



# Institute for Policy Integrity

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VIA ELECTRONIC SUBMISSION

Office of the General Counsel  
US Department of Energy  
Washington, DC

Attention: Regulatory Burden RFI - Docket No. DOE-HQ-2011-0014-0001

**Subject:** Response to Request for Information on “Reducing Regulatory Burden,” 76 Fed. Reg. 6123 (Feb. 3, 2011)

The Institute for Policy Integrity at New York University School of Law submits the following comments to the Department of Energy (“DOE”) in response to its request for comments on the formulation of a preliminary plan for retrospective analysis as required by Executive Order 13,563.<sup>1</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

On January 18, 2011, President Obama issued Executive Order 13,563 “in order to improve regulation and regulatory review.”<sup>2</sup> Section 6(b) of the Executive Order directs agencies to “develop and submit to the Office of Information and Regulatory Affairs [“OIRA”] a preliminary plan . . . under which the agency will periodically review its existing significant regulations.”<sup>3</sup> On February 2, OIRA issued a memo to agency heads offering guidance for complying with the Executive Order.<sup>4</sup> On February 3, DOE issued a request for comments “to assist DOE in reviewing its existing regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed.”<sup>5</sup>

This was not the first effort to promote retrospective review of existing federal rules. Executive Order 12,866 required agencies “to submit to OIRA a program . . . under which the agency will periodically review its existing significant regulations.”<sup>6</sup> Section 610 of the Regulatory Flexibility Act imposes a similar requirement with the specific aim of regulatory relief for small businesses.<sup>7</sup>

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<sup>1</sup> Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011) (“Improving Regulation and Regulatory Review”).

<sup>2</sup> *Id.* at 3821.

<sup>3</sup> *Id.* § 6(b) at 3822.

<sup>4</sup> OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-11-10, EXECUTIVE ORDER 13563, “IMPROVING REGULATION AND REGULATORY REVIEW” (2011) [hereinafter OIRA Memo 2011].

<sup>5</sup> Reducing Regulatory Burden Request for Information, 76 Fed. Reg. 6123, 6123 (Feb. 3, 2011).

<sup>6</sup> Exec. Order No. 12,866 § 5(a), 58 Fed. Reg. 51,735, 51,739-40 (Sept. 30, 1993) (“Regulatory Planning and Review”).

<sup>7</sup> Regulatory Flexibility Act, 5 U.S.C. § 610 (2006).

Some statutes also require periodic retrospective analyses of rules issued under their authority.<sup>8</sup> One such review was recently conducted by the Environmental Protection Agency and revealed that the 1990 Amendments to the Clean Air Act are producing significant net benefits for society.<sup>9</sup>

Reviews are also conducted on ad hoc bases. During the George W. Bush presidency, the White House Office of Management and Budget (“OMB”) frequently requested reviews of particular rules.<sup>10</sup> Furthermore, agencies occasionally conduct reviews on a discretionary basis for a variety of reasons.<sup>11</sup> Despite these steps, agencies conduct very few retrospective reviews relative to the total volume of federal rulemaking.<sup>12</sup> This inconsistent history of retrospective analysis at the federal level highlights the need for agencies to think critically about how to design review plans that will have meaningful and lasting effects.

Retrospective analyses are also conducted by public policy scholars,<sup>13</sup> the European Union,<sup>14</sup> and certain state governments.<sup>15</sup> The successes and mistakes of such reviews can also inform recommendations for the federal government.

Policy Integrity offers the following seven recommendations to guide DOE in developing procedural and substantive policies for conducting retrospective reviews:

- Retrospect reviews should avoid both deregulatory and pro-regulatory biases and should instead calibrate regulatory programs for improved efficiency and effectiveness.
- Agencies should use retrospective analysis to improve the quality of their prospective regulatory reviews.
- Agencies should adopt clear and publicly available guidelines for selecting rules to review.
- Retrospective analysis should include a thorough and balanced review of a rule’s impacts, such as costs and benefits, distributional consequences, and other empirical effects.
- Agencies should design rules ex-ante so that they can be easily and effectively monitored and evaluated.
- Retrospective review should be transparent and actively seek public participation.
- Agencies should foster independent and unbiased retrospective analysis of existing rules by appointing a review team of personnel separate from the authors of the initial rule.

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<sup>8</sup> See, e.g., Clean Air Act, 42 U.S.C. 7612 (2006).

<sup>9</sup> ENVTL. PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020 (Mar. 2011) (finding the Clean Air Act is on track to generate almost \$2 trillion in direct benefits by 2020 at a cost of only \$65 billion), available at <http://www.epa.gov/air/sect812/feb11/fullreport.pdf>.

<sup>10</sup> See John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 Fordham Urb. L.J. 953, 974 (2006) (“In 2004, OIRA launched a more targeted effort to streamline rules impacting the manufacturing sector of the U.S. economy; about seventy-six such rules have been targeted by agencies for reform.”).

<sup>11</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 5 (2007) [hereinafter GAO REEXAMINING REGULATIONS] (finding that the frequency of retrospective reviews often “reflected how an agency exercises its own discretionary authorities, such as responding to petitions or concerns raised by regulated entities or to changes over time in an industry sector or technology.”).

<sup>12</sup> See Graham, *supra* note 10, at 973-74 (“The vast majority of these rules have never been re-examined to determine whether they achieved their intended purpose, or what their actual costs and benefits were.”).

<sup>13</sup> See, e.g., Winston Harrington, Richard D. Morgenstern & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates*, 19 J. POL’Y ANALYSIS & MGMT. 297 (2000) (comparing *ex ante* and *ex post* assessments of 28 rules).

<sup>14</sup> See European Commission, *Impact Assessment Guidelines*, SEC(2009) 92 (Jan. 15, 2009) [hereinafter EC Guidelines 2009] (explaining best practices in the European Union for regulatory review), available at [http://ec.europa.eu/governance/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf).

<sup>15</sup> See, e.g., N.Y. Exec. Order 25 (Aug. 6, 2009) (establishing a regulatory review and reform program).

## **Recommendation 1: Retrospective Reviews Should Avoid Both Deregulatory and Pro-Regulatory Biases and Should Instead Calibrate Regulatory Programs for Improved Efficiency and Effectiveness**

Agencies should use retrospective analysis of existing policies as a way to improve the efficacy of their regulatory programs. With the benefit of new and more accurate information about how a rule is functioning in practice, agencies can better decide how best to achieve their regulatory goals and maximize net benefits to society. Agencies may decide that an existing rule should be made more or less stringent; they may decide that an additional or alternative rule is needed; they may find that a rule is duplicative or otherwise not achieving its intended purpose and decide to rescind it all together; or agencies may find that a rule is functioning as intended and should be retained without adjustment.

Previous calls for retrospective review have suffered from an intrinsic deregulatory bias. Executive Order 12,866 directs agencies to evaluate existing rules “to determine whether regulations promulgated . . . have become unjustified or unnecessary” and “to confirm that regulations are . . . not duplicative or inappropriately burdensome in the aggregate.”<sup>16</sup> The stated purpose of retrospective review under the Regulatory Flexibility Act is “to determine whether such rules should be continued without change, or should be amended or rescinded . . . to minimize any significant economic impact of the rules upon a substantial number of such small [businesses].”<sup>17</sup>

The President’s current initiative pointedly rejects such a deregulatory bias. Under Executive Order 13,563, “agencies shall 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” (emphasis added).<sup>18</sup> In explaining the Executive Order, OIRA elaborates upon the importance of avoiding deregulatory bias: “[Retrospective] review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking.”<sup>19</sup> OIRA continues on to say that underperforming rules may warrant “a stronger, expanded, or somewhat different approach.”<sup>20</sup> The White House clearly intends that retrospective review should be an occasion to consider the full range of options for improvement rather a binary determination of whether or not a rule is overly burdensome.

Consistent with this directive, agencies should not limit the scope of their retrospective review plans to promulgated rules. They should also consider reviewing decisions to deregulate, denied public petitions for regulation, and significant areas of regulatory *inaction*. These areas have historically been overlooked by the existing system of regulatory impact analysis.<sup>21</sup> This suggests that there may be significant missed opportunities for cost-effective regulation that maximizes net social benefits. Including them within the scope of a retrospective review plan would help to correct a structural and economically irrational deregulatory bias inherent in the current OIRA review process.<sup>22</sup>

As a matter of public policy, this is the correct approach. There are inherent limitations to the process of prospective regulatory impact analysis as currently practiced by agencies and OIRA. In

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<sup>16</sup> Exec. Order No. 12,866 § 5, 58 Fed. Reg. 51,735, 51,739-40 (Sept. 30, 1993).

<sup>17</sup> Regulatory Flexibility Act, 5 U.S.C. § 610 (2006).

<sup>18</sup> Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011).

<sup>19</sup> OIRA Memo 2011, *supra* note 4, at 4-5.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1271-80 (2006).

<sup>22</sup> See RICHARD L. REVESZ AND MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 153-61 (2008).

particular “prospective analysis of costs and benefits are often erroneous and . . . unanticipated developments can make regulations obsolete, too stringent, or insufficiently stringent.”<sup>23</sup> As a result, there is enormous potential for retrospective analysis to “improve policies over time based on the updated information about effectiveness, benefits, costs, and unintended countervailing or ancillary effects.”<sup>24</sup> This presents a valuable opportunity for agencies to improve the efficacy of their existing regulations and, over time, to meet their statutory obligations in more cost-effective and less intrusive ways.

## **Recommendation 2: Agencies Should Use Retrospective Analysis to Improve the Quality of Their Prospective Regulatory Reviews**

Retrospective analysis presents opportunities for improving the accuracy of prospective regulatory analysis, particularly estimates about likely costs and benefits. Therefore, retrospective analysis can be used to improve the quality of future policymaking.

Past reviews of existing regulations have discovered both overestimates and underestimates in prospective regulatory impact analyses.<sup>25</sup> Retrospective reviews provide an opportunity for agencies to compare the actual consequences of regulation with their *ex ante* projections—in essence, it allows agencies to check their work. As agencies conduct more retrospective reviews they will improve their predictive methodologies. This in turn will improve their ability to anticipate the effects of new rules.

Retrospective analysis can also help agencies anticipate which policy mechanisms will best achieve their regulatory goals. Writing in the context of environmental regulation, a report published by the National Research Council argues, “[P]rogram evaluation of existing policies informs decisions about what policies to use in new situations. . . . By knowing what policies have accomplished in other contexts, prospective analyses—such as benefit-cost analysis—can be grounded in experience as well as theory and forecasting.”<sup>26</sup>

With more empirical information about the actual effects of regulation, agencies will be better able to plan and defend their actions on the principles of evidence-based decisionmaking. Currently, with little hard evidence about regulations’ effects, protection-oriented interest groups often maintain that agencies systematically underestimate benefits and overestimate costs. Similarly, anti-regulatory interest groups often maintain the opposite—that agencies overestimate benefits and underestimate costs. Retrospective review will help to frame and anchor debates about the merits of regulation in a set of independently established facts.

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<sup>23</sup> Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1531 (internal citations omitted). See also GAO REEXAMINING REGULATIONS, *supra* note 11 at 12 (“One particular reason cited for the usefulness of retrospective reviews was that regulations can change behavior of regulated entities, and the public in general, in ways that cannot be predicted prior to implementation.”).

<sup>24</sup> Jonathan B. Wiener, *Better Regulation in Europe*, 513 (2006) Duke Law Faculty Scholarship, Paper 1586, available at [http://scholarship.law.duke.edu/faculty\\_scholarship/1586](http://scholarship.law.duke.edu/faculty_scholarship/1586). See generally Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in NEW PERSPECTIVES ON REGULATION 111 (David Moss & John Cisternino eds., 2009) (arguing that regulations should be regularly monitored and updated as new information is learned).

<sup>25</sup> See Wiener, *supra* note 24, at 513 (noting that both OMB and academic reviews have observed inaccurate estimates). See also Hahn & Sunstein, *supra* note 23.

<sup>26</sup> Cary Coglianese and Lori D. Snyder Benbear, *Program Evaluation of Environmental Policies: Toward Evidence-Based Decision Making*, in DECISION MAKING FOR THE ENVIRONMENT: SOCIAL AND BEHAVIORAL SCIENCE RESEARCH PRIORITIES 246, 251-52 (Garry D. Brewer & Paul C. Stern eds., National Academies Press 2005).

### **Recommendation 3: Agencies Should Adopt Clear and Publicly Available Guidelines for Selecting Rules for Review**

Executive Order 13,563 recognizes that conducting retrospective analysis for all existing rules would be inefficient and infeasible.<sup>27</sup> In light of practical resource constraints and other prudential concerns, agencies should use their discretion to prioritize those rules for which retrospective analysis would be most valuable. As OIRA explains, “The aim is . . . to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive . . . in order to expand on those that work (and thus to fill possible gaps) and to modify, improve, or repeal those that do not.”<sup>28</sup> Such a discretionary approach is more desirable than a fixed timetable for review. In 2007 the Government Accountability Office evaluated existing retrospective review programs throughout the federal bureaucracy and found that discretionary reviews were “more productive and more likely to generate further action” than mandatory reviews compelled by an external timetable, such as that imposed by Section 610 of the Regulatory Flexibility Act.<sup>29</sup>

In adopting a discretionary approach, agencies should establish guidelines for identifying and prioritizing certain policies for review.<sup>30</sup> Clearly articulated criteria will help agencies achieve their own goals, such as efficiency, fairness, political accountability, and legality.<sup>31</sup> They will also help interested parties anticipate which rules an agency is likely to review. Ability to anticipate likely reviews will both improve the quality of public input into the deliberations and reduce uncertainty for regulated parties.

Specific criteria should be included in each agency’s rule prioritization process, organized according to the two general contexts in which retrospective review will be appropriate. First, once enough time has passed, reviews should be conducted to evaluate how well rules are performing: whether they are accomplishing their stated goals, at what costs, and with what unintended beneficial or costly side effects. Second, changed circumstances may provide a rationale for examining whether a particular rule should be modified or rescinded. In this context, an existing rule will warrant retrospective review if there has been a fundamental change in the facts, or in an understanding of the facts, since the original promulgation of the rule. It would waste significant resources if the retrospective review process simply provided another opportunity for interested groups to rehash arguments and facts presented during the initial notice and comment rulemaking process. However, a substantive change in circumstances could constitute a valid reason to embark upon a retrospective review.

Advances or changes in technology are good examples of substantive changes in circumstance that would legitimate retrospective review. OIRA suggests, “Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken.”<sup>32</sup> One study comparing *ex ante* cost estimates to *ex post* assessments of the same regulations notes, “In numerous case studies, actual compliance costs are lower because of unanticipated use of new

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<sup>27</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (January 18, 2011) mandates that “To facilitate the periodic review of existing significant regulations, agencies shall 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.” The language illuminates the goals of retrospective analysis, (modification of rules in accordance with the results) which accord with something less than universal retrospective analysis, which would be extremely resource-intensive.

<sup>28</sup> OIRA Memo 2011, *supra* note 4, at 4.

<sup>29</sup> GAO REEXAMINING REGULATIONS, *supra* note 11, at 6

<sup>30</sup> *Id.* (“Agency review processes should facilitate the identification of rules that warrant repeal or modification.”)

<sup>31</sup> JASON A. SCHWARTZ, INSTITUTE FOR POLICY INTEGRITY, 52 EXPERIMENTS WITH REGULATORY REVIEW 5 (2010), available at <http://policyintegrity.org/publications/detail/52-experiments-with-regulatory-review/>.

<sup>32</sup> OIRA Memo 2011, *supra* note 4, at 4.

technology.”<sup>33</sup> Retrospective analysis of such rules would indicate that prospective cost estimates were inflated and that the net benefits are higher than originally anticipated. Such rules could be excellent candidates for an expanded scope or increased stringency.

In selecting rules for retrospective analysis, agencies should also be mindful of timing. “[W]hile regulation often stimulates technological development, technological change takes time.”<sup>34</sup> Agencies should be careful not to review existing rules so early as to reduce the ability or incentive for industry to adapt. Older rules are better candidates for review because technological or other substantive changes are more likely to have occurred since their promulgation.

Agencies should also prioritize retrospective review of significant rules.<sup>35</sup> Significant rules have a larger impact on the U.S. economy, and ensuring their efficiency is therefore more important. If a significant rule is producing more net benefits than the *ex ante* estimates indicated, then expanding its scope or increasing its stringency could provide an opportunity to maximize net benefits. Rules that are found to be inefficient can be revised or eliminated.

Agencies should also prioritize the review of rules that may serve either explicitly, or in practice, as pilot programs for more expansive regulation or novel regulatory strategies. Accurately assessing such rules is more important than simply ensuring that the rule is functioning properly in that particular instance. By serving as natural regulatory experiments, small-scale “pilot rules” have the potential to inform regulatory strategies at the programmatic level.<sup>36</sup>

Certain criteria should *not* be considered when agencies are selecting rules for retrospective review. Agencies should resist the urge to review rules solely as a result of intensive lobbying. As stated above, retrospective review should not be a reiteration of the debate that occurred between the agency, interested groups, the public, and OIRA during the initial rulemaking process. Therefore, a high volume of repetitive comments should not in and of itself weigh in favor of conducting a retrospective review. Lobbying efforts, and public comments more generally, should only trigger a retrospective review if they offer notice of a substantial change in circumstances or information that was not considered during the initial rulemaking.

As agencies gain experience with retrospective review and develop best practices over time they should update and improve their retrospective analysis guidelines. Further, in order to facilitate nationwide improvement in the quality of regulations, they should share information about those best practices with other agencies in the federal and state bureaucracies. OIRA is in a unique position to play an important role in this information sharing process, which could help the accomplishments of one agency spread to others.

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<sup>33</sup> Winston Harrington, Richard D. Morgenstern & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates*, 19 J. POL’Y ANALYSIS & MGMT. 297, 314 (2000).

<sup>34</sup> Thomas O. McGarity & Ruth Ruttenberg, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Counting the Cost of Health, Safety and Environmental Regulation*, 80 TEX. L. REV. 1997, 2056 (2002).

<sup>35</sup> Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) (defining as “significant” rules that will have an annual effect on the economy of \$100 million or more; adversely affect the economy, jobs, the environment, or public health; raise novel policy issues; or impede another agency’s actions or purview).

<sup>36</sup> See Greenstone, *supra* note 24, at 118 (“If possible, regulations should be launched on a small scale before being applied to a large population. This approach has several advantages. First, it allow for experimentation. Small-scale implementation leaves the space to create randomly assigned treatment and control groups. Second, it allows different forms of the regulation to be tested. Third, it limits the damage if the regulation is found to fail a cost-benefit test.”).

#### **Recommendation 4: Retrospective Analysis Should Include a Thorough and Balanced Review of a Rule’s Impacts, Such as Costs and Benefits, Distributional Consequences, and Other Empirical Effects**

OIRA emphasizes that while agencies should establish their own priorities for the goals and methodologies for their retrospective analyses, all plans should provide for an analysis of the costs and benefits of the regulations being reviewed, both quantitatively and qualitatively.<sup>37</sup> “Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations.”<sup>38</sup> As noted above, anticipated costs often exceed actual costs,<sup>39</sup> and retrospective review provides an opportunity to recalibrate the actual relationship between the costs of a regulation and the benefits it creates.

While there is a relatively small universe of literature on retrospective analysis specifically, much of the commentary on cost-benefit analysis is relevant insofar as the technique is incorporated into retrospective review. Agencies should aim to follow the same best practices in their retrospective analyses as they do when conducting a regulatory impact analysis during the notice and comment process.<sup>40</sup> These practices include such factors as the choice of an appropriate baseline<sup>41</sup> and identifying the proper scope of the analysis.<sup>42</sup> One of the persistent difficulties in prospective cost-benefit analysis is ensuring that evaluations sufficiently address the nonquantified or nonmonetized impacts of regulation.<sup>43</sup> Some unquantified benefits and costs may be particularly amenable to retrospective analysis, as they may be easier to identify and measure after implementation of the regulation.

In addition to traditional cost-benefit analyses, agencies should also pay particular attention to the distributional impact of the regulation.<sup>44</sup> Purely assessing the efficiency of a regulation may entail looking solely at aggregate costs and aggregate benefits, but the distribution of those costs and benefits are relevant to decisionmaking as well. Executive Order 13,563 states, “Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and *distributive impacts*.”<sup>45</sup> It is therefore crucial that agencies consider the distribution of costs and benefits their retrospective analyses.

Agencies should assess the full range of distributive impacts, rather than focusing exclusively on impacts to a single community, like small businesses.<sup>46</sup> When considering employment impacts of regulations, agencies should be careful not to conflate layoffs with unemployment and should recognize the limitations of economic models to measure job changes. Retrospective analysis also provides agencies with an ideal opportunity to assess the distributive impacts of not just individual rules, but of their broader regulatory regimes.

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<sup>37</sup> OIRA Memo 2011, *supra* note 4, at 5.

<sup>38</sup> *Id.*

<sup>39</sup> Winston Harrington, Richard D. Morgenstern & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates*, 19 J. POL’Y ANALYSIS & MGMT. 297, 314 (2000).

<sup>40</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, 14-42 (Sept. 17, 2003).

<sup>41</sup> *Id.* at 15; *See also* Thomas O. McGarity & Ruth Ruttenberg, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Counting the Cost of Health, Safety and Environmental Regulation*, 80 TEX. L. REV. 1997, 2039 (2002).

<sup>42</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, 15 (Sept. 17, 2003).

<sup>43</sup> *Id.* at 27 (“You should carry out a careful evaluation of non-quantified benefits and costs.”).

<sup>44</sup> REFORMING REGULATORY IMPACT ANALYSIS 232 (Winston Harrington, Lisa A. Heinzerling & Richard D. Morgenstern eds., 2009) (“Distributional consequences of regulation are important.”).

<sup>45</sup> Exec. Order No. 13,563, 76 Fed. Reg. at 3,821 (January 18, 2011)(emphasis added).

<sup>46</sup> *See* Schwartz, *supra* note 31, at 21-22.

In addition to cost-benefit analysis and a consideration of distributional consequences, retrospective reviews should include broader policy considerations. The National Research Council's Panel on Social and Behavioral Research Priorities for Environmental Decision Making published some findings that have relevance both for the environmental sphere and well beyond: "Policies may be assessed after implementation (ex post) to determine whether any of a number of conditions has changed: public health conditions, environmental quality, environmental performance of regulated entities, or managers' perceptions about the costs, benefits, and effectiveness of the new rules."<sup>47</sup> Retrospective reviews are an opportunity to take the pulse of the broad environment in which the regulation functions in order to assess the best agency course of action.

### **Recommendation 5: Agencies Should Design Rules Ex Ante So That They Can Be Easily and Effectively Monitored and Evaluated**

Agencies can facilitate retrospective review and help ensure the longevity of their retrospective review plans if they anticipate the prospect of having to conduct retrospective review during the initial rulemaking process. The Government Accountability Office recommends, "Consideration, during the promulgation of certain new rules, of whether and how [the agency] will measure the performance of the regulation, including how and when [it] will collect, analyze, and report the data needed to conduct a retrospective review."<sup>48</sup> Effective review of existing regulatory programs will often depend on the availability of performance data.<sup>49</sup> Furthermore, it is often the case that much of the available data is produced by accounting mechanisms "built into the regulations themselves."<sup>50</sup> Careful planning about what reporting requirements and other data collection systems should be integrated into new regulations may reduce the costs and improve the quality of subsequent retrospective reviews.

The European Commission's Impact Assessment Guidelines offer recommendations about how best to design new regulations for eventual review.<sup>51</sup> They suggest that regulations include "indicators" that can be used for "measuring to what extent a policy has been properly implemented and its objectives achieved."<sup>52</sup> They further suggest that indicators be "relevant" in the sense that they are "closely linked to the objectives to be reached."<sup>53</sup> They should be "accepted" by agency staff, the public, and the regulated entities.<sup>54</sup> Indicators should also be "credible for non experts, unambiguous and easy to interpret."<sup>55</sup> They should be "easy to monitor," and in particular they should be cost-effective to obtain.<sup>56</sup> Finally, indicators should be "robust against manipulation."<sup>57</sup> Furthermore, the Impact Assessment Guidelines recommend that new regulations outline, from the outset, the eventual process for monitoring and evaluation.<sup>58</sup>

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<sup>47</sup> NATIONAL RESEARCH COUNCIL, *DECISION MAKING FOR THE ENVIRONMENT: SOCIAL AND BEHAVIORAL RESEARCH PRIORITIES*, 97 (Gary D. Brewer & Paul C. Stern eds., 2005).

<sup>48</sup> GAO REEXAMINING REGULATIONS, *supra* note 11, at 53.

<sup>49</sup> See Coglianese, *supra* note 26, at 258 ("All of the program evaluation methods we have reviewed here depend on valid and reliable data...").

<sup>50</sup> *Id.*

<sup>51</sup> See EC Guidelines 2009, *supra* note 14, at 48-49. See also European Commission, *Part III: Annexes to Impact Assessment Guidelines* 76-78 (Jan. 15, 2009) [hereinafter EC Guidelines 2009 Annexes] (elaborating upon best practices in the European Union for retrospective regulatory review), available at [http://ec.europa.eu/governance/impact/commission\\_guidelines/docs/iag\\_2009\\_annex\\_en.pdf](http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf).

<sup>52</sup> EC Guidelines 2009, *supra* note 14, at 48.

<sup>53</sup> EC Guidelines 2009 Annexes, *supra* note 53, at 76.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 77.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 77-78.



## **Recommendation 6: Retrospective Reviews Should Be Transparent and Actively Seek Public Participation**

Agency guidelines for retrospective review should strive for both public participation and transparency, in accordance with Executive Order 13,563.<sup>59</sup> OIRA states, “Because knowledge of the effects of rules is widely dispersed in society, and because members of the public are likely to have useful information and perspectives, agencies should consider developing mechanisms to promote public consultation about existing rules on a continuing basis.”<sup>60</sup>

In order to foster public participation and transparency, an agency should notify the public when it is considering selecting specific rules for retrospective review and when it initiates the retrospective review process. Consistent with OIRA’s comments encouraging public participation, agencies should facilitate mechanisms through which the public can submit comments to the agency that may prove informative and relevant to a retrospective analysis. Public participation can take many shapes, but agencies should make an effort to create opportunities for public comment through the internet.

Upon completion of a retrospective review, agencies should publish their evaluations, thereby fostering transparency and enhancing the credibility of the agency’s reviewing actions.<sup>61</sup> In addition to publishing the reviews themselves, the agency should include what action, if any, it intends to take as a result of the review. This will strengthen regulatory certainty and aid interested groups in predicting government behavior in response to regulatory success or failure, which will help them to adapt accordingly.

## **Recommendation 7: Agencies Should Foster Independent and Unbiased Retrospective Analysis of Existing Rules by Appointing a Review Team of Personnel Separate from the Authors of the Initial Rule**

Agencies should strive to give the team conducting retrospective analysis as much independence as possible from those who were responsible for the rule during the proposal stage.<sup>62</sup> There are two reasons for this. First, to the greatest extent possible, the retrospective review process should be insulated from political pressures. A team or department dedicated solely to retrospective review may be able to maintain a higher level of insulation than if such personnel were responsible for other agency functions such as negotiating rulemakings with interest groups and stakeholders. Second, those who prepared and evaluated the rule before its implementation concluded that the regulation was proper and consequently may have a slight bias in favor of the regulation as they approved it, which would then hamper their ability to conduct a fully objective and dispassionate retrospective review. Such independence will permit analysis that is mostly free from the biases that prior involvement with the project may create.

## **Conclusion**

A robust program for retrospective review has the potential to dramatically improve the cost-effective development of socially beneficial agency rulemaking. Past retrospective review proposals have often proven ineffective, but this need not be the case going forward. Agencies should not view retrospective analysis as an unnecessary burden imposed upon them by political

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<sup>59</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (January 18, 2011) (“General Principles of Regulation:” Our regulatory system “must allow for public participation and an open exchange of ideas.”). See also OIRA Memo 2011, *supra* note 4, at 5.

<sup>60</sup> OIRA Memo 2011, *supra* note 4, at 5.

<sup>61</sup> See Greenstone, *supra* note 24, at 119.

<sup>62</sup> *Id.* at 121 (“As much as possible, these [RA] functions should be removed from political control and placed in independent hands.”).

actors; Executive Order 13,563 recognizes that retrospective analysis is not simply an occasion for deregulation or a rubber stamp on existing regulations. Rather, agency personnel should see it as a meaningful opportunity for more rational, evidence-based decisionmaking, which can actually help them do their jobs. These comments offer a roadmap for seizing that opportunity.

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