



**Request for Proposals—January 10, 2014
RETROSPECTIVE REVIEW OF AGENCY RULES**

The Administrative Conference is seeking a consultant to undertake a research project that will study the procedures by which agencies engage in retrospective review of existing regulations and develop recommendations for enhancing or building upon the existing regime. Proposals are due by 6:00 p.m. Eastern Time on February 5, 2014.

Background

Periodic review of existing federal regulations is essential to a well-functioning regulatory system. Such reviews, among other things, are an essential tool for ensuring that existing regulations meet regulatory objectives without imposing undue burdens, that they have not been rendered obsolete by changing technology or market conditions, and that they do not require modification to address newly-identified regulatory gaps. Federal agencies conduct such reviews for a range of reasons and purposes. Retrospective reviews may be required by generally applicable or agency- or program-specific statutory provisions. Federal agencies also initiate review of existing regulations to, among other things, comply with internal review policies, address changing technology or market conditions, or respond to public petitions.

Overlaid on top of these statutory requirements and agency practices are presidential review directives. Indeed, in recognition of the central importance of regulatory review, every presidential administration over the past three decades has directed federal agencies—through executive orders (EO) or other presidential initiatives—to engage in retrospective review. For instance, President Reagan convened a task force on regulatory relief whose mandate included making changes to existing regulations.¹ Similarly, in EO 12,866, President Clinton required federal agencies to formulate a program to “periodically review” existing regulations.²

President Obama has issued a series of executive orders aimed at creating an ongoing, robust culture of review across federal agencies: EO 13,563, *Improving Regulation and Regulatory Review*; EO 13,579, *Regulation and Independent Regulatory Agencies*; and EO 13,610, *Identifying and Reducing Regulatory Burdens*.³ Key aspects of this retrospective review process include: development of agency plans for periodic review of existing significant rules that, consistent with law, agency resources, and regulatory priorities, assess whether these rules should be “modified, streamlined, expanded, or repealed . . . to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives”⁴; and establishment of guidelines for public participation in review planning, prioritization of initiatives with quantifiable monetary savings, and biannual status reports.⁵ Regulatory planning

¹ US Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, at 10 (July 2007).

² Exec. Order No. 12,866, § 5, 58 Fed. Reg. 51,735, 51,739–40 (Oct. 4, 1993).

³ Exec. Order No. 13,563, § 6(b), 76 Fed. Reg. 3,821, 3,822 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011); Exec. Order No. 13,610, 77 Fed. Reg. 28,469 (May 10, 2012).

⁴ Exec. Order No. 13,563, § 6(b).

⁵ Exec. Order No. 13,610, §§ 2-4.



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under these executive orders is mandatory for covered executive agencies, and related plans and reports are subject to review by the Office of Information and Regulatory Affairs (OIRA) before finalization and public posting. Independent regulatory agencies are encouraged, but not required, to follow the same core review principles and public posting of plans applicable to executive agencies. Though past administrations had issued one-time regulatory review initiatives, these executive orders were hailed for formalizing an “unprecedented” ongoing, government-wide retrospective review program.

The current OIRA Administrator has also underscored the economic value of retrospective review, and emphasized that ensuring agency follow-through on review plans remains vitally important.⁶ Some scholars, on the other hand, question whether these executive orders truly represent a sea change in retrospective review practices. While lauding the effort, they suggest that agency review plans have not led to meaningful reductions in regulatory burdens, and posit that additional reforms are needed to create a more robust, consistent system of retrospective review.⁷ Congressional committees have also held several hearings to consider enhancing or expanding existing mechanisms for retrospective review,⁸ and proposed legislation aiming to supplement these programs has been introduced.⁹ However, no comprehensive scholarly studies have yet evaluated the range of agency approaches to retrospective review, assessed the effectiveness of such efforts at promoting retrospective review, or explored potential measures to aid retrospective review planning and/or analytic practices. A Conference study of retrospective review at this juncture would thus be timely and helpful. The Conference is well-positioned to undertake such a study, having hosted a workshop on retrospective review shortly after the issuance of EO 13,563 to aid agencies in the development of their preliminary retrospective review plans.¹⁰ Moreover, nearly twenty years have passed since the Conference last issued a recommendation on retrospective review.¹¹

⁶ See *The Office of Information and Regulatory Affairs - Federal Regulations and Regulatory Reform: Hearing Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of OIRA Administrator Howard Shelanski).

⁷ See, e.g., Sam Batkins & Ike Brannon, *The Need for Retrospective Review of Regulations*, REGULATION 3 (Summer 2013); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57, 59 (2013) (characterizing Obama Administration’s lookback initiative as “a good first step . . . but, by itself, will do little to build a lasting culture of serious regulatory evaluation”); *Reducing Unnecessary and Costly Red Tape through Smarter Regulations: Hearing Before the Joint Econ. Comm.*, 113th Cong. (2013) (statement of Michael Greenstone) (proposing the “establish[ment of] a new, independent body for regulatory review” that would be responsible for conducting government-wide retrospective reviews).

⁸ See, e.g., *Reducing Unnecessary and Costly Red Tape through Smarter Regulations*, *supra* n. 6; *Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations: Hearing Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2012).

⁹ See, e.g., Regulatory Improvement Act of 2013, S. 1390, 113th Cong. (2013).

¹⁰ See Administrative Conference of the United States, Workshop on Retrospective Review of Existing Regulations Workshop Summary (Mar. 10, 2011), <http://www.acus.gov/sites/default/files/documents/Retrospective%20Review%20of%20Existing%20Regulations%20Final.pdf> (providing workshop synopsis).

¹¹ Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995).



Project

The project will examine existing mechanisms for retrospective review to identify promising agency practices and consider potential reforms designed to enhance or supplement the current review regime.

Scope of Work

The project will address each of the following topics:

- **Examining Agency Approaches to Retrospective Review.** The project will examine how agencies have conducted retrospective review of regulations. It will consider the nature of such reviews and highlight agency “best practices” for review planning. This could include, for example, suggestions about how to identify priorities or determine which regulatory programs are good candidates for retrospective review.
- **Identifying Characteristics of Successful Reviews.** The project also will consider, consistent with applicable legal and resource constraints, the qualities of effective retrospective reviews. Salient research topics may include: (a) offering guidance for federal agencies on effective analytical processes; (b) examining how best to use public input in the review process; and (c) encouraging agencies to develop plans for future reassessment of regulations at the time of promulgation. The project could explore the relative strengths and weaknesses of different methodological approaches to retrospective review.
- **Suggesting Measures to Enhance Retrospective Review.** Based on the foregoing research, the project will offer recommendations for improving retrospective review, including associated analytic practices.

Given the breadth of the potential research, project submissions should offer concrete substantive proposals on addressing these topics.

How to Submit a Proposal

Proposals are invited from qualified persons who would like to serve as a research consultant on this project. We welcome joint submissions, particularly those that include one or more researchers with a background in economics. All responses will be considered by the Conference staff and the Chairman.

A consultant’s study should result in a report that is delivered first for review by the Conference staff and Chairman and then forwarded to a committee of the Conference membership for consideration. The report should provide proposed recommendations. The consultant works with Conference staff and the committee to refine and further shape the report and may work with Conference staff to revise the recommendations. Recommendations approved by the



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committee are then forwarded to the Council of the Conference for consideration, and the Council forwards the recommendations (with its views) to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and <http://www.acus.gov>).

The Conference will provide a consulting fee for this study plus a budget for related expenses. The Conference also typically encourages its consultants to publish the results of their studies in journals or other publications. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice.

Those submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will (in most cases) need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.

To submit a proposal to serve as the Conference's consultant on this project, you must:

- Send an e-mail to Attorney Advisor Reeve T. Bull at rbull@acus.gov. *Proposals must be submitted by e-mail.*
- Include the phrase "ACUS Project Proposal" in the subject line of your e-mail.

In the body of your e-mail or in an attachment, please:

- State the name of the project for which you are submitting a proposal: "Retrospective Review of Agency Rules."
- Explain why you would be well qualified to work on the project. Include your *curriculum vitae* or other summary of relevant experience.
- Explain your research methodology and how you would develop recommendations based on the research. There is no required format, and 2-3 pages should probably be sufficient for this section.
- State how much funding you would need for the project, keeping in mind that a typical Conference research contract includes a consulting fee of \$15,000 plus travel expenses of \$1,000, and research assistance expenses of \$2,000. There may be some flexibility in the budget based on factors relating to the proposal (*e.g.*, the consultant's location relative to Washington, DC, and the need for research assistance and empirical or interviewing work), so your proposal should suggest any special needs in this regard. The amount of the consulting fee and expenses is not a critical factor in the award of the contract; the quality of the proposal and of the consultant's ability to carry out the study will be the most important factors.
- Propose a schedule for the project. The Conference's research projects typically call for submission of an outline, a draft report, and a final report. Multiple draft reports may be



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necessary based on input from the Chairman, staff, or committee. The draft report should be substantially complete and ready for consideration by the committee. Proposals for this project should target the submission of the draft report so that the recommendation can be targeted for completion at a plenary session of the Conference held in December 2014. A July 2014 submission date for the draft report is preferred, but high quality research leading to a well-written report will be the prime consideration.

Submit your proposal by 6:00 p.m. Eastern Time on February 5, 2014. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on:

- The qualifications and experience of the researcher(s) and knowledge of literature in the field (if applicable);
- The quality and clarity of the proposal;
- The timeline of the proposal and the ability of the researcher(s) to perform the research in a timely manner;
- The likelihood that the research will contribute to greater understanding of the subject matter studied and lead to an Administrative Conference recommendation that will improve administrative procedures in the federal government; and
- The cost of the proposal (although the other factors are more important)

Failure to follow the above instructions may result in your proposal not being considered. Including the phrase “ACUS Project Proposal” in the subject line of your e-mail is important so that your proposal can be easily identified.