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Regulatory Policy

Agencies' Methods of Reviewing Regulations Are Coming Under Scrutiny

As federal agencies prepare to submit their semiannual reviews of existing regulations, the way in which they review rules is itself coming under review.

Retrospective review, or a look-back at all pending and existing regulations, has been ordered by nearly every administration in recent decades, but primarily as a one-time initiative.

The Obama administration took it one step further and asked for reviews twice a year in Executive Order 13,563 in January 2011. Agencies issued their first set of retrospective review reports that summer; their latest retrospective review reports are due this month.

Sen. Portman sees more than \$10.2 billion in added costs, while OMB sees \$13 billion in savings.

In January, Howard Shelanski, administrator of the Office of Information and Regulatory Affairs, said one of his top priorities this year was to strengthen and further institutionalize retrospective reviews in federal agencies (11 DER B-1, 1/16/14).

In June, Shaun Donovan, the president's nominee to be director of the Office of Management and Budget, called retrospective review a priority.

The ongoing interest has led academics and experts in the regulatory field to take a closer look at the process and offer suggestions and improvements.

Portman Sees Net Costs. One critic of the retrospective review effort to date is Sen. Rob Portman (R-Ohio), who was OMB director in President George W. Bush's administration.

"Regulatory housecleaning is essential to smarter regulation and reducing overall burdens on American businesses, and I strongly support the administration's emphasis on asking federal agencies to 'look back' and eliminate inefficient old rules," Portman told Bloomberg BNA in an e-mail.

"But like other good ideas, it is not worth much if it is not implemented effectively and closely managed," Portman said.

The initial results from the Obama administration effort aren't encouraging and indicate that the administration has done a poor job of managing the regulatory look-back program, Portman said.

Portman said that although the notable goal of this effort is to find cost savings, as of January 2014, regulatory look-back actually added more than \$10.2 billion in regulatory costs, on net.

"Something's not right, and we must encourage the administration to do more," Portman said.

OMB: \$13 Billion in Savings. The estimated cost savings of the first 90 regulations examined under the regulatory look-back was \$3.3 billion, according to an analysis of agency data by the American Action Forum, a Senate aide said. "That's a big number, but it becomes less impressive when put in context," the aide said.

In 2013, for example, the administration added more than \$112 billion in new direct regulatory costs, the aide said. And according to the AAF report, which describes itself as a center-right policy institute, final rules issued under the administration's look-back plan have, on net, added more than \$10.2 billion in regulatory costs, the aide said.

OMB questioned some comparisons in AAF's report, saying its numbers showed that more than \$13 billion in regulatory costs have been saved so far, with more to come.

"Retrospective review continues to be a high priority," said Emily Cain, spokeswoman for OMB. "This administration will continue to strengthen and institutionalize regulatory review and focus on improving benefits while reducing costs," she said.

In May, for example, the Centers for Medicare and Medicaid Services streamlined health and safety standards for hospitals and health-care providers, saving more than \$3 billion over the next five years.

First of Its Kind. Reeve Bull, an attorney adviser with the Administrative Conference of the United States (ACUS), said the conference is researching retrospective review with the goal of producing recommendations that the full conference can vote on at its December plenary session.

The ACUS project examines retrospective reviews agencies are conducting under executive orders and other laws, seeking best practices and principles that will deliver a strong retrospective review system, Bull said.

President Barack Obama has issued three executive orders on retrospective review, the first being Executive Order No. 13,563, Bull said (12 DER AA-1, 1/19/11). The order directed agencies to examine their existing regulations, determine which were unnecessary, which

could be streamlined, and which needed to be strengthened in light of subsequent information, he said.

“And past administrations have done this as well, going back quite some time, I think at least to [President Jimmy] Carter and perhaps earlier,” Bull said. “But basically, this is the first initiative that I’m aware of that’s an ongoing process—not a one-time review,” he said.

Significant Interest. Shortly after EO 13,563 was issued, ACUS held a workshop in early 2011, with the understanding that agencies had a certain number of days to put together retrospective review plans, Bull said. The idea was for agencies that had some institutional knowledge to share best practices, he said.

There seemed to be a lot of interest by agencies, Bull said. Obama subsequently issued EO 13,579, which encourages retrospective review by independent regulatory agencies, and EO 13,610, which builds on the existing retrospective review environment, he said.

The three executive orders and other retrospective review requirements in law, including the Regulatory Flexibility Act (P.L. 104-121) that deals with the impact on small businesses, made it a salient issue, Bull said.

There is also interest on Capitol Hill, where various bills being debated would assemble an independent group to conduct retrospective review, Bull said.

“Some of the concern in the [scholarly] literature is that agencies don’t necessarily have an incentive to do robust retrospective review themselves,” Bull said.

Conducting Research. Joseph Aldy, assistant professor of public policy at the Harvard Kennedy School, said he was collecting information for the ACUS project.

Aldy said he was reviewing plans agencies have submitted to OIRA, and interviewing agency representatives and individuals outside government who are or were active in the regulatory process, as well as various stakeholders, including former OIRA staff.

The ongoing research builds on the premise in regulatory policy that analysis can inform policy makers, Aldy said.

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There is a long tradition of doing *ex ante* analysis when considering proposed regulations, Aldy said. “But it’s been much more of an ad hoc process over the years in looking back to see what have been the impacts in practice,” he said.

Aldy said much can be learned about the efficacy and cost-effectiveness of regulatory programs by doing *ex post* analysis.

“I think there’s a lot of interest in thinking through how one can effectively institutionalize retrospective re-

view so that it can help improve the efficiency of the regulatory program,” Aldy said.

Institutionalizing Reviews. There are a couple of ways to think about how to institutionalize retrospective review, Aldy said.

One way is to consider how this effort differs from past efforts, including Reagan’s Task Force on Regulatory Relief, Bush’s Council on Competitiveness and Clinton’s National Performance Review, Aldy said.

Some retrospective review is already institutionalized under existing statute, Aldy said. For example, under the Clean Air Act, the Environmental Protection Agency has to evaluate national ambient air quality standards every five years.

Regulations should be designed to facilitate learning, Aldy said. That means regulations should produce data that—in three, five or seven years—can easily be used to evaluate whether it achieved its purpose, he said.

Aldy said regulations also should produce data to help agencies assess their costs. Then, policy makers can determine whether it is the least expensive way to deliver benefits, or whether there might be ways to get a bigger bang for the buck, he said.

Renewed Push. This administration has made substantive, good-faith efforts to create retrospective review processes that have and can continue to accomplish some real good in reducing the unnecessary burden of outdated rules, said Michael Fitzpatrick, former OIRA associate administrator in the Obama administration.

But the challenge, which also has been the case with previous administration efforts, is how to maintain the momentum and institutionalize the processes, Fitzpatrick said.

The U.S. does very well by global standards in reviewing and improving rules as they are being developed, Fitzpatrick said. But, as in many countries, it is less successful in figuring out how to look back at rules years later to determine whether they are still doing their job, he said.

Fitzpatrick said there has been a renewed push by the administration on retrospective review.

“I’m not sure of the precise form of this renewed effort,” Fitzpatrick said. “But it’s my understanding that currently there is significant discussion and emphasis on this—both at the White House and at the agencies—and that it remains an important initiative for the president,” he said.

Outdated, Inefficient Rules. Retrospective review efforts are most successful when they can identify regulations that aren’t operating effectively or are outdated, Fitzpatrick said. This often occurs because of new technologies, changes in social norms or new regulation in the same space, he said.

However, there are long-standing challenges inherent in this process, Fitzpatrick said. “A rule is not a good candidate for retrospective review simply because one stakeholder group or another continues to object to the regulation,” he said.

Instead, a good case needs to be made that a regulation is ineffective, unnecessary or isn’t implemented in the way that it was intended to, Fitzpatrick said.

Fitzpatrick also said that the public plays a critical role in identifying regulations in need of review.

“One can’t expect the regulators alone, with all of their other responsibilities, to also come up with the best candidates for retrospective review,” Fitzpatrick said. “That really is an obligation that resides substantially with stakeholders outside of government,” he said.

Inherent Challenges. Another challenge is in systemic retrospective review design—how to select the rules to scrutinize, what criteria to apply to regulations and how to measure continued effectiveness, Fitzpatrick said.

“And this can be a complicated proposition,” Fitzpatrick said. After years, most if not all of the compliance costs of a rule might have been absorbed even as the benefits continue to accrue. Regulated entities may no longer see any benefit in change because they’ve spent the money to comply, he said.

Also, agencies are increasingly strapped for resources because of budget constraints and conducting retrospective review stretches them further, Fitzpatrick said.

Finally, there is an understandable reluctance to reopen all of the political battles that were waged to promulgate a rule in the first place, Fitzpatrick said.

Systemic Approach. A more ambitious form of retrospective review that many people are talking about is a systemic, broad-brush approach, Fitzpatrick said.

This might include a regular schedule for reviewing the effectiveness of certain classes of rules, he said. “And that is, again, more ambitious but also more complicated and more difficult to design,” he said.

There is interesting work being done in academia and at ACUS, where scholars are looking at best practices and other ways to institutionalize and systematize reviews, Fitzpatrick said.

“And we’ll have to wait to see what they come up with, but that could certainly lead towards retrospective review 2.0—a more systemic and broad-gauge approach—as opposed to a transactional approach, which we’ve seen more to date,” he said.

How to Evaluate. Susan Dudley, former OIRA administrator during the President George W. Bush’s administration and now director of the Regulatory Studies Center at the George Washington University, said she is working with a colleague on a project and paper dealing with retrospective review.

There is a whole skill set and training for students in how to evaluate programs, but it is almost never applied to regulations, Dudley said.

There are procedures and methods applied to on-budget programs, which have stronger incentives, Dudley said. For those programs, funds aren’t appropriated or programs reauthorized if they can’t demonstrate some success, she said.

However, once regulations are in place, they seem to stay forever, Dudley said.

Lack of Incentives, Knowledge. Stepping back, there are two problems, Dudley said. One is lack of incentives and the other is lack of knowledge, she said.

Dudley said she and her colleague were trying to focus on the lack of knowledge by seeing whether there are tools that can be applied. She said she is working on a paper that hopefully will be ready to share for review in a few months.

The other part is lack of incentives, Dudley said. “And there I think there just need to be some changes,” she said. “We spend a lot of resources on regulatory impact analysis before the regulation is written, when we know nothing about it—we know nothing about what its impacts are,” she said.

“And then we never go back and look to see whether our estimates were right,” Dudley said.

After-Action Review. Shifting resources from *ex ante* review to *ex post* review wouldn’t only allow policy makers to evaluate the effects of rules in place, but also do a better job of *ex ante* review, Dudley said.

There also need to be greater incentives for agencies, because no one really wants to review a regulation once it is in place, Dudley said. Even regulated parties aren’t all that interested in agencies looking back because once they’ve made the investment in compliance, it is not in their interest to stop. That would give competitors an edge, she said.

But better incentives will probably require legislative action, Dudley said.

In the meantime, regulatory center staff is trying to file public comment on every major proposal to ask how it will be measured if it takes effect, Dudley said.

No Plan at Outset. In their comments, center staff is taking at face value what regulators say a rule will achieve, only questioning whether regulators are committed to measuring outcomes, Dudley said.

“And for the most part, we see no mention at all of the president’s executive orders that are asking agencies to plan for retrospective review at the outset,” Dudley said.

Review should be an continuous process, Dudley said. For example, the Regulatory Flexibility Act governs regulations that have an effect on small businesses, she said. Agencies are supposed to look every 10 years at how regulations are working and whether there are ways to reduce burdens on small entities, Dudley said. “That has not worked very well at all,” she said.

Retrospective review is a big undertaking, and it isn’t easy, Dudley said.

“One of the questions that we ask is the time line: when do you think you will have achieved the goals you say you will, and then when can you measure whether you have,” Dudley said. “It will vary depending on the rule,” she said.

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Executive Order 13,563, Improving Regulation and Regulatory Review, is available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

Executive Order 13,579, Regulation and Independent Regulatory Agencies, is at <http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-13579-regulation-and-independent-regulatory-agencies>.

Executive Order 13,610, Identifying and Reducing Regulatory Burdens, is at <http://www.whitehouse.gov/the-press-office/2012/05/10/executive-order->

identifying-and-reducing-regulatory-burdens.
The AAF report, “Three Years of Regulatory Reform:
Did the President’s Executive Orders Work?” is at

<http://americanactionforum.org/insights/three-years-of-regulatory-reform-did-the-presidents-executive-orders-work>