Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation for Committee | April 23, 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 may be done in either of two ways. One way is to engage in retrospective review of some or all of their regulations on a pre-set schedule (e.g., every ten years). The other way is to set a one-time date for the retrospective review of a regulation and, when that retrospective review is performed, set a new date for the next retrospective review, and so on. This latter method enables the agency to adjust the frequency of a regulation’s retrospective review in light of experience obtained in a prior retrospective review. Retrospective review may occur as a result of a statutory requirement or the agency’s own initiative. In accordance with long-standing executive branch policy, the Administrative Conference has long endorsed the practice of retrospective review of agency regulations, and has urged agencies to consider periodic retrospective review.

Some regulations are subject to periodic retrospective review requirements, either on specified intervals or more generally. For example, the Clean Air Act requires the Environmental


\[3\] Recommendation 95-3, supra note 2, 43110; Recommendation 2017-6, supra note 2.
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 regulations within ten years of the publication of such regulations as final. Other regulations 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’ regulations. It can help agencies determine whether regulations continue to meet their statutory objectives. It can help agencies determine whether a regulation is obsolete because, for example, the underlying statute has been amended or repealed.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 regulations), and assess whether and how the regulation should be revised in a new rulemaking. And it can help agencies determine how accurate the assessments they make before regulations 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 regulations may not be strong candidates for periodic review because the need for the regulation 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 regulations is time that may not be spent on other projects. For this reason, agencies might reasonably decide

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5 5 U.S.C. § 610.
7 Id. at 8.
to restrict periodic review to only important regulations, such as those that affect large numbers
of people or those that have particularly pronounced effects on specific groups. And periodic
retrospective review can also entail costs for regulated parties and beneficiaries associated with
uncertainty concerning whether or not a regulation will be retained or modified. Agencies,
therefore, will 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 how to establish a
periodic retrospective review plan. It does so by, among other things, identifying the kinds of
regulations 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 encouraging agencies to
seek public input to both help identify the kinds of regulations that lend themselves well to
periodic retrospective review and inform the agencies’ analyses of their regulations.

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 regulations. 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

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.
regulatory missions, and how they intend to address these questions. 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

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

1. Agencies should identify any specific regulations or categories of regulations that are subject to statutory periodic retrospective review requirements.

2. For regulations not subject to statutory periodic retrospective review requirements, agencies should establish a periodic retrospective review plan. In deciding which regulations, if any, should be subject to this review plan, agencies should consider the public benefits of periodic retrospective review, including potential gains from learning, and the costs, including administrative burden and policy instability. When agencies adopt new regulations for which decisions regarding retrospective review have not been established, agencies should as part of that rulemaking decide whether those regulations should be subject to retrospective review.

3. When planning for periodic retrospective reviews, agencies should not limit themselves to reviewing a specific final regulation when a review of a larger regulatory program would be more constructive.

4. For regulations that agencies decide to subject to periodic retrospective review, agencies should decide whether to subject some or all of the regulations to a pre-set schedule of retrospective review or whether some or all of the regulations should have only an initial date for retrospective review, with a subsequent date for each retrospective review set at

Commented [LAS2]: Note to Committee: Recommendation 95-3, Review of Existing Agency Regulations, and Recommendation 2014-5, Retrospective Review of Agency Rules, both use the phrase “existing regulations” to describe the category of rules that are within the scope of those recommendations. If the committee wishes to mirror the language used in executive orders, Executive Order 13563 and Executive Order 13610 limit their retrospective review sections to “existing significant regulations.”

Commented [LAS3]: Note to Committee: Proposed language from William Funk.

Commented [LAS4]: Note to the Committee: This recommendation was proposed by Bridget Dooling in response to Dave Rostker’s comments at the committee meeting on April 9.

the time of the preceding retrospective review. In either case, agencies should decide the optimal frequency of review for a pre-set schedule of retrospective reviews or the optimal period before the first retrospective review. In doing so, agencies should consider, among others, the following factors:

a. The pace of change of the technology, science, sector of the economy, or part of society affected by the regulation. 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, costs, and distributional impacts. 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, complaints, requests for waivers or exemptions, or suggestions received from interested groups and members of the public. The level of public interest or amount of new evidence regarding changing the regulation may warrant more frequent reviews;

e. The complexity of the regulation, 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 regulation may warrant less frequent reviews; and

g. Reliance interests connected with the regulation. Regulations on which regulated entities and beneficiaries have come to rely (with higher costs of change) may lend themselves to less frequent reviews.

5. In making the decisions outlined in Recommendations 1 through 3, public input can help agencies identify which regulations 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

Commented [LAS5]: Note to Committee: Proposed language from William Funk.

Commented [LAS6]: Comment from Institute for Policy Integrity: “Subsection (e) suggests that a less complex rule warrants more frequent reviews. Why this may be is not clear and the subsection requires more explanation.”
normally monitor agencies’ activities, creating online discussion forums designed to solicit feedback, and posting requests for information.

6. Agencies should provide public disclosure regarding their periodic retrospective review plans, including which regulations are subject to periodic retrospective review, how frequently the regulations are reviewed, what the review entails, and whether the review of the regulation is conducted pursuant to a legal requirement of 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.

7. With respect to regulations subject to a pre-set schedule of retrospective reviews, agencies should periodically reassess both the regulations that should be subject to periodic retrospective review and the optimal frequency of review.

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

8. 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 regulations’ 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.

9. 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 regulation 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 regulation, and posting

Commented [LAS7]: Comment from Institute for Policy Integrity: same issues as 3(d), “the content of public input should weigh more heavily in these determinations than the sheer volume of public input.”

Commented [LAS8]: Comment from Institute for Policy Integrity: “agencies should also consider detailing plans for retrospective review in their annual Regulatory Plans. Executive Order 12,866 calls for agencies to do so.”

Commented [LAS9]: 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.

Commented [LAS10]: Note to Committee: Proposed language from William Funk.

Commented [LAS11]: Comment from Institute for Policy Integrity: “Such documentation should include a weighing of the costs and benefits of alternatives, and ACUS should recommend that agencies consider a reasonable number of alternatives during their periodic reviews, and should disclose information on the costs and benefits of those alternatives.” And “If documents relating to retrospective review are to be posted on regulations.gov, they need to be readily findable. Such documents should be cross-linked as appropriate on agencies’ own websites, and regulations.gov might feature some identifiable subsection on retrospective review.”

Commented [LAS12]: Comment from Institute for Policy Integrity: “Agencies may not know which groups are normally monitoring regulatory activities. This goal might be rephrased to focus on affected groups that are underrepresented in the agency’s proceedings, or more generally on vulnerable communities that are disproportionately affected by the rule.”
requests for information on the regulation. Agencies should integrate relevant information
from the public into their retrospective reviews.

10. 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

11. 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 regulation, or category of regulation, each time
      it is reviewed. This approach allows staff to gain expertise in a particular kind of
      regulation, thereby potentially improving the efficiency of the review;
   b. Assigning different staff the same regulation, or category of regulation, 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 regulations; 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
      regulation, and procedural considerations, such as whether the regulation conflicts
      with other regulations or complies with plain language requirements, will enter into
      the review.

Using Evidence Act Processes

12. 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 regulation 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 regulation, 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 regulation.

Interagency Coordination

13. 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.

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