Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation for Committee | April 9, 2021

Retrospective review is the process by which agencies analyze existing regulations and decide whether they need to be modified in any respect. Periodic retrospective review is the process by which agencies engage in retrospective review of some or all of their rules on a pre-set schedule (e.g., every ten years), whether as a result of a statutory requirement or their own initiative. In accordance with long-standing executive branch policy, the Administrative Conference has long endorsed the practice of retrospective review of agency rules, and has urged agencies to consider periodic retrospective review.

Some rules are subject to periodic retrospective review requirements, either on specified intervals or more generally. For example, the Clean Air Act requires the Environmental Protection Agency to review certain ambient air quality regulations every five years. The Regulatory Flexibility Act requires agencies to publish in the Federal Register a plan for the “periodic review of rules . . . which have or will have a significant economic impact upon a substantial number of small entities.” The Act also requires agencies to review all such rules.


3 Recommendation 95-3, supra note 2, 43110; Recommendation 2017-6, supra note 2.

within ten years of the publication of such rules as final. Other rules are subject to periodic review under periodic review plans created by agencies, some of which are not statutorily mandated. Periodic retrospective review can enhance the quality of agencies’ rules. It can help agencies determine whether regulations continue to meet their statutory objectives. It can help agencies determine whether a rule is obsolete because, for example, the underlying statute has been amended or repealed. It can help agencies evaluate regulatory performance (e.g., benefits, costs, ancillary impacts, and distributional impacts of rules), and assess whether and how the rule should be revised in a new rulemaking. And it can help agencies determine how accurate the assessments they make before rules are issued are with regard to likely regulatory impact (e.g., forecasts of benefits, costs, ancillary impacts, and distributional impacts) and identify ways to improve the accuracy of those assessment methodologies.

There are also drawbacks associated with periodic retrospective review. Some rules may not be strong candidates for periodic review because the need for the rule is unlikely to change and the benefits associated with periodically revisiting it are small. There are costs associated with collecting data and analyzing it, and time spent on reviewing existing rules is time that may not be spent on other projects. And there can be costs for regulated parties and beneficiaries associated with uncertainty concerning whether or not a rule will be retained or modified. Agencies therefore need to carefully tailor their periodic retrospective review plans.

Mindful of both the value of periodic retrospective review and the costs associated with it, this Recommendation offers practical suggestions to agencies about whether and how to

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5 5 U.S.C. § 610.
7 Id. at 8.
establish a periodic retrospective review regime. It does so by, among other things, identifying
the kinds of rules that lend themselves well to periodic retrospective review, proposing factors
for agencies to consider in deciding the optimal review frequency when they have such
discretion, and identifying different models for staffing periodic retrospective reviews. In doing
so, it builds upon the Administrative Conference’s longstanding endorsement of public
participation in all aspects of the rulemaking process,8 including retrospective review,9 by
couraging agencies to seek public input to both help identify the kinds of rules that lend
themselves well to periodic retrospective review and inform the agencies’ analyses of their rules.

It also recognizes the important institutional role that the Office of Management and
Budget (OMB) plays in agencies’ retrospective review efforts, and the important role that the
Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-
issued guidance can play.10 It suggests that agencies work with OMB to help facilitate data
collection relevant to reviewing rules. It calls attention to the Evidence Act’s requirements for
certain agencies to create Learning Agendas and Annual Evaluation Plans, which lay out
research questions that agencies plan to address regarding their missions, including their
regulatory missions, and how they intend to address these questions.11 The Recommendation
states that agencies can satisfy the Evidence Act’s requirements to create Learning Agendas and
Annual Evaluation Plans if they undertake and document certain activities as they carry out
periodic retrospective review.

RECOMMENDATION

8 Admin. Conf. of the U.S., Recommendation 2018-7, Public Engagement in Rulemaking, 84 Fed. Reg. 2146 (Feb. 6,
2019); Admin. Conf. of the U.S., Recommendation 2017-2, Negotiated Rulemaking and Other Options for Public
9 Recommendation 2014-5, supra note 2.
10 See Bennear & Wiener, supra note 6.
Deciding the Kinds of Rules Subject to Periodic Review and the Frequency of Review

1. Agencies should identify the specific rules or categories of rules, if any, that are subject to statutory periodic retrospective review requirements.

2. For rules not subject to statutory periodic retrospective review requirements, agencies should decide whether to establish a periodic retrospective review regime. In doing so, agencies should consider the benefits of periodic retrospective review, including potential gains from learning, and the costs, including administrative burden and policy instability.

3. For rules that agencies decide to subject to periodic retrospective review, agencies should decide the optimal periodicity (frequency) of review. In doing so, agencies should consider the following factors:
   a. The pace of change of the technology, science, or the sector of economy affected by the rule. A higher pace of change may warrant more frequent reviews;
   b. The degree of uncertainty about the accuracy of the initial estimates of regulatory benefits and costs. Greater uncertainty may warrant more frequent reviews;
   c. Changes in the statutory framework under which the regulation was issued. More changes may warrant more frequent reviews;
   d. Comments, petitions, complaints, or suggestions received from stakeholder groups and members of the public. A greater number of requests for changing the rule may warrant more frequent reviews;
   e. The complexity of the rule, as demonstrated by poor compliance rates, the amount of clarifying guidance issued, remands from the courts, or other factors. Less complexity may warrant more frequent reviews;
   f. The administrative burden in conducting reviews. Greater staff time involved in reviewing the rule may warrant less frequent reviews; and
   g. Reliance interests connected with the rule. Rules on which regulated entities and beneficiaries have come to rely (with higher costs of change) may lend themselves to less frequent reviews.

4. Public input can help agencies identify which rules should be subject to review and with what frequency. Agencies should consider soliciting public input by means such as...
convening meetings of interested persons, engaging in targeted outreach efforts to affected
interests that do not normally monitor agencies’ activities, creating online discussion
forums designed to solicit feedback, and posting requests for information.

5. Agencies should periodically reassess both the class of rules that should be subject to
periodic retrospective review and the optimal frequency of review.

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

6. Agencies should publish a document or set of documents explaining how they conducted
a given periodic review, what information they considered, and what public outreach they
undertook. They should include this document or set of documents on Regulations.gov, if
applicable. In so doing, to the extent appropriate, agencies should organize the data within
the document or set of documents in ways that allow private parties to recreate the
agencies’ 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.

7. Agencies should provide public disclosure regarding their periodic retrospective review
regimes, including which rules are subject to periodic retrospective review, how frequently
the rules are reviewed, what the review entails, and whether the review of the rule is
conducted pursuant to a legal requirement or the agency’s own initiative. Agencies should
include these notifications on their websites, and should consider including them within
the Federal Register and the Code of Federal Regulations, even if not legally required to
do so.

8. Agencies should seek input from relevant parties when conducting periodic retrospective
review. Possible outreach methods include convening meetings of interested persons,
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, creating online
discussion forums designed to solicit feedback on the rule, and posting requests for

Commented [LAS1]: For Committee consideration: The committee should potentially discuss where these public
disclosures should be published and whether they should be included in the Code of Federal Regulations. The
recommendation as written aligns with Recommendation 2020-1, Rules on Rulemakings.
information on the rule. Agencies should integrate relevant information from the public into their retrospective reviews.

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

Ensuring Adequate Resources and Staffing

10. Agencies should decide how to best structure their staffing of periodic retrospective reviews to foster a 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. Assigning different staff the same rule, or category of rule, each time it is reviewed. This approach promotes objectivity by allowing differing viewpoints to enter into the analysis;
   c. Establishing or cooperating with standing committees of experts, either within or outside the agency, to review rules; and
   d. 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.

Using Evidence Act Processes

11. To satisfy the Evidence Act’s requirements to create Learning Agendas and Annual Evaluation Plans, agencies should undertake and document the following activities as they carry out periodic retrospective review:
a. Create precise questions to be addressed by the review, such as whether the rule in question maximizes net benefits, how frequently it should be reviewed, or how it affects a particular sector of the economy;

b. Describe the information needed to conduct reviews of the rule, including whether the agency will undertake new information collection requests or if it will use existing information;

c. Describe the methods it will use in conducting the reviews, such as randomized control trials or quasi-experimental methods;

d. Describe the anticipated challenges in conducting the review, such as obstacles to collecting relevant data; and

e. Describe how it will use the review results to inform policy making, including by strengthening, maintaining, or otherwise modifying the rule.

Interagency Coordination

12. A body or expert entity with interagency responsibilities should regularly convene agencies to identify and share best practices on periodic retrospective review, addressing questions such as how to improve timeliness and analytic quality of reviews and the optimal frequency of discretionary reviews.

13. To promote a coherent regulatory scheme, agencies should coordinate their periodic retrospective reviews with other agencies that have issued related regulations.

Commented [LAS2]: For Committee consideration: The committee will want to discuss what agency or entity is best suited to this task.