

Report for Recommendation 95-3

Agency Review of Existing Regulations

Sidney A. Shapiro

John M. Rounds Professor of Law
University of Kansas

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited.

Table of Contents

INTRODUCTION.....	411
I. THE ABA REPORT.....	411
II. MANDATES FOR REVIEW	412
A. Legislative Mandates.....	412
1. Regulatory Flexibility Act.....	413
2. Rulemaking Petitions.....	413
3. GPRA.....	413
B. Executive Mandates.....	414
C. Agency Mandates.....	416
D. Proposed Legislation	417
1. Rulemaking Petitions.....	417
2. Review Procedures.....	418
E. The Role of Legal Mandates.....	420
III. THE REVIEW PROCESS.....	424
A. Management	424
1. Appointment Of A Manager.....	425
2. Review Process	425
3. Staff Input	425
4. The Review Staff	426
5. Choice of Rules	426
B. Methodology	428
C. Measurement.....	429
D. Public Input.....	432
IV. REDUCING THE NEED FOR RULE REVISIONS.....	436
A. More Flexible Regulations.....	437
B. Interim Final Rules.....	438
C. Interpretation of Rules.....	439
V. MORE EFFICIENT RULEMAKING	439
A. Management	440
B. Direct Final Rules	441
C. Executive Oversight	441
D. Congressional Coordination	442

Introduction

On February 23, 1995, President Clinton ordered administrative agencies to review existing regulations and identify which rules were obsolete, unnecessary, or could be eliminated for other reasons.¹ This order is in addition to an earlier executive order that requires agencies to have a program for the review of existing regulations.² President Bush mandated a similar review in January 1992, when he ordered a 90 day moratorium on new regulations.³ These actions indicate the high priority that these administrations have assigned to the review of existing regulations.

The American Bar Association (ABA) has studied the experience of departments and agencies in responding to the Bush order and in conducting review programs generally. This paper evaluates the ABA report and other information concerning these programs. Part I explains the relationship of this report to the ABA study. Part II documents existing and proposed legal obligations of agencies to review their regulations. Part III explains what is known about current review programs and makes recommendations concerning how such programs can be improved. Part IV considers what steps agencies can take to reduce the need to revise regulations after they are promulgated. Finally, Part V considers how the rulemaking process can be made more efficient to permit agencies to revise or rescind regulations more expeditiously.

I. The ABA Report

This paper is based on a report written for the Administrative Law and Regulatory Practice Section of the ABA (Section) by Neil Eisner and Judy Kaleta, who are attorneys in the Department of Transportation.⁴ The ABA report was based on the responses to a letter and questionnaire distributed to federal departments and agencies in April 1993. The letter explained the general background and purpose of the study. The questionnaire contained twenty inquiries concerning the general nature of existing regulations and reviews, public participation, the review process, staffing, impact analyses, and resources

¹Alexis Simendinger, *Regulatory Reform: Clinton Issues Regulatory Directive; Opposes GOP Reg Moratorium*, *Contract*, Nat'l Env't Daily (BNA) (Feb. 23, 1995).

²Exec. Order 12866, §5, 3 CFR §644 (1993 Comp.).

³*Bush Announces 90-Day Moratorium on Rules: Reilly Says He Will Re-Examine Waste Standards*, 22 Env't Rep. (BNA) 2294 (Jan. 31, 1993).

⁴Federal Agency Reviews of Existing Regulations: A report of the American Bar Association, Section of Administrative Law & Regulatory Practice, containing information and suggestions for conducting reviews of existing regulations (1994) [hereinafter cited as ABA Report].

and time.⁵ Sixteen departments and agencies responded either in writing or by meeting with Eisner and Kaleta. A list of the departments and agencies that responded is attached to the ABA Report.

At its October meeting, the Section authorized the distribution of the report for information purposes to rulemaking departments and agencies. At its February meeting, the Section passed a recommendation concerning agency review of existing rules to be submitted to the ABA House of Delegates at its August 1995 meeting. If the House of Delegates adopts the Section's recommendations, they will be ABA policy.

The ABA authors, Eisner and Kaleta, have done a remarkable public service in gathering and presenting the information contained in the ABA report. Although I rely significantly on their work, I have reorganized and augmented their effort.

II. Mandates for Review

Agency review of existing regulations takes place in response to a number of legal mandates. Congress has imposed obligations to review existing regulations and is considering additional requirements. As noted earlier, President Clinton has ordered agencies to undertake the review of existing regulations. Finally, some agencies have adopted regulations or policies concerning this subject. This section describes the scope of existing and proposed legal mandates to review existing rules and evaluates the impact of these requirements.

A. Legislative Mandates

Agencies are subject to three legislative mandates to review existing regulations. The Regulatory Flexibility Act requires agencies to review periodically regulations that have an impact on small businesses.⁶ The Administrative Procedure Act (APA) requires agencies to respond to rulemaking petitions that request an agency to revise or rescind a regulation.⁷ Finally, the Government Performance and Review Act (GPRA), which requires agencies to establish strategic plans and measure their performance in reaching those goals,⁸ apparently compels agencies to assess the impact of their rules.⁹

⁵*Id.*

⁶5 USC §§601- 612 (1988 & Supp. V. 1993).

⁷5 USC §553(e).

⁸P.L. 103-62, 107 Stat. 291 (1993).

⁹*See infra* section IIA3.

1. Regulatory Flexibility Act

The Regulatory Flexibility Act, which directs agencies to consider the impact of proposed regulations on small businesses,¹⁰ also requires the review of existing regulations. Agencies must review once every ten years existing regulations that have a significant economic impact on a substantial number of small entities.¹¹ An agency is required to assess: (i) the continued need for a rule; (ii) the nature of complaints or comments received concerning it; (iii) the complexity of a rule; (iv) the extent to which a rule duplicates, overlaps, or conflicts with other federal rules, and to the extent feasible, state and local regulations, and (v) the length of time since the rule has been evaluated and the degree to which there have been changes in conditions in the area affected by the rule.¹²

2. Rulemaking Petitions

Review under the Flexibility Act is limited to regulations that adversely impact a substantial number of small businesses. The APA imposes an additional obligation to review regulations by establishing "the right to petition for the issuance, amendment, or repeal of a rule."¹³ If an agency does not grant a petition, it must give prompt notice of the denial and include a brief statement of the grounds of denial.¹⁴ The petitions process, however, only generates review of a regulation if someone petitions an agency for this action. Individuals or entities may fail to file a petition because they lack knowledge concerning the process, do not have the resources to take this step, or believe that the agency will not respond favorably to their input.¹⁵

3. GPRA

Regulations may escape review under the previous processes because they are not subject to petitions or do not adversely affect a substantial number of small businesses. The GPRA also obligates agencies to study the impact of their regulations, but it may not plug this gap. This legislation requires each agency to submit to OMB a "strategic plan" for program activities by Sept. 30, 1997.¹⁶ A program includes any activity or project listed in the program and financing

¹⁰5 USC §§603-604.

¹¹*Id.* §610.

¹²*Id.*

¹³5 USC §553(e).

¹⁴*Id.* §555(e).

¹⁵See ABA Report, *supra* note 4, at 18 ("Even agencies with clear procedures for petitions for rulemaking often find that the regulated community prefers to seek legislative change in lieu of petitioning the agency.")

¹⁶5 USC §306(a).

schedules of the federal budget.¹⁷ The goals must be stated in “an objective, quantifiable, and measurable form” unless OMB authorizes some alternative form of measurement.¹⁸ An agency must report annually to the President and Congress on its performance in achieving its plan beginning no later than March 31, 2000.¹⁹ These reports must explain the agency’s success in achieving its performance goals and, if goals were not met the reasons for the lack of success.²⁰

How rulemaking agencies will comply with the act is unclear. For example, the act does not require that an agency study the impact of specific rules, but it does appear to require agencies to measure the overall success of their regulations.²¹ The act requires pilot programs²² and these are under way.²³ Since OSHA is one of the pilot programs, rulemaking agencies should have additional information concerning compliance.

B. Executive Mandates

Agencies are subject to legislative mandates to review existing regulations, but these do not cover all regulations or even all significant regulations. Regulations can escape review because they are not subject to the Regulatory Flexibility Act or the petitions process. The GPRA appears to require agencies to measure the overall impact of their regulatory programs, but it does not require the assessment of individual rules. President Clinton, however, has obligated agencies to adopt programs for the review of existing regulations by executive order. This section describes and evaluates the scope of this mandate.

President Clinton’s Executive Order 12866 requires agencies to submit to the Office of Information and Regulatory Affairs (OIRA) a “program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations...”²⁴ A “significant” regulation is one that is likely to have an annual effect on the economy of \$100 million or has other important economic or social effects.²⁵ Agencies are to determine which regulations “should be modified or eliminated so as to make the agency’s regulatory program more effective in achieving the regulatory

¹⁷31 USC §1115 (f)(6).

¹⁸*Id.* §§1115 (a)(2), (b).

¹⁹*Id.* §1116(a).

²⁰*Id.* §1116(d).

²¹See *supra* notes 17-18.

²²31 USC §1118.

²³Memorandum For The Heads of Departments and Agencies Designated As Pilot Projects Under P.L. 103-62 from Alice B. Rivlin, Acting Director, OMB (Sept. 23, 1994).

²⁴Exec. Order 12866, *supra* note 2, §5(a).

²⁵*Id.* §3(f).

objectives, less burdensome, or in greater alignment with the President's priorities and principles set for [Executive Order 12866]."²⁶ The order also directs the Administrator of OIRA and the Regulatory Working Group, comprised of the Vice President, presidential policy advisors, and the heads of some agencies, to pursue regulatory review.²⁷ Finally, the order invites state, local, and tribal governments to assist in identifying regulations that impose "significant or undue burdens" on them, or that are otherwise inconsistent with the public interest.²⁸

OIRA released a report on the first year of Executive Order 12866 in December 1994.²⁹ Although agencies were "somewhat further along" in implementing the administration's look-back requirements than six months earlier," OIRA stated that "real progress will depend on the extent to which senior policy officials recognize and attend to this effort."³⁰ OIRA acknowledged that agency managers were "understandably focused on meeting obligations for new rules, often under statutory or court deadlines, at a time when staff and budgets are being reduced,"³¹ and that "it is hard to muster resources for the generally thankless task of rethinking and rewriting current regulatory programs."³² Moreover, OIRA noted that its look-back provisions required a substantial commitment from agencies. The report explained:

[The look-back] is *not* directed at a simple elimination or expending of specific regulations from the Code of Federal Regulations. Not does it envision tinkering with regulatory provisions to consolidate or update provisions. Most of this type of change has already been accomplished, and the additional dividends to be realized are unlikely to be significant. Rather, the look-back provided for in the Executive Order speaks to a fundamental re-engineering of entire regulatory systems, many of which remained fundamentally unchanged for 30 to 50 years.³³

Finally, OIRA gave examples of some agencies that were engaged in such fundamental changes.³⁴

²⁶*Id.* §5(a).

²⁷*Id.* §5(b).

²⁸*Id.*

²⁹The First Year of Executive Order 12866, A Report Prepared By OIRA Administrator Sally Katzen (Dec. 20, 1994), reprinted in O.S.H. REP. (BNA) 1609 (Jan. 4, 1995).

³⁰*Id.* at 1618.

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.* at 1618-20.

President Clinton extended the obligation of departments and agencies to review existing regulations on February 21, 1995.³⁵ He required agencies "to conduct a page-by-page review of all your regulations now in force and [to] eliminate or revise those that are outdated or otherwise in need of reform."³⁶ The review is to consist of at least five criteria: (i) Is a regulation obsolete?; (ii) Could its intended goal be achieved in more efficient, less intrusive ways?; (iii) Are there better private sector alternatives, such as market mechanisms, that can better achieve the public good envisioned by the regulation?; (iv) Could private business, setting its own standards and being subject to public accountability, do the job as well?; and (v) Could the States or local governments do the job, making Federal regulation unnecessary?³⁷ The President ordered agencies to deliver to him by June 1, 1995, a list of regulations that will be eliminated or modified.³⁸

The President's directive establishes a firm deadline for agencies to complete a review of existing rules. His prior order did not contain such a deadline. Moreover, the President has redirected the review program or at least augmented its goals. The President has required agencies to search out outdated regulations or regulations that are otherwise in need of reform. The OIRA report identified the goal of the administration's review program as a fundamental re-engineering of entire regulatory systems.

C. Agency Mandates

Some departments and agencies have mandated the review of existing regulations in operations manuals or orders. In the Department of Defense (DOD), for example, every regulation is reviewed on a two-year cycle according to the DOD Directives Systems Review Program.³⁹ The Department of Interior, in its departmental manual, and the Federal Deposit Insurance Corporation, in a policy statement, have established five-year review cycles.⁴⁰ These entities have also set criteria for the review of rules. The criteria focus on the age of a rule, its economic impact, the burden it poses on industry, whether it duplicates another federal requirement, and whether it is inconsistent with a change in a law or administration policy.⁴¹

³⁵Supra, note 1.

³⁶Memorandum For Heads of Departments and Agencies From William J. Clinton On Regulatory Reinvention Initiative 2 (Mar. 4, 1995).

³⁷*Id.*

³⁸*Id.* Agencies are to indicate which regulations can be modified or eliminated administratively and which will require legislative authority for modification or elimination. *Id.*

³⁹ABA Report, *supra* note 4, at 10.

⁴⁰*Id.*

⁴¹*Id.*

D. Proposed Legislation

Agencies are now legally obligated to engage in the review of existing regulations as the result of legislative, executive, and agency mandates. Legislation pending in the Senate would alter the current petition process and establish procedures for the review of existing regulations. This section discusses proposals that illustrate the nature of the reforms being considered. Because reform legislation is in a state of flux in the Senate, some of the details described below may have been altered after this section was written.

1. Rulemaking Petitions

Amendments proposed by Senators Hatch and Grassley⁴² to legislation originally sponsored by Senator Dole⁴³ illustrate how Congress might amend the current petitions process. This bill would extend the right to petition to the issuance, amendment, or repeal of an interpretive rule, general statement of policy, or guidance.⁴⁴ Agencies would have 180 days to respond to such a petition.⁴⁵ An agency must grant the petition if there is a "reasonable likelihood" that the subject of the petition has the effect of a major rule and amendment or repeal is necessary to satisfy the decisional criteria for new rules.⁴⁶ For purposes of this requirement, a major rule is defined as any rule that is likely to have a gross annual effect of \$50 million or more in costs or that has a significant effect on the economy.⁴⁷ Under the criteria for promulgation of new rules, an agency must find that the benefits of the rule exceed its costs and that the rule imposes the least costs with the greatest benefits of any of the reasonable alternative policies that the agency has the authority to adopt.⁴⁸ If, after consideration of the petition, the agency finds that the subject of the petition does not conform to the decisional criteria for new rules, it "shall take immediate action" to amend or

⁴²Substitute S. 343, 104th Cong., 1st Sess. §553(e) (1995) [hereinafter cited as Hatch\Grassley Amendments].

⁴³S. 343, 104th Cong., 1st Sess. §625 (Feb. 9, 1995 version) [hereinafter cited as Dole Bill].

⁴⁴Hatch\Grassley Amendments, *supra* note 42, §553(e)(3)(A). Individuals could also petition for the issuance of an interpretation of the meaning of a rule, interpretative rule, or a general statement of policy or guidance and for a variance or exemption from the terms of a rule. *Id.* §553(e)(2)(C)-(D).

⁴⁵*Id.* §553(e)(4).

⁴⁶*Id.* §553(e)(3)(B).

⁴⁷*Id.* §621(4)(A)(i).

⁴⁸*Id.* §624(b). If an agency is required by its statutory mandate to approve a rule that does not meet these requirements, the legislation would prohibit the agency from adopting that rule unless its rules imposes lower costs than any of the reasonable alternative rules. *Id.* §624(c). In addition, the agency must prepare a written explanation of why it is required to promulgate a rule with potential costs that are not justified by the potential benefits and transmit that explanation to Congress. *Id.* §624(d).

rescind the rule, interpretative rule, policy statement, or guidance to conform with those criteria.⁴⁹

The legislation originally proposed by Senator Dole illustrates how Congress may extend the petitions process.⁵⁰ This bill would empower any person who is subject to a "major" rule to petition an agency to perform a cost-benefit analysis for that regulation.⁵¹ For purposes of this requirement, a major rule is defined as any rule that is likely to have a gross annual effect of \$50 million or more in costs or that has a significant effect on the economy.⁵² Once an agency receives such a petition, it is required to respond within 180 days.⁵³ It must grant the petition if the petitioner shows "a reasonable likelihood that the cost of the major rule outweigh the benefits, or that reasonable questions exist as to whether the rule provides greater net benefits to society than any reasonable alternative to the rule that may be more clearly resolved through [a cost-benefit study]."⁵⁴ Under the Hatch and Grassley proposal, an agency has one year to complete its cost-benefit analysis.⁵⁵

2. Review Procedures

The Hatch and Grassley proposal and legislation proposed by Senator Roth⁵⁶ would establish elaborate procedures for the review of existing regulations. These procedures address which rules must be reviewed, specify time deadlines for such review, and establish the process of review.

Both bills require an agency to review all existing major rules and any other rules selected by the agency.⁵⁷ In addition, the Hatch\Grassley Amendments would require review of rules that are "inconsistent with, or duplicative of, any other obligation or requirement established by any Federal statute, rule, or other agency statement, interpretation, or action that has the force of law."⁵⁸

The bills require the following procedures. An agency must publish in the Federal Register a proposed schedule for completion of its review within nine

⁴⁹*Id.* §553(e)(3)(C).

⁵⁰Dole Bill, *supra* note 43, §625.

⁵¹*Id.* §625(a)(1).

⁵²*Id.*; *see id.* §621(4)(A)(i) (defining major rule). The right to petition for a cost-benefit analysis would include any "major" rule that the agency previously enacted, regardless whether a cost-benefit analysis had been done previously. *Id.* §625(a)(1).

⁵³*Id.* §625(d)(4).

⁵⁴*Id.* §625(a)(3).

⁵⁵Hatch\Grassley Amendments, *supra* note 42, §623(b).

⁵⁶S. 291, 104th Cong., 1st Sess. (1995) (Jan. 27 version) [cited hereinafter as the Roth Bill].

⁵⁷Hatch\Grassley Amendments, *supra* note 42, §627(a)(1)(A)(i), (iii); Roth Bill, *supra* note 56, §641(a)(1)(A).

⁵⁸Hatch\Grassley Amendments, *supra* note 42, §627(a)(1)(A)(ii).

months after the effective date of the legislation and request public input.⁵⁹ After the President has had the opportunity to add any rule to an agency's review agenda,⁶⁰ the agency must publish a final schedule for review within one year after the effective date of the legislation.⁶¹ An agency would also be obligated to review any new major rules that it promulgated or any other rule that the President designated for review.⁶²

The legislation would also establish deadlines for rule review. The Roth bill would require that an agency complete its review of existing rules within ten years after the effective date of the legislation and of new rules within 10 years of their adoption.⁶³ If a review of a rule was not completed within these time periods, the rule would not longer be valid, but the President could extend a deadline to fifteen years at the agency's request.⁶⁴ The Hatch\Grassley proposal would terminate any rule that is not reviewed within seven years of the enactment of the legislation or five years after it is promulgated, except that the President could extend either time period to ten years.⁶⁵

Both bills have procedures concerning public participation. An agency would be required to publish in the Federal Register four types of information concerning each rule under review.⁶⁶ First, it must identify its statutory authority for a rule and state whether the rule continues to fulfill the intent of Congress in enacting the rule. Second, the agency must publish an assessment of the benefits and costs of the rule during the period in which it has been in effect. Third, it must explain the proposed agency action concerning the rule. Fourth, it must invite proposals from the public for modifications and alternatives which may accomplish the objectives of the rule in a more effective or less burdensome manner. If an agency proposes to renew a rule without amendment, it would be obligated to give interested persons at least 60 days to comment on the proposed renewal of the rule.⁶⁷ The agency is then required to publish in the Federal

⁵⁹Hatch\Grassley Amendments, *supra* note 42, §627(a)(1)(A)-(B); Roth Bill, *supra* note 56, §641(a)(1)(A)-(B).

⁶⁰Hatch\Grassley Amendments, *supra* note 42, §627(a)(2); Roth Bill, *supra* note 60, §641(a)(2). The President can delegate this function to a subordinate. Unless the text indicates otherwise, any reference to the President in this section indicates that the President or his designee can perform the function being discussed.

⁶¹Hatch\Grassley Amendments, *supra* note 42, §627(a)(3); Roth Bill, *supra* note 56, §641(a)(3).

⁶²Hatch\Grassley Amendments, *supra* note 42, §627(b)(1); Roth Bill, *supra* note 56, §641(b)(1).

⁶³Roth Bill, *supra* note 56, §641(b)(1).

⁶⁴Hatch\Grassley Amendments, *supra* note 42, §627(f).

⁶⁵*Id.* §641(f).

⁶⁶Hatch\Grassley Amendments, *supra* note 42, §627(c); Roth Bill, *supra* note 56, §641(c).

⁶⁷Hatch\Grassley Amendments, *supra* note 42, §627(e)(1); Roth Bill, *supra* note 56, §641(e)(1).

Register a notice that the rule has been renewed and to justify why the rule is in compliance with the decisional criteria established by the legislation.⁶⁸

E. The Role of Legal Mandates

Existing legal requirements have not resulted in an ongoing government wide process for agency review of existing regulations. The review requirements of the Regulatory Flexibility Act only apply to rules that impact on small businesses.⁶⁹ The petition process of the APA may cause an agency to review a rule, but only if a petition is filed.⁷⁰ The GPRA obligates agencies to measure the overall impact of their rules, but it does not require the review of individual rules.⁷¹ The President ordered agencies to establish a review program at the start of his administration, but most agencies have not yet complied.⁷² The President has sought to remedy this oversight by ordering a one-time review with a short deadline.⁷³ Finally, only a few agencies have obligated themselves to conduct an ongoing review process.⁷⁴

Previous experience with President Bush's one-time review under a short deadline indicates that this approach to review may not yield productive results. When President Bush ordered a 90-day moratorium on new regulations in January 1992,⁷⁵ he also ordered departments and agencies "to evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth."⁷⁶ Agencies told the ABA that they had insufficient time to conduct thorough reviews, and that the reviews that occurred produced little of value.⁷⁷ Because agencies were required to review all of their regulations in 90 days, some agencies had to review more than one part of the Code of Federal Regulations

⁶⁸Hatch\Grassley Amendments, *supra* note 42, §627(e)(2); Roth Bill, *supra* note 56, §641(e)(2). For a description of the decisional criteria, see *supra* note 48 & accompanying text.

⁶⁹See *supra* note 10 & accompanying text.

⁷⁰See *supra* notes 13-14 & accompanying text.

⁷¹See *supra* note 21 & accompanying text.

⁷²See *supra* notes 24-28 & accompanying text.

⁷³See *supra* note 35 & accompanying text.

⁷⁴See *supra* notes 39-41 & accompanying text.

⁷⁵*Supra*, note 3.

⁷⁶ABA Report, *supra* note 4, at 9. The order also established criteria for review and required reports on what rules were changed, including the benefits associated with those changes, and on what rules were not to be changed, including the reasons why no action was appropriate. *Id.* President Bush required agencies to consider whether: (i) the expected benefits to society of any regulation clearly outweigh the expected costs; (ii) regulations were fashioned to maximize net benefits to society; (iii) regulations adopted performance standards to the maximum extent possible; (iv) regulations incorporated market mechanisms to the maximum extent possible; and (v) regulations were sufficiently clear and certain to avoid needless litigation. *Id.* at 9-10.

⁷⁷*Id.* at 15.

each day on average.⁷⁸ At some agencies, one part can contain hundreds or thousands of requirements.⁷⁹ Moreover, some agencies reported that they received large volumes of public comments concerning existing rules, which made meeting the 90-day deadline particularly difficult.⁸⁰

Proposed legislation that would establish an on-going government-wide process for the review of rules is a more promising approach than periodic one-shot reviews. This approach not only gives agencies more time to complete the reviews, but an agency can plan for the process because it can predict its obligations.

Congress (and the President), however, should generally refrain from mandating standardized, detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies. Past experience with legislative and presidential oversight demonstrates that micromanagement robs agencies of the flexibility they need to respond quickly and effectively to the various demands made on them.⁸¹ Moreover, as discussed below, agencies differ concerning the types and number of regulations they issue, the resources available for the review of existing regulations, and the methods of review that would be the most productive.⁸² Any attempt to fit the review of existing regulations into a cookie cutter format is likely therefore to reduce the effectiveness of such reviews. In particular, tight time frames or review requirements applicable to *all* rules, regardless of their narrow scope or small impact, may prevent agencies from engaging in a meaningful effort. Finally, detailed controls appear to be unnecessary because agencies are likely to respond to general commands to engage in rule review. The ABA report found that "agencies agree that they cannot ignore the need to review their regulations and that, as a general proposition, mandatory or discretionary review of existing regulations is a sound idea, and that agencies generally attributed their failure to undertake this obligation to time and resource constraints."⁸³ Moreover, to the extent that agencies might not respond to a general order, because of lack of interest among agency personnel to move on to new and different challenges, or the political (or personnel) embarrassment associated with admitting that a regulation could be improved, OMB is in a position to hold them accountable.

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹Sidney A. Shapiro, *Political Oversight and The Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

⁸²*See infra* Section III.

⁸³*Id.* at 14.

For these reasons, Congress should assign to the President the responsibility for overseeing that agencies comply with general guidelines that take into account agency resources and other responsibilities. This approach would give an agency sufficient flexibility to design a review process that addressed its particular situation. This approach also permits an agency to develop appropriate priorities concerning which rules to review (and in what order) in consultation with OMB and the public (including but not limited to the regulated community). Moreover, if the President and Congress consider the review of regulations to be of significant importance, they should ensure that agencies have adequate resources to conduct effective and meaningful reviews, as well as complete their other responsibilities.

The issue of deadlines illustrates why micromanagement is undesirable. One proposal would require an agency to review any major rule within five years of its promulgation and, if the agency failed to meet this deadline, the rule would no longer be in effective.⁸⁴ There are two significant difficulties with such a deadline. First, the agency is required to review a rule even if the regulated community, interested public, and the agency are satisfied with the rule. Under these circumstances, the mandated review becomes a paperwork exercise and a waste of resources. Second, the five year deadline may force an agency to devote resources to rule review that could be spend on more productive activities. For example, if an agency has dozens of rules to review, it could be forced to spend time on the review process instead of meeting other statutory responsibilities. If these other responsibilities are more important to the public, the mandate would result in a misallocation of resources. Given these difficulties, it would be better for Congress to require agencies to set their own deadlines for the review of rules (perhaps subject to some ceiling such as ten or fifteen years) and require agencies to comply with the deadlines that they set.⁸⁵

Reform of the petition process can also improve the review of rules, but some current legislative proposals are counterproductive. The Administrative Conference has recommended that agencies establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking including establishing deadlines for notification to the petitioner of the action taken on the petition.⁸⁶ If the President or Congress determines that agencies have ignored this recommendation, the President (by executive order) or Congress (by legislation) should mandate that agencies follow it. If necessary,

⁸⁴See *supra* note 65 & accompanying text.

⁸⁵See Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 56 (1989) (proposing that Congress require OSHA to establish deadlines for rulemaking and make agency-set deadlines judicially enforceable).

⁸⁶Administrative Conference of the United States, Recommendation 86-6, *Petitions For Rulemaking*, 51 Fed. Reg. 46989 (1986).

the President and Congress could mandate specific procedures including a requirement that an agency respond to a petition within a specific time, for example, 12 to 18 months. If specific procedures are mandated, however, the President and Congress should avoid micromanagement for the same reasons expressed earlier concerning procedures for the review process.

Some legislative proposals, however, involve such micromanagement. For example, one proposal sets a short deadline of 180 days to respond to a petition.⁸⁷ The same proposal requires an agency to engage in a preliminary assessment of the costs and benefits of any rule, interpretative rule, policy statement, or guidance, which is the subject of a petition.⁸⁸ In light of this burden, an agency is unlikely to meet the deadline without its effort having a significant adverse impact on its other activities.

The right to petition an agency to perform a cost-benefit analysis is another example of counterproductive micromanagement.⁸⁹ If Congress requires an agency to review all major existing rules, as is proposed, then an agency will have an obligation to determine whether such rules meet a cost-benefit test.⁹⁰ A requirement that an agency respond to a petition to undertake the same activity is duplicative. It is also disruptive for two reasons. First, a general requirement that an agency review existing major rules permits the agency to schedule the review of such rules in light of its other mandates. By comparison, a petitions process requires the agency to start the review process at the time it receives the petition. This difficulty is exacerbated if Congress mandates a short deadline to respond to the petition. One proposal is that an agency must respond to such a petition within 180 days.⁹¹ Second, under a general requirement, the agency can determine the order in which it reviews existing rules. This discretion permits the agency to establish appropriate priorities. The petitions process can empower regulated entities or members of the public to determine the agency's agenda for review.⁹² Moreover, an agency could find that it must stop work on other important activities in order to respond to such petitions.

Congress should not permit the petitions process to drive an agency's agenda. Agencies have broad responsibilities to respond to the needs of the public at large, and not all aspects of the public are equally equipped to file rulemaking petitions. Unless an agency has sufficient discretion to determine its

⁸⁷See *supra* note 45 & accompanying text.

⁸⁸See *supra* notes 46, 48 & accompanying text.

⁸⁹See *supra* note 51 & accompanying text.

⁹⁰See *supra* notes 56-57 & accompanying text.

⁹¹See *supra* note 53 & accompanying text.

⁹²See Shapiro & McGarity, *supra* note 85, at 14 (beneficiary groups dominate OSHA's agenda for rulemaking by filing rulemaking petitions).

own review agenda, it can not take into account the interests of members of the public who are unlikely to file rulemaking petitions.

III. The Review Process

When agencies implement a review program, they must make decisions concerning the management structure of the program, what method(s) of review to use, how to measure the success or failure of regulations, and how to obtain public input. This section considers the options available to agencies concerning each of these issues. No one set of options, however is likely to be optimal for all agencies. Because agencies differ concerning their mandates, budgets, personnel, structure, and other factors, what are promising approaches in one agency may not work successfully in another agency.

A. Management

The ABA report provides some information concerning how agencies manage review programs. Some departments and agencies have established review cycles and criteria in their operations manuals or orders. As noted earlier, DOD's review program specifies that every regulation is reviewed every two years.⁹³ The Department of the Interior and the Federal Deposit Insurance Corporation have established five year review cycles.⁹⁴ In addition, senior policy officials in departments and agencies meet on a frequent basis to discuss current issues including problems with existing regulations. The Federal Aviation Administration (FAA), for example, reviews daily information concerning aircraft accidents. When the FAA identified the failure to remove ice as a potential problem, it immediately held a public meeting to review existing deicing requirements. When the FAA decided that additional steps were necessary, it proposed and adopted an amendment of existing requirements before the next winter season.⁹⁵

The ABA report also identifies key aspects of the management process. These concern appointment of a program manager, designation of a review process, solicitation of staff input, choice of review staff, and a process to choose which rules to review. This section explains these issues and makes recommendations concerning how they should be accomplished.

⁹³See *supra* note 39 & accompanying text.

⁹⁴See *supra* note 40 & accompanying text.

⁹⁵ABA Report, *supra* note 4, at 14.

1. Appointment Of A Manager

The appointment of a senior level policy official to administer the review program is important for several reasons. The appointment signals an agency's commitment to the program, makes an agency official accountable for performance of the program, including assignment of adequate personnel and timely completion of projects, and creates an advocate for the review program within the agency to battle for necessary resources.⁹⁶

2. Review Process

The manager of the review process should establish a process for determining when there are problems with rules.⁹⁷ The creation of a process will help ensure that the agency's staff is aware of the review program and will clarify what duties they might have. The explicit adoption of a process will also encourage an agency to think about what review process will work best.

When a review program is established, the manager will face four issues. First, how should staff input be obtained? Second, which employees will conduct the review? Third, which regulations will be reviewed and in what order? The remainder of this section discusses these aspects of the review process. Finally, what method of review should the agency use? Section IIB discusses review methodologies.

3. Staff Input

Employees who routinely work with agency regulations, such as inspectors, investigators, rule writers, policy analysts, and litigators, are in a position to identify problems with the regulations as well as potential solutions. For example, a litigator or an investigator may find that many regulated entities are not in compliance with a rule because the rule is confusing.⁹⁸ Thus, an agency needs a method to collate problems identified by its staff. The manager should designate someone who is to receive this information and ensure that it is available to those persons who are involved in the review process.⁹⁹

⁹⁶*Id.* at 22.

⁹⁷*Id.*; VICE PRESIDENT AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: IMPROVING REGULATORY SYSTEMS 39 (1993) [cited hereinafter as the National Performance Review] ("Heads of regulatory agencies should require their staffs to check the effectiveness and workability of their programs periodically.").

⁹⁸ABA Report, *supra* note 4, at 23-24.

⁹⁹*Id.* at 24.

4. The Review Staff

A manager needs to decide which agency employees are to conduct reviews. Some agencies assign reviews to the staff persons who wrote the rule in order to take advantage of their expertise.¹⁰⁰ Other agencies assign this role to different staff to gain an independent perspective or they create an *ad hoc* team to bring in additional participants.¹⁰¹ A few of these agencies have persons assigned permanently to this role.¹⁰² In departments, a manager also has the option of asking the Inspector General to conduct a review.¹⁰³

5. Choice of Rules

A manager will need to choose which regulations will be reviewed and on what schedule.¹⁰⁴ If an agency can review all of its regulations within a relatively short period of time, it will need to determine in what order the rules will be reviewed. In this situation, some agencies establish a schedule that takes them through each section or part of their regulations over a specified period of time.¹⁰⁵ Alternatively, an agency can review a regulation within some time period after it has been promulgated or after it has been last reviewed.¹⁰⁶

Agencies, however, may not be able to review all of their regulations within such a time period. The size of the task can be one reason. As the ABA Report notes, “[o]ne agency’s regulations may include over one-hundred Parts in one Title of the Code of Federal Regulations, printed on thousands of pages.”¹⁰⁷ Competing demands for resources may be another reason. The ABA Report explains, “While many agencies are concerned about the scarcity of resources for regular systematic reviews, they generally have to find resources to review their regulations as a result of statutory changes, court decisions, resolution of policy issues, participation in international standard-setting organizations, petitions for rulemaking, changes in industry practices, and their own enforcement experience.”¹⁰⁸ Moreover, agencies face resource conflicts because they are subject to legislative deadlines for rulemaking, or must respond to judicial remands of a regulation.¹⁰⁹

¹⁰⁰*Id.* at 17.

¹⁰¹*Id.* at 17-18.

¹⁰²*Id.*

¹⁰³*Id.* at 25.

¹⁰⁴*Id.* at 21.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 14.

¹⁰⁸*Id.* at 15.

¹⁰⁹*Id.* at 18.

When faced with these conflicts, an agency can choose rules for review based on whether review is legally required, how long since a rule was last reviewed, or on the potential benefits to the public of reviewing a rule compared to the cost to the agency in time and resources.¹¹⁰ In evaluating the benefits of reviewing a rule, an agency should consider whether there have been changes in administrative policy, economic conditions, technological or scientific knowledge, or in the costs and/or benefits of a rule.¹¹¹ Review of regulations might also be justified in light of litigation experiences or because there are implementation and enforcement difficulties, overlapping and duplicative rules, conflicts and inconsistencies in rules, and unnecessary and obsolete rules.¹¹²

For purposes of evaluating the benefits of reviewing a rule, an agency can also take into account information from the public such as complaints, rulemaking petitions to amend or repeal rules, and requests for exemptions.¹¹³ In addition, an agency can solicit public comment concerning which rules should be reviewed.¹¹⁴ Agencies could seek this information semi-annually, when they publish their regulatory agendas, or issue a periodic notice in the federal register.¹¹⁵ Agencies could also hold public meetings or set up electronic bulletin boards to make it easier for the public to submit nominees for review.¹¹⁶

Although any one of the previous considerations might be sufficient to warrant a review and a decision to revise or revoke a regulation, a rule should receive a higher review priority the more reasons that exist, or the more serious is the problem that is identified.¹¹⁷ For example, one request for an interpretation might indicate a potential weakness in a rule, while hundreds of requests indicate that it may be easier to amend the rule than to respond to requests for exemptions or interpretations.

In summary, good management practices are important to a review program. Agencies should assign a senior level policy official to administer the program and to ensure the commitment of appropriate personnel and resources. The manager should establish review priorities if the agency can not review all of its regulations, determine which personnel to assign to this process, and enforce appropriate deadlines for completing reviews. In addition to the previous steps, an agency needs to determine the method by which regulations chosen for review will be evaluated. The next section discusses review methods.

¹¹⁰*Id.* at 18, 25.

¹¹¹*Id.* at 11.

¹¹²*Id.*

¹¹³*Id.* at 11-12.

¹¹⁴*Id.* at 30.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.* at 10.

B. Methodology

Agencies use a variety of methods for review. Some agencies organize the review of rules by general topics, such as CFR parts, but this method may not work for all agencies. The FAA, for example, was overwhelmed with 2000 public suggestions for changes when it attempted to review all of its aircraft certification regulations. Other agencies review rules by subject matter.¹¹⁸ For example, the Department of Agriculture's Animal and Plant Inspection Service (APHIS) reviews its animal protection regulations by species of animal. For each species, APHIS considers various subjects such as inspection, disinfection, quarantine locations, and port destinations.¹¹⁹ Still other agencies use cross-cutting reviews.¹²⁰ The Environmental Protection Agency (EPA), for example, is reviewing compliance problems in six industries. These reviews address all EPA regulations that impact on each industry.¹²¹

Agencies have also engaged in multi-agency efforts to improve regulations.¹²² For example, the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Department of Transportation (DOT), APHIS and EPA have been reviewing the regulation of infectious substances to ensure worker protection and safety. A joint project by the Small Business Administration and OIRA is another example of this method. These agencies sponsored a "Small Business Forum on Regulatory Reform" which resulted in five industry-specific work groups consisting of governmental and industry representatives. These groups recommended increased coordination among agencies to respond to duplicative, overlapping, and inconsistent regulations.

Some agencies, however, are reluctant to engage in multi-agency review of regulations because of the potential of loss of control. They fear that they might have to go along with the majority or yield to a more powerful agency.¹²³ The government's experiences with the coordination of biotechnology policy confirms this difficulty. A study of that process for the Administrative Conference observed, "The lesson to be drawn...is that there are two types of interagency coordination that do not mix well. The second function — requiring common policies — is inimical to the first function — exchanging information and data — because no agency will be anxious to cooperate with a process that threatens

¹¹⁸*Id.* at 16.

¹¹⁹*Id.*

¹²⁰*Id.* at 16-17.

¹²¹*Id.*

¹²²*Id.* at 28.

¹²³*Id.* at 27.

its independence."¹²⁴ This problem, however, should not be permitted to frustrate coordination efforts. The Administrative Conference has noted concerning biotechnology, that such coordination is "critical" when agencies share regulatory responsibilities.¹²⁵ It recommended that agencies meet for purposes of fact-finding, reporting, and exchanging information.¹²⁶ If the agenda of multi-agency reviews is an exchange of information, agencies should feel comfortable to attend. Moreover, it is more likely that agencies can reach consensus in this environment concerning the elimination of unnecessary overlaps or inconsistencies.¹²⁷

In summary, agencies can review regulations on an individual basis, by general topics or subject matter, or on a cross-cutting and multi-agency basis. As a general matter, the categorical approaches, such as review by general topics or specific subjects, may yield greater benefits than the review of unrelated individual regulations, but these benefits must be balanced against the extra time and increased complexity that is involved in such reviews.¹²⁸ Which categorical approach is best for a particular agency will depend on its individual circumstances. In light of the considerable variety of federal regulation, individual agencies are in the best position to determine which method is best tailored for individual situations.

Which ever of the previous methods an agency chooses, it should also engage in periodic "clean-up" reviews that address problems such as outdated references, address changes, and obsolete requirements.¹²⁹ For example, DOT identified over 70 regulations that were obsolete, redundant, or could be reissued as nonregulatory guidance as part of the review mandated by former President Bush.¹³⁰ It then issued one rulemaking document to rescind the regulations.¹³¹

C. Measurement

When an agency engages in one of the previous methods of review, it must determine whether a rule or a set of rules requires amendment or recession. As noted earlier, one important reason to revise or rescind a rule is that its benefits and/or costs of are different than expected.¹³² To assess benefits and costs, an agency must take three steps.

¹²⁴Sidney A. Shapiro, *Biotechnology and the Design of Regulation*, 17 *ECOLOGY L.Q.* 1, 33 (1990).

¹²⁵Administrative Conference of the U.S., Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 *Fed. Reg.* 53,493 (1989).

¹²⁶*Id.*

¹²⁷ABA Report, *supra* note 4, at 27.

¹²⁸*Id.* at 27.

¹²⁹*Id.* at 26.

¹³⁰See *supra* note 3 & accompanying text (describing review mandated by President Bush).

¹³¹ABA Report, *supra* note 4, at 26.

¹³²*Id.* at 23.

First, it must establish a baseline against which to measure the benefits of the rule.¹³³ If a rule has a clear objective, such as the mitigation of some economic or social problem, an agency will be in a better position to take this step. If an OSHA rule is intended to reduce the number of fatal accidents that occur in construction sites because of falls, for example, it can determine whether the number of such accidents has actually declined.

Second, an agency must have access to reliable information concerning the extent to which the rule has achieved its objective and at what cost.¹³⁴ Some agencies have access to statistical data bases that will provide relevant information. For example, DOT consults state accident reports or National Transportation Safety Board accident reports.¹³⁵ Such records, however, may not be entirely reliable. The Labor Department, for example, collects statistics concerning workplace accidents and diseases, but the accuracy of this data is open to question.¹³⁶

If an agency does not have access to an existing data base, it can seek the information from private parties. Alternatively, an agency can establish a data source as part of a regulation when the rule is promulgated. DOT, for example, requires reports to be submitted to it concerning the number of positive results under drug and alcohol testing programs.¹³⁷ Both types of efforts, however, are subject to the constraints of the Paperwork Reduction Act.¹³⁸

An agency is likely to face similar difficulties obtaining reliable information concerning costs. Unless an agency can consult an existing data base, it will probably have to obtain cost data from regulated entities. The Nuclear Regulatory Commission, for example, uses a regulatory impact survey. Under this approach, agency staff visits to licensees for the purpose of obtaining comments concerning such issues as inspections and reporting requirements. Unless such visits constitute an inspection, however, they are still subject to the constraints of the Paperwork Reduction Act.¹³⁹ In addition, there may be some question about the reliability of the data obtained because regulated entities have an incentive to calculate compliance costs as high as possible.¹⁴⁰

¹³³*Id.* at 22.

¹³⁴*Id.* at 23.

¹³⁵*Id.*

¹³⁶THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* 5-8 (1993).

¹³⁷ABA Report, *supra* note 4, at 23.

¹³⁸44 USC §3501 (1988 & Supp. V 1993).

¹³⁹ABA Report, *supra* note 4, at 23.

¹⁴⁰Studies have found that industry projections of expected compliance costs in response to a notice of proposed rulemaking are significantly higher than actual compliance costs. See Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale For Technology-Based Regulation*, DUKE L.J. 729, 731 (1991).

Agencies should also obtain information about technological changes if possible. One frequently heard complaint is that regulators do not keep up with changes in the state-of-the-art.¹⁴¹ For example, rules written before the computer age may not permit regulated entities to use computer technology to lower the cost of compliance.¹⁴² In this case, regulated entities may be the best source for information concerning technological changes that impact on rules.¹⁴³

Third, the agency has to establish cause and effect. If an agency finds that a problem has become better, for example, the change may not be attributable to a regulation. For example, although the Consumer Product Safety Commission attributes the reduction in the number of children who are accidentally poisoned to its regulation that requires child-proof caps for medicines, another analyst claims that there is no such association.¹⁴⁴ Similarly, studies disagree concerning the extent to which safer workplaces can be attributed to OSHA safety regulations.¹⁴⁵ The impact of a rule can be even more difficult to determine when the benefits of the rule are indirect, such as rules requiring content labeling or warning labels on food or drugs.¹⁴⁶

Although some agencies, such as the National Highway Traffic Safety Administration (NHTSA), have policy offices that develop information and conduct studies concerning the impact of existing regulations,¹⁴⁷ many agencies do not have such programs.¹⁴⁸ As noted earlier, however, the GPRA may compel all agencies to undertake this activity.¹⁴⁹

Whether or not the GPRA compels agencies to develop measurement methods, it is an important element in a program to review existing regulations. Agencies should establish methods to measure the success or failure of regulations, and to obtain the information necessary to make such assessments, including information on costs, benefits, and changes in technology.

¹⁴¹ ABA Report, *supra* note 4, at 23.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Gregory B. Rodgers, Directorate for Economic Analysis, U.S. Consumer Product Safety Commission, *The Safety Effects of Child-Resistant Closures* (May 1992) (finding an association between regulation and decline in injuries and describing a study that found no such association).

¹⁴⁵ See THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *supra* note 136, at 10-13 (describing studies of the impact of OSHA safety regulations).

¹⁴⁶ ABA Report, *supra* note 4, at 23.

¹⁴⁷ *E.g.*, U.S. Department of Transportation, National Highway Traffic Safety Administration, *Evaluation Program Plan 1994-1998* (May 1994).

¹⁴⁸ ABA Report, *supra* note 4, at 16.

¹⁴⁹ See *supra* notes 16-23 & accompanying text.

D. Public Input

Any program of review requires public input to be successful. As the ABA Report notes, "[I]f those subject to the regulations are having difficulty implementing them because the rules are confusing, because they are most costly than the government thought, or because they conflict with other regulations, the government needs to know this."¹⁵⁰

Agencies receive public input in routine activities, such as enforcement and litigation,¹⁵¹ and from rulemaking petitions to amend or rescind a rule.¹⁵² Yet, these sources may not be sufficient. Some members of the public may not understand how to contact an agency with complaints or comments, or that they can file a rulemaking petition. Moreover, agencies have found that persons who file rulemaking petitions often do not provide sufficient information.¹⁵³ In addition, many persons with complaints apparently go to Congress with their problems because they assume that the agency will be unresponsive.¹⁵⁴ In response to such problems, some agencies have adopted detailed procedures for rulemaking petitions which attempt to structure this process to make it more accessible to the public and more useful to the agency.¹⁵⁵ For example, the FAA publishes petitions for public comment to attempt to obtain the input of potentially opposing parties.¹⁵⁶

Agencies are proactive in seeking public input in other ways. They may request information in the *Federal Register* or the *Semiannual Regulatory Agenda*.¹⁵⁷ The notice may be a general notice requesting information, an advanced notice of proposed rulemaking (ANPR), or a notice of proposed rulemaking.¹⁵⁸ The request for information can be a general invitation for information concerning any of an agency's rules, or the agency can focus its request on specific rules.

Agencies who rely on routine general requests for information have found that they have had few responses.¹⁵⁹ The general nature of these requests is apparently one reason for the lack of response.¹⁶⁰ As discussed below, agencies have had more success with focused requests for information.¹⁶¹ A second

¹⁵⁰ ABA Report, *supra* note 4, at 29-30.

¹⁵¹ *Id.* at 15.

¹⁵² See *supra* note 13-14 & accompanying text.

¹⁵³ ABA Report, *supra* note 4, at 15.

¹⁵⁴ *Id.* at 15.

¹⁵⁵ See, e.g., Food and Drug Administration, 21 CFR §§10.20, 10.25, 10.30, 10.40 (1994).

¹⁵⁶ ABA Report, *supra* note 4, at 31.

¹⁵⁷ *Id.* at 15, 20.

¹⁵⁸ *Id.* at 20.

¹⁵⁹ *Id.* at 15.

¹⁶⁰ *Id.*

¹⁶¹ See *infra* notes 163-68 & accompanying text.

problem is that the comments that are received are often of little value.¹⁶² These comments concern proposed regulations rather than existing rules, recommend changes with little or no merit, or propose changes that the agency does not have the authority to make. In addition, comments often do not provide any supporting data, although agencies can address this problem by requesting additional information.

Some agencies rely on focused requests for information because of the previous problems.¹⁶³ For example, they request information concerning a particular regulation or area of regulation in the *Federal Register*. When the Departments of Transportation and Agriculture took this step in response to President Bush's order to review existing regulations,¹⁶⁴ they received a large number of useful comments.¹⁶⁵ When agencies use focused requests for information, they also include specific questions to draw attention to potential problem areas.¹⁶⁶ The FAA, for example, asked the public to identify the top three rules that they believed required review.¹⁶⁷ Some agencies have found that a focused approach yields a better response if they take additional steps, such as a press release, to draw attention to a request.¹⁶⁸

Agencies use advisory committees as a third method to acquire public input.¹⁶⁹ As a general matter, advisory committees can be a valuable resource for an agency.¹⁷⁰ In rule review, committees can help identify problems with rules and gather information.¹⁷¹ The Food and Drug Administration (FDA), for example, invited public comment on which regulations should be reviewed and then it asked its advisory committees to help evaluate those recommendations.¹⁷² The advisory committee process is subject to two limitations, however. First, agencies must comply with the Federal Advisory Committee Act (FACA).¹⁷³ Some agencies believe that the requirements imposed by FACA hamper public participation.¹⁷⁴ Second, Executive Order 12838 prohibits the formation of new

¹⁶²ABA Report, *supra* note 4, at 15.

¹⁶³*Id.*

¹⁶⁴*See supra* note 3 & accompanying text (describing President Bush's mandate).

¹⁶⁵ABA Report, *supra* note 4, at 30.

¹⁶⁶*Id.* at 16.

¹⁶⁷*Id.* at 30.

¹⁶⁸*Id.* at 15-16.

¹⁶⁹*Id.* at 16.

¹⁷⁰*See Shapiro & McGarity, supra* note 85, at 35 (describing advantages of advisory committees).

¹⁷¹ABA Report, *supra* note 4, at 16.

¹⁷²*Id.* at 30.

¹⁷³5 USC App. §1.

¹⁷⁴ABA Report, *supra* note 4, at 19.

advisory committees except where "compelling considerations" require the formation of a committee.¹⁷⁵

Finally, agencies use fact-finding hearings or meetings to gather information.¹⁷⁶ The Department of Labor, for example, has been successful in holding informal, fact-finding hearings where it asks for ideas for changes.¹⁷⁷ Agencies have also found it useful to schedule meetings between regulated entities and/or beneficiaries and agency staff responsible for the implementation and enforcement of rules.¹⁷⁸ These approaches have the advantage that they do not fall under the requirements of FACA if the agency is not seeking advice from the participants.¹⁷⁹ The persons who participate, however, may not have the same level of expertise as members of an advisory committee.

As the previous discussion suggests, agencies can structure the process of obtaining public input in ways that will increase the quality of the information that is received. Even if the process does not usually produce useful information, agencies should still actively seek public input.¹⁸⁰ As the ABA report explains, "Rules can be more effectively implemented if the public is willing to accept them, and the public is generally more willing to accept rules if they have an opportunity to be heard concerning any problems and believe that these problems have been considered in a reasonable manner."¹⁸¹ At the same time, legitimacy is related to whether an agency meets behind closed doors with persons or groups on only one side of an issue.¹⁸² Unless an agency speaks with all stakeholders, the consultation process is not likely to be considered legitimate.

In light of the prior discussion, an agency can take several steps to obtain good public input. First, it can appoint a person to receive public comments.¹⁸³ When a rule is published in the *Federal Register*, for example, it can provide the name and telephone number of a person to contact if members of the public have any problems with the implementation of a rule.¹⁸⁴ An agency can also designate an ombudsman to receive public comments or complaints. If the ombudsman has more independence or authority than a person who is designated to receive comments, this approach may be a better alternative. ACUS has concluded that agencies that administer programs with major responsibilities involving

¹⁷⁵Termination and Limitation of Federal Advisory Committees, Exec. Ord. 12838, §3a, 3 CFR §590 (1993 Comp.).

¹⁷⁶ABA Report, *supra* note 4, at 16.

¹⁷⁷*Id.* at 30.

¹⁷⁸*Id.*

¹⁷⁹Note 173 *supra*.

¹⁸⁰ABA Report, *supra* note 4, at 30.

¹⁸¹*Id.* at 30.

¹⁸²National Performance Review, *supra* note 97, at 39.

¹⁸³*Id.* at 24.

¹⁸⁴*Id.*

significant interactions with members of the general public are likely to benefit from establishing an ombudsman service.¹⁸⁵

Second, an agency is more likely to obtain useful information if it periodically seeks out public input.¹⁸⁶ An agency can request information in its Regulatory Agenda or in the *Federal Register*, or it can use such methods such as press releases.¹⁸⁷ Experience has shown that the quality of public input improves when an agency asks specific questions and requests supporting data.¹⁸⁸ An agency is also more likely to get useful responses if it sets up an electronic bulletin board to make it easier to submit information.¹⁸⁹ An agency can also use focus groups or consumer surveys.¹⁹⁰ The National Performance Review recommends that OIRA should work with agencies to make it easier for them to obtain clearance under the Paperwork Act when surveys are used for the purpose of reviewing existing regulations.¹⁹¹

Third, although increased public participation is an important goal, the National Performance Review warns that "granting access behind closed doors to interest groups representing only one side of an issue creates major problems."¹⁹² An agency therefore should "take care...to allow access by a wide group of interests and to ensure that all truly affected groups are represented in formal and informal negotiations."¹⁹³ Moreover, "[d]ocketing of contacts with outside parties should also be addressed."¹⁹⁴

Fourth, agencies can consult advisory committees and hold public meetings to obtain public input.¹⁹⁵ This approach may be particularly useful to follow up on comments received from the public concerning which regulations should be reviewed.¹⁹⁶

Fifth, agencies can improve the petition process by following the ACUS recommendations on rulemaking petitions,¹⁹⁷ which were endorsed by the National Performance Review.¹⁹⁸ The Administrative Conference recommends

¹⁸⁵ Administrative Conference of the U.S., Recommendation 90-2, *The Ombudsman in Federal Agencies*, 55 Fed. Reg. 34211 (1990).

¹⁸⁶ See *supra* notes 159-62 & accompanying text.

¹⁸⁷ See *supra* note 163-68 & accompanying text.

¹⁸⁸ See *supra* note 166 & accompanying text.

¹⁸⁹ ABA Report, *supra* note 4, at 30.

¹⁹⁰ National Performance Review, *supra* note 97, at 39.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *supra* notes 170, 176 & accompanying text.

¹⁹⁶ See *supra* note 178 & accompanying text.

¹⁹⁷ Administrative Conference of the U.S., Recommendation 86-6, *Petitions For Rulemaking*, 51 Fed. Reg. 46988 (1986).

¹⁹⁸ National Performance Review, *supra* note 97, at 44.

that agencies establish by rule procedures for the receipt, consideration, and prompt disposition of petitions. These procedures should include specification of where to file petitions, the recommended contents of petitions, and the prompt notification of petitioners of the action taken with a summary explanation statement. In addition, the Conference recommends that, where feasible and appropriate, agencies should provide guidance on the type of data, argumentation, and other information that the agency needs to consider petitions, develop effective methods to provide notice to interested persons that a petition has been filed, invite comments on the petition, and establish internal management controls to assure timely consideration and disposition of petitions.

The ABA Report also encourages an agency to encourage peer review of a petition before it is filed.¹⁹⁹ Under this approach, petitioners would talk with other interested parties in an attempt to develop a consensus position before submitting a petition. If consensus were reached, the agency's consideration of the petition would likely be expedited.

Finally, an agency can take steps to ensure that the public understands how the rulemaking process works. It can provide training courses or develop other educational materials for the public which explain the procedural requirements for rulemaking, the opportunities to provide information to the agency, and the process for submitting a rulemaking petition.²⁰⁰ It can also consider educating the public concerning the various rulemaking requirements which might help the public appreciate the difficulty of changing rules even when such changes may be warranted.²⁰¹

IV. Reducing The Need For Rule Revisions

Amending or rescinding a rule can create the same resource and time burdens on an agency as the adoption of a regulation.²⁰² For this reason, the public would benefit if agencies can reduce the need to revise regulations after they are promulgated. An agency can take three steps to accomplish this objective. First, it can adopt rules that are less likely to become obsolete or pose similar problems. Second, it can adopt interim final rules in appropriate circumstances. Third, it can rely to a greater extent on formal interpretations to adjust rules in light of their impact. This section describes and evaluates these alternatives.

¹⁹⁹ABA Report, *supra* note 4, at 31.

²⁰⁰*Id.* at 32.

²⁰¹*Id.*

²⁰²Sidney A. Shapiro, *Rethinking Environment Change: Policy Instruments and Adaptability To Change 2-9* (Oct. 12, 1991) (Paper for Office of Technology Assessment) (describing impact rulemaking constraints on revision of existing regulations).

A. More Flexible Regulations

The flexibility of a regulation depends on the extent to which it has to be changed in response to a change in circumstances and to how easily it can be changed if necessary. An agency can take four steps to make its regulations more flexible. It can promulgate performance standards, design standards that permit equivalent methods of compliance to be used, rules that automatically adjust, and consensus standards.

The use of performance standards will make it less necessary for agencies to revise some regulations.²⁰³ A performance standard states a regulatory obligation in terms of some ultimate goal that must be achieved. Unlike a design standard, it does not specify the use of a particular technology or method.²⁰⁴ As a result, regulated entities are free to achieve the regulatory goal in any appropriate way. For this reason, a regulated entity can adopt a less expensive or more effective method of achieving the regulatory goal without any change in the regulation. By comparison, if an agency specifies a particular design, the regulated entity must use that design until the agency amends its regulation to permit use of some other technique.²⁰⁵

If an agency promulgates a design standard, it can make it more flexible by permitting regulated entities to adopt a method of compliance that is the equivalent of the technology required by regulation. Where appropriate, an agency can designate an official who has the authority to accept equivalent compliance with the rule in lieu of compliance with the exact requirements of the regulation.²⁰⁶ For example, an environmental regulation could give regulated entities the option of adopting a technology specified in the regulation or another technology, but the entity would have the burden of establishing that the alternative would provide the same level of pollution protection.²⁰⁷

An agency can also adopt rules that contain standards for automatic adjustments to a change in circumstance.²⁰⁸ For example, an agency could require dollar amounts specified in a regulation to increase automatically in accordance with the rate of inflation as measured by government statistics. The agency could publish a notice in the *Federal Register* advising the public of the new amount.²⁰⁹

²⁰³ ABA Report, *supra* note 4, at 28; see Administrative Conference of the U.S., Recommendation 87-10, *Regulation By The Occupational Safety and Health Administration*, 52 Fed. Reg. 49147 (1987) (recommending that OSHA should generally make greater use of performance standards).

²⁰⁴ STEPHEN BREYER, *REGULATION AND ITS REFORM* 105 (1982).

²⁰⁵ *Id.*

²⁰⁶ ABA Report, *supra* note 4, at 29.

²⁰⁷ Shapiro, *supra* note 202, at 17.

²⁰⁸ ABA Report, *supra* note 4, at 28.

²⁰⁹ *Id.*

Finally, an agency can adopt as its regulations appropriate voluntary standards established by consensus-setting organizations.²¹⁰ An agency may initially be able to adopt such standards more quickly than conventional regulations because of their consensus nature. Members of the organization that that produced the voluntary standard are less likely to challenge it than a conventional regulation.²¹¹ If the organization subsequently makes changes in its voluntary standard, an agency might find it easier to adopt the revision for the same reason. In addition, an agency might be able to use "direct final" rulemaking to adopt the revisions. The potential benefits of direct final rulemaking are discussed in the next section.²¹²

B. Interim Final Rules

Use of interim final rules may also reduce the need to revise regulations.²¹³ After an agency promulgates a final rule, it can announce that it will review the regulation after some period of time elapses. The agency can also invite public comments concerning the rule in the meantime. When an agency takes these steps, the regulation is described as an "interim final rule." The Administrative Conference has sponsored a study of interim final rules.²¹⁴

An agency could use this approach when it has concerns about potential implementation problems, or when it simply wants to be assured that no such problems exist.²¹⁵ If the agency combined an interim final rule with an extensive comment period, such as one or two years, it might find that revision of the rule is easier. The interim status of the rule might encourage more public comment than if the rule was promulgated in a conventional manner. In turn, this information may make it easier for the agency to determine whether the rule required revision, and if it did, how it should be changed.²¹⁶

If an agency does not amend or rescind an interim final rule, it remains in effect as promulgated. If an agency prefers, it can give a regulation actual interim effect by placing a "sunset" date in the regulation.²¹⁷ A rule with a sunset

²¹⁰*Id.* at 28; see generally Ernest S. Rosenberg, *Emerging Issues in Standards and Industry Self-Regulation* in PROTECTING THE CONSUMER INTEREST: PRIVATE INITIATIVE AND PUBLIC RESPONSE 141 (Robert N. Katz ed. 1976).

²¹¹See, e.g., JOHN MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCES REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA (1988) (arguing that OSHA's adoption of consensus standards would speed up rulemaking); but see Shapiro & McGarity, *supra* note 85, at 736-39 (contesting Mendeloff's argument).

²¹²See *infra* Section V.

²¹³ABA Report, *supra* note 4, at 29.

²¹⁴Michael Asimow, Interim-Final Rules (March 1995 draft).

²¹⁵ABA Report, *supra* note 4, at 29.

²¹⁶*Id.*

²¹⁷*Id.*

provision might have two advantages.²¹⁸ First, it forces the agency to evaluate the rule within a specific time framework. Second, it sends a stronger message to the public that the agency is concerned about the implementation of the rule. This message may prompt better public input concerning how well the regulation works. The adoption of a regulation with a sunset provision, however, may not work in many circumstances. For example, the agency may find itself adopting a new rule at a time when it has other pressing business. Moreover, the agency would have this obligation even if the original regulation did not require any changes. In addition, the public may find it difficult to plan if a rule is only effective for a limited number of years.

C. Interpretation of Rules

Finally, if an agency does not have a program for interpretation of regulations, adoption of such a program can reduce the number of regulations that have to be revised. Interpretive rules permit an agency to advise the public of the construction of regulations that the agency administers.²¹⁹ Similarly, policy statements allow an agency to advise the public of the manner in which an agency proposes to exercise a discretionary power.²²⁰ Because interpretive rules and policy statements do not require notice and comment rulemaking,²²¹ they can be a more expeditious way to adjust the impact of regulations than the promulgation of a legislative rule.

Agencies that issue interpretations should ensure that these rules (and other policy guidance) are collected in one place and are accessible to the public.²²² Agencies could also increase the availability of this information by giving electronic access to the public.²²³ Because these steps should reduce confusion about existing regulations, they might reduce the need to review existing regulations.²²⁴

V. More Efficient Rulemaking

Agencies can take steps to reduce the need to revise regulations. If, however, rules are to be revised, an agency would benefit from a more efficient rulemaking process. The Administrative Conference, the National Performance

²¹⁸*Id.*

²¹⁹ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 54 (2nd ed. 1991).

²²⁰*Id.*

²²¹5 USC §553(b)(A).

²²²National Performance Review, *supra* note 97, at 25.

²²³*Id.* at 39; ABA Report, *supra* note 4, at 25.

²²⁴ABA Report, *supra* note 4, at 25.

Review, and the ABA, among others, have made suggestions to improve this process. These steps include better rulemaking management, use of direct final rules, and improved coordination of executive and legislative oversight. This section reviews these recommendations and their potential benefit for revising or rescinding rules.

A. Management

A more efficient rulemaking process would have two advantages concerning the review of existing regulations. If an agency's review process identifies regulations to amend or rescind, it can more quickly take those steps. In addition, if rulemaking is more efficient, an agency might free up resources that can be used for regulatory reviews.²²⁵

The Administrative Conference and the National Performance Review have recommended a number of steps that agencies could take to improve their management process.²²⁶ First, an agency should develop strategies to set priorities.²²⁷ Its strategy should cover both the adoption of new rules and the amendment or rescission of existing regulations. Second, an agency should set and enforce deadlines concerning the development and promulgation of rules.²²⁸ If it has a tracking system for this purpose,²²⁹ it can integrate management of new rulemaking initiatives and the amendment or rescission of existing regulations. It can also integrate deadlines for completion of the review of existing regulations to determine if they require revision or rescission.²³⁰ Third, an agency will benefit from the elimination of bottlenecks and other similar delays.²³¹ For example, it can obtain more rapid internal clearances of proposed and final rules by eliminating clearance by officials whose approval is unnecessary or inappropriate.²³² It can also develop training courses to lessen delays caused by mistakes.²³³ Finally, an agency can reward innovative managers and personnel

²²⁵*Id.* at 25.

²²⁶Administrative Conference of the U.S., Recommendation 93-4, *Improving the Environment For Agency Rulemaking*, 59 Fed. Reg. 4669, 4672 (1993).

²²⁷*Id.*

²²⁸*Id.*

²²⁹See Administrative Conference of the United States, Recommendation 87-1, *Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration*, 52 Fed. Reg. 23629 (1987) (recommending OSHA should establish a computer status system to set and track deadlines for rulemaking); ABA Report, *supra* note 4, at 33.

²³⁰See *supra* Section IIIA (recommending that an agency should establish and enforce deadlines to complete the review of existing regulations).

²³¹Recommendation 93-4, *supra* note 226, at 4672; National Performance Review, *supra* note 97, at 43; ABA Report, *supra* note 4, at 32.

²³²Recommendation 93-4, *supra* note 226, at 4672; National Performance Review, *supra* note 97, at 43-44; ABA Report, *supra* note 4, at 33.

²³³ABA Report, *supra* note 4, at 33.

for making improvements in the rulemaking process.²³⁴ Because the review and revision of existing regulations will impose additional resource burdens on an agency, it will benefit from innovation in this area.²³⁵

B. Direct Final Rules

Better management can speed up the rulemaking process and make additional resources available for the review of existing regulations. An agency should also consider the use of direct final rules to revise or revoke existing regulations.²³⁶ For a direct final rule, an agency publishes a notice in the *Federal Register* that the rule will become effective in a specified number of days (such as 60 days) unless a member of the public objects. The notice indicates that if anyone notifies the agency within some specified period of time (such as 30 days) of an intention to file adverse or negative comments on the rule, the regulation will not take effect. Instead, the agency will republish the rule as a proposed rule, and it will go through the usual notice and comment procedure.²³⁷ The Administrative Conference has undertaken a study of the potential of direct final rules.²³⁸

This process might be particularly advantageous for making noncontroversial changes to existing regulations. For example, an agency could use this approach for deleting obsolete regulations or for fixing "clear" mistakes in other regulations.²³⁹ If there were no objections, the agency would have saved the time it otherwise would have spent on a comment period. An agency, however, must be careful not to use this process if it is likely to receive adverse comments. In this case, use of the process will slow adoption of revised regulations.

C. Executive Oversight

An agency's capacity to revise or rescind existing regulations may be impacted by executive oversight. If an agency must meet burdensome analytical requirements to obtain OMB's approval to revise or revoke the rule, the agency's final action will be delayed. The Administrative Conference recently renewed its

²³⁴ See National Performance Review, *supra* note 64, at 97 (recommending improved incentives for rulemaking staff).

²³⁵ *Id.*

²³⁶ Recommendation 93-4, *supra* note 226, at 4673; National Performance Review, *supra* note 97, at 44; ABA Report, *supra* note 4, at 33.

²³⁷ National Performance Review, *supra* note 97, at 44.

²³⁸ See Ronald Levin, Direct Final Rulemaking (Mar. 1995 Draft).

²³⁹ ABA Report, *supra* note 4, at 33.

endorsement of OMB's coordination of rulemaking as beneficial and necessary.²⁴⁰ At the same time, the Conference recommended that the OMB's program "should be sensitive to the burdens being imposed on the rulemaking process, and implementation of the program should ensure that it does not unduly delay or constrain rulemaking."²⁴¹

Congress, as well as the President, determines what rulemaking analyses agencies must perform and submit to OMB. Pending legislation would increase the analytical burdens that agencies must undertake subject to OMB supervision, although some bills make a distinction between regulatory and deregulatory initiatives.²⁴² Thus, legislative developments may also affect how easily agencies can amend or rescind rules. The ABA has urged the President and Congress "to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned analyses...."²⁴³

D. Congressional Coordination

The National Performance Review identified improvements in agency and Congressional relationships as an important step in making rulemaking more efficient.²⁴⁴ It recommended that agencies work with Congress to write legislation as a method of avoiding unintended consequences.²⁴⁵ If implementation problems can be avoided by better drafting, there may be less need for agencies to revise regulations.

The ABA Report recommends that agencies make Congress aware of how resource limitations will impact on the process of reviewing existing regulations.²⁴⁶ For example, agencies can periodically brief legislative staff concerning areas they are considering reviewing, the potential benefits they expect, and the resources available for this effort.²⁴⁷

²⁴⁰Recommendation 93-4, *supra* note 226, at 4671.

²⁴¹*Id.* at 4673. The Conference also recommended that the "President should consider the cumulative impact of existing analytical requirements on the rulemaking process before continuing these requirements or imposing new ones. *Id.*

²⁴²*See supra* section IIA4.

²⁴³ABA Resolution, Rulemaking Analyses Requirements (August, 1991).

²⁴⁴National Performance Review, *supra* note 97, at 65.

²⁴⁵*Id.* at 67.

²⁴⁶ABA Report, *supra* note 4, at 33.

²⁴⁷*Id.*