



HOW WELL DO FEDERAL REGULATIONS ACTUALLY WORK? THE ROLE OF RETROSPECTIVE REVIEW

With the volume of federal regulations exceeding some 165,000 pages, a reliable practice of review is critical to judge how well or poorly existing regulations actually work and to revise regulations accordingly. Yet despite decades of executive orders aimed at improving retrospective analysis and review, agencies consistently fail to produce useful measures of regulations' performance.

The Obama Administration's recent directives (Executive Orders 13563 and 13579) renewed an emphasis on the analysis and review of existing federal rules. In addition, E.O.13563 stipulates that the regulatory system "*must measure, and seek to improve, the actual results of regulatory requirements*" (emphasis added).

This order is a welcome step in the right direction. But has the administration's new directive spurred progress in agencies' practice of retrospective review? A year after Executive Order 13563 was issued, a new [Mercatus Center](#) study by Randall Lutter, a visiting scholar at Resources for the Future, looks at the impact on four regulatory agencies: the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the National Highway Safety Traffic Administration (NHSTA), and the Securities and Exchange Commission (SEC).

Below is a brief summary; to read "The Role of Retrospective Analysis and Review in Regulatory Policy" in its entirety and to learn more about the author, please click [here](#).

SUMMARY

This study analyzed the most recent reports on retrospective review issued by the four regulatory agencies, but found little evidence of progress toward improving measurement of actual results. It also found that very few retrospective analyses of current regulations provided sufficient information to evaluate whether benefits exceeded costs.

With the possible exception of the NHSTA, the study found little effort by these agencies to engage in retrospective analysis of existing regulations. In other words, it was impossible to judge how well existing regulations work, even by the agencies' own reports on retrospective review.

KEY CHALLENGES & SUGGESTED REFORMS

There are many obstacles to better regulatory measurement, analysis, and review. But the most prominent and problematic challenges appear to be the following: agencies' lack of impartiality in reviewing their own regulations; an inappropriately narrow focus; and a failure to promote steps to better measure regulations' actual benefits versus costs. In addition to more aggressive implementation of the president's directive, the following changes are recommended to improve agencies' retrospective analyses and reviews:

1. Promote impartial review.

Nearly all regulations are created, managed, and reviewed by the same agency, making impartial review by that agency nearly impossible. Steps to promote impartial review include the following:

- Create a data-driven environment using pilot programs.
 - Congress could authorize special pilot programs intended to collect information about regulatory effectiveness. This would help ensure that new rules have an empirical basis adequate to show that their benefits likely exceed costs.
 - Further, Congress could authorize an agency to issue regulations only after it had completed a pilot study of their likely effects.
- Congress could create a nonpartisan office charged with conducting and reviewing both retrospective and prospective economic analyses of regulations and regulatory programs.

2. Revise the scope of retrospective analyses.

The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow. In particular, this focus may have led to retrospective reviews that do not appear to use information developed from broader retrospective analyses of regulatory programs.

Further, the retrospective review plans of the EPA, FDA, NHTSA, and SEC appear to be reclassifying rulemaking and general housekeeping as retrospective review. For example, the FDA claimed savings from changes it would do in the normal order of operation, such as updates to recognize changing technology.

Considering the breadth and scope of the regulatory code, a wholesale approach focused on regulatory programs—rather than individual regulations—may provide more useful and efficient measures of effectiveness. It may also be helpful to refocus and clarify agencies' practice of retrospective review.

3. Measure outcomes, not outputs.

Historically, regulatory agencies have focused their evaluations on output; they evaluate regulations' likely benefits and costs before they are promulgated, when regulators know the least. Unfortunately, the review plans of key agencies do not specify new steps for improving the measurement of regulations' actual effects. To reliably assess whether rules or regulatory programs are actually addressing the underlying problem, agencies must increase focus on outcomes rather than outputs.

- Congress should encourage or require greater use of pilot projects to collect information on regulations' effectiveness and costs.
- New rules need to include more measures of outcomes. Agencies should promote market-based mechanisms, such as permit trading, and the use of surveys to measure the effectiveness of information disclosure requirements.

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