

RESEARCH SUMMARY

Best Practices in Crafting Regulations: How to Realize the Advantages of Performance over Design Standards

Performance standards are generally accepted as a best practice in regulatory rulemaking. Yet agencies often default to design standards instead. In “[Performance Standards vs. Design Standards: Facilitating a Shift toward Best Practices](#),” Laura Montgomery, Patrick McLaughlin, Tyler Richards, and Mark Febrizio examine the advantages of performance standards over design standards. They also consider the drawbacks of performance standards and how those drawbacks can be overcome.

A *performance standard* establishes a goal that regulated entities must achieve. It is often characterized by a threshold above or below which the entity must remain. In the automobile industry, for example, this type of standard could include a specific emission standard a vehicle must meet.

A *design standard*, on the other hand, mandates that regulated entities employ a particular means of compliance. For example, a design standard may require vehicles to be equipped with a specific type of catalytic converter to reduce emissions. The difference between the two is that performance standards allow the entity to meet the standard in whatever way it chooses (within the constraints of the law), while design standards mandate the approach it must take to meet the standard.

BENEFITS OF PERFORMANCE STANDARDS RELATIVE TO DESIGN STANDARDS

- *They permit regulated entities to choose the approach best suited to their situation.* Firms are better placed than regulators to determine what processes and actions are required within their businesses to achieve a given regulatory objective. Design standards choose the compliance technology for all businesses.
- *They allow for innovation and entrepreneurship in compliance.* Design standards often discourage or even outlaw such activity.
- *They help ensure a fair playing field for regulated entities.* When properly crafted, performance standards can help mitigate government favoritism and reduce disproportionate burdens from regulation.

DRAWBACKS OF PERFORMANCE STANDARDS—AND HOW TO OVERCOME THEM

Reluctance to adopt performance standards is often a result of the uncertainty, greater risk, and measurement challenges they can bring. Agencies also do not always make clear what must be done to achieve or satisfy the standard. With design standards, regulated entities may be confident that, so long as they implement the design, they will be in compliance.

There are several steps that agencies can take to ensure effective implementation of new performance standards:

- Set standards that are reasonable and attainable
- Focus the requirements on the ends, not the means
- Make the requirements clear and simple so that regulated entities know what they must do to comply
- Evaluate measurement costs for agencies and compliance costs for regulated entities
- Lay out a clear plan for compliance testing and enforcement
- Consider how a regulation might disproportionately harm small businesses or low-income households
- Consider large penalties for misconduct when the likelihood or cost of fraud or evasive behavior is high
- Consider potential unintended consequences, such as what kind of tradeoffs regulated entities might make following a new regulation.

LEARNING FROM OTHER AGENCIES

Agencies can learn from the actions and experiences of other agencies that have adopted performance standards. For example, a key benefit of the Federal Aviation Administration's performance-based approach is that the means of compliance are adaptable over time, able to adjust to changing market conditions and technology.

Similarly, the Federal Railroad Administration is currently reforming its regulatory approach by amending its passenger safety requirements to improve compatibility with advanced technologies such as high-speed rail. By creating more flexibility, the new approach allows firms to meet requirements in the most cost-effective way.