



# Institute for Policy Integrity

*new york university school of law*

August 1, 2011

VIA ELECTRONIC SUBMISSION

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Attention: Docket No. FR—5506—N—02

Subject: Reducing Regulatory Burden; Retrospective Review Plans Under E.O. 13,563, 76 Fed. Reg. 106 (June 2, 2011)

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

This comment assesses HUD's "Preliminary Plan for Retrospective Review of Regulatory Actions Under E.O. 13,563"<sup>2</sup> (the Plan) and offers recommendations for how the Plan can be improved to be more in line with the regulatory priorities outlined by the President, as well as administrative law principles and best practices.

HUD's retrospective review efforts should aim to enhance net regulatory benefits, whether that means eliminating, modifying, or even expanding an existing regulation. HUD should select rules for review if circumstances have changed or if there is updated data on costs and benefits; these criteria should be made explicit in the Plan and given controlling weight. Public input is critical to identifying such changes, but the sheer volume of comments from stakeholders should not be a factor in rule selection. Retrospective review is also an opportunity to evaluate areas of agency inaction, and the Plan should include a step on revisiting recent public petitions for rulemaking and other indicators of potential regulatory gaps.

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<sup>1</sup> Policy Integrity would also like to direct HUD's attention to our comments submitted during the agency's initial call for public input.

<sup>2</sup> U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT (May 16, 2011) [hereinafter HUD Plan].

These comments offer the following more specific recommendations for improving the Plan:

- The Plan currently articulates a list of criteria HUD will use in selecting and prioritizing rules for retrospective review, however the list provided is admittedly “not exhaustive, but [rather] provides examples of the types of factors that HUD will consider in determining whether a particular regulation merits retrospective review.”<sup>3</sup> This open-endedness is problematic. A list of specific criteria should be established and applicable Department-wide.
- The two most important criteria should be whether enough time has passed to allow for meaningful evaluation of how well a rule is performing, and whether changed circumstances warrant the reexamination of a rule. Neither criterion is emphasized in the aforementioned list of “example factors.”
- The Plan’s language and content suggest a deregulatory focus, targeting areas where regulatory burdens and redundancies can be reduced. A more balanced framework would focus on maximizing net benefits, not merely reducing administrative costs. In addition to streamlining paperwork requirements, retrospective review may, for instance, call for new areas to be regulated or for the expansion of existing services.
- The Plan should include a discussion of how HUD will use retrospective reviews to improve the quality of future prospective impact analyses. Properly conceived, retrospective reviews will be used to verify the accuracy of initial regulatory impact analyses and reveal any tendencies toward the overestimation or underestimation of costs and benefits.
- The Plan is essentially silent on the procedures and methodologies that will be used in conducting retrospective reviews. The final Plan should answer procedural issues, such as who will be responsible for conducting reviews within each sub-agency; it should establish guidelines to ensure their work is transparent, independent, and methodologically rigorous. To this end, more elaboration on the substantive tools that will be used—including cost-benefit and risk tradeoff analysis—is warranted.

#### **HUD’s Factors for Rule Selection, Prioritization, and Evaluation Should Focus on Net Benefits**

HUD names various factors that it will probably consider in prioritizing rules for retrospective reviews. Reserving room to apply evaluative criteria “on a case-by-case basis,” the Department lists the following “examples of the types of factors” it will use: (1) whether and how often a regulation has been identified by the public as deserving review; (2) widely-used regulations; (3) the “complexity and scope” of a regulation; and (4) regulations that are often the subject of stakeholder waiver requests.<sup>4</sup> Elsewhere, the Plan notes that whether a regulation has “been in effect for a sufficient amount of time” will also be considered.<sup>5</sup>

While all of these factors are legitimate and relevant, none are set out as required criteria in selecting rules for retrospective review. In fact, the Department expressly leaves open the possibility that all or none of the examples given will be utilized, depending on “case-by-case” assessments.<sup>6</sup> Nor are the example factors organized in a manner that would suggest a hierarchy or blueprint for invoking them during the review process. Greater specificity about which criteria are mandatory or carry greater weight might better direct analysts’ attention, conserve agency resources, ensure consistency and quality of reviews, and clarify for the public the agency’s basis

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<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 5.

for various decisions. Moreover, although all of the listed criteria share the overarching goal of enhancing net regulatory benefits, this connection should be articulated more clearly.

Going forward, a revised Plan should set forth a clear list of criteria for prioritizing and systematizing retrospective reviews. Specific criteria should be applicable Department-wide, while others may be left to case-by-case determinations.

#### *Factors for Rule Selection Should Concentrate on Changed Circumstances and Updated Data*

In the area of rule selection, the goal of enhancing net benefits suggests two appropriate contexts for conducting retrospective review. First, rules should be selected for review if changed circumstances indicate a rule no longer functions efficiently or effectively. New technology may drastically reduce compliance costs, indicating that a stronger rule might better deliver net social benefits. Or new economic circumstances may have raised compliance costs, perhaps pointing to the need for more flexibility to restore efficiency. Or new legislation may render a rule obsolete or require its modification.

Second, new data on the costs and benefits of rules may raise the opportunity for retrospective review. If the original analysis underestimated the costs, the rule may need to be restructured to ensure that benefits once again justify costs; if the original analysis underestimated the benefits, the rule may not be fully capturing the potential for effective performance, and a stronger rule could be justified. When enough time has passed, this type of reevaluation based on new data is possible.

In general, the Plan should prioritize those rules that pose the greatest opportunity to increase net benefits, rather than those that appear to be easiest to review. More specifically, HUD should clearly list two primary factors for rule selection: whether circumstances have changed, and whether there is updated data on costs and benefits. Articulating these controlling criteria will also help interested parties anticipate those regulations HUD is likely to review, which will improve the quality of public comments submitted.

The Plan's initial list of candidates for retrospective review offers a short explanation of the basis for the selection of each rule. Some selections seem to have been motivated by factors well-aligned with the main goal of retrospective review. For instance, the Federal Housing Administration's rule concerning requests for alternative maximum mortgages appears well justified in light of advancements in FHA's capability to establish appropriate mortgage amounts.<sup>7</sup> However, several rules were chosen because they promise to "remove restrictions" or "remove requirements" or "provide flexibility" or "streamline" regulations. And yet scant mention is made of the information on which such conclusions were drawn and, equally important, whether relevant tradeoffs were duly analyzed. Thus the justifications appear predetermined.

In revising the Plan, HUD should indicate the scope of its initial inquiry into existing rules and specify what criteria were used in selecting these particular ones for the first round of retrospective review.

#### *Factors Should Promote and Systematize Review of Agency Inaction*

The retrospective review process offers agencies a valuable chance to assess areas of agency inaction. Inaction has been historically overlooked by the existing system of regulatory impact analysis,<sup>8</sup> which suggests that there may be significant missed opportunities for cost-effective regulation that maximizes social benefits. The Plan does not address this issue at all. HUD should promote reviews of inaction in a systematic way by incorporating them into the retrospective

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<sup>7</sup> *Id.*, Appendix at 3.

<sup>8</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1271-80 (2006).

review process. One option for doing this is incorporating into the review protocol a specific step for looking at pending and recently denied public petitions, or other indicators of regulatory gaps, to see whether changed circumstances or updated data may warrant a new rule.

*Factors for Rule Prioritization Can Conserve Agency Resources and Should Move Beyond Paperwork*

Based on which rules have been selected for the initial round of review, it seems HUD is prioritizing reviews of inefficient paperwork or other reporting burdens. Streamlining bureaucratic requirements and harnessing the latest technologies to reduce compliance costs are worthwhile goals, and HUD should pursue such changes. However, the appeal of these low-hanging fruit should not monopolize the agency's attention or distract it from other opportunities to use retrospective review to enhance net benefits. Opportunities to eliminate redundancies or upgrade technology should only be prioritized for review when the agency believes that such changes represent the best scenario for enhancing net benefits. Other potential rule changes, including rule expansions justified by new data or changed circumstances, should not be ignored simply because analyzing their effects may be more difficult.

*Factors for Rule Reassessment Should Utilize Balanced Cost-Benefit and Distributional Analyses*

The Plan's language reflects a slight deregulatory bias. As noted above, the Plan repeatedly steers the objectives of retrospective analysis toward eliminating unnecessary or burdensome provisions.<sup>9</sup> The Plan asks whether increases in regulatory flexibility or market certainty or administrative efficiency are possible, but never inquires into whether net benefits have grown as a result of regulation. And for nearly all candidate rules, HUD predicts with confidence that the outcome of its retrospective analysis will be the removal of regulatory requirements.

It is unclear from the Plan what methodologies will be used in assessing whether removing a particular regulatory requirement will actually increase the net benefits of a rule. The Plan only notes that the Department will analyze the costs and benefits of rules undergoing retrospective review "where appropriate."<sup>10</sup> Readers are left to imagine what circumstances would be deemed appropriate and on what grounds, and what analytical tools would be used in the alternative.

Once HUD has selected a rule for review, its evaluation should consist of comparing the full quantitative and qualitative costs and benefits of the existing rule, as well as feasible policy alternatives, and then selecting the option that maximizes net benefits. HUD should follow the same best practices in its retrospective analyses as it does when conducting a regulatory impact analysis.<sup>11</sup> This includes identifying an appropriate baseline and the proper scope of analysis.<sup>12</sup> The Plan should also direct HUD to pay special attention to any unquantified benefits and costs that might be easier to identify and measure after the implementation of a regulation.

To evaluate rules, a balanced cost-benefit analysis should be accompanied by a balanced distributional analysis. In the Plan's Appendix, HUD acknowledges that certain rules undergoing retrospective review impose cumulative burdens on affected parties—for example, one FHA rule will "remove overly burdensome reporting requirements for small lenders."<sup>13</sup> However, the Plan's main text offers no discussion of distributional impacts. And while a review of small business or local government impacts may be statutorily required in some cases, a broader distributional

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<sup>9</sup> HUD Plan at 10.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, 14-42 (Sept. 17, 2003).

<sup>12</sup> *Id.* at 15.

<sup>13</sup> HUD Plan, Appendix at 5.

analysis may better comport with the goals of Executive Order 13,563.<sup>14</sup> Retrospective review is an opportunity for agencies to assess how benefits and burdens fall across all affected subpopulations, not just costs and not just small businesses.

Finally, throughout the Plan, HUD should give care to its word choice, mindful that the Executive Order looks for opportunities to expand as well as eliminate or modify rules. At times the Plan seems to focus more on the reduction of burdens than on the potential to enhance benefits by expanding rules. In general, the Plan should not contain language that might bias analysts against opportunities to increase efficiency by expanding rules, or discourage the public from submitting useful data on why rule expansions might be warranted.

### **HUD Should Design Rules that Monitor and Collect Data Necessary for Retrospective Review**

HUD can facilitate retrospective review and help ensure the longevity of a successful retrospective review plan if the agency anticipates the future need for data on a rule's efficiency and effectiveness. Though HUD is "committed to maintaining a culture of retrospective review,"<sup>15</sup> the Plan does not provide insight on how the Department or its sub-agencies will use the entire rulemaking process to support the goals of retrospective review.

The Plan notes the Department's openness to "solicit[ing] the peer review of data underlying new or revised"<sup>16</sup> rules, but HUD should also consider formally integrating data collection platforms into its retrospective review processes. Research should be coordinated and shared in order to facilitate periodic comparisons between actual and estimated values, and procedures should be put into place to alert retrospective review analysts to possible or emerging discordance between projected and actual impacts, thus triggering an inquiry into whether a full retrospective analysis would be timely.

Careful planning during a rule's formation is integral to determining what reporting requirements and data collection systems will reduce the costs and improve the quality of subsequent retrospective reviews. When drafting new rules, HUD should consider how it "will measure the performance of the regulation, including how and when [it] will collect, analyze, and report the data needed to conduct a retrospective review."<sup>17</sup>

### **HUD Should Study Ex Ante Versus Ex Post Benefits as well as Costs**

Retrospective review provides a valuable opportunity for HUD to systematically compare the actual consequences of regulations with original impact projections. The current Plan is silent on this point. The revised Plan should recognize this opportunity and set forth how HUD will capitalize on it over time.

As a preliminary measure, the Plan should call for an initial agency-wide study of ex ante versus ex post cost and benefit estimates. Both benefits and costs must be included, as both can be easily over- or under-estimated during initial analyses. In designing such a study, the Department should carefully consider its chosen methodology. The number of rules evaluated and their representativeness of the range of HUD rulemakings, will determine how useful the findings will ultimately be in revealing latent patterns of bias or analytical errors in initial impact assessments. To ensure impartial and useful results, the Plan should require a sufficiently large sample size, chosen randomly and reflecting the full range of regulations promulgated by HUD's sub-agencies.

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<sup>14</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011) (noting the need for agencies to consider "fairness" and "human dignity").

<sup>15</sup> HUD Plan at 2.

<sup>16</sup> *Id.*

<sup>17</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 53 (2007).

Naturally, a threshold issue may be whether enough data exists on a regulation's ex ante and ex post estimates.

### **HUD Should Establish Procedural Rules and Guidelines for Retrospective Reviews**

Aside from articulating the role of the Office of General Counsel in overseeing HUD's compliance with Executive Order 13,563, the Plan fails to explain important procedural aspects of retrospective review, such as who will be tasked with conducting those reviews. Sound reviews will require robust data analysis, and should be assigned to appropriate staff within each sub-agency. The Plan should either establish—or appoint appropriate Department staff to establish—protocols for reviewing regulations on an ongoing basis. Similarly, the Plan should delegate responsibility for: facilitating intra-Department information-sharing, ensuring the integration of analytic tools in decision-making, and making sure that lessons learned through retrospective analyses are internalized as best practices, to improve the quality and consistency of analyses throughout HUD.

Guidelines set forth in the final Plan should emphasize key principles to which all reviews must adhere. For instance, they should require that analysts conducting retrospective reviews have as much independence as possible from those who were responsible for the rule during the proposal stage. Guidelines should also advance public participation and transparency. While public participation can take many shapes, in addition to receiving public comments at certain points, it may be appropriate to periodically release a report documenting trends that have come to light through the retrospective review process, such as problems with particular data or cost-benefit estimates.

### **HUD Should Actively Seek Public Participation During All Steps in Retrospective Review**

HUD's guidelines for retrospective review should strive for public participation and transparency in accordance with Executive Order 13,563. The current Plan makes several nods toward that goal. For instance, HUD will be establishing a new website and e-mail inbox and will solicit input through various media.<sup>18</sup> Yet the Plan seems to suggest that public input will be considered only at two phases in the retrospective review process: (1) during the rule selection process, when HUD will seek feedback on which rules merit a second look; and (2) after the retrospective analysis has been completed, when the findings from that analysis are released to the public in the form of a new proposed rule.

HUD should consider whether additional points of interactivity with the public could improve its retrospective analyses. For instance, during the initial rule selection phase, stakeholders may be overwhelmed by efforts to comment on the vast number of regulations that HUD may possibly select for review; thus it is important that public has another opportunity to weigh in, after HUD announces which rules have been chosen. Additionally, the Plan needs to clarify when completed reevaluations will be presented for public inspection and comment.

Sincerely,

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<sup>18</sup> *Id.* at 3-4.