

Comment from William Funk, Liaison Representative
April 7, 2021

To: Committee on Administration and Management

Date: April 7, 2021

From: William Funk, Liaison Representative of the ABA Administrative Law and Regulatory Practice Section

Subject: Comment on the Draft Recommendation – Periodic Retrospective Review

I would like to suggest a slightly different conception of “periodic” retrospective review. The current conception appears to follow the statutory tendency to require review every X years. I would like to substitute the idea that “periodic” simply means a plan by which there will be a regular review of rules retrospectively, but not necessarily (or usually) upon the same number of years between each review. Let me explain.

Rather than have an agency *ex ante* establish a periodicity for the retrospective review of a rule or rules, an agency should establish the time when the first retrospective review would take place, and part of that retrospective review would involve setting the time for the next retrospective review. To say *ex ante* that a review for any given regulation should occur every X years presumes knowledge the agency does not have. The agency, considering the matters outlined in the proposed recommendation number 5, might well be able to judge when it should first retrospectively review a given existing rule in light of current conditions, but I submit that to establish an appropriate schedule for successive retrospective reviews into the indefinite future would exceed the ability of the agency to predict the future.

Then at the time of the first retrospective review, the agency would in light of the conditions and experience at that time set the date for the next retrospective review, and so on.

This methodology would apply not only to existing rules as to which no review date had already been set as well as to new rules coming into existence after the initial setting of retrospective review of rules already in existence. That is, for already existing rules for which a retrospective review was not already scheduled, the agency would in light of the considerations in the recommendation set initial retrospective review dates for each. Then, as indicated above, when that initial retrospective review takes place, the agency would set the date for the next retrospective review. For rules coming into existence after the initial setting of retrospective review dates, part of that rulemaking would include setting a retrospective review date for that rule. This would be true for any “new” rule, whether a wholly new rule or an amendment to an existing rule. This methodology would, moreover, allow for public participation in setting each review date.