

December 28, 2021

Xavier Becerra, Secretary
Department of Health and Human Services
200 Independence Avenue, S.W. Washington, D.C. 20201

RE: Securing Updated and Necessary Statutory Evaluations Timely; Proposal to Withdraw or Repeal, Docket No. HHS-OS-2020-0012, RIN: 0991-AC24

Dear Sec. Becerra,

These comments are in response to a proposed rule by the U.S. Department of Health and Human Services (HHS)¹ that would withdraw a rule only recently finalized, the Securing Updated and Necessary Statutory Evaluations Timely (SUNSET) rule.² The SUNSET rule implements sunset with periodic review on HHS regulations under which a department rule would be repealed (or sunset) absent the department assessing and reviewing the rule periodically as called for under Section 610 of the Regulatory Flexibility Act (RFA).

My interest in providing comment here centers around two specific requests by HHS.

[Comments regarding experience with sunset with periodic review](#)

With respect to sunset with periodic review, HHS writes, "We welcome comments regarding the experience of state and foreign governments with these laws."³ This commenter hails from the State of North Carolina, whose legislature passed sunset with periodic review in 2013⁴ and whose experiences with same should alleviate HHS concerns. As an economist and a public policy analyst focused on state regulation for a North Carolina think tank, the John Locke Foundation, I had written on the merits of sunset with periodic review prior to the law's passage and have continued to follow North Carolina's experiences under it with great interest.⁵

¹ U.S. Department of Health and Human Services, Securing Updated and Necessary Statutory Evaluations Timely; Proposal to Withdraw or Repeal, 86 Fed. Reg. 59906 (October 29, 2021).

² U.S. Department of Health and Human Services, Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (January 19, 2021).

³ Proposed rule at 59919.

⁴ Session Law 2013-413, North Carolina General Assembly, <https://www.ncleg.net/enactedlegislation/sessionlaws/html/2013-2014/sl2013-413.html>.

⁵ See, e.g., Jon Sanders, "Not Written in Stone: How sunset laws can improve North Carolina's regulatory climate," *Spotlight* No. 439, John Locke Foundation, June 4, 2013, <https://www.johnlocke.org/research/not-written-in-stone-how-sunset-laws-can-improve-north-carolinas-regulatory-climate>; Jon Sanders, "Cleaning Up the Regulatory Toolshed: How Sunset With Periodic Review Is Working In North Carolina, and How It Could Do Even More," *Spotlight* No. 488, John Locke Foundation, March 14, 2017, <https://www.johnlocke.org/research/regulatory-reform-cleaning-up-red-tape-in-north-carolina>; and Jon Sanders, "Rule removal under periodic review has slowed

Under the law as originally passed in North Carolina (later modified, as explained below), all existing agency rules were slated for automatic repeal (sunset) in 10 years without review. It instituted a three-step process for reviewing rules. First, the agency initially determines whether it considers a rule *necessary* or *unnecessary*. If the rule is found to be necessary, the agency determines whether it affects the property interest of the regulated public and whether it would have people objecting to it. The rule is classified as necessary with or without what is called “substantive public interest” (the substantive public interest being either property interest affected by the rule or public comment engendered by it).

The agency then seeks public comment on that initial determination on its web site and submits its determination to the state Office of Administrative Hearings for online posting and reception of public comments for at least 60 days. Afterwards, the agency submits a report to the state Rules Review Commission (RRC) with its initial determination, public comments about it, and its response to those comments. The RRC is the agency tasked with oversight of rules created by executive agencies, and its duties are listed in the state's Administrative Procedure Act (APA).⁶

Next, the RRC reviews the report and the public comments. Part of this review entails deciding whether each public comment has merit (i.e., whether a comment addressed the substance of the rule and related to the RRC's statutory standards for review). Based upon that, the RRC could change the agency's designation of a rule as “unnecessary” or “necessary without substantive public interest” to “necessary with substantive public interest.”

The RRC then drafts a final determination report to submit to the Joint Legislative Administrative Procedure Oversight Committee, which comprises eight members apiece from the state House and Senate. This report includes the agency's report items along with the RRC's determinations of public comments.

The following regulatory actions would result from that report once it became effective:

- Rules deemed “unnecessary” would expire on the first day of the month after the report's effective date
- Rules deemed “necessary without substantive public interest” would remain in effect
- Rules deemed “necessary with substantive public interest” — including, based on public comments of merit, rules initially deemed by the agency as “unnecessary” or “necessary without substantive public interest” — would have to be readopted as new rules under the process outlined in the state APA

down, but a new law tightens the process," John Locke Foundation, July 22, 2019, <https://www.johnlocke.org/rule-removal-under-periodic-review-has-slowed-down-but-a-new-law-tightens-the-process>.

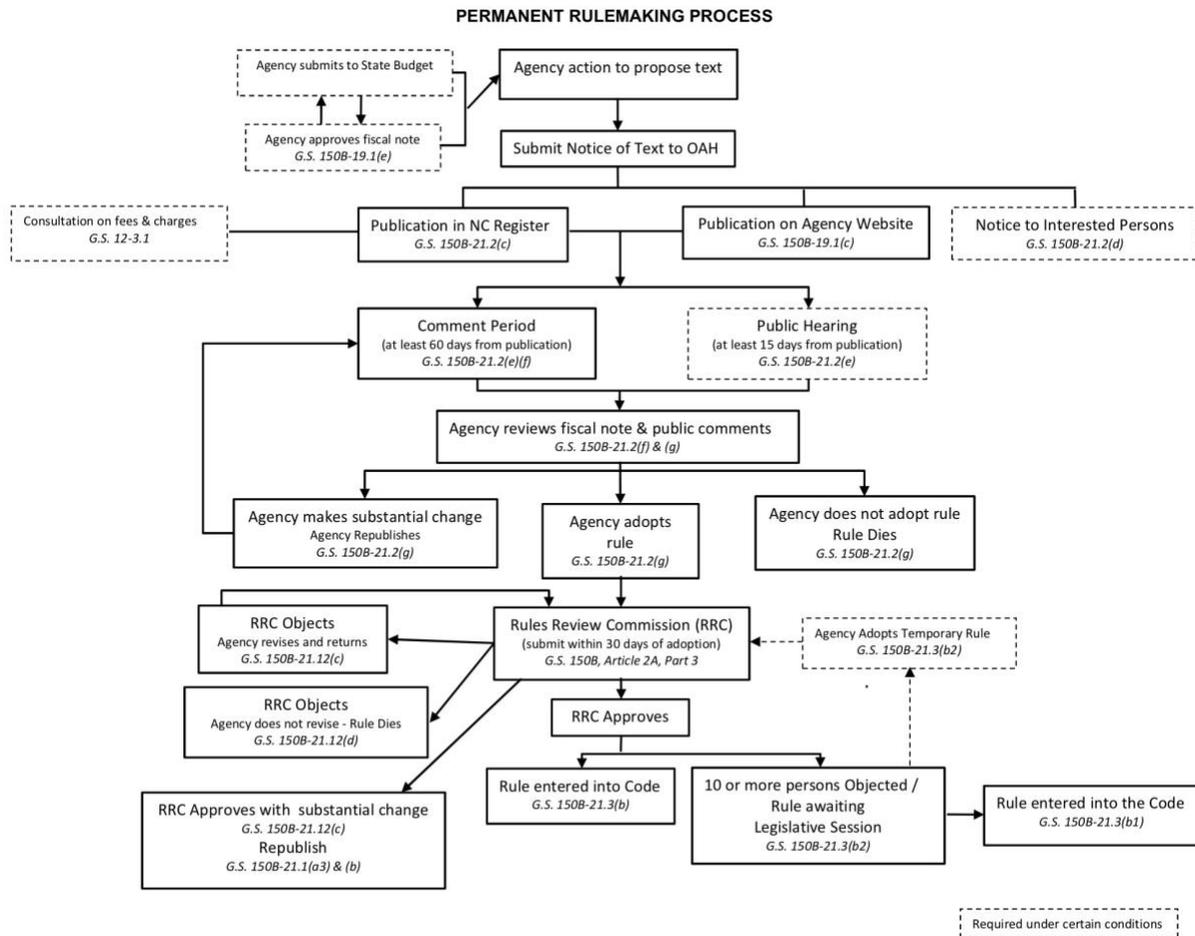
⁶ North Carolina General Statutes §150B, <https://www.ncleg.gov/Laws/GeneralStatuteSections/Chapter150B>.

In the final step, the RRC's final determination report becomes effective either when the agency consults with the oversight committee or, barring a consultation, on the 61st day following delivery of the report.

Of interest to HHS is that North Carolina rulemaking is bound by its APA. HHS had given weight to comments to the effect that "the experience of foreign governments with sunset provisions would not be applicable to HHS, because these governments are not bound by the requirements of the APA."⁷ North Carolina agencies are, however, bound by an APA.

Below is a flowchart provided by the North Carolina Office of Administrative Hearings to show the process for permanent rulemaking as set forth in the state APA:

Chart: Permanent rulemaking in North Carolina⁸



⁷ Proposed rule at 59919.

⁸ Office of Administrative Hearings, "Permanent Rulemaking Process," University of North Carolina School of Government, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/06.%20Moore%20-%20283%29%20Rulemaking%20Chart%20-%20Permanent%20Rule.pdf.

With North Carolina agencies similarly constricted as HHS to an APA, HHS should be encouraged by the State's experience with sunset with periodic review.

As a result of North Carolina's process for sunset with periodic review, by mid-year 2019 — *only six years after the law's passage* — state agencies had reviewed 19,361 rules. Of those, 2,008 were repealed, 5,542 were sent back through the rules-adoption process, and 11,811 were automatically readopted.⁹ Also, there have been no reports of accidental expirations.

Of interest here is not only that the process had resulted in streamlining the total stock of state rules, repealing about one out of every ten reviewed. From economic research literature we should expect significantly faster economic growth as a result, compared with if no rules were repealed.¹⁰ What is also compelling is that, contrary to concerns HHS expressed about accidental expiration of rules, the RRC in North Carolina began in 2017 seeking a tighter process for sunset with periodic review to ensure greater scrutiny.

Specifically, RRC Chairman Garth Dunklin urged the General Assembly to eliminate the "necessary without substantive public input" option that allowed a rule to remain without the scrutiny provided by formal re-adoption. This reform was passed into law in 2019.¹¹

The following is from a *Carolina Journal* news story on the issue:

In early December, Dunklin appeared before the Joint Legislative Administrative Procedure Oversight Committee and recommended the General Assembly revise the law to eliminate the option allowing agencies to simply maintain rules without review.

Eliminating the "middle bucket" would bring the law closer to its original objective, "simply that every bill in the code would expire on certain dates, and have to be re-adopted," similar to a process other states use, Dunklin said.

"The concept there [of sunset with periodic review] was to make agencies pick up and look at their rules, and examine their continuing usefulness and efficacy, expose them to the process of public comment that is a part of our rulemaking process," Dunklin said. Outdated rules could be stricken from the code, and the remaining rules could be improved with renewed scrutiny.¹²

⁹ Jon Sanders, "Rule removal under periodic review has slowed down, but a new law tightens the process," John Locke Foundation, July 22, 2019, <https://www.johnlocke.org/rule-removal-under-periodic-review-has-slowed-down-but-a-new-law-tightens-the-process>.

¹⁰ John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth*, vol. 18, no. 2, Springer, 2013, pp. 137–77, <http://www.jstor.org/stable/42635321>. Also see the literature cited in the SUNSET rule at 5697.

¹¹ Session Law 2019-140, North Carolina General Assembly, <https://www.ncleg.gov/BillLookup/2019/h590>.

¹² Dan Way, "Rules review head wants more regulations scrapped," *Carolina Journal*, January 4, 2017, <https://www.carolinajournal.com/news-article/rules-review-head-wants-more-regulations-scrapped>.

One of the reasons behind Dunklin's request would seem especially germane to HHS, given that this one federal agency hosts a stock of regulations (approximately 18,000) that is nearly as large as the State of North Carolina's — and that HHS sees this stock as somehow too large to review. Such an excuse runs counter to all reason; if anything, it calls for reviews to begin as soon as possible.

How could HHS expect the average citizen to comply with all those rules, which he or she must do or else face severe consequences, when HHS staff are made out to view the amount of rules so daunting they cannot even review them all over a decade? Not to mention, but they are continually adding to that stock. It draws to mind the premise of civil rights attorney Harvey Silverglate's book *Three Felonies a Day*,¹³ about overregulation and such a proliferation of federal laws and regulations as to render them unknowable to anyone intent upon abiding by the law.

The following passage about North Carolina's experience with periodic review bears consideration:

Dunklin noted that many agency heads who were asked by a Rules Review Commission member what a particular rule was, “the response, disturbingly frequently, would be, ‘I’m not really sure, it’s just always been there,’” he said.

Dunklin said some agencies still have no idea what some of their rules are. So far, 12 percent of all rules have been eliminated as obsolete after agency reviews.

“In some instances we have seen agencies repeal rules because they relate to a program that expired more than 10 years ago,” Dunklin said. After reviewing its rules, the North Carolina Board of Barber Examiners classified more than half unnecessary; the rest are going through the readoption process.¹⁴

By HHS' own admission, “85% of Department regulations created before 1990 have not been edited.”¹⁵ Continuing to create regulations without revisiting them is irresponsible. As shown by regulatory bodies in North Carolina, with decades passing by without review, it is reasonable and likely to expect some portion, possibly sizeable, of HHS rules to be obsolete, let alone unknowable.

That inescapable fact brings me to the other specific request for comment from HHS.

[Comments regarding modifying the SUNSET rule](#)

¹³ Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent*, Encounter Books, 2009.

¹⁴ Way, "Rules review head wants more regulations scrapped."

¹⁵ SUNSET rule at 5699.

With respect to considering alternatives to the proposed rule, HHS considers "maintain[ing] the general approach of the SUNSET final rule" but adopting either "a two-year period following the effective date to assess and review all regulations older than ten years" or "an initial ten-year period following the effective date to assess and review all regulations, regardless of when they were first published."¹⁶

HHS does well to state that "we request comment on whether, consistent with the goals of retrospective review as well as other current policy priorities and considerations discussed in this proposed rule, the Department should consider modifying, rather than withdrawing or repealing, the SUNSET final rule."¹⁷ Given that rule review has been long delayed at HHS, that this delay has made the task of rule review daunting, that abandoning the idea would worsen the problem to the detriment of regulated individuals and the overall economy, as well as the good functioning of the department, and that the department itself acknowledges that "HHS now believes more targeted alternatives suggested by commenters merit further consideration,"¹⁸ I submit the following alternatives for addressing the need for retrospective review and these other department needs as well:

1. HHS could consider instituting a longer period for undertaking retrospective review of existing rules, while future rules would be subject to the 10-year review period. This alternative would address the department's concern about the initial large retrospective review task at hand, yielding upon completion a manageable and known retrospective review load while also benefitting regulated entities and the economy in general with the benefits of a more streamlined, up-to-date regulatory environment.
2. HHS could also consider implementing a longer period in general for retrospective review. This alternative would also have the initial benefit of addressing the department's concern about the current large retrospective review task at hand. It would furthermore benefit regulated entities and the economy in general with the benefits of a more streamlined, up-to-date regulatory environment, though those benefits would be limited somewhat the longer the review period would be made.
3. HHS could institute a process for a patchwork system of retrospective reviews of existing rules while future rules would be subject to the 10-year review period. The department could progressively examine rules, for example, from each subagency or by section of the *U.S. Code of Federal Regulations*. This approach could yield the same benefits as described above. It also could yield some good experimentation in the review process as broken into more manageable chunks, innovations that could result in future time savings and efficiencies in retrospective reviews going forward that not only would benefit HHS, but also other federal agencies — and by extension, regulated entities and the economy in general.

¹⁶ Proposed rule at 59929.

¹⁷ Proposed rule at 59908.

¹⁸ Proposed rule at 59919.

4. HHS could mandate reviews without attaching the sunset (expiration) outcome. This alternative would remove the unlikely outcome of accidental sunset of rules; otherwise, the benefits of this approach would be entirely dependent upon the department's ability to adhere to mandated reviews. Among other things, HHS would under this alternative need to be sure to hold each rule to its foundational purpose and expectations, not judge a rule by the creation of unintended beneficiaries who would have discovered a financial interest in keeping the rule unchanged even as it fails in its original intent.

Concluding comments

Before finalizing a rule to eliminate sunset with periodic review, HHS wisely seeks to learn of the experience of states that have similar review processes. Over the past decade, North Carolina has shown that sunset with periodic review to be an effective process at reviewing rules as well as repealing those no longer needed. Like HHS, North Carolina's agencies are bound by an APA. There have been no reports of "accidental repeal" of rules. In fact, the process has proven so effective — with nearly 20,000 rules reviewed in the first six years — that the North Carolina General Assembly, at the prompting of the state's Rules Review Commission, recently passed a law tightening the process so that more rules would be made to pass through formal readoption (i.e., review).

North Carolina's experience should allay HHS concerns regarding sunset with periodic review. Furthermore, the department should be cheered by the happy consequence attested to in the economic research literature, that by streamlining department rules we should expect significantly faster economic growth as a result.

There was one concern expressed by HHS against sunset with periodic review that seems, upon reflection, better considered an urgent call specifically *for* sunset with periodic review. The department is concerned that a review of its own rules over a decade would be too taxing upon its staff to undertake. This department had previously acknowledged that 85% of its rules created well over three decades ago have not been edited. Letting this problem not just fester but grow ever more daunting as time passes and rulemaking persists would be extremely irresponsible, especially as the department expects regulated parties to abide by these same rules which the department here considers far too many even to review.

There are several alternatives to the proposed rule to rescind the SUNSET rule that could be considered that would amend the rule to address reasonable concerns within HHS while maintaining focus on the pressing necessity of retrospective review. They include a longer retrospective review period, either for existing rules or for all rules, including future ones; a system of reviewing existing rules by subagency or section in the *U.S. Code of Federal Regulations*; or mandating retrospective review without sunset attached.

Rather than surrender before the enormity of the task at hand, the situation calls for an urgency more like the catchphrase in Patrick O'Brian's Aubrey/Maturin novels set amid the daunting Napoleonic Wars: "There is not a moment to lose."

Respectfully,

A handwritten signature in black ink, appearing to read 'JS', with a long, sweeping horizontal line extending to the right.

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