ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

~~Regulatory Experimentation~~Learning from Regulatory Experience

Committee on Rulemaking

Proposed Recommendation | December 15, 2017

Proposed Amendments

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

1   Making sound regulatory decisions demands information and analysis. Several

2 Administrative Conference recommendations encourage agencies to gather data when making

3 new rules and when reviewing existing rules.[1] These recommendations reinforce analytic

4 demands imposed on agencies by legislation,[2] executive orders,[3] and judicial decisions.[4]

5   Agencies need information about the problems that new rules will address, such as ~~about~~

6 the risks involved and their causes. But agencies also need information about potential solutions

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[1] *See, e.g.*, 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 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28,364 (July 12, 1985); Admin. Conf. of the U.S., Recommendation 79-4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 44 Fed. Reg. 38,826 (June 8, 1979).

[2] *See, e.g.*, Data Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763A-153 (2001).

[3] *See, e.g.*, Exec. Order No. 12,866, § 5, 58 Fed. Reg. 51,735, 51,739 (Oct. 4, 1993) ("[T]o . . . improve the effectiveness of existing regulations . . . each . . . agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives."); Exec. Order No. 13,563, § 6, 58 Fed. Reg. 3821, 3822 (Jan. 21, 2011) (requiring agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned"); Exec. Order No. 13,771, § 2, 82 Fed. Reg. 9339 (Feb. 3, 2017) (requiring the repeal of two existing regulations for each new regulation proposed, and leaving in place prior analytical requirements); Exec. Order No. 13,777, § 3, 82 Fed. Reg. 12,285, 12,286 (Mar. 1, 2017) (requiring the establishment of Regulatory Reform Tasks forces that "shall evaluate existing regulations (as defined in section 4 of Executive Order 13,771) and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law").

[4] *See, e.g.*, Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52 (1983) (explaining that the agency must show that its action was the result of "reasoned decisionmaking" consistent with "the evidence before the agency").

7   to these problems. What possible alternative rules or rule designs might help solve the

8   problems? How effective are these alternatives likely to be in addressing the underlying

9   problems? Are there constraints, barriers, or unanticipated consequences that arise in the use of

10 these different alternatives? In terms of understanding possible alternatives and how well they

11 might work in practice, agencies benefit from having information from experience with different

12 solutions. Learning from experience is the focus of this recommendation.

Learning from Regulatory Experience

13 No uniform or tidy formula exists as to how agencies should generate, gather, and

14 analyze the data necessary to ~~facilitate the learning needed to~~ support sound regulatory decisions.

15 A variety of well-accepted and widely-used methods exist from which agencies may choose,

16 with the appropriate choices often varying agency by agency and even from situation to

17 situation. Practical considerations such as resource and data availability will affect the choices

18 agencies make about the methods of learning used to support regulatory decisionmaking.[5] Still,

19 it is possible to identify some of the main methods for learning ~~from experience~~ that ~~are available~~

20 ~~to~~ agencies ~~and which they~~ should ~~be encouraged to~~ consider using at different stages of the

21 rulemaking lifecycle. These methods, which are not necessarily mutually exclusive, can be used

22 before or after a rule is adopted, and they may ~~potentially~~ be considered on occasion as part of

23 the final rule itself, which might be structured to ~~encourage or allow for variation that can~~

24 facilitate future learning by agency officials.

25 Variation is the key to agency learning. In this context, "variation" can refer to

26 differences among jurisdictions[6] or across time,[7] with some jurisdictions or time periods having

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[5] A general discussion of factors to consider in choosing methods and measurements in regulatory learning can be found in Cary Coglianese, *Measuring Regulatory Excellence*, *in* ACHIEVING REGULATORY EXCELLENCE 291–305 (Cary Coglianese ed., 2017) [hereinafter Coglianese, *Measuring Regulatory Excellence*].

[6] Cross-sectional analysis means analysis of data collected across at least two groups or jurisdictions, with one that is subject to the intervention (such as regulation) and one that is not. *See* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1117–19.

[7] Longitudinal analysis is a research design that involves repeated observations of the same subjects over a period, where variation in the intervention occurs over time (i.e., data before and after an intervention is introduced). *See* Cary Coglianese, *Measuring*

DRAFT December 11, 2017

27 in place a version of a rule and others having in place a different version of the rule (or no
28 applicable rule at all). It can also refer to differences among regulated entities or people within
29 the same jurisdiction, with some entities or people subject to a version of a rule and others
30 subject to a different version of the rule (or no applicable rule at all). ~~Variation generally arises~~
31 ~~either between time periods[8] or jurisdictions.[9]~~

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32   An agency can learn from all of these kinds of variation. ~~by comparing time periods or~~
33 ~~jurisdictions where a regulatory obligation has been imposed with time periods or jurisdictions~~
34 ~~without such a regulatory obligation.~~ For example, a regulation that goes into effect in 2017

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35 leaves the agency with two distinct time periods to compare: the years before 2017, and 2017
36 and beyond. A rule that applies in jurisdictions X and Y but not in jurisdictions A and B leaves
37 the agency with the ability to compare outcomes in X and Y with those in A and B, assuming the
38 jurisdictions are comparable or that differences can be statistically controlled. The agency can
39 then learn whether outcomes are improved in those time periods or jurisdictions with the
40 regulatory obligation. However, agencies must be careful not to assume automatically that any
41 differences in outcomes that they observe have been caused by the intervention of the regulation.
42 Other factors that correlate with the observed outcomes might also vary across the same time
43 periods or jurisdictions.

Using Observational or Randomized Methods to Learn from Experience

44   To learn from experience, agencies should seek methods that allow them to draw valid
45 inferences about whether a particular regulatory intervention causes (or will cause)
46 improvements in the desired outcomes. Concern about the validity of such causal inferences

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Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy, Organisation for Econ. Co-Operation and Dev. [OECD] Expert Paper No. 1 39 (Aug. 2012) [hereinafter Coglianese, *Measuring Regulatory Performance*].

[8] ~~Longitudinal analysis is a research design that involves repeated observations of the same subjects over a period, where variation in the intervention occurs over time (i.e., data before and after an intervention is introduced). See Cary Coglianese, Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy, Organisation for Econ. Co-Operation and Dev. [OECD] Expert Paper No. 1 39 (Aug. 2012)~~ [hereinafter Coglianese, *Measuring Regulatory Performance*].

[9] ~~Cross-sectional analysis means analysis of data collected at a specific point in time but where variation exists across at least two groups or jurisdictions, one subject to the intervention (such as a regulation) and one that is not. See id.~~

DRAFT December 11, 2017

47 generally takes two forms. The first of these—external validity—refers to the extent to which

48 the inferences from a study situated within a particular time period or setting can apply to other

49 time periods and settings. In other words, an agency should consider to what extent the results of

50 a study focused on entities or individuals in one period or setting are generalizable to entities or

51 individuals in other times or settings. The second type of validity—internal validity—refers to

52 the extent to which the outcomes observed in a study can be said to have been caused by the

53 intervention rather than by potential confounders.[10] In other words, an agency should consider

54 whether what might appear to be a relationship between a regulation and changes in outcomes

55 truly derives from the regulation. For example, if a study shows that accidents from a particular

56 industrial process have declined following the adoption of a regulation intended to reduce those

57 accidents, concern about internal validity would lead agency officials to consider the possibility

58 that the observed decline might have arisen from market or technological factors that led to

59 changes in the relevant industrial processes around the same time as the regulation but which

60 came about for reasons entirely unrelated to the regulation. An agency may wish to learn

61 whether the observed decline came from the regulation or from other factors so as to know

62 whether to redesign the regulation if further improvements are warranted.

63   To isolate the true effects of a regulation on relevant outcomes, such as risk reduction,

64 agencies ~~have two main analytical approaches available to them:~~can use randomized approaches

65 ~~and~~or observational approaches. Both of these approaches have advantages and disadvantages,

66 and choosing between them will depend on a variety of contextual factors.

67   Randomized approaches promise to generate results with a high level of internal validity

68 because, by making a random assignment of individuals or entities subject to a regulatory

69 intervention, any other factors that might lead to changes in the relevant outcomes should be

70 distributed randomly between the group subject to the regulatory intervention and the

71 comparison group. Of course, randomized methods can also have their limitations. There is

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[10] In this context, "confounders" refer to changes in outcomes that may appear to have been caused by the regulation but are actually caused by other factors. *See* Coglianese, *Measuring Regulatory Performance*, *supra* note 7 and accompanying text.

DRAFT December 11, 2017

72   always a question as to whether the results of a randomized experiment are externally valid. For

73   example, a perfectly designed randomized experiment may indicate that exposure to an

74   intervention generates particular outcomes in a laboratory setting but may not mean that those

75   same outcomes will occur outside of the laboratory. In addition, the results of randomized

76   methods may lack validity if individuals, knowing that their behaviors are part of a randomized

77   experiment, behave differently from how they would otherwise act. Researchers try to limit this

78   particular threat to validity by using double-blind, or even just single-blind, study designs.[11]

79   However, it is possible that in many regulatory contexts, regulated parties will know they are

80   subject to a randomized study and may engage in strategic behavior that may skew the results of

81   the study.

82   In addition to these methodological challenges, randomized study methods may present

83   legal, policy, and ethical concerns. From a legal standpoint, subjecting similar parties to

84   different rules may be thought to raise concerns under the equal protection clause of the

85   Constitution or the arbitrary-and-capricious standard of the APA.[12] Of course, an agency might

86   present a legally valid argument that the rational basis, or non-arbitrary reason, for its action is to

87   generate information necessary to make an informed decision.[13] From a policy standpoint, if

88   some entities are subject to regulation and others are not, an agency may well risk artificially

89   distorting a market, depending on what a rule requires or how the study is designed. From an

90   ethical standpoint, if a rule specifically sets up an experiment with the idea that, after the

91   experiment, the agency may change the rule, a concern may exist if some regulated entities will

92   by then have invested heavily in capital-intensive equipment required by the rule. Another

93   concern might be with varying levels of health or safety protection to different members of the

94   public. In the absence of countervailing considerations, legal, policy, and ethical challenges such

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[11] "Blindness" in this context means ~~lack of awareness~~subjects are not aware of ~~being~~whether they are in the treatment or comparison group. "Double blindness" means neither the subjects nor the researchers know which subjects received the treatment, and which received the placebo. *See* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 948–50 (2011).

[12] *See* 5 U.S.C. § 706(2)(A).

[13] *See* Abramowicz et al., *supra* note 8, at 968.

DRAFT December 11, 2017

95   as these may mean that regulatory agencies should use randomized study methods will be

96   appropriate for use by regulatory agencies only under limited circumstances.

97   WhereIf randomized study methods are either unavailable or inadvisable, agencies have

98   available to themcan use a broad range of opportunities to learn from observational studies.

99   Sometimes these studies are called "natural experiments," as they seek to draw inferences based

100 on variation that naturally arises over time or across settings in the absence of randomization.

101 For this reason, observational studies lack some of the methodological advantages thatof

102 randomization can provide. Internal validity is generally a more present concern with

103 observational studies, as other factors may confound a study's results. In other words, other

104 factors may also vary naturally with the intervention under study and affect the observed

105 outcomes. An example of a potential confounding factor is when an intervention is accepted

106 voluntarily; those individuals or entities who voluntarily choose to adopt a new practice may be

107 different from the individuals or entities to whom a mandatory requirement would apply.

108 The possibility of such confounding factors should be accounted for when conducting

109 observational studies and can be effectively addressed by using various methods that attempt to

110 mimic statistically what occurs with randomization.[14] Assuming the potential threats to internal

111 validity can be addressed, observational studies may in some circumstances lead to results with

112 stronger external validity than randomization. As a general matter, observational studies will

113 also not raise the same legal, policy, or ethical concerns as randomization. With observational

114 studies, the agency is either exploiting natural variation that would have arisen from the rule

115 anyway or allowing for learning from other existing variation, such as state-by-state variation.

Opportunities for Learning from Experience Throughout the Rulemaking Lifecycle

116 Agencies have opportunities to learn from experience throughout the rulemaking

117 lifecycle. For example, one stage of this cycle occurs before a rule is adopted, as agencies are

118 focused on a problem to be addressed and are considering potential regulatory solutions.

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[14] Examples of such statistical methods include: difference-in-differences, propensity score matching, instrumental variables, and regression discontinuity. *See* Coglianese, *Measuring Regulatory Excellence*, *supra* note 5, at 39–42.

DRAFT December 11, 2017

119   Learning from experience at this early stage can help inform an agency of how a rule should be

120   designed. Another stage of the cycle lies with the design of the rule itself. At this stage, as an

121   agency writes a rule, it may design it in a way that can facilitate the type of variation needed to

122   promote learning. Finally, yet another stage arises after the agency has promulgated the rule. At

123   this stage, agencies can consider actions, such as waivers, that can facilitate learning from

124   experience.

Learning Before Adopting a Rule

125   Prior to adopting a rule, an agency should gather information using appropriate methods

126   to help inform the regulatory action it plans to take. An agency ~~will have options for~~may wish to

127   consider randomized ~~and~~or observational methods ~~that it may wish to consider~~.

128   *Randomized Methods*. Agencies can analyze existing peer-reviewed studies that

129   incorporate a randomized design. They can also initiate or support new pilot programs that

130   produce randomized study data. For example, if an agency were trying to determine whether a

131   certain default rule related to saving for retirement should be required of all employers offering

132   401(k) plans, it might, if consistent with applicable law, seek the cooperation of some large

133   employers to see whether they would assign randomly some of their employees to a company

134   policy that requires them to opt into a retirement saving plan and other employees to a company

135   policy that defaults employees into the plan but then allows them to opt out. Such action would

136   be voluntary by the company but random (and effectively involuntary) by the individual. The

137   agency might be able to learn better which default rule will yield greater savings and then use

138   these results to inform a decision about a regulation that would apply to all companies.

139   *Observational Methods*. Agencies can also undertake observational studies prior to

140   creating new rules. An agency might, for example, employ a cross-sectional research design by

141   looking at variation in existing policies at the state level (or perhaps in other countries), taking to

142   heart Justice Louis Brandeis's observation that "a state may, if its citizens choose, serve as a

143   laboratory; and try novel social and economic experiments without risk to the rest of the

7

144   country."[15] In fact, Congress has, on numerous occasions, directed agencies to analyze state-by-

145   state variation to help determine optimal policies.[16]

Designing a Rule to Facilitate Learning

146   An agency can write a rule to facilitate future learning or to enable it later to take

147   advantage of variation that stems naturally from the rule. Again, ~~options~~ an agency may wish to

148   consider ~~will include~~ randomized ~~and~~or observational methods.

149   *Randomized Methods*. ~~One potential approach~~When appropriate, an agency might

150   consider~~, when appropriate, would be to~~ structur~~ing the~~a rule to allow for learning through a

151   randomized method.[17] This could entail writing a rule in such a way that some entities or people

152   that fall within the agency's regulatory scope are subject to one version of the rule and some are

153   subject to another version of the rule or not subject to the rule at all. The agency's decision as to

154   who falls within each category could be made on a random basis. For example, Michael

155   Abramowicz, Ian Ayres, and Yair Listokin ~~have postulated~~use as an example a test of speed

156   limits in which the posted limits on different roads are randomly increased or decreased.[18]

157   Drivers on these roads are informed of the regulatory intervention (i.e., the speed limit on that

158   road) without necessarily knowing that they were participating in a randomized experiment.

159   ~~Although this example falls outside the realm of federal rulemaking, a~~Agencies at the federal

160   level may have similar ways to structure the timing or application of a rule using randomization.

161   Assuming any potential methodological, legal, ethical, and policy concerns about randomization

162   can be addressed, there may be some circumstances in which randomization will be an

163   appropriate way for an agency to generate variation that will facilitate learning from experience.

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[15] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[16] *See, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58, § 139, 119 Stat. 594, 647 (2005) ("[T]he Secretary . . . shall conduct a study of State and regional policies that promote cost-effective programs to reduce energy consumption (including energy efficiency programs) that are carried out by utilities that are subject to State regulation.").

[17] *See generally* Abramowicz et al., *supra* note 8.

[18] *See id.* at 951.

DRAFT December 11, 2017

164   *Observational Methods*. For the reasons discussed above, agencies will generally find it

165 more feasible to use observational approaches than randomized ones. In any rulemaking, there

166 will be variation from observing the world before the rule went into effect and comparing it to

167 the world after the rule has taken effect. Further, in the case of a rule that an agency has

168 rescinded, there will be variation in three conditions: the world before the rule went into effect,

169 the world in which the rule was in effect, and the world after the rule was rescinded. Such

170 variation can present rich opportunities for observational studies. Agencies may well decide, at

171 the outset when promulgating a new rule, to commit to setting up a longitudinal study. In doing

172 so, they would need to collect data from regulated parties before the rule goes into effect and

173 then collect data once the rule has taken effect, keeping in mind potential confounders and using

174 statistical techniques to control for them.[19]

175   Additionally, agencies may consider deliberately introducing or allowing for some non-

176 random variation in response to a rule by allowing for flexibility by states in the implementation

177 of the rule. For example, variation can occur if the agency sets a federal minimum standard and

178 permits states to exceed that standard. Agencies then can commit to using the resulting state-by-

179 state variation to compare firms separated by a very short distance in neighboring states that have

180 adopted different rules. Using the statistical technique known as regression discontinuity, the

181 agency may be able to approximate randomization (i.e., the "assignment" of firms to a state with

182 one rule versus another would be effectively random).[20]

     Learning After Promulgating a Rule

183   ~~Once a rule has been put in place, an agency has available further opportunities to take~~

184 ~~advantage of variation and can again consider options for using either randomized or~~

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[19] *See* Admin. Conf. of the U.S., Recommendation 2014-5, ¶ 7, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114, 75,116–17 (Dec. 17, 2014).

[20] *See* Jonah B. Gelbach & Jonathan Klick, *Empirical Law and Economics, in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS (Francisco Parisi ed., 2017).

DRAFT December 11, 2017

185 observational methodsAn agency can also use either randomized or observational methods to
186 take advantage of variation once a rule has been put into place.

187 *Randomized Methods.* Once a rule has been adopted, an agency might choose to
188 deregulate a segment of the market on a random basis to learn from variation. In 2004, the
189 Securities and Exchange Commission (SEC) did this with respect to its "Uptick Rule."[21] Market
190 observers characterized Tthe SEC's concludedconclusion to be that the rule did not substantially
191 increase market efficiency and consequently rescinded the rule.[22]

192 *Observational Methods.* In addition to deregulating on a random basis, agencies can
193 achieve variation once the rule is in place by considering conditional waivers and exemptions.
194 For example, if a regulated entity can present some evidence to suggest that it can meet the
195 purpose of the regulation using an alternative approach, the agency might grant a waiver to that
196 entity with the condition that the entity uses that alternative approach.[23] After granting a certain
197 number of waivers, the agency could then test the effectiveness of its rule by comparing entities
198 that have selected different approaches. The agency would likely find it necessary to use
199 statistical techniques to control for potential confounders. Over time, these kinds of studies may
200 provide the agency with retrospective information that justifies amending an existing rule.
201 Fairness, legal, and ethical concerns might be minimized when using conditional waivers if the
202 agency permits all regulated entities to seek a waiver based on presentation of evidence and the
203 agency widely publicizes its waiver availability.[24]

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[21] *See* Order. Suspending the Operation of Short Sale Price Provisions for Designated Securities and Time Periods, Exchange Act Release No. 50,104, 69 Fed. Reg. 48,032 (Aug. 6, 2004).

[22] *See* Zachary Gubler, Regulatory Experimentation 42 (Nov. 17, 2017) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/regulatory-experimentation-final-report.

[23] *See* Admin. Conf. of the U.S., *Regulatory Waivers and Exemptions* (Nov. 17, 2017), https://www.acus.gov/recommendation/waivers-and-exemptions-recommendation-revised; *see also* Aaron Nielson, Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Non-Enforcement Practices 30 (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/regulatory-waivers-and-exemptions-final-report.

[24] *See* Admin. Conf. of the U.S., *Regulatory Waivers and Exemptions* (Nov. 17, 2017), https://www.acus.gov/recommendation/waivers-and-exemptions-recommendation-revised.

204   Examples of the main methods of learning discussed in the preceding sections can be

205 summarized in Table 1.

206   **Table 1: Examples of Methods for Regulatory Learning**

	Randomized	**Observational**
Learning before adopting a rule	● Randomized voluntary pilot programs ● Studies that rely on randomization	● Pilot programs where intervention is not assigned randomly (such as with voluntary programs) ● Analysis of regulatory approaches in different jurisdictions, including ~~and~~ countries
Designing a rule to facilitate learning	● Randomized assignment of different regulatory obligations	● Rules that allow for state implementation and variation (e.g., cooperative federalism) ● Analysis of temporal differences (i.e., "before and after" comparisons) ● Creation of regulatory thresholds that will facilitate later comparisons of entities above/below a threshold
Learning after promulgating a rule	● Regulated entities randomly selected for different types of suspension of enforcement	● Granting of waivers or exemptions that allow for the adoption of alternative approaches that can be studied

Common Issues in Learning from Experience

207   As noted, each stage of the rulemaking lifecycle ~~presents~~allows agencies ~~with the~~

208 ~~opportunity~~ to learn from variation. Agencies ~~have options available to them to~~ can learn from

209 both randomized and observational methods, keeping in mind the virtues and challenges of each.

210 Whichever method an agency chooses, at least two additional issues should be considered: data

211 collection and public input.

Data Collection

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212   Collecting data is essential. Only with information can agencies hope to learn from

213   analyzing regulations. When collecting data, though, agencies must be mindful of the Paperwork

214   Reduction Act (PRA), which can constrain their ability to send a survey instrument to ten or

215   more parties.[25] As part of agencies' data collection efforts, it may be helpful for agencies

216   Agencies may find it helpful to work closely with the Office of Information and Regulatory

217   Affairs (OIRA) to ensure proper use of use available flexibility within the PRA and the Office of

218   Management and Budget's (OMB's) implementing regulations. as part of data collection

219   endeavors.

Public Input

220   Best practices generally call for some opportunity for the public to learn about and

221   comment on the design of and the results of studies an agency undertakes. For pre-rule learning,

222   the notice-and-comment process provides the required minimum process by which agencies

223   should engage the public, but there are other methods of public input that might be useful, even

224   at the pre-rule stage, for public input beyond just notice and comment.[26] If an agency is planning

225   to revise a rule, a subsequent notice-and-comment rulemaking will provide an additional

226   opportunity for public input. If an initial rule contained a sunset provision,provides for its

227   expiration on a certain date, that would alsomay also help ensure that the public has the

228   opportunity to offer input on a future notice-and-comment rulemaking to keep or modify the

229   rule. Even rules not subject to the APA's notice-and-comment procedures, pursuant to the

230   APA's good cause exemption, can benefit from subsequent opportunities for public comment.[27]

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[25] *See* 44 U.S.C. § 3502(3)(A)(i).

[26] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,039 (2017); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (2013).

[27] Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (1995).

DRAFT December 11, 2017

231   But even absent a new notice-and-comment rulemaking—even if the agency is keeping

232 the rule "as is"—it may benefit from outside input on the systematic learning effort it has

233 undertaken, whether through a peer review process, advisory committees, public hearings or

234 meetings, or just a supplemental solicitation of comments. The decision as to which approach to

235 use to solicit public input will turn on numerous factors, including resource constraints.[28]

RECOMMENDATION

236   1. ~~To improve the quality of their rules, a~~Agencies should seek opportunities to ~~generate~~

237   ~~information through variation that agencies intentionally introduce or foster~~collect data to

238   learn the most effective way to design their rules and analyze the effects of their rules.

239   They can learn from experience at one or more stages of the rulemaking process, from

240   pre-rule analysis to retrospective review, ~~such as through~~. Before adopting a rule,

241   agencies can learn from pilot projects, demonstrations, ~~or~~and flexibility among states or

242   regulated entities. After promulgating a rule, agencies can use waivers and exemptions[29]

243   to learn. ~~Agencies should conduct learning in such ways that responsibly give~~As agencies

244   seek out such learning opportunities, they should give due regard for legal, ethical,

245   practical, and fairness considerations. ~~They can learn from experience at one or more~~

246   ~~stages of the rulemaking lifecycle, from pre-rule analysis to retrospective review.~~Only

247   when appropriate, agencies should consider applying one version of a rule to some

248   regulated entities and another version of the rule, or no applicable rule at all, to other

249   regulated entities on a random basis.

250   2. ~~When agencies analyze variation to learn more about the effectiveness of policy options,~~

251   ~~they should make every effort to collect data and conduct reliable analysis. Only where~~

252   ~~appropriate, agencies should consider creating variation through a randomized control~~

253   ~~trial.~~

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[28] *See* Gubler, *supra* note 19, at 54.

[29] *See* Admin. Conf. of the U.S., Proposed Recommendation, Regulatory *Waivers and Exemptions* (Nov. 17, 2017), https://www.acus.gov/recommendation/waivers-and-exemptions-recommendation-revised.

DRAFT December 11, 2017

254   3.2.To inform the learning process, agencies should consider soliciting public input at
255   various points in the rulemaking lifecycle. This can include input on the design and
256   results of any learning process. In addition to the public input required under 5 U.S.C. §
257   553(c), agencies should consider, as time and resources permit, the use of supplemental
258   requests for public comment, peer review, advisory committee deliberation, or public
259   hearings or meetings.

260   4.3.When gathering data, agencies and ~~OMB~~ the Office of Management and Budget (OMB)
261   should seek to use flexibilities within the Paperwork Reduction Act and OMB's
262   implementing regulations (e.g., a streamlined comment period for collections associated
263   with proposed rules) ~~where~~when permissible and appropriate.

264   5.4.Congress should ensure that agencies have legal authority and sufficient resources to
265   implement these recommendations.

DRAFT December 11, 2017