



Institute for Policy Integrity

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June 30, 2011

Patrick F. Kennedy
Under Secretary for Management
U.S. Department of State
RegulatoryReview@state.gov

Attention: Docket No. DOS-2011-0079

Subject: Comments on State's Preliminary Plan for Retrospective Analysis of Existing Rules (May 18, 2011)

The Institute for Policy Integrity at New York University School of Law submits the following comments to the State Department ("State") in response to its request for comments on improving regulations through periodic retrospective review as required by Executive Order 13,563.¹ Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

This comment assesses State's "Preliminary Plan for Retrospective Analysis of Existing Rules"² and recommends that the agency should adopt clearer guidelines for when and how its rulemaking bureaus should conduct retrospective reviews. Additionally, State's Plan should concentrate on increasing net benefits to improve the efficiency and efficacy of the agency's regulatory programs. Further, State should utilize retrospective review to identify the systemic biases inherent in cost-benefit estimation methodologies, to determine the potential costs of regulatory inaction, and to instruct the design of future rules.

State Should Develop an Ongoing Mechanism to Solicit Public Comments and Engage in Regular Retrospective Reviews

According to OIRA, retrospective review requires "a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive."³ For most federal agencies, this would involve a specific timeline for retrospective review. State's unique characteristics, however, might justify a slight departure from that usual process. As stated within the Plan, the agency's mission is not often the subject of rulemaking, and hence the agency does not publish rules on a regular basis. On the one hand, the small number of total regulations to review could suggest that an ad hoc approach would be sufficient; this is the strategy adopted by the Plan.⁴ But on the other hand, precisely because State is

¹ Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821, 3822 (Jan. 18 2011) ("Improving Regulation and Regulatory Review").

² Department of State Preliminary Plan for Retrospective Analysis of Existing Rules (May 18, 2011), <http://www.whitehouse.gov/files/documents/2011-regularoty-action-plans/DepartmentofStatePreliminaryRegulatoryReformPlan.pdf> [hereinafter State Plan].

³ OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-11-10, EXECUTIVE ORDER 13,563, "IMPROVING REGULATION AND REGULATORY REVIEW" 4 (2011) [hereinafter OIRA MEMO 2011].

⁴ State Plan, *supra* note 2, at 4 ("The Department will not impose a mandatory schedule for review on the organizations responsible for promulgating rules").

not often focused on rulemaking means that the agency is less likely to prioritize retrospective reviews in the future if it relies purely on an ad hoc system. The longevity of the retrospective review process is important, and the review process obviously has value: as the Plan indicates, State has already taken notice of a number of regulations that require reconsideration or alterations, which otherwise might have persisted as outdated, inefficient rules.⁵ Even though the agency does not frequently create regulations, those rules it does have on the books would still benefit from regular checks of their ongoing efficiency.

The agency should therefore try to systematize an ongoing review procedure, appropriately scaled to State's resources and needs, rather than leaving everything up to ad hoc process and individual bureaus. If the agency does not feel a precise timeline is appropriate, it could consider creating an open and ongoing system, perhaps implement online, where the public, agency analysts, and other agencies can identify rules that warrant review due to changed circumstances or updated data on costs and benefits. The agency might also want to more formally solicit public comments and agency officials' feedback at regular intervals with an announcement in the Federal Register and an internal review process. By announcing times or specifying circumstances where public comment is welcomed, the Plan would ensure that State receives more productive and comprehensive public comments. Additionally, it will decrease the possibility that a regulation in need of review goes unnoticed by State.

State Should Only Conduct Reviews if Justified by Changed Circumstances, Updated Data, or Regulatory Inaction

In addition to listing dates or circumstances when public comment will be accepted by State, the Plan must also specify how public comments will be evaluated for the purpose of generating review. To achieve its own goals of efficiency, fairness, political accountability, and legality, State's Plan must contain a clearly articulated list of criteria for selecting regulations. Certainly, public comments are key to understanding the on-the-ground benefits and burdens of regulations and gauging whether circumstances have changed. However, only if the commenter points to specific changed circumstances or updated data, or points out an area of regulatory inaction, should the comment be used to justify a review. New circumstances, updated data, and areas of agency inaction provide State with new information that it could not or did not have the opportunity to consider when the original regulations were passed. New information alone will justify the expense of conducting a comprehensive review of State rules and regulations.⁶ By contrast, intense lobbying or other public calls for review that are unsupported by this kind of new information simply rehash old debates and are not relevant to retrospective review.

These criteria for review are already partially and implicitly incorporated into the current version of the Plan: most of the changes being considered in State's initial round of retrospective reviews are largely driven by changed circumstances and updated data.⁷ For example, the Plan states that the Bureau of Political-Military Affairs will review existing regulations based on "statutory changes, geo-political developments, new departmental requirements/priorities, or other unforeseen events."⁸ Indeed, the bureau's munitions list needs to be updated to reflect new military technology. Similarly, paperwork burdens can now be eased by taking advantage of new digital

⁵ *Id.* at 4-9.

⁶ See OIRA MEMO 2011, *supra* note 6, at 4 ("Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken."); see also Exec. Order No. 13,563 at 3,822 (describing the goal of retrospective analysis to modify rules that are "outmoded, inefficient, insufficient, or excessively burdensome" in light of changed circumstances).

⁷ State Plan, *supra* note 2, at 4-9.

⁸ *Id.* at 5.

technologies to reduce costs.⁹ Also, the Bureau of Resource Management is proposing to repeal its FACA regulations to eliminate redundancies created by new legislation.¹⁰ Finally, the Bureau of Consular Affairs is responding to an area of regulatory inaction by considering a new regulation that would grant the right to counsel at U.S. Embassies and consulates.¹¹

But to help guide the future selection of rules for retrospective review, the Plan should stipulate that State will conduct retrospective review based on public comment or agency analyst recommendation *only* if the comment appropriately justifies the review by pointing to changed circumstances, new data, or a regulatory gap. Not only will this requirement limit the number of reviews that State will have to conduct, but it will also ensure that the reviews that it does conduct are worth the expense of the review procedure.

Plan’s Language and Process Should Be More Open to Rule Expansions and Other Modifications Beside Elimination

The Plan needs to adopt the neutral stance on regulating that the Executive Order envisions. The current version of the Plan stipulates that “review will focus on the *elimination* of rules that are no longer warranted” (emphasis added) and only later adds that it will “also consider strengthening, complementing, or modernizing rules where necessary.”¹² However, to maximize the net benefits of regulations, the Plan should stipulate that policy actions should, in the words of Executive Order 13,563, be “in accordance with what has been learned”¹³ from retrospective review. Thus, if the results of the review dictate that current regulation should be expanded then the agency should not hesitate to do so. On the other hand, if a policy deregulation is supported by the retrospective review then the agency should adopt that approach. By shifting the objective from deregulation to an approach that, *ex ante*, considers all policy options furthers the objective of efficient and effective regulation.

State Should Design Rules Ex Ante So They Can Be Easily and Effectively Evaluated

State can facilitate retrospective review by anticipating review during the initial rule-making process.

Careful planning during a rule’s formation is integral to determining what reporting requirements and data collection systems will reduce the costs and improve the quality of subsequent retrospective reviews. The Government Accountability Office recommends that when formulating new rules the agency should consider how it “will measure the performance of the regulation, including how and when [it] will collect, analyze, and report the data needed to conduct a retrospective review.”¹⁴ Effective review of existing regulatory programs will depend on the availability of performance data, which will be ample if the appropriate accounting mechanisms are “built into the regulations themselves.”¹⁵

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 9.

¹² *Id.* at 4.

¹³ Exec. Order No. 13,563 (emphasis added).

¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 53 (2007).

¹⁵ Cary Coglianese & Lori D. Snyder Benneer, *Program Evaluation of Environmental Policies: Toward Evidence-Based Decision Making*, in *Decision Making for the Environment: Social and Behavioral Science Research Priorities* 246, 258 (Garry D. Brewer & Paul C. Stern eds., National Academics Press 2005) (“All of the program evaluation methods we have reviewed here depend on valid and reliable data...”).

An example of where ex ante design can facilitate retrospective review comes up in the list of initial candidates for review: specifically, the potentially new rule allowing for attorney representation at U.S. embassies and consulates.¹⁶ If State decides to pass such a rule, it could incorporate a provision that required data collection on how often such representation is sought, the cost of such representation, and the value gained by providing for such representation. As a result, if the rule were ever subjected to a retrospective review, State would have information at its disposal to conduct a cost-benefit analysis of the rule. Not only would such a review cost less for the agency to conduct, but it would also result in a more informative review. If the agency is forced to pull together data when it decides to conduct a review, there is a significant possibility that important data will be left out or will be impossible to come by. Designing rules ex ante so that they can be easily and effectively monitored mitigates this possibility.

Another possibility State could explore when proposing such new rules is a pilot program. A short, small-scale pilot stage to a rulemaking could allow the agency to collect data on the rule's costs and benefits before rolling it out full-scale.

As State gains experience with retrospective review and develops best practices over time, it should update and improve its retrospective analysis guidelines. In order to facilitate nationwide improvement in the quality of regulations, they should share information about these best practices with other agencies in the federal and state bureaucracies.

Sincerely,

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¹⁶ State Plan, *supra* note 2, at 9.