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POLICY BRIEF

Regulator Discretion at the State Level: The Case of Arizona

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Periodic review of administrative rules is important to ensure that public policy is achieving desired outcomes. Such review can also improve the design of new regulations, as lessons from past experience are used in the creation and implementation of new rules and programs. A 2010 report showed that, as a result of either a governor's executive order or a state statute, 40 states had processes for the periodic review of rules.[1] In many cases, however, these reviews are quite limited in scope, focusing narrowly on impacts on small businesses; in some cases, the review requirements are not seriously enforced and meaningful review does not occur. In recent years many governors have taken further steps to guarantee that rules are reviewed on at least a one-time basis.[2]

In order to be successful when reviewing existing regulations, regulatory agencies must competently identify the rules under their purview, determine which ones need updating or eliminating, and, critically, take action to modify or repeal those rules. In some cases, however, regulators lack the legal authority to take this last step, i.e., to make substantive changes to regulations, because rules can be required by federal or state law.

THE CASE OF ARIZONA

An example of a state that requires periodic review of regulations is Arizona. State law provides that every five years state agencies review their own rules to determine if any should be amended or repealed.[3] At the end of their reviews, agencies submit a report to the Governor's Regulatory Review Council summarizing their findings and describing any proposed course of action. The statute governing the review process requires, among other things, that agencies

provide the "authorization of the rule by existing statutes" in their reports.[4] Thus, these reports offer important insights into the extent to which state regulations are authorized or required by state or federal law.

The most recent review of Arizona regulations took place in 2017. In late 2017, the Arizona Governor's Regulatory Review Council produced a report summarizing information gathered from state agencies.[5] The report shows that, as of March 31, 2017, Arizona has 10,917 rules.

With respect to the authorization for these rules, the report organizes the rules into four categories: *agency discretion*, *state statute*, *federal statute or regulation*, and *definitions or applicability*.

While all regulations must have some statutory basis, the *agency discretion* classification means that the decision of whether to adopt a given regulation is left up to the regulator by the legislature, or that a statute delegates general lawmaking powers to an agency without mandating that a specific regulation be promulgated.

By contrast, the *state statute* classification means that a governing state statute requires a specific rule in an agency's chapter of the state code, and therefore state law must be changed before an agency can significantly alter or eliminate a rule.

Similarly, the *federal statute or regulation* classification means that a rule is required by federal law, is in place because of a condition for the state to receive federal grants or other incentives, or exists as part of an agreement between the federal government and Arizona. These rules also have authority stemming from state statute, but their original authority begins with a federal mandate.

Finally, rules whose authority traces to definitions or applicability are typically issued at the discretion of the regulating agencies, but rather than add additional regulatory burdens on the public, these rules serve to add clarity to the language of other regulations or to more clearly identify who is impacted or what activities fall under the scope of regulations.

RESULTS OF ARIZONA'S REVIEW

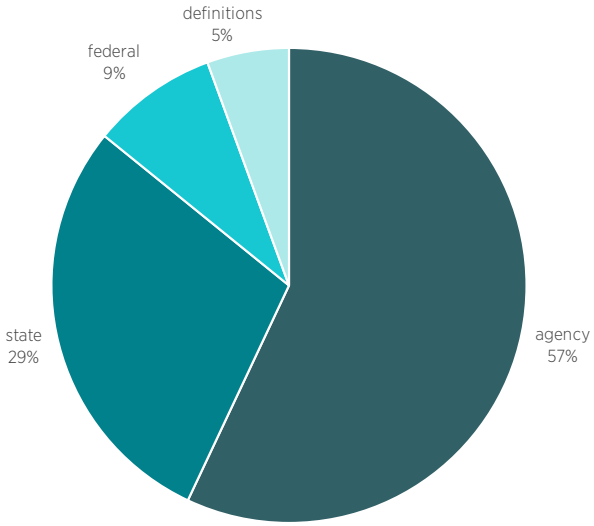
Arizona's review determined that 57 percent of regulations on the books existed at the discretion of the state regulating agency, 29 percent were mandated by state statute, and 9 percent of rules cited federal laws or agreements as authorizing the regulation. Just 5 percent of rules were classified as relating to definitions or applicability.

Judging by these numbers, it appears that state regulators have considerable discretion in Arizona, though some exceptions exist at specific agencies. For example, 83 percent of the state Water Infrastructure Finance Authority's rules are required by the federal government, as are 80 percent of the

Emergency Response Commission's rules, 58 percent of the state Radiation Regulatory Agency's rules, and 52 percent of Department of Environmental Quality's rules.

Relating to state law, 87 percent of the Private Investigator and Security Guard Hearing Board's regulations are required by state statute, as are 63 percent of the State Boxing and Mixed Martial Arts Commission's rules and 53 percent of the Department of Emergency and Military Affairs's rules.

Figure 1. Composition of Arizona Regulations in 2017, by Original Authority



Source: Office of Economic Opportunity, Governor's Regulatory Review Council, *Arizona Administrative Code Rule Inventory 17-1*, 2017.

LESSONS FROM OTHER STATES

While the findings from Arizona's review are informative, Arizona may not be representative of all states. For example, West Virginia is a state that generally requires legislative approval before new regulations can be adopted.[6] Thus, agencies have far less discretion to change or modify old regulations in West Virginia compared to Arizona because so many of the regulations in the *West Virginia Code of State Rules* are required by state statute.

Similarly, since 2017 Wisconsin has been a state that prohibits promulgation of regulations estimated to cost $10 million or more unless the legislature passes a bill that allows the regulation to proceed.[7] While this requirement may make it harder for some large regulations to be promulgated, those regulations that are adopted through this process (which will also be some of the most consequential regulations) will also be harder for regulators to change in the future because the rules will have an explicit legislative endorsement.

While there may be benefits to processes—such as those found in West Virginia and Wisconsin—

that significantly reduce state regulator discretion, such policies may also have the unintended consequence of tying the executive branch's hands in future efforts to amend regulations as needed by changing circumstances.

By contrast, the governor in Arizona has considerable authority when it comes to rule changes. For example, after the Governor's Regulatory Review Council reviews agency rule reports, the council has the authority to order an agency to amend or repeal a rule that is deemed materially flawed. If the agency fails to do so by a specified date, the rule automatically expires.[8]

CONCLUSION

The point of having periodic reviews is to improve regulations according to changing circumstances as new technologies, products, and business models emerge. Improvements could take the form of rolling back obsolete rules, reducing regulatory burden without diluting necessary protections, replacing cumbersome requirements with nimbler and smarter ones, or even strengthening regulations.

Even when a rule is required by law, the agency may still have discretion over certain aspects of the rule. On the other hand, even when the agency has broad discretion over how and whether to regulate, the agency must still adhere to administrative procedures in the state, which are set up to ensure checks and balances, public participation, and government accountability.

State legislatures should provide instructions to the executive branch regarding how to prioritize and conduct rule reviews; at the same time, state agencies should maintain a degree of discretion to modify rules as needed to fulfill their mandates, and they should routinely make recommendations to the legislature regarding regulatory improvements that require statutory changes.

It is not easy to strike the balance between statutory authority and administrative discretion. The first step toward finding that balance is to account for who has authority over each rule in the state administrative code; herein we offer such a picture for Arizona.

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NOTES

1. Jason A. Schwartz, "52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemaking" (Report No. 6, Institute for Policy Integrity, New York University School of Law, New York, November 2010), 116–24.
2. Some examples of recent executive orders related to regulatory review include Arizona Exec. Order No. 2016-03; Arizona Exec. Order No. 2017-02; Maryland Exec. Order No. 01.01.2015.20; Colorado Exec. Order No. D2012-002; Massachusetts Exec. Order No. 562; Illinois Exec. Order No. 2016-13; Nebraska Exec. Order No. 17-04; Missouri Exec. Order No. 17-03; Missouri Exec. Order No. 17-11.
3. Ariz. Rev. Stat. § 41-1056.
4. Ariz. Rev. Stat. § 41-1056(A)(3).
5. Office of Economic Opportunity, Governor's Regulatory Review Council, *Arizona Administrative Code Rule Inventory 17-1*, 2017.
6. W. Va. Code § 29A-3-9.
7. Technically, the requirement applies to regulations estimated to cost $10 million for implementation or compliance over any two-year period. Some regulations, such as emergency regulations or some rules from the Department of Natural Resources related to air quality, are exempt from this requirement. See Wis. Stat. § 227.139 (2018).
8. Ariz. Rev. Stat. §§ 41-1056 (E)–(G).