

Institutional Dimensions of Retrospective Analysis of Environmental Regulation

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Motivation

- ▶ Repeated calls for retrospective regulatory review (ex post regulatory impact assessment, program evaluation, look-back, etc.), since at least the 1970s.
- ▶ These efforts have typically:
 - ▶ Focused on each rule taken one at a time.
 - ▶ Focused on reducing cost.
 - ▶ Focused on asking the regulatory agency that issued the rule to conduct the retrospective analysis of the rule.
- ▶ Despite decades of effort, limited success of retrospective review.
- ▶ Causes are multi-dimensional, but institutional design may play a key role.

Outline of presentation

- ▶ What do we mean by retrospective review?
 - ▶ What are the goals?
 - ▶ What are the tasks?
- ▶ Historically, what has been the institutional framework for retrospective review – e.g., who does it?
- ▶ What is the full suite of institutional options?
- ▶ How could we optimally align the goals, tasks and institutional options?

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Goals of retrospective review

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- ▶ “Rule Relevance” Goal
 - ▶ Is regulation still legally authorized, necessary?
 - ▶ Does it apply to a currently existing risk?
 - ▶ Is it redundant with other rules?



Goals of retrospective review

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- ▶ “Rule Improvement” Goal
 - ▶ Costs
 - ▶ Benefits
 - ▶ Cost-effectiveness
 - ▶ Ancillary Impacts
 - ▶ Economic Efficiency, Maximizing Overall Net Benefits
 - ▶ Distributional Equity



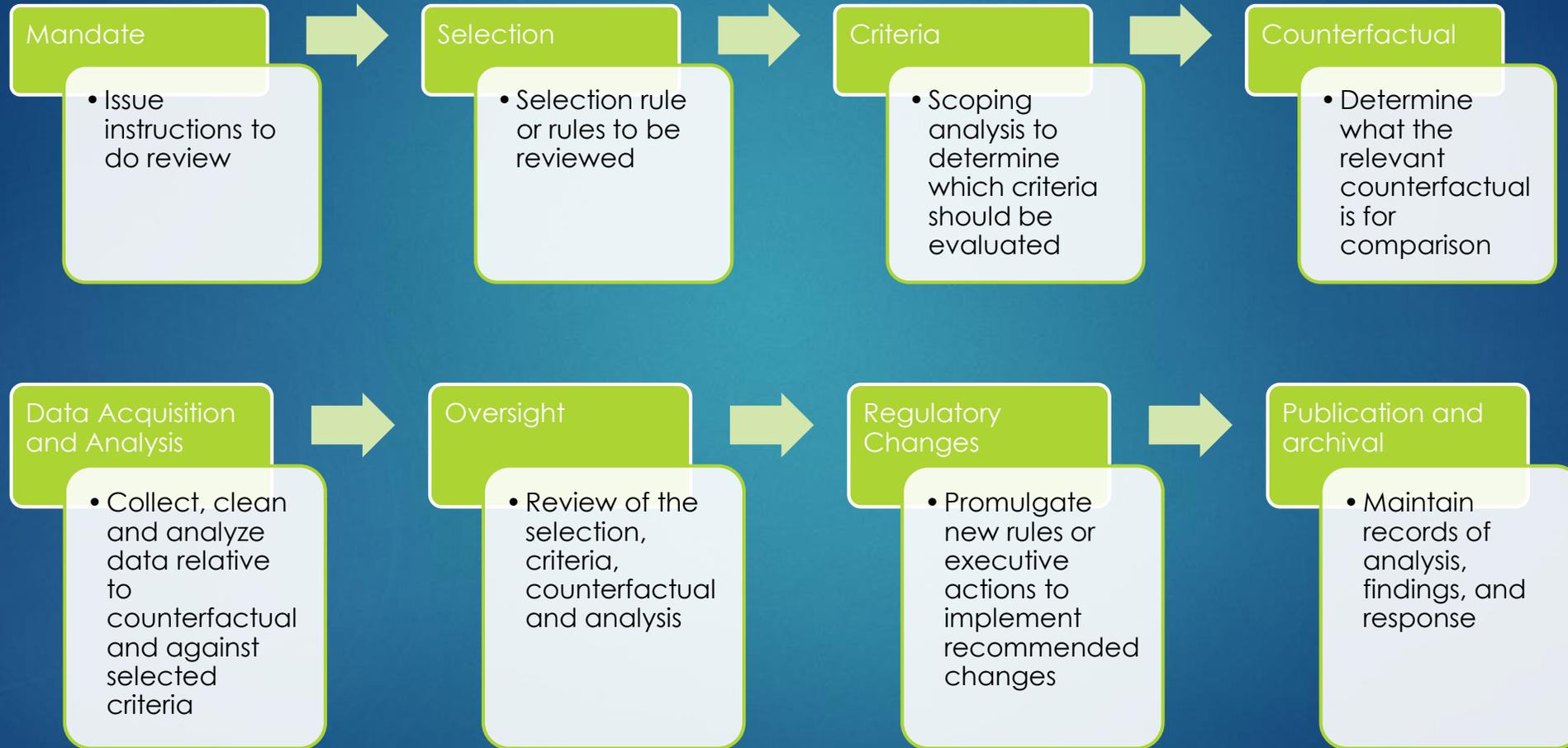
Goals of retrospective review

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- ▶ “Regulatory Learning” Goal
 - ▶ Comparing performance of alternative policy options
 - ▶ Improving accuracy of methods of policy analysis, e.g. ex ante regulatory impact assessments
 - ▶ Understanding cumulative and interactive effects of multiple rules



Tasks of retrospective review



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Retrospective Review in Retrospect

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- ▶ Our paper details decades of efforts at implementing retrospective review – executive, legislative, ...
- ▶ Past efforts have focused on:
 - ▶ Each rule taken one at a time
 - ▶ Review by the agency that promulgated the rule
 - ▶ “Rule relevance” goal
 - ▶ “Rule improvement” goal, but primarily on reducing costs

Shortcomings of previous efforts

- ▶ They have mainly focused on the criterion of reducing the costs of each regulation, rather than a broader set of impacts.
- ▶ They have been mostly ad hoc lookbacks, with few instances of advance planning in initial rules themselves to collect data over time and then conduct a planned retrospective analysis at a future date.
- ▶ They have focused on one rule at a time, with little attention to “regulatory learning” from retrospective analyses of multiple rules or multiple RIAs.
- ▶ They have focused on the agency that issued the rule, asking that agency to undertake the retrospective analysis, rather than exploring other institutional options.

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Agency Review

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Pros

- ▶ Has topical expertise
- ▶ Has data (sometimes, on some impacts)
- ▶ Has legal authority to adopt and implement any changes to a rule

Cons

- ▶ Takes resources away from other activities that the agency may view as more “mission critical”
- ▶ Less motivation than for *ex ante* RIA
- ▶ May be reluctant to critique its own rules and analyses
- ▶ May require expertise in evaluation that does not exist in the agency (esp. if multiple rules)

OIRA oversight, or as an alternative

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Pros

- ▶ Has evaluation expertise, and experience reviewing ex ante RIAs
- ▶ Can look at rules across agencies
- ▶ Can oversee agency (or interagency) reviews

Cons

- ▶ May not have topical expertise
- ▶ Does not have authority to promulgate revised rules
- ▶ Does not currently have sufficient resources for numerous reviews

Additional institutional options

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- ▶ Other expert government agencies (beyond OIRA)
- ▶ Interagency Working Group
- ▶ Outside experts from academia, non-profits, think tanks
- ▶ One-time commission
- ▶ New standing commission or review board
- ▶ Courts
- ▶ Congress
- ▶ Stakeholders and the public

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One size need not fit all

- ▶ Can consider multiple institutions (plural) for retrospective review(s)
- ▶ Reviews can involve different tasks designed to achieve different goals
- ▶ Can align institutional options with goals/tasks

Mapping tasks to institutions

	Agency that promulgated or issued the rule	Multi-agency Working Group	Center of gov't – e.g. US OMB/OIRA, EU RSB	Commission or expert board – which could be post-crisis (e.g. 9/11 or BP Inquiry), or a standing body (e.g. NTSB, GAO, ACUS, or a new Regulatory Improvement Commission)	Courts	Researchers – universities, think tanks (including via NAS panels)	Stakeholders – NGOs, industry
Selection of which rules to analyze	Ex ante EIA (NEPA) Ex ante RIA Ex post RIA		Can flag rules for ex ante or ex post RIA	Could select sets of rules and RIAs for comparative evaluation		Can select rules for academic research	Litigation challenging ex ante EIA (NEPA) Suggestions (or petitions) for ex post RIA
Criteria/Impacts: -Costs -Benefits -Ancillary impacts -Net benefits -Distribution	Ex ante EIA, RIA Ex post RIA (US agencies) (has focused on cost)	Ex post RIA (EU REFIT Platform) (has focused on cost)	Guidance on methods (e.g. OMB Circular A-4; CEQ regs). Could add for ex post.	Could issue guidance on methods for ex post		Can conduct ex ante and ex post analyses -- under contract to agencies, or as academic research	Can provide info, data
Assess multiple rules to test policy designs, and cumulative impacts	If multiple rules within same agency.	Could do so	Could oversee	Could do so – perhaps best equipped		Could do so	
Assess multiple rules to test accuracy of ex ante RIA methods	If multiple rules within same agency.	Could do so	Could oversee	Could do so – perhaps best equipped		Could do so	
Oversight and review of analysis			Ex ante RIA Ex post RIA	Could do so	EIA (NEPA) RIA (as part of judicial review of rule)	Can review agency EIAs, RIAs	

An example—Selection of rules

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- ▶ Agency, or Agency with Input from Stakeholders
 - ▶ Topical knowledge
 - ▶ Awareness of costs (maybe benefits)
 - ▶ Can lead to over-focus on costs
 - ▶ Okay for single rule review, but not as good for multi-rule learning
- ▶ Alternative—Interagency working group, or commission
 - ▶ Broader mandate to focus on learning across agencies/rules/RIAs
 - ▶ (Perhaps) broader criteria than just costs – also benefits, ancillary impacts, net benefits, distributional
 - ▶ Less topical knowledge
 - ▶ May not have buy-in from Agency or stakeholders

An example—Criteria

- ▶ Many criteria may be well handled by promulgating agency.
 - ▶ E.g., costs and benefits of single rule
- ▶ Other criteria will be limited by a single agency/single rule approach.
 - ▶ Learning – about policy designs/instruments, cumulative impacts, and analytic methods – may require analysis across agencies and multiple rules/RIAs.
 - ▶ Broader arrays of costs and benefits, particularly cumulative costs/benefits and ancillary impacts, may extend across multiple rules and agencies.

Some tradeoffs and implications

- ▶ Topical expertise vs. analytic expertise
- ▶ Independence and candor of analysis vs. ownership of results, authority to make policy changes
- ▶ Revising each past rule vs. learning to improve multiple rules
- ▶ These suggest the potential fruitfulness of multi-agency group or commission/board
 - ▶ Membership from all regulatory agencies
 - ▶ Develops broader expertise in analysis
 - ▶ Can learn across multiple rules, RIAs, agencies

Some recommendations

- ▶ OMB should issue guidance on retrospective review akin to Circular A-4
- ▶ Agency analysis of own rules should not focus narrowly on costs
 - ▶ Net benefits
 - ▶ Full set of impacts including ancillary costs and benefits
 - ▶ Include scoping analysis on range of potential issues for review
- ▶ Plan for review and data collection from outset
- ▶ Develop a planned adaptive regulation schedule for regular periodic reviews
- ▶ Develop an inter-agency working group to focus on regulatory learning goal
- ▶ Consider a commission/board for regulatory learning goal