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PERIODIC REVIEW OF AGENCY REGULATION

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Periodic Review of Agency Regulation

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Abstract: Learning from past experience can help improve regulation and enhance the accuracy of policy analyses. One tool for such learning is retrospective review or ex post evaluation. Despite longstanding calls for retrospective review, results to date have been episodic and limited. One potential way to make retrospective review more consistent and systematic, and to cultivate more iterative updating through continuous performance evaluation, may be to make these reviews periodic – not a single look-back, but repeated evaluations on a scheduled frequency (e.g., every five or ten years). Although the Administrative Conference of the US (ACUS) has recommended such periodic review since at least 1995, and some executive orders and statutes require agencies to undertake periodic reviews, there has been little study of how often periodic review is employed, how well it performs, and whether it should be undertaken more widely. The aim of this study – conducted for ACUS– is to understand how agencies undertake periodic reviews; to identify their incentives, barriers and facilitators; and to inform best practices for agencies to employ periodic reviews to improve regulation and regulatory impact analysis. We assembled a database of periodic review efforts across U.S. federal agencies and used that database to select a representative sample for more detailed study. For this sample, we collected documentary evidence and conducted interviews of agency personnel. Preliminary findings suggest that: agencies are more likely to conduct periodic reviews when specifically required by statute, and when the agency adapts the periodic review process to cultivate a culture of ongoing evaluation and updating; the net benefits of periodic reviews are likely to be greater when the evidentiary basis for the regulation is evolving rapidly (e.g., changing science, technology, or social conditions), but is likely to be smaller where the opportunity costs to the agency and/or society of repeated reviews are high; the usefulness of periodic reviews is limited when the reviews are not documented or shared more broadly; and, the optimal frequency of periodic review remains an understudied variable.

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1. Introduction

Learning from past experience offers important opportunities for regulatory improvement.[1] One key tool for such learning is ex post impact assessment or retrospective review of agency policies, which has been sought by every US president, of both political parties, since the 1970s.[2] The Administrative Conference of the United States (ACUS) has recommended these approaches several times, including in 1995, in 2014, and in 2017.[3] The objectives of such retrospective reviews include evaluating how well past policies are working, and assessing potential changes to improve these policies such as removing obsolete rules, reducing regulatory burdens, increasing net benefits, and more generally learning to improve the quality of government regulations.[4]

Nonetheless, despite the broad and longstanding support for such retrospective review, US government measures to require retrospective review have yielded only limited results thus far, with only occasional episodes of effort to analyze and revise past policies.[5] Part of the reason for

[1] See Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in *New Perspectives on Regulation* (David Moss and John Cisternino, eds., Cambridge, MA: The Tobin Project, 2009); Cary Coglianese, "Thinking Ahead, Looking Back: Assessing the Value of Regulatory Impact Analysis and Procedures for Its Use," 3 *Korean J. Law and Legislation* 5 (2013); Lori S. Bennear and Jonathan B. Wiener, "Adaptive Regulation: A Framework for Policy Learning Over Time," draft presented at Harvard Kennedy School Regulation Workshop (2019a); Lori S. Bennear and Jonathan B. Wiener, "Built to Learn," in *A Better Planet* (Daniel C. Esty, ed., New Haven, CT: Yale University Press, 2019b).

[2] See Cary Coglianese, "Moving Forward with Regulatory Lookback," 30 *Yale J. Reg. Online* 57 (2012); Cass R. Sunstein, "The Regulatory Lookback," 94 *B.U. L. Rev.* 579 (2014); 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," report to ACUS (2014); Reeve T. Bull, "Building a Framework for Governance: Retrospective Review and Rulemaking Petitions," 67 *Admin. L. Rev.* 265 (2015); Maureen Cropper, Arthur Fraas and Richard Morgenstern, "Looking Backward to Move Regulations Forward," 355 *Science* 1375 (2017); Lori S. Bennear and Jonathan B. Wiener, "Institutional Roles and Goals for Retrospective Regulatory Analysis," Discussion Paper, Resources for the Future (RFF) (revised October 26, 2020).

[3] Administrative Conference of the U.S. (ACUS), *Recommendation 95-3, Review of Existing Agency Regulations,* 60 Fed. Reg. 43108 (1995); ACUS, *Recommendation 2014-5, Retrospective Review of Agency Rules,* 79 Fed. Reg. 75114, 75117 (2014); ACUS, *Recommendation 2017–6, Learning From Regulatory Experience,* 82 Fed. Reg. 61738 (2017).

[4] See Coglianese (2013), supra note 1; Coglianese (2012), supra note 2; Sunstein, supra note 2; Aldy, supra note 2; Cropper, Fraas & Morgenstern, supra note 2; Bennear & Wiener (2020), supra note 2.

[5] See Coglianese (2012), supra note 2; Aldy, supra note 2; Sunstein, supra note 2; Bennear and Wiener (2020), supra note 2; Jonathan B. Wiener and Daniel L. Ribeiro, "Environmental Regulation Going Retro," 32 *J. Land Use &*

the limited record of retrospective review so far may be that past efforts have encountered a mismatch of institutional roles, incentives, and goals for policy change and learning.[6]

One potential way to make retrospective review – and more generally learning from experience – a more consistent and systematic part of agency practice, and to cultivate more iterative updating through continuous performance evaluation, may be to make these reviews periodic, i.e., not a single look-back, but repeated evaluations on a scheduled frequency (such as every X years). Such "periodic retrospective review" or simply "periodic review" can look not only at past performance since the rule was promulgated, but also at performance varying over multiple periods, and at policy options for the next period. Some efforts have already been advanced to promote periodic review. ACUS recommended periodic review in 1995 ("Systematic review processes should … provide for a periodic, ongoing review" for which agencies should consider "e.g., regulations reviewed every [x] years") (brackets in original), and in 2014 ("Agencies should periodically evaluate the results of their retrospective reviews").[7] Presidential executive orders have called for periodic review.[8] Periodic review is sometimes required by statute.[9] In some cases, agencies choose to engage in periodic review even where it is not statutorily required.

Yet, even though several agencies undertake periodic reviews, there has been little study of how well periodic review performs, why some agencies undertake it while others do not, and whether or how it should be undertaken more widely. The aim of this study – conducted for ACUS

Environmental Law 1 (2016); Randall Lutter, "Regulatory Policy: What Role for Retrospective Analysis and Review?" 4 *J. Benefit-Cost Analysis* 17 (2013); Susan Dudley, "A Retrospective Review of Retrospective Review," Regulatory Studies Center, The George Washington University (2013), at https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/20130507-a-retrospective-review-of-retrospective-review.pdf .

[6] See Bennear and Wiener (2020), supra note 2.

[7] ACUS, Recommendation 95-3, supra note 3, at 43109; ACUS, Recommendation 2014-5, supra note 3, at 75117.

[8] E.g. section 5 of Executive Order 12866, 58 Fed. Reg. 51735 (1993).

[9] E.g. Regulatory Flexibility Act, 5 U.S.C. 610 (10 years); Clean Air Act, 42 U.S.C. 7409(d) (5 years).

– is to understand how agencies undertake periodic reviews; to identify their incentives, barriers and facilitators; and to inform best practices for agencies to employ periodic reviews to improve regulation. To study the current practice of periodic review, we assembled a database of periodic review efforts across U.S. federal agencies. We then used that database to select a smaller representative sample for more detailed study. For this smaller sample, we collected documentary evidence and conducted interviews of agency personnel. Our preliminary findings suggest that: agencies are more likely to conduct periodic reviews when specifically required by statute, and when the agency adapts the periodic review process to cultivate an agency culture of ongoing evaluation and updating[10]; the net benefits of periodic reviews are likely to be greater when the evidentiary basis for the regulation is evolving quickly (e.g., changing science, technology, or social conditions), but smaller where the opportunity costs to the agency and/or society of repeated reviews are high; the usefulness of periodic reviews is limited when the reviews are not documented or shared more broadly; and, the optimal frequency of periodic review remains an understudied variable.

In section 2 we discuss the normative arguments on the pros and cons of periodic review. In section 3 we survey the current requirements for periodic reviews, such as in executive orders, statutes and agency policies. In section 4 we report on our interviews with agency staff in our smaller sample. In section 5 we summarize our main findings. We conclude in Section 6 with a set of potential recommendations.

[10] On cultivating a "culture" of retrospective and periodic review, see e.g. Cass R. Sunstein, Memorandum on EO 13563 (2011) ("With its emphasis on 'periodic review of existing significant regulations,' Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. To promote that culture, future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of 'actual results.' "); ACUS Recommendation 2014-5, supra n.3 ("The following recommendation is intended to provide a framework for cultivating a 'culture of retrospective review' within regulatory agencies."); Aldy, supra n. 2, at 5, 11, 47-50, and 70 (discussing efforts to develop a "culture of retrospective review"). Cf. Greenstone, supra n.1 (advocating a "culture of persistent regulatory experimentation and evaluation").

2. Normative Arguments on the Pros and Cons of Periodic Review

One normative rationale advanced for retrospective review is that "things accumulate." When many administrative rulemakings accumulate in the Code of Federal Regulations (CFR), this accumulation increases the probability that rules may overlap, be redundant, or become obsolete. Periodic review may thus enable agencies to reduce overall regulatory burden.

A second normative rationale for retrospective review is that "things change." Regulations promulgated at one time will reflect the state of the world at that point in time and decisions made under uncertainty about what the world would be like in the future. This uncertainty can relate to changes in science, technology, social conditions, values and priorities. Ex ante impact assessments inevitably reflect this uncertainty. Retrospective review offers an opportunity to reassess the regulation ex post, compared to the ex ante assessment and compared to a counterfactual scenario(s) of the state of the world without the regulation.[11] For example, if the regulatory goal is to maximize societal net benefits,[12] the ex ante regulatory impact assessment will reflect the understanding of the expected benefits and costs of the selected option and alternative options at the time the rule was promulgated. Yet over time the realized net benefits can change for myriad reasons, such as new information on the estimates of benefits or costs, new scientific discoveries, new social science evidence, new technical options for compliance, new policy alternatives, changing social valuations of important outcomes, changes in the eventual implementation of the rule that occur after the ex ante impact assessment and promulgation, and

[11] See Aldy, supra note 2; Cropper, Fraas and Morgenstern, supra note 2; Sunstein, supra note 2.
[12] See EO 12866, supra, retained by each administration since 1993 and recently reaffirmed by the Memorandum on "Modernizing Regulatory Review" (Jan. 20, 2021), at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/ .

other policy changes introduced by the same or other governments.[13] Retrospective review provides the opportunity to make ex post assessments and potential adjustments in the face of these changes (such as to reduce costs, increase benefits, improve equity, or other revisions). The success of retrospective review can be enhanced by planning from the initial rulemaking to collect data on key indicators in order to prepare for subsequent retrospective review.[14] Retrospective review also offers opportunities to test and improve the accuracy of ex ante impact assessment.[15]

Going further, the basic normative rationale advanced for periodic review is that the world keeps changing anew – both that "things keep accumulating" and "things keep changing."[16] If the initial promulgation reflects understanding at a specific point in time, retrospective review also reflects understanding at the specific time of ex post review. For example, if the goal as noted above is to maximize net benefits, and if the net benefits continue to evolve over time, the retrospective review should arguably be repeated at periodic intervals so that these changes can continually be reflected in ongoing performance evaluation and iterative updating of regulatory policy. In the face of rapid or sustained change, a regulation that remains static can yield an

[13] See Bennear and Wiener (2020), supra note 2. Post-promulgation changes in rule implementation were a significant source of the divergence between ex ante and ex post impact assessments observed in the study by Winston Harrington, Richard D. Morgenstern and Peter Nelson, "On the Accuracy of Regulatory Cost Estimates," 19 *J. Policy Analysis and Management* 297 (2000).

[14] See Susan Dudley and Sally Katzen, "Crossing the Aisle to Streamline Regulation," *Wall Street Journal*, May 13, 2019, at https://www.wsj.com/articles/crossing-the-aisle-to-streamline-regulation-11557788679 .

[15] See Coglianese (2012), supra note 2; Aldy, supra note 2; Bennear and Wiener (2020), supra note 2.

[16] A rapidly changing world poses challenges to many areas of administrative law and regulation, including the regulation of information technology and artificial intelligence, see David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, and Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies,* report to ACUS (Feb. 2020); and environmental regulation, see Daniel Botkin, Discordant Harmonies (1990); Daniel A. Farber, "Environmental Protection as a Learning Experience," 27 *Loyola LA L. Rev.* 791 (1993); Jonathan B Wiener, "Law and the New Ecology," 22 Ecol. L.Q. 325 (1995); Jonathan B Wiener, "Beyond the Balance of Nature," 7 Duke Envtl. L. & Policy Forum 1 (1996); P.C.D. Milly et al., "Stationarity is Dead: Whither Water Management," 319 Science 573-574 (2008); Robin Craig, " 'Stationarity Is Dead' —Long live transformation: Five principles for climate change adaptation law," 34 Harv. Envtl. L. Rev. 9-75 (2010); P.C.D. Milly et al., "On Critiques of "Stationarity is Dead: Whither Water Management?" 51 Water Res. Rsch. 7785-7789 (2015). Some of these changes may warrant amendment or replacement of legislative authority as well as or instead of revision of administrative agency rules. The present report focuses on how agencies can use periodic review to enhance learning, which may help inform both legislative and administrative choices.

increasing mismatch with actual conditions and a worsening net benefits profile. Periodic reviews can help correct these mismatches and improve the net benefits profile over time.[17] (Agencies may also make occasional revisions to adjust rules and implementation to new circumstances, even without a designated schedule of periodic reviews.[18]) Moreover, these periodic reviews can also be used to test and improve the accuracy of the ex ante impact assessments, contributing to better methods of ex ante assessments for subsequent new regulations.[19]

But retrospective review, whether one-time or periodic, can have costs as well as benefits. Some of these costs are borne by agencies asked to undertake the reviews. Agencies must engage in data collection and analysis to support the review and potentially any rule revision that the review deems warranted. The Paperwork Reduction Act limits agency requests for information from regulated entitites, and agency information collection requests (ICRs) can take time to be reviewed at OMB. Moreover, agencies may have an incentive not to include information reporting or data submission requirements as part of the original rule, to the exent this is counted as a cost of the rule in the ex ante RIA. Further, agencies incur the opportunity costs of devoting time and resources to the retrospective reviews rather than devoting these agency resources to other activities (such as actions sought by Congress or by a new Administration). Revising a rule must go through the appropriate administrative procedures, so retrospective or periodic reviews may

[17] See Bennear and Wiener, "Built to Learn" (2019b), supra note 1; Justin R. Pidot, "Governance and Uncertainty," 37 *Cardozo L. Rev.* 113 (2015); Lawrence E. McCray, Kenneth A Oye and Arthur C. Petersen, "Planned Adaptation in Risk Regulation: An Initial Survey of US Environmental, Health, and Safety Regulation," 77 *Technological Forecasting and Social Change* 951–959 (2010).

[18] See Wendy Wagner, William West, Thomas McGarity, and Lisa Peters, "Dynamic Rulemaking." 92 *NYU L. Rev.* 183 (2017).

[19] See Coglianese (2012), supra note 2; Bennear and Wiener, "Built to Learn" (2019b), supra note 1; Bennear and Wiener,(2020); supra note 2; Adam J. White, "Retrospective Review, for Tomorrow's Sake." *Yale J. on Regulation: Notice and Comment Blog* (November 28, 2016) at http://yalejreg.com/nc/retrospective-review-for-tomorrows-sake-by-adam-j-white/ .

confront limited agency resource consraints.[20] Agencies may also incur the reputational costs of revisiting and opening to question their earlier analyses and policy choices. These reputational costs may also have contributed to the inhibitions faced by agencies and the limited results of past calls for retrospective reviews.[21]

In addition to costs borne by the agency, periodic review can also generate costs to society. For example, regulated actors (such as industries and households) and policy beneficiaries (those protected by a rule) may incur costs due to the added uncertainty and adjustments (instability) that may arise from making the policy more adaptive, subject to review and potential revision.[22] Even if revising a rule would yield societal net benefits, including gains to regulated actors (such as compliance cost savings), or gains to policy beneficiaries (such as improved protections), there may also be costs of uncertainty and adjustment if rules are less static and more adaptive. Such instability costs can be worth tolerating, in order to achieve the policy improvements (such as in net benefits or fairness) from periodically reviewing and revising the policy to reduce its mismatch with the changing world. But these costs can still be real, such as if reliance on the continued stability of a rule is important for actors' decisions and for the rule's efficacy in shaping future outcomes.[23] And these costs may be incurred by actors different from those who enjoy the gains from the periodic reviews.

[20] See Robin Craig and J.B. Ruhl, "Designing Administrative Law for Adaptive Management," 67 *Vanderbilt L. Rev.* 1 (2014).
[21] See Bull, supra note 2; Bennear and Wiener (2020), supra note 2; Wiener and Ribeiro, supra note 5.
[22] See Bennear and Wiener, "Built to Learn" (2019b), supra note 1. The tradeoff of adaptive benefits versus instability costs was reflected in Pound's remark that "The law must be stable, and yet it cannot stand still," Roscoe Pound, Interpretations of Legal History 1 (Cambridge University Press, 1923).
[23] See Aaron Nielsen, "Sticky Regulations," 85 *U. Chi. L. Rev.* 85 (2018); John Coffee, "The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated," 97 *Cornell L. Rev.* 1019 (2012); Richard J. Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future," 94 *Cornell L. Rev.* 1153 (2009).

Periodic review might also have effects on the political economy of regulation. For example, in some cases, the prospect of retrospective and periodic reviews (in contrast to static rules) might encourage regulated actors to resist compliance, hoping that the regulation could be relaxed in future reviews. On the other hand, the prospect of periodic reviews could help overcome impasse and ease gridlock by facilitating agreement among stakeholders to the initial adoption (and each revision) of the regulation, because they are reassured that the initial regulation will be amenable to subsequent or ongoing review.[24] In turn, the prospect of periodic review may enable agencies to develop more experimental regulatory approaches than if the rule were to be static.[25]

These pros and cons of periodic review imply that its net benefits will be greater where the expected rate of change (in the world, and specifically in the net benefits profile of the initial regulation) and thus the gains from learning (about policy performance, and about impact assessment methods) are higher, in which case a static rule promises a worsening mismatch while periodic review offers improvements through iterative updating. And the above pros and cons imply that the net benefits of periodic review will be smaller where the opportunity costs to the agency, or the instability costs to society, are higher.

Moreover, the optimal frequency of periodic review – the length of the time period or interval between reviews ("every X years") – should also vary based on such benefits and costs: greater gains from learning, such as may be expected in situations of more rapid change, would imply a shorter optimal time period; but higher opportunity costs of repeated reviews (including

[24] See Bennear and Wiener, "Built to Learn" (2019b), supra note 1. In addition to reassuring stakeholders that they will have future opportunities to revisit the rule – this facilitiating initial adoption rather than impasse – periodic review may similarly reassure the agency itself. Aaron Nielsen points out that "If agencies believe that they will not be able to easily change the regulation, they may be more reluctant to promulgate it at all." Nielsen, "Sticky Regulations," supra note 22, at 142.

[25] See ACUS Recommendation 2017-6, supra note 3; Greenstone, supra note 1; Zachary J. Gubler, "Experimental Rules," 55 *Boston College L. Rev.* 129 (2014); Zachary Gubler, "Regulatory Experimentation," report to ACUS (Nov. 17, 2017), at https://www.acus.gov/report/regulatory-experimentation-final-report .

to the agency, and to society) imply a longer optimal time period. These considerations are likely to vary by issue area, implying that the optimal frequency of periodic review may also vary.

3. Requirements for Periodic Review

There have been some requirements in place for periodic review since at least the 1970s. These requirements have taken varied forms, including executive orders, statutes that apply broadly to actions by all agencies, statutes that apply narrowly to particular rules promulgated by particular agencies, and policies adopted by agencies themselves. This section surveys the written requirements for periodic review. This section does not address whether these requirements have been met in practice, which we discuss in the following sections based on further documentary and interview evidence.

3.1. Executive Orders

While a series of executive orders, dating back to at least the Carter administration, are well known for institutionalizing requirements for benefit-cost analyses in ex ante regulatory impact assessments (RIAs), many of these same executive orders have also required some form of retrospective review and a few even required some form of periodic review. The stated purpose of President Carter's EO 12044 was to "adopt procedures to improve existing and future regulations" (*Executive Order 12044* 1978, § 1). This EO required agencies to "periodically review their existing regulations to determine whether they are achieving the policy goals of this Order" (*Executive Order 12044* 1978, § 1). This EO also established criteria for selecting rules for review and required publication of rules selected for review in the semiannual agency agenda (*Executive Order 12044* 1978, § 2(a)). EO 12044 was the first to require advanced planning for future reviews by requiring at rule promulgation that "a plan for evaluating the regulation after its issuance has been developed" (*Executive Order 12044* 1978, § 2(d)(8)). While EO 12044 was

rescinded by President Reagan in 1981, many of these features of executive requirements for periodic retrospective review reappear in subsequent EOs and legislation.

President Reagan's EO 12291 focused more on ex ante regulatory impact analysis (*Executive Order 12291* 1981). While it did not require agencies to develop plans for retrospective review, nor require periodic reviews, it did require agencies to "initiate reviews of currently effective rules in accordance with the purposes of this Order" and it gave OMB the ability to select rules for review and determine the timing of reviews (*Executive Order 12291* 1981, § 3(i)). So, in principle, periodic reviews were still possible, perhaps as designated by OMB, even if not expressly required by this EO.

President Clinton's Executive Order 12866 restored some of the features of retrospective and periodic review that had been present in President Carter's EO 12044. In particular, Section 5 of EO 12866 requires that "each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will *periodically review its existing significant regulations* to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles" (*Executive Order 12866* 1993, § 5(a)) (emphasis added). It also requires that "significant regulations selected for review shall be included in the agency's annual Plan," and that the "agency shall also identify any legislative mandates to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances" (*id.*)[26] EO 12866 has been

[26] EO 12866 § 3(b) states that its use of the term "Agency, unless otherwise indicated, means any authority of the United States that is an ''agency'' under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10)." Later, EO 13579 called on agencies considered to be independent agencies to participate in retrospective review efforts.

maintained in force by all subsequent presidents of both parties, hence its requirement of periodic review has been in effect since 1993.

President Obama's EO 13563 reinforced this requirement for periodic review of existing regulations, requiring agencies to submit to OIRA "a preliminary plan . . . under which the agency will periodically review its existing regulations . . . ." (*Executive Order 13563* 2011, § 6(b)).[27] On his first day in office, President Biden issued a memorandum on "Modernizing Regulatory Review" that expressly reaffirmed both EO 12866 and 13563, though without specifically mentioning retrospective or periodic review of existing regulations.[28]

3.2. Government-wide Statutory Requirements

Congress has also required periodic review. We categorize Congressional requirements into two groups—broad statutes that apply to many agencies, and specific statutes that apply to particular rules issued by a particular agency (or occasionally multiple agencies). Included in the first category are the Regulatory Flexibility Act of 1980 and its subsequent amendments and the Foundations for Evidence-Based Policymaking Act of 2018 (enacted in January 2019).

3.2.1. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires in its section 610 that agencies publish in the Federal Register "a plan for the periodic review of the rules issued by the agency which will have a significant economic impact on a substantial number of small entities …" In addition to requiring such "a plan for …periodic review," Section 610 then states:

[27] EO 13563 § 7(a) states that "For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866."
[28] Memorandum on Modernizing Regulatory Review, Jan. 20, 2021, at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/ .

> The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule.

Thus, while the period of the first review is specified at "within" 10 years from the promulgation of a final rule, the frequency of any subsequent periodic reviews is not specified. For each such review, Section 610 states that agencies must address:

> (1) the continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

Not all rules impose a "significant economic impact on a substantial number of small entities." Indeed only a small percentage of all agency[29] rules are subject to the periodic review requirements under the RFA. The Government Accountability Office (GAO) has found that lack of clarity in the meaning of the terms "significant" and "substantial" has led agencies to use broad interpretations that allow rules to forgo these requirements.[30] Nonetheless, for rules that meet these criteria, the RFA appears to require periodic review on something approximating a decadal basis (if the initial ten year period were repeated). And because any agency rule could, in theory, have a significant economic impact on a substantial number of small entities, the periodic review requirement under the RFA applies broadly across federal agencies.

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[29] Regulatory Flexibility Act, 5 U.S.C. § 601(1) states that "the term 'agency' means an agency as defined in section 551(1) of this title [5]."

[30] See Government Accountability Office, Regulatory Flexibility Act: Clarification of Key Terms Still Needed (Statement of Victor Rezendes, Managing Director, Strategic Issues Team, Congressional Testimony), March 6, 2002. See also Aldy, supra n.2, at 29 (observing inconsistent implementation of RFA section 610 reviews by agencies).

3.2.2. The Foundations for Evidence-Based Policymaking Act

The Foundations for Evidence-Based Policymaking Act (FEBPA or the Evidence Act), enacted in January 2019, is a relatively new law that seeks to enhance agencies' strategic planning and the use of evidence-based evaluation in the policy process across all agencies.[31] The Evidence Act requires that each agency[32] develop an evidence-building plan—"a systematic plan for identifying and addressing policy questions relevant to the programs, policies, and regulations of the agency" (section 312(a)). Consistent with the strategic plan to be updated every four years under FEBPA section 306, the head of each agency is required under section 312(b) to develop annual "evaluation plans" that:

> (1) describe key questions for each significant evaluation study that the agency plans to begin in the next fiscal year;
>
> (2) describe key information collections or acquisitions the agency plans to begin in the next fiscal year; and

[31] Foundations for Evidence-Based Policymaking Act, HR 4174, P.L. 115-435, 132 Stat. 5529 (Jan. 14, 2019), codified at 5 U.S.C. 312. The bipartisan enactment of FEBPA in early 2019 built on prior work by the bipartisan Commission on Evidence-Based Policymaking (established by act of Congress in March 2016, P.L. 114-140, signed by President Obama) and its report on The Promise of Evidence-Based Policymaking (2017), as well as work by OMB, other federal agencies, state governments, think tanks, academic researchers, and others. ACUS Recommendations 2017-6 and 2014-5, see supra n.3, had called for evidence-based evaluation of new and existing regulations, steps now advanced by the FEBPA, see Todd Rubin, "The Evidence Act and Regulations," The Regulatory Review (Dec. 3, 2019), at https://www.theregreview.org/2019/12/03/rubin-evidence-act-regulations/ . See also Bridget Dooling, "Agency Learning Agendas and Regulatory Research," Brookings (May 12, 2020), at https://www.brookings.edu/research/agency-learning-agendas-regulatory-research/ . Relatedly, during the Obama administration, the Director of OMB together with the heads of the Domestic Policy Council (DPC), Office of Science and Technology Policy (OSTP), and Council of Economic Advisers (CEA), had issued guidance to federal agencies such as OMB Memorandum M-13-17, "Next Steps in the Evidence and Innovation Agenda" (July 26, 2013), calling on agencies to develop "high-quality low-cost evaluations" and "iterative experiementation," using "evidence building" approaches that feature "agency-wide evaluation plans," "common evidence guidelines," "cross-agency learning networks," and "what works clearinghouses."

[32] Under FEBPA section 306 regarding strategic plans, section 306(f) provides that "For purposes of this section the term 'agency' means an Executive agency defined under section 105, but does not include the Central Intelligence Agency, the Government Accountability Office, the United States Postal Service, and the Postal Regulatory Commission." (This may refer to 5 U.S.C. 105 which provides "For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment.") Then in the Definitions section, 5 U.S.C. 311(1), FEBPA states that "the term 'agency' means an agency referred to under section 901(b) of title 31." (This appears to be the definition that applies to the evidence-building plans under section 312.)

(3) any other information included in guidance issued by the Director under subsection (a)(6).

In addition, the FEBPA requires each agency to designate its evaluation officers and a statistical officer. And the Act requires the establishment of an Advisory Committee on Data for Evidence Building with membership of information officers, privacy officers, performance officers, data officers, and evaluation officers selected from the agency as well as 10 members from other stakeholder groups including State and local governments and NGOs.

While the FEBPA does not directly call for periodic review of regulations, it does set a framework for periodic strategic plans in section 306 and annual evaluation plans in section 312, under which agencies could better conduct such periodic evaluations of their policies and programs, and share expertise across agencies through the Advisory Committee.[33] Further, to implement the Foundations for Evidence-Based Policymaking Act, OMB has issued a series of memoranda to federal agencies, calling on the agencies to develop "learning agendas" to improve their policies and programs based on the questions and evidence assembled under the Act.[34] OMB notes that these evidence-building learning agendas are periodic: "The Evidence Act requires that agencies' strategic plans include a section on evidence building to be developed in conjunction with the agency's process of updating its strategic plan every four years."[35] In addition, the Office

[33] See Rubin, supra n.31.
[34] See OMB Memorandum M-19-23, *Phase 1 Implementation of the Foundations for Evidence-Based Policymaking Act of 2018: Learning Agendas, Personnel, and Planning Guidance* (July 10, 2019), at https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf (using the phrase "learning agenda" more than 100 times, and stating on p.7 in n.14 that "A learning agenda is equivalent to the agency evidence-building plan required in Section 101 of the Evidence Act. 5 U.S.C. §312(a)."). See also OMB Memorandum M-20-12, *Phase 4 Implementation of the Foundations for Evidence-Based Policymaking Act of 2018: Program Evaluation Standards and Practices* (March 10, 2020), at https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-12.pdf .
[35] OMB Memorandum M-19-23 (July 10, 2019), supra n. 34, at Appendix B, p.14. OMB adds that "The Evidence Act requires CFO Act agencies to have a learning agenda that covers a four-year period aligned with the strategic

of Evaluation Science (OES) at the General Services Administration (GSA) has published a set of "Evidence Act Toolkits" to assist agencies in their "learning agendas."[36] It appears possible, through guidance from OMB (perhaps complemented with a recommendation from ACUS, see section 6 below), that this new statute could be implemented through the kind of periodic reviews discussed in the present report.

3.3. Agency-specific Statutory Requirements

There are also statutory requirements for periodic review that apply more narrowly to only certain agencies and certain regulations. We conducted a review of statutes with requirements for periodic review across multiple agencies, focusing initially on statutory authorities exercised by several prominent regulatory agencies: the Environmental Protection Agency (EPA), the Department of Transportation (DOT) (both the National Highway Transportation Safety Administration (NHTSA) and the Federal Aviation Administration (FAA)), the Department of Health and Human Services (HHS) (in particular the Food and Drug Administration (FDA)), the Department of Labor (in particular the Occupational Safety and Health Administration (OSHA)), the Department of Homeland Security (DHS), the Department of Energy (DOE), the Department of Commerce (DOC) (including the National Marine Fisheries Service (NMFS)), the Department of the Interior (DOI) (including the Fish and Wildlife Service (FWS)), the United States Department of Agriculture (USDA), and the Federal Communications Commission (FCC).

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plan and that addresses priority questions (i.e., questions relevant for programmatic, operational, regulatory, or policy decision-making) across the entire agency (i.e., the entire Cabinet-level Department)." *Id.* at Appendix B, p.15. The due date every 4 years for agencies' strategic plans is set in 5 U.S.C. 306(a) to occur "Not later than the first Monday in February of any year following the year in which the term of the President commences under section 101 of title 3."

[36] See https://oes.gsa.gov/toolkits/ .

Numerous statutes require periodic review, but the nature of those requirements varies. Some statutes have general requirements for periodic review using terms such as "from time to time," "as necessary," or "revise periodically." In at least one case, a review can be triggered by the request of an outside actor such as the Governor of a State. And some statutes specify the periodicity of the review, at time intervals ranging in this sample from 1 year to 8 years.

Table 1 contains a list of statutes by agency that require some form of periodic review, organized into three groups: those with generic requirements for periodic review but no specified timetable; those with the possibility of periodic review on request by an outside stakeholder, and those with a specified periodicity or time interval for reviews.

In the remainder of this section, we examine selected agency-specific statutory requirements in more depth. These statutes were selected to be illustrative of the types of statutory language used and the types of activities required in periodic reviews.

Table 1: Agency-Specific Statutory Requirements for Periodic Review				
Agency	Statute Name	Statute Code	Trigger	Periodicity
Unspecified Periodicity--Agency Discretion				
EPA	Clean Air Act: National Ambient Air Quality Standards § 108	42 USC § 7408	NA	NA
EPA	Clean Air Act: New Source Performance Standards § 111	42 USC § 7411	NA	NA
EPA	Clean Air Act: Hazardous Air Pollutants § 112	42 USC § 7412	NA	NA
EPA	Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), § 103	42 USC § 9603	NA	NA
EPA	Safe Drinking Water Act, § 1418 and § 1463	42 USC 300g–7 & 300j–23	NA	NA
DOT-NHTSA	Motor Vehicle Safety, § 30117	49 USC § 30117	NA	NA
DOT-NHTSA	Motor Vehicle Safety, § 30166	49 USC § 30166	NA	NA
DHHS-FDA	Federal Food, Drug, and Cosmetic Act, § 346	21 USC § 346	NA	NA
DHHS-FDA	Federal Food, Drug, and Cosmetic Act, §360	21 USC § 360	NA	NA
DHHS-FDA	Federal Food, Drug, and Cosmetic Act, §371	21 USC § 371	NA	NA
DHHS-FDA	Federal Food, Drug, and Cosmetic Act, §387	21 USC § 387	NA	NA
DOL-OSHA	Occupational Safety and Health Act, Lead-based paint activities	29 USC 671	NA	NA
DHS	Homeland Security Act	6 USC § 1003	NA	NA
DHS	Homeland Security Act	6 USC § 3534	NA	NA
DHS	Homeland Security Act	6 USC § 3535	NA	NA
DOE	Energy Policy Act §717	15 USC § 717	NA	NA
DOE	Energy Policy Act	42 USC 15962	NA	NA
DOE	Energy Policy Act	42 USC 13389	NA	NA
DOE	Energy Independence and Security Act § 203	42 USC 17203	NA	NA
DOE	Energy Independence and Security Act § 32304A	42 USC 32304A	NA	NA
DOE	Federal Power Act	16 USC 824a-3	NA	NA
USDA	Healthy, Hunger-Free Kids Act of 2010	42 USC 1758b	NA	NA
USDA	Agriculture Risk Protection Act of 2000	7 USC 1508	NA	NA
Unspecified Periodicity--Stakeholder Triggered				
EPA	Clean Air Act: New Source Performance Standards § 111	42 USC § 7411	Application of the Governor of a State	NA
Specified Periodicity				
EPA	Clean Air Act § 109	42 USC § 7409	NA	5 years
EPA	Clean Air Act: New Source Performance Standards § 111	42 USC § 7411	NA	8 years
EPA	Clean Air Act: Hazardous Air Pollutants § 112(c)(1) and § 112(d)(6)	42 USC § 7412	NA	8 years
EPA	Clean Air Act: Hazardous Air Pollutants § 112(r)(3)	42 USC § 7412	NA	5 years
EPA	Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), § 121	42 USC § 9603	NA	5 years
EPA	Safe Drinking Water Act, § 1412	42 USC 300g-1	NA	5 years
EPA	Frank Lautenberg Chemical Safety for the 21st Century Act	15 USC 2625	NA	5 years
DOT-NHTSA	Motor Vehicle Safety, § 30111	49 USC § 30111	NA	5 years
DOT-NHTSA	Motor Vehicle Safety, § 30127	49 USC § 30127	NA	Annually
DOT-NHTSA	Motor Vehicle Safety, § 30141	49 USC § 30141	NA	2 years
DOT-NHTSA	Highway Safety Standards	23 USC § 412	NA	3 years
DHHS-FDA	Federal Food, Drug, and Cosmetic Act, § 346	21 USC § 346	NA	5 years
DHS	Homeland Security Act	6 USC § 888	NA	Annually
DHS	Homeland Security Act	6 USC § 3533	NA	Annually
DOE	Energy Policy Act	42 USC 16354	NA	5 years
DOE	Energy Independence and Security Act § 110	42 USC 17110	NA	5 years
DOE	Energy Independence and Security Act § 711	42 USC 17271	NA	5 years
DOE	Energy Independence and Security Act § 641	42 USC 17231	NA	2 years
DOE	Energy Independence and Security Act § 302	42 USC 6293	NA	7 years
USDA	Healthy, Hunger-Free Kids Act of 2010	42 USC 1751	NA	Annually
DOC and DOI	Endangered Species Act	16 USC 1533	NA	5 years
DHHS and USDA	National Nutrition Monitoring and Related Research Act, Dietary Guidelines for Americans	7 USC 5341	NA	5 years
FCC	Telecommunications Act of 1996 §202(h)	47 USC 161	NA	4 years

3.3.1. Clean Air Act: NAAQS and HAPs

3.3.1.1 NAAQS

Several provisions of the Clean Air Act (CAA) provide for periodic review of air quality standards in order to assess and update in light of new information, notably the latest science on the health impacts of the pollutants. CAA §§ 108 and 109 provide for periodic review of National Ambient Air Quality Standards (NAAQS). This includes periodic review "from time to time" of the criteria air pollutants which EPA lists under §§ 108(a)(1) and 108(c), and periodic review "at five year intervals" of the NAAQS under 109(d)(1). These provisions read:

> 108 (a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants
>
> (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—
>
> (A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
>
> (B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and
>
> (C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.[37]

> 108 (c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section. Not later than six months after August 7, 1977, the Administrator shall revise and reissue criteria relating to concentrations of NO2 over such period (not more than three hours) as he deems appropriate. Such criteria shall include a discussion of nitric and nitrous acids, nitrites, nitrates, nitrosamines, and other carcinogenic and potentially carcinogenic derivatives of oxides of nitrogen.[38]

[37] Clean Air Act § 108(a), 42 U.S.C. § 7408(a) (--).
[38] Clean Air Act § 108(c), 42 U.S.C. § 7308(c) (--).

> 109 (d)(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.[39]

Though the above provisions instruct the EPA Administrator to conduct periodic review of NAAQS, the CAA also requires EPA to establish an independent committee to conduct these reviews, known as the Clean Air Scientific Advisory Committee (CASAC). CASAC reviews NAAQS and the science upon which NAAQS levels are based. The CAA provisions concerning CASAC read as follows:

> 109 (d)(2)(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.[40]

Despite the CAA's statutory requirement that EPA review and either retain or revise NAAQS every five years at a minimum, EPA historically has not always met this timeline and has often been forced through litigation to fulfill its statutory mandate.[41]

The procedural details of NAAQS periodic review are within the EPA Administrator's discretion.[42] Under the current process, during the planning phase, EPA develops an Integrated Review Plan (IRP), which reflects CASAC and public review and input. This IRP summarizes the

[39] Clean Air Act § 109(d)(1), 42 U.S.C. § 7309(d)(1) (--).
[40] Clean Air Act § 109(d)(2)(B), 42 U.S.C. § 7309(d)(2)(B) (--).
[41] U.S. Congressional Research Service, The National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM): EPA's 2006 Revisions and Associated Issues (RL34762; March 14, 2013), by Robert Esworthy, at 1. *See*, *e.g.*, American Farm Bureau Federation v. U.S. EPA, 559 F.3d 512 (D.C. Cir. 2006).
[42] U.S. Congressional Research Service, Ozone and Particulate Matter Air Standards: EPA Review (IF11288; July 6, 2020), by Kate C. Shouse and Robert Esworthy, at 1.

previous reviews and identifies the issues the current review plans to tackle and outlines the reviews' schedule and its process.[43] EPA then compiles an Integrated Science Assessment (ISA) of any updates to the scientific literature since the time of the previous NAAQS review.[44] The ISA is subject to public input and feedback from CASAC.[45] EPA then typically uses the ISA to guide its quantitative assessment of risk and exposure (which are sometimes presented in a separate Risk and Exposure Assessment (REA) document).[46] The EPA then summarizes the scientific information in the ISA and the quantitative risk and exposure analyses to create the Policy Assessment (PA) document, which identifies options that the EPA Administrator could consider regarding potential revisions to the NAAQS.[47] This PA reflects input from the public and from CASAC.[48] Based on the IRP, the ISA, the PA, CASAC's feedback, and public input, EPA then proceeds through the rulemaking process in order to retain or revise NAAQS standards.[49]

Primary NAAQS must be set at levels that, "allowing an adequate margin of safety, are requisite to protect the public health."[50] This language has been interpreted to mean that EPA may

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[43] Id. at 1–2.
[44] Id. at 2.
[45] Id.
[46] Id.
[47] Id.
[48] Id.
[49] Id. This process is described by EPA in "Process of Reviewing the National Ambient Air Quality Standards," at https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards (last visited 30 March 2021). The key steps were reflected in a Memorandum from EPA Administrator Lisa Jackson on "Process for Reviewing National Ambient Air Quality Standards," May 21, 2009, at https://www.epa.gov/sites/production/files/2020-09/documents/naaqsreviewprocessmemo52109.pdf , and her Letter to Dr. Jonathan Samet, Chair of CASAC, May 21, 2009, at https://www.epa.gov/sites/production/files/2020-09/documents/oar-09-000-7191sametfinalresponse.pdf , retaining the ISA, REA, and PA, but separating the Advanced Notice of Proposed Rulemaking (ANPR) from the PA while expanding the PA to bridge from science to policy options, thus building on the key steps set forth in Memoranda by EPA Deputy Administrator Marcus Peacock, "Process for Reviewing National Ambient Air Quality Standards," Dec. 7, 2006, at https://www.epa.gov/sites/production/files/2020-09/documents/memo_process_for_reviewing_naaqs.pdf ; "Modifications to Process for Reviewing National Ambient Air Quality Standards," April 17, 2007, at https://www.epa.gov/sites/production/files/2020-09/documents/peacock_4_17_07_memo.pdf ; and his letter to Dr. Rogene Henderson, Chair of CASAC, Sept. 8, 2008, at https://www.epa.gov/sites/production/files/2020-09/documents/peacocklettertocasac090808.pdf .
[50] Clean Air Act § 109(b), 42 U.S.C. § 7309(b) (--).

not consider non-health criteria such as costs or technological feasibility when setting NAAQS.[51] However, recognizing that the standards must be set taking into account judgments about the science, in each periodic review, the Policy Assessment (PA) provides staff analysis of the scientific basis for alternative policy options for consideration by senior EPA management prior to rulemaking.[52]

3.3.1.2 Hazardous Air Pollutants (HAPS)

In addition to these periodic reviews of the NAAQS, the CAA also calls for periodic reviews of the emissions standards for Hazardous Air Pollutants (HAP) under section 112, as significantly amended in 1990. Under CAA section 112(d)(6), EPA must review and consider revising the Maximum Achievable Control Technology (MACT) standards at least every 8 years:

> (d)(6) Review and revision. The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

When EPA reviews its MACT standards under 112(d)(6), and uses that information in deciding whether to revise the MACT, the agency may consider cost, must assess technological change in control options, and must address regulatory gaps such as missing standards for listed air toxics from that source category.[53]

EPA has had difficulty meeting the timelines in the CAA for issuing the numerous initial MACT standards (addressing more than 180 hazardous air pollutants from many source categories) and then reviewing them every 8 years. A GAO study in 2006 of the MACT standards

[51] U.S. Congressional Research Service. The National Ambient Air Quality Standards (NAAQS) for Particular Matter (PM): EPA's 2006 Revisions and Associated Issues (RL34762; March 14, 2013), by Robert Esworthy at 7. *See generally*, Whitman v. American Trucking Association, 531 U.S. 457, 465-472, 475-76 (2001).
[52] See https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards (visited January 31, 2021).
[53] Louisiana Environmental Action Network (LEAN) v. EPA, 955 F.3d 1088 (D.C. Cir. 2020).

found that EPA had often missed these deadlines, had inadequate funding to carry out the program, was often driven by litigation to promulgate or review standards, and had insufficient data on how well the promulgated standards were working.[54] Although we lack comprehensive data on the timeliness of reviews for the numerous MACT standards subject to periodic review under 112(d)(6), long delays in such reviews appear to continue in at least some cases.[55] For example, in 1998 EPA had issued a MACT standard for hazardous air pollutant emissions from more than 100 facilities in the Pulp and Paper sector. After several years of study and some litigation, EPA employed a contractor to review the technology control options pursuant to 8-year periodic review provision in CAA 112(d)(6).[56] In addition, under CAA 112(f)(2) – which requires a one-time "residual risk review" to occur within 8 years of issuance of the MACT standard – EPA reviewed whether the MACT standards provide an ample margin of safety to protect public health. EPA then undertook a new rulemaking and published a revised final rule in September 2012.[57] In another example, EPA issued MACT standards for hazardous air pollutants including vinyl chloride, ethyl benzene, toluene and benzene from Municipal Solid Waste Landfills in 2003; after study and litigation, EPA conducted a residual risk review under 112(f)2) and a technology review under 112(d)(6), and was to issue a revised final rule in March 2020.[58]

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[54] GAO, Clean Air Act: EPA Should Improve the Management of Its Air Toxics Program (GAO-06-669) (23 June 2006), at https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-06-669/html/GAOREPORTS-GAO-06-669.htm .

[55] EPA has posted information on these "Risk and Technology Review of the National Emissions Standards for Hazardous Air Pollutants" at https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous .

[56] See RTI International, "Section 112(d)(6) Technology Review for Pulping and Papermaking Processes" (Nov. 16, 2011), at https://www.epa.gov/sites/production/files/2015-06/documents/tech_review_memo_subpart_s.pdf .

[57] See EPA, "National Emission Standards for Hazardous Air Pollutants From the Pulp and Paper Industry," 77 Fed. Reg. 55698 (Sept. 11, 2012). EPA collects this history in "Pulp and Paper Production (MACT I & III): National Emissions Standards for Hazardous Air Pollutants (NESHAP) for Source Categories," at https://www.epa.gov/stationary-sources-air-pollution/pulp-and-paper-production-mact-i-iii-national-emissions-standards .

[58] See https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU18 .

3.3.2. Clean Air Act & Renewable Fuel Standards

The Clean Air Act (CAA) § 211(o)(11) mandates a periodic review relating to renewable fuel standards (RFS) as provided for under § 211(o)(2)(B). Specifically, it reads:

> To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—
> (A) existing technologies;
> (B) the feasibility of achieving compliance with the requirements; and
> (C) the impacts of the requirements described in subsection (a)(2) on each individual and entity described in paragraph (2).[59]

Though this section purports to provide a framework for periodic review of RFS, the Environmental Protection Agency (EPA) has itself made note of the ambiguity of this statutory mandate; EPA has underlined the statute's lack of specificity about the expected extent of periodic review or the publication format of outputs from the review process.[60] Furthermore, EPA notes that the statute does not indicate how frequently the agency must conduct periodic review of RFS or the deadline by which it must conduct its first review.[61] The agency also states that the periodic review is on the three items enumerate in (A)-(C) and not on the past rules themselves. They may use the information from these reviews to promulgate new rules, but not necessarily to revise past rules. This is an extension of our definition of periodic retrospective review, but is in the same spirit.

Not only does § 211(o)(11) fail to specify these crucial elements of periodic review, but the minimally descriptive language in the statute does little to provide EPA with meaningful guidance about what the provision *does* say. For instance, EPA notes that § 211(o)(11)'s phrase,

[59] Clean Air Act § 211(o)(11), 42 U.S.C. § 7511(o)(11) (--).
[60] U.S. Environmental Protection Agency, *EPA-420-S-17-002*, *Periodic Reviews for the Renewable Fuel Standard Program* (2017) at 1.
[61] Id. at 2.

"appropriate adjustment," does not specify what component of the RFS program the agency is permitted to adjust: percentage standards under § 211(o)(3)(C), greenhouse gas reduction percentages under § 211(o)(4), or cellulosic waiver credit prices for inflation under § 211(o)(7)(D)(ii).[62] In the face of this lack of specificity, the EPA interprets § 211(o)(11)'s language to refer to § 211(o)(7)'s waiver authority and § 211(o)(2)(B)(ii)'s (re)set authority.[63] Finally, § 211(o)(11)(C) refers to § 211(a)(2), a Clean Air Act subsection that does not actually exist. As a consequence, EPA interprets subsection (C) as inoperative.[64]

Though less formalized and under different headings, EPA has conducted numerous periodic reviews of existing technologies since 2007, helping the agency meet its statutory mandate under § 211(o)(11)(A).[65] EPA also cites its conclusions in 2014 through 2018 "that none of the statutory volume targets for cellulosic biofuel, advanced biofuel, and total renewable fuels were feasible" as evidence that it had conducted a periodic review of "the feasibility of achieving compliance with the requirements" of § 211(o)(2)(B).[66]

3.3.3. Endangered Species Act & Listed Species

Under the Endangered Species Act (ESA), the Secretaries of Commerce and Interior are responsible for conducting a periodic review at least once every five years of listed species in order to evaluate whether the status of such species should be updated or whether the species should be removed from the list (Endangered Species Act § 4(c)(2)).[67]

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[62] Id.
[63] Id.
[64] Id. at 3–5.
[65] *See*, *e.g.*, 72 FR 23900, 75 FR 14670, 75 FR 76790, 77 FR 1320, 78 FR 49794, 80 FR 77420, 81 FR 89746, 79 FR 42128, 81 FR 80828, "Completed pathway assessments," available in docket EPA-HQ-OAR-2017-0627, "Decision Document – Approval of Fiberight Municipal Solid Waste Separation Plan," June 2012 available in docket EPA-HQ-OAR_2017-0627.
[66] U.S. Environmental Protection Agency, *EPA-420-S-17-002*, *Periodic Reviews for the Renewable Fuel Standard Program* (2017) at 9–10.
[67] Endangered Species Act § 4(c)(2), 16 U.S.C. § 1533(c)(2) (2006; enacted 1973).

In practice, the Department of Interior has designated its agency, the U.S. Fish and Wildlife Service (FWS), to carry out these reviews under the ESA, while the Department of Commerce has designated its National Marine Fisheries Service (NMFS) within the National Oceanic and Atmospheric Administration (NOAA) to carry out these reviews under the ESA.[68] In an effort to develop a uniform approach to conducting periodic reviews of listed species across both agencies, FWS and NMFS (collectively the Services) have developed a guidance document that states their methodologies and clarifies their understandings of their mandates.[69]

The Services' periodic review under ESA § 4(c)(2) uses "the best scientific and commercial data available" to assess whether a species is appropriately listed, to track the species' progress toward recovery, and to develop or amend a plan for its conservation.[70] This reliance on best scientific data may, under certain circumstances, require peer review of scientific determinations per the Information Quality Act.[71] The Services' 5-year periodic review analysis examines (1) the relevance of the 1996 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy),[72] (2) progress toward meeting the species' recovery criteria as outlined in its recovery plan if such a document exists, and (3) continued applicability of the five listing factors.[73] Under the DPS Policy, distinct population segments listed prior to 1996 must be evaluated for consistency with the Policy's requirements.[74]

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[68] *See* U.S. Envtl. Prot. Agency and U.S. Fish and Wildlife Serv., *5-Year Review Guidance: Procedures for Conducting 5-Year Reviews Under the Endangered Species Act* 1-1 (2006).
[69] *See, generally* U.S. Envtl. Prot. Agency and U.S. Fish and Wildlife Serv., *5-Year Review Guidance: Procedures for Conducting 5-Year Reviews Under the Endangered Species Act* (2006).
[70] Id. at 2-1 and 1-2.
[71] *See* Id. at 1-4 (citing Pub. L. No. 106-554 § 515).
[72] 61 Fed. Reg. 4722.
[73] U.S. Envtl. Prot. Agency and U.S. Fish and Wildlife Serv., *5-Year Review Guidance: Procedures for Conducting 5-Year Reviews Under the Endangered Species Act* 2-5 (2006).
[74] Id. at 1-6.

The Services clarify that their 5-year periodic review of listed species does not constitute rulemaking; rather, the review is a recommendation to the Secretaries of Commerce and Interior expressing either that no change to the species' classification is necessary or that a change *is* necessary and, therefore, rulemaking is required.[75] Because the 5-year periodic review of listed species is not a rulemaking, the Services consider all status reviews to fulfill the 5-year periodic review requirement so long as the status review (1) is published in the Federal Register, (2) actually addresses the status of the species, and (3) makes a recommendation about the classification of the species.[76]

Though the ESA requires that periodic review of listed species be conducted at least once every five years, the Services stipulate that this timeframe is not always possible and state that a failure to meet the 5-year review requirement does not undermine the listing of the species.[77] Once a periodic review has been initiated, the Services endeavor to complete less complex reviews within several months to a year, while giving themselves more time to complete more complex reviews.[78]

3.3.4. National Nutrition Monitoring and Related Research Act & Dietary Guidelines for Americans

The 1990 National Nutrition Monitoring and Related Research Act (NNMRRA) mandates that the Secretaries of Agriculture and Health & Human Services (HHS) jointly administer at least every five years periodic reviews of national dietary guidelines. Since passage of the NNMRRA, the U.S. Department of Agriculture (USDA) and the Department of Health & Human Services (DHHS) have conducted numerous periodic reviews of these national dietary guidelines, including

[75] Id. at 1-2.
[76] Id.
[77] *See* Id. at 1-4.
[78] Id. at 1-5.

the first three which were produced voluntarily before the Congressional mandate.[79] These national dietary guidelines, published in a document called Dietary Guidelines for Americans (DGA), inform all federal nutrition policies including the national School Lunch Program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the Supplemental Nutrition Assistance Program (SNAP).[80] Specifically, NNMRRA § 5341(a) reads:

> (1) In general. At least every five years the Secretaries shall publish a report entitled "Dietary Guidelines for Americans". Each such report shall contain nutritional and dietary information and guidelines for the general public, and shall be promoted by each Federal agency in carrying out any Federal food, nutrition, or health program.
>
> (2) Basis of guidelines. The information and guidelines contained in each report required under paragraph (1) shall be based on the preponderance of the scientific and medical knowledge which is current at the time the report is prepared.
>
> (3) Pregnant women and young children. Not later than the 2020 report and in each report thereafter, the Secretaries shall include national nutritional and dietary information and guidelines for pregnant women and children from birth until the age of 2.[81]

In practice, USDA and DHHS periodically convene a special Dietary Guidelines Advisory Committee (DGAC), a group of independent experts who assemble and review scientific data to inform the nutrition guidelines, and who make recommendations to USDA and DHHS based on these data.[82] DGAC's report is then subject to public comment and feedback from other federal

[79] U.S. Congressional Research Service. Dietary Guidelines for Americans: Frequently Asked Questions (R44360; Feb. 2, 2016), by Agata Dabrowska at 2.
[80] Id. at Summary.
[81] 1990 National Nutrition Monitoring and Related Research Act § 5341(a), P.L. 101-445, -- 7 U.S.C. 5341 (1990).
[82] U.S. Congressional Research Service. Dietary Guidelines for Americans: Frequently Asked Questions (R44360; Feb. 2, 2016), by Agata Dabrowska at Summary.

agencies, which informs the DGA document produced by USDA and DHHS.[83] This DGA document is then reviewed by the National Academies of Medicine (NAM).[84]

Though the aforementioned process captures the periodic review process as it stands today, the process has evolved in several meaningful ways since 1980. For instance, DHHS and USDA scientists themselves produced national nutrition guidelines in-house in 1980, a process that caused stakeholders to raise concern about the guidelines' validity.[85] In the wake of these critiques, a Senate Committee in 1983 appropriated money to convene an external federal committee comprised of scientific and nutrition experts who would themselves review the scientific data and develop recommendations for the Secretaries of USDA and HHS, an external federal committee that was made permanent in 1987.[86]

Generally speaking, the national dietary guidelines have evolved to include a larger number of guidelines.[87] The final guidelines produced by DHHS and USDA have also avoided references to tax policy or sustainability considerations, despite the presence of these concerns in DGAC's report.[88]

3.3.5. Toxic Chemicals

The Frank Lautenberg Chemical Safety for the 21st Century Act (2016), amending the Toxics Substances Control Act (1976), provides:

> Section 26(L) … (2) REVIEW.—Not later than 5 years after the date of enactment of the Frank R. Lautenberg Chemical Safety for the 21st Century Act, and not less frequently than once every 5 years thereafter, the Administrator [of EPA] shall—

[83] Id.
[84] Id.
[85] Id. at 2.
[86] Id. at 2–3 (citing U.S. House of Representatives Conference Committee, 100th Cong., 1st sess., 1987, H.Rept. 100-498).
[87] Id. at 2.
[88] Id. at 13.

(A) review the adequacy of the policies, procedures, and guidance developed under paragraph (1), including with respect to animal, nonanimal, and epidemiological test methods and procedures for assessing and determining risk under this title; and
(B) revise such policies, procedures, and guidance as the Administrator determines necessary to reflect new scientific developments or understandings.

The Lautenberg Chemical Safety Act was enacted in 2016, so the first 5 year review period will occur in 2021.

3.3.6. Food Safety

The Federal Food, Drug & Cosmetics Act (FFDCA), 21 USC § 346a(b)(2)(F), provides:

> In establishing, modifying, leaving in effect, or revoking a tolerance for a pesticide chemical residue, the Administrator may, when assessing chronic dietary risk, consider available data and information on the percent of food actually treated with the pesticide chemical (including aggregate pesticide use data collected by the Department of Agriculture) only if the Administrator—…
> (iv) provides for the periodic reevaluation of the estimate of anticipated dietary exposure.

3.3.7. Energy Standards

The Energy Policy Act (EPAct), § 312 provides:

> (f)(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

And EPAct § 990 provides:

> "(e) Periodic Reviews and Assessments.—
> "(1) In General.— The Secretary shall enter into appropriate arrangements with the National Academy of Sciences to conduct periodic reviews and assessments of—
> "(A) the research, development, demonstration, and commercial application programs authorized by this Act and amendments made by this Act;
> "(B) the measurable cost and performance-based goals for the programs as established under section 902, if any; and
> "(C) the progress on meeting the goals.
> "(2) Timing.— The reviews and assessments shall be conducted every 5 years or more often as the Secretary considers necessary."

3.3.8. Quadrennial Reviews of Media Ownership Policies

The Federal Communnications Commission (FCC) conducts a Quadrennial Review of its media ownership policies. Under the Communications Act of 1934, 47 U.S.C. § 151 *et seq*., the FCC issues rules governing ownership of broadcast media to prevent market concentration and promote competition. Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, (as amended by Pub. L. No. 108–199, § 629, 118 Stat. 3, 99–100 (2004), and codified at 47 U.S.C. 161) requires the FCC to review these rules quadrennially to "determine whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." (Prior to the 2004 amendments, this review was required biennially.) The rules emanating from these periodic reviews have often been challenged in court. Most recently, the FCC's appeal from the decision in Prometheus Radio Project v. FCC, 939 F.3d 567 (3d Cir. 2019), was argued before the US Supreme Court on Jan. 19, 2021.

3.4. Agency Policies

Some agencies have adopted their own policies calling for periodic reviews of their regulations. Some of these are contained in the agency's "rule on rulemaking."[89]

For example, the Department of Transportation (DOT) has, pursuant to Executive Order 13563, published a plan for the retrospective review and analysis of its existing rules. This plan specifies its procedures for retrospective review and notes that "[s]ince 1998, [DOT] has had a plan that requires all of it existing rules to be reviewed every 10 years to determine whether they need to be revised or revoked."[90] This plan also notes that the review of these rules is to consider,

[89] See ACUS, Recommendation 2020-1, "Rules on Rulemaking" (issued Dec. 16, 2020) (including Recommendation 2(f) on "procedures for reassing existing rules").
[90] Dep't of Transp., Plan for Implementation of Executive Order 13563 (2 August 2011).

among other factors, "[t]he need to eliminate overlapping or duplicative regulations"; "[t]he burdens imposed on, and the benefits achieved for, those affected and whether they are greater or less than originally estimated"; and "[t]he degree to which technology, economic conditions, or other involved factors have changed."[91] (DOT's implementation in practice of these requirements is discussed in Section 4 below.)

FEMA has also codified Rulemaking Policy and Procedures in 49 CFR Chapter I, Subchapter a, Part 1 that require periodic review. In Section 1.8, FEMA is required as part of the semi-annual regulatory agenda to publish "a plan for periodic reviews of existing regulations within 10 years of the date of publication." The reviews should specify: "the continued need for the rule, the nature, type and number of complaints received concering the rule from the public; the complexity of the rule, including need for review of language for clarity; the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule." All of these requirements for the components of the review are consistent with, indeed the same as, those required under the RFA.

The Securities and Exchange Committee (SEC) established requirements for retrospective review of existing regulations and a plan for periodic review of commission rules in 17 CFR Chapter II. These two rules on rulemakings draw from the requirements from the RFA and hence

[91] *Id.* at 12. On March 24, 2021, DOT issued a rule rescinding its prior rule on its administrative procedures, following directions in Executive Orders 13990 and 13992 issued by President Biden in early 2021. Dep't of Transportation, "Administrative Procedures, Guidance and Enforcement Procedures," – Fed. Reg. – (March 24, 2021), at https://www.transportation.gov/sites/dot.gov/files/2021-03/Repeal%20of%20Administrative%20Rule.pdf (rescinding Dep't of Transportation, "Administrative Rulemaking, Guidance, and Enforcement Procedures," 84 Fed. Reg. 71714 (Dec. 27, 2019) which had been codified in 49 CFR part 5).

require that rules be reviewed with an eye toward: "the continued need for the rule, the nature, type and number of complaints received concering the rule from the public; the complexity of the rule, including need for review of language for clarity; the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule." However, while the RFA requires these reviews within 10 years only for rules that have a significant economic impact on a substantial number of small entities, the SEC has chosen to extend this review to a much larger class of rules. "This approach was adopted primarily because the commission staff had already targeted certain blocks of rules for its own internal review. It was determined in such cases that staff resources would be economized by simply expanding the scope of the planned reviews to accommodate the review requirements of the RFA."

Prof. Aldy reported to ACUS in his 2014 report on retrospective review that the "National Marine Fisheries Service [NMFS] promulgated a 2013 rule that covers the speed of vessels that could collide with North Atlantic right whales (78 FR 73726). This rule removed a sunset provision and established that the agency would periodically review the benefits and costs of the rule, and no later than five years after the publication of the final rule. While the rule did not describe in detail how the review would be undertaken, it does establish the norm for periodic review of performance and consideration of net social benefits."[92]

The Department of Health and Human Services (HHS) issued a notice of proposed rulemaking on Nov. 4, 2020, and then a final rule on January 8, 2021, aiming to go further than

[92] Aldy, supra note 2, at 62.

seeking periodic reviews, by subjecting its rules to a "sunset" date: the department's regulations would terminate unless they have been reviewed within the preceding 10 years.[93] The preamble to the final rule states:

> Therefore, in order to ensure evidence-based regulation that does not become outdated as conditions change, HHS finalizes this rule to provide that, subject to certain exceptions, all regulations issued by the Secretary or his delegates or sub-delegates in Titles 21, 42, and 45 of the CFR shall expire at the end of (1) five calendar years after the year that this final rule first becomes effective, (2) ten calendar years after the year of the Section's promulgation, or (3) ten calendar years after the last year in which the Department Assessed and, if required, Reviewed the Section, whichever is latest. The RFA and executive orders have only resulted in limited retrospective review by the Department. The Department believes this final rule will effectuate the desire for periodic retrospective reviews expressed in the RFA and Executive Orders, as well as ensure the Department's regulations are having appropriate impacts and have not become outdated. The literature and the Department's experience suggest that many regulations are having estimated impacts that, over time, differ from what was estimated at the time the regulations were promulgated. This final rule will enhance both (1) the fulfillment of the existing policies that led to the Department's regulations and (2) the Department's longstanding desire to comply with the RFA and periodically review its regulations.[94]

The HHS rule estimated that the agency would need to review thousands of its rules before their expiration under this new rule:

> The Department has roughly 18,000 regulations, the vast majority of which it believes would need to be Assessed. Roughly 12,400 of these regulations are over ten years old, and roughly 17,200 are more than five years old. The vast majority of these would need to be Assessed within five years of this final rule's effective date (or six years if the optional extension is exercised by the Secretary). The Department estimates that roughly five regulations on average are part of the same rulemaking due to the number of unique Federal Register citations associated with its regulations. This would suggest the Department would have to perform roughly 3,440 Assessments in the first five years (or six for certain of these regulations if the extension is exercised by the Secretary, and 3,600 Assessments in total.[95]

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[93] HHS, Final Rule, "Securing Updated and Necessary Statutory Evaluations Timely," 86 Fed. Reg. 5694 (Jan. 19, 2021), at https://www.federalregister.gov/documents/2021/01/19/2021-00597/securing-updated-and-necessary-statutory-evaluations-timely .

[94] 86 Fed. Reg. at 5694-5695.

[95] 86 Fed. Reg. at 5740-5741 (citations omitted).

A lawsuit challenging this sunset rule was filed on March 9, 2021. On March 18, 2021, the Biden administration HHS announced that it would delay the implementation of this rule by one year, to 2022, while considering potential revisions.

The pros and cons of a sunset (expiration date) for thousands of rules, unless reviews are conducted by that date, warrant careful consideration. While recognizing the objective to promote retrospective reviews that may be needed, a strict sunset date is an especially strong, perhaps overly strong, incentive for periodic review. It raises questions under US administrative law regarding whether and how an agency can set an expiration date for thousands of its rules through a single new rule, without going through notice and comment rulemaking to rescind each rule or cluster of rules separately.[96] Sunsetting rules may pose high social instability costs, as discussed above, if numerous rules on which stakeholders rely suddenly expire, potentially outweighing the benefits of the agency undertaking periodic reviews of some of these rules. Moreover, there does not seem to be a strong analytic basis presented for the periodicity (5 or 10 years) required in the HHS sunset review rule. There could be other mechanisms to mobilize such mega-review, such as a statutory, executive order, or agency requirements to do periodic reviews on a staggered timeline yet without a sunset. At least, the timing in the HHS rule may need to be extended to make it feasible to conduct thousands of reviews and to set priorities on which rules to review in which sequence.

[96] This issue is discussed briefly in Part III of the preamble to the HHS rule, 86 Fed. Reg. at 5703-04 (arguing that the agency has the legal authority to address multiple rules through one combined rulemaking to avoid a "cumbersome" process of revising each rule separately; and that it "can, through notice-and-comment rulemaking, amend its regulations to provide that they expire at a future date"). See also id. (arguing that "it is nearly impossible to see how a satisfyingly comprehensive review could occur without a sunset mechanism. … The literature and the Department's experience suggest that large numbers of regulations are having impacts that, over time, differ from what was estimated at the time the regulations were promulgated. Therefore, the Department needs to conduct periodic reviews of its regulations to determine whether the policy goals behind the regulations are in fact being effected (and if amending those regulations could more effectively further those goals). The Department concluded that the benefits of retrospective review, and need to more strongly incentivize it, justified this course of action. Forty years of experience since the RFA's enactment; the decades since relevant Executive Orders were enacted; and other Federal government efforts to spur the Department to conduct more retrospective reviews indicate that, absent this final rule's pushing mechanism, the Department will not conduct as many retrospective reviews as desired.").

The agency may need additional staff and funding to conduct the large volume of periodic reviews. If well designed and scheduled, even without a sunset, an agency pursuing a mega-review process could take the opportunity to conduct reviews that compare multiple rules (to assess policy designs and their performance) and multiple RIAs (to assess and improve the accuracy of ex ante impact assessments), in order to advance regulatory learning, perhjaps with the assistance of an outside entity such as an expert contractor and/or oversight body.[97]

4. Interviews with Agency Personnel

We arranged interviews with staff at several key agencies to learn more about their actual practice (if any) of periodic review. Here we identify the agencies; the individual staff remain anonymous. Live interviews were conducted by Zoom due to the COVID-19 pandemic. Live interviews were conducted with staff from the Office of Management and Budget, Office of Information and Regulatory Affairs (OMB/OIRA); the Environmental Protection Agency (EPA); the Department of Transportation (DOT); the Department of Agriculture (USDA). We also received written answers to questions from the Occupational Safety and Health Administration (OSHA). We offered respondents an opportunity to review the report prior to publication to correct factual errors. All findings and conclusions from the research are solely the discretion of the authors.

The interviews followed a scripted set of questions. The questions posed to OMB/OIRA were slightly different from the questions posed to the regulatory agencies. The set of questions asked of the agencies is given in Figure 1 while the questions asked of OMB/OIRA are given in Figure 2.

[97] See Bennear & Wiener (2020), supra n.2.

1. Is our use of the term "periodic review" consistent with your understanding of periodic review, or does that term mean something different to you and your agency?
2. Does your agency conduct this type of periodic review (or has it in the past) ? If so, could you give some examples?
3. What is the primary purpose of these periodic reviews?
4. How does the agency decide how frequently to do reviews?
5. Which stakeholders play a role in periodic review, and what role do they play?
6. Who within the agency leads the periodic review process? Who conducts the analysis?
7. How have periodic reviews been used to make changes in agency rules, policies, programs or other regulatory actions?
8. To what extent have periodic reviews had a broader effect, beyond revising a specific rule being reviewed?

Figure 1: Interview Questions for Regulatory Agencies

1. Is our use of the term "periodic review" consistent with your understanding of periodic review, or does that term mean something different to you and your agency?
2. Which agencies are most frequently engaged in periodic review?
3. What is the authority calling for these agencies to undertake this periodic review (e.g., statutory, EO, agency policy, court order, etc.)?
4. What are some (or the best) examples of successful use of periodic review to improve agency actions? What kinds of results have these periodic reviews produced, e.g. changing a rule, policy or program or other action? or broader effects?
5. What are some examples of unsuccessful use of periodic review, including agencies that tried but achieved little, or agencies that do not undertake periodic reviews despite their being called to do so?
6. Are there examples of periodic review processes that turn out to impede agency improvements, or otherwise have downsides? What are some examples, and why did the periodic review fail to yield the desired results?
7. What factors best explain that the difference between successful and unsuccessful periodic reviews?
8. How have periodic reviews been used to make changes in agency rules, policies, programs or other regulatory actions?
9. To what extent have periodic reviews had a broader effect, beyond revising a specific rule being reviewed?

Figure 2: Interview Questions for OMB/OIRA

The remainder of this section is organized by major question (as outlined in Figures 1 and 2). Rather than report agency-by-agency, we report by question topic, focusing on key commonalities and differences that emerged from the interviews on each topic.

4.1. Definition and Examples of Periodic Review

We offered each interviewee the following definition of periodic review: "Periodic review is a type of retrospective, or ex post, review of the performance of existing agency regulatory actions. Periodic review differs from some types of retrospective reviews, however, in that these periodic reviews are repeated multiple times, often at regular intervals (e.g., every X years)." Nearly all of the agencies we spoke with agreed that their agency's interpretation of periodic review aligned with this definition. One agency pointed out that some of their activities may go beyond our definition because the agency does not always require a retrospective review of the performance of past agency actions, but rather sometimes assesses the latest knowledge regarding science or technology that may inform future regulatory actions. But the use of such knowledge to revise or update a past rule in a new rule seems inevitably to implicate the same questions of evaluating the performance of the past rule in light of new information about changes in science, technology, social conditions, and other key factors, and thus fits comfortably into periodic review of agency regulation.

For each agency, we asked the staff interviewed to identify examples of periodic review, including examples we found in the documentary evidence we collected (described in Section 3 above). For example, EPA identified Clean Air Act regulations, Safe Drinking Water Act reguations, and others. OSHA stated they have done several reviews under Section 610 of the RFA. USDA discussed both Section 610 reviews under the RFA and reviews conducted in support of reauthorization of the Farm Bill. DOT recalled reviews consistent with the 10-year review mandate and for Section 610 of the RFA.

4.2. Purpose of Periodic Review

The agency staff shared widespread agreement that many periodic reviews occur because they are required by statute. At EPA, the most prominent periodic reviews occur under the Clean Air Act, particularly the National Ambient Air Quality Standards (NAAQS). These standards are required to be reviewed every five years by statute (CAA 109(d)) (see Section 3.3.1.1). According to agency staff, in earlier approach (before the revisions to the process that began about 2006, as described above), this process faced significant staffing challenges as each five year review drew staff from other projects in a time crunch to meet the next NAAQS review deadline. Since about 2006-2009, the Agency has changed the process so that there is a standing group of EPA staff and of members of the Clean Air Scientific Advisory Committee (CASAC) who conduct ongoing reviews of the latest science on the human health impacts of each criteria air pollutant for the ISA, the REA (if conducted), and the PA, bridging from the science to the policy options. Agency staff told us that these changes have made the periodic review of the NAAQS standards more effective. Rather than a start-and-stop process of review every five years, the process is now far more continuous, even though changes to the NAAQS standards are only promulgated (if needed) every five years.

EPA staff also mentioned several other examples of periodic review within the agency. They said the Safe Drinking Water standards undergo a less rigorous scientific review than the Clean Air Act standards, but the maximum contaiminant levels (MCLs) set under the SDWA are reviewed periodically. Under the Clean Air Act, the Maximum Attainable Control Technology (MACT) standards for Hazardous Air Pollutants have provisions that call for periodic review of the practices, processes, and control technologies. These reviews of science and technology can be used to update rules, but updating the rules is not required.

DOT staff emphasized that there is a wide range of retrospective reviews performed at the agency ranging from pro forma to deeply substantive. The Office of the Sectretary at DOT has procedures for these reviews that focus largely on pro forma aspects such as ensuring that the regulations are in clear plain language, correcting references, and the like. Rules that have a substantial economic impact on a significant number of small entities and are therefore subject to periodic review under the Regulsatory Flexibility Act (RFA) typically receive more substantive reviews.

For the USDA, congressional appropripriations is a key driver of periodic program review. In particular, the Farm Bill is a major driver of periodic review. This reauthorization is supposed to happen every 5 years, though in reality it is frequently closer to 6 or 7 years. Both the conservation and nutrition programs are subject to re-authorization and the Farm Bill requires reporting to specifically evaluate various aspects of the program.

The national Dietary Guidelines for Americans are also subject to periodic review. Scientists in the Agricultural Research Service at USDA are involved in reviewing the dietary guidelines, which are jointly administered by HHS and USDA. The staff we spoke with were not experts on this aspect of periodic review within USDA but thought that the dietary guidlelines program was reviewed more continuously based on updated science, rather than in five year periods such as the nutrition programs authorized by the Farm Bill.

OSHA stated that the primary purpose of their periodic reviews is "to examine whether the reviewed standards have become unjustified, unnecessary, or insufficient as a result of changed circumstances; whether the standards are compatible with other regulations or are duplicative or inappropriately burdensome in the aggregate; and whether the effectiveness of the standards can be improved." They also said that: "specifically for small entities, the primary purpose of these

reviews is to determine whether the reviewed standards should be continued without change, rescinded, or amended to minimize any significant economic impact on a substantial number of small entities."

OMB/OIRA reviews and provides government-wide guidance and policy for regulatory impact assessment and other regulatory analyses at federal agencies required to perform such analysis under EO 12866. OIRA staff told us that most of the periodic reviews they see are the result of compliance with the Regulatory Flexibility Act (RFA) – so called Section 610 reviews. Aside from the RFA reviews, agencies tend to do these reviews and tend perform more detailed or frequent reviews when they are statutorily mandated. OIRA staff cited the NAAQS standards at EPA and the Energy Efficiency standards at DOE as examples where there were statutory requirements for periodic review.

4.3. Frequency of review

At EPA, the frequency of some reviews is mandated by statute. Staff did not recall any deviation from these timetables toward a more frequent review. If anything, some of these timelines are more aggressive than the agency staff think is practical/reasonable, because the reviews stretched the agency too thin given its resources. As noted above, the 8 year deadline for perioridic review of the MACT standards under CAA 112(d)(6) have often been missed. Struggling with the regulatory timetable did lead EPA to change the staffing model for the Clean Air Act NAAQS reviews so that staff worked more continuously on the ongoing updating of new information and the waves of 5 year reviews were thereby more achievable.

DOT has a 10 year review cycle for all rules. Agency staff we interviewed stated that the agency does its best to meet this 10 year cycle, but that the rules are staggered so that the 10 year

cycles don't all come due at the same time, and that nevertheless staffing shortages sometimes keep the agency from meeting the 10 year goal. While the all rules are supposed to be reviewed every 10 years, these reviews can happen earlier or more frequently. Stakeholder input is critical in the determination to review a rule "off-cycle" at DOT (see section 4.4a).

OSHA's responses to questions about periodic review focused on the Section 610 reviewes under the RFA. OSHA staff stated that while they intend to review rules subject to this requirement (e.g., rules that have a significant economic impact on a substantial number of small entities) every ten years as required, "in practice, OSHA is still working through its backlog of these rules and conducting initial Section 610 lookback reviews intermittently depending on the Administration and on agency priorities and resources. OSHA has not yet reached the periodic review stage for any official Section 610 lookback review." OSHA emphasized that it has other mechanisms to seek stakeholder input on rule effectiveness, which we discuss in Section 4.4 below.

When asked about what the ideal frequency of periodic review should be, OIRA staff said that there are little data on which to base a judgement. They observed that the reality is that agencies are typically doing what is required by statute, and absent purposeful variation, it is difficult to say whether some timelines are better than others.

4.4. Role of Stakeholders

Stakeholder feedback is one factor that might prompt an agency to do a review earlier or more frequencly. EPA staff indicated that they do get petitions, such as under the Toxic Substances Control Act and the Clean Air Act, and these petitions can lead to regulatory reviews.

DOT has recently taken a more proactive approach to solicit stakeholder input on regulatory reviews. Under EO 13771 (2017) (rescinded 2021), DOT put out a request for information across

all regulated sectors asking if there were regulations that DOT should relax or remove. DOT staff said that feedback from the trucking industry and internally from FAA prompted reviews of regulations that would not have been reviewed otherwise. The Hours of Service Rule was relatively new when EO 13771 was signed, but this rule was reviewed for potential opportunities to reduce regulatory burdens and costs ahead of the ten year schedule.

Another way stakeholders have input in the regulatory review process is more indirect. FAA can grant waivers and exemptions to regulations, and these are frequently requested by regulated actors when technology is changing quickly (for example with unmanned aircraft systems, commonly called drones). If numerous parties ask for the same type of waiver, staff said that this pattern signals to FAA that the rule is outdated and should be reviewed on a faster schedule.[98] This also enables FAA to base the new rule on data it collected as part of the waiver and exemption requests. Tracking exemptions and waivers and using those data to inform review was not mentioned by other agencies.

While stakeholders did not have a strong role in selecting programs for review at USDA (this is largely driven by the Farm Bill), they did have a role in the findings of those reviews and subsequent changes.

OSHA's responses highlighted multiple mechanisms outside of the Section 610 process to seek information from stakeholders, including periodic stakeholder meetings, an online forurm for comments and complaints, feedback from inpsectors, letters from Congress and the SBA raising concerns, internal review of accident and fatality data, and evidence of changes in scientific and technical understanding. These other process of review do lead to new rulemakings to improve

[98] Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61742 (Dec. 29, 2017).

earlier standards, and these are frequent for safety standards and for some health standards (e.g., lead, silica, beryllium).

4.5. Who Conducts the Review

Different types of staff conduct the periodic reviews at different agencies. At EPA, much of the periodic reviews require scientific or technical and engineering expertise, as the rule changes are based on changes in scientific understanding. The Clean Air Act NAAQS primary standards are required to be set at a level that is protective of public health with an adequate margin of safety (CAA 109), so the reviews focus on health effects and the staff with relevant expertise. Even when statutes allow for consideration of costs, such as the MACT standards under CAA 112(d)(6) and the MCLs under the Safe Drinking Water Act, staff we spoke with said that many reviews are still largely focused on whether there has been any substantive change in the science or technology that warrants a rule revision.

The staffing of reviews at DOT depends on the statute and rule. For the Aviation Cleanup Rule, the staff were lawyers going through language of old rules and cleaning up the language. At FAA there is a rulemaking office with engineers in addition to legal staff. For a substantive rule revision, the same staff who write the rules would also be involved in the review and the revision.

The Directorate of Technical Support and Emergency Management (DTSEM) is the organization within OSHA that leads the Section 610 lookback review process. Because DSTEM is not typically the organization that performed the original analysis nor the organization that reviewed the original analysis, OSHA argues that division in staffing helps to ensure the objectivity of the lookback reviews.

4.6. Use of Periodic Review

All agencies stated that periodic reviews have led to substative regulatory improvement at least some of time. This was more likely when the underlying evidence basis for the rule, particularly the science or technology, was changing. Mandated periodic review of all regulations (at DOT for example) and reviews required to satisfy the RFA did not always identify issues that require change, and thus, did not always necessitate substantive revision to existing regulations.

There was also not agreement that the periodic review is necessary to promote rule changes when warranted. At DOT, staff observed that the Office of the Secretary directs operating administrations (e.g. FAA, NHTSA) to explore policy changes (whether that makes regulation more or less stringent), and will direct sub-parts of the agency to produce reviews making substantive recommendations -- and this can arise even absent a mandate for periodic review.

OSHA noted that to date, Section 610 reviews have largely affected guidance and enforcement policies rather than resulting in changes requiring rulemaking. OSHA emphasized that understanding the impacts of Section 610 reviews on broader issues beyond a single rule was speculative. However, agncy staff believed there were two areas where Section 610 lookbacks have arguably improved OSHA's analytic methods. The first is to focus OSHA's attention on, and perhaps to anticipate, the technological response of industry to the rule. For example, for the Section 610 review of the ethylene oxide (EtO) rule, OSHA found that with advances in EtO sterilizer designs, such as local exhaust ventilation and purge controls built directly into the sterilizers, new equipment did not need costly add-on engineering controls to achieve the levels mandated by the standard. The second is to make use of accident data and accident narratives in the years after a safety rule is enforced to obtain a retrospective sense of the effectiveness of that rule. This method was certainly used in prior Section 610 lookback reviews and has become routine in OSHA safety rulemakings today.

Staff at OIRA said that from their perspective, it is difficult to develop a metric for the "success" of periodic reviews. More frequent reviews leading to rule changes could be a measure of success, but sometimes reviews reveal that no rule change is warranted, and that too could be a successful review. The OIRA staff noted that OSHA undertook a series of "standards improvement projects, or SIPs" in 3 or 4 phases that addressed the mechanics of the standards. The staff said that these improvements did not fundamentally change the basic requirements of the standards themselves, but the process was systematic and well-executed.

No agency mentioned or could provide an example of periodic reviews motivating broader regulatory learning goals, such as comparing policy designs and outcomes across multiple rules. This may be the result of periodic reviews focusing, so far, on each rule one at a time.[99]

5. Findings

Our review of statutes and agency policies reveals that periodic review is widely required, perhaps more widely required than is well known. However, our review of documents and our interviews also reveal that these periodic reviews are inconsistently implemented. Some of this inconsistency may stem from ambiguity in the requirements themselves. Some may reflect lack of agency staffing or expertise. Some may reflect opportunity costs of periodic review, where agencies face resource constraints and obligations to do other activities, or inhibitions to critique their own past work, or where the instability costs to affected parties persuade the agency to delay periodic reviews. But regardless of the reason, not all required periodic reviews are being completed and those that are completed are of variable quality.

[99] See Bennear & Wiener (2020), supra n.2.

In our sample, agencies appear to have employed periodic review more regularly when required by statute with a designated frequency (e.g. "every x years") than with more vague language (such as "periodically"). Periodic reviews required by executive order appear to be less common, perhaps because EO 12866 section 5 says merely "periodically," without designating a frequency, and depends on OMB/OIRA to mobilize reviews while statutory time deadlines can sometimes be enforced by petitioners in court.[100] We also found that periodic reviews required by agency policy may be on the rise, to the extent that agencies adopt more "rules on rulemaking."[101]

Congressional reauthorization is also a driver of periodic review for agencies with significant programs that require legislative reauthorization, such as reviews by USDA for the Farm Bill. This Congressional reauthorization, beyond a statutory requirement for the agency to undertake periodic reviews, is a form of legislative sunsetting; if Congress does not reauthorize its own statute, the agency programs may cease to exist. Thus it is not surprising to see agencies devoting significant resources to conduct reviews when congressional reauthorization is required. This does not necessarily mean, however, that requiring sunsetting of rules or congressional reauthorization of statutes is optimal, because there can be significant costs of policy instability (to regulated actors and policy beneficiaries) and opportunity costs of the agency's time and effort spent on reviews, as discussion above in Section 2.

Agency staff told us that periodic reviews have been more effective when they have moved from episodic efforts to creating a culture of continuous review and updating. Rather than treating each periodic review as a separate inquiry conducted from scratch, these agencies have designated

[100] See Sunstein, supra note 2; Bennear and Wiener (2020), supra note 2.
[101] See ACUS, Recommendation 2020-1, "Rules on Rulemaking" (issued Dec. 16, 2020) (including Recommendation 2(f) on "procedures for reassing existing rules").

standing teams and advisory committees to engage in ongoing data collection and analysis. Examples include the EPA reviews of the NAAQS, and the USDA and HHS reviews of the DGAs. These ongoing efforts can transform periodic reviews from episodic burdens to continuous learning opportunities – which may be especially apt where the evidence base for the rule is continuously evolving. Indeed, we see the greatest evidence of this ongoing evaluation process in areas where the science, technology or society is rapidly evolving, such as at EPA, USDA and HHS, DOT, and OSHA. These efforts to organize for more continuous review may necessitate changes in staffing – for example, through specialized advisory bodies such as CASAC with which EPA works to undertake reviews of the NAAQS (separate from other science advisory boards to that agency), and the DGAC for USDA and HHS reviews of the DGAs. In addition, EPA changed its approach to the NAAQS revisions process in order to pursue more continuous evaluation of the existing scientific evidence, which better facilitiated meeting the aggressive every five year mandate. OSHA also highlighted its efforts outside of the Section 610 process to revise regulations periodically.

Importantly, many interviewees questioned the efficacy of the required periodic reviews in Section 610 of the RFA. Some stated these reviews were more of a check-box activity, while others said that their agency had other mechanisms in place to get stakeholder feedback and update rules when needed. No interviewee cited the mandated Section 610 reviews as a key driver of regulatory improvement over time.[102]

The optimal frequency or periodicity of the periodic reviews has been understudied. Where the frequency of periodic review is specified – e.g. “at 5 year intervals” or “every 8 years” or

[102] The limited role of RFA section 610 in prompting agencies to revise rules was also noted by Copeland, Curtis W. "The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms." Library Of Congress Washington DC Congressional Research Service, 2008.

"every 10 years" – these requirements typically lack stated reasons or explanations for why this time period was chosen over alternative time periods. OMB/OIRA and agencies could assess the appropriateness of alternative frequencies for periodic reviews, and develop recommendations for EOs, statutes, and agency policies to optimize these frequencies. A new EO, for example, or OMB guidance under EO 12866 section 5 (e.g. in a new Circular A-4), or under the FEBPA (e.g. regarding strategic plans, evidence-building, evaluation plans and learning agendas), could go beyond a call for reviews "periodically" or "from time to time," to indicate specific time periods for periodic reviews, or to identify normative criteria for OMB and agencies to select such time periods in each policy area, such as the criteria discussed in Section 2 above. In principle, the optimal frequency should vary in direct proportion to the expected rate of change (portending the emerging mismatch of a static rule) and the associated gains from learning (about policy performance and about impact assessment methods) – e.g., more rapid change implies greater gains from learning and a shorter optimal time period; slower change implies a longer optimal time period – and in inverse proportion to the expected opportunity costs of repeated reviews (including to the agency, and to society). These considerations are likely to vary by issue area, implying that the optimal frequency of periodic review may also vary.

All of the agencies have some mechanism for collecting information from stakeholders that can inform which rules are reviewed or how frequently. One of the features of periodic review at DOT, which could be more widely generalizable, is to use data on requests for waivers and exemptions to "flag" rules that have become outdated or where the technology or society is changing and hence a rule revision is needed. Some agencies expressed concern that the data they would need to conduct more periodic reviews might require submitting information collection requests to OIRA, and the hope that OIRA would look more favorably on such requests.

The staffing of reviews varies widely by agency. OSHA has a staffing model in which different parts of the agency conduct the Section 610 reviews than the parts that did the analysis or reviewed the analysis for the original rule. OSHA was the only agency that mentioned this staffing strategy in our interviews. In contrast, EPA has moved to a more specialized staffing model to keep pace with the demands of repeated five year reviews of the NAAQS for multiple pollutants. In that model, where an in-depth and up-to-date understanding of the science is critical, the same staff are continuously reviewing the emerging science, unlike the approach to review taken by OSHA with different staffs reviewing at different stages in the life of the rule. USDA told us that the reviews that accompany the Farm Bill reauthorization are rigorous and conducted by staff with deep expertise in the program. . Some variation in staffing models may make sense and may align with the specific nature of the review. The variation we observed across agencies suggests opportunities for learning about which approaches work best under which circumstances and some guidance to agencies on how to choose among options.

One of the potential benefits of periodic retrospective review is the opportunity to learn in ways that extend beyond the rule being reviewed.[103] In our sample, we see some limited evidence of this learning occurring, primarily in helping the agency improve its capacity to collect data, anticipate change, and prepare for potential rule revisions. EPA revised its staffing model to create a more continuous learning approach. OSHA improved its ability to anticipate technological change and use accident and fatality data to better identify which rules may need review. DOT uses data on requests for exemptions and waivers to better identify rules that require review. All of these improvements may have spillover effects on other aspects of agency rulemaking. And agencies could learn from each other about such improvements, if such information were shared.

[103] See Bennear and Wiener (2020), supra note 2.

6. Recommendations

Deciding the Kinds of Rules Subject to Periodic Review and the Frequency of Review

Recommendation 1: Agencies should identify: (a) which specific rules or categories of rules, if any, should be subject to periodic retrospective review; and (b) the frequency of review for each rule or category of rule an agency determines should be subject to periodic retrospective review. Agencies should review both (a) and (b) periodically.

Recommendation 2: To help inform 1(a) and 1(b), both in the initial instance and in ensuing periods, agencies should, among other things:

a. Ascertain any relevant periodic retrospective review requirements from statutes, executive orders, regulations, and other sources of law. Agencies may be subject to laws that require periodic review for some or all of their rules, thus shaping their discretion on 1(a) and 1(b);

b. Solicit and consider relevant public feedback. The following are examples of some methods that agencies can use, either alone or in tandem, to solicit such input: (a) Convening meetings of interested persons; (b) Engaging in targeted outreach efforts such as proactively bringing 1(a) and 1(b) to the attention of affected interests that do not normally monitor the agency's activities; (c) Creating online discussion forums designed to solicit comments on 1(a) and 1(b); and Posting requests for information on 1(a) and 1(b);

c. Use Evidence Act processes. Agencies should consider using the Learning Agendas and Annual Evaluation Plans they develop under the Foundations for Evidence Based Policymaking Act (FEBPA) and associated OMB guidance to formulate research questions and devise studies with the goal of ascertaining the answers to 1(a) and 1(b). Agencies and OMB should work with one another in formulating these questions, creating study designs and, carrying out the studies.

d. Consider the optimal periodicity (frequency) of periodic review for each relevant rule or program. In doing so, agencies should:

    i. Consider the benefits of periodic review, including the potential gains from learning, which may depend significantly on, among other factors the pace of change of the technology, science, or the sector of the economy affected by the rule; the degree of uncertainty about the accuracy of the initial estimates of regulatory benefits and costs; changes in the statutory framework under which the regulation was issued; comments, petitions, complaints, or suggestions received from stakeholder groups and members of the public; and the complexity of the rule, as demonstrated by rates of noncompliance, the amount of clarifying guidance issued, remands from the

courts, or other factors. In general, higher levels of these factors may warrant more frequent reviews (shorter periods/intervals).

ii. Consider costs of periodic review, including, among other factors, the administrative burden and the policy instability that may ensue as rules are reviewed more frequently. In general, rules on which regulated entities and beneficiaries have come to rely (with higher costs of change) may lend themselves to less frequent reviews (longer periods/intervals).

Recommendation 3: After deciding 1(a) and 1(b), both in the initial instance and in ensuing periods, agencies should notify the public which of their rules are subject to periodic retrospective review, the frequency of the review, and whether the review of the rule is conducted pursuant to a legal requirement or whether it is conducted pursuant to the agency's own initiative. Agencies should include these notifications on their websites, and should consider including them within the *Federal Register*, even if not legally required to do so.

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

Recommendation 4: Agencies should disclose relevant data, as appropriate, concerning the periodic retrospective analyses of their regulations on Regulations.gov, their webpages, and other publicly available websites. In so doing, to the extent appropriate, agencies should organize the data in ways that allow private parties to recreate the agency's work and to run additional analyses concerning existing rules' effectiveness. Agencies should also, to the extent feasible, explain in plain language the significance of their data and how they used the data to shape their review. Agencies should encourage private parties to submit information and analyses and should integrate relevant information into their retrospective reviews.

Recommendation 5: Agencies should proactively seek public input on rules subject to periodic retrospective review, both between review periods and during a review period, to determine, among other questions, how the rule has impacted the economy, whether it is being enforced effectively, and how it interacts with state and local regulations. Such public input could take the form of, among other things: (a) Convening meetings of interested persons; (b) Engaging in targeted outreach efforts such as proactively bringing the rule to the attention of affected interests that do not normally monitor the agency's activities; (c) Creating online discussion forumsdesigned to solicit feedback on the rule; and (d) Posting requests for information on the rule.

Recommendation 6: For rules subject to periodic retrospective review, agencies should continuously collect and analyze data relevant to the rule and its performance (e.g. benefits, costs, ancillary impacts, distributional impacts) between review periods so that agencies are apprised of the most up-to-date data come each review period. Agencies should work with OIRA to properly invoke any flexibilities within the Paperwork Reduction Act that would enable agencies to gather such data expeditiously.

Recommendation 7: Agencies should keep track of the number of waivers or exemptions they have granted concerning a rule subject to periodic review, to help gauge the need for more frequent reviews.

Recommendation 8: Based on the agency's consideration of any public feedback it has received concerning a rule, its monitoring of relevant data, and its monitoring of the number of waivers and exemptions granted concerning a rule, an agency should consider reviewing such rules before their scheduled review period has arrived, to the extent it is legally permitted to do so.

Coordinating with Other Agencies

Recommendation 9: Agencies should coordinate their periodic retrospective reviews with other agencies that have issued related regulations in order to promote a coherent regulatory scheme that maximizes net benefits.

Ensuring Adequate Resources and Staffing

Recommendation 10: Agencies should decide how to best structure their staffing of periodic retrospective reviews to foster a continuous process of agency practice and culture of retrospective review. Below are examples of some staffing models, which may be used in tandem or separately:

a. Assigning the same staff the same rule, or category of rule, each time it is reviewed. This approach allows staff to gain expertise in a particular kind of rule, thereby potentially improving the efficiency of the review.
b. Establishing or cooperating with standing committees of experts, either within or outside the agency, to review rules, such as an interagency group, or a commission, to review multiple rules and multiple RIAs that may involve more than one agency and that can benefit from comparative retrospective analysis of policy performance and of accuracy of ex ante RIA methodologies. As with a), this approach promotes efficiency by allowing experts to review the relevant rules but may require additional procedural considerations.
c. Pairing subject matter experts, such as engineers, economists, and scientists, with other agency employees in conducting the reviews. This approach maximizes the likelihood that both substantive considerations, such as the net benefits of the rule, and procedural considerations, such as whether the rule conflicts with other rules or complies with Plain Language requirements, will enter into the review.

Recommendation 11: OMB and agencies should consider retrospective review needs when formulating agencies' budgets and Congress should appropriate budget authority to account for retrospective review needs.

Recommendation 12: An oversight body or expert entity (such as OMB/OIRA, or an interagency group, or GAO, or a new commission), should "periodically" (e.g. every 4 years) conduct a "meta-review" to assess progress on periodic review by the agencies, the extent to which this set of Recommendations has been implemented, and options for improvement. If this "meta review" were to occur every four years, it could be scheduled to occur in the second or third year of each

presidential term, just after the agencies update their own strategic plans and learning agendas every four years under the Evidence Act.. This "meta-review of periodic reviews" should assess factors such as: timeliness (how well are the agencies meeting their periodic review frequency dates), analytic quality of periodic reviews, influence on policy improvement, gains in learning, social net benefits and distributional equity, data needs, staffing needs, costs to agencies, costs to society, and others. This “meta-review” could also comment on the optimal frequency of each agency's or program's periodic reviews, in light of the criteria for optimizing periodicity discussed above.