



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Periodic Retrospective Review

### Committee on Administration and Management

#### Proposed Recommendation for Committee | April 9, 2021

1           Retrospective review is the process by which agencies analyze existing regulations and  
2 decide whether they need to be modified in any respect. Periodic retrospective review is the  
3 process by which agencies engage in retrospective review of some or all of their rules on a pre-  
4 set schedule (e.g., every ten years), whether as a result of a statutory requirement or their own  
5 initiative. In accordance with long-standing executive branch policy,<sup>1</sup> the Administrative  
6 Conference has long endorsed the practice of retrospective review of agency rules,<sup>2</sup> and has  
7 urged agencies to consider periodic retrospective review.<sup>3</sup>

8           Some rules are subject to periodic retrospective review requirements, either on specified  
9 intervals or more generally. For example, the Clean Air Act requires the Environmental  
10 Protection Agency to review certain ambient air quality regulations every five years.<sup>4</sup> The  
11 Regulatory Flexibility Act requires agencies to publish in the *Federal Register* a plan for the  
12 “periodic review of rules . . . which have or will have a significant economic impact upon a  
13 substantial number of small entities.” The Act also requires agencies to review all such rules

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<sup>1</sup> 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.”).

<sup>2</sup> 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).

<sup>3</sup> Recommendation 95-3, *supra* note 2, 43110; Recommendation 2017-6, *supra* note 2.

<sup>4</sup> 42 U.S.C. § 7309(d)(1).



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14 within ten years of the publication of such rules as final.<sup>5</sup> Other rules are subject to periodic  
15 review under periodic review plans created by agencies, some of which are not statutorily  
16 mandated.<sup>6</sup>

17 Periodic retrospective review can enhance the quality of agencies' rules. It can help  
18 agencies determine whether regulations continue to meet their statutory objectives. It can help  
19 agencies determine whether a rule is obsolete because, for example, the underlying statute has  
20 been amended or repealed. It can help agencies evaluate regulatory performance (e.g., benefits,  
21 costs, ancillary impacts, and distributional impacts of rules), and assess whether and how the rule  
22 should be revised in a new rulemaking. And it can help agencies determine how accurate the  
23 assessments they make before rules are issued are with regard to likely regulatory impact (e.g.,  
24 forecasts of benefits, costs, ancillary impacts, and distributional impacts) and identify ways to  
25 improve the accuracy of those assessment methodologies.<sup>7</sup>

26 There are also drawbacks associated with periodic retrospective review. Some rules may  
27 not be strong candidates for periodic review because the need for the rule is unlikely to change  
28 and the benefits associated with periodically revisiting it are small. There are costs associated  
29 with collecting data and analyzing it, and time spent on reviewing existing rules is time that may  
30 not be spent on other projects. And there can be costs for regulated parties and beneficiaries  
31 associated with uncertainty concerning whether or not a rule will be retained or modified.  
32 Agencies therefore need to carefully tailor their periodic retrospective review plans.

33 Mindful of both the value of periodic retrospective review and the costs associated with  
34 it, this Recommendation offers practical suggestions to agencies about whether and how to

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<sup>5</sup> 5 U.S.C. § 610.

<sup>6</sup> 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).

<sup>7</sup> *Id.* at 8.



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35 establish a periodic retrospective review regime. It does so by, among other things, identifying  
36 the kinds of rules that lend themselves well to periodic retrospective review, proposing factors  
37 for agencies to consider in deciding the optimal review frequency when they have such  
38 discretion, and identifying different models for staffing periodic retrospective reviews. In doing  
39 so, it builds upon the Administrative Conference's longstanding endorsement of public  
40 participation in all aspects of the rulemaking process,<sup>8</sup> including retrospective review,<sup>9</sup> by  
41 encouraging agencies to seek public input to both help identify the kinds of rules that lend  
42 themselves well to periodic retrospective review and inform the agencies' analyses of their rules.

43 It also recognizes the important institutional role that the Office of Management and  
44 Budget (OMB) plays in agencies' retrospective review efforts, and the important role that the  
45 Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-  
46 issued guidance can play.<sup>10</sup> It suggests that agencies work with OMB to help facilitate data  
47 collection relevant to reviewing rules. It calls attention to the Evidence Act's requirements for  
48 certain agencies to create Learning Agendas and Annual Evaluation Plans, which lay out  
49 research questions that agencies plan to address regarding their missions, including their  
50 regulatory missions, and how they intend to address these questions.<sup>11</sup> The Recommendation  
51 states that agencies can satisfy the Evidence Act's requirements to create Learning Agendas and  
52 Annual Evaluation Plans if they undertake and document certain activities as they carry out  
53 periodic retrospective review.

### RECOMMENDATION

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<sup>8</sup> 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).

<sup>9</sup> Recommendation 2014-5, *supra* note 2.

<sup>10</sup> See Benneer & Wiener, *supra* note 6.

<sup>11</sup> 5 U.S.C. § 306.



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### **Deciding the Kinds of Rules Subject to Periodic Review and the Frequency of Review**

- 54 1. Agencies should identify the specific rules or categories of rules, if any, that are subject to  
55 statutory periodic retrospective review requirements.
- 56 2. For rules not subject to statutory periodic retrospective review requirements, agencies  
57 should decide whether to establish a periodic retrospective review regime. In doing so,  
58 agencies should consider the benefits of periodic retrospective review, including potential  
59 gains from learning, and the costs, including administrative burden and policy instability.
- 60 3. For rules that agencies decide to subject to periodic retrospective review, agencies should  
61 decide the optimal periodicity (frequency) of review. In doing so, agencies should consider  
62 the following factors:
- 63 a. The pace of change of the technology, science, or the sector of economy affected  
64 by the rule. A higher pace of change may warrant more frequent reviews;
- 65 b. The degree of uncertainty about the accuracy of the initial estimates of regulatory  
66 benefits and costs. Greater uncertainty may warrant more frequent reviews;
- 67 c. Changes in the statutory framework under which the regulation was issued. More  
68 changes may warrant more frequent reviews;
- 69 d. Comments, petitions, complaints, or suggestions received from stakeholder groups  
70 and members of the public. A greater number of requests for changing the rule may  
71 warrant more frequent reviews;
- 72 e. The complexity of the rule, as demonstrated by poor compliance rates, the amount  
73 of clarifying guidance issued, remands from the courts, or other factors. Less  
74 complexity may warrant more frequent reviews;
- 75 f. The administrative burden in conducting reviews. Greater staff time involved in  
76 reviewing the rule may warrant less frequent reviews; and
- 77 g. Reliance interests connected with the rule. Rules on which regulated entities and  
78 beneficiaries have come to rely (with higher costs of change) may lend themselves  
79 to less frequent reviews.
- 80 4. Public input can help agencies identify which rules should be subject to review and with  
81 what frequency. Agencies should consider soliciting public input by means such as



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82 convening meetings of interested persons, engaging in targeted outreach efforts to affected  
83 interests that do not normally monitor agencies' activities, creating online discussion  
84 forums designed to solicit feedback, and posting requests for information.

85 5. Agencies should periodically reassess both the class of rules that should be subject to  
86 periodic retrospective review and the optimal frequency of review.

### **Performing Data Analysis and Soliciting Public Feedback on Rules Subject to Periodic Review**

87 6. Agencies should publish a document or set of documents explaining how they conducted  
88 a given periodic review, what information they considered, and what public outreach they  
89 undertook. They should include this document or set of documents on Regulations.gov, if  
90 applicable. In so doing, to the extent appropriate, agencies should organize the data within  
91 the document or set of documents in ways that allow private parties to recreate the  
92 agencies' work and to run additional analyses concerning existing rules' effectiveness.  
93 Agencies should also, to the extent feasible, explain in plain language the significance of  
94 their data and how they used the data to shape their review.

95 7. Agencies should provide public disclosure regarding their periodic retrospective review  
96 regimes, including which rules are subject to periodic retrospective review, how frequently  
97 the rules are reviewed, what the review entails, and whether the review of the rule is  
98 conducted pursuant to a legal requirement or the agency's own initiative. Agencies should  
99 include these notifications on their websites, and should consider including them within  
100 the *Federal Register* and the *Code of Federal Regulations*, even if not legally required to  
101 do so.

102 8. Agencies should seek input from relevant parties when conducting periodic retrospective  
103 review. Possible outreach methods include convening meetings of interested persons,  
104 engaging in targeted outreach efforts such as proactively bringing the rule to the attention  
105 of affected interests that do not normally monitor the agency's activities, creating online  
106 discussion forums designed to solicit feedback on the rule, and posting requests for

**Commented [LAS1]:** For Committee consideration: The committee should potentially discuss where these public disclosures should be published and whether they should be included in the *Code of Federal Regulations*. The recommendation as written aligns with Recommendation 2020-1, Rules on Rulemakings.



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107 information on the rule. Agencies should integrate relevant information from the public  
108 into their retrospective reviews.

109 9. Agencies should work with OMB to properly invoke any flexibilities within the  
110 Paperwork Reduction Act that would enable them to gather relevant data expeditiously.

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### **Ensuring Adequate Resources and Staffing**

112 10. Agencies should decide how to best structure their staffing of periodic retrospective  
113 reviews to foster a culture of retrospective review. Below are examples of some staffing  
114 models, which may be used in tandem or separately:

115 a. Assigning the same staff the same rule, or category of rule, each time it is reviewed.

116 This approach allows staff to gain expertise in a particular kind of rule, thereby  
117 potentially improving the efficiency of the review;

118 b. Assigning different staff the same rule, or category of rule, each time it is reviewed.

119 This approach promotes objectivity by allowing differing viewpoints to enter into  
120 the analysis;

121 c. Establishing or cooperating with standing committees of experts, either within or  
122 outside the agency, to review rules; and

123 d. Pairing subject matter experts, such as engineers, economists, and scientists, with  
124 other agency employees in conducting the reviews. This approach maximizes the  
125 likelihood that both substantive considerations, such as the net benefits of the rule,  
126 and procedural considerations, such as whether the rule conflicts with other rules  
127 or complies with plain language requirements, will enter into the review.

### **Using Evidence Act Processes**

128 11. To satisfy the Evidence Act's requirements to create Learning Agendas and Annual  
129 Evaluation Plans, agencies should undertake and document the following activities as they  
130 carry out periodic retrospective review:



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- 131 a. Create precise questions to be addressed by the review, such as whether the rule  
132 in question maximizes net benefits, how frequently it should be reviewed, or how  
133 it affects a particular sector of the economy;
- 134 b. Describe the information needed to conduct reviews of the rule, including whether  
135 the agency will undertake new information collection requests or if it will use  
136 existing information;
- 137 c. Describe the methods it will use in conducting the reviews, such as randomized  
138 control trials or quasi-experimental methods;
- 139 d. Describe the anticipated challenges in conducting the review, such as obstacles to  
140 collecting relevant data; and
- 141 e. Describe how it will use the review results to inform policy making, including by  
142 strengthening, maintaining, or otherwise modifying the rule.

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### **Interagency Coordination**

- 145 12. A body or expert entity with interagency responsibilities should regularly convene agencies  
146 to identify and share best practices on periodic retrospective review, addressing questions  
147 such as how to improve timeliness and analytic quality of reviews and the optimal  
148 frequency of discretionary reviews.
- 149 13. To promote a coherent regulatory scheme, agencies should coordinate their periodic  
150 retrospective reviews with other agencies that have issued related regulations.

**Commented [LAS2]:** For Committee consideration: The committee will want to discuss what agency or entity is best suited to this task.