



Periodic Retrospective Review

Committee on Administration and Management

Proposed Recommendation from Committee on Administration and Management | May 7, 2021

1 Retrospective review is the process by which agencies assess existing regulations and
2 decide whether they need to be revisited. Consistent with long-standing executive branch policy,¹
3 the Administrative Conference has endorsed the practice of retrospective review of agency
4 regulations,² and has urged agencies to consider conducting retrospective review under a specific
5 timeframe, which is often known as “periodic retrospective review.”³ Agencies may conduct
6 periodic retrospective review in different ways. One common way is for an agency to engage in
7 such review of some or all of its regulations on a pre-set schedule (e.g., every ten years). Another
8 way is for the agency to set a one-time date for reviewing a regulation and, when that review is
9 performed, set a new date for the next review, and so on. This latter method enables the agency
10 to adjust the frequency of a regulation’s periodic retrospective review in light of experience.

11 Periodic retrospective review may occur because a statute requires it or because an
12 agency simply chooses to do it. Statutes requiring periodic retrospective review may specify a

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 See 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, at 43110.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 time interval over which review should be conducted or leave the frequency up to the agency.
14 The Clean Air Act, for example, requires the Environmental Protection Agency to review certain
15 ambient air quality regulations every five years.⁴ On the other hand, Congress only stated that the
16 Department of Transportation must “specify procedures for the periodic review and update” of
17 its rule on early warning reporting requirements for manufacturers of motor vehicles, and did not
18 specify how often that review must occur.⁵ Where periodic retrospective review is not mandated
19 by statute, agencies have sometimes voluntarily implemented periodic retrospective review
20 programs.⁶

21 Periodic retrospective review can enhance the quality of agencies’ regulations by helping
22 agencies determine whether regulations continue to meet their statutory objectives. Such review
23 can also assist agencies in evaluating regulatory performance (e.g., the benefits, costs, ancillary
24 impacts,⁷ and distributional impacts⁸ of regulations), and assess whether and how a regulation
25 should be revised in a new rulemaking. And periodic retrospective review can help agencies
26 determine the accuracy of the assessments they made before issuing their regulations (including
27 assessments regarding forecasts of benefits, costs, ancillary impacts, and distributional impacts)
28 and identify ways to improve the accuracy of those assessment methodologies.⁹

29 There can also be drawbacks associated with periodic retrospective review. Some
30 regulations may not be strong candidates for such review because the need for the regulations is

⁴ 42 U.S.C. § 7309(d)(1).

⁵ 49 U.S.C. § 30166.

⁶ See 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., by income groups, race, sex, industrial sector, geography).” *Id.* at 14.

⁹ *Id.* at 8.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

31 unlikely to change and the benefits associated with periodically revisiting them are small. There
32 are costs associated with collecting data and analyzing it, and time spent on reviewing existing
33 regulations is time that may not be spent on other important regulatory activities. For this reason,
34 agencies might reasonably decide to limit periodic retrospective review to certain types of
35 regulations, such as important regulations¹⁰ that affect large numbers of people or that have
36 particularly pronounced effects on specific groups. Periodic retrospective review can also
37 generate uncertainty regarding whether a regulation will be retained or modified. Agencies,
38 therefore, should carefully tailor their periodic retrospective review plans.

39 Mindful of both the value of periodic retrospective review and the tradeoffs associated
40 with it, this Recommendation offers practical suggestions to agencies about how to establish a
41 periodic retrospective review plan. It does so by, among other things, identifying the types of
42 regulations that lend themselves well to periodic retrospective review, proposing factors for
43 agencies to consider in deciding the optimal review frequency when they have such discretion,
44 and identifying different models for staffing periodic retrospective review. In doing so, it builds
45 upon the Administrative Conference's longstanding endorsement of public participation in all
46 aspects of the rulemaking process,¹¹ including retrospective review,¹² by encouraging agencies to
47 seek public input to both help identify the types of regulations that lend themselves well to
48 periodic retrospective review and inform that review.

49 This Recommendation also recognizes the important role that the Office of Management
50 and Budget (OMB) plays in agencies' periodic retrospective review efforts and the significance
51 of the Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated
52 OMB-issued guidance.¹³ It suggests that agencies work with OMB to help facilitate data

¹⁰ See Recommendation 2014-5, *supra* note 2, ¶ 6.

¹¹ See, e.g., 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).

¹² See *supra* note 2.

¹³ See Bennear & Wiener, *supra* note 6.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

53 collection relevant to reviewing regulations. It calls attention to the Evidence Act's requirements
54 for certain agencies to create Learning Agendas and Annual Evaluation Plans, which lay out
55 research questions that agencies plan to address regarding their missions, including their
56 regulatory missions, and how they intend to address these questions.¹⁴ Consistent with the
57 Evidence Act, the Recommendation states that agencies can incorporate periodic retrospective
58 reviews in their Learning Agendas and Annual Evaluation Plans by undertaking and
59 documenting certain activities as they carry out their reviews.

RECOMMENDATION

Selecting the Types of Regulations to Subject to Periodic Retrospective Review and the Frequency of Review

- 60 1. Agencies should identify any specific regulations or categories of regulations that are
61 subject to statutory periodic retrospective review requirements.
- 62 2. For regulations not subject to statutory periodic retrospective review requirements,
63 agencies should establish a periodic retrospective review plan. In deciding which
64 regulations, if any, should be subject to this review plan, agencies should consider the
65 public benefits of periodic retrospective review, including potential gains from learning
66 more about regulatory performance, and the costs, including the administrative burden
67 associated with performing the review and any disruptions to reliance interests and
68 investment-backed expectations. When agencies adopt new regulations for which decisions
69 regarding periodic retrospective review have not been established, agencies should, as part
70 of the process of developing such regulations, decide whether those regulations should be
71 subject to periodic retrospective review.

¹⁴ 5 U.S.C. § 312(a)–(b); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-19-23, PHASE 1 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: LEARNING AGENDAS, PERSONNEL, AND PLANNING GUIDANCE (2019); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMORANDUM M-20-12, PHASE 4 IMPLEMENTATION OF THE FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018: PROGRAM EVALUATION STANDARDS AND PRACTICES (2020).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 72 3. When planning for periodic retrospective review agencies should not limit themselves to
73 reviewing a specific final regulation when a review of a larger regulatory program would
74 be more constructive.
- 75 4. For regulations that agencies decide to subject to periodic retrospective review, agencies
76 should decide whether to subject some or all of the regulations to a pre-set schedule of
77 review or whether some or all of the regulations should have only an initial date for review,
78 with a subsequent date for each review set at the time of the preceding review. In either
79 case, agencies should decide the optimal frequency of review for a pre-set schedule of
80 review or the optimal period before the first review. In selecting the frequency of review
81 or setting the first or any subsequent date of review, agencies should consider, among
82 others, the following factors:
- 83 a. The pace of change of the technology, science, sector of the economy, or part of
84 society affected by the regulation. A higher pace of change may warrant more
85 frequent review;
 - 86 b. The degree of uncertainty about the accuracy of the initial estimates of regulatory
87 benefits, costs, ancillary impacts, and distributional impacts. Greater uncertainty
88 may warrant more frequent review;
 - 89 c. Changes in the statutory framework under which the regulation was issued. More
90 changes may warrant more frequent review;
 - 91 d. Comments, complaints, requests for waivers or exemptions, or suggestions
92 received from interested groups and members of the public. The level of public
93 interest or amount of new evidence regarding changing the regulation may warrant
94 more frequent review;
 - 95 e. The difficulties arising from implementation of the regulation, as demonstrated by
96 poor compliance rates, requests for waivers or exemptions, the amount of clarifying
97 guidance issued, remands from the courts, or other factors. Greater difficulties may
98 warrant more frequent review;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 99 f. The administrative burden in conducting periodic retrospective review. Larger
100 burdens, such as greater staff time, involved in reviewing the regulation may
101 warrant less frequent review; and
- 102 g. Reliance interests and investment-backed expectations connected with the
103 regulation. Greater reliance or expectations may lend themselves to less frequent
104 review.
- 105 5. In making the decisions outlined in Recommendations 1 through 4, public input can help
106 agencies identify which regulations should be subject to periodic retrospective review and
107 with what frequency. Agencies should consider soliciting public input by means such as
108 convening meetings of interested persons, engaging in targeted outreach efforts to
109 historically underrepresented or under-resourced groups, and posting requests for
110 information.
- 111 6. Agencies should publicly disclose their periodic retrospective review plans, which should
112 cover issues such as which regulations are subject to periodic retrospective review, how
113 frequently those regulations are reviewed, what the review entails, and whether the review
114 is conducted pursuant to a legal requirement or the agencies' own initiative. Agencies
115 should include these notifications on their websites and consider publishing them in the
116 *Federal Register*, even if the law does not require it.
- 117 7. With respect to regulations subject to a pre-set schedule of periodic retrospective review,
118 agencies should periodically reassess the regulations that should be subject to periodic
119 retrospective review and the optimal frequency of review.

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

- 120 8. Agencies should publish a document or set of documents in a prominent, easy-to-find place
121 on the portion of their websites dealing with rulemaking matters, explaining how they
122 conducted a given periodic retrospective review, what information they considered, and
123 what public outreach they undertook. They should also include this document or set of
124 documents on Regulations.gov. To the extent appropriate, agencies should organize the



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 125 data in the document or set of documents in ways that allow private parties to re-create the
126 agencies' work and run additional analyses concerning existing regulations' effectiveness.
127 When feasible, agencies should also explain in plain language the significance of their data
128 and how they used the data to shape their review.
- 129 9. Agencies should seek input from relevant parties when conducting periodic retrospective
130 review. Possible outreach methods include convening meetings of interested persons;
131 engaging in targeted outreach efforts, such as proactively bringing the regulation to the
132 attention of historically underrepresented or under-resourced groups; and posting requests
133 for information on the regulation. Agencies should integrate relevant information from the
134 public into their periodic retrospective reviews.
- 135 10. Agencies should work with the Office of Management and Budget (OMB) to properly
136 invoke any flexibilities within the Paperwork Reduction Act that would enable them to
137 gather relevant data expeditiously.

138

Ensuring Adequate Resources and Staffing

- 139 11. Agencies should decide how to best structure their staffing of periodic retrospective
140 reviews to foster a culture of retrospective review and ongoing learning. Below are
141 examples of some staffing models, which may be used in tandem or separately:
- 142 a. Assigning the same staff the same regulation, or category of regulation, each time
143 it is reviewed. This approach allows staff to gain expertise in a particular kind of
144 regulation, thereby potentially improving the efficiency of the review;
- 145 b. Assigning different staff the same regulation, or category of regulation, each time
146 it is reviewed. This approach promotes objectivity by allowing differing viewpoints
147 to enter into the analysis;
- 148 c. Engaging or cooperating with agency or non-agency subject matter experts to
149 review regulations; and
- 150 d. Pairing subject matter experts, such as engineers, economists, sociologists, and
151 scientists, with other agency employees in conducting the review. This approach
152 maximizes the likelihood that both substantive considerations, such as the net



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

153 benefits and distributional and ancillary impacts of the regulation, and procedural
154 considerations, such as whether the regulation conflicts with other regulations or
155 complies with plain language requirements, will enter into the review.

Using Evidence Act Processes

156 12. Consistent with the Evidence Act, agencies should incorporate periodic retrospective
157 reviews in their Learning Agendas and Annual Evaluation Plans. In doing so, agencies
158 should ensure that they include:

- 159 a. The precise questions they intend to answer using periodic retrospective review.
160 Those questions should include how frequently particular regulations should be
161 reviewed and should otherwise be keyed to the factors set forth in Section 5 of
162 Executive Order 12866 for periodic retrospective review of existing significant
163 regulations.;
- 164 b. The information needed to adequately review the regulations subject to the
165 periodic retrospective reviews. Agencies should state whether they will undertake
166 new information collection requests or use existing information to conduct the
167 reviews;
- 168 c. The methods the agencies will use in conducting their reviews, which should
169 comport with the federal program evaluation standards set forth by OMB;
- 170 d. The anticipated challenges the agencies anticipate encountering during the
171 reviews, if any, such as obstacles to collecting relevant data; and
- 172 e. The ways the agencies will use the results of the reviews to inform policy making.

173

174

Interagency Coordination

175 13. Agencies that are responsible for coordinating activities among other agencies, such as the
176 Office of Information and Regulatory Affairs, should, as feasible, regularly convene
177 agencies to identify and share best practices on periodic retrospective review. These



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

178 agencies should address questions such as how to improve timeliness and analytic quality
179 of review and the optimal frequency of discretionary review.

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