



Retrospective Review of Agency Rules

Committee on Regulation

Proposed Recommendation | December 4–5, 2014

1 *The following recommendation is intended to provide a framework for cultivating a*
2 *“culture of retrospective review” within regulatory agencies. It urges agencies to remain*
3 *mindful of their existing body of regulations and the ever-present possibility that those*
4 *regulations may need to be modified, strengthened, or eliminated in order to achieve statutory*
5 *goals while minimizing regulatory burdens. It encourages agencies to make a plan for*
6 *reassessing existing regulations and to design new regulations in a way that will make later*
7 *retrospective review easier and more effective. It recognizes that input from stakeholders is a*
8 *valuable resource that can facilitate and improve retrospective review. Finally, it urges agency*
9 *officials to coordinate with sister agencies and the Office of Management and Budget to*
10 *promote coherence in shared regulatory space.*

11 Traditionally, federal regulatory policymaking has been a forward-looking enterprise:
12 Congress delegates power to administrative agencies to respond to new challenges, and
13 agencies devise rules designed to address those challenges. Over time, however, regulations
14 may become outdated, and the cumulative burden of decades of regulations issued by
15 numerous federal agencies can both complicate agencies’ enforcement efforts and impose a
16 substantial burden on regulated entities. As a consequence, Presidents since Jimmy Carter
17 have periodically undertaken a program of “retrospective review,” urging agencies to reassess
18 regulations currently on the books and eliminate, modify, or strengthen those regulations that
19 have become outmoded in light of changed circumstances.¹ Agencies have also long been
20 subject to more limited regulatory lookback requirements, including the Regulatory Flexibility

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/Aldy%20Retrospective%20Review%20Report%20CIRCULATED%2009-17-2014.pdf>.



21 Act, which requires agencies to reassess ten-year-old regulations having “a significant economic
22 impact upon a substantial number of small entities,”² and program-specific retrospective
23 review requirements erected by statute.³

24 Though historical retrospective review efforts have resulted in some notable successes,⁴
25 especially in those instances in which high-level leadership in the executive branch and
26 individual agencies has strongly supported these endeavors,⁵ retrospective review of regulatory
27 effects has not been held to the same standard as prospective review, and the various statutory
28 lookback requirements apply only to subsets of regulations. President Barack Obama has
29 sought to build on these initiatives in several executive orders. On January 18, 2011, he issued
30 Executive Order (EO) 13,563,⁶ which directed executive branch agencies regularly to reassess
31 existing rules to identify opportunities for eliminating or altering regulations that have become
32 “outmoded, ineffective, insufficient, or excessively burdensome.”⁷ Shortly thereafter, he issued
33 another order encouraging independent regulatory agencies to pursue similar regulatory
34 lookback efforts (EO 13,579⁸) and yet another order providing a more detailed framework for
35 retrospective review in executive branch agencies (EO 13,610⁹).

36 The Administrative Conference has long endorsed agencies’ efforts to reevaluate and
37 update existing regulations. In 1995, the Conference issued a recommendation stating that

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/whoweare/history2.html> (highlighting the successes of the Clinton Administration’s 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.

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

⁹ 77 Fed. Reg. 28,469 (May 14, 2012).



38 “[a]ll agencies (executive branch or ‘independent’) should develop processes for systematic
39 review of existing regulations to determine whether such regulations should be retained,
40 modified or revoked” and offering general guidance by which agencies might conduct that
41 analysis.¹⁰ In addition, in early 2011, shortly after the promulgation of EO 13,563, the
42 Conference hosted a workshop designed to highlight best practices for achieving the EO’s
43 goals.¹¹

44 Administrative law scholars and other experts have debated the effectiveness of existing
45 retrospective review efforts. EO 13,610 touts the elimination of “billions of dollars in regulatory
46 costs and tens of millions of hours in annual paperwork burdens” achieved under the EO 13,563
47 framework and promises additional savings.¹² Cass Sunstein, the former Administrator of the
48 Office of Information and Regulatory Affairs (OIRA), has suggested that these initiatives have
49 yielded billions of dollars in savings.¹³ Nevertheless, many criticize the existing system of
50 regulatory lookback as inadequate, especially insofar as it relies upon individual agencies to
51 reassess their own regulations and provides few incentives for ensuring robust analysis of
52 existing rules.¹⁴ From the opposite perspective, many criticize current retrospective review

¹⁰ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108, 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%2003-21.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) (highlighting successful retrospective review efforts, including a Department of Health and Human Services reform to reporting requirements saving \$5 billion over five years and a Department of Labor rule to harmonize hazard warnings with the prevailing international practice saving \$2.5 billion over five years); *see also* Memorandum from President Ronald Reagan on the Review of Federal Regulatory Programs (Dec. 15, 1986) (describing the results of the Presidential Task Force on Regulatory Relief, which included “substantial changes to over 100 existing burdensome rules” that “sav[ed] businesses and consumers billions of dollars each year”).

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).



53 efforts as inherently deregulatory, possessing a strong bias in favor of eliminating or weakening
54 regulations rather than strengthening regulations that may be insufficiently protective.¹⁵

55 Ultimately, a system of “self-review,” in which individual agencies are responsible for
56 evaluating their own regulations and, to the extent permitted by law, modifying, strengthening,
57 or eliminating those that are deemed to be outdated, can only succeed if agencies promote a
58 “culture of retrospective review.”¹⁶ Without a high-level enforcement mechanism, any
59 regulatory lookback initiative runs the risk of devolving into an exercise of pro forma
60 compliance. This might not be an inevitable outcome, however. If the relevant agency officials,
61 including both those conducting retrospective reviews and those drafting new rules, come to
62 view regulation as an ongoing process whereby agency officials recognize the uncertainty
63 inherent in the policymaking exercise and continually reexamine their regulations in light of
64 new information and evolving circumstances, a durable commitment can emerge.¹⁷ Rather
65 than regulatory review as a static, only backward-looking exercise, it should be present from
66 the beginning as an on-going culture of evaluation and iterative improvement. Planning for
67 reevaluation and regulatory improvement (including defining how success will be measured
68 and how the data necessary for this measurement will be collected) should be considered an
69 integral part of the development process for appropriate rules. This culture of evaluation and
70 improvement is already part of many government programs, but not yet of most regulatory
71 programs.

72 This recommendation aims to help agencies create such a culture of retrospective
73 review. To promote robust retrospective analysis, agency officials must see it as critical to
74 advancing their missions. To obtain this “buy-in,” these officials must have a framework for

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.

¹⁷ Aldy, *supra* note 1, at 40.



75 performing the required analysis and possess adequate resources for conducting the necessary
76 reviews (such that doing so is wholly integrated into agencies' other responsibilities rather than
77 serving to displace those existing responsibilities). Given the costs of performing robust
78 retrospective analysis, it is critical that agencies have adequate resources such that conducting
79 retrospective review does not detract from other aspects of their regulatory missions. Thus,
80 the recommendation sets forth considerations relevant both to identifying regulations that are
81 strong candidates for review and for conducting retrospective analysis.¹⁸ In addition, the
82 recommendation encourages agencies to integrate retrospective analysis into their
83 policymaking framework more generally, urging them not only to reevaluate existing
84 regulations but also to design new regulations with an eye towards later reexamination and to
85 consider the cumulative regulatory burden. In doing so, agencies should identify data
86 collection needs and consider other regulatory drafting strategies that can help them later
87 determine whether the regulation achieved its purpose.¹⁹ Finally, the recommendation
88 identifies opportunities for conserving agency resources by taking advantage of internal and
89 external sources of information and expertise. In many instances, stakeholders may be able to
90 furnish information to which agency officials otherwise lack access.²⁰ In other cases, overseas

¹⁸ Agencies also should periodically review regulations that have incorporated by reference material published elsewhere in order to ensure that they are updated as appropriate and contain complete and accurate access information. Administrative Conference of the United States, Recommendation 2011-5, *Incorporation by Reference*, ¶¶ 6–10, 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012).

¹⁹ Agencies should, where appropriate and legally permissible, use experimental methods and data-driven evaluation techniques in order to identify the actual impacts caused by regulations and determine whether they are achieving their intended outcomes. 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). This might include, among other things, taking the opportunity of pilot projects and regulatory phase-ins to test different regulatory approaches. Agencies also should, where appropriate and legally permissible, consider alternative regulatory mechanisms and other innovative approaches designed to lessen regulatory burdens while ensuring appropriate levels of regulatory protection.

²⁰ 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 actually defend regulations that create barriers to entry for newer, smaller competitors. SUSAN E. DUDLEY & JERRY



91 regulators may have confronted similar regulatory problems, and incorporating these
92 approaches would have the double benefit of avoiding duplication of effort and providing
93 opportunities for eliminating unnecessary regulatory divergences.²¹ Further, the information
94 generated from retrospective review has the potential to conserve resources during future
95 regulatory development of similar rules by informing ex ante regulatory analysis, which in turn
96 improves the quality of new regulations.²²

97 Though the recommendation identifies certain common principles and opportunities for
98 promoting robust retrospective analysis, it accepts the fact that each agency must tailor its
99 regulatory lookback procedures to its statutory mandates, the nature of its regulatory mission,
100 its competing priorities, and its current budgetary resources. In short, retrospective review is
101 not a “one-size-fits-all” enterprise. In addition, as optimal regulatory approaches may evolve
102 over time, so too may retrospective review procedures. Therefore, the recommendation avoids
103 an overly rigid framework. Rather, it identifies considerations and best practices that, over
104 time, should help foster a regulatory approach that integrates retrospective analysis as a critical
105 element of agency decisionmaking and that accounts for the uncertainty inherent in regulatory
106 policymaking at all stages of the process. The overall goal is to move away from a model of
107 retrospective analysis as an episodic, top-down reporting and compliance obligation to one
108 where agencies internalize a culture of retrospective review as part of their general regulatory
109 mission.

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).

²¹ 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).

²² PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 57 (2014).



RECOMMENDATION

110 **Value of Retrospective Review**

111 1. The Conference endorses the objectives of Executive Orders 13,563, 13,579, and
112 13,610 with respect to retrospective review of existing regulations. Agencies should work with
113 the Office of Management and Budget (OMB), as appropriate, to develop retrospective review
114 into a robust feature of the regulatory system.

115 **Integrating Retrospective Review into New Regulations**

116 2. When formulating new regulations, agencies should, as appropriate, given available
117 resources, priorities, and the nature of the regulation, establish a framework for reassessing the
118 regulation at a later date. The rigor of analysis should be tailored to the rule. The framework
119 should include the following (portions of which the agency should include in the rule's
120 preamble, where appropriate):

121 (a) Agencies should describe the methodology by which they intend to evaluate the
122 efficacy of and the impacts caused by the regulation, using data-driven experimental or
123 quasi-experimental designs where appropriate.

124 (b) Agencies should include a clear statement of the rule's intended regulatory
125 results with some objectively measurable outcome(s) and a plan for gathering the data
126 needed to measure the desired outcome(s). To the extent feasible, objectives should be
127 outcome-based rather than output-based. Objectives may include measures of both
128 benefits and costs (or cost-effectiveness), as appropriate.

129 (c) Agencies should identify key assumptions underlying any regulatory impact
130 analysis performed on the regulation. This should include a description of the level of
131 uncertainty associated with projected regulatory costs and benefits, consistent with
132 OMB Circular A-4.



133 (d) Agencies should establish a target time frame within which they plan to reassess
134 the proposed regulation.

135 (e) Agencies should include a discussion of how the public and other governmental
136 agencies (federal, state, tribal, and local) will be involved in the review.

137 3. When reviewing regulations, the Office of Information and Regulatory Affairs (OIRA)
138 should facilitate planning for subsequent retrospective review to the extent appropriate.
139 Agencies should consider including a section in the preamble of their proposed and final rules
140 that accounts separately for paperwork burdens associated with retrospective review.

141 4. Where it is legally permissible and appropriate, agencies should consider designing
142 their regulations in ways that allow for experimentation, innovation, competition, and
143 experiential learning (calling upon the insights of internal statistical offices, as well as policy and
144 program evaluation offices, in order to design plans for reassessing regulations, to the extent
145 they have such resources). As recommended by OMB Circular A-4, agencies should consider
146 allowing states and localities greater flexibility to tailor regulatory programs to their specific
147 needs and circumstances and, in so doing, to serve as models for alternative regulatory
148 approaches. Many of the statutes that authorize federal regulations are based on shared
149 responsibility among different levels of government and are thus amenable to such flexibility.

150 **Prioritizing Regulations for Retrospective Analysis**

151 5. In light of resource constraints, agencies should adopt and publicize a framework for
152 prioritizing rules for retrospective analysis. Agency frameworks should be transparent and
153 enable the public to understand why the agency prioritized certain rules for review in light of
154 the articulated selection criteria. Though considerations will vary from agency to agency and
155 program to program, the following factors can help identify strong candidates for retrospective
156 review that could inform regulatory revision:

157 (a) Likelihood of improving attainment of statutory objective;



- 158 (b) Likelihood of increasing net benefits and magnitude of those potential benefits;
- 159 (c) Uncertainty about the accuracy of initial estimates of regulatory costs and
160 benefits;
- 161 (d) Changes in the statutory framework under which the regulation was issued;
- 162 (e) Internal agency administrative burden associated with the regulation;
- 163 (f) Changes in underlying market or economic conditions, technological advances,
164 evolving social norms, and/or changes in public risk tolerance;
- 165 (g) Cumulative regulatory burden created by the regulation at issue and related
166 regulations (including those issued by other agencies);
- 167 (h) Comments, petitions, complaints, or suggestions received from stakeholder
168 groups and members of the public;
- 169 (i) Differences between U.S. regulatory approaches and those of key international
170 trading partners; and
- 171 (j) Complexity of the rule (as demonstrated by poor compliance rates, amount of
172 guidance issued, remands from the courts, or other factors).

173 To the extent applicable, agencies should consider both the initial estimates of regulatory costs
174 and benefits, and any additional evidence suggesting that those estimates are no longer
175 accurate.

176 6. Though agencies will likely focus their retrospective analysis resources primarily on
177 important regulations as identified by the foregoing factors, they should also take advantage of
178 simple opportunities to improve regulations when the changes are relatively minor (e.g.,
179 allowing electronic filing of forms in lieu of traditional paper filing).



180 **Performing Retrospective Analysis**

181 7. When conducting retrospective analysis of existing regulations, agencies should
182 consider whether the regulations are accomplishing their intended purpose or whether they
183 might, to the extent permitted by law, be modified, strengthened, or eliminated in order to
184 achieve statutory goals more faithfully, minimize compliance burdens on regulated entities, or
185 more effectively confer regulatory benefits. The level of rigor of retrospective analysis will
186 depend on a variety of factors. As appropriate, agencies should employ statistical tools to
187 identify the impacts caused by regulations, including their efficacy, benefits, and costs and
188 should also consider the various factors articulated in recommendation 5 in determining how
189 regulations might be modified to achieve their intended results more effectively.

190 8. Agencies should consider assigning the primary responsibility for conducting
191 retrospective review to a set of officials other than those responsible for producing or enforcing
192 the regulation, and ensure that these officials are adequately resourced to conduct effective
193 reviews. Reviewing officials should coordinate and collaborate with rule producers and
194 enforcers.

195 **Inter-Agency Coordination**

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

201 10. Agencies should consider regulations adopted by key trading partners and examine
202 the possibility of either harmonizing regulatory approaches or recognizing foreign regulations
203 as equivalent to their U.S. counterparts when doing so would advance the agency mission or
204 remove an unnecessary regulatory difference without undermining that mission.



205 11. OIRA should consider formulating a guidance document that highlights any
206 considerations common to all agency retrospective analyses.

207 **Promoting Outside Input**

208 12. Regulated parties, non-governmental organizations, academics, and other outside
209 entities or individuals often possess valuable information concerning both the impact of
210 individual regulations and the cumulative impact of a body of regulations issued by multiple
211 agencies to which individual agencies might not otherwise have access. Agencies should
212 leverage this outside expertise both in reassessing existing regulations and devising
213 retrospective review plans for new regulations. In so doing, agencies should be mindful of the
214 potential applicability of the Paperwork Reduction Act, and agencies and OMB should utilize
215 flexibilities within the Act and OMB's implementing regulations (e.g., a streamlined comment
216 period for collections associated with proposed rules) where permissible and appropriate.

217 13. Agencies should disclose relevant data concerning their retrospective analysis of
218 existing regulations on "regulations.gov," their Open Government webpages, and/or other
219 publicly available websites. In so doing, to the extent appropriate, agencies should organize the
220 data in ways that allow private parties to recreate the agency's work and to run additional
221 analysis concerning existing rules' effectiveness. Agencies should encourage private parties to
222 submit information and analysis and should integrate relevant information into their
223 retrospective reviews.

224 **Ensuring Adequate Resources**

225 14. Agencies and OMB should consider agencies' retrospective review needs and
226 activities when developing and evaluating agency budget requests. To the extent that agencies
227 require additional resources to conduct appropriately searching retrospective reviews,
228 Congress should fund agencies as necessary.