



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation | June 17, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council (with sources shown in the margin).

1 Retrospective review is the process by which agencies assess existing regulations and
2 decide whether they need to be revisited. Consistent with longstanding executive-branch policy,¹
3 the Administrative Conference has endorsed the practice of retrospective review of agency
4 regulations² and has urged agencies to consider conducting retrospective review under a specific
5 timeframe, which is often known as “periodic retrospective review.”³ Agencies may conduct
6 periodic retrospective review in different ways. One common way is for an agency to **engage in**
7 **such undertake** review of some or all of its regulations on a pre-set schedule (e.g., every ten
8 years). Another way is for the agency to set a one-time date for reviewing a regulation and, when
9 that review is performed, set a new date for the next review, and so on. This latter method
10 enables the agency to adjust the frequency of a regulation’s periodic retrospective review in light
11 of experience.

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

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

³ Recommendation 95-3, *supra* note 2.



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12 Periodic retrospective review may occur because a statute requires it or because an
13 agency ~~simply~~ chooses to do it ~~on its own initiative~~. Statutes requiring periodic retrospective
14 review may specify a time interval over which review should be conducted or leave the
15 frequency up to the agency. The Clean Air Act, for example, requires the Environmental
16 Protection Agency to review certain ambient air quality regulations every five years.⁴ On the
17 other hand, ~~the Transportation Recall Enhancement, Accountability, and Documentation~~
18 ~~(TREAD) Act provides that the Congress only stated that the~~ Department of Transportation must
19 “specify procedures for the periodic review and update” of its rule on early warning reporting
20 requirements for manufacturers of motor vehicles, ~~and did not specify without specifying~~ how
21 often that review must occur.⁵ ~~Where Even when~~ periodic retrospective review is not mandated
22 by statute, agencies have sometimes voluntarily implemented periodic retrospective review
23 programs.⁶

24 Periodic retrospective review can enhance the quality of agencies’ regulations by helping
25 agencies determine whether regulations continue to meet their statutory objectives. Such review
26 can also ~~assist help~~ agencies ~~in evaluating evaluate~~ regulatory performance (e.g., the benefits,
27 costs, ancillary impacts,⁷ and distributional impacts⁸ of regulations), ~~and~~ assess whether and how
28 a regulation should be revised in a new rulemaking. ~~And periodic retrospective review can help~~
29 ~~agencies~~ determine the accuracy of the assessments they made before issuing their regulations
30 (including assessments regarding forecasts of benefits, costs, ancillary impacts, and distributional

⁴ 42 U.S.C. § 7309(d)(1).

⁵ 49 U.S.C. § 30166(m)(5).

⁶ See Lori S. Benneer & Jonathan B. Wiener, Periodic Review of Agency Regulation 33–38 (~~Apr 1, 2021 June 7, 2021~~) (~~draft~~ report to the Admin. Conf. of the U.S.) (discussing periodic retrospective review plans issued by several agencies, including the Department of Transportation, the Securities and Exchange Commission, and the Federal Emergency Management Agency).

⁷ An ancillary impact is an “impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 26 (2003).

⁸ A distributional impact is an “impact of a regulatory action across the population and economy, divided up in various ways (e.g., by income groups, race, sex, industrial sector, geography).” *Id.* at 14.



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31 impacts) and identify ways to improve the accuracy of ~~those~~ the underlying assessment
32 methodologies.⁹

33 ~~There~~ But there can also be drawbacks associated with periodic retrospective review.
34 Some regulations may not be strong candidates for such review because the need for the
35 regulations is unlikely to change and the benefits associated with periodically revisiting them are
36 likely to be small. There are also costs associated with collecting and analyzing data and
37 analyzing it, and time spent on reviewing existing regulations may come at the cost of is time
38 that may not be spent on other important regulatory activities. For this reason, agencies might
39 reasonably decide to limit periodic retrospective review to certain types of regulations, such as
40 important regulations that affect large numbers of people or that have particularly pronounced
41 effects on specific groups.¹⁰ Periodic retrospective review can also generate uncertainty
42 regarding whether a regulation will be retained or modified. Agencies, therefore, should
43 ~~carefully~~ tailor their periodic retrospective review plans carefully to account for these drawbacks.

44 Mindful of both the value of periodic retrospective review and the tradeoffs associated
45 with it, this Recommendation offers practical suggestions to agencies about how to establish a
46 periodic retrospective review plan. It does so by, among other things, identifying the types of
47 regulations that lend themselves well to periodic retrospective review, proposing factors for
48 agencies to consider in deciding the optimal review frequency when they have such discretion,
49 and identifying different models for staffing periodic retrospective review. In doing so, it builds
50 upon the Administrative Conference's longstanding endorsement of public participation in all
51 aspects of the rulemaking process,¹¹ including retrospective review,¹² by encouraging agencies to

⁹ *Id.* at 8.

¹⁰ See, e.g., Recommendation 2014-5, *supra* note 2, ¶ 5 (providing a list of factors for agencies to consider when prioritizing some regulations as important).

¹¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017).

¹² See *supra* note 2.



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52 seek public input ~~to~~ both ~~to~~ help identify the types of regulations that lend themselves well to
53 periodic retrospective review and ~~to~~ inform that review.

54 This Recommendation also recognizes the important role that the Office of Management
55 and Budget (OMB) plays in agencies' periodic retrospective review efforts ~~and as well as~~ the
56 significance of the Foundations for Evidence-Based Policymaking Act (the Evidence Act) and
57 associated OMB-issued guidance.¹³ It ~~suggests that encourages~~ agencies ~~to~~ work with OMB to
58 help facilitate data collection relevant to reviewing regulations. It ~~also~~ calls attention to the
59 Evidence Act's requirements ~~for that~~ certain agencies ~~to~~ create Learning Agendas, ~~which~~
60 ~~identify questions for agencies to address regarding their regulatory missions,~~ and Annual
61 Evaluation Plans, which lay out ~~specific measures agencies will take to answer those~~
62 ~~questions, research questions that agencies plan to address regarding their missions, including~~
63 ~~their regulatory missions, and how they intend to address these questions.~~¹⁴ Consistent with the
64 Evidence Act, the Recommendation ~~states provides~~ that agencies can incorporate periodic
65 retrospective review ~~in~~ their Learning Agendas and Annual Evaluation Plans by undertaking
66 and documenting certain activities as they carry out their review ~~s~~.

67 ~~In issuing this Recommendation, the Conference recognizes that agencies will need to~~
68 ~~consider available resources in deciding whether a periodic retrospective review program should~~
69 ~~be implemented and, if so, what form it should take. The recommendations offered below are~~
70 ~~subject to that qualification.~~

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¹³ See Benneer & Wiener, *supra* note 6.

¹⁴ 5 U.S.C. § 312(a)-(b); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-19-23, PHASE 1 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: LEARNING AGENDAS, PERSONNEL, AND PLANNING GUIDANCE (2019); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-20-12, PHASE 4 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: PROGRAM EVALUATION STANDARDS AND PRACTICES (2020).



RECOMMENDATION

Selecting the Types of Regulations to Subject to Periodic Retrospective Review and the Frequency of Review

- 71 1. Agencies should identify any specific regulations or categories of regulations that are
72 subject to statutory periodic retrospective review requirements.
- 73 2. For regulations not subject to statutory periodic retrospective review requirements,
74 agencies should establish a periodic retrospective review plan. In deciding which
75 regulations, if any, should be subject to ~~this such a~~ review plan, agencies should consider
76 the public benefits of periodic retrospective review, including potential gains from
77 learning more about regulatory performance, and the costs, including the administrative
78 burden associated with performing the review and any disruptions to reliance interests
79 and investment-backed expectations. When agencies adopt new regulations for which
80 ~~decisions plans~~ regarding periodic retrospective review have not been established,
81 agencies should, as part of the process of developing such regulations, decide whether
82 those regulations should be subject to periodic retrospective review.
- 83 3. When ~~planning agencies plan~~ for periodic retrospective review, ~~agencies they~~ should not
84 limit themselves to reviewing a specific final regulation when a review of a larger
85 regulatory program would be more constructive.
- 86 4. ~~For regulations that~~When agencies decide to subject ~~regulations~~ to periodic retrospective
87 review, ~~agencies they~~ should decide whether to subject some or all of the regulations to a
88 pre-set schedule of review or whether, ~~for~~ some or all of the regulations, ~~it is preferable to~~
89 ~~set should have~~ only an initial date for review ~~and decide, as part of that review, when to~~
90 ~~undertake the next review, - with a subsequent date for each review set at the time of the~~
91 ~~preceding review. In either case, agencies should decide the optimal frequency of review~~
92 ~~for a pre-set schedule of review or the optimal period before the first review.~~ In selecting
93 the frequency of review or setting the first or any subsequent date of review, agencies
94 should consider, among others, the following factors:



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- 95 a. The pace of change of the technology, science, sector of the economy, or part of
96 society affected by the regulation. A higher pace of change may warrant more
97 frequent review;
- 98 b. The degree of uncertainty about the accuracy of the initial estimates of regulatory
99 benefits, costs, ancillary impacts, and distributional impacts. Greater uncertainty
100 may warrant more frequent review;
- 101 c. Changes in the statutory framework under which the regulation was issued. More
102 changes may warrant more frequent review;
- 103 d. Comments, complaints, requests for waivers or exemptions, or suggestions
104 received from interested ~~groups and members of the public~~persons. The level of
105 public interest or amount of new evidence regarding changing the regulation may
106 warrant more frequent review;
- 107 e. The difficulties arising from implementation of the regulation, as demonstrated by
108 poor compliance rates, requests for waivers or exemptions, the amount of
109 clarifying guidance issued, remands from the courts, or other factors. Greater
110 difficulties may warrant more frequent review;
- 111 f. The administrative burden in conducting periodic retrospective review. Larger
112 burdens, such as greater staff time, involved in reviewing the regulation may
113 warrant less frequent review; and
- 114 g. Reliance interests and investment-backed expectations connected with the
115 regulation. ~~Greater reliance or expectations may lend themselves to less frequent~~
116 ~~review. Steps taken by persons in reliance on a particular regulation or with the~~
117 ~~expectation that it will remain unaltered may weigh in favor of less frequent~~
118 ~~review.~~
- 119 5. In making the decisions outlined in ~~Recommendations Paragraphs~~ 1 through 4, public
120 input can help agencies identify which regulations should be subject to periodic
121 retrospective review and with what frequency. Agencies should consider soliciting public
122 input by means such as convening meetings of interested persons, engaging in targeted



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- 123 outreach efforts to historically underrepresented or under-resourced groups that may be
124 affected by the agencies' regulations, and posting requests for information.
- 125 6. Agencies should publicly disclose their periodic retrospective review plans, which should
126 cover issues such as which regulations are subject to periodic retrospective review, how
127 frequently those regulations are reviewed, what the review entails, and whether the
128 review is conducted pursuant to a legal requirement or the agencies' own initiative.
129 Agencies should include these notifications on their websites and consider publishing
130 them in the *Federal Register*, even if the law does not require it.
- 131 7. With respect to regulations subject to a pre-set schedule of periodic retrospective review,
132 agencies should periodically reassess the regulations that should be subject to periodic
133 retrospective review and the optimal frequency of review.

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**Publishing Results of Periodic Retrospective Review and Soliciting Public Feedback
on Regulations Subject to Review**

- 134 8. Agencies should publish a document or set of documents in a prominent, easy-to-find
135 place on the portion of their websites dealing with rulemaking matters, a document or set
136 of documents explaining how they conducted a given periodic retrospective review, what
137 information they considered, and what public outreach they undertook. They should also
138 include this document or set of documents on Regulations.gov. To the extent appropriate,
139 agencies should organize the data in the document or set of documents in ways that allow
140 private parties to re-create the agencies' work and run additional analyses concerning
141 existing regulations' effectiveness. When feasible, agencies should also explain in plain
142 language the significance of their data and how they used the data to shape their review.
- 143 9. Agencies should seek input from relevant parties when conducting periodic retrospective
144 review. Possible outreach methods include convening meetings of interested persons;
145 engaging in targeted outreach efforts, such as proactively bringing the regulation to the
146 attention of historically underrepresented or under-resourced groups; and posting requests
147 for information on the regulation. Agencies should integrate relevant information from
148 the public into their periodic retrospective reviews.



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149 10. Agencies should work with the Office of Management and Budget (OMB) to properly
150 invoke any flexibilities within the Paperwork Reduction Act that would enable them to
151 gather relevant data expeditiously.

Ensuring Adequate Resources and Staffing

152 11. Agencies should decide how **to**-best **to** structure their staffing of periodic retrospective
153 reviews to foster a culture of retrospective review and ongoing learning. Below are
154 examples of some staffing models, which may be used in tandem or separately:
155 a. Assigning the same staff the same regulation, or category of regulation, each time
156 it is reviewed. This approach allows staff to gain expertise in a particular kind of
157 regulation, thereby potentially improving the efficiency of the review;
158 b. Assigning different staff the same regulation, or category of regulation, each time
159 it is reviewed. This approach promotes objectivity by allowing differing
160 viewpoints to enter into the analysis;
161 c. Engaging or cooperating with agency or non-agency subject matter experts to
162 review regulations; and
163 d. Pairing subject matter experts, such as engineers, economists, sociologists, and
164 scientists, with other agency employees in conducting the review. This approach
165 maximizes the likelihood that both substantive considerations, such as the net
166 benefits and distributional and ancillary impacts of the regulation, and procedural
167 considerations, such as whether the regulation conflicts with other regulations or
168 complies with plain language requirements, will enter into the review.

Using Evidence Act Processes

169 12. Consistent with the Evidence Act, agencies should incorporate periodic retrospective
170 reviews in their Learning Agendas and Annual Evaluation Plans. In doing so, agencies
171 should ensure that they include:
172 a. The precise questions they intend to answer using periodic retrospective review.
173 Those questions should include how frequently particular regulations should be



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- 174 reviewed and should otherwise be keyed to the factors set forth in Section 5 of
175 Executive Order 12866 for periodic retrospective review of existing significant
176 regulations;
- 177 b. The information needed to adequately review the regulations subject to the
178 periodic retrospective reviews. Agencies should state whether they will undertake
179 new information collection requests or use existing information to conduct the
180 reviews;
- 181 c. The methods the agencies will use in conducting their reviews, which should
182 comport with the federal program evaluation standards set forth by OMB;
- 183 d. The anticipated challenges the agencies anticipate encountering during the
184 reviews, if any, such as obstacles to collecting relevant data; and
- 185 e. The ways the agencies will use the results of the reviews to inform policy making.

Interagency Coordination

- 186 13. Agencies that are responsible for coordinating activities among other agencies, such as
187 the Office of Information and Regulatory Affairs, should, as feasible, regularly convene
188 agencies to identify and share best practices on periodic retrospective review. These
189 agencies should address questions such as how to improve timeliness and analytic quality
190 of review and the optimal frequency of discretionary review.
- 191 14. To promote a coherent regulatory scheme, agencies should coordinate their periodic
192 retrospective reviews with other agencies that have issued related regulations.