort and providing opportunities for eliminating unnecessary regulatory divergences.[21] Further, the information generated from retrospective review has the potential to conserve resources during future regulatory development of similar rules by informing ex ante regulatory analysis, which in turn improves the quality of new regulations.[22]

Though the recommendation identifies certain common principles and opportunities for promoting robust retrospective analysis, it accepts the fact that each agency must tailor its regulatory lookback procedures to its statutory mandates, the nature of its regulatory mission, its competing priorities, and its current budgetary resources. In short, retrospective review is not a "one-size-fits-all" enterprise. In addition, as optimal regulatory approaches may evolve over time, so too may retrospective review procedures. Therefore, the recommendation avoids an overly rigid framework. Rather, it identifies considerations and best practices that, over time, should help foster a regulatory approach that integrates retrospective analysis as a critical element of agency decisionmaking and that accounts for the uncertainty inherent in regulatory policymaking at all stages of the process. The overall goal is to move away from a model of

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[20] Aldy, *supra* note 1, at 22–23, 54, 56–57; *see generally* Bull, *supra* note 14 (proposing a system whereby private entities would use petitions for rulemaking to urge agencies to adopt less burdensome alternatives to existing regulations while preserving existing levels of regulatory protection). Agencies should nevertheless recognize that private and non-governmental entities' interests may not align with public interests and that established firms may actually defend regulations that create barriers to entry for newer, smaller competitors. SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 18–19 (2d ed. 2012) (describing the so-called "bootleggers and Baptists" phenomenon, whereby businesses that benefit from market interventions may make common cause with civil society groups that advocate such policies for other reasons).

[21] Exec. Order No. 13,609, § 1, 77 Fed. Reg. 26,413, 26,413 (May 4, 2012); Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, ¶ 4, 77 Fed. Reg. 2259, 2260 (Jan. 17, 2012).

[22] PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 57 (2014).

retrospective analysis as an episodic, top-down reporting and compliance obligation to one where agencies internalize a culture of retrospective review as part of their general regulatory mission.

RECOMMENDATION

Value of Retrospective Review

1. The Conference endorses the objectives of Executive Orders 13,563, 13,579, and 13,610 with respect to retrospective review of existing regulations. Agencies should work with the Office of Management and Budget (OMB), as appropriate, to develop retrospective review into a robust feature of the regulatory system.

Integrating Retrospective Review into New Regulations

2. When formulating new regulations, agencies should, where appropriate, given available resources, priorities, authorizing statutes, nature of the regulation, and impact of the regulation, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. The rigor of analysis should be tailored to the rule being reviewed. The agencies should consider including the following in the framework:

(a) The methodology by which they intend to evaluate the efficacy of and the impacts caused by the regulation, including data-driven experimental or quasi-experimental designs where appropriate, taking into account the burdens to the public in supplying relevant data to agencies.

(b) A clear statement of the rule's intended regulatory results with some measurable outcome(s) and a plan for gathering the data needed to measure the desired outcome(s). To the extent feasible, objectives should be outcome-based rather than output-based. Objectives may include measures of both benefits and costs (or cost-effectiveness), as appropriate.

(c) Key assumptions underlying any regulatory impact analysis being performed on the regulation. This should include a description of the level of uncertainty associated with projected regulatory costs and benefits, consistent with OMB Circular A-4.

(d) A target time frame or frequency with which they plan to reassess the proposed regulation.

(e) A discussion of how the public and other governmental agencies (federal, state, tribal, and local) will be involved in the review.

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.

3. When reviewing new regulations, the Office of Information and Regulatory Affairs (OIRA) should facilitate planning for subsequent retrospective review to the extent appropriate. Agencies should consider including a section in the preamble of their proposed and final rules that accounts separately for paperwork burdens associated with the collection of data to facilitate retrospective review and should note that data gaps can impede subsequent retrospective review (though the paperwork burden would still be included in the total cost of the instant rule).

4. Where it is legally permissible and appropriate, agencies should consider designing their regulations in ways that allow alternative approaches in the rule that could help the agency in a subsequent review of the rule to determine whether there are more effective approaches to implementing its regulatory objective. For example, agencies could allow for experimentation, innovation, competition, and experiential learning (calling upon the insights of internal statistical offices, as well as policy and program evaluation offices, in order to design plans for reassessing regulations, to the extent they have such resources). As recommended by OMB Circular A-4, agencies should consider allowing states and localities greater flexibility to tailor regulatory programs to their specific needs and circumstances and, in so doing, to serve

as a natural experiment to be evaluated by subsequent retrospective review. Statutes that authorize shared responsibility among different levels of government may be amenable to such flexibility.

Prioritizing Regulations for Retrospective Analysis

5. In light of resource constraints and competing priorities, agencies should adopt and publicize a framework for prioritizing rules for retrospective analysis. Agency frameworks should be transparent and enable the public to understand why the agency prioritized certain rules for review in light of the articulated selection criteria. Though considerations will vary from agency to agency and program to program, the following factors can help identify strong candidates for retrospective review that could inform regulatory revision:

(a) Likelihood of improving attainment of statutory objective;

(b) Likelihood of increasing net benefits and magnitude of those potential benefits;

(c) Uncertainty about the accuracy of initial estimates of regulatory costs and benefits;

(d) Changes in the statutory framework under which the regulation was issued;

(e) Cumulative regulatory burden created by the regulation at issue and related regulations (including those issued by other agencies);

(f) Changes in underlying market or economic conditions, technological advances, evolving social norms, public risk tolerance, and/or standards that have been incorporated by reference;

(g) Internal agency administrative burden associated with the regulation;

(h) Comments, petitions, complaints, or suggestions received from stakeholder groups and members of the public;

(i) Differences between U.S. regulatory approaches and those of key international trading partners;

(j) Complexity of the rule (as demonstrated by poor compliance rates, amount of guidance issued, remands from the courts, or other factors); and

(k) Different treatment of similarly situated persons or entities (including both regulated parties and regulatory beneficiaries).

To the extent applicable, agencies should consider both the initial estimates of regulatory costs and benefits, and any additional evidence suggesting that those estimates are no longer accurate.

6. Though agencies will likely focus their retrospective analysis resources primarily on important regulations as identified by the foregoing factors, they should also take advantage of simple opportunities to improve regulations when the changes are relatively minor (e.g., allowing electronic filing of forms in lieu of traditional paper filing).

Performing Retrospective Analysis

7. When conducting retrospective analysis of existing regulations, agencies should consider whether the regulations are accomplishing their intended purpose or whether they might, to the extent permitted by law, be modified, strengthened, or eliminated in order to achieve statutory goals more faithfully, minimize compliance burdens on regulated entities, or more effectively confer regulatory benefits. The level of rigor of retrospective analysis will depend on a variety of factors and should be tailored to the circumstances. As appropriate and to the extent resources allow, agencies should employ statistical tools to identify the impacts caused by regulations, including their efficacy, benefits, and costs and should also consider the various factors articulated in recommendation 5 in determining how regulations might be modified to achieve their intended purpose more effectively.

8. Agencies should consider assigning the primary responsibility for conducting retrospective review to a set of officials other than those responsible for producing or enforcing

the regulation, if adequate resources are available. Reviewing officials should coordinate and collaborate with rule producers and enforcers.

9. 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 practices that should be addressed.

Inter-Agency Coordination

10. Agencies should coordinate their retrospective reviews with other agencies that have issued related regulations in order to promote a coherent regulatory scheme that maximizes net benefits. Agencies and OMB should also consider creating a high-level organization responsible for promoting coordination between agencies in their retrospective review efforts (or assigning this function to an existing entity, such as the Regulatory Working Group).

11. In conducting retrospective review, agencies should consider regulations adopted by key trading partners and examine the possibility of either harmonizing regulatory approaches or recognizing foreign regulations as equivalent to their U.S. counterparts when doing so would advance the agency mission or remove an unnecessary regulatory difference without undermining that mission.

12. OIRA should consider formulating a guidance document that highlights any considerations common to agency retrospective analyses generally.

Promoting Outside Input

13. Regulated parties, non-governmental organizations, academics, and other outside entities or individuals may possess valuable information concerning both the impact of individual regulations and the cumulative impact of a body of regulations issued by multiple agencies to which individual agencies might not otherwise have access. Agencies should leverage outside expertise both in reassessing existing regulations and devising retrospective

review plans for new regulations. In so doing, agencies should be mindful of the potential applicability of the Paperwork Reduction Act, and agencies and OMB should utilize flexibilities within the Act and OMB's implementing regulations (e.g., a streamlined comment period for collections associated with proposed rules) where permissible and appropriate. Agencies should also consider using social media, as appropriate, to learn about actual experience under the relevant regulation(s).

14. Agencies should disclose relevant data concerning their retrospective analyses of existing regulations on "regulations.gov," their Open Government webpages, and/or other publicly available websites. In so doing, to the extent appropriate, agencies should organize the data in ways that allow private parties to recreate the agency's work and to run additional analyses concerning existing rules' effectiveness. Agencies should encourage private parties to submit information and analyses and should integrate relevant information into their retrospective reviews.

Ensuring Adequate Resources

15. Agencies and OMB should consider agencies' retrospective review needs and activities when developing and evaluating agency budget requests. To the extent that agencies require additional resources to conduct appropriately searching retrospective reviews, Congress should fund agencies as necessary.