



## Periodic Retrospective Review

### Committee on Administration and Management

#### Proposed Recommendation for Committee | April 23, 2021

1 Retrospective review is the process by which agencies analyze existing regulations and  
2 decide whether they need to be modified in any respect. Periodic retrospective review may be  
3 done in either of two ways. One way is to engage in retrospective review of some or all of their  
4 regulations on a pre-set schedule (e.g., every ten years). The other way is to set a one-time date  
5 for the retrospective review of a regulation and, when that retrospective review is performed, set  
6 a new date for the next retrospective review, and so on. This latter method enables the agency to  
7 adjust the frequency of a regulation's retrospective review in light of experience obtained in a  
8 prior retrospective review. Retrospective review may occur as a result of a statutory requirement  
9 or the agency's own initiative. In accordance with long-standing executive branch policy,<sup>1</sup> the  
10 Administrative Conference has long endorsed the practice of retrospective review of agency  
11 regulations,<sup>2</sup> and has urged agencies to consider periodic retrospective review.<sup>3</sup>

12 Some regulations are subject to periodic retrospective review requirements, either on  
13 specified intervals or more generally. For example, the Clean Air Act requires the Environmental

<sup>1</sup> See Exec. Order No. 12866, 58 Fed. Reg. 51735, 51739–51740 (Sept. 30, 1993); see also Joseph E. Aldy, Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 27 (Nov. 17, 2014) (report to the Admin. Conf. of the U.S.) (“The systematic review of existing regulations across the executive branch dates back, in one form or another, to the Carter Administration.”).

<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61738 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43108 (Aug. 18, 1995).

<sup>3</sup> Recommendation 95-3, *supra* note 2, 43110; Recommendation 2017-6, *supra* note 2.

**Commented [LAS1]:** Note to Committee: Proposed language from William Funk



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14 Protection Agency to review certain ambient air quality regulations every five years.<sup>4</sup> The  
15 Regulatory Flexibility Act requires agencies to publish in the *Federal Register* a plan for the  
16 “periodic review of rules . . . which have or will have a significant economic impact upon a  
17 substantial number of small entities.” The Act also requires agencies to review all such  
18 regulations within ten years of the publication of such regulations as final.<sup>5</sup> Other regulations are  
19 subject to periodic review under periodic review plans created by agencies, some of which are  
20 not statutorily mandated.<sup>6</sup>

21 Periodic retrospective review can enhance the quality of agencies’ regulations. It can help  
22 agencies determine whether regulations continue to meet their statutory objectives. It can help  
23 agencies determine whether a regulation is obsolete because, for example, the underlying statute  
24 has been amended or repealed. It can help agencies evaluate regulatory performance (e.g.,  
25 benefits, costs, ancillary impacts, and distributional impacts of regulations), and assess whether  
26 and how the regulation should be revised in a new rulemaking. And it can help agencies  
27 determine how accurate the assessments they make before regulations are issued are with regard  
28 to likely regulatory impact (e.g., forecasts of benefits, costs, ancillary impacts, and distributional  
29 impacts) and identify ways to improve the accuracy of those assessment methodologies.<sup>7</sup>

30 There are also drawbacks associated with periodic retrospective review. Some regulations  
31 may not be strong candidates for periodic review because the need for the regulation is unlikely  
32 to change and the benefits associated with periodically revisiting it are small. There are costs  
33 associated with collecting data and analyzing it, and time spent on reviewing existing regulations  
34 is time that may not be spent on other projects. For this reason, agencies might reasonably decide

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<sup>4</sup> 42 U.S.C. § 7309(d)(1).

<sup>5</sup> 5 U.S.C. § 610.

<sup>6</sup> Lori S. Benneer & Jonathan B. Wiener, *Periodic Review of Agency Regulation* 33–38 (Apr. 1, 2021) (draft report to the Admin. Conf. of the U.S.) (discussing periodic retrospective review plans issued by several agencies, including the Department of Transportation, the Securities and Exchange Commission, and the Federal Emergency Management Agency).

<sup>7</sup> *Id.* at 8.



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35 to restrict periodic review to only important regulations, such as those that affect large numbers  
36 of people or those that have particularly pronounced effects on specific groups. And periodic  
37 retrospective review can also entail costs for regulated parties and beneficiaries associated with  
38 uncertainty concerning whether or not a regulation will be retained or modified. Agencies,  
39 therefore, will need to carefully tailor their periodic retrospective review plans.

40 Mindful of both the value of periodic retrospective review and the costs associated with  
41 it, this Recommendation offers practical suggestions to agencies about how to establish a  
42 periodic retrospective review plan. It does so by, among other things, identifying the kinds of  
43 regulations that lend themselves well to periodic retrospective review, proposing factors for  
44 agencies to consider in deciding the optimal review frequency when they have such discretion,  
45 and identifying different models for staffing periodic retrospective reviews. In doing so, it builds  
46 upon the Administrative Conference's longstanding endorsement of public participation in all  
47 aspects of the rulemaking process,<sup>8</sup> including retrospective review,<sup>9</sup> by encouraging agencies to  
48 seek public input to both help identify the kinds of regulations that lend themselves well to  
49 periodic retrospective review and inform the agencies' analyses of their regulations.

50 It also recognizes the important institutional role that the Office of Management and  
51 Budget (OMB) plays in agencies' retrospective review efforts, and the important role that the  
52 Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-  
53 issued guidance can play.<sup>10</sup> It suggests that agencies work with OMB to help facilitate data  
54 collection relevant to reviewing regulations. It calls attention to the Evidence Act's requirements  
55 for certain agencies to create Learning Agendas and Annual Evaluation Plans, which lay out  
56 research questions that agencies plan to address regarding their missions, including their

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<sup>8</sup> Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017).

<sup>9</sup> Recommendation 2014-5, *supra* note 2.

<sup>10</sup> See Bennear & Wiener, *supra* note 6.



57 regulatory missions, and how they intend to address these questions.<sup>11</sup> The Recommendation  
58 states that agencies can satisfy the Evidence Act’s requirements to create Learning Agendas and  
59 Annual Evaluation Plans if they undertake and document certain activities as they carry out  
60 periodic retrospective review.

### RECOMMENDATION

#### Deciding the Kinds of Regulations Subject to Periodic Review and the Frequency of Review

- 61 1. Agencies should identify any **specific regulations** or categories of regulations that are  
62 subject to statutory periodic retrospective review requirements.
- 63 2. For regulations not subject to statutory periodic retrospective review requirements,  
64 agencies should establish a periodic retrospective review plan. In deciding which  
65 regulations, if any, should be subject to this review plan, agencies should consider the  
66 public benefits of periodic retrospective review, including potential gains from learning,  
67 and the costs, including administrative burden and policy instability. **When agencies adopt  
68 new regulations for which decisions regarding retrospective review have not been  
69 established, agencies should as part of that rulemaking decide whether those regulations  
70 should be subject to retrospective review.**
- 71 3. **When planning for periodic retrospective reviews, agencies should not limit themselves to  
72 reviewing a specific final regulation when a review of a larger regulatory program would  
73 be more constructive.**
- 74 4. For regulations that agencies decide to subject to periodic retrospective review, agencies  
75 should decide **whether to subject some or all of the regulations to a pre-set schedule of  
76 retrospective review or whether some or all of the regulations should have only an initial  
77 date for retrospective review, with a subsequent date for each retrospective review set at**

**Commented [LAS2]:** Note to Committee: Recommendation 95-3, *Review of Existing Agency Regulations*, and Recommendation 2014-5, *Retrospective Review of Agency Rules*, both use the phrase “existing regulations” to describe the category of rules that are within the scope of those recommendations. If the committee wishes to mirror the language used in executive orders, Executive Order 13563 and Executive Order 13610 limit their retrospective review sections to “existing significant regulations.”

**Commented [LAS3]:** Note to Committee: Proposed language from William Funk.

**Commented [LAS4]:** Note to the Committee: This recommendation was proposed by Bridget Dooling in response to Dave Rostker’s comments at the committee meeting on April 9.

<sup>11</sup> 5 U.S.C. § 306.



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78 the time of the preceding retrospective review. In either case, agencies should decide the  
79 optimal frequency of review for a pre-set schedule of retrospective reviews or the optimal  
80 period before the first retrospective review. In doing so, agencies should consider, among  
81 others, the following factors:

- 82 a. The pace of change of the technology, science, sector of the economy, or part of  
83 society affected by the regulation. A higher pace of change may warrant more  
84 frequent reviews;
- 85 b. The degree of uncertainty about the accuracy of the initial estimates of regulatory  
86 benefits, costs, and distributional impacts. Greater uncertainty may warrant more  
87 frequent reviews;
- 88 c. Changes in the statutory framework under which the regulation was issued. More  
89 changes may warrant more frequent reviews;
- 90 d. Comments, complaints, requests for waivers or exemptions, or suggestions  
91 received from interested groups and members of the public. The level of public  
92 interest or amount of new evidence regarding changing the regulation may warrant  
93 more frequent reviews;
- 94 e. The complexity of the regulation, as demonstrated by poor compliance rates, the  
95 amount of clarifying guidance issued, remands from the courts, or other factors.  
96 Less complexity may warrant more frequent reviews;
- 97 f. The administrative burden in conducting reviews. Greater staff time involved in  
98 reviewing the regulation may warrant less frequent reviews; and
- 99 g. Reliance interests connected with the regulation. Regulations on which regulated  
100 entities and beneficiaries have come to rely (with higher costs of change) may lend  
101 themselves to less frequent reviews.

102 5. In making the decisions outlined in Recommendations 1 through 3, public input can help  
103 agencies identify which regulations should be subject to review and with what frequency.  
104 Agencies should consider soliciting public input by means such as convening meetings of  
105 interested persons, engaging in targeted outreach efforts to affected interests that do not

**Commented [LAS5]:** Note to Committee: Proposed language from William Funk.

**Commented [LAS6]:** Comment from Institute for Policy Integrity: "Subsection (e) suggests that a less complex rule warrants more frequent reviews. Why this may be is not clear and the subsection requires more explanation."



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106 normally monitor agencies’ activities, creating online discussion forums designed to solicit  
107 feedback, and posting requests for information.

108 6. Agencies should provide public disclosure regarding their periodic retrospective review  
109 plans, including which regulations are subject to periodic retrospective review, how  
110 frequently the regulations are reviewed, what the review entails, and whether the review of  
111 the regulation is conducted pursuant to a legal requirement of the agency’s own initiative.  
112 Agencies should include these notifications on their websites, and should consider  
113 including them within the *Federal Register* and the *Code of Federal Regulations*, even if  
114 not legally required to do so.

115 7. With respect to regulations subject to a pre-set schedule of retrospective reviews, agencies  
116 should periodically reassess both the regulations that should be subject to periodic  
117 retrospective review and the optimal frequency of review.

**Performing Data Analysis and Soliciting Public Feedback on Regulations Subject to Periodic Review**

118 8. Agencies should publish a document or set of documents explaining how they conducted  
119 a given periodic review, what information they considered, and what public outreach they  
120 undertook. They should include this document or set of documents on Regulations.gov, if  
121 applicable. In so doing, to the extent appropriate, agencies should organize the data within  
122 the document or set of documents in ways that allow private parties to recreate the  
123 agencies’ work and to run additional analyses concerning existing regulations’  
124 effectiveness. Agencies should also, to the extent feasible, explain in plain language the  
125 significance of their data and how they used the data to shape their review.

126 9. Agencies should seek input from relevant parties when conducting periodic retrospective  
127 review. Possible outreach methods include convening meetings of interested persons,  
128 engaging in targeted outreach efforts such as proactively bringing the regulation to the  
129 attention of affected interests that do not normally monitor the agency’s activities, creating  
130 online discussion forums designed to solicit feedback on the regulation, and posting

**Commented [LAS7]:** Comment from Institute for Policy Integrity: same issues as 3(d), “the content of public input should weigh more heavily in these determinations than the sheer volume of public input.”

**Commented [LAS8]:** Comment from Institute for Policy Integrity: “agencies should also consider detailing plans for retrospective review in their annual Regulatory Plans. Executive Order 12,866 calls for agencies to do so.”

**Commented [LAS9]:** For Committee consideration: The committee should potentially discuss where these public disclosures should be published and whether they should be included in the *Code of Federal Regulations*. The recommendation as written aligns with Recommendation 2020-1, Rules on Rulemakings.

**Commented [LAS10]:** Note to Committee: Proposed language from William Funk.

**Commented [LAS11]:** Comment from Institute for Policy Integrity: “Such documentation should include a weighing of the costs and benefits of alternatives, and ACUS should recommend that agencies consider a reasonable number of alternatives during their periodic reviews, and should disclose information on the costs and benefits of those alternatives.” And “If documents relating to retrospective review are to be posted on regulations.gov, they need to be readily findable. Such documents should be cross-linked as appropriate on agencies’ own websites, and regulations.gov might feature some identifiable subsection on retrospective review.”

**Commented [LAS12]:** Comment from Institute for Policy Integrity: “Agencies may not know which groups are “normally monitoring regulatory activities. This goal might be rephrased to focus on affected groups that are underrepresented in the agency’s proceedings, or more generally on vulnerable communities that are disproportionately affected by the rule.



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131 requests for information on the regulation. Agencies should integrate relevant information  
132 from the public into their retrospective reviews.

133 10. Agencies should work with OMB to properly invoke any flexibilities within the  
134 Paperwork Reduction Act that would enable them to gather relevant data expeditiously.

### 135 **Ensuring Adequate Resources and Staffing**

136 11. Agencies should decide how to best structure their staffing of periodic retrospective  
137 reviews to foster a culture of retrospective review. Below are examples of some staffing  
138 models, which may be used in tandem or separately:

- 139 a. Assigning the same staff the same regulation, or category of regulation, each time  
140 it is reviewed. This approach allows staff to gain expertise in a particular kind of  
141 regulation, thereby potentially improving the efficiency of the review;
- 142 b. Assigning different staff the same regulation, or category of regulation, each time  
143 it is reviewed. This approach promotes objectivity by allowing differing viewpoints  
144 to enter into the analysis;
- 145 c. Establishing or cooperating with standing committees of experts, either within or  
146 outside the agency, to review regulations; and
- 147 d. Pairing subject matter experts, such as engineers, economists, and scientists, with  
148 other agency employees in conducting the reviews. This approach maximizes the  
149 likelihood that both substantive considerations, such as the net benefits of the  
150 regulation, and procedural considerations, such as whether the regulation conflicts  
151 with other regulations or complies with plain language requirements, will enter into  
152 the review.

### **Using Evidence Act Processes**

153 12. To satisfy the Evidence Act's requirements to create Learning Agendas and Annual  
154 Evaluation Plans, agencies should undertake and document the following activities as they  
155 carry out periodic retrospective review:



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- 156 a. Create precise questions to be addressed by the review, such as whether the
- 157 regulation in question maximizes net benefits, how frequently it should be
- 158 reviewed, or how it affects a particular sector of the economy;
- 159 b. Describe the information needed to conduct reviews of the regulation, including
- 160 whether the agency will undertake new information collection requests or if it will
- 161 use existing information;
- 162 c. Describe the methods it will use in conducting the reviews, such as randomized
- 163 control trials or quasi-experimental methods;
- 164 d. Describe the anticipated challenges in conducting the review, such as obstacles to
- 165 collecting relevant data; and
- 166 e. Describe how it will use the review results to inform policy making, including by
- 167 strengthening, maintaining, or otherwise modifying the regulation.

**Commented [LAS13]:** Comment from DOT/Jonathan Dols: "Whether a rule maximizes net benefits is not a precise question (maximum relative to...?). Suggest deleting

**Commented [LAS14]:** Comment from DOT/Jonathan Dols: "Recommend deleting 'randomized control trials or quasi-experimental methods' as examples because these methods are probably the least likely to be used in a retrospective review. For example, a regulation typically applies to units (e.g. the entire U.S.) for which randomization and assigning control groups is not possible. Perhaps combine with previous recommendation on information, as the information collected will determine the method used.

**Interagency Coordination**

- 170 13. A body or expert entity with interagency responsibilities should regularly convene agencies
- 171 to identify and share best practices on periodic retrospective review, addressing questions
- 172 such as how to improve timeliness and analytic quality of reviews and the optimal
- 173 frequency of discretionary reviews.
- 174 14. To promote a coherent regulatory scheme, agencies should coordinate their periodic
- 175 retrospective reviews with other agencies that have issued related regulations.

**Commented [LAS15]:** For Committee consideration: The committee will want to discuss what agency or entity is best suited to this task.

**Commented [LAS16R15]:** Comment from Institute for Policy Integrity: "OIRA seems well suited to this task. Indeed, Executive Order 12,866 already assigns OIRA to coordinate a working group on pursuing the objectives of regulatory review."

**Commented [LAS17]:** Comment from Institute for Policy Integrity on additional possible recommendation: "Agencies should think about how to craft their rulemakings to facilitate future retrospective reviews. Setting clear metrics and clear processes for collecting the information necessary to conduct future reviews should be a part of agencies' rulemakings, and ACUS's recommendations should so advise.... ACUS should advise OIRA and agencies to work together to balance the benefits and costs of collecting the information necessary to conduct periodic reviews.