

# AFTER 36 YEARS IT TAKES MORE THAN A NUDGE TO JUMP START THE REVIEW OF EXISTING REGULATIONS

A Submission to the Administrative Conference of the United States (ACUS)

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## Bottom Line

The following text demonstrates that once a regulation is promulgated it is around forever; thus the need for OMB *ex ante* review of proposed regulations. To address this problem OMB has for more than three decades conducted periodic interventions to create a continuous program for retrospective review of regulations and all of these efforts have failed. Furthermore there is little incentive for agencies to conduct retrospective reviews on a continuous basis. If retrospective reviews are to be conducted on a continuous basis then it is the regulated community which must take the initiative; however the regulated community will not take such an action unless OMB delineates a procedural program which allows for their effective participation in retrospective reviews. The text that follows sets forth one approach for meeting the aforementioned goals.

## Introduction: Tracing the Roots of Retrospective Review

Retrospective review plays a critical role in ensuring the effectiveness of existing federal regulations. As regulations age, they can become “outmoded, ineffective, insufficient, or excessively burdensome.”<sup>1</sup> Aging or “old” regulations are often ill equipped to address and adapt to modern regulatory needs. They create substantial risk, both economic and non-economic, that negatively affects the security of common citizens and can place significant and often unnecessary costs on regulated entities.<sup>2</sup> As a result, fair and effective regulatory systems must provide a comprehensive and efficient process by which existing regulations are periodically reviewed.

The importance of retrospective review is particularly great in the federal government because the United States regulatory system has historically been more reactive than proactive in

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<sup>1</sup> Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>2</sup> See W. MARK CRAIN & NICOLE V. CRAIN, THE COST OF FEDERAL REGULATIONS TO THE U.S. ECONOMY, MANUFACTURING, AND SMALL BUSINESS 2 (2014)

nature.<sup>3</sup> History shows that many of the most significant regulations are often promulgated immediately following a crisis or widespread market failure.<sup>4</sup> The need or public pressure to quickly pass regulations after a disaster or crisis can result in regulations being promulgated without enough regard for their durability or future review.<sup>5</sup> Although “reactionary rulemaking” may provide acceptable short-term solutions, it often creates long-term regulatory problems that heighten the need for retrospective review.<sup>6</sup> Over time, as more and more “reactionary regulations” are promulgated, the need for an effective and uniform retrospective review process grows larger and larger.<sup>7</sup>

Up to this point, the actual use of retrospective review in the United States by federal agencies is still relatively limited and sporadic.<sup>8</sup> The absence of a uniform or comprehensive retrospective review process is not caused by a lack of appreciation for its importance. A quick glance into the past shows the importance of retrospective review has long been realized.<sup>9</sup>

President Carter first formally recognized retrospective review as a critical component for effective regulation in Executive Order (E.O.) 12044, which he issued in 1978.<sup>10</sup> Each Administration after him, *both* Democrat and Republican, has followed his lead in lockstep and issued an executive order or other formal memorandum emphasizing the importance of retrospective review. This formal and continued recognition of the importance of retrospective review, coupled with the relatively limited actions taken by agencies to engage in retrospective review, highlights the need for more than a “nudge” to jumpstart the retrospective review process. The current lack of an effective and uniform retrospective review process creates the need for broad reform of how it is administered by agencies.

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<sup>3</sup> See Reeve T. Bull, *Building a Framework for Governance: Retrospective Review & Rulemaking Petitions*, \_\_ ADMIN. L. REV. \_\_ (forthcoming 2015).

<sup>4</sup> *Id.*

<sup>5</sup> See *Id.* (Explaining the concept of “availability bias” whereby regulators or decisionmakers may overreact to recent or heavily publicized events).

<sup>6</sup> See *Id.*; Sam Batkins, *It’s Past time to Address Regulatory Duplication*, REGBLOG (Oct. 3, 2014, 7:30 AM), <http://www.regblog.org/blog/2014/05/19/19-batkins-regulatory-duplication/>.

<sup>7</sup> Bull, *supra* note 3.

<sup>8</sup> Joseph E. Aldy, *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design & Implementation of Regulatory Policy* 3 (Sept. 17, 2014), available at <http://www.acus.gov/sites/default/files/documents/Adly%20Retrospective%20Review%20Report%20CIRCULATED%209-17-2014.pdf>; SUSAN E. DUDLEY ET AL., PUBLIC INTEREST COMMENT ON THE OFFICE OF MANAGEMENT AND BUDGET’S DRAFT 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS 3 (2014) (Finding “that many agencies are not currently complying with E.O 13563 and OMB’s direction to write and design their rules so as to facilitate retrospective analysis of their effects.”).

<sup>9</sup> See Exec. Order No. 12044, 3 C.F.R. 152 (1979); Exec. Order No. 12291, 3 C.F.R. 127 (1982).

<sup>10</sup> Exec. Order No. 12044, 3 C.F.R. 152 (1979) (Stating that in selecting regulations for review agencies shall consider: “(a) the continued need for the regulation; (b) the type and number of complaints or suggestions received; (c) the burdens imposed on those directly or indirectly affected by the regulations; (d) the need to simplify or clarify language; (e) the need to eliminate overlapping and duplicative regulations; and (f) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions or other factors have changed in the area affected by the regulation.”).

This comment contains suggested actions or reforms that should be taken to create a more uniform and comprehensive system of retrospective review. It recognizes what ACUS' undertaking of this project implies: there is substantial room for improvement of retrospective review processes in the federal government.

This comment is organized into three brief sections. The first proposes a new mechanism that builds on OMB's existing role in the rulemaking process; the second emphasizes the importance of including public stakeholders; and the third proposes the creation of an interagency working group to oversee the implementation of the proposed reforms.

### **A. The Need for a Uniform Retrospective Review Requirement**

Proposed regulations promulgated by non-independent agencies are subject to mandatory external review by the Office of Information and Regulatory Affairs (OIRA). Existing rules, however, generally have no mandatory review process.<sup>11</sup> Instead, the initiation of review for existing rules is largely left to the discretion of each agency.

There are reasonable rationales for leaving the retrospective review process in the hands of each agency. Individual agencies are presumably well suited or positioned to identify those existing regulations in need of review. In addition, it would likely be more difficult and possibly less efficient for one central body to identify and/or review existing regulations on a government wide basis.

However, by making retrospective review discretionary in nature, agencies lack any strong incentive (and maybe the resources) to engage in it. This lack of incentive is clearly demonstrated by the relatively limited or "mixed use" of retrospective review by agencies up to this point.<sup>12</sup> The relative lack of retrospective review activity by agencies highlights the need for a mechanism by which agencies are required, not merely trusted, to regularly engage in retrospective review.

Therefore, ACUS should recommend that OMB, as part of its existing ex ante review process, insert into select rules a commitment by the agency to conduct retrospective review of the regulation. In addition, OMB should include in the final rule a timetable that the agency must follow.

Taking advantage of OMB's existing ex ante review process would not only ensure timely review of existing regulations, but would also create a more uniform system of retrospective review across the government. Such uniformity would improve the overall effectiveness of the regulatory system and benefit both regulated entities and the public.

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<sup>11</sup> Bull, *supra* note 3.

<sup>12</sup> Aldy, *supra* note 8, at 3.

## B. Leveraging Stakeholder Knowledge

In addition to creating a new mechanism that requires agencies to regularly engage in retrospective review, ACUS should include recommendations that increase the involvement of public stakeholders in the retrospective review process. Those parties most directly impacted by regulations are often in the best position to identify the regulations in most need of review and provide information on how to best change or update existing regulations. Through the inclusion of outside parties, agencies can gain unique knowledge and perspective that can assist agency officials throughout the review process.

Listed below are several steps ACUS should recommend agencies and/or OMB take to improve the involvement of public stakeholders in the retrospective review process.

### 1. Encourage Public Stakeholders to file Requests for Correction under the Data Quality Act (DQA) to modify existing regulations when new information justifies such an action.

Currently, public stakeholders rely solely on agencies to initiate the retrospective review process. This suggested recommendation removes this reliance and addresses the historical failure of agencies to regularly initiate and engage in retrospective review.<sup>13</sup> This suggested recommendation is supported by E.O. 13563, which implores agencies “to adopt regulations through a process that involves public participation.”<sup>14</sup>

In addition, the implementation of a process allowing Requests for Correction would be relatively simple, as the DQA already provides an existing framework that includes relevant standards and deadlines.<sup>15</sup> OMB could undertake this role by simply issuing a statement directing agencies to issue guidance stating that stakeholders can use the DQA to petition for the review of existing regulations based upon data that is no longer accurate or representative of the "best available" information. In that OMB has the statutory authority to oversee the implementation of the DQA its oversight over the resultant Requests for Correction would add a sense of robustness to retrospective reviews.

### 2. ACUS should recommend that OMB establish a publicly accessible docket on regulations.gov where the public can submit data or comments on the rule throughout its life. Along with this, OMB should request that regulated entities regularly report their actual costs of complying with the rule.

Effective review of existing regulations requires accurate data. Unlike prospective review, where costs and economic impacts may be mere estimates, retrospective review should involve the actual costs and practical impacts of complying with existing regulations. By requesting regulated entities to report their costs of compliance, agencies can engage in a more accurate (and therefore more effective) review of existing regulations.

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<sup>13</sup> *Id.*

<sup>14</sup> Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>15</sup> Treasury and General Government Appropriations Act of 2001, P.L. 106-554, § 515.

**3. Each Agency shall announce any initiation of retrospective review in the Unified Agenda.**

Any meaningful review of existing regulation must involve public stakeholders. In order to accomplish such participation, agencies should announce any initiation of retrospective review in the Unified Agenda. Through this publication, those most impacted by the rule would have an opportunity to share their insights or knowledge about a particular rule with the agency.

**4. Agencies should strive to hold periodic workshops on existing regulations and publish the resultant findings every six months in the Unified Agenda.**

Regularly holding workshops would provide an opportunity for public stakeholders to voice issues relating to an existing regulation and provide agency officials with an opportunity to learn about the regulation's practical effects. Any findings or information obtained through the use of these workshops should be published in the Unified Agenda so as to educate all other public stakeholders.

**C. Creation of an Inter-Agency Working Group to Implement Reforms**

Given the diversity of regulatory agencies throughout the federal government and the wide range of retrospective review practices employed by them, implementation of any proposed reforms must be performed in a deliberate and thoughtful manner. In this light, ACUS should recommend that OMB create an interagency working group composed of at least two executive branch agencies and one independent agency to oversee implementation of its retrospective review recommendations.

Ample precedent for the creation of such a working group exists; such interagency groups have been set up in the past to implement a variety of different initiatives.<sup>16</sup> The creation of a working group makes especially good sense in the retrospective review context because there has historically been a lack of uniformity in the way agencies approach retrospective review requirements or recommendations. The working group should seek to identify various techniques or "best practices" for implementing retrospective review reforms and publish its findings in a publicly accessible location.

**Conclusion**

ACUS' recommendations regarding retrospective review practices in the federal government should acknowledge the historical failure of agencies to regularly initiate and engage

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<sup>16</sup> See FEDERAL TRADE COMMISSION, INTERAGENCY WORKING GROUP SEEKS INPUT ON PROPOSED VOLUNTARY PRINCIPLES FOR MARKETING FOOD TO CHILDREN (2011), *available at* <http://www.ftc.gov/news-events/press-releases/2011/04/interagency-working-group-seeks-input-proposed-voluntary> (Provides an example of an interagency working group. Here, several agencies came together to formulate "principles that can be used by industry as a guide for marketing food to children.").

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in meaningful retrospective review on a continual basis. At a minimum, ACUS should recommend that: (1) OMB insert into select rules a commitment by the agency to conduct retrospective review; (2) Public stakeholders be allowed to file Requests for Correction under the DQA; and (3) OMB establish a publicly accessible docket on which regulated entities and the public can report costs of compliance or comments.