



Administrative Conference Recommendation

Retrospective Review of Agency Rules

Draft for October 29, 2014 Committee Meeting

Traditionally, federal regulatory policymaking has been 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 Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a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. As a consequence, 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.¹ Agencies have also long been subject to more limited regulatory lookback requirements, including the Regulatory Flexibility Act, which requires agencies to reassess ten-year-old regulations having "a significant economic impact upon a substantial number of small entities,"² and program-specific retrospective review requirements erected by statute.³

Though historical retrospective review efforts have resulted in some notable successes,⁴ especially in those instances in which high-level leadership in the executive branch and individual agencies has strongly supported these endeavors,⁵ retrospective review of regulatory effects has not been held to the same standard as prospective review, and the various statutory lookback requirements apply only to subsets of regulations. President Barack Obama has sought to build on these initiatives in several executive orders. On January 18, 2011, he issued Executive Order ("EO") 13,563,⁶ which directed executive branch agencies regularly to reassess existing rules to identify opportunities for eliminating or altering regulations that have become "outmoded, ineffective, insufficient, or excessively burdensome."⁷ Shortly thereafter, he issued another order encouraging independent regulatory agencies to pursue similar regulatory lookback

Comment [RTB1]: General Comment on Preamble from Alan Morrison: First, I read the preamble and the recommendations fairly quickly, but I did not see a frank recognition that retrospective reviews, if done properly, are quite expensive and time consuming. I know that you recommend adequate resources from Congress, but that is not realistic. Some cynics might say that retro review is designed to slow agencies down, but whether that is true or not, cost needs to be made more prominent in the discussion and recommendations. Related to cost of a review of a particular regulation is the recognition that it costs money & takes time to decide which regs to review in detail. Setting a date and then embarking on a full scale review without further study is not a good idea. I am not sure how to include these thoughts (or where), but they belong someplace.

Second, I am not persuaded that internal experience is likely to be relevant, let alone of much help. I am OK with a mention of it, but I think that there are three places where it appears and that seems over-kill.

¹ 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%20209-17-2014.pdf>.

² 5 U.S.C. § 610.

³ Aldy, *supra* note 1, at 3.

⁴ See generally MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985).

⁵ See generally John Kamensky, *National Partnership for Reinventing Government: A Brief History* (Jan. 1999), available at <http://govinfo.library.unt.edu/npr/whoware/history2.html> (highlighting the successes of the Clinton Administration National Performance Review and emphasizing the importance of high-level executive branch and agency leadership).

⁶ 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁷ *Id.* § 6.



efforts (EO 13,579⁸) and yet another order providing a more detailed framework for retrospective review in executive branch agencies (EO 13,610⁹).

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.¹⁰ 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.¹¹

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.¹² Cass Sunstein, the former Administrator of the Office of Information and Regulatory Affairs, has suggested that these initiatives have yielded billions of dollars in savings.¹³ Nevertheless, many criticize 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.¹⁴ From the opposite perspective, many criticize 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.¹⁵

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."¹⁶ **Given the lack of any high-level enforcement mechanism, the Obama Administration regulatory lookback initiative, like its predecessors, runs the risk of devolving into an exercise in pro forma**

⁸ 76 Fed. Reg. 41,587 (July 14, 2011).

⁹ 77 Fed. Reg. 28,469 (May 14, 2012).

¹⁰ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

¹¹ 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%202013-21.pdf>.

¹² Exec. Order No. 13,610, § 1, 77 Fed. Reg. 28,469, 28,469 (May 14, 2012).

¹³ CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 180-84 (2013).

¹⁴ 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).

¹⁵ 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>; Rena Steinzor, *The Real "Tsunami" in Federal Regulatory Policy*, CPR BLOG, May 22, 2014, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=2480725C-9CC8-717D-E8DE6C4C4A5FF6EB>.

¹⁶ Aldy, *supra* note 1, at 39-40; Coglianese, *supra* note 14, at 66A.



compliance. Without a high-level enforcement mechanism, any regulatory lookback initiative runs the risk of devolving into an exercise of pro forma compliance. This might not be an inevitable 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, a durable commitment can emerge.¹⁷ Rather than regulatory review as a static, only backward-looking exercise, it should be present from the beginning as an on-going culture of evaluation and iterative improvement: with planning for such reevaluation and regulatory improvement (including defining how success will be measured and how the data necessary for this measurement will be collected) should be considered an integral part of the rule development process. This culture of evaluation and improvement is already part of many government programs, but not yet of most regulatory programs.

This recommendation aims to help agencies create such a culture of retrospective review. To promote robust retrospective analysis, agency officials must see it as critical to advancing their 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 is wholly integrated into agencies’ other 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 other regulatory drafting strategies that can help them later determine whether the regulation achieved its purpose.¹⁸ Finally, the recommendation identifies opportunities for conserving agency resources by leveraging internal and external sources of information and expertise. In many instances, stakeholders may be able to furnish information to which agency officials otherwise lack access.¹⁹ In other cases, overseas regulators may have confronted similar regulatory problems,

¹⁷ Aldy, *supra* note 1, at 40.

¹⁸ In particular, the agencies should consider how 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. John DiNardo & David S. Lee, *Program Evaluation & Research Designs*, in 4A HANDBOOK OF LABOR ECONOMICS 463–536 (2011); see also generally JOSEPH S. WHOLEY, HARRY P. HATRY, & KATHRYN E. NEWCOMER, HANDBOOK OF PRACTICAL PROGRAM EVALUATION (3d ed. 2010).

¹⁹ Aldy, *supra* note 1, at 22–23, 54, 56–57; see generally Bull, *supra* note 14 (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 recognize that private and non-governmental entities’ interests may not align with public interests and that established firms may

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Comment [RTB2]: Comment from Jeff Lubbers: This sentence bothers me a little. On a purely grammatical level, it looks like it might require an apostrophe either after “Administration” or even after “predecessor”—depending on what “its” modifies. More substantively, and more importantly, it seems to express the conclusion that the predecessors did actually devolve into an exercise of pro forma compliance—which seems unfair (or at least unnecessary to maintain here). It also suggests that the Obama Administration lacks a high-level enforcement mechanism—which this OMB might dispute. How about simply saying: “Without a high-level enforcement mechanism, any regulatory lookback initiative runs the risk of devolving into an exercise of pro forma compliance.”

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Comment [RTB3]: Comment from Jeff Lubbers: The sentence beginning with “Rather than...” is rather long and hard to follow. One small fix would be to add the word “viewing” after “than.” But it might be better to break it up into two sentences, with a period after “improvement.” The second sentence needs something like “should be considered” ...an integral part...



and incorporating these approaches would have the double benefit of avoiding duplication of effort and providing opportunities for eliminating unnecessary regulatory divergences.²⁰ Further, the information generated from retrospective review has the potential to conserve resources during regulatory development by informing ex ante regulatory analysis, which in turn improves the quality of new regulations.

Though the recommendation identifies certain common principles and opportunities for promoting robust retrospective analysis, it accepts the fact that each agency must tailor its regulatory lookback procedures to its statutory mandates and the nature of its regulatory mission. In addition, as optimal regulatory approaches may evolve over time, so too may retrospective review procedures. Therefore, the recommendation avoids 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 in regulatory policymaking at all stages of the process. The overall goal is to move away from a model of retrospective analysis as an episodic, top-down reporting and compliance obligation to one where agencies internalize a culture of retrospective review as part of their general regulatory mission.

RECOMMENDATION

Value of Retrospective Review

1. Agencies should internalize the requirements of Executive Orders 13,563, 13,579, and 13,610 and work with the Office of Management and Budget (“OMB”), as appropriate, to develop retrospective review into a robust feature of the regulatory system.

Integrating Retrospective Review into New Regulations

2. When formulating new regulations, agencies should, to the extent possible, establish a framework for reassessing the regulation at a later date. This should include, at a minimum, a clear statement in the rule’s preamble of the intended regulatory result with some objectively measurable outcome(s) and a plan for gathering the data needed to measure the achievement of the desired outcome(s). To the extent appropriate, agencies should also do the following:

- (a) Agencies should describe the methodology by which they intend to evaluate the effectiveness of the proposed rule. They should identify any framework they have devised to determine the causal impacts of the regulation, including whether the

Comment [RTB4]: Comment from Jeff Lubbers: I wonder if in the recommendations (perhaps part of #1) whether we shouldn't say that future Presidents should preserve these EOs. We've not done that so directly in the past, but if we think these Orders strike the right balance, maybe we should say so.

Comment [RTB5]: Comment from Alan Morrison: I do not know what "causal" means or why it is needed.

actually defend regulations that create barriers 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).

²⁰ 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).



regulation is achieving its intended result (e.g., creating a control group or utilizing some alternative methodology to compare the “regulated” condition to the “unregulated” or “differently regulated” condition).

- (b) Agencies should develop quantified performance objectives for assessing the effectiveness of the regulation. To the extent feasible, objectives should be outcome-based rather than output-based. Objectives may include measures of both benefits and costs (or cost-effectiveness) as appropriate.
- (c) Agencies should ascertain the types of data that bear upon whether the regulation is achieving its intended objectives and should identify the data sources and plans to obtain this information in the preamble to the rule. Consistent with the Paperwork Reduction Act, agencies should ensure that data collection plans appropriately balance burden with practical utility.
- (d) Agencies should identify key assumptions underlying any regulatory impact analysis performed on the proposed rule. This should include a description of the level of uncertainty associated with projected regulatory costs and benefits. It may also include plans for updating the analysis as new information becomes available, including information gained from implementation of the regulation.
- (e) Agencies should establish a target timeline frame by which they will reassess the proposed regulation.
- (f) Agencies should include a discussion of how the public and other governmental agencies (federal, state, tribal, and local) will be involved in the review.

Comment [RTB6]: Comment from Jeff Lubbers: I wonder if in Rec. 2(c), we shouldn't say something to urge OMB (OIRA?) to be receptive to information collection requests that are related to retrospective reviews. Or maybe it would be better to put that thought in Rec. 12—adding a sentence: “For its part, OMB (OIRA?) should ...”

Comment [RTB7]: Jeff Lubbers recommends using the phrase “target timeline,” to be consistent with the Committee on Rulemaking’s recommendation on Petitions for Rulemaking.

Comment [RTB8]: Suggested edit from Alan Morrison: I suggest “time frame” and not “time line” - it is more realistic and more flexible.

When reviewing proposed rules, the Office of Information and Regulatory Affairs (“OIRA”) should encourage agencies to plan for subsequent retrospective review to the extent appropriate.

3. Where it is legally permissible and appropriate, agencies should consider designing their regulations in ways that allow for experimentation, innovation, competition, and experiential learning. For example, as recommended by OMB Circular A-4, agencies might allow states and localities greater flexibility to tailor regulatory programs to their specific needs and circumstances, and in so doing, to serve as models for alternative regulatory approaches. Many of the statutes that authorize federal regulations are based on shared responsibility among different levels of government and are thus amenable to such flexibility. Agencies might also consider the possibility of creating experimental frameworks by which they establish a control group and experiment with a diversity of regulatory approaches in order to identify the most effective option.

Prioritizing 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 frameworks should be transparent and enable the public to understand why the agency prioritized certain rules for review in light of



the articulated selection criteria. Though considerations will vary from agency to agency and program to program, the following factors can help identify strong candidates for retrospective review that could inform regulatory revision:

- (a) Likelihood of increasing net **future** benefits and magnitude of those 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 was issued;
- (e) Internal agency administrative burden associated with the regulation;
- (f) Changes in underlying market or economic conditions, technological advances, evolving social norms, and/or changes in public risk tolerance;
- (g) Cumulative regulatory burden created by the regulation at issue and related regulations (including those issued by other agencies);
- (h) Comments, **petitions**, complaints, or suggestions received from stakeholder groups and members of the public;
- (i) **Disparities** **fferences** between U.S. regulatory approaches and those of key international trading partners;
- (j) Complexity of the rule (as demonstrated by poor compliance rates or other factors); and
- (k) Amount of guidance that the agency has issued interpreting the regulation.

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 important regulations as identified by the foregoing factors, they should also take advantage of simple opportunities to improve regulations, **even when the complexity of the changes is relatively minor (e.g., allowing electronic filing of forms in lieu of 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 achieve statutory goals more faithfully, minimize compliance burdens on regulated entities, or more effectively confer regulatory benefits. Agencies should employ statistical tools to identify the **causal** impacts of regulations, including their efficacy, benefits, and costs. Agencies should also consider the various factors articulated in

Comment [RTB9]: Comment from Alan Morrison: Just because a rule was expensive when it was issued does not mean it is a candidate for review on that basis. If companies had to make major changes in equipment, those costs are sunken and a change in the rule would not ease that burden. It is future costs that matter, which is why I would add "future" to recommendation 4(a) after "net."

Comment [RTB10]: Comment from Jeff Lubbers: In 4(h) you might want to reference the petition-for-rulemaking recommendation—with final language added after the Plenary. You could also do the same thing in 4(i) with respect to the International Regulatory Cooperation recommendation (2011-6), or add a note to recommendation 10.

Comment [RTB11]: Comment from Alan Morrison: I would change "Disparities" to "Differences" - a little less judgmental.

Comment [RTB12]: Peter Strauss recommends expanding this bullet point to note the potential for updating privately developed standards that are incorporated by reference into federal law: I regret that the recommendation lacks any integration with the IBR recommendation. Two thirds of all IBR rules are more than 20 years old, although revised by standards groups every five years or less. Each revision is a signal for review, and as I recall the recommendation it included suggestions for simplified revisions.

Comment [RTB13]: Proposed edit from Alan Morrison: Not sure complexity is right word or even whether the phrase in which it is contained is needed: the point is that minor changes can be useful and I would leave it at that (also shorter).

Jeff Lubbers proposes retaining the final phrase of the sentence but deleting the word "even."

Comment [RTB14]: Suggested edit from Jeff Lubbers.



recommendation 4 in considering how regulations might be modified to achieve their intended results more effectively.

7. Agencies should consider assigning the primary responsibility for conducting retrospective review to a set of officials other than those responsible for producing or enforcing the regulation, and ensure that these officials are adequately resourced to conduct effective reviews.

8. Agencies should call upon the insights of internal statistical offices as well as policy and program evaluation offices in order to design plans for reassessing regulations, to the extent they have such resources.

Inter-Agency Coordination

9. Agencies should coordinate with sister agencies that have issued related regulations in order to promote a coherent regulatory framework that maximizes net benefits. Agencies and OMB should also consider creating a high-level organization responsible for promoting coordination between agencies in their retrospective review efforts (or assigning this function to an existing entity, such as the Regulatory Working Group).

10. Agencies should consider regulations adopted by key 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 regulatory difference without undermining that mission.

11. OIRA should consider formulating a guidance document that highlights any considerations common to all agency retrospective analyses. In addition, OIRA should strive to coordinate among agencies to ensure that they consider how their existing regulations may interact with those of sister agencies.

Leveraging Outside Input

12. Regulated parties, non-governmental organizations, academics, and other outside entities or individuals often possess valuable information concerning both 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 leverage this outside expertise both in reassessing existing regulations and devising retrospective review plans for new regulations. In so doing, agencies should be mindful of the potential applicability of the Paperwork Reduction Act and should utilize flexibilities within the Act and OMB's implementing regulations (e.g., a streamlined comment period for collections associated with proposed rules) where permissible and appropriate.

13. Agencies should disclose relevant data concerning their retrospective analysis of existing regulations on "regulations.gov," their Open Government webpages, and/or other publicly available websites. In so doing, agencies should organize the data in ways that allow private parties to recreate the agency's work and to run additional analysis concerning existing rules'



effectiveness. Agencies should allow private parties to submit comments reflecting any such outside work and should integrate relevant information presented into their retrospective reviews.

Ensuring Adequate Resources

14. Agencies should plan for retrospective review when adopting new regulations, which should conserve significant resources when later reassessing those regulations and help promote regulatory learning. Similarly, agencies should strive to leverage stakeholder input, consider international regulatory approaches, and take other appropriate actions to economize when conducting retrospective review. Agencies and OMB should consider agencies' retrospective review needs and activities when developing and evaluating agency budget requests. To the extent that agencies require additional resources to conduct appropriately searching retrospective reviews, since the benefits of such analyses often far exceed the costs, Congress should ensure that agencies receive the necessary funding.

Comment [RTB15]: Comment from Alan Morrison: In the first sentence, I do not understand everything after the part that starts with "which." I also think that this discussion of resources is incomplete for reasons set forth above. I would also move it up to earlier in the recommendation because without adequate ADDITIONAL money, retrospective review is a BAD idea.