Regulatory Look-Back: How Agencies Define “Less” to Mean “More”

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What is Retrospective?

- President Carter’s EO 12,044: “Agencies shall periodically review their existing regulations to determine whether they are achieving the policy goals of this order.”
- OECD: “Conduct systematic programme reviews of the stock of significant regulation.”
- President Obama’s EO 13,563: “Promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.”
President Carter’s Retrospective Review Criteria

- The continued need for the regulation;
- The burdens imposed on those directly or indirectly affected by the regulations;
- The need to eliminate overlapping and duplicative regulations; and
- The length of time since the regulation has been evaluated.
Implementation of EO 12,044

- Interior publishes plan (43 Fed. Reg. 22,573) to amend regulatory process and determine at an early stage whether a rule is “significant.”
  - Before discharging a final significant rule, Interior will only approve “the least burdensome of the acceptable alternatives.”
  - All significant rules should include a plan “for evaluating the rule after its issuance.”
Implementation of EO 12,044 Continued

• Regulatory Analysis shall be prepared if:
  – “The rule will have an annual economic effect of $100 million or more,” or
  – “The potential economic effect … is sufficiently major as to require formal analyses to assure that the objectives of the rule are achieved with minimum burden.”
  – Other factors: imposing total paperwork burden in excess of 100,000 hours, or requires more than 20,000 persons to respond. Current paperwork burden is 10.39 billion hours.
Regulatory Accountability Act v. President Carter

- Publish in the Federal Register an **advanced notice** of proposed rulemaking for a major or high-impact rule;
- “The agency shall adopt the **least costly** rule considered during the rulemaking … that meets relevant statutory objectives.”
- President Carter: Only approve “**the least burdensome** of the acceptable alternatives.”
- President Carter: **notice of intent** for significant regulations.
Results of EO 12,044

- Energy published a plan (43 Fed. Reg. 50,812) and identified 68 regulations for review or implementation, but many were simply new regulations, not “look-backs.”
- EPA published a plan (43 Fed. Reg. 23,679), but did not initially list specific proposals. EPA did propose a “sunset” policy for all reporting requirements after five years.
- Many agency plans simply restated the goals of the EO 12,044.
Struggles of Regulatory Reform

Year-to-year Change in Code of Federal Regulations Pages

Change

Executive Order 13,563
January 18, 2011

• Reaffirmed EO 12,866: Each agency must “adopt a regulation only upon a reasoned determination that its benefits justify its costs.”

• Section 6: Retrospective Analysis of Existing Rules. “Promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.”

• Agencies should: “Modify, streamline, expand, or repeal them in accordance with what has been learned.”
Implementation of EO 13,563

• Section 6(b): “Within 120 days of the date of this order, each agency shall develop and submit to [OIRA] a preliminary plan … which will periodically review its existing significant regulations.”

• Memorandum 11-19 of April 25, 2011. EO 13,563 “recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch.”

• EO 13,610: “Agencies shall submit draft reports to OIRA … on the second Monday of January and July.” The final reports should be available to the public no later than three weeks from the submission to OIRA (February 3 and August 4 of 2014).
Meeting Deadlines

• Meeting this deadline?
  – Energy update submitted March 9, 2014;
  – HUD retrospective plan posted on March 10, 2014;
  – Interior update posted on March 11, 2014;

• On March 11, 2014, Administrator Howard Shelanski testified before the Senate Homeland Security and Governmental Affairs Committee, pledging all of the updated plans would be completed that week.
## March Retrospective Review Plans

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Ratio of New Burdens to Fewer Burdens

Review Plan Rules: Paperwork Comparison

- Rules Increasing Paperwork
- Rules Decreasing Paperwork

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More Burdens Continued

Review Plan Rules: Cost Comparison

- Rules Increasing Costs
- Rules Decreasing Costs
Look Back or Look Forward?

• Energy included 18 regulations, but none reduced costs. The four regulations that monetized costs were new efficiency standards.

• HHS included 15 ACA regulations, or one-fifth of the entire review plan.
  – E.g. A final rule that implements § 1104 of the ACA, electronic fund transfers, which will cost $333 million annually (77 Fed. Reg. 48,007).
• EPA’s plan included the most expensive major rule OIRA ever approved, new CAFE standards for 2017-2025 light-duty vehicles (77 Fed. Reg. 62,623), and Tier 3 emission standards that lower the sulfur content in gasoline, which will cost $1.5 billion annually (79 Fed. Reg. 23,413).

• DOT appears to be the only bright spot. It listed 94 rulemakings for review, and plans to cut $2 billion in costs and more than 43 million hours. If all of DOT’s paperwork cuts are finalized, it could reduce its paperwork burden by 21 percent.
Recycling Old Regulations

- Many of the regulations in retrospective review plans predate EO 13,563, and several are from the previous administration.
- By AAF’s count, at least 39 proposed or final rules predate EO 13,563, and 15 rulemakings originated from the previous administration.
- Example: Fabled “spilled milk” rule. President Obama mentioned it in his 2012 SOTU, but the Unified Agenda noted the rule was scheduled for amendment in 2009. SBA records reveal the rule was nominated for repeal in 2008 as part of SBA’s “Regulatory Review and Reform Initiative.”
Toward a 21st-Century Regulatory System

If the FDA deems saccharin safe enough for coffee, then the EPA should not treat it as hazardous waste.

By BARACK OBAMA

Updated Jan. 18, 2011 12:01 a.m. ET

For two centuries, America's free market has not only been the source of dazzling ideas and path-breaking products, it has also been the greatest force for prosperity the world has ever known. That vibrant entrepreneurialism is the key to our continued global leadership and the success of our people.

But throughout our history, one of the reasons the free market has worked is that we have sought the proper balance. We have preserved freedom of commerce while applying those rules and regulations necessary to protect the public against threats to our health and safety and to safeguard people and businesses from abuse.

From child labor laws to the Clean Air Act to our most recent strictures against hidden fees and penalties by credit card companies, we have, from time to time, embraced common sense rules of the road that strengthen our country without unduly interfering with the pursuit of progress and the growth of our economy.

Sometimes, those rules have gotten out of balance, placing unreasonable burdens on business—burdens that have stifled innovation and have had a chilling effect on growth and jobs. At other times, we have failed to meet our basic responsibility to protect the public interest, leading to disastrous consequences. Such was the case in the run-up to the financial crisis from which we are still recovering. There, a lack of proper oversight and transparency nearly led to the collapse of the financial markets and a full-scale Depression.

Over the past two years, the goal of my administration has been to strike the right balance. And today, I am signing an executive order that makes clear that this is the operating principle of our government.

This order requires that federal agencies ensure that regulations protect our safety, health and environment while promoting economic growth. And it orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive. It's a review that will help bring order to regulations that have become a patchwork of overlapping rules, the result of tinkering by administrations and legislators of both parties and the influence of special interests in Washington over decades.

Where necessary, we won't shy away from addressing obvious gaps: new safety rules for infant formula, procedures to stop preventable infections in hospitals, efforts to target chronic violators of workplace safety laws. But we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.

For instance, the FDA has long considered saccharin, the artificial sweetener, safe for people to consume. Yet for years, the EPA made companies treat saccharin like other dangerous chemicals. Well, if it goes in your coffee, it is not hazardous waste. The EPA wisely eliminated this rule last month.

But creating a 21st-century regulatory system is about more than which rules to add and which rules to subtract. As the executive order I am signing makes clear, we are seeking more affordable, less intrusive means to achieve the same ends—giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens. It means using disclosure as a tool to inform consumers of their choices, rather than restricting those choices. And it means making sure the government does more of its work online, just like companies are doing.

We're also getting rid of absurd and unnecessary paperwork requirements that waste time and money. We're looking at the system as a whole to make sure we avoid excessive, inconsistent and redundant regulation. And finally, today I am directing federal agencies to do more to account for—and reduce—the burdens regulations may place on small businesses. Small firms drive growth and create most new jobs in this country. We need to make sure nothing stands in their way.

One important example of this overall approach is the fuel-economy standards for cars and trucks. When I took office, the country faced years of litigation and confusion because of conflicting rules set by Congress, federal regulators and states.
Washington Is Eliminating Red Tape

New reforms will save Americans billions without sacrificing public health or safety.

By CASS SUNSTEIN
August 23, 2011

Early this year, President Obama ordered an unprecedentedly ambitious government-wide review of existing federal regulations, emphasizing that we must "measure, and seek to improve, the actual results of regulatory requirements." He directed agencies and departments to produce preliminary plans to streamline those requirements and eliminate red tape.

Last May, agencies released over two dozen preliminary plans, identifying reforms that will save billions of dollars. At the same time, agencies asked the public to evaluate the preliminary plans, identify new reforms, and participate in creating a 21st-century regulatory system that protects public health and safety while also promoting economic growth and job creation.

Today I can announce that agencies are releasing their final plans, including hundreds of initiatives that will reduce costs, simplify the system, and eliminate redundancy and inconsistency.

We have already achieved a great deal. Significant burden-reducing rules have been finalized or publicly proposed by the Department of Labor, the Environmental Protection Agency and the Department of Transportation—and they are expected to save more than $4 billion over the next five years.

Many of the reforms focus on small business. For example, the Department of Defense recently issued a new rule to accelerate payments on contracts to as many as 60,000 small businesses, thus improving their cash flow in an economically difficult time. The Small Business Administration is adopting a single electronic application to reduce the paperwork burden now imposed on certain lenders, which in turn will benefit borrowers who seek relatively small amounts of capital to grow and succeed.

The reforms announced today span a wide range:

• The Department of Health and Human Services will soon propose to remove unnecessary regulatory and reporting requirements now imposed on hospitals and other health-care providers, potentially saving $4 billion over the next five years.

• The Department of Labor is finalizing a rule to simplify and improve hazard warnings for workers, likely saving employers more than $2.5 billion over the next five years without compromising safety.

• The Department of Transportation is proposing a rule that will eliminate unnecessary regulation of the railroad industry, saving a total of $340 million or more.

• The Environmental Protection Agency will soon propose a rule to reduce burdens on hazardous-waste generators by moving from paper-based to electronic reporting, saving up to $126 million annually.

By the end of this year, the Internal Revenue Service will eliminate 55 million hours in annual paperwork burdens by consolidating reporting requirements and streamlining various tax forms.

Today's plans explicitly recognize that the regulatory look-back is not a one-time endeavor. Agencies will continue to revisit existing rules, asking whether they should be updated, streamlined or repealed. And they will do so in close consultation with the public. Ideas are welcome at any time.
Figure 1. Federal Regulation Restrictions, 1997–2012
Regulatory Duplication

- In their 2013 annual report, “Actions Needed to Reduce Fragmentation, Overlap, and Duplication,” GAO identified 17 areas of duplication.

- Senator Tom Coburn estimates roughly $95 billion in annual spending is duplicative.

- AAF examined these 17 problem areas for duplicative paperwork. AAF found 642 million hours of regulatory duplication, totaling 990 forms, and approximately $46 billion in related costs.
Adding to Duplication

- GAO identified Medicaid as a primary area of duplication.
- AAF found 9 agencies involved in the administration of Medicaid, generating 47 million hours of paperwork from 125 forms.
- As part of ACA implementation, there is more Medicaid paperwork. New eligibility changes will add 21.2 million paperwork burden hours, or 3.4 percent of HHS’s total paperwork budget.
Managing the Regulatory Thicket

Campaign to Cut Waste

President Obama and Vice President Biden launch the Campaign to Cut Waste, which will hunt down and eliminate wasteful tax dollars in every agency and department across the Federal Government.

READ THE EXECUTIVE ORDER

The President’s first Executive Order called for more transparent, participatory, and collaborative government. This action set the bar for Executive Orders and Memoranda to follow that further his commitment to a government that is open and efficient.

Regulation Reform

In January 2011, President Obama outlined his plan to create a 21st-century regulatory system—one that protects public health and welfare while promoting economic growth, innovation, competitiveness, and job creation. Among other things, his Executive Order on Regulation said the following: Always consider costs and reduce burdens for American businesses and consumers when developing rules; expand opportunities for public participation and public comment; simplify rules; promote freedom of choice; and ensure that regulations are driven by real science.

The President also called for an unprecedented government-wide review of regulations already on the books. As a result of that review, more than two dozen agencies identified initiatives to reduce burdens and save money. We released those draft plans to the public and asked for your comments. The final plans reflect feedback we received from industries, small businesses, and individuals from around the country—and they will save U.S. businesses billions of dollars in regulatory burdens.

Featured Plans

The Department of Health and Human Services will soon propose to remove unnecessary regulatory and reporting requirements now imposed on hospitals and other healthcare providers, potentially saving an additional $1.4 billion over the next five years.

All Plans

Department of Agriculture
May 2012 Update: Download PDF
June 2012 Update: Read and Discuss on Slideshare | Download PDF
Final: Read and Discuss on Slideshare | Download PDF
Preliminary: Read and Discuss on Slideshare | Download as PDF

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Finding Plans

DOL Regulations

Retrospective Analysis of Existing Rules

We recognize the importance of having a formalized system for routine regulatory review and are committed to complying with Executive Order (E.O.) 13563, “Improving Regulation and Regulatory Review” (78 FR 3821). Our Plan for Retrospective Regulatory Review is designed to create a framework for the schedule and method for reviewing our significant rules and determining whether they are obsolete, unnecessary, unjustified, excessively burdensome, counterproductive or duplicative of other Federal regulations.

- Read the Department’s Retrospective Review Progress Report — July 2012 (PDF)
- Read the Department’s Retrospective Review Progress Report — December 2012 (PDF)
- Read the Department’s Retrospective Review Progress Report — May 2013 (PDF)
- Read the Department’s Retrospective Review Progress Report — January 2012 (PDF)
- Read the Department’s Plan for Retrospective Analysis of Existing Rules (PDF)

Reducing Reporting and Paperwork Burdens

Consistent with the Paperwork Reduction Act of 1995 (PRA) and Executive Order 13610, the Department of Labor is taking meaningful steps to reduce paperwork and reporting burdens on the American people, including small businesses.

- Read OSHA’s Memorandum on Reducing Reporting and Paperwork Burdens — June 2012 (PDF)
- Read the Department’s Burden Reduction Initiatives Plan (PDF)

Regulatory Agenda

If you would like to stay informed about the information on this page, please subscribe to e-mail updates.

The entirety of the Department’s Fall 2013 regulatory agenda and regulatory plan statement was made available on DOL’s Website and at www.regulations.gov. The regulatory agenda is a listing of all the regulations the Department of Labor expects to have under active consideration for promulgation, proposal, or review during the coming 6- to 12-month period.

Featured Items from the Regulatory Agenda

Regulatory Labor Department Initiatives Supporting "Plan/Prevent/Protect"

Injury and Illness Prevention Program (OSHA)

Videos

Lauren Sugarman Discusses Equal Opportunity In Construction
Anywhere and Everywhere
Possible Reform Options

- Codify EOs 13,563, 13,610, and 13,579 (applies to independent agencies) and include a judicial review component.
- Putting teeth in the Paperwork Reduction Act. Set a cap on the total number of collections (currently around 9,200) and hours (10.3 billion). 1995 PRA amendments set a goal to reduce overall paperwork by 35 percent over five years.
- Borrow EPA’s idea from 1978 and sunset regulations after a period of time. This already applies to paperwork collections (three years).