



## **Administrative Conference Recommendation**

### **Retrospective Review of Agency Rules**

#### **Draft for October 15, 2014 Committee Meeting**

Traditionally, federal regulatory policymaking is seen as a forward-looking enterprise: Congress delegates power to administrative agencies to respond to new challenges, and agencies devise rules designed to address those challenges. Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities. In this light, Presidents since Jimmy Carter have periodically undertaken a program of "retrospective review," urging agencies to reassess regulations currently on the books and eliminate, modify, or strengthen those regulations that have become outmoded in light of changed circumstances.<sup>1</sup> Agencies have also long been subject to more limited regulatory lookback requirements, including the Regulatory Flexibility Act, which requires agencies to periodically reassess regulations having "a significant economic impact upon a substantial number of small entities,"<sup>2</sup> and program-specific retrospective review requirements erected by statute.<sup>3</sup>

Though historical retrospective review efforts have resulted in some notable successes, especially in those instances in which high-level leadership in the executive branch and individual agencies has strongly supported these endeavors,<sup>4</sup> the Presidential initiatives were generally one-time affairs, and the various statutory regulatory lookback requirements apply only to subsets of regulations. President Barack Obama has sought to build on these more limited initiatives by creating a comprehensive, ongoing program of retrospective review for the entire body of federal regulations. On January 18, 2011, he issued Executive Order ("EO") 13,563,<sup>5</sup> which directed executive branch agencies to regularly reassess existing rules to identify opportunities for eliminating or altering regulations that have become "outmoded, ineffective, insufficient, or excessively burdensome."<sup>6</sup> Shortly thereafter, he issued another order encouraging independent regulatory agencies to pursue similar regulatory lookback efforts (EO

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<sup>1</sup> Joseph E. Aldy, *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design & Implementation of Regulatory Policy* 3 (Sept. 17, 2014), available at <http://www.acus.gov/sites/default/files/documents/Adly%20Retrospective%20Review%20Report%20CIRCULATE%20D%209-17-2014.pdf>.

<sup>2</sup> 5 U.S.C. § 610.

<sup>3</sup> Aldy, *supra* note 1, at 3.

<sup>4</sup> See generally John Kamensky, National Partnership for Reinventing Government: A Brief History (Jan. 1999), available at <http://govinfo.library.unt.edu/npr/whoweare/history2.html> (highlighting the successes of the Clinton Administration National Performance Review and emphasizing the importance of high-level executive branch and agency leadership).

<sup>5</sup> 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>6</sup> *Id.* § 6.



13,579<sup>7</sup>) and yet another order providing a more detailed framework for retrospective review in executive branch agencies (EO 13,610<sup>8</sup>).

The Administrative Conference has long endorsed agencies' efforts to reevaluate and update existing regulations. In 1995, the Conference issued a recommendation stating that “[a]ll agencies (executive branch or ‘independent’) should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or revoked” and offering general guidance by which agencies might conduct that analysis.<sup>9</sup> In addition, in early 2011, shortly after the promulgation of EO 13,563, the Conference hosted a workshop designed to highlight best practices for achieving the EO’s goals.<sup>10</sup>

Administrative law scholars and other experts have debated the effectiveness of existing retrospective review efforts. EO 13,610 touts the elimination of “billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens” achieved under the EO 13,563 framework and promises additional savings.<sup>11</sup> Cass Sunstein, the former Administrator of the Office of Information and Regulatory Affairs, has catalogued billions of dollars in savings resulting from the Obama Administration initiatives.<sup>12</sup> Nevertheless, many have criticized the existing system of regulatory lookback as inadequate, especially insofar as it relies upon individual agencies to reassess their own regulations and provides few incentives for ensuring robust analysis of existing rules.<sup>13</sup> On the other side, many have criticized current retrospective review efforts as inherently deregulatory, possessing a strong bias in favor of eliminating or weakening regulations rather than strengthening regulations that may be insufficiently protective.<sup>14</sup>

Ultimately, a system of “self-review,” in which individual agencies are responsible for evaluating their own regulations and eliminating or modifying those that are deemed to be outdated, can only succeed if agencies promote a “culture of retrospective review.”<sup>15</sup> Given the lack of any high-level enforcement mechanism, the Obama Administration regulatory lookback initiative, like its less ambitious predecessors, runs the risk of devolving into an empty exercise

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<sup>7</sup> 76 Fed. Reg. 41,587 (July 14, 2011).

<sup>8</sup> 77 Fed. Reg. 28,469 (May 14, 2012).

<sup>9</sup> Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

<sup>10</sup> Administrative Conference of the United States, *Retrospective Review of Existing Regulations*, Workshop Summary (Mar. 10, 2011), <http://www.acus.gov/sites/default/files/documents/ACUS%20Retrospective%20Review%20Workshop%20Final%203-21.pdf>.

<sup>11</sup> Exec. Order No. 13,610, § 1, 77 Fed. Reg. 28,469, 28,469 (May 14, 2012).

<sup>12</sup> CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 180–84 (2013).

<sup>13</sup> *See, e.g.*, Reeve T. Bull, *Building a Framework for Governance: Retrospective Review & Rulemaking Petitions*, \_\_ ADMIN. L. REV. \_\_ (forthcoming 2015); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57A, 60A (2013); Michael Mandel & Diana G. Carew, *Progressive Policy Institute Policy Memo, Regulatory Improvement Commission: A Politically Viable Approach to U.S. Regulatory Reform* 13 (May 2013).

<sup>14</sup> *See, e.g.*, Michael A. Livermore & Jason A. Schwarz, *Unbalanced Retrospective Regulatory Review*, PENN PROGRAM ON REGULATION REG BLOG, July 12, 2012, <http://www.regblog.org/2012/07/12-livermore-schwartz-review.html>.

<sup>15</sup> Aldy, *supra* note 1, at 39–40; Coglianese, *supra* note 13, at 66A.



in pro forma compliance. This might not be a foregone outcome, however, if the relevant agency officials, including both those conducting retrospective reviews and those drafting new rules, come to view regulation as an ongoing process whereby agency officials recognize the uncertainty inherent in the policymaking exercise and continually reexamine their regulations in light of new information and evolving circumstances.<sup>16</sup>

This recommendation aims to help agencies create such a culture of retrospective review. Agency officials may be reluctant to promote robust retrospective analysis unless if they see it as critical to advancing their regulatory missions. To obtain this “buy-in,” these officials must have a framework for performing the required analysis and possess adequate resources for conducting the necessary reviews (such that doing so does not detract from the agencies’ other regulatory responsibilities). Thus, the recommendation sets forth considerations relevant both to identifying regulations that are strong candidates for review and for conducting retrospective analysis. In addition, the recommendation encourages agencies to integrate retrospective analysis into their policymaking framework more generally, urging them not only to reevaluate existing regulations but also to design new regulations with an eye towards later reexamination and to consider the cumulative regulatory burden. In doing so, agencies should identify data collection needs and consider regulatory implementation strategies that facilitate estimation of the causal impacts of the regulation.<sup>17</sup> Finally, the recommendation identifies opportunities for conserving agency resources by leveraging outside sources of information and expertise. In many instances, stakeholders may be able to furnish information to which agency officials otherwise lack access.<sup>18</sup> In other cases, overseas regulators may have confronted a similar regulatory problem,

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<sup>16</sup> Aldy, *supra* note 1, at 40.

<sup>17</sup> In particular, the agencies should consider how the implementation permits the application of experimental and so-called quasi-experimental statistical methods for regulatory evaluation. Through these approaches, the intent is either to explicitly assign “treatments” and “controls” under the regulatory policy, and compare the outcomes of these two groups (experimental designs), or to identify those that are “treated” by the regulation and those that compose a credible comparison group to serve as “controls.” This latter, quasi-experimental approach can draw from an array of tools in program evaluation, including difference-in-differences (in which an analyst compares the differences in outcomes between two groups before and after the implementation of a rule), regression discontinuity (in which an analyst compares outcomes for those just above and just below a threshold that determines regulatory requirements), and other methods. See John DiNardo & David S. Lee, *Program Evaluation & Research Designs*, in 4A HANDBOOK OF LABOR ECONOMICS 463–536 (2011).

<sup>18</sup> Aldy, *supra* note 1, at 22–23, 54, 56–57; see generally Bull, *supra* note 13 (proposing a system whereby private entities would use petitions for rulemaking to urge agencies to adopt less burdensome alternatives to existing regulations while preserving existing levels of regulatory protection). Agencies should nevertheless exercise caution in relying too closely upon outside input in reanalyzing existing regulations, given the risks of facilitating rent-seeking and the fact that established firms may actually prefer the regulatory status quo insofar as it creates a barrier to entry for newer, smaller competitors. SUSAN E. DUDLEY & JERRY BRITO, *REGULATION: A PRIMER* 18–19 (2d ed. 2012) (describing the so-called “bootleggers and Baptists” phenomenon, whereby businesses that benefit from market interventions may make common cause with civil society groups that advocate such policies for supposedly more altruistic purposes).



and considering foreign approaches would both avoid duplication of effort and provide opportunities for eliminating unnecessary regulatory divergences.<sup>19</sup>

Though the recommendation identifies certain common principles and opportunities for promoting robust retrospective analysis, it is mindful of the fact that each agency must tailor its regulatory lookback procedures in light of its statutory mandate and the unique nature of its regulatory mission. In addition, as optimal regulatory approaches may evolve over time, so too may retrospective review procedures, and the recommendation therefore avoids providing an overly rigid framework. Rather, it identifies considerations and best practices that, over time, should help foster a regulatory approach that integrates retrospective analysis as a critical element of agency decisionmaking and that accounts for the uncertainty inherent to regulatory policymaking at all stages of the process. Moving away from a model of retrospective analysis as an occasional, top-down reporting and compliance obligation should help to cultivate and maintain a culture of retrospective review.

## RECOMMENDATION

### Value of Retrospective Review

1. Agencies should continue to work with the Office of Management and Budget to develop retrospective review into a robust feature of the U.S. regulatory system.

### Integrating Retrospective Review into New Regulations

2. When formulating new regulations, agencies should, to the extent possible, implement a framework for reassessing the regulation at a later date. This should include, at a minimum, a clear statement of the intended regulatory result with some objectively measurable outcome. This might also include, among other things, a timeline by which the agency will conduct a retrospective analysis, a set of factors to guide that analysis, and a description of information that stakeholder groups might provide to supplement the agency's reevaluation efforts.

3. To the extent it is legally permissible and appropriate, agencies might also consider the possibility of creating experimental frameworks by which they establish a control group and potentially experiment with a diversity of regulatory approaches in order to identify the most effective option.

### Triaging Regulations for Retrospective Analysis

4. In light of resource constraints, agencies should adopt and publicize a framework for prioritizing certain rules for retrospective analysis. Agency prioritization frameworks should be transparent and enable third-party replication of the set of prioritized rules for retrospective

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<sup>19</sup> Exec. Order No. 13,609, § 1, 77 Fed. Reg. 26,413, 26,413 (May 4, 2012); Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, ¶ 4, 77 Fed. Reg. 2259, 2260 (Jan. 17, 2012).



analysis. Though considerations will vary from agency to agency and program to program, the following factors may prove especially relevant in identifying strong candidates for retrospective review that could inform regulatory revision:

- (a) Likelihood of increasing net benefits and magnitude of potential benefits;
- (b) Likelihood of improving attainment of statutory objectives;
- (c) Uncertainty surrounding the initial estimates of regulatory costs and benefits;
- (d) Changes in the statutory framework under which the regulation is issued;
- (e) Internal administrative burden associated with the regulation;
- (f) Age of the regulation;
- (g) Changes in underlying market or economic conditions and technological advances;
- (h) Cumulative regulatory burden created by the regulation at issue and related regulations (including those issued by other agencies);
- (i) Comments, petitions, or complaints received from stakeholder groups and members of the public;
- (j) Evolving social norms and changes in public risk tolerance;
- (k) Disparities between U.S. regulatory approaches and those of key international trading partners; and
- (l) Complexity of the rule (as demonstrated by poor compliance rates or other factors).

To the extent applicable, agencies should consider both the initial estimates of regulatory costs and benefits, and any additional evidence suggesting that those estimates are no longer accurate.

5. Though agencies will likely focus their retrospective analysis resources primarily on especially significant regulations as identified by the foregoing factors, they should also take advantage of simple opportunities to alleviate burdens on regulated entities, even when the costs of compliance are not especially large (e.g., allowing electronic filing of forms in addition to traditional paper filing).

### **Performing Retrospective Analysis**

6. When conducting retrospective analysis of existing regulations, agencies should consider whether the regulations are accomplishing their intended purpose or whether they might be amended or eliminated in order to more faithfully achieve statutory goals, minimize compliance burdens on regulated entities, or more effectively capture regulatory benefits. This may entail



either weakening or strengthening the underlying regulations, depending upon evolving circumstances and new information acquired by the agency. In performing retrospective review, the agency should be mindful of the following analytical factors:

- (a) Ensuring that the agency is faithfully executing its statutory mandate;
- (b) Minimizing regulatory costs and maximizing benefits to the greatest extent feasible;
- (c) Analyzing whether changes in technology, market forces, statutory requirements, public risk tolerance, or any other factor merit reconsideration of a given regulatory approach;
- (d) Accounting for new information that was unavailable when the agency promulgated the regulation at issue;
- (e) Employing rigorous statistical tools to promote identification of the causal impacts of the regulation, including its efficacy, benefits, and costs (calling upon economic tools such as difference-in-differences analysis, propensity-score matching, instrumental variables regression, and regression discontinuity as appropriate);
- (f) Determining the cumulative regulatory burden created by the regulation at issue and related regulations issued by the instant agency and sister agencies;
- (g) Considering information submitted by stakeholder groups concerning the benefits and costs of the existing regulatory regime; and
- (h) Considering regulatory approaches of major trading partners with an eye toward removing unnecessary regulatory divergences.

7. Agencies should call upon the insights of internal statistical offices as well as policy and program evaluation shops in order to design plans for reassessing regulations.

### **Inter-Agency Coordination**

8. Agencies should coordinate with sister agencies who have issued related regulations in order to promote a coherent, minimally burdensome regulatory framework.

9. Agencies should consider regulations adopted by major trading partners and examine the possibility of either harmonizing regulatory approaches or recognizing foreign regulations as equivalent to their U.S. counterparts when doing so would advance the agency mission or remove an unnecessary barrier to trade without undermining that mission.

10. The Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget should consider formulating a guidance document modeled on Circular A-4 that highlights any considerations common to all agency retrospective analyses. In addition, OIRA should strive to coordinate amongst agencies to ensure that they consider how their existing regulations may interact with those of sister agencies.



### **Leveraging Outside Input**

11. Regulated entities, civil society organizations, and other outside groups often possess valuable information concerning the impact of individual regulations and the cumulative impact of a body of regulations issued by multiple agencies to which individual agencies might not otherwise have access. Agencies should strive to leverage this outside expertise both in reassessing existing regulations and devising retrospective review plans for new regulations. To this end, agencies should identify the type of information that would aid their decisionmaking and convey to outside entities the need for such information in publicly available retrospective review plans for existing regulations and in rule preambles for new regulations.

12. Agencies should disclose data and analysis via the internet and social media to facilitate third-party verification and analytic extensions that can inform future regulatory development.

### **Ensuring Adequate Resources**

13. Designing and conducting robust retrospective review requires adequate resources. In many instances, the resource savings associated with well-designed retrospective review initiatives will more than offset the initial additional costs created. Integrating retrospective review plans into rules in the initial instance will conserve significant resources on the back end. Moreover, agencies might achieve additional savings by taking advantage of stakeholder input and insights from foreign counterparts who have confronted similar issues. To the extent that agencies require additional resources to conduct appropriately searching retrospective review, the benefits of such analyses often far exceed the costs, and Congress should ensure that agencies receive the necessary funding.