AGENCY PRIORITY SETTING
AND THE REVIEW OF
EXISTING AGENCY RULES

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Introduction: Setting Priorities

An appropriate metaphor for the competing demands for agency projects is that of a business establishment with a front door, back door, and a side window. The business owner expects most customers to come through the front door, but the firm reserves the back door for dealing with complaints about previous transactions. Especially demanding and impatient customers come in through the side window and thereby avoid the crowd that is pressing at the front and back doors.

In the agency context, agency staff members, private parties, and elected officials show up at the front door with proposals for new rules. The same customers show up at the back door with proposals to reconsider existing regulations. Finally, especially demanding customers go to the side window to avoid the crush of business at the two doors. A private party gets to the side window by suing the agency for failing to respond to a rulemaking petition. An elected official gets to the side window by ordering an agency to respond to his or her demands.

If there is a crowd at the side window, an agency may find itself devoting most of its resources to satisfying these customers. At this point, outsiders will dictate an agency’s agenda. If this result is to be avoided, we must maintain the side window without overwhelming an agency’s ability to control its own agenda. If I may paraphrase Judge Leventhal’s observation about forcing agencies to respond to petitions, we must be careful not to “overstimulat[e] the organism.” The ABA and the Administrative Conference have issued recommendations concerning the side window that attempt to walk the fine line be-

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tween accountability and overstimulation. My goal today is to explain this tension and assess its implication for the review of existing rules, which I will call 'rule review.'

I. Agency Doors

I will start by describing the front and back doors at an agency. In light of this background, I will then consider why agencies until recently have been more interested in promulgating new rules than rule review.

A. The Front Door

A few years ago Tom McGarity and I studied priority setting at OSHA for the Administrative Conference. What we found illustrates what happens at the front door of an agency. The crowd of projects at OSHA's front door arose from five general sources:

1. The most frequent source of rulemaking initiatives was rulemaking petitions from worker representatives. Almost all of these groups ended up at the side window when OSHA was unable to respond to their petitions in a timely manner.

2. Elected officials were another source. OSHA was the recipient of legislative pressure to move some projects up on the agenda, and White House pressure to move others down the agenda.

3. OSHA staff, including inspectors, policy personnel, and scientists, were a third source.

4. OSHA also reacted to private standard setting organizations, such as the American National Standards Institute.

5. Finally, other agencies can be a source. The National Institute of Occupational Safety and Health made recommendations to OSHA, as did EPA, which referred projects under authority of the Toxic Substances Control Act.

B. The Back Door

Besides projects for new rules, OSHA and other agencies must also consider what existing rules to review. A report authored by Neil Eisner and Judy Kaleta for this section's Rulemaking Committee sheds light on the nature of the back door at agencies. According to their report, there are five major sources of candidates for rule review:


1. First, agencies receive complaints and suggestions concerning existing rules. They also become aware of the need to revise rules from requests for interpretations and exemptions.
2. Second, agencies may receive formal petitions to revise or revoke a rule.
3. Third, agencies must determine how to respond to rules that are remanded by courts.
4. Fourth, members of Congress and White House officials also show up at the back door. The Competitiveness Council, headed by Vice-President Quayle, is a good example. Its predecessor, the Task Force on Regulatory Relief, chaired by Vice-President Bush, may be an even better example.
5. Agency staff members are the final source. A few agencies have formal review processes to identify rules that should be amended or revoked. At most agencies, however, staff members learn about potential problems as part of their day to day routines as inspectors, litigators, policy analysts, and so on.

C. The Front Door versus the Back Door

As these descriptions indicate, there is likely to be a crowd at both the front and back door of an agency. Yet, there is a general perception that agencies historically have ignored the crowd at their back door and concentrated instead on issuing new rules. This perception is an impetus for the legislation pending in Congress concerning petitions and rule review. I will offer three explanations concerning why agencies have not favored rule review, and I will argue that this tendency has changed. The first explanation is that agencies have made a rational allocation of their scarce resources. We found that OSHA has sufficient resources to pursue actively about 15 to 20 rulemaking efforts at any given moment. Since it takes OSHA four to eight years to develop a rule, we estimated that OSHA could take on only two to five new projects in any single year. In light of this constraint, OSHA can argue that protection of workers from unregulated hazards is a more pressing problem than fine tuning existing rules. The problem with this explanation is that many agencies do not appear to have a formal, organized, priority-setting process that weighs the relative merits of new projects. OSHA, for example, did not have such a process until last year. Thus, it is not clear how carefully agencies make allocation decisions. The bureaucratic culture of an agency is a second explanation. Staff members who are dedicated to the proactive mission of an agency will be more interested in solving new problems than in refining existing regulations. Employees may also avoid rule review because it involves the unpleasant task of finding out the mistakes that were made when the rule was established. Moreover, Eisner and Kaleta's report indicates that most agencies have not assigned the responsibility to conduct rule review to a senior manager. Without such a high-level patron, rule review will receive short shrift if there is no staff constituency in favor of it.

This lack of agency leadership relates to the last explanation. Until recently, agencies have favored new rules in response to political pressure, but this situation has changed. With Republican presidents, congressional Democrats sought to expose the failure of agencies to address pressing problems, such as unsafe meat, dirty air, or dangerous cars. Such oversight stymied the most aggressive attempts by Presidents Reagan and Bush to deregulate. Now that Congress is controlled by Republicans, the effort is to expose regulatory excesses by the Democrat in the White House. The administration has responded by giving rule review a high priority, and this trend could accelerate under a Republican president. Rule review, however, may ultimately lose favor even with a Republican president. Since public opinion polls show strong support for major regulatory programs, such as environmental law, ultimately there may be limited political mileage in focusing on old rules to the visible detriment of new initiatives.

II. Agencies and the Side Window

I have suggested that a sizeable crowd can build up at an agency’s front and back doors, and that an agency will not be able to respond to many of these customers. Some of the disappointed customers will head for the side window where they can make a stronger claim to have their project pursued. Private parties move to the side window when they seek judicial review of an agency’s failure to respond to a rulemaking petition in a timely manner. This process is necessary to hold an agency accountable, but it has two potential disadvantages. First, it invites judges to second-guess agency priority setting, although most judges have admirably resisted this temptation. Second, an agency can easily become overwhelmed at the side window if very many lawsuits are filed against it. To mitigate the cost of defending such cases, agencies will move the disputed project higher on their agenda. Alternatively, an agency will spend scarce resources trying to convince the courts that it has rational priorities.

The president also appears at the side window. In 1992, President Bush announced a 90-day moratorium on new rules and a review of federal regulations. President Clinton ordered a similar review in February of this year. Such one-shot reviews will identify some regulations that should be revised or repealed, but they are also a disruptive way to conduct rule review, especially when a president imposes a short deadline for completion of the project. OSHA, for example, has assigned 100 persons to respond to President Clinton’s order to review existing regulations.7

Congress also shows up at the side window. When legislators have become frustrated at the pace at which the front door opens, they have established rulemaking deadlines, hammers, and other coercive devices intended to speed up

rulemaking. EPA, for example, is subject to dozens of such deadlines. Legislative deadlines have merit, but they can also backfire. If Congress sets unrealistic deadlines, or too many deadlines, it can severely distort the priority-setting process at an agency.

III. ABA and ACUS Recommendations

The recommendations issued by the ABA and ACUS concerning rule review have the merit of recognizing the previous risks inherent in expanding the side door. For example, ACUS recommends that if Congress decides to mandate that agencies develop processes for systematic review of existing regulations, "it should limit that requirement to a broad review, assign to the President responsibility for overseeing the review process, and specify that each agency design its own program." The ABA calls on Congress to "ensure that agencies have adequate resources to conduct effective and meaningful [rule] reviews," and to "avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies."

Both groups also call for an agency to make decisions about rule review as part of its ongoing priority-setting process. This recommendation recognizes that a priority-setting process is crucial to establishing a rational approach to balancing the demands on agencies at the front and back doors.

Finally, both groups call for effective public involvement in setting priorities to review rules. Such involvement is important to establish the legitimacy of the choices made, and to provide an agency with sufficient information to make rational choices.

IV. Conclusion

The previous description of the priority-setting process leads me to three conclusions. First, agencies should develop priority-setting procedures, or if they have such procedures, they should consider rule review as part of that process. Second, although agency staff members may not be enthusiastic about rule review, agencies respond to political pressure to undertake this activity. Third, a side window is useful to ensure agency accountability concerning new rules and rule review, but too much reliance on it will overwhelm an agency's capacity to control its own agenda.

The ACUS and ABA recommendations would fine-tune the existing priority setting process. I support such caution. As Judge Leventhal warned, we must be careful not to overstimulate the organism.