



April 8, 2021

To: ACUS-Committee on Administration and Management, Committee Chair Aaron Nielson, Staff Counsel Leigh Anne Schriever, and Consultants Lori Benneer and Jonathan Wiener

Re: Periodic Review of Agency Regulation

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits these comments on the project on Periodic Review of Agency Regulation. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Comments on Proposed Recommendations

Recommendation 3: Subsection (d) suggests that receiving a greater number of requests from stakeholders for changing the rule may warrant more frequent reviews. Certainly, when regulated entities are frequently complaining about unanticipated problems with compliance, or if other stakeholders uncover new relevant evidence, such input can be very valuable in gauging the need for and frequency of review. But the volume with which stakeholders are rehashing old arguments that were already addressed during the initial rulemaking and comment period, may not be a good gauge for retrospective review. If an agency fully addressed complaints about a proposed rule and issued the rule anyway, and two years later the same stakeholders are frequently repeating the exact same protests, but no other circumstances have changed in the meantime, that is not necessarily a good reason to schedule a near-term review. Though if the complaint is that the agency mis-estimated or mis-weighed the costs and benefits in the original rule, and if there is a changed circumstance (like a change in administration or new evidence), that may warrant a review. But the overall point is: it is the *content* of stakeholder input, *not the volume*, that matters. Therefore, draft recommendation 3(d), which calls for more frequent reviews based on a greater number of stakeholder complaints, needs some revision and nuance, to focus more on the content, and not just the volume, of stakeholder input.

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.

In 3(b), in addition to considering uncertainty about the estimates of benefits and costs, uncertainty about the *distribution* of benefits and costs may also warrant more frequent reviews.

Recommendation 4: This recommendation begins with the premise that public input can help agencies identify which rules should be subject to review and with what frequency. As explained above in the comments on 3(d), the content of public input should weigh more heavily in these determinations than the sheer volume of public input. An old argument that has been appropriately addressed but is now being rehashed with great frequency should not necessarily carry more weight than a novel argument or novel evidence presented carefully but powerfully by a fewer number of stakeholders.

Recommendation 6: This recommendation calls for agencies to publish documents concerning their periodic reviews, including on regulations.gov, if applicable. To begin such documentation should include a weighing of the costs and benefits of alternatives, and ACUS should recommend that agencies

¹ This document does not purport to present New York University School of Law’s view, if any.

consider a reasonable number of alternatives during their periodic reviews, and should disclose information on the costs and benefits of those alternatives. At times, some agencies that are statutorily obligated to conduct periodic reviews have determined that no update is necessary, and have reported that conclusion in the Federal Register without conducting any analysis of the costs and benefits of any alternatives.² Though we recognize the additional analytical burden on agencies, agencies should give meaningful consideration to reasonable alternatives in conducting such periodic reviews, and disclose the results of such analyses to the public—ACUS should include those points in this recommendation.

Additionally, concerning publication on regulations.gov: At times in the past, some agencies have dropped their calls for comments on retrospective review into hard-to-find dockets on regulations.gov. 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.

Recommendation 7: In addition to publishing notifications of periodic reviews in the *Federal Register*, agencies should also consider detailing plans for retrospective review in their annual Regulatory Plans. Executive Order 12,866 calls for agencies to do so.³

Recommendation 8: Bringing reviews to the attention of affected interests that do not normally monitor the agency's activities is an admirable goal, but the standard, as phrased, may be hard for agencies to implement. 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.

Recommendation 12: 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.⁴

Proposal for Additional Recommendations

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 agencies. The consultants' report rightly notes that some agencies may worry that including additional information collection requests in their rules will seem to increase the costs of their rules. However, information collection should generate benefits as well as costs. Though the benefit of information collection is often hard to value, ACUS should advise OIRA and agencies to work together to balance the benefits and costs of collecting the information necessary to conduct periodic reviews.

Respectfully submitted,

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² See, e.g., 84 Fed. Reg. 71,626, 71,633 (Dec. 27, 2019) ("[B]ecause DOE has concluded amended standards for GSILs would not be economically justified [based largely on financial considerations alone] . . . DOE did not conduct . . . [an] emissions analysis."); 85 Fed. Reg. 24,094, 24,139 (proposed Apr. 30, 2020) ("Because this action does not propose to change the existing NAAQS for PM, it does not impose costs or benefits relative to the baseline of continuing with the current NAAQS in effect. Thus, the EPA has not prepared a Regulatory Impact Analysis for this action.").

³ Exec. Order No. 12,866 § 5(a) ("Any significant regulations selected for review shall be included in the agency's annual Plan.").

⁴ Exec. Order No. 12,866 § 5(b).