



Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation for Committee | May 7, 2021

1 Retrospective review is the process by which agencies analyze existing regulations and
2 decide whether they need to be modified in any respect. Periodic retrospective review may be
3 done in either of two ways. One way is to engage in retrospective review of some or all of their
4 regulations on a pre-set schedule (e.g., every ten years). The other way is to set a one-time date
5 for the retrospective review of a regulation and, when that retrospective review is performed, set
6 a new date for the next retrospective review, and so on. This latter method enables the agency to
7 adjust the frequency of a regulation's retrospective review in light of experience obtained in a
8 prior retrospective review. Retrospective review may occur as a result of a statutory requirement
9 or the agency's own initiative. In accordance with long-standing executive branch policy,¹ the
10 Administrative Conference has long endorsed the practice of retrospective review of agency
11 regulations,² and has urged agencies to consider periodic retrospective review.³

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

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 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, 43110; Recommendation 2017-6, *supra* note 2.

Commented [LAS1]: Note to Committee: Proposed language from William Funk



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14 Protection Agency to review certain ambient air quality regulations every five years.⁴ The
15 Regulatory Flexibility Act requires agencies to publish in the *Federal Register* a plan for the
16 “periodic review of rules . . . which have or will have a significant economic impact upon a
17 substantial number of small entities.” The Act also requires agencies to review all such
18 regulations within ten years of the publication of such regulations as final.⁵ Other regulations are
19 subject to periodic review under periodic review plans created by agencies, some of which are
20 not statutorily mandated.⁶

21 Periodic retrospective review can enhance the quality of agencies’ regulations. It can help
22 agencies determine whether regulations continue to meet their statutory objectives. It can help
23 agencies determine whether a regulation is obsolete because, for example, the underlying statute
24 has been amended or repealed. It can help agencies evaluate regulatory performance (e.g.,
25 benefits, costs, ancillary impacts, and distributional impacts of regulations), and assess whether
26 and how the regulation should be revised in a new rulemaking. And it can help agencies
27 determine how accurate the assessments they make before regulations are issued are with regard
28 to likely regulatory impact (e.g., forecasts of benefits, costs, ancillary impacts,⁷ and distributional
29 impacts⁸) and identify ways to improve the accuracy of those assessment methodologies.⁹

⁴ 42 U.S.C. § 7309(d)(1).

⁵ 5 U.S.C. § 610.

⁶ Lori S. Benneer & Jonathan B. Wiener, *Periodic Review of Agency Regulation* 33–38 (Apr. 1, 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., income groups, race, sex, industrial sector, geography).” *Id.* at 14.

⁹ *Id.* at 8.



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30 There are also drawbacks associated with periodic retrospective review. Some regulations
31 may not be strong candidates for periodic review because the need for the regulation is unlikely
32 to change and the benefits associated with periodically revisiting it are small. There are costs
33 associated with collecting data and analyzing it, and time spent on reviewing existing regulations
34 is time that may not be spent on other projects. For this reason, agencies might reasonably decide
35 to restrict periodic review to only important regulations, such as those that affect large numbers
36 of people or those that have particularly pronounced effects on specific groups. And periodic
37 retrospective review can also entail costs for regulated parties and beneficiaries associated with
38 uncertainty concerning whether or not a regulation will be retained or modified. Agencies,
39 therefore, will need to carefully tailor their periodic retrospective review plans.

40 Mindful of both the value of periodic retrospective review and the costs associated with
41 it, this Recommendation offers practical suggestions to agencies about how to establish a
42 periodic retrospective review plan. It does so by, among other things, identifying the kinds of
43 regulations that lend themselves well to periodic retrospective review, proposing factors for
44 agencies to consider in deciding the optimal review frequency when they have such discretion,
45 and identifying different models for staffing periodic retrospective reviews. In doing so, it builds
46 upon the Administrative Conference's longstanding endorsement of public participation in all
47 aspects of the rulemaking process,¹⁰ including retrospective review,¹¹ by encouraging agencies to
48 seek public input to both help identify the kinds of regulations that lend themselves well to
49 periodic retrospective review and inform the agencies' analyses of their regulations.

50 It also recognizes the important institutional role that the Office of Management and
51 Budget (OMB) plays in agencies' retrospective review efforts, and the important role that the
52 Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-

¹⁰ 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).

¹¹ Recommendation 2014-5, *supra* note 2.



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53 issued guidance can play.¹² It suggests that agencies work with OMB to help facilitate data
54 collection relevant to reviewing regulations. It calls attention to the Evidence Act's requirements
55 for certain agencies to create Learning Agendas and Annual Evaluation Plans, which lay out
56 research questions that agencies plan to address regarding their missions, including their
57 regulatory missions, and how they intend to address these questions.¹³ The Recommendation
58 states that agencies can satisfy the Evidence Act's requirements to create Learning Agendas and
59 Annual Evaluation Plans if they undertake and document certain activities as they carry out
60 periodic retrospective review.

RECOMMENDATION

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

- 61 1. Agencies should identify any specific regulations or categories of regulations that are
62 subject to statutory periodic retrospective review requirements.
- 63 2. For regulations not subject to statutory periodic retrospective review requirements,
64 agencies should establish a periodic retrospective review plan. In deciding which
65 regulations, if any, should be subject to this review plan, agencies should consider the
66 public benefits of periodic retrospective review, including potential gains from learning,
67 and the costs, including administrative burden and policy instability. When agencies adopt
68 new regulations for which decisions regarding retrospective review have not been
69 established, agencies should as part of the process of developing such regulations, decide
70 whether those regulations should be subject to retrospective review.
- 71 3. When planning for periodic retrospective reviews, agencies should not limit themselves to
72 reviewing a specific final regulation when a review of a larger regulatory program would
73 be more constructive.

¹² See Benneer & Wiener, *supra* note 6.

¹³ 5 U.S.C. § 306.



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- 74 4. For regulations that agencies decide to subject to periodic retrospective review, agencies
75 should decide whether to subject some or all of the regulations to a pre-set schedule of
76 retrospective review or whether some or all of the regulations should have only an initial
77 date for retrospective review, with a subsequent date for each retrospective review set at
78 the time of the preceding retrospective review. In either case, agencies should decide the
79 optimal frequency of review for a pre-set schedule of retrospective reviews or the optimal
80 period before the first retrospective review. In doing so, agencies should consider, among
81 others, the following factors:
- 82 a. The pace of change of the technology, science, sector of the economy, or part of
83 society affected by the regulation. A higher pace of change may warrant more
84 frequent reviews;
 - 85 b. The degree of uncertainty about the accuracy of the initial estimates of regulatory
86 benefits, costs, ancillary impacts, and distributional impacts. Greater uncertainty
87 may warrant more frequent reviews;
 - 88 c. Changes in the statutory framework under which the regulation was issued. More
89 changes may warrant more frequent reviews;
 - 90 d. Comments, complaints, requests for waivers or exemptions, or suggestions
91 received from interested groups and members of the public. The level of public
92 interest or amount of new evidence regarding changing the regulation may warrant
93 more frequent reviews;
 - 94 e. The difficulties arising from implementation of the regulation, as demonstrated by
95 poor compliance rates, requests for waivers or exemptions, the amount of clarifying
96 guidance issued, remands from the courts, or other factors. Greater difficulties may
97 warrant more frequent reviews;
 - 98 f. The administrative burden in conducting reviews. Greater staff time involved in
99 reviewing the regulation may warrant less frequent reviews; and
 - 100 g. Reliance interests and investment-backed expectations connected with the
101 regulation. Greater reliance or expectations may lend themselves to less frequent
102 reviews.

Commented [LAS2]: Note to Committee: The Committee wished to review this again to see if it correctly captures its intent. In particular, “requests for waivers or exemptions” is now in both (d) and (e) and there was some debate about whether that phrase should be in one or the other or both.



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- 103 5. In making the decisions outlined in Recommendations 1 through 4, public input can help
104 agencies identify which regulations should be subject to review and with what frequency.
105 Agencies should consider soliciting public input by means such as convening meetings of
106 interested persons, engaging in targeted outreach efforts to historically underrepresented
107 or under-resourced groups, creating online discussion forums designed to solicit feedback,
108 and posting requests for information.
- 109 6. Agencies should publicly disclose their periodic retrospective review plans, including
110 which regulations are subject to periodic retrospective review, how frequently the
111 regulations are reviewed, what the review entails, and whether the review of the regulation
112 is conducted pursuant to a legal requirement of the agency’s own initiative. Agencies
113 should include these notifications on their websites, and should consider including them
114 within the *Federal Register*, even if not legally required to do so.
- 115 7. With respect to regulations subject to a pre-set schedule of retrospective reviews, agencies
116 should periodically reassess both the regulations that should be subject to periodic
117 retrospective review and the optimal frequency of review.

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

- 118 8. Agencies should publish a document or set of documents in a prominent, easy-to-find place
119 on the portion of their websites dealing with rulemaking matters, explaining how they
120 conducted a given periodic review, what information they considered, and what public
121 outreach they undertook. They should also include this document or set of documents on
122 Regulations.gov, if applicable. In so doing, to the extent appropriate, agencies should
123 organize the data within the document or set of documents in ways that allow private parties
124 to recreate the agencies’ work and to run additional analyses concerning existing
125 regulations’ effectiveness. Agencies should also, to the extent feasible, explain in plain
126 language the significance of their data and how they used the data to shape their review.
- 127 9. Agencies should seek input from relevant parties when conducting periodic retrospective
128 review. Possible outreach methods include convening meetings of interested persons,

Commented [LAS3]: Note to Committee: This language comes from the consultants’ recommendations in their report. We do have a recommendation, 2013-5, Social Media in Rulemaking, where we refer to agencies facilitating “social media discussions.”

Commented [LAS4]: Note to Committee: The Institute for Policy Integrity commented “agencies should also consider detailing plans for retrospective review in their annual Regulatory Plans. Executive Order 12,866 calls for agencies to do so.” This issue was addressed in Recommendation 95-3, *Review of Existing Agency Regulations*, which says “Agencies should establish priorities for which regulations are reviewed when developing their annual regulatory programs or plans” and there is a footnote to Executive Order 12866. Recommendation 2014-5, *Retrospective Review of Agency Rules*, does not directly address the issue of annual Regulatory Plans or Executive Order 12866’s requirements.

Commented [LAS5]: Note to Committee: As requested, this language mirrors the language used in the Rules on Rulemakings recommendation regarding how agencies should publicize documents on their websites in transparent ways. This is in accord with Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, which uses the language “in a manner that will ensure their availability and usefulness for regulated parties and the public.” Recommendation 2020-6, *Agency Litigation Webpages*, also addresses this and says “Agencies that post... materials on their websites should make sure that website users can easily locate those materials.”



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129 engaging in targeted outreach efforts such as proactively bringing the regulation to the
130 attention of **historically underrepresented or under-resourced groups**, creating online
131 discussion forums designed to solicit feedback on the regulation, and posting requests for
132 information on the regulation. Agencies should integrate relevant information from the
133 public into their retrospective reviews.

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

136 **Ensuring Adequate Resources and Staffing**

137 11. Agencies should decide how to best structure their staffing of periodic retrospective
138 reviews to foster a culture of retrospective review. Below are examples of some staffing
139 models, which may be used in tandem or separately:

- 140 a. Assigning the same staff the same regulation, or category of regulation, each time
141 it is reviewed. This approach allows staff to gain expertise in a particular kind of
142 regulation, thereby potentially improving the efficiency of the review;
- 143 b. Assigning different staff the same regulation, or category of regulation, each time
144 it is reviewed. This approach promotes objectivity by allowing differing viewpoints
145 to enter into the analysis;
- 146 c. Engaging or cooperating with experts, either within or outside the agency, to review
147 regulations; and
- 148 d. Pairing subject matter experts, such as engineers, economists, and scientists, with
149 other agency employees in conducting the reviews. This approach maximizes the
150 likelihood that both substantive considerations, such as the net benefits of the
151 regulation, and procedural considerations, such as whether the regulation conflicts
152 with other regulations or complies with plain language requirements, will enter into
153 the review.

Using Evidence Act Processes

Commented [LAS6]: Note to Committee: This language is drawn from the Rules on Rulemakings recommendation. The language was also changed in Recommendation 5 to make sure it was consistent.



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- 154 12. To satisfy the Evidence Act’s requirements to create Learning Agendas and Annual
- 155 Evaluation Plans, agencies should undertake and document the following activities as they
- 156 carry out periodic retrospective review:
- 157 a. Create precise questions to be addressed by the review, such as whether the
- 158 regulation in question maximizes net benefits, how frequently it should be
- 159 reviewed, or how it affects a particular sector of the economy;
- 160 b. Describe the information needed to conduct reviews of the regulation, including
- 161 whether the agency will undertake new information collection requests or if it will
- 162 use existing information;
- 163 c. Describe the methods it will use in conducting the reviews, such as randomized
- 164 control trials or quasi-experimental methods;
- 165 d. Describe the anticipated challenges in conducting the review, such as obstacles to
- 166 collecting relevant data; and
- 167 e. Describe how it will use the review results to inform policy making, including by
- 168 strengthening, maintaining, or otherwise modifying the regulation.

Interagency Coordination

- 171 13. A body or expert entity with interagency responsibilities should regularly convene agencies
- 172 to identify and share best practices on periodic retrospective review, addressing questions
- 173 such as how to improve timeliness and analytic quality of reviews and the optimal
- 174 frequency of discretionary reviews.
- 175 14. To promote a coherent regulatory scheme, agencies should coordinate their periodic
- 176 retrospective reviews with other agencies that have issued related regulations.

Commented [LAS7]: Comment from Richard Morgenstern and Art Fraas: We believe that the best approach for achieving this objective is to include this discussion as part of the agency rulemaking and to incorporate the required instruments and processes within the rule.

Commented [LAS8]: Comment from DOT/Jonathan Dols: “Whether a rule maximizes net benefits is not a precise question (maximum relative to...?). Suggest deleting

Commented [LAS9]: Comment from Richard Morgenstern and Art Fraas: We endorse the importance of setting out precise questions to be addressed by the review, such as examining the nature and distribution of the benefits and costs, developing a benefit-cost analysis (with comparison to a counterfactual scenario), or considering effects on a particular sector of the economy. In our view, it would be grossly inadequate if the inquiry were to focus solely on how frequently regulations should be reviewed.

Commented [LAS10]: Comment from DOT/Jonathan Dols: “Recommend deleting ‘randomized control trials or quasi-experimental methods’ as examples because these methods are probably the least likely to be used in a retrospective review. For example, a regulation typically applies to units (e.g. the entire U.S.) for which randomization and assigning control groups is not possible. Perhaps combine with previous recommendation on information, as the information collected will determine the method used.

Commented [LAS11]: For Committee consideration: The committee will want to discuss what agency or entity is best suited to this task.

Commented [LAS12R11]: Comment from Institute for Policy Integrity: “OIRA seems well suited to this task. Indeed, Executive Order 12,866 already assigns OIRA to coordinate a working group on pursuing the objectives of regulatory review.”

Commented [LAS13R11]: Comment from Richard Morgenstern and Art Fraas: We recommend that OMB should formalize guidance for retrospective evaluation of rules. These requirements should be based on identifying the real impacts of the regulations and ought to include the availability of a relevant control group and the associated data for estimating compliance costs and effectiveness (or benefits).

Commented [LAS14]: Comment from Institute for Policy Integrity on additional possible recommendation: “Agencies should think about how to craft their rulemakings to facilitate future retrospective reviews. Setting clear metrics and clear processes for collecting the information necessary to conduct future reviews should be a part of agencies’ rulemakings, and ACUS’s recommendations should so advise... ACUS should advise OIRA and agencies to work together to ...