

Statement of Neil Eisner
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before the
Senate Subcommittee on Regulatory Affairs and Federal Management
on
“Examining Federal Rulemaking Challenges and Areas of Improvement Within the Existing
Regulatory Process”
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Chairman Lankford, Ranking Member Heitkamp, Members of the Committee. Thank you for inviting me to testify today on this important topic. I understand that this hearing is intended to examine today’s federal rulemaking process and address areas that need improvement. I also understand that there will be other hearings on this subject. As one who has worked in this area for many years, I appreciate the effort of the committee to hear from a diverse group of people in a bipartisan effort to examine the need for improvements.

I have worked on regulatory issues for many years. For a little over a year, I was the Acting Assistant Chief Counsel for Regulations and Enforcement at the Federal Aviation Administration (FAA). I then moved up to a newly created position in the Office of the Secretary of Transportation (OST) as the Assistant General Counsel for Regulation and Enforcement, where, for 35 years, I oversaw the regulatory activities of the entire Department. Since my retirement from the Federal government, I have been a consultant on a variety of administrative law issues. I have also been an adjunct professor at American University’s Washington College of Law for over a decade, where I have taught classes on Administrative Law and the Federal Regulatory Process. I am also a Senior Fellow in the Administrative Conference of the U. S. (ACUS) and Chair of its Rulemaking Committee. In addition, I am a former Chair of the American Bar Association (ABA) Section of Administrative Law and Regulatory Practice and currently a Senior Fellow in the Section. I have written articles for scholarly publications and spoken in many forums, including law schools, on administrative law matters, particularly rulemaking.

Based on my experience at DOT, which has one of the largest regulatory programs in the Federal government, I have found rulemaking to be a very important tool for the government in addressing problems we, as a nation, face. I believe the process generally works very well. It can be improved, and many agencies are voluntarily making continuous efforts to do that. However, we must be very careful in identifying the problems that need fixing, particularly determining whether the problem results from a deficiency in the underlying procedural requirements or under the authorizing statute. We also need to determine whether the problem results from the failure of only some agencies to follow existing requirements; we should not amend good requirements, requirements that are well understood after many years of use, because some officials are ineffective in implementing their rules. We should not add potential or unnecessary burdens to a process applicable to all agencies where those burdens may slow

down or stop the issuance of “good” rules or the rescission of “bad” rules because of implementation failures of a few. We also have to be mindful that such action could also convince agencies that have authority to implement their statutory obligations through either rules or orders to use the adjudicatory process, which generally would not be as effective as rulemaking and would not require such things as economic analyses.

I would like to provide some details to illustrate how the process works well and the many positive, voluntary actions agencies have taken to improve the process – to make it more efficient and effective. We have to encourage more of this. I would also like to offer some specific suggestions on what can be improved by this Committee and the Congress.

The Administrative Procedure Act

The Basic Process. The basic statute governing rulemaking, the Administrative Procedure Act (APA), established an excellent, relatively simple process. The APA requires “notice and comment” processes that open the government decision making to public participation; the exceptions that are provided for “good cause” are reasonable and rarely misused. The agencies are required to respond to the public comment received and provide a reasoned basis for their final decisions, and, importantly, final decisions are subject to judicial review. The statute also provides the public the right to petition agencies for the issuance, amendment, or repeal of a rule. Almost 70 years of agency experience and court decisions have provided a solid basis for determining what is acceptable and what works well.

Related Requirements. Since the APA was passed, dozens of additional requirements have been directly or indirectly imposed on the regulatory process through new statutes, executive orders, presidential memoranda, OMB orders, and other documents. Even if everyone agreed that they all added worthwhile requirements, they have created problems just by the existence of so many, from so many different sources. Some of the requirements cause confusion by creating overlapping requirements or using different terms for essentially the same thing (e.g., “major” and “economically significant” rulemakings). At DOT, we created a summary document of all of the requirements and would update it as necessary. Despite that, Departmental staff found it difficult to keep up, and rulemakings were delayed when documents had to be returned to the initiating office to make the necessary changes. A consolidation of the requirements, without substantive changes, would probably be welcomed by many of the participants in the process. However, it would be very difficult to achieve, because there are so many different sources. Some would object to consolidation, because they do not want codification of executive orders, since it would make them difficult to change or update. Perhaps that could be addressed by separate, but coordinated executive branch and legislative branch consolidation.

Executive Branch Oversight. Direct agency and departmental oversight of the process as well as individual rulemaking actions is an important element for ensuring effectiveness and efficiency. Earlier in my career, I heard, too frequently, from senior officials about their frustration that they were first made aware of significant agency proposals when it was too late to affect the decision making. That was one of the reasons why my office was created. DOT has taken a number of steps over the years to address this and provide further organized oversight. When my office was created, a Departmental order on DOT’s regulatory policies and procedures was issued. The order established requirements for agendas of all rulemakings, early coordination among the agencies, economic analyses for all rules, retrospective reviews of

existing regulations, and enhanced public participation. Over the years, additional steps were taken, such as establishing a formal retrospective review plan and schedule. The Department also developed training on the rulemaking process and such specific topics as economic analyses and impacts on small entities. The Department also created what was the first electronic, internet-accessible public rulemaking and adjudicatory docket in the government; among other things, this helped the public and the agency more readily follow the rulemakings and efficiently comment on or review comments. It created an electronic tracking system that permitted senior leadership to more easily follow the progress of rulemakings.

Perhaps one of the most valuable steps DOT took was the creation of a program for meetings between the Deputy Secretary, General Counsel, and other senior OST officials with a different operating administration each week to review all of the agency's rulemakings. This required senior officials in OST and the agency (usually represented by the Administrator and other senior agency officials) to keep apprised of each rulemaking's details and issues, so that they could effectively discuss those rulemakings starting at the earliest stages. They would discuss various issues, including concerns about compliance with the APA and other requirements, before decisions were made. Where more in-depth discussions were needed, The Deputy Secretary would schedule separate briefings. To get that level of participation so early in the process was quite valuable. The officials probably found that it resulted in better decisions and that the earlier attention saved everyone considerable time at the end of the process. Indeed, the senior officials found the meetings so valuable that they started adding other subjects to the meetings, such as reports to Congress and responses to National Transportation Safety Board (NTSB) recommendations.

However, it is often difficult for senior officials to appreciate the need for early involvement. But these are the people I would sometimes be surprised to learn had no idea about things like the costs of, or legal problems with, rulemakings they were promoting; and this was in a Department that did a very good job with its rulemaking responsibilities. Although these were rare instances and the failures were remedied, they resulted in wasted resources pursuing a faulty proposal. Initially, to get them to spend time in early discussions on rulemakings or in training courses about how to effectively apply the process requirements, you need to convince the very highest officials in the agency and department to support or even push it. It would be very difficult for a legislature or President to mandate these kinds of activities.

OIRA oversight is also important and valuable. OIRA provides very good guidance on how to prepare economic analyses. It ensures appropriate coordination with other agencies. It provides a check on the objectivity of an agency's decision. Simply reminding some agency officials that their decision must undergo OIRA review before a proposed or final rule can be issued may cause agency officials to change their mind. However, some also argue that OIRA focuses too much on keeping costs down rather than attaining a reasonable level of benefits. They also criticize OIRA for causing unreasonable delays in rulemaking, a subject of an ACUS Statement in December of 2013 on "Improving the Timeliness of OIRA Regulatory Review." To the extent these OIRA "actions" reflect the views of the President, however, it would be difficult to effectively address them through legislation, and legislation could simply increase burdens on the agencies.

Judicial and Congressional Oversight. Judicial review is an important part of the success of the APA process. The agencies routinely consider it during the rulemaking process. They

closely review court decisions involving the process to determine whether they need to modify their implementation. They know that “cutting a corner” or taking a chance might result in their having to do the entire rulemaking over again. I recognize that litigation can be a costly and lengthy process. But it can also create serious problems for agencies, especially if they get a reputation in the courts for not following the legal standards.

Congressional oversight can also be very effective. Simply setting up a hearing gets the attention of senior officials; they do not want to be in the position of trying to explain something that is difficult to defend. Unsatisfactory answers in the hearing may also make it clear to Congressional committees that fixes to the substantive statutes of offending agencies are necessary. Less formal actions can be taken, also. For example, committee staff can use regular meetings with agency staff to explore perceived problems. Members or committees could ask the Government Accountability Office (GAO) or agency Inspector Generals (IGs) to gather necessary data to determine whether there are problems with particular agencies, such as failing to prepare required analyses. Focused legislation could be used to address particular problems. For example, a “failing” agency could be required to create an independent office that reports directly to the head of the agency, an “ombudsman,” to receive complaints about the agency; the ombudsman could be authorized to protect the names of the complainants, determine whether the complaint is legitimate, and if he or she cannot get the problem fixed, report it directly to the head of the agency or department and, if necessary, to Congress. Because of the costs involved in creating such an office, Congress should only use this where other steps are not fixing the problem. Even discussions of the possibility of such legislation might result in appropriate fixes. Finally, the Committee could consider changes to the Congressional review provisions in the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the way it is used. I do not believe it is necessary for that statute to require that “hard” copies of all final rules and supporting documents be submitted to both houses of Congress and GAO before they can take effect. It creates unnecessary expenses for the agencies and creates some confusion about whether or when a rule takes effect. It also subjects Congress and GAO to a significant paper burden. These documents are readily available via the internet, and the statute should be amended to eliminate the requirement for the agency to submit them. The Congress should also consider better ways to use the final rules. For example, committees could spend more time closely reviewing the rules from agencies they believe are problematic or to look at particular issues such as effects on small businesses or State, local, and tribal governments.

Consideration of Changes. To the extent the Committee does consider changes to the APA or other generally applicable statutes, one important factor you should keep in mind whenever you identify a problem is that the agency may not be the cause that problem. An agency may not adequately address public comments, it may not provide a reasonable basis for its actions, or it may take too long to make a decision, but those failures may have been directed by officials outside the agency. It also may have been made by a political appointee in the agency who disagreed with career staff advice. Those decisions may or may not have been justified, but any legislative changes may come after the official has left. Changes to the APA will not necessarily fix the problem. More importantly, even if the problems are due to agency failure, changes to the APA would apply to all agencies. Imposing extra procedural or analytical requirements on those doing a good job may result in those agencies foregoing the voluntary and innovative steps they may otherwise take to improve their particular rulemakings. For example, the additional requirements may cause them to not issue an ANPRM or permit a reply comment period. It may

lead agencies to take less effective steps, such as adjudication or guidance in lieu of a binding rule.

It is also important to note that changes to a 70-year old statute would have to be very carefully drafted to avoid unintended consequences. For example, FAA issues thousands of “airspace” rules or “airworthiness directives” every year that everyone wants and often needs quickly; they are “rules-of-the road” telling pilots things like the amended approach path to take to particular runway at a particular airport or routine fixes that need to be made to an aircraft to address problems; occasionally there are some that warrant special handling, and the agency gives it the necessary extra attention. Inadvertently making a change that delays those kinds of good rules could cause significant problems. Moreover, extra analytical requirements could prevent an agency from deciding to rescind an unnecessary rule or amend another one to keep up with changes in the state-of-the-art, because it does not have the resources to meet the new requirements.

Public Participation. One of the most troubling aspects of the APA process is the perception that agencies do not take public comment seriously, that they do not make changes to their proposed rules based on those comments. It is troubling because DOT and many other agencies I am familiar with do take them seriously.

That is why agencies take many extra, voluntary steps to increase effective public participation. They seek comment before they issue notices of proposed rulemaking (NPRM), through such steps as advance notices, requests for comment or data, and public meetings. They may provide reply comment periods so that the public can respond to what others have said. They also issue supplemental notices of proposed rulemaking (SNPRM) and interim final rules (IFR), usually because they have made changes on which they want, but may not be required to get, further comment. They provide early notice of pending rulemaking actions through agency websites and the *Federal Register*. They have processes for interested people to sign up on a list serve to receive notification when the agency places proposals or related documents in the rulemaking docket. They may have agency experts available prior to the start of a hearing to explain their proposals to those who need help. They may hold hearings in the evening to make participation easier for those who cannot attend during the day. They are increasingly turning to technology to make effective participation easier; they have tried internet technology, such as blogging sites, to see if that may allow better participation and exchange of ideas. They have explored the use of simple forms on the internet to see if that can ease submission. They provide simple instructions for the public on how to submit effective comments.

With respect to consideration of comments, at DOT, significant comments are discussed in senior-level briefings. Power point presentations often include multiple slides covering the comments and the changes made as a result of them. The participants in the meetings – including inter-agency reviews – discuss the merits of the comments and whether more should be done. Finally, sometimes agencies will make decisions to completely withdraw proposed rules because of the adverse comments they received. When final action is taken, some will be accompanied by press briefings and releases that note the changes made.

The bottom line is that agencies do consider comments and make changes, but many in the public think they do not. The perception is important because that may mean that many who should participate in the process will not. It is also important because, when people believe that

they have been given a fair opportunity to participate, even if their recommendations are not adopted, they are more likely to accept or comply with any eventual rule.

This is a difficult problem; there are no easy solutions. Agencies simply have to keep trying to find ways to make it clear they do consider comments. For example, I believe that, when set up properly, negotiated rulemaking can be very effective. One of the reasons for this is because members of the public get to see the decision-making process up close and personal. They get to see how difficult it is to make a decision that will satisfy everyone on all issues, they see the agency representative ask good questions and acknowledge that he or she is receiving helpful information, and they may witness the agency representative change his or her position on some issues. As another example, we had a rulemaking where the oversight officials thought the agency and the affected industry were not “hearing” each other; the agency had issued multiple proposals trying to clarify its position and industry kept responding that the agency had it all wrong. We recommended the agency have a facilitated public meeting. The facilitator was a neutral party who could delicately nudge the participants, including the agency, to listen better. It worked. More use of techniques like this might make it clearer that the agencies are listening, even when these techniques are not used. I do not believe legislation can fix the problem, but the Congress may be able to help, for example, by providing agencies the resources they need to use facilitated processes or otherwise providing incentives to agencies who need to do more of some of the things noted above.

Public Petitions. Although my experience at DOT was that there were relatively few written public petitions, maybe because there was a very large number of other, less formal methods for agencies to receive information on the need to issue, amend, or repeal a rule. Agencies may learn about problems when they are visiting a business or attending meetings with industry and public interest groups about compliance with existing rules. Reports on things like accidents or environmental releases may make it clear to an agency that a change is needed. Too many requests for interpretations and exemptions or enforcement or litigation experience may indicate a problem. Government entities such as the NTSB, IGs, or GAO may make recommendations for new or changed rules. I believe those methods are very effective and are well utilized at DOT. The right to petition is, of course, always available, and in December of 2014, ACUS adopted some valuable recommendations on how agencies can make the process more effective and timely, many based on best practices already in use.

Compliance Programs. Another frequent complaint I have heard about rulemaking programs is that agencies’ compliance programs were based on a “gotcha” philosophy followed by unfair penalties. My experience at DOT was the opposite. DOT’s general policy was that it wanted to achieve the highest level of compliance possible with its rules. DOT did not want to have to impose a penalty for a violation. They achieved this through a variety of steps. The agencies would do training or issue helpful guidance after they issued some rules. They would offer contact information for people who needed help. They would post commonly asked questions and answers on the internet. When they visited a regulated entity, they would offer advice on problems they saw. They would advise companies they visited for a compliance review about their right to complain and protections against retaliation. They would often hold off on a penalty to give a company the opportunity to fix the problem. In imposing a penalty, they would consider the company’s ability to pay. If they found it necessary to impose a penalty, their goal was still to advise the company on how to fix the problem.

The Department, however, regulates over 500,000 companies and as many as 8 million employees. Some companies or individuals are very careless. Some intentionally ignore requirements. In my experience, the Department's enforcement actions were well-justified. There were occasions where the agency's actions were not justified, and when higher officials found those kinds of problems, they were appropriately addressed.

Other suggestions. I do have one relatively minor suggestion, noted below, for the Committee to consider. The APA provides exceptions to the informal rulemaking requirements for matters relating to public property, loans, grants, benefits, or contracts that may no longer be appropriate. Many agencies voluntarily apply the APA requirements to those rulemakings and the ABA and ACUS have recommended such action, but there has been some movement recently to reverse the voluntary coverage. This Committee should consider whether the APA should be amended to delete these exceptions.

Analytical Requirements

One of the most contentious issues in the rulemaking arena appears to be the quality of the processes for identifying the problem – often referred to as a risk assessment – and the analyses of the alternatives for fixing the problem; sometimes combined into one document, these analyses can cover overall costs and benefits and cost-effectiveness as well as particular effects on the environment; State, local, and Indian tribal governments; unfunded mandates; energy; paperwork; privacy; foreign commerce; and other matters. My experience has been with DOT agencies that are generally recognized as doing a very good job on these analyses or assessments. Significant rulemakings are subject to considerable scrutiny and challenge within the agency and during the review conducted by my prior office, and review by OIRA and other affected Federal agencies, including the Small Business Administration's (SBA) Office of the Chief Counsel for Advocacy. Proposed rules are then subject to public comment and any final rule undergoes the same level of scrutiny. Some agencies have large staffs of analysts and others may have to rely on outside contractors.

I believe the procedures for conducting these analyses are very good. OIRA has prepared an excellent document, a circular on "Regulatory Analysis," that is valuable for the economists and other analysts but also easily understood by other professional staff involved in the decision-making process. Some analysts make mistakes, some analyses are weak. This may result from a variety of factors, such as time constraints or inadequate resources. It may also result from senior officials making decisions first and then directing that analyses be prepared to justify the decision. This, however, is not a problem that can be addressed by additional analytical requirements. Oversight by the agencies, OIRA, and others, complemented by judicial review and Congressional oversight help. The appointment of good people and training for agency officials also can help. DOT provides the oversight and the training, and I know other agencies also do so, but sometimes you cannot get the ones who need it most to attend the training.

I have also found that the problems that are raised with the analyses at DOT are not generally over the quality of the analyses or whether they are even done. The issues are generally over such things as assumptions that are made when there is inadequate data available. When agencies realize they have limited data, they will generally note this in the proposed rule's preamble or the analysis and ask the public to provide what data they have, often by asking specific questions. Sometimes they will hold public meetings or take other steps to gather such

information from the public before they start a rulemaking. They must also be careful not to violate the provisions of the Paperwork Reduction Act in their attempts to gather data. Some requests are very successful. Others are not, perhaps because some parties with good data disagree with the need for any regulation and do not want to aid the agency's efforts.

When there are disputes about the data, good agencies will take additional steps to try and address the concerns raised. For example, when the National Highway Traffic Safety Administration (NHTSA) issued a proposal to establish an automatic occupant protection rule, it received comments from some that its estimate for the cost of an airbag was much too high and from others that it was too low. Although airbags were not available in motor vehicles at the time, there were some available for testing. NHTSA did a "tear down" study of one, priced each part in the marketplace, kept track of the time to rebuild the airbag, used standard industry wages for the time, added in a standard profit, and came up with a cost number. In its cost-benefit analysis, it also included a "sensitivity analysis" that looked at the effect of the low and high numbers suggested by commenters as well as the number from its "tear down" study on the cost-benefit ratio before a decision was made on what to do in the final rule.

I have found that many who have complaints about the analyses are generally not aware of the depth or sophistication of the analyses. Some concerns are legitimate, and I have seen changes made to address those concerns before final decisions were made. Furthermore, I have found that the economists are constantly trying to improve their techniques and data sources and will proudly note how much better today's analyses are than those made 35 years ago. What is needed in this area is for OIRA to continue to update its guidance, as necessary, and for the agencies to be provided the necessary resources for training and other activities to learn how to do a better job.

International Regulatory Cooperation

As the countries of the world become more economically inter-related, it becomes more important to ensure that we consider the effect of that on the costs and benefits of our regulations. We can decrease compliance costs and increase safety, for example, by having one, uniform requirement throughout the world for the placard placed on hazardous material packaging; anywhere in the world, emergency responders will know how to handle a problem. The U.S. regulatory agencies understand this and spend substantial time working with their counterparts around the world. We must cooperate with the other nations to ensure that our regulations do not require their citizens to violate their laws to comply with our rules and vice-versa. We must ensure that our citizens can participate in the rulemakings of other nations as easily as they can participate in ours. Most importantly, we must take advantage of opportunities to coordinate our regulatory activities so that we can lower the cost of implementing our respective rules while increasing their benefits. Many people have legitimate concerns about how much we can effectively accomplish; for example, we must ensure that each country will actively enforce the requirements on which we agree. If we can do this, the benefits can be significant.

A good example of this occurred a number of years ago at DOT. Congress mandated that the Department convene a negotiated rulemaking to develop model standards for parking permits for

people with disabilities. This was not an area that DOT regulated, but it was an area in which many Members of Congress received numerous complaints. People with permits from one State would often have problems using it in another State. Hence, the need for the statute and the effort of the Department to work out a consensus agreement to develop essentially one standard for the permits that could then be used everywhere in the U.S. My counterpart in the Canadian government called me to ask if they could participate in the negotiations; her point was quite simple: it would be even better and potentially less expensive for the permit holders if the standard was uniform throughout the U.S. and Canada. We agreed, and the resulting negotiations were successful. There was one potential obstacle that we were able to work around. A negotiating committee convened by the U.S. government with more than one non-government member requires compliance with the Federal Advisory Committee Act (FACA). Foreign government representatives are not permitted to be members of U.S. advisory committees. They can attend and speak at the meetings, but they cannot vote. The committee saw the advantages of developing a model that was acceptable to all members as well as Canada, and they were successful in accommodating Canada's concerns. In other situations, it may not be that easy. Congress should consider ways to address this issue, where appropriate, to permit more effective and efficient negotiations.

Retrospective Review of Existing Rules.

Across the Federal government, I have seen a clear recognition of the need to periodically review existing rules to see if they are working as expected. Despite this, many people do not believe that the agencies do a good job; some argue they do not do enough reviews or do not perform an objective analysis. Based on my DOT experience and an article I co-authored a couple decades ago on "Federal Agency Review of Existing Regulations," I see four major issues. First, I think many miss the extent to which a well-run agency is reviewing its existing rules on an informal but regular, often daily, ad hoc basis. Second, some agencies have formal programs to schedule and conduct reviews; they may successfully conduct all of them, but often cannot, because of competing priorities. For example, the President may require a review of all regulations over a relatively short period of time or Congress may mandate a lengthy set of new regulations that affects the resources the agency has for its formal review program. A presidentially-required review may achieve impressive results in a short period of time but usually does not permit the agency to conduct the extensive and thorough research and analysis some rules need. Third, for many decades, the agencies have lacked the resources needed to do all the reviews they wanted; recent budget cuts have compounded that problem. Finally, and closely related to the third point, many do not appreciate the time and depth of the analyses it takes to do a thorough review.

As I noted above with respect to petitions, there are a number of ways agencies obtain information about the need to revise or revoke a rule. Some of the information, such as an NTSB recommendation or numerous requests for an exemption may result in the identification of a problem that warrants thorough analysis. Some information may warrant immediate action to at least identify a quick fix until further analysis can be done. For example, within hours of an air carrier accident, senior FAA officials may meet to discuss whether there were shortcomings in existing rules that should otherwise have prevented the accident. After an accident where failure to deice the aircraft was a factor, FAA quickly held a public meeting to review existing

requirements; there was agreement that more was needed, and before the next winter FAA developed and issued a proposed and then a final rule. Some data, such as motor vehicle accident data, is received on a regular basis and compiled annually for public dissemination. This kind of data is used, among other things, for regular studies of the effectiveness of the rules an agency has issued. NHTSA has prepared excellent reports on the effectiveness of its rules based on this kind of data; an excellent example is one issued in January of this year, “Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012 – Passenger Cars and LTVs.”

DOT has made a serious effort for over four decades to conduct regular, retrospective reviews – starting before executive orders or statutes imposed specific requirements. These reviews have not been limited to the informal processes noted above.

While I was part of the FAA regulatory team in the late 1970’s, FAA developed an approach to allow its staff to review major parts of their regulations in an organized, coherent manner that provided significant opportunities for public participation. The program office responsible for conducting the reviews asked that my office assign one or sometimes two attorneys to each review; the assignment was a “highest priority” for the attorney -- i.e., he or she would always be available when needed. As an example of these reviews, one of the first was of FAA’s aircraft certification regulations. It covered 11 of FAA’s 73 “Parts” of the Code of Federal Regulations (CFR). A “Part” covers numerous sections. FAA started by asking for public suggestions for changes and received almost 2,000. They then used public hearings and other steps to discuss the suggestions and subsequently issued 8 NPRMs of approximately 200 pages each, proposing about 600 changes. They adopted approximately 500 in 9 final rules averaging about 200 pages. The process took 8 years to complete. It was a massive but very successful effort. However, it was only a fraction of the agency’s existing rules. FAA started others. The problem was resources. Just before I left FAA, the program office asked me for another “first priority” attorney. I had no one to give them; all of my attorneys were assigned to existing reviews. The agency no longer does reviews like this.

As another example of the problems, the predecessor agency of the Pipeline and Hazardous Materials Safety Administration (PHMSA) had set up a special office in the 1970’s to conduct regulatory reviews. By the time my co-author and I completed the study for our article noted above, agency staff advised us that, with an increasing workload resulting from statutory mandates, the office was primarily devoting its time to developing new rules. The “review” office had essentially disappeared.

DOT continues to take steps to address the need to review existing rules. In 1998, the Department established a 10-year plan and schedule for reviewing all of its rules, with some exceptions. In 2008 it published a new schedule for the next ten years. The plan and schedule are published as part of the semi-annual Regulatory Agenda and posted on the Department’s regulatory website. The Department encourages public suggestions and participation in the process and provides very brief status updates in each Fall publication of the Agenda and on its website.

One important point to stress, because of some misunderstanding about how some agencies conduct reviews (e.g., some people question why agencies do not announce dates for reviews of final rules when they issue the final rule), is that many agencies perform reviews based on rules

as they appear in the CFR. Some final rules do create new programs, but many amend existing rules. Oftentimes, those amendments cut across many existing rules or programs. A final rule, for example, amending a definition may have significant effects on rules for medical approvals, licensing, operations, and equipment. It may make more sense for the agency to review each of those subject areas separately, including the effect of the definitional change on that subject when the subject is reviewed.

Other departments and agencies are making similar, conscientious efforts to review their rules. For example, the Department of Labor (DOL), is just completing a public participation phase of a review that includes the use of Idea Scale, a software program that allows the agency to have interactive public participation.

ACUS adopted a recommendation in December of 2014 on “Retrospective Review of Agency Rules” that provided many valuable suggestions for agencies and also accented the need for budgetary resources. Considering the limited resources available to agencies, I would not recommend any legislative changes imposing general, additional or different requirements. Instead, if Congress identifies particular agency problems, it could encourage or mandate specific changes for them.

Agency Innovation

One of the things I think illustrates the effort of many agencies to develop high quality rules – rules that are effective and reasonable – is the many voluntary, innovative steps they have taken to improve the process. I have mentioned some of these above, particularly with respect to public participation. There are a few others worth highlighting.

In the 1980’s, the senior career staff of many rulemaking Departments and agencies created an informal group to ease communication about a variety of issues that they all confront. For example, they have discussed issues about the implementation of new rulemaking process requirements, they have combined their expert resources to offer employee training, they have shared information on the values they use for “statistical lives” in cost-benefit analyses and the methodology for developing those values, and they have shared information about important court decisions or pending legislation. Based on the collegial relationships we developed, we also made it much easier to work together. For example, when DOT and the Department of Interior (DOI) were having problems resolving how to handle issues concerning aircraft-bird strikes, my contact at DOI and I talked about it and set up a meeting among the agencies’ staffs that helped resolve the matter. DOT was the first agency to use the negotiated rulemaking process, generally a voluntary process that, if set up properly, can lead to very effective rules. EPA followed closely behind us, and we quickly started sharing best practices. For example, EPA obtained good results by providing a one-day training course on the basics of effective negotiation. We were very interested in the idea, so they came to our next negotiation and provided the training so we could observe and evaluate it. When DOT started to work with the Cornell University e-Rulemaking Initiative (CeRI) to examine whether the use of blogs could help improve public participation and the quality of comments, we invited other agencies who were interested in the project to join us in the initial discussions with Cornell so that we could try to design a project that would result in a report that was valuable to other agencies. When DOT

created software to create a Rulemaking Management System (RMS) that tracked the status of all rulemaking actions in the Department and created the ability to generate a range of reports, allowed electronic submission and circulation of documents for review by others in the Department, and created an electronic filing system, we shared what we had done with other departments and agencies and provided the software to those who were interested.

A number of agencies have voluntarily created regulatory websites that provide the public with a significant amount of information about the substance of the rulemakings they are working on as well as the process for developing the rules. DOT's site -- <http://www.dot.gov/regulations/> -- for example, provides information on the rulemaking responsibilities of the operating administrations and OST as well as contact information for people who can provide more information; a description of all the process requirements applicable to DOT rulemakings, with links to the requirements; a description of how the rulemaking process works, including a section on how to prepare effective comments, particularly written to help small entities and individual commenters; a description of the economic values used by DOT in preparing cost-benefit analyses; information about DOT guidance documents and requirements governing DOT's use of them; reports on the status of DOT's significant rulemakings; reports on the effects of DOT rulemakings, designed to help those interested in particular issues, such as rules that may have effect on small entities, or European Union nations, or paperwork burdens; reports on regulatory enforcement and compliance data; information that is intended to help small entities and state, local, and tribal governments effectively participate in DOT's rulemaking process and implement any final rules; information on DOT's retrospective review plan, a description of the process, and a list of the reviews; information on DOT's efforts with respect to plain language drafting; and information about DOT's blog project with CeRI. EPA and the Federal Communication Commission (FCC) are examples of two other agencies with websites they created to help the public. It takes a considerable amount of time to create the sites and keep them up to date.

The People

I would be remiss if I did not mention the people I worked with in and out of the government who spend a great amount of time to try to make the process more effective and efficient. The many career people I worked with in DOT as well as in many other agencies were very bright, capable people who worked very hard to develop solutions to the problems they faced. They enjoyed and were very proud of their work. I worked through six Presidential Administrations and many more changes in DOT political leadership, and there, too, I generally saw people who understood their responsibilities, personally participated in many of the "debates" among their staffs, and were conscientious and objective in their decision making.

Many senior political and career officials throughout the government and private citizens devote considerable time to participation in the work of ACUS and other organizations such as the American, D.C., and Federal Bar Associations, as well as associations for economists and other professional experts involved in rulemaking issues. They use their expertise and experience to help develop recommendations to improve the rulemaking process or to make presentations in training programs or courses. I know I personally benefited from my exposure to their expertise and experience.

These people all help make the process work well and continually get better.

I believe that Federal regulations can and do effectively address problems that the marketplace cannot fix. I have personally dealt with people around the world who envy our system and want to learn from our experience. I also recognize that the process can be used ineffectively, even by people with the best intentions. Those who are proud of their achievements also know that there is always room for improvement, and they work hard at that. We just need to be careful how we seek those improvements.

I want to thank you for the opportunity to speak with you about these important issues. I look forward to any comments or questions you may have for me.