



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Artificial Intelligence Algorithmic Tools in Retrospective Review of Agency Rules

Committee on Regulation

Proposed Recommendation for Plenary | June 15, 2023

Proposed Amendments

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

1 Retrospective review is the process by which agencies assess existing rules and decide
2 whether they need to be revisited. Consistent with longstanding executive-branch policy, the
3 Administrative Conference has endorsed the practice of retrospective review of agency rules
4 (including those that incorporate standards by reference), encouraged regulatory agencies to
5 cultivate a culture of retrospective review, and urged agencies to establish plans to conduct
6 retrospective reviews periodically.¹ The Conference has also recognized, however, that agencies
7 often have limited resources available to conduct retrospective reviews. To encourage agencies
8 to undertake retrospective reviews despite resource limitations, the Conference has identified
9 opportunities for agencies to conserve resources, for example by taking advantage of internal and
10 external sources of information and expertise.²

11 New technologies may offer additional opportunities for agencies to conserve resources
12 and conduct more robust retrospective review in a cost-effective manner. ~~Most significantly~~

¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2021-2, *Periodic Retrospective Review*, 86 Fed. Reg. 36,080 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,783 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (Jan. 17, 2012); Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108 (Aug. 18, 1995).

² Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan Morrison:

I suggest adding "Using" or "Use of" before "Algorithmic Tools" (if adopted).

Commented [RC2]: Proposed Amendment from Regulation Committee:

The Committee voted to replace the original title of this Recommendation from *Artificial Intelligence in Retrospective Review of Agency Rules* to *Algorithmic Tools in Retrospective Review of Agency Rules*.

DRAFT June 9, 2023



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13 **Among these**, algorithmic tools may enable agencies to automate some tasks associated with
14 retrospective review. An algorithmic tool is a computerized process that uses a series of rules or
15 inferences drawn from data to transform specified inputs into outputs to make decisions or
16 support decision making.³ The use of such tools may also help agencies identify issues that they
17 otherwise might not detect. The General Services Administration (GSA) and several other
18 agencies have already begun experimenting with the use of algorithmic tools to conduct some
19 tasks in service of retrospective review or similar functions.⁴

20 Although algorithmic tools hold out the promise of lowering the cost of completing
21 governmental tasks and improving the quality, consistency, and predictability of agencies'
22 decisions, agencies' use of algorithmic tools also raises important concerns.⁵ Statutes, executive
23 orders, and agency policies highlight many such concerns.⁶ In a prior Statement, the Conference
24 itself described concerns about transparency (especially given the proprietary nature of some
25 artificial intelligence (AI) systems), harmful bias, technical capacity, procurement, data usage
26 and storage, privacy, security, and the full or partial displacement of human decision making and
27 discretion that may arise when agencies rely on AI tools.⁷ **There are also practical challenges**
28 **associated with the development and use of agency-specific** algorithmic tools ~~including the~~
29 ~~potentially high startup costs associated with developing or procuring them, the need to develop~~
30 ~~internal capacity and expertise to use them appropriately, related needs in staffing and training,~~
31 ~~and the need for ongoing maintenance and oversight~~—which may lead agencies to rely on the
32 **algorithmic tools developed and used by GSA and other agencies. These challenges include the**

³ Algorithmic tools include, but are not limited to, applications that use artificial intelligence techniques.

⁴ Catherine M. Sharkey, Algorithmic Retrospective Review of Agency Rules (May 3, 2023) (report to the Admin. Conf. of the U.S.).

⁵ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies (Feb. 2020) (report to the Admin. Conf. of the U.S.).

⁶ See, e.g., AI Training Act, Pub. L. No. 117-207, 136 Stat. 2237 (Oct. 17, 2022); Exec. Order No. 14,091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 10,825 (Feb. 16, 2023); Exec. Order No. 13,960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 Fed. Reg. 78,939 (Dec. 3, 2020); Exec. Order No. 13,859, Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 (Feb. 11, 2019).

⁷ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

Commented [CA3]: Proposed Amendment from Council #1:

The present wording of lines 28-32 are a bit confusing. The Council recommends that on line 28, following "associated with" and preceding "algorithmic tools" inserting "development and use of agency-specific" to make the recommendation more clear.



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33 potentially high startup costs associated with developing or procuring them, the need to develop
34 internal capacity and expertise to use them appropriately, related needs in staffing and training,
35 and the need for ongoing maintenance and oversight.

36 The Conference recognizes that agencies may be able to leverage algorithmic tools to
37 more efficiently, cost-effectively, and accurately identify rules (including those that incorporate
38 standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate
39 cross-references, or might benefit from resolving issues with intersecting or overlapping rules or
40 standards. Because agencies have only recently begun using algorithmic tools to support
41 retrospective review, this Recommendation does not address the potential use of those tools to
42 perform more complex tasks—such as identifying rules that may need to be modified,
43 strengthened, or eliminated to better achieve statutory goals or reduce regulatory burdens—for
44 which the potential risks and benefits are still unclear and which may raise additional issues
45 regarding agency decision making, including those highlighted above. This Recommendation
46 offers identifies best practices for agencies to acquire, use, and assess algorithmic tools for
47 retrospective review in a way that accords with applicable legal requirements and promotes
48 accuracy, efficiency, transparency, and accountability. To encourage coordination and
49 collaboration across the executive branch, this Recommendation also encourages the General
50 Services Administration to continue to explore options for developing, acquiring, and using
51 algorithmic tools to support retrospective review and share its findings and capabilities with
52 other agencies, and the Office of Management and Budget to provide guidance on the use of
53 these tools to support retrospective review.

RECOMMENDATION

- 54 1. Agencies should assess whether they can use algorithmic tools to more efficiently, cost-
55 effectively, and accurately identify rules (including those that incorporate standards by
56 reference) that are outmoded or redundant, contain typographic errors or inaccurate
57 cross-references, or might benefit from resolving issues with intersecting or overlapping
58 rules or standards.

Commented [CA4]: Proposed Amendment from Council #2:

This proposed amendment is intended to clarify that this Recommendation not only identifies best practices for individual agencies but also makes recommendations to GSA and OMB to encourage cross-agency coordination and collaboration.



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- 59 2. When agencies contemplate using an algorithmic tool to support retrospective review,
60 they should consider whether it would be most efficient, cost-effective, and accurate to
61 develop a new tool in-house, implement a tool developed and made available by another
62 agency, or procure a tool from a commercial vendor or contractor. In making this
63 determination, agencies should assess whether there is an existing tool that meets their
64 needs and, in so doing, consult with other agencies that have experience using
65 algorithmic tools to support retrospective review. If there is no such tool, agencies should
66 consider whether they have sufficient in-house expertise and capacity to develop an
67 adequate tool.
- 68 3. Agencies should ensure that regulatory decision makers who use algorithmic tools to
69 support retrospective review (a) have adequate training on the capabilities and risks of
70 those tools and (b) carefully assess the output ~~before relying on it for further~~
71 ~~consideration.~~
- 72 4. ~~To promote transparency and build internal expertise, agencies should, when developing~~
73 ~~or selecting an algorithmic tool to support retrospective review, ensure that the source~~
74 ~~code for the tool is publicly available and interoperable with other government~~
75 ~~systems consider open-source options and those that would maximize interoperability~~
76 ~~with other government systems.~~ If agencies do not use an algorithmic tool that is open-
77 source, they should ensure that key information about the tool's development, operation,
78 and use is available to agency personnel and the public.
- 79 5. When agencies publish retrospective review plans and descriptions of specific
80 retrospective reviews, as described in Recommendation 2021-2, *Periodic Retrospective*
81 *Review*, they should disclose whether, and if so, explain how, they plan to use or used
82 algorithmic tools to support retrospective review. Additionally, when agencies
83 incorporate retrospective reviews in their Learning Agendas and Annual Evaluation
84 Plans, as described in Recommendation 2021-2, they should include information about
85 the use of algorithmic tools.

Commented [CA5]: Proposed Amendment from Council #3:

This proposed amendment is intended to clarify what is meant by "further consideration."

Commented [CA6]: Proposed Amendment from Council #4:

These are worthy factors for consideration, but "ensure" is too strong and clashes with the reality that best-in-class tools often will not be open-source, and ensuring interoperability with other government systems is challenging given the current patchwork of government IT systems. Accordingly, the Council proposes the following language.



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- 86 6. When the analysis deriving from a retrospective review using an algorithmic tool will
87 influence a new rulemaking, agencies should be transparent about their use of the tool
88 and explain how the tool contributed to the decision to develop the new rule.
- 89 ~~7.1. The General Services Administration should continue to explore options for developing,
90 acquiring, and using algorithmic tools to support retrospective review and share its
91 findings and capabilities with other agencies.~~
- 92 ~~8.1. The Office of Management and Budget should provide guidance on the use of
93 algorithmic tools to support retrospective review.~~
- 94 7. Agencies should share their experiences **with each other** in using these tools, **and to**
95 manage risk and monitor internal processes, **agencies should** consider developing their
96 own internal evaluation and oversight mechanisms for algorithmic tools used in
97 retrospective review, both for initial approval of a tool and, as applicable, for regular
98 oversight of the tool.
- 99 **8. The General Services Administration should continue to explore options for developing,
100 acquiring, and using algorithmic tools to support retrospective review and share its
101 findings and capabilities with other agencies.**
- 102 **9. The Office of Management and Budget should consider providing guidance on the use
103 of algorithmic tools to support retrospective review.**

Commented [CA7]: Proposed Amendment from Council #5:

This proposed amendment is intended to clarify with whom agencies should share their experiences.

Commented [CMA8]: Proposed Amendment from Government Member Stephanie Tatham (OMB):

We appreciate this suggestion and the helpful empirical research supporting this draft Recommendation and will consider it.

More immediately, OMB is working to implement the President's directive in Executive Order 14094 Section 2(d) to consider guidance or tools to modernize the notice-and-comment process, including to address mass, computer-generated (such as those generated through artificial intelligence), or fraudulent comments. We appreciate the Conference's early leadership in studying and calling attention to these important issues in Recommendation 2021-1.