Without retrospective review, we won’t know if a problem has been fixed.

Retrospective review provides the opportunity to more accurately assess a regulation’s actual benefits and costs.

Retrospective review provides the opportunity to reevaluate and clarify policy.

By integrating retrospective review into regulatory oversight, Congress increases transparency and strengthens the link between regulations and agencies’ statutory authority for issuing them.

When federal agencies are considering new regulations or a change in current regulations, they are required to perform a Regulatory Impact Analysis under Executive Order 12866. This requirement means that agencies must identify and define the problem they seek to address, demonstrate whether there is a need to address it at the federal level, examine options for addressing the problem, analyze both the costs and benefits of those options, and then determine what course of action to take.

No matter how well the agency executes the Regulatory Impact Analysis, though, many consequences of a regulation are unclear before it is in place. Because the economy is an immensely complex system of independent actors, best efforts to predict the economic impacts of regulations can be very inaccurate. Given the uncertainty of predicting the effects of a change in policy before a regulation is on the books, retrospective review is an important tool for determining the actual effect of a regulation.

Given that the number of regulations has grown substantially over the past decades, determining the costs of regulation is increasingly important.
WHEREAS Regulatory Impact Analysis relies on regulators’ estimates of how new rules will alter economic activity, retrospective review takes into account the actual effects of regulation, which may be significantly larger or smaller than predicted.

Agencies can use retrospective review to determine which rules are no longer needed, which have costs that outweigh their benefits, and which should be revised to better achieve the desired effects.

President Barack Obama emphasized the need for regulatory review with Executive Order 13563 and Executive Order 13579 in 2011.

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WHAT IS RETROSPECTIVE REVIEW?

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THE CURRENT STATE OF RETROSPECTIVE REVIEW

While agencies are required to conduct retrospective review, regulators often fail to study current regulations or fail to conduct appropriately rigorous analyses. Current requirements call for these studies to be done within the agency rather than by the legislative branch as some countries such as Australia and Switzerland do. Additionally, most United States regulations do not contain sunset provisions, so they remain in effect indefinitely unless the agency takes steps to remove them. This stands in contrast to countries whose sunset regulations automatically expire unless a retrospective review demonstrates that they should remain in place.

- President Obama’s Executive Order 13563 and Executive Order 13579 contain requirements for retrospective review that build on executive order requirements developed under President Bill Clinton’s Executive Order 12866 for agencies to look at the costs of rules after they are in place.
- Despite these requirements, most agencies exhibit poor compliance in retrospective review. (For an analysis of compliance, see figure 1.)
- One problem with retrospective review is that the process is not as open to the public as it should be. Introducing congressional oversight into the process provides increased accountability to the review process.

One agency currently exhibits well-established practices in the area of retrospective review. The National Highway Traffic Safety Administration (NHTSA) has evaluated its own rules 92 times since 1973. In particular, this agency conducts retrospective review by comparing data for instances of regulatory compliance against noncompliance to determine whether or not their rules actually achieve the benefits predicted in the Regulatory Impact Analysis. These randomized traffic safety trials stand in contrast to agencies such as the Environmental Protection Agency that assume complete compliance with their rules, an unrealistic view of how people respond to regulations.

Unfortunately, the NHTSA example of best practices is the exception rather than the rule among agencies, and most agencies have demonstrated an inability to conduct adequate reviews under the current system. Additionally, while the NHTSA demonstrates that agencies can in fact prioritize resources to conduct regular retrospective reviews, their static practices of analysis have not markedly improved since the agency began reviewing rules. If Congress integrated retrospective review into its regulatory oversight practices, the congressional oversight function could permit the transparent determination of whether or not agencies are achieving what they are statutorily designed to accomplish.

THE NEW ZEALAND EXAMPLE

With the election of Prime Minister David Lange in 1984, New Zealand began to implement major economic reforms. The momentum for these reforms came from New Zealand’s falling economic growth rates. The country tumbled from having one of the highest per capita income levels in the world in the first half of the twentieth century to falling behind all major European economies in the second half. These reforms also encompassed the Parliament itself and the way in which it carried out its business and attempted to improve public trust in the institutions of government.

In 1986, the New Zealand Parliament passed the Commerce Act, which included new procedural requirements for all new regulations and for retrospective review of all existing regulations. These requirements were designed to simplify the policy environment and reduce the burden of regulations on the economy and the public. Although only a minority of regulations was considered controversial, the process provided an opportunity for transparent evaluation of existing regulations with regard to their actual economic costs and benefits.

The New Zealand Parliament’s Regulations Review Committee examines all new regulations as they are promulgated and existing regulations every five years. It will also hear complaints about regulations from citizens. Although the committee does not have the authority to strike rules, it does provide recommendations to Parliament on whether a new regulation should be approved or a reviewed regulation should be continued. The decision of Parliament on these recommendations is final and determines whether a regulation will be
promulgated or repealed. In fact at the five-year review, the regulation ceases to exist unless Parliament takes a positive action to renew the regulation.

In the abstract, an individual regulation may not appear to create a significant burden, yet they act cumulatively. Collectively, agency rules create a significant burden for businesses and consumers. The New Zealand Parliament’s Regulations Review Committee creates increased accountability for administrative agencies, which otherwise might not be subjected to legislative oversight. In making recommendations as to which regulations should be renewed or struck after five-year periods, the committee uses the following specific evaluation tests as required by the statute.

**THE FIVE TESTS**

The regulations review committee:

1. determines that consultation has occurred with all other affected government agencies including local and regional government and all the various interest groups who are affected by the rule.

2. determines that appropriate economic analysis has occurred.

3. determines that the empowering statute grants the power to enforce the regulation in question.

4. examines evidence that the problem complained of is real and of sufficient magnitude to require government action.

5. examines evidence that the current regulations have actually rectified the problem identified.

Through these five tests along with public testimony, the committee gathers the necessary information regarding regulations to present recommendations to Parliament. In practice, the majority of regulations under review are not considered defective and are recommended for reinstatement after the committee reviews them. For those rules that the committee raises concerns about, though, this process provides an opportunity to take detrimental rules off the books.

Because the review process in New Zealand is designed to study each regulation’s specific effects and it is transparent and requires prior consultation by agencies with affected parties, committee members have minimal disputes. Because the committee may not debate policy, but rather must focus on the mechanics of regulation through the five tests above, it largely avoids partisan setbacks.
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The Mercatus Center at George Mason University is a research, education, and outreach organization that works with scholars, policy experts, and government officials to connect academic learning and real-world practice.

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BENEFITS OF RETROSPECTIVE REVIEW

Retrospective review as practiced in New Zealand offers several economic benefits. Although federal agencies in the United States focus significant resources to conduct Regulatory Impact Analyses on proposed rules, they rarely subject existing rules to this scrutiny. However, retrospective review and analysis can be more accurate for existing rules because of the potential for random testing and because a regulation’s effects, intended or not, become more obvious once it is in place. Congress should consider requiring the opportunity to conduct retrospective reviews of regulations for the following reasons:

- Oftentimes regulations are designed to fix a specific problem. Without retrospective review, we won’t know if a problem has been fixed, and the rule is likely to stay on the books regardless.
- Agency economists can make their best efforts to conduct accurate Regulatory Impact Analyses at proposed rulemakings. However, predicting how people will respond to a new legal environment is an imprecise science. Retrospective review provides the opportunity to more accurately assess a regulation’s benefits and costs.
- The increasing number of regulations creates the potential for overlapping and contradictory rules at the federal level as well as between federal and state rules. Retrospective review provides the opportunity to reevaluate and clarify policy.
- Because regulators are not elected officials, agency rulemaking is less transparent than legislation passed by Congress. Regulatory review by Congress increases transparency and strengthens the link between regulations and agencies’ statutory authority for issuing them.

Retrospective review provides the key opportunity to reveal the unforeseen costs and unintended consequences of regulations. While cost-benefit analysis ahead of rulemaking provides important information, after regulations are in place this analysis is more accurate, so it should be used for current rules as well as proposed ones. Because agencies often act as proponents of their cause when evaluating their rules, their own efforts at retrospective review are biased in favor of existing regulations. In many cases, therefore, congressional review could introduce increased neutrality and rigor to retrospective review. For an example of successful retrospective review practices, Congress should look to the example of New Zealand’s Regulation Review Committee.

FURTHER READING


