ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

January 21, 2020

SENT VIA COMMENTS@FDIC.GOV

Ms. Annmarie H. Boyd
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: RIN 3064–ZA13, Request for Information on a Framework for Analyzing the Effects of FDIC Regulatory Actions

Dear Ms. Boyd:

On behalf of the Office of the Chairman of the Administrative Conference of the United States (ACUS), I offer the following comments in response to the above-referenced Request for Information. These comments respond to the portion of the Federal Deposit Insurance Corporation's (FDIC's) request pertaining to how the agency should analyze the effects of its regulations.

ACUS is an independent agency in the executive branch charged by statute with making recommendations to the President, federal agencies, Congress, and the Judicial Conference of the United States to improve administrative procedure, including rulemaking. ACUS's official recommendations are issued by its Assembly, a body partially composed of representatives from executive and independent agencies. All of ACUS's recommendations can be found at www.acus.gov, and in the *Federal Register*.

The FDIC may find Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,738 (Dec. 29, 2017); and Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,352 (July 10, 2013), to be particularly germane to this Request.

In Recommendation 2014-5, ACUS advises agencies to create ex post evaluation plans as they are developing rules to facilitate later retrospective review. In Recommendation 2017-6, ACUS proposes a number of ways agencies can take advantage of regulatory "treatment" and "control" groups to draw causal inferences, discusses some of the methodological strengths and limitations of these approaches, and discusses the legal considerations that may arise. In Recommendation 2013-2, ACUS notes that agencies can adopt or adapt the regulatory analysis practices described in OMB Circular A-4 or any successor government-wide guidance. Copies of the recommendations are attached.

ACUS's Office of the Chairman thanks the FDIC for this opportunity to comment on its rulemaking process. Please contact me at trubin@acus.gov or 202-480-2097 if you have questions or would like further information.

Sincerely,

Todd Rubin
Attorney Advisor
Administrative Conference of the U.S.

Attachments: Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*; Recommendation 2014-5, *Retrospective Review of Agency Rules*; Recommendation 2017-6, *Learning from Regulatory Experience*

Administrative Conference Recommendation 2013-2

Benefit-Cost Analysis at Independent Regulatory Agencies

Adopted June 13, 2013

Benefit-cost analysis (also known as cost-benefit analysis) is one of the primary tools used in regulatory analysis to anticipate and evaluate the likely consequences of rules.[1] Although some regulatory benefits and costs are difficult to quantify or monetize, those preparing such analyses generally attempt to estimate the overall benefits that a proposed or final rule would create as well as the aggregate costs that it would impose on society, and then determine whether the former justify the latter. Some observers have disputed its utility in rulemaking,[2] but benefit-cost analysis (and other forms of regulatory analysis) can help ensure that decisionmakers fully contemplate the risks and rewards of any proposed regulatory strategy.[3] Benefit-cost analysis can also improve transparency, helping to ensure that the public and Congress understand why regulatory decisions are made.

[1] *See* Office of Management and Budget, Circular A-4 (Sept. 17, 2003), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/ [hereinafter "OMB Circular A-4"]. Much of the literature on regulatory analysis, including prior recommendations of the Administrative Conference, uses the term "cost-benefit analysis" in lieu of, or in addition to, "benefit-cost analysis." Circular A-4 uses the term "benefit-cost analysis," and this recommendation will therefore utilize the same terminology.

[2] Critics of benefit-cost analysis contend that it ignores values that cannot be easily quantified, that benefits can often be difficult to monetize, that it tends to overestimate costs, and that it undervalues future benefits through the application of discounting methodologies. *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1557–60, 1580–81 (2001).

[3] *See* Administrative Conference of the United States, Recommendation 79-4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 44 Fed. Reg. 38,826 (July 3, 1979) ("Wise decisionmaking presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other."); Cass R. Sunstein, *The Office of Information & Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1846 (2013) ("Cost-benefit analysis can be

For more than 30 years, Cabinet departments and other executive agencies like the Environmental Protection Agency (but not independent regulatory agencies[4] such as the Federal Trade Commission (FTC)) have been required by executive orders to conduct benefit-cost or other types of regulatory analyses for their "major" or "economically significant" rules.[5] In 1981, President Ronald Reagan issued Executive Order (EO) 12,291,[6] which instructed covered executive agencies to prepare regulatory impact analyses of their draft proposed and final major rules (including a description of benefits and costs), and to submit all of their draft rules to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) before publication in the Federal Register. Subsequent administrations have reaffirmed the importance of benefit-cost analysis and OIRA review. Currently, EO 12,866, issued by President William Jefferson Clinton in 1993, requires Cabinet departments and other covered executive agencies to "assess both the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a

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exceedingly important, and in the Obama Administration, several steps were taken to strengthen it, contributing to a situation in which the net benefits of economically significant rules were extraordinarily high."); *cf.* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 10 (2008) ("Although cost-benefit analysis, as currently practiced, is . . . biased against regulation, those biases are not inherent to the methodology. If those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis.").

[4] As a general matter, "independent regulatory agencies" are those whose heads possess "for cause" removal protection and that enjoy some degree of independence from the executive branch. DAVID E. LEWIS & JENNIFER L. SELIN, ACUS SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 49 (1st ed., 2d Printing Mar. 2013). Under Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), the term "agency" excludes independent regulatory agencies. *Id.* § 3(b). However, independent regulatory agencies are covered by the planning requirements in section 4 of the executive order.

[5] "Major" and "economically significant" rules include (but are not limited to) rules likely to result in annual costs, benefits, or transfer payments of $100 million or more. *See* Congressional Review Act, 5 U.S.C. § 804(2); Exec. Order No. 12,866, *supra* note 4, § 3(f)(1). Transfer payments are monetary payments from one group to another that do not affect total resources available to society. *See* OMB Circular A-4, *supra* note 1. The most common form is the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, and crop payments). In 2010, more than one-third of all major rules were so categorized because of the amount of transfer payments. *See* U.S. Cong. Research Service, *REINS Act: Number and Types of "Major Rules" in Recent Years*, R41651, Feb. 21, 2011, by Curtis W. Copeland and Maeve Carey.

[6] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (revoked by § 11 of EO 12,866).

regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[7] It also requires them to assess the costs and benefits of "significant" draft proposed and final rules submitted to OIRA for review, and to conduct more thorough analysis of economically significant draft proposed and final rules.[8]

As noted previously, independent regulatory agencies traditionally have not been subject to the formal benefit-cost analysis requirements imposed by executive order, although several recent Presidents have encouraged those agencies to voluntarily apply the principles contained in the relevant executive orders.[9] Virtually all independent regulatory agencies are subject to certain crosscutting statutes that may require some type of regulatory analysis, such as the Regulatory Flexibility Act[10] and the Paperwork Reduction Act.[11] In addition, some independent regulatory agencies' organic acts or other statutes require them to conduct benefit-cost analyses or to consider certain economic effects of their regulations, although the requirements vary significantly from agency to agency. For instance, some agencies (e.g., the Consumer Product Safety Commission) are required by statute to prepare a formal regulatory analysis statement that describes expected costs and benefits prior to issuing certain rules.[12] Other agencies (e.g., the Commodity Futures Trading Commission (CFTC) and the Securities and

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[7] Exec. Order No. 12,866, *supra* note 4, § 1(b)(6).

[8] *Id.* § 6(a)(3); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (President Obama) (stating that the benefits of proposed and final rules must "justify" the costs); Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989) (suggesting guidelines for the enhanced openness of executive regulatory review and recommending the reconsideration of existing rules looking toward the repeal of unnecessary regulations).

[9] *See, e.g.*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (stating that independent regulatory agencies "should promote" the goal, articulated in EO 13,563, of producing a "regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation" and "should comply" with the provisions in EO 13,563 regarding public participation, integration and innovation, flexible approaches, and science "[t]o the extent permitted by law").

[10] 5 U.S.C. §§ 601–12.

[11] 44 U.S.C. §§ 3501–21.

[12] 15 U.S.C. § 2058(f).

Exchange Commission (SEC)) are required by statute to "consider" costs and benefits or other factors associated with some of their rules.[13] Still other agencies (e.g., the Federal Communications Commission and the Nuclear Regulatory Commission) are not subject to any formal regulatory analysis requirements for most of their rules.

The Administrative Conference believes that it is in the interest of the independent regulatory agencies, the executive branch, Congress, the courts, and the public that independent regulatory agencies' current practices relating to benefit-cost analysis be documented. In this light, the report supporting the recommendation examined efforts by independent regulatory agencies to analyze regulatory benefits and costs in recent major rules.[14] It also examined whether the agencies factor benefits and costs into their decisionmaking. The report indicated that, in many instances, independent regulatory agencies quantify at least some of the costs (and, to a lesser extent, the benefits) created by the major rules they adopt and, in other instances, such agencies usually provide at least qualitative descriptions of the associated benefits and costs. The report also discusses several factors that the agencies said affected their ability to quantify and monetize regulatory costs and benefits. For example, several agencies mentioned the Paperwork Reduction Act approval process as inhibiting their ability to gather the data needed to prepare regulatory analyses in a timely fashion.[15]

This recommendation encourages agencies to voluntarily adopt certain practices that some independent regulatory agencies (and other agencies) have developed when conducting

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[13] CFTC is required to "consider the costs and benefits" of the agency's action before issuing certain rules and orders. 7 U.S.C. § 19(a). The SEC is required, when it is engaged in rulemaking under certain statutory provisions, to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b). Interpretation of these provisions has been a matter of debate.

[14] *See* CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 60–107 (Mar. 29, 2013), *available at* http://acus.gov/sites/default/files/documents/Copeland%20CBA%20Report%203-29-13.pdf.

[15] *Cf.* Administrative Conference of the United States, Recommendation 2012-4, *Paperwork Reduction Act,* ¶ 3, 77 Fed. Reg. 47,800, 47,808 (Aug. 10, 2012) (recommending that agencies "use all available processes for OMB approval for information gathering").

regulatory analyses for major rules. The Conference recognizes that increasing the attention paid to the economic impact of proposed and final rules might well require substantial use of limited agency resources. This might require independent agencies to make significant tradeoffs among competing priorities and may delay the rulemaking process. Nevertheless, some independent regulatory agencies are already subject to benefit-cost and other types of regulatory analysis requirements, and others have voluntarily conducted such analyses, and the Conference therefore wishes to highlight innovative practices undertaken by these agencies.[16]

The recommendation, first, identifies various policies and practices used in several of the independent regulatory agencies and offers a series of proposals to encourage their use in other agencies. For example, it recommends that each independent regulatory agency develop written guidance on the preparation of benefit-cost and other types of regulatory analyses. Such guidance should be designed to help ensure that any regulatory analysis the agency undertakes is soundly developed, transparent, consistently conducted, and contributes to agency compliance with applicable statutes and other rulemaking requirements. Second, the recommendation highlights a series of analytical practices that OMB Circular A-4 recommends to Cabinet departments and other executive agencies for their major rules, and the recommendation encourages independent regulatory agencies to consider whether those practices may be useful in the development of their major rules. For example, it recommends that agencies' analyses be as transparent and reproducible as practicable, subject to the limitations of law and applicable policies (including preventing the disclosure of proprietary information or trade secrets, or other confidential information). The recommendation does not seek to establish a one-size-fits-all approach to regulatory analysis, and recognizes that each agency must tailor the analyses it conducts to accord with relevant statutory requirements, its own regulatory priorities, and the potential impact of the analysis on regulatory decisionmaking to ensure proper use of limited agency resources. Finally, the recommendation proposes that, to the extent Congress decides to impose or endorse new regulatory analysis requirements on

[16] *See, e.g.*, Copeland, *supra* note 14, at 99 (describing the Federal Communications Commission's increased usage of benefit-cost analysis in light of EO 13,579).

independent regulatory agencies, Congress should consider giving those agencies the discretion to scale the analyses to the significance of the rules, and should consider the agency resources needed to satisfy such requirements.[17]

RECOMMENDATION

Encouraging the Diffusion of Certain Policies and Practices

1. Each independent regulatory agency should develop and keep up to date written guidance regarding the preparation of benefit-cost and other types of regulatory analyses. That guidance should be tailored to the agency's particular statutory and regulatory environment. To accomplish this goal, independent regulatory agencies may choose whether or not to adopt or adapt the regulatory analysis practices described in OMB Circular A-4 or any successor government-wide guidance.

2. If an independent regulatory agency prepares a regulatory analysis for a proposed or final rule, the analysis should be developed as early in the rulemaking process as reasonably practical. Once prepared, the analysis may need to be updated as the agency becomes aware of new information that may affect the rulemaking, or if changes are made to the substance of the rule.

3. If an independent regulatory agency determines that additional analytical expertise or experience may be helpful to prepare a regulatory analysis (e.g., determining how certain costs or benefits could be quantified or monetized), it should, to the extent appropriate, consult with other governmental entities with expertise in this area.

[17] Between January 2007 and December 2012, federal agencies published 19,246 final rules, of which 485 were considered "major" rules. See Copeland, *supra* note 14, at Table 1. Expanding the rules on which regulatory analysis is required from "economically significant" or "major" rules to rules considered "significant" under EO 12,866 would likely quintuple the number of analyses required. See http://www.reginfo.gov/public/do /eoCountsSearch for data on this issue.

4. Consistent with applicable laws and the procedures and flexibilities permitted in the Paperwork Reduction Act, independent regulatory agencies and OIRA should facilitate the timely collection of information necessary to develop the agencies' regulatory analyses.

Recommended Practices for Major Rules

5. Independent regulatory agencies should consider the appropriateness of the analytical guidance provided in OMB Circular A-4 when developing regulatory analyses for major rules. They should consider structuring their analyses of those rules in terms of three general principles: (a) identify the need for the regulation; (b) examine plausible alternative regulatory approaches; and (c) estimate, to the extent possible, the benefits and costs of the proposed rule and the primary alternatives.

6. Consistent with applicable laws and agency resources, independent regulatory agencies should consider including in their regulatory analyses assessments of the impact of not only those actions that are within the agency's statutory discretion but also of those actions that are statutorily mandated. Agencies should consider showing the effects of both types of actions in order to improve regulatory transparency.

7. Subject to the limitations of law and applicable policies, independent regulatory agencies' regulatory analyses should be as transparent and reproducible as practicable. In particular, agencies should consider disclosing how the analyses were conducted, posting the analyses on their websites and other appropriate online fora, and summarizing the methods and results in the preambles of the notice of proposed rulemaking and the final rule.

8. Independent regulatory agencies should consider including in the preambles of the notice of proposed rulemaking and the final rule a summary statement or table concisely showing the agencies' overall estimates of the expected total benefits, costs, and transfer payments of regulatory actions and the primary alternatives, including any benefits or costs that could not be quantified or monetized.

Recommendations to Congress

9. If Congress decides to establish or endorse new requirements that independent regulatory agencies prepare benefit-cost analyses of their proposed or final rules, it should recognize that agencies need (a) the flexibility to scale the analyses to the significance of the rules and (b) the resources to satisfy such requirements.

Administrative Conference Recommendation 2014-5

Retrospective Review of Agency Rules

Adopted December 4, 2014

Executive Summary

The following recommendation is intended to provide a framework for cultivating a "culture of retrospective review" within regulatory agencies. It urges agencies to remain mindful of their existing body of regulations and the ever-present possibility that those regulations may need to be modified, strengthened, or eliminated in order to achieve statutory goals while minimizing regulatory burdens. It encourages agencies to make a plan for reassessing existing regulations and to design new regulations in a way that will make later retrospective review easier and more effective. It recognizes that input from stakeholders is a valuable resource that can facilitate and improve retrospective review. Finally, it urges agency officials to coordinate with other agencies and the Office of Management and Budget to promote coherence in shared regulatory space.

Preamble

Traditionally, federal regulatory policymaking has been a forward-looking enterprise: Congress delegates power to administrative agencies to respond to new challenges, and agencies devise rules designed to address those challenges. Over time, however, regulations may become outdated, and the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies' enforcement efforts and impose a substantial burden on regulated entities. As a consequence, Presidents since Jimmy Carter have periodically undertaken a program of "retrospective review," urging agencies to reassess regulations currently on the books and eliminate, modify, or strengthen those regulations that

have become outmoded in light of changed circumstances.[1] Agencies have also long been subject to more limited regulatory lookback requirements, including the Regulatory Flexibility Act, which requires agencies to review regulations having "a significant economic impact upon a substantial number of small entities"[2] within ten years of issuance, and program-specific retrospective review requirements erected by statute.[3]

Though historical retrospective review efforts have resulted in some notable successes,[4] especially in those instances in which high-level leadership in the executive branch and individual agencies has strongly supported these endeavors,[5] retrospective review of regulations has not been held to the same standard as prospective review, and the various statutory lookback requirements apply only to subsets of regulations. President Barack Obama has sought to build on these initiatives in several executive orders. On January 18, 2011, he issued Executive Order (EO) 13,563,[6] which directed executive branch agencies regularly to reassess existing rules to identify opportunities for eliminating or altering regulations that have become "outmoded, ineffective, insufficient, or excessively burdensome."[7] Shortly thereafter, he issued another order encouraging independent regulatory agencies to pursue similar

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[1] Joseph E. Aldy, *Learning from Experience: An Assessment of Retrospective Reviews of Agency Rules & the Evidence for Improving the Design & Implementation of Regulatory Policy* 4 (Nov. 17, 2014), *available at* http://www.acus.gov/report/retrospective-review-report.

[2] 5 U.S.C. § 610.

[3] Aldy, *supra* note 1, at 4.

[4] *See generally* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985).

[5] *See generally* John Kamensky, National Partnership for Reinventing Government: A Brief History (Jan. 1999), *available at* http://govinfo.library.unt.edu/npr/whoweare/history2.html (highlighting the successes of the Clinton Administration's National Performance Review and emphasizing the importance of high-level executive branch and agency leadership).

[6] 76 Fed. Reg. 3821 (Jan. 21, 2011).

[7] *Id.* § 6.

regulatory lookback efforts (EO 13,579[8]) and yet another order providing a more detailed framework for retrospective review in executive branch agencies (EO 13,610[9]).

The Administrative Conference has long endorsed agencies' efforts to reevaluate and update existing regulations. In 1995, the Conference issued a recommendation stating that "[a]ll agencies (executive branch or 'independent') should develop processes for systematic review of existing regulations to determine whether such regulations should be retained, modified or revoked" and offering general guidance by which agencies might conduct that analysis.[10] In addition, in early 2011, shortly after the promulgation of EO 13,563, the Conference hosted a workshop designed to highlight best practices for achieving the EO's goals.[11]

Administrative law scholars and other experts have debated the effectiveness of existing retrospective review efforts. EO 13,610 touts the elimination of "billions of dollars in regulatory costs and tens of millions of hours in annual paperwork burdens" achieved under the EO 13,563 framework and promises additional savings.[12] Cass Sunstein, the former Administrator of the Office of Information and Regulatory Affairs (OIRA), has suggested that these initiatives have yielded billions of dollars in savings.[13] Nevertheless, many criticize the existing system of

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[8] 76 Fed. Reg. 41,587 (July 14, 2011).

[9] 77 Fed. Reg. 28,469 (May 14, 2012).

[10] Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[11] Administrative Conference of the United States, Retrospective Review of Existing Regulations, Workshop Summary (Mar. 10, 2011), http://www.acus.gov/fact-sheet/retrospective-review-workshop-summary.

[12] Exec. Order No. 13,610, § 1, 77 Fed. Reg. 28,469, 28,469 (May 14, 2012).

[13] CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 180–84 (2013) (highlighting successful retrospective review efforts, including a Department of Health and Human Services reform to reporting requirements saving $5 billion over five years and a Department of Labor rule to harmonize hazard warnings with the prevailing international practice saving $2.5 billion over five years); *see also* Memorandum from President Ronald Reagan on the Review of Federal Regulatory Programs (Dec. 15, 1986) (describing the results of the Presidential Task Force on Regulatory Relief, which included "substantial changes to over 100 existing burdensome rules" that "sav[ed] businesses and consumers billions of dollars each year").

regulatory lookback as inadequate, especially insofar as it relies upon individual agencies to reassess their own regulations and provides few incentives for ensuring robust analysis of existing rules.[14] From the opposite perspective, many criticize current retrospective review efforts as inherently deregulatory, possessing a strong bias in favor of eliminating or weakening regulations rather than strengthening regulations that may be insufficiently protective.[15]

Ultimately, a system of "self-review," in which individual agencies are responsible for evaluating their own regulations and, to the extent permitted by law, modifying, strengthening, or eliminating those that are deemed to be outdated, can only succeed if agencies promote a "culture of retrospective review."[16] Without a high-level commitment, any regulatory lookback initiative runs the risk of devolving into an exercise of pro forma compliance. This might not be an inevitable outcome, however. If the relevant agency officials, including both those conducting retrospective reviews and those drafting new rules, come to view regulation as an ongoing process whereby agency officials recognize the uncertainty inherent in the policymaking exercise and continually reexamine their regulations in light of new information and evolving circumstances, a durable commitment can emerge.[17] Regulatory review should not only be a backward-looking exercise; rather, it should be present from the beginning as part of an on-going culture of evaluation and iterative improvement. Planning for reevaluation and regulatory improvement (including defining how success will be measured and how the data necessary for this measurement will be collected) should be considered an integral part of the

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[14] *See, e.g.*, Reeve T. Bull, *Building a Framework for Governance: Retrospective Review & Rulemaking Petitions*, __ ADMIN. L. REV. __ (forthcoming 2015); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57A, 60A (2013); Michael Mandel & Diana G. Carew, Progressive Policy Institute Policy Memo, *Regulatory Improvement Commission: A Politically Viable Approach to U.S. Regulatory Reform* 13 (May 2013).

[15] *See, e.g.*, Michael A. Livermore & Jason A. Schwarz, *Unbalanced Retrospective Regulatory Review*, PENN PROGRAM ON REGULATION REGBLOG, July 12, 2012, http://www.regblog.org/2012/07/12-livermore-schwartz-review.html; Rena Steinzor, *The Real "Tsunami" in Federal Regulatory Policy*, CPRBLOG, May 22, 2014, http://www.progressivereform.org/CPRBlog.cfm?idBlog=2480725C-9CC8-717D-E8DE6C4C4A5FF6EB.

[16] Aldy, *supra* note 1, at 47–48; Coglianese, *supra* note 14, at 66A.

[17] Aldy, *supra* note 1, at 47–48.

development process for appropriate rules. This culture of evaluation and improvement is already part of many government programs, but not yet of most regulatory programs.

This recommendation aims to help agencies create such a culture of retrospective review. To promote robust retrospective analysis, agency officials must see it as critical to advancing their missions. To obtain this "buy-in," these officials must have a framework for performing the required analysis and possess adequate resources for conducting the necessary reviews (such that doing so is wholly integrated into agencies' other responsibilities rather than serving to displace those existing responsibilities). Given the costs of performing robust retrospective analysis, it is critical that agencies have adequate resources such that conducting retrospective review does not detract from other aspects of their regulatory missions. Thus, the recommendation sets forth considerations relevant both to identifying regulations that are strong candidates for review and for conducting retrospective analysis.[18] In addition, the recommendation encourages agencies to integrate retrospective analysis into their policymaking framework more generally, urging them not only to reevaluate existing regulations but also to design new regulations with an eye towards later reexamination and to consider the cumulative regulatory burden. In doing so, agencies should identify data collection needs and consider other regulatory drafting strategies that can help them later determine whether the regulation achieved its purpose.[19] Finally, the recommendation identifies opportunities for conserving agency resources by taking advantage of internal and

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[18] In 2011, the Conference recommended that agencies periodically review regulations that have incorporated by reference material published elsewhere in order to ensure that they are updated as appropriate and contain complete and accurate access information. Administrative Conference of the United States, Recommendation 2011-5, *Incorporation by Reference*, ¶¶ 6–10, 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012).

[19] Some scholars propose the use of experimental methods and data-driven evaluation techniques in order to identify the actual impacts caused by regulations and determine whether they are achieving their intended outcomes. John DiNardo & David S. Lee, *Program Evaluation & Research Designs*, *in* 4A HANDBOOK OF LABOR ECONOMICS 463–536 (2011); *see also generally* JOSEPH S. WHOLEY, HARRY P. HATRY, & KATHRYN E. NEWCOMER, HANDBOOK OF PRACTICAL PROGRAM EVALUATION (3d ed. 2010). This might include, among other things, taking the opportunity of pilot projects and regulatory phase-ins to test different regulatory approaches. Some scholars also propose the use of alternative regulatory mechanisms and other innovative approaches designed to lessen regulatory burdens while ensuring appropriate levels of regulatory protection.

external sources of information and expertise. In many instances, stakeholders may be able to furnish information to which agency officials otherwise lack access.[20] In other cases, overseas regulators may have confronted similar regulatory problems, and incorporating these approaches would have the double benefit of avoiding duplication of effort and providing opportunities for eliminating unnecessary regulatory divergences.[21] Further, the information generated from retrospective review has the potential to conserve resources during future regulatory development of similar rules by informing ex ante regulatory analysis, which in turn improves the quality of new regulations.[22]

Though the recommendation identifies certain common principles and opportunities for promoting robust retrospective analysis, it accepts the fact that each agency must tailor its regulatory lookback procedures to its statutory mandates, the nature of its regulatory mission, its competing priorities, and its current budgetary resources. In short, retrospective review is not a "one-size-fits-all" enterprise. In addition, as optimal regulatory approaches may evolve over time, so too may retrospective review procedures. Therefore, the recommendation avoids an overly rigid framework. Rather, it identifies considerations and best practices that, over time, should help foster a regulatory approach that integrates retrospective analysis as a critical element of agency decisionmaking and that accounts for the uncertainty inherent in regulatory policymaking at all stages of the process. The overall goal is to move away from a model of retrospective analysis as an episodic, top-down reporting and compliance obligation to one

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[20] Aldy, *supra* note 1, at 25–26, 70–71; *see generally* Bull, *supra* note 14 (proposing a system whereby private entities would use petitions for rulemaking to urge agencies to adopt less burdensome alternatives to existing regulations while preserving existing levels of regulatory protection). Agencies should nevertheless recognize that private and non-governmental entities' interests may not align with public interests and that established firms may actually defend regulations that create barriers to entry for newer, smaller competitors. SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER 18–19 (2d ed. 2012) (describing the so-called "bootleggers and Baptists" phenomenon, whereby businesses that benefit from market interventions may make common cause with civil society groups that advocate such policies for other reasons).

[21] Exec. Order No. 13,609, § 1, 77 Fed. Reg. 26,413, 26,413 (May 4, 2012); Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, ¶ 4, 77 Fed. Reg. 2259, 2260 (Jan. 17, 2012).

[22] PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 57 (2014).

where agencies internalize a culture of retrospective review as part of their general regulatory mission.

RECOMMENDATION

Value of Retrospective Review

1. The Conference endorses the objectives of Executive Orders 13,563, 13,579, and 13,610 with respect to retrospective review of existing regulations. Agencies should work with the Office of Management and Budget (OMB), as appropriate, to develop retrospective review into a robust feature of the regulatory system.

Integrating Retrospective Review into New Regulations

2. When formulating new regulations, agencies should, where appropriate, given available resources, priorities, authorizing statutes, nature of the regulation, and impact of the regulation, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. The rigor of analysis should be tailored to the rule being reviewed. The agencies should consider including the following in the framework:

(a) The methodology by which they intend to evaluate the efficacy of and the impacts caused by the regulation, including data-driven experimental or quasi-experimental designs where appropriate, taking into account the burdens to the public in supplying relevant data to agencies.

(b) A clear statement of the rule's intended regulatory results with some measurable outcome(s) and a plan for gathering the data needed to measure the desired outcome(s). To the extent feasible, objectives should be outcome-based rather than output-based. Objectives may include measures of both benefits and costs (or cost-effectiveness), as appropriate.

(c) Key assumptions underlying any regulatory impact analysis being performed on the regulation. This should include a description of the level of uncertainty associated with projected regulatory costs and benefits, consistent with OMB Circular A-4.

(d) A target time frame or frequency with which they plan to reassess the proposed regulation.

(e) A discussion of how the public and other governmental agencies (federal, state, tribal, and local) will be involved in the review.

Agencies that have systematic review plans available on the internet that set forth the process and a schedule for their review of existing rules may address the recommendations in subparagraphs (a)–(e), as appropriate, by reference to their plans.

3. When reviewing new regulations, the Office of Information and Regulatory Affairs (OIRA) should facilitate planning for subsequent retrospective review to the extent appropriate. Agencies should consider including a section in the preamble of their proposed and final rules that accounts separately for paperwork burdens associated with the collection of data to facilitate retrospective review and should note that data gaps can impede subsequent retrospective review (though the paperwork burden would still be included in the total cost of the instant rule).

4. Where it is legally permissible and appropriate, agencies should consider designing their regulations in ways that allow alternative approaches in the rule that could help the agency in a subsequent review of the rule to determine whether there are more effective approaches to implementing its regulatory objective. For example, agencies could allow for experimentation, innovation, competition, and experiential learning (calling upon the insights of internal statistical offices, as well as policy and program evaluation offices, in order to design plans for reassessing regulations, to the extent they have such resources). As recommended by OMB Circular A-4, agencies should consider allowing states and localities greater flexibility to tailor regulatory programs to their specific needs and circumstances and, in so doing, to serve

as a natural experiment to be evaluated by subsequent retrospective review. Statutes that authorize shared responsibility among different levels of government may be amenable to such flexibility.

Prioritizing Regulations for Retrospective Analysis

5. In light of resource constraints and competing priorities, agencies should adopt and publicize a framework for prioritizing rules for retrospective analysis. Agency frameworks should be transparent and enable the public to understand why the agency prioritized certain rules for review in light of the articulated selection criteria. Though considerations will vary from agency to agency and program to program, the following factors can help identify strong candidates for retrospective review that could inform regulatory revision:

(a) Likelihood of improving attainment of statutory objective;

(b) Likelihood of increasing net benefits and magnitude of those potential benefits;

(c) Uncertainty about the accuracy of initial estimates of regulatory costs and benefits;

(d) Changes in the statutory framework under which the regulation was issued;

(e) Cumulative regulatory burden created by the regulation at issue and related regulations (including those issued by other agencies);

(f) Changes in underlying market or economic conditions, technological advances, evolving social norms, public risk tolerance, and/or standards that have been incorporated by reference;

(g) Internal agency administrative burden associated with the regulation;

(h) Comments, petitions, complaints, or suggestions received from stakeholder groups and members of the public;

(i) Differences between U.S. regulatory approaches and those of key international trading partners;

(j) Complexity of the rule (as demonstrated by poor compliance rates, amount of guidance issued, remands from the courts, or other factors); and

(k) Different treatment of similarly situated persons or entities (including both regulated parties and regulatory beneficiaries).

To the extent applicable, agencies should consider both the initial estimates of regulatory costs and benefits, and any additional evidence suggesting that those estimates are no longer accurate.

6. Though agencies will likely focus their retrospective analysis resources primarily on important regulations as identified by the foregoing factors, they should also take advantage of simple opportunities to improve regulations when the changes are relatively minor (e.g., allowing electronic filing of forms in lieu of traditional paper filing).

Performing Retrospective Analysis

7. When conducting retrospective analysis of existing regulations, agencies should consider whether the regulations are accomplishing their intended purpose or whether they might, to the extent permitted by law, be modified, strengthened, or eliminated in order to achieve statutory goals more faithfully, minimize compliance burdens on regulated entities, or more effectively confer regulatory benefits. The level of rigor of retrospective analysis will depend on a variety of factors and should be tailored to the circumstances. As appropriate and to the extent resources allow, agencies should employ statistical tools to identify the impacts caused by regulations, including their efficacy, benefits, and costs and should also consider the various factors articulated in recommendation 5 in determining how regulations might be modified to achieve their intended purpose more effectively.

8. Agencies should consider assigning the primary responsibility for conducting retrospective review to a set of officials other than those responsible for producing or enforcing

the regulation, if adequate resources are available. Reviewing officials should coordinate and collaborate with rule producers and enforcers.

9. Agencies should periodically evaluate the results of their retrospective reviews and determine whether they are identifying common problems with the effectiveness of their rule development and drafting practices that should be addressed.

Inter-Agency Coordination

10. Agencies should coordinate their retrospective reviews with other agencies that have issued related regulations in order to promote a coherent regulatory scheme that maximizes net benefits. Agencies and OMB should also consider creating a high-level organization responsible for promoting coordination between agencies in their retrospective review efforts (or assigning this function to an existing entity, such as the Regulatory Working Group).

11. In conducting retrospective review, agencies should consider regulations adopted by key trading partners and examine the possibility of either harmonizing regulatory approaches or recognizing foreign regulations as equivalent to their U.S. counterparts when doing so would advance the agency mission or remove an unnecessary regulatory difference without undermining that mission.

12. OIRA should consider formulating a guidance document that highlights any considerations common to agency retrospective analyses generally.

Promoting Outside Input

13. Regulated parties, non-governmental organizations, academics, and other outside entities or individuals may possess valuable information concerning both the impact of individual regulations and the cumulative impact of a body of regulations issued by multiple agencies to which individual agencies might not otherwise have access. Agencies should leverage outside expertise both in reassessing existing regulations and devising retrospective

review plans for new regulations. In so doing, agencies should be mindful of the potential applicability of the Paperwork Reduction Act, and agencies and OMB should utilize flexibilities within the Act and OMB's implementing regulations (e.g., a streamlined comment period for collections associated with proposed rules) where permissible and appropriate. Agencies should also consider using social media, as appropriate, to learn about actual experience under the relevant regulation(s).

14. Agencies should disclose relevant data concerning their retrospective analyses of existing regulations on "regulations.gov," their Open Government webpages, and/or other publicly available websites. In so doing, to the extent appropriate, agencies should organize the data in ways that allow private parties to recreate the agency's work and to run additional analyses concerning existing rules' effectiveness. Agencies should encourage private parties to submit information and analyses and should integrate relevant information into their retrospective reviews.

Ensuring Adequate Resources

15. Agencies and OMB should consider agencies' retrospective review needs and activities when developing and evaluating agency budget requests. To the extent that agencies require additional resources to conduct appropriately searching retrospective reviews, Congress should fund agencies as necessary.

Administrative Conference Recommendation 2017-6

Learning from Regulatory Experience

Adopted December 15, 2017

Making sound regulatory decisions demands information and analysis. Several Administrative Conference recommendations encourage agencies to gather data when making new rules and when reviewing existing rules.[1] These recommendations reinforce analytic demands imposed on agencies by legislation,[2] executive orders,[3] and judicial decisions.[4]

Agencies need information about the problems that new rules will address, such as the risks involved and their causes. But agencies also need information about potential solutions to these problems. What possible alternative rules or rule designs might help solve the problems? How effective are these alternatives likely to be in addressing the underlying problems? Are there constraints, barriers, or unanticipated consequences that arise in the use of these different

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[1] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28,364 (July 12, 1985); Admin. Conf. of the U.S., Recommendation 79-4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 44 Fed. Reg. 38,826 (June 8, 1979).

[2] *See, e.g.*, Data Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763A-153 (2001).

[3] *See, e.g.*, Exec. Order No. 12,866, § 5, 58 Fed. Reg. 51,735, 51,739 (Oct. 4, 1993) ("[T]o . . . improve the effectiveness of existing regulations . . . each . . . agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives."); Exec. Order No. 13,563, § 6, 58 Fed. Reg. 3821, 3822 (Jan. 21, 2011) (requiring agencies to "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"); Exec. Order No. 13,771, § 2, 82 Fed. Reg. 9339 (Feb. 3, 2017) (requiring the repeal of two existing regulations for each new regulation proposed, and leaving in place prior analytical requirements); Exec. Order No. 13,777, § 3, 82 Fed. Reg. 12,285, 12,286 (Mar. 1, 2017) (requiring the establishment of regulatory reform task forces that "shall evaluate existing regulations . . . and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law").

[4] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 52 (1983) (explaining that the agency must show that its action was the result of "reasoned decisionmaking" consistent with "the evidence before the agency").

alternatives? In terms of understanding possible alternatives and how well they might work in practice, agencies benefit from having information from experience with different solutions. Learning from experience is the focus of this recommendation.

Learning from Regulatory Experience

No uniform or tidy formula exists as to how agencies should generate, gather, and analyze the data necessary to support sound regulatory decisions. A variety of well-accepted and widely-used methods exist from which agencies may choose, with the appropriate choices often varying agency by agency and even from situation to situation. Practical considerations such as resource and data availability will affect the choices agencies make about the methods of learning used to support regulatory decisionmaking.[5] Still, it is possible to identify some of the main methods for learning that agencies should consider using at different stages of the rulemaking lifecycle. These methods, which are not necessarily mutually exclusive, can be used before or after a rule is adopted, and they may be considered on occasion as part of the final rule itself, which might be structured to facilitate future learning by agency officials.

Variation is the key to agency learning. In this context, "variation" can refer to differences among jurisdictions[6] or across time,[7] with some jurisdictions or time periods having in place a version of a rule and others having in place a different version of the rule (or no applicable rule at all). It can also refer to differences among regulated entities or people within

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[5] A general discussion of factors to consider in choosing methods and measurements in regulatory learning can be found in Cary Coglianese, *Measuring Regulatory Excellence*, *in* ACHIEVING REGULATORY EXCELLENCE 291–305 (Cary Coglianese ed., 2017) [hereinafter Coglianese, *Measuring Regulatory Excellence*].

[6] Cross-sectional analysis means analysis of data collected across at least two groups or jurisdictions, with one that is subject to the intervention (such as regulation) and one that is not. *See* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1117–19.

[7] Longitudinal analysis is a research design that involves repeated observations of the same subjects over a period, where variation in the intervention occurs over time (i.e., data before and after an intervention is introduced). *See* Cary Coglianese, *Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy*, Organization for Econ. Co-Operation and Dev. [OECD] Expert Paper No. 1 39 (Aug. 2012) [hereinafter Coglianese, *Measuring Regulatory Performance*].

the same jurisdiction, with some entities or people subject to a version of a rule and others subject to a different version of the rule (or no applicable rule at all).

An agency can learn from all of these kinds of variation. For example, a regulation that goes into effect in 2017 leaves the agency with two distinct time periods to compare: the years before 2017, and 2017 and beyond. A rule that applies in jurisdictions X and Y but not in jurisdictions A and B leaves the agency with the ability to compare outcomes in X and Y with those in A and B, assuming the jurisdictions are comparable or that differences can be statistically controlled. The agency can then learn whether outcomes are improved in those time periods or jurisdictions with the regulatory obligation. However, agencies must be careful not to assume automatically that any differences in outcomes that they observe have been caused by the intervention of the regulation. Other factors that correlate with the observed outcomes might also vary across the same time periods or jurisdictions.

Using Observational or Randomized Methods to Learn from Experience

To learn from experience, agencies should seek methods that allow them to draw valid inferences about whether a particular regulatory intervention causes (or will cause) improvements in the desired outcomes. Concern about the validity of such causal inferences generally takes two forms. The first of these—external validity—refers to the extent to which the inferences from a study situated within a particular time period or setting can apply to other time periods or settings. In other words, an agency should consider to what extent the results of a study focused on entities or individuals in one period or setting are generalizable to entities or individuals in other times or settings. The second type of validity—internal validity—refers to the extent to which the outcomes observed in a study can be said to have been caused by the intervention rather than by potential confounders.[8] In other words, an agency should consider whether what might appear to be a relationship between a regulation and changes in outcomes

[8] In this context, "confounders" refer to changes in outcomes that may appear to have been caused by the regulation but are actually caused by other factors. *See* Coglianese, *Measuring Regulatory Performance*, *supra* note 7 and accompanying text.

truly derives from the regulation. For example, if a study shows that accidents from a particular industrial process have declined following the adoption of a regulation intended to reduce those accidents, concern about internal validity would lead agency officials to consider the possibility that the observed decline might have arisen from market or technological factors that led to changes in the relevant industrial processes around the same time as the regulation but which came about for reasons entirely unrelated to the regulation. An agency may wish to learn whether the observed decline came from the regulation or from other factors so as to know whether to redesign the regulation if further improvements are warranted.

To isolate the true effects of a regulation on relevant outcomes, such as risk reduction, agencies can use randomized approaches or observational approaches. Both of these approaches have advantages and disadvantages, and choosing between them will depend on a variety of contextual factors.

Randomized approaches promise to generate results with a high level of internal validity because, by making a random assignment of individuals or entities subject to a regulatory intervention, any other factors that might lead to changes in the relevant outcomes should be distributed randomly between the group subject to the regulatory intervention and the comparison group. Of course, randomized methods can also have their limitations. There is always a question as to whether the results of a randomized experiment are externally valid. For example, a perfectly designed randomized experiment may indicate that exposure to an intervention generates particular outcomes in a laboratory setting but may not mean that those same outcomes will occur outside of the laboratory. In addition, the results of randomized methods may lack validity if individuals, knowing that their behaviors are part of a randomized experiment, behave differently from how they would otherwise act. Researchers try to limit this particular threat to validity by using double-blind, or even just single-blind, study designs.[9]

[9] "Blindness" in this context means subjects are not aware of whether they are in the treatment or comparison group. "Double blindness" means neither the subjects nor the researchers know which subjects received the treatment, and which received the placebo. *See* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 948–50 (2011).

However, it is possible that, in many regulatory contexts, regulated parties will know they are subject to a randomized study and may engage in strategic behavior that may skew the results of the study.

In addition to these methodological challenges, randomized study methods may present legal, policy, and ethical concerns. From a legal standpoint, subjecting similar parties to different rules may be thought to raise concerns under the Equal Protection Clause of the Constitution or the arbitrary-and-capricious standard of the Administrative Procedure Act.[10] Of course, an agency might present a legally valid argument that the rational basis, or non-arbitrary reason, for its action is to generate information necessary to make an informed decision.[11] From a policy standpoint, if some entities are subject to regulation and others are not, an agency may well risk artificially distorting a market, depending on what a rule requires or how the study is designed. From an ethical standpoint, if a rule specifically sets up an experiment with the idea that, after the experiment, the agency may change the rule, a concern may exist if some regulated entities will by then have invested heavily in capital-intensive equipment required by the rule. Another concern might be with varying levels of health or safety protection to different members of the public. In the absence of countervailing considerations, legal, policy, and ethical challenges such as these may mean that regulatory agencies should use randomized study methods only under limited circumstances.

If randomized study methods are either unavailable or inadvisable, agencies can use a broad range of opportunities to learn from observational studies. Sometimes these studies are called "natural experiments," as they seek to draw inferences based on variation that naturally arises over time or across settings in the absence of randomization. For this reason, observational studies lack some of the methodological advantages of randomization. Internal validity is generally a more present concern with observational studies, as other factors may confound a study's results. In other words, other factors may also vary naturally with the

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[10] *See* 5 U.S.C. § 706(2)(A).

[11] *See* Abramowicz et al., *supra* note 9, at 968.

intervention under study and affect the observed outcomes. An example of a potential confounding factor is when an intervention is accepted voluntarily; those individuals or entities who voluntarily choose to adopt a new practice may be different from the individuals or entities to whom a mandatory requirement would apply.

The possibility of such confounding factors should be accounted for when conducting observational studies and can be effectively addressed by using various methods that attempt to mimic statistically what occurs with randomization.[12] Assuming the potential threats to internal validity can be addressed, observational studies may in some circumstances lead to results with stronger external validity than randomization. As a general matter, observational studies will also not raise the same legal, policy, or ethical concerns as randomization. With observational studies, the agency is either exploiting natural variation that would have arisen from the rule anyway or allowing for learning from other existing variation, such as state-by-state variation.

Opportunities for Learning from Experience Throughout the Rulemaking Lifecycle

Agencies have opportunities to learn from experience throughout the rulemaking lifecycle. For example, one stage of this cycle occurs before a rule is adopted, as agencies are focused on a problem to be addressed and are considering potential regulatory solutions. Learning from experience at this early stage can help inform an agency of how a rule should be designed. Another stage of the cycle lies with the design of the rule itself. At this stage, as an agency writes a rule, it may design it in a way that can facilitate the type of variation needed to promote learning. Finally, yet another stage arises after the agency has promulgated the rule. At this stage, agencies can consider actions, such as waivers, that can facilitate learning from experience.

[12] Examples of such statistical methods include: difference-in-differences, propensity score matching, instrumental variables, and regression discontinuity. *See* Coglianese, *Measuring Regulatory Performance*, *supra* note 7, at 39–42.

Learning Before Adopting a Rule

Prior to adopting a rule, an agency should gather information using appropriate methods to help inform the regulatory action it plans to take. An agency may wish to consider randomized or observational methods.

Randomized Methods. Agencies can analyze existing peer-reviewed studies that incorporate a randomized design. They can also initiate or support new pilot programs that produce randomized study data. For example, if an agency were trying to determine whether a certain default rule related to saving for retirement should be required of all employers offering 401(k) plans, it might, if consistent with applicable law, seek the cooperation of some large employers to see whether they would assign randomly some of their employees to a company policy that requires them to opt into a retirement savings plan and other employees to a company policy that defaults employees into the plan but then allows them to opt out. Such action would be voluntary by the company but random (and effectively involuntary) by the individual. The agency might be able to learn better which default rule will yield greater savings and then use these results to inform a decision about a regulation that would apply to all companies.

Observational Methods. Agencies can also undertake observational studies prior to creating new rules. An agency might, for example, employ a cross-sectional research design by looking at variation in existing policies at the state level (or perhaps in other countries), taking to heart Justice Louis Brandeis's observation that "a . . . state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[13] In fact, Congress has, on numerous occasions, directed agencies to analyze state-by-state variation to help determine optimal policies.[14]

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[13] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[14] *See, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58, § 139, 119 Stat. 594, 647 (2005) ("[T]he Secretary . . . shall conduct a study of State and regional policies that promote cost-effective programs to reduce energy consumption (including energy efficiency programs) that are carried out by utilities that are subject to State regulation.").

Designing a Rule to Facilitate Learning

An agency can write a rule to facilitate future learning or to enable it later to take advantage of variation that stems naturally from the rule.[15] Again, an agency may wish to consider randomized or observational methods.

Randomized Methods. When appropriate, an agency might consider structuring a rule to allow for learning through a randomized method.[16] This could entail writing a rule in such a way that some entities or people that fall within the agency's regulatory scope are subject to one version of the rule and some are subject to another version of the rule or not subject to the rule at all. The agency's decision as to who falls within each category could be made on a random basis. For example, Michael Abramowicz, Ian Ayres, and Yair Listokin use as an example a test of speed limits in which the posted limits on different roads are randomly increased or decreased.[17] Drivers on these roads are informed of the regulatory intervention (i.e., the speed limit on that road) without necessarily knowing that they are participating in a randomized experiment. Although this example falls outside the realm of federal rulemaking, agencies at the federal level may have similar ways to structure the timing or application of a rule using randomization. Assuming any potential methodological, legal, ethical, and policy concerns about randomization can be addressed, there may be some circumstances in which randomization will be an appropriate way for an agency to generate variation that will facilitate learning from experience.

Observational Methods. For the reasons discussed above, agencies will generally find it more feasible to use observational approaches than randomized ones. In any rulemaking, there will be variation from observing the world before the rule went into effect and comparing it to the world after the rule has taken effect. Further, in the case of a rule that an agency has

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[15] These features can facilitate retrospective review. *See* Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114 (Dec. 17, 2014).

[16] *See generally* Abramowicz et al., *supra* note 9.

[17] *See id.* at 951.

rescinded, there will be variation in three conditions: the world before the rule went into effect; the world in which the rule was in effect; and the world after the rule was rescinded. Such variation can present rich opportunities for observational studies, especially when a satisfactory baseline or control group can be identified. Agencies may well decide, at the outset when promulgating a new rule, to commit to setting up a longitudinal study. In doing so, they would need to collect data from regulated parties before the rule goes into effect and then collect data once the rule has taken effect, keeping in mind potential confounders and using statistical techniques to control for them.[18]

Additionally, agencies may consider deliberately introducing or allowing for some non-random variation in response to a rule by allowing for flexibility by states in the implementation of the rule. For example, variation can occur if the agency sets a federal minimum standard and permits states to exceed that standard. Agencies then can commit to using the resulting state-by-state variation to compare firms separated by a very short distance in neighboring states that have adopted different rules. Using the statistical technique known as regression discontinuity, the agency may be able to approximate randomization (i.e., the "assignment" of firms to a state with one rule versus another would be effectively random).[19]

Learning After Promulgating a Rule

An agency can also use either randomized or observational methods to take advantage of variation once a rule has been put into place.

Randomized Methods. An agency might choose, only if appropriate, after taking into account all legal, ethical, practical, and fairness considerations, to vary the application of a rule on a randomized basis to learn from variation.[20]

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[18] *See* Admin. Conf. of the U.S., Recommendation 2014-5, ¶ 7, *Retrospective Review of Agency Rules*, 79 Fed. Reg. 75,114, 75,116–17 (Dec. 17, 2014).

[19] *See* Jonah B. Gelbach & Jonathan Klick, *Empirical Law and Economics*, *in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS (Francisco Parisi ed., 2017).

[20] In 2004, the Securities and Exchange Commission (SEC) varied the application of its "Uptick Rule." *See* Order Suspending the Operation of Short Sale Price Provisions for Designated Securities and Time Periods, Exchange Act

Observational Methods. In addition to varying the application of a rule on a randomized basis, agencies can achieve variation once the rule is in place by considering conditional waivers and exemptions. For example, if a regulated entity can present some evidence to suggest that it can meet the purpose of the regulation using an alternative approach, the agency might grant a waiver to that entity with the condition that the entity uses that alternative approach.[21] After granting a certain number of waivers, the agency could then test the effectiveness of its rule by comparing entities that have selected different approaches. The agency would likely find it necessary to use statistical techniques to control for potential confounders. Over time, these kinds of studies may provide the agency with retrospective information that justifies amending an existing rule. Fairness, legal, and ethical concerns might be minimized when using conditional waivers if the agency permits all regulated entities to seek a waiver based on presentation of evidence and the agency widely publicizes its waiver availability.[22]

Table 1 summarizes the main methods of learning discussed in the preceding sections.

Release No. 50,104, 69 Fed. Reg. 48,032 (Aug. 6, 2004). Market observers characterized the SEC's conclusion to be that the rule did not substantially increase market efficiency. The SEC rescinded the rule. *See* Zachary Gubler, Regulatory Experimentation 42 (Nov. 17, 2017) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/regulatory-experimentation-final-report.

[21] *See* Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. ___ (approved Dec. 15, 2017); *see also* Aaron Nielson, Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Non-Enforcement Practices 30 (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/regulatory-waivers-and-exemptions-final-report.

[22] *See* Admin. Conf. of the U.S., Recommendation 2017-7, *Regulatory Waivers and Exemptions*, 82 Fed. Reg. ___ (approved Dec. 15, 2017).

Table 1: Examples of Methods for Regulatory Learning

	Randomized	Observational
Learning before adopting a rule	• Randomized voluntary pilot programs • Studies that rely on randomization	• Pilot programs where intervention is not assigned randomly (such as with voluntary programs) • Analysis of regulatory approaches in different jurisdictions, including countries
Designing a rule to facilitate learning	• Randomized assignment of different regulatory obligations	• Rules that allow for state implementation and variation (e.g., cooperative federalism) • Analysis of temporal differences (i.e., "before and after" comparisons) • Creation of regulatory thresholds that will facilitate later comparisons of entities above/below a threshold
Learning after promulgating a rule	• Randomized application of rules in appropriate circumstances	• Granting of waivers or exemptions that allow for the adoption of alternative approaches that can be studied

Common Issues in Learning from Experience

As noted, each stage of the rulemaking lifecycle allows agencies to learn from variation. Agencies can learn from both randomized and observational methods, keeping in mind the virtues and challenges of each. Whichever method an agency chooses, at least two additional issues should be considered: data collection and public input.

Data Collection

Collecting data is essential. Only with information can agencies hope to learn from analyzing regulations. When collecting data, though, agencies must be mindful of the Paperwork Reduction Act (PRA), which can constrain their ability to send a survey instrument to ten or

more parties.[23] As part of agencies' data collection efforts, it may be helpful for agencies to work closely with the Office of Information and Regulatory Affairs to ensure proper use of available flexibility in accordance with the PRA and the Office of Management and Budget's implementing regulations.

Public Input

Best practices generally call for some opportunity for the public to learn about and comment on the design and results of studies an agency undertakes. For pre-rule learning, the notice-and-comment process provides the required minimum process by which agencies should engage the public, but there are other methods of public input that might be useful, even at the pre-rule stage, for public input beyond just notice and comment.[24] If an agency is planning to revise a rule, a subsequent notice-and-comment rulemaking will provide an additional opportunity for public input. If an initial rule provides for its expiration on a certain date, that may also help ensure that the public has the opportunity to offer input on a future notice-and-comment rulemaking to keep or modify the rule. Even rules not subject to notice-and-comment procedures can benefit from subsequent opportunities for public comment.[25]

But even in situations in which the agency does not undertake a new notice-and-comment rulemaking or otherwise leaves a rule "as is," the agency may benefit from outside input on the systematic learning effort it has undertaken, whether through a peer review process, advisory committees, public hearings or meetings, or just a supplemental solicitation of comments. The decision as to which approach to use to solicit public input will turn on numerous factors, including resource constraints.[26]

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[23] *See* 44 U.S.C. § 3502(3)(A)(i).

[24] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,039 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

[25] Admin. Conf. of the U.S., Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Nov. 8, 1995).

[26] *See* Gubler, *supra* note 20, at 54.

RECOMMENDATION

1. Agencies should seek opportunities to collect data to learn the most effective way to design their rules and analyze the effects of their rules. They can learn from experience at one or more stages of the rulemaking process, from pre-rule analysis to retrospective review. Before adopting a rule, agencies can learn from pilot projects, demonstrations, and flexibility among states or regulated entities. After promulgating a rule, agencies may, where legally permissible, use waivers and exemptions to learn. As agencies seek out such learning opportunities, they should give due regard for legal, ethical, practical, and fairness considerations.
2. When agencies analyze variation to learn more about the effectiveness of policy options, they should make every effort to collect data and conduct reliable analysis. Only where appropriate, agencies should consider creating variation through a randomized control trial.
3. To inform the learning process, agencies should consider soliciting public input at various points in the rulemaking lifecycle. This can include input on the design and results of any learning process. In addition to the public input required under 5 U.S.C. § 553(c), agencies should consider, as time and resources permit, the use of supplemental requests for public comment, peer review, advisory committee deliberation, or public hearings or meetings.
4. When gathering data, agencies and the Office of Management and Budget (OMB) should seek to use flexibilities within the Paperwork Reduction Act and OMB's implementing regulations (e.g., a streamlined comment period for collections associated with proposed rules) when permissible and appropriate.
5. Agencies, as appropriate, should seek legal authority from Congress to take advantage of this recommendation.