



## **Administrative Conference Recommendation 2021-2**

### **Periodic Retrospective Review**

**Adopted June 17, 2021**

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

Periodic retrospective review may occur because a statute requires it or because an agency chooses to do it on its own initiative. Statutes requiring periodic retrospective review may specify a time interval over which review should be conducted or leave the frequency up to the agency. The Clean Air Act, for example, requires the Environmental Protection Agency to

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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> 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).

<sup>3</sup> Recommendation 95-3, *supra* note 2.



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review certain ambient air quality regulations every five years.<sup>4</sup> On the other hand, the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act provides that the Department of Transportation must “specify procedures for the periodic review and update” of its rule on early warning reporting requirements for manufacturers of motor vehicles without specifying how often that review must occur.<sup>5</sup> Even when periodic retrospective review is not mandated by statute, agencies have sometimes voluntarily implemented periodic retrospective review programs.<sup>6</sup>

Periodic retrospective review can enhance the quality of agencies’ regulations by helping agencies determine whether regulations continue to meet their statutory objectives. Such review can also help agencies evaluate regulatory performance (e.g., the benefits, costs, ancillary impacts,<sup>7</sup> and distributional impacts<sup>8</sup> of regulations), assess whether and how a regulation should be revised in a new rulemaking, determine the accuracy of the assessments they made before issuing their regulations (including assessments regarding forecasts of benefits, costs, ancillary impacts, and distributional impacts), and identify ways to improve the accuracy of the underlying assessment methodologies.<sup>9</sup> Agencies that have incorporated standards by reference in their regulations also can—and, indeed, should—arrange to be notified by the adopting standards organizations of relevant revisions to those standards and consider adopting those revisions, thus ensuring that regulations remain current.

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<sup>4</sup> 42 U.S.C. § 7309(d)(1).

<sup>5</sup> 49 U.S.C. § 30166(m)(5).

<sup>6</sup> See Lori S. Benneer & Jonathan B. Wiener, *Periodic Review of Agency Regulation* 33–38 (June 7, 2021) (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> An ancillary impact is an “impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking . . . .” OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 26 (2003).

<sup>8</sup> 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.

<sup>9</sup> *Id.* at 8.



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But there can also be drawbacks associated with periodic retrospective review. Some regulations may not be strong candidates for such review because the need for the regulations is unlikely to change and the benefits associated with periodically revisiting them are likely to be small. There are also costs associated with collecting and analyzing data, and time spent reviewing existing regulations may come at the cost of other important regulatory activities. For this reason, agencies might reasonably decide to limit periodic retrospective review to certain types of regulations, such as important regulations that affect large numbers of people or that have particularly pronounced effects on specific groups.<sup>10</sup> Periodic retrospective review can also generate uncertainty regarding whether a regulation will be retained or modified. Agencies, therefore, should tailor their periodic retrospective review plans carefully to account for these drawbacks.

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

This Recommendation also recognizes the important role that the Office of Management and Budget (OMB) plays in agencies' periodic retrospective review efforts as well as the

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<sup>10</sup> See, e.g., Recommendation 2014-5, *supra* note 2, ¶ 5 (providing a list of factors for agencies to consider when prioritizing some regulations as important).

<sup>11</sup> 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).

<sup>12</sup> See *supra* note 2.



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significance of the Foundations for Evidence-Based Policymaking Act (the Evidence Act) and associated OMB-issued guidance.<sup>13</sup> It encourages agencies to work with OMB to help facilitate data collection relevant to reviewing regulations. It also calls attention to the Evidence Act's requirements that certain agencies create Learning Agendas, which identify questions for agencies to address regarding their regulatory missions, and Annual Evaluation Plans, which lay out specific measures agencies will take to answer those questions.<sup>14</sup> Consistent with the Evidence Act, the Recommendation provides that agencies can incorporate periodic retrospective review in their Learning Agendas and Annual Evaluation Plans by undertaking and documenting certain activities as they carry out their review.

In issuing this Recommendation, the Conference recognizes that agencies will need to consider available resources in deciding whether a periodic retrospective review program should be implemented and, if so, what form it should take. The recommendations offered below are subject to that qualification.

### RECOMMENDATION

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

1. Agencies should identify any specific regulations or categories of regulations that are subject to statutory periodic retrospective review requirements.
2. For regulations not subject to statutory periodic retrospective review requirements, agencies should establish a periodic retrospective review plan. In deciding which regulations, if any, should be subject to such a review plan, agencies should consider the public benefits of periodic retrospective review, including potential gains from learning

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<sup>13</sup> See Bennear & Wiener, *supra* note 6.

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



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more about regulatory performance, and the costs, including the administrative burden associated with performing the review and any disruptions to reliance interests and investment-backed expectations. When agencies adopt new regulations for which plans regarding periodic retrospective review have not been established, agencies should, as part of the process of developing such regulations, decide whether those regulations should be subject to periodic retrospective review.

3. When agencies plan for periodic retrospective review, they should not limit themselves to reviewing a specific final regulation when a review of a larger regulatory program would be more constructive.
4. When agencies decide to subject regulations to periodic retrospective review, they should decide whether to subject some or all of the regulations to a pre-set schedule of review or whether, for some or all of the regulations, it is preferable to set only an initial date for review and decide, as part of that review, when to undertake the next review. In selecting the frequency of review or setting the first or any subsequent date of review, agencies should consider, among others, the following factors:
  - a. The pace of change of the technology, science, sector of the economy, or part of society affected by the regulation. A higher pace of change may warrant more frequent review;
  - b. The degree of uncertainty about the accuracy of the initial estimates of regulatory benefits, costs, ancillary impacts, and distributional impacts. Greater uncertainty may warrant more frequent review;
  - c. Changes in the statutory framework under which the regulation was issued. More changes may warrant more frequent review;
  - d. Comments, complaints, requests for waivers or exemptions, petitions for the modification or repeal of existing rules, or suggestions received from interested persons. The level of public interest or amount of new evidence regarding changing the regulation may warrant more frequent review;
  - e. The difficulties arising from implementation of the regulation, as demonstrated by poor compliance rates, requests for waivers or exemptions, the amount of



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clarifying guidance issued, remands from the courts, or other factors. Greater difficulties may warrant more frequent review;

- f. The administrative burden in conducting periodic retrospective review. Larger burdens, such as greater staff time, involved in reviewing the regulation may warrant less frequent review; and
  - g. Reliance interests and investment-backed expectations connected with the regulation. Steps taken by persons in reliance on a particular regulation or with the expectation that it will remain unaltered may favor less frequent review.
5. In making the decisions outlined in Paragraphs 1 through 4, public input can help agencies identify which regulations should be subject to periodic retrospective review and with what frequency. Agencies should consider soliciting public input by means such as convening meetings of interested persons, engaging in targeted outreach efforts to historically underrepresented or under-resourced groups that may be affected by the agencies' regulations, and posting requests for information.
  6. Agencies should publicly disclose their periodic retrospective review plans, which should cover issues such as which regulations are subject to periodic retrospective review, how frequently those regulations are reviewed, what the review entails, and whether the review is conducted pursuant to a legal requirement or the agencies' own initiative. Agencies should include these notifications on their websites and consider publishing them in the *Federal Register*, even if the law does not require it.
  7. With respect to regulations subject to a pre-set schedule of periodic retrospective review, agencies should periodically reassess the regulations that should be subject to periodic retrospective review and the optimal frequency of review.



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

8. Agencies should publish in a prominent, easy-to-find place on the portion of their websites dealing with rulemaking matters, a document or set of documents explaining how they conducted a given periodic retrospective review, what information they considered, and what public outreach they undertook. They should also include this document or set of documents on Regulations.gov. To the extent appropriate, agencies should organize the data in the document or set of documents in ways that allow private parties to re-create the agencies' work and run additional analyses concerning existing regulations' effectiveness. When feasible, agencies should also explain in plain language the significance of their data and how they used the data to shape their review.
9. Agencies should seek input from relevant parties when conducting periodic retrospective review. Possible outreach methods include convening meetings of interested persons; engaging in targeted outreach efforts, such as proactively bringing the regulation to the attention of historically underrepresented or under-resourced groups; and posting requests for information regarding the regulation. Agencies should integrate relevant information from the public into their periodic retrospective reviews.
10. Agencies should work with the Office of Management and Budget (OMB) to properly invoke any flexibilities within the Paperwork Reduction Act that would enable them to gather relevant data expeditiously.

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

11. Agencies should decide how best to structure their staffing of periodic retrospective reviews to foster a culture of retrospective review and ongoing learning. Below are examples of some staffing models, which may be used in tandem or separately:
  - a. Assigning the same staff the same regulation, or category of regulation, each time it is reviewed. This approach allows staff to gain expertise in a particular kind of regulation, thereby potentially improving the efficiency of the review;





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- b. Assigning different staff the same regulation, or category of regulation, each time it is reviewed. This approach promotes objectivity by allowing differing viewpoints to enter into the analysis;
- c. Engaging or cooperating with agency or non-agency subject matter experts to review regulations; and
- d. Pairing subject matter experts, such as engineers, economists, sociologists, and scientists, with other agency employees in conducting the review. This approach maximizes the likelihood that both substantive considerations, such as the net benefits and distributional and ancillary impacts of the regulation, and procedural considerations, such as whether the regulation conflicts with other regulations or complies with plain language requirements, will enter into the review.

### **Using Evidence Act Processes**

12. Consistent with the Evidence Act, agencies should incorporate periodic retrospective reviews in their Learning Agendas and Annual Evaluation Plans. In doing so, agencies should ensure that they include:
- a. The precise questions they intend to answer using periodic retrospective review. Those questions should include how frequently particular regulations should be reviewed and should otherwise be keyed to the factors set forth in Section 5 of Executive Order 12866 for periodic retrospective review of existing significant regulations;
  - b. The information needed to adequately review the regulations subject to the periodic retrospective reviews. Agencies should state whether they will undertake new information collection requests or use existing information to conduct the reviews;
  - c. The methods the agencies will use in conducting their reviews, which should comport with the federal program evaluation standards set forth by OMB;
  - d. The anticipated challenges the agencies anticipate encountering during the reviews, if any, such as obstacles to collecting relevant data; and





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- e. The ways the agencies will use the results of the reviews to inform policymaking.

### **Interagency Coordination**

13. Agencies that are responsible for coordinating activities among other agencies, such as the Office of Information and Regulatory Affairs, should, as feasible, regularly convene agencies to identify and share best practices on periodic retrospective review. These agencies should address questions such as how to improve timeliness and analytic quality of review and the optimal frequency of discretionary review.
14. To promote a coherent regulatory scheme, agencies should coordinate their periodic retrospective reviews with other agencies that have issued related regulations.