

RETROSPECTIVE REVIEW IN FOUR STATES

Initial efforts are encouraging, but institutionalization is limited.

◆ BY STUART SHAPIRO, DEBRA BORIE-HOLTZ, AND IAN MARKEY

Government agencies have long been required to analyze the costs and benefits of their most critical prospective regulations. Yet once a regulation is in place, discussions of its effectiveness and its costs and benefits are largely the province of academic analysis—if they're examined at all. Rarely do agencies revisit earlier regulatory decisions and few polities require sunset provisions or mandatory reviews. Moreover, once regulations have been put in place, they are rarely repealed.

In recent years, however, government-initiated “retrospective review” has become more common. At the federal level, President Obama’s Executive Order 13563 directs agencies to conduct retrospective analysis of existing rules in order to identify “outmoded, ineffective, insufficient, or excessively burdensome” regulations and to recommend revisions. His subsequent EO 13610 requires agencies to conduct periodic retrospective analyses with the continual goal to modify, streamline, and repeal existing rules.

In a 2013 *Yale Journal on Regulation* paper, Penn law professor Cary Coglianese discusses the potential benefits of EO 13563, but notes that without some form of institutionalization, its benefits are likely to be temporary at best. Other presidents have initiated regulatory lookbacks, but none have led to a culture of retrospective review in federal agencies. In a report for the Administrative Conference of the United States, Harvard public policy professor Joseph Aldy acknowledges the significant potential cost savings from retrospective review, but notes that the necessary culture of review Coglianese envisions is unlikely to develop unless agencies include plans for future reviews in current regulations. Individual

retrospective reviews by federal agencies have also been criticized, with numerous scholars focusing on the difficulties associated with agencies reviewing (and being asked to critique) their own regulations.

Among the 50 states, exactly half have imposed some form of retrospective review on other regulatory agencies. Most academic work on retrospective review has focused on the federal level; examining the states could provide additional insights. The states may have very different experiences than the federal government, given stricter constraints on resources at the state level and fewer economists at the state level capable of conducting cost-benefit analysis of existing regulations.

In order to better understand the motivations for regulatory lookbacks and the effects of those lookbacks, we conducted case studies of a few states’ initiatives. Of the 25 states that enacted look-backs from 2006 through 2013, we selected four states with varying political conditions in order to see why the lookback was initiated and how it operated in varying political climates. Our goal was to understand the motivation for regulatory lookbacks, their effects, and whether any progress has been made toward a culture of retrospective review.

FOUR STATES LOOKING BACK

The four states we examined were Delaware, Nevada, Florida, and Rhode Island. Delaware implemented its look-back in 2012. At the time, the state’s governor was a Democrat in a state where Democrats had controlled the governor’s mansion since 1993. Nevada also adopted its look-back in 2012. The state’s then-new governor was the third straight Republican to serve as its chief executive. Florida adopted its look-back a year earlier, in 2011. Its governor, a Republican, was elected by the narrowest of margins: 1 percentage point over the independent incumbent (who later became a Demo-

crat). Finally, Rhode Island's governor was a former Republican U.S. senator who switched to independent, and who ultimately became a Democrat; he implemented the look-back in 2012.

In each state we reviewed documents on retrospective review. We also interviewed numerous individuals who were involved with their state's lookback efforts.

Delaware / Efforts to adopt retrospective review date back a decade in Delaware, progressing from failed legislation, to an executive order, to legislation that passed in 2015. In 2006 and 2008, bills were introduced in the Delaware General Assembly to reform the regulatory process. As part of this legislation there were components of retrospective review. According to our interview subject, the bills were killed in the Senate with the tacit support of the governor's office.

With the onset of the Great Recession, however, the pressure to examine regulations as a potential source of slow economic growth intensified in Delaware as it did across the nation. Gov. Jack Markell (D) responded with Executive Order 36 on June 14, 2012, ordering his executive branch agencies to "conduct, in accordance with the procedures set forth below, a periodic review of regulations promulgated by such Agency to determine whether any such regulations should be modified or eliminated." The order also required agencies to solicit public input on problematic regulations and revise those regulations. It required agencies to report back to the governor within one year, and then to engage in the process again every three years.

According to one person we spoke with, Markell's motivation for the order was to avoid a retrospective review process mandated by the legislature that would be out of his control. We were told, "The initiative was either the result of the Democratic administration seeing the need to look at all the regulations that were in existence as a general view or [if you are a Republican] it was a way to stop legislation from being passed to mandate regulatory review."

The implementation of Executive Order 36 is described in a report to the General Assembly issued in June 2013. The report noted that agencies received a total of 234 comments on reviewing regulation, but only 93 of them were directed toward specific regulations (or sets of regulations). The report described the results of the review as follows:

As a result of the EO 36 process, 12 Agencies are amending or deleting a total of 144 regulations. Of that total, 83 regulations are being amended, and 61 amendments are being deleted. Please note, however, that the above total includes a number of amendments or deletions to regulations that were not technically part of the EO 36 process.

The regulatory changes described in the report are a combination of substantive changes and mere bookkeeping. The Delaware Department of Transportation modified its *Subdivision Streets Manual* in order to make development easier in less dense areas. Permitting processes for aboveground storage tanks and small

water systems were simplified. Still, many of the changes involved removing outdated regulations from the books or combining sections of code.

The individuals we spoke with were skeptical of the initiative's benefits. One said:

It was either a waste of time or a success. Lots of energy and time [were] spent on public hearings in each district.... I believe it was effective in that it made agencies look at regulations. They found that there weren't many unnecessary ones. They didn't get a lot.... Even if ones were old and outdated, they weren't enforced, so you cleaned out some file drawers. You got rid of things that weren't germane. Were there real substantive changes made? No.

While the effect of the executive order was limited, the Delaware legislature was sufficiently impressed to vote it into law. Markell signed the legislation on July 22, 2015. It largely mirrors the process set up in EO 36, but requires reviews every four years rather than three, and allows for a rotating schedule of reviews across agencies. At this point, it is too early to tell whether putting the process in legislation will result in more ambitious changes than the executive order.

Nevada / Nevada's story of retrospective review is much shorter than Delaware's. It largely consists of a one-time executive order issued by a new Republican governor. The order resulted in a wide-ranging review of regulations, but the effect is even less clear than in Delaware. Furthermore, there is no report summarizing the regulations that were modified or repealed as a result of the order, and interview subjects could not provide us with a written summary.

When Brian Sandoval (R) entered the governor's office in January 2011, one of his first acts was to issue an executive order freezing the promulgation of new regulations for one year and directing executive branch agencies to conduct a review of existing regulations. (Numerous exemptions to the freeze were added a few weeks later.) Within one year, agencies were required to identify regulations for repeal.

The motivation for the order, according to one interviewee, was the governor's determination to reinvigorate the Nevada economy:

We were in an economic downturn. The governor was looking to make government more efficient. One of our strategic priorities was an efficient state government and it fell into that. His election was key in that.

In February 2012, Sandoval issued a press release describing the results of the retrospective review. According to the press release, 654 rules were repealed and more than 1,000 would be modified. The press release itself identified only two regulations for repeal: one restricting the establishment of Internet-based driving schools, and the other requiring that toilets have labels indicating the amount of water per flush. There was no report

REGULATORY REFORM

providing greater detail as there was in Delaware. Our interview subject admitted that many of the regulations repealed were no longer being enforced, but he could not identify the proportion of repeals that fell in that category.

There has been little done in the way of retrospective review in Nevada since the conclusion of the initial Sandoval review.

Florida/ The story of regulatory review in Florida is an especially political one. While campaigning for governor in 2010, Rick Scott (R) vowed,

We're gonna freeze all regulations. Regulation is killing jobs—the paperwork, the delay, the uncertainty—so we're gonna freeze regulation and look at what we can roll back that doesn't hurt consumers."

Following up on that pledge, in his January 2011 inaugural address he called for the suspension of all new regulations and the creation of the Office of Fiscal Accountability and Regulatory Reform. That same day he signed Executive Order 11-01, following up on his directives from the speech.

In March 2011, Scott's regulatory actions were subject to a suit brought in Florida court where plaintiffs claimed he had exceeded his authority in the executive order. This argument centered on the bylaws of the Florida legislature. Plaintiffs argued that the governor lacked the authority to force agencies to suspend regulatory creation. In response, Scott issued Executive Order 11-72, which was quite similar to 11-01, but the language directing agencies to suspend rulemaking was softened.

In August of that year, the Florida Supreme Court ruled against the governor, finding he had overstepped his authority in directing agencies to suspend rulemaking. Interestingly, the directive for agencies to review their current rules was not part of the case. In response, Scott issued EO 11-211, which focused more strongly on the regulatory review aspect of EOs 11-01 and 11-72. As part of the directive, agencies under the direct control of the governor were ordered to produce yearly regulatory review plans, with the first round of results expected in July 2012. These plans would describe the rules each agency would be reviewing over the subsequent year.

In 2012, the Florida legislature also passed HB 7055, which clearly stated that EOs 11-72 and 11-211 are "consistent with law and public policy of this state." The culmination of this battle to implement regulatory review was the publication of several reports throughout 2015. The reports identify thousands of regulations across various agencies and make recommendations for the rules to be repealed or revised. The reports merely identify candidates for repeal, however, rather than reporting on progress. Furthermore, because some of the reports list individual sections of the same regulation separately, the number of rules deemed candidates for repeal is inflated.

Rhode Island/ Like Delaware, the lookback initiative in Rhode

Island has both an executive and legislative history. In 2012, legislation was enacted directing all state agencies to review existing regulations for harmful effects on small businesses. It required agencies to review the regulations over a four-year period. Later that same year, Gov. Lincoln Chafee (then an independent, now a Democrat) ordered members of his cabinet and agency heads to speed up the review and get it done in about a year-and-a-half, rather than four. Under Chafee's accelerated plan, 25 percent of the review was to be completed by Dec. 31, 2012. Another 25 percent would have to be completed every four months, with the final deadline on Dec. 31, 2013.

When we first inquired about the progress of the accelerated review in early 2013, no report on the effort was available, though one was scheduled for release later that spring. According to one insider, the impetus for Chafee's initiative was the state's economic downturn as part of the Great Recession. Of particular concern was the effect that some regulations had on small businesses, including regulations involving professional licensing boards.

A final report was issued in December 2014. Agencies reviewed more than 1,600 regulations over 17 months, quicker than the statute prescribed (but a year longer than Chafee ordered). There was a general acknowledgement that many of the rules identified for repeal represented the "low-hanging fruit." But that's largely a reality of just how difficult it is to repeal or modify regulations directly tied to the statutes, noted one individual we interviewed.

The flood of responses following a state call for members of the public and businesses to identify rules in need of reform was described as especially onerous and burdensome. "It was like death by a 1,000 paper cuts," the interviewee told us, speaking of the aggregate effect of the regulations. Interestingly, agency representatives said that most respondents "did not differentiate between federal or local regulations that they wanted to see repealed," let alone those that actually fell under state jurisdiction. For the most part, we were told the public thinks "everything is an issue." This observation corresponds with the results of a survey we conducted of business leaders in five Midwestern states in early 2014. Only one in 10 respondents was able to identify a specific state law or regulation that had a major detrimental effect on his or her business. More than half of the respondents "reported federal laws or regulations."

The results of the Rhode Island review are identified in a recent report issued by the state's Office of Regulatory Reform. The highlights include:

- Agencies identified more than 250 changes to improve the state's regulatory system.
- Almost three-quarters (70.9 percent) of the reforms have been carried out.
- There have been 48 repeals of outdated, unnecessary, or obsolete regulation.

Among the most significant regulations modified:

- The Department of Labor and Training streamlined its application for biweekly pay and made updates to the hazardous substance right-to-know registration form.
- The Department of Taxation consolidated regulations related to commercial farming and food produce.
- The Department of Environmental Management streamlined its business permitting process.

While the results of Rhode Island's retrospective review are impressive on their face, one person we interviewed drew this analogy:

This process is like watching a bathtub fill up. [The Office of Regulatory Review] can work hard to drain the tub of unnecessary regulations, but the faucet is turned on full blast. We have to develop a strategy to stop the water from coming into the tub. There has to be a very careful policy analysis of the up-front of the impact a proposed bill is going to have.

At the moment, a lot of interest is still focused on the rulemaking process. One interviewee told us, "Regulatory reform is a hot issue!" For the time being, the slowed economy in Rhode Island is credited for fueling this continuing interest.

Looking ahead, some advocates of regulatory reform in Rhode Island cite the need to build agency capacity in order to do more regulatory analysis before the proposal and adoption stage. The weak institutional powers of the state's General Assembly and its part-time citizen legislature make it unlikely that strong advocates for reform will emerge from the legislative branch, according to one interviewee. This arrangement has been blamed in part for the state's regulatory agencies being empowered with great discretion when rulemaking.

Despite its success, retrospective review was seen by some in Rhode Island as limiting, particularly in comparison to prospective reviews. It is unclear whether, despite continued interest in regulatory reform, retrospective review will be institutionalized there.

CONCLUSIONS

The four states we examined had several things in common. In each, the governor played the key role in instituting regulatory review. This was true regardless of party, but the Democratic governors had to be pushed a bit by their legislatures (which were controlled by Democrats). The rhetoric surrounding regulatory review focused on the economic conditions created by the Great Recession in all four states. This raises the question of whether retrospective review will hold appeal in better economic times.

The results of each state's regulatory review were also similar. There were press releases with impressive numbers of changes resulting from the lookbacks. Digging deeper, however, revealed that the numbers were largely inflated by counting regulations that were not being enforced, that were duplicative of other requirements, or were long out of date. Buried among the more

trivial changes were some real regulatory relief measures, particularly in Rhode Island and Delaware.

Interview subjects from Delaware and Rhode Island identified a significant roadblock to retrospective review: if regulations are required by law, modifying them will often require an act of the legislature. None of the retrospective review processes (including President Obama's EO 13563) have a mechanism to initiate legislative action. Therefore, there is an upper bound on actions that can be undertaken through purely executive action. The people we spoke with in Rhode Island also said that retrospective review was less effective if it was divorced from prospective review.

All of the states also rushed through their retrospective reviews. Meaningfully assessing the costs and benefits of a regulation takes time. Given that most of the reviews in these states (which involved looking at hundreds of regulations) took a year or two, it is reasonable to conclude that there was little careful analysis of the regulations in many states where retrospective reviews were conducted. This rushed timing may inevitably lead to focusing on regulations that are having little effect (positive or negative) and to "cleaning up the books" efforts rather than serious analysis of major, currently enforced regulations. It also may indicate that the political sponsors of retrospective review are more concerned with showing concern about the economy than actually producing substantive change.

Finally, the prospects for inculcating a culture of retrospective review are very limited. In Nevada and Rhode Island, the review was a one-time action (although Rhode Island is still focused on regulatory reform more broadly). In Florida, any new retrospective review is probably very dependent on gubernatorial preferences given the highly politicized nature of the debate over retrospective review. Even though the legislature has now approved executive-branch lookback efforts, the governor will have to want to follow through on them. Only in Delaware does a continuing program of retrospective review appear to have taken root, though time will tell if it produces meaningful regulatory reform or just yields "cleaning up the books" exercises. R

READINGS

- "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions," by Reeve T. Bull. *Administrative Law Review*, Vol. 67, No. 2 (2014).
- "Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy," by Joseph E. Aldy. John F. Kennedy School of Government (Harvard University), 2014.
- "Looking Back to Move Ahead," by Sofie E. Miller. *Regulation*, Vol. 37, No. 3 (Fall 2014).
- "Moving Forward with Regulatory Lookback," by Cary Coglianese. *Yale Journal on Regulation*, Vol. 30 (2013).
- "Regulatory Policy: What Role for Retrospective Analysis and Review?" by Randall Lutter. *Journal of Benefit-Cost Analysis*, Vol. 4, No. 1 (2013).
- "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," by Michael Greenstone. *New Perspectives on Regulation*, Vol. 13 (2009).
- "Trying to Float in a Sea of Regulations: Perceptions and Reality about Regulatory Overload," by Stuart Shapiro and Deborah Borie-Holtz. SSRN Working Paper #2496436, 2014.