

Institute for Policy Integrity

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June 19, 2012

Gregory H. Woods, General Counsel
United States Department of Energy
VIA ELECTRONIC SUBMISSION

Subject: Comments on “Regulatory Burden RFI” (May 29, 2012)

The Institute for Policy Integrity, a non-partisan think tank at New York University School of Law, has previously submitted comments on the Department of Energy’s plan for periodic retrospective review. Most of the recommendations from those previous comments (attached at the end of this letter) still apply. DOE’s latest update on its plan largely emphasizes ways to minimize compliance burdens and cut paperwork requirements.¹ While such low-hanging fruit should be pursued, focusing on them should not detract from the other important goals articulated by Executive Order 13,563.² Retrospective review is an opportunity to consider modifying, expanding, or eliminating existing rules, based on changed economic, technological, or legal circumstances, as well as updated data on costs and benefits. Retrospective review should strive to enhance net benefits, not just to decrease compliance costs.

One particularly underdeveloped section of DOE’s plan concerns the use of retrospective review to improve prospective regulatory analysis. DOE recognizes the potential insights that retrospective review can offer into its analytical choices,³ but the May 2012 update does not suggest DOE has followed through on this potential in any concrete way. DOE should use retrospective review to compare the ex-ante versus ex-post values of both benefits estimates and cost estimates. A review of the benefits and effectiveness of DOE’s range of efficiency labeling and public disclosure requirements may prove especially useful in informing future rulemakings.⁴

¹ See DOE, Retrospective Review Plan Report, May 2012 Update.

² Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821, 3822 (Jan. 18 2011) (“Improving Regulation and Regulatory Review”).

³ See DOE, Retrospective Review Plan, August 2011, at 11.

⁴ For more details on the benefits of labeling and disclosure requirements, as well as recommendations on testing for the effectiveness of labeling programs, see Comments from Policy Integrity to DOE, on Full-Fuel Cycle Analysis (Oct. 19, 2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/21centgov/May_2012_Report_DOE_052512.pdf.

Naturally, a threshold issue may be whether enough data exists on a regulation's ex-ante and ex-post estimates. To that end, DOE should also use its retrospective review plan as a chance to develop guidance on designing rules prospectively to monitor and collect the data necessary to conduct retrospective reviews. 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, DOE 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."⁵

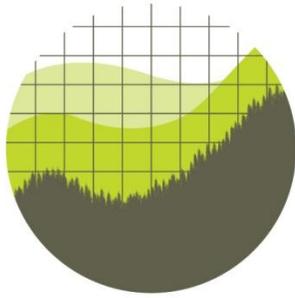
For more details on these and other recommendations, please see the attached comments submitted in March and August of 2011.

Sincerely,

Michael A. Livermore
Jason A Schwartz

Institute for Policy Integrity
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⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 53 (2007).



Institute for Policy Integrity

new york university school of law

March 21, 2011

VIA ELECTRONIC SUBMISSION

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

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

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

The Institute for Policy Integrity at New York University School of Law submits the following comments to the Department of Energy (“DOE”) in response to its request for comments on the formulation of a preliminary plan for retrospective analysis as required by Executive Order 13,563.¹ Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

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

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

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

² *Id.* at 3821.

³ *Id.* § 6(b) at 3822.

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

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

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

⁷ Regulatory Flexibility Act, 5 U.S.C. § 610 (2006).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The President’s current initiative pointedly rejects such a deregulatory bias. Under Executive Order 13,563, “agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, *insufficient*, or excessively burdensome, and to modify, streamline, *expand*, or repeal them in accordance with what has been learned” (emphasis added).¹⁸ In explaining the Executive Order, OIRA elaborates upon the importance of avoiding deregulatory bias: “[Retrospective] review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking.”¹⁹ OIRA continues on to say that underperforming rules may warrant “a stronger, expanded, or somewhat different approach.”²⁰ The White House clearly intends that retrospective review should be an occasion to consider the full range of options for improvement rather a binary determination of whether or not a rule is overly burdensome.

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

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

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

¹⁷ Regulatory Flexibility Act, 5 U.S.C. § 610 (2006).

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

¹⁹ OIRA Memo 2011, *supra* note 4, at 4-5.

²⁰ *Id.* at 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (January 18, 2011) mandates that “To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” The language illuminates the goals of retrospective analysis, (modification of rules in accordance with the results) which accord with something less than universal retrospective analysis, which would be extremely resource-intensive.

²⁸ OIRA Memo 2011, *supra* note 4, at 4.

²⁹ GAO REEXAMINING REGULATIONS, *supra* note 11, at 6

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

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

³² OIRA Memo 2011, *supra* note 4, at 4.

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

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

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

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

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

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

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

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

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

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

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

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

While there is a relatively small universe of literature on retrospective analysis specifically, much of the commentary on cost-benefit analysis is relevant insofar as the technique is incorporated into retrospective review. Agencies should aim to follow the same best practices in their retrospective analyses as they do when conducting a regulatory impact analysis during the notice and comment process.⁴⁰ These practices include such factors as the choice of an appropriate baseline⁴¹ and identifying the proper scope of the analysis.⁴² One of the persistent difficulties in prospective cost-benefit analysis is ensuring that evaluations sufficiently address the nonquantified or nonmonetized impacts of regulation.⁴³ Some unquantified benefits and costs may be particularly amenable to retrospective analysis, as they may be easier to identify and measure after implementation of the regulation.

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

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

³⁷ OIRA Memo 2011, *supra* note 4, at 5.

³⁸ *Id.*

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

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

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

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

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

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

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

⁴⁶ *See* Schwartz, *supra* note 31, at 21-22.

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

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

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

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

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

⁴⁸ GAO REEXAMINING REGULATIONS, *supra* note 11, at 53.

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

⁵⁰ *Id.*

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

⁵² EC Guidelines 2009, *supra* note 14, at 48.

⁵³ EC Guidelines 2009 Annexes, *supra* note 53, at 76.

⁵⁴ *Id.*

⁵⁵ *Id.* at 77.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 77-78.

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

Agency guidelines for retrospective review should strive for both public participation and transparency, in accordance with Executive Order 13,563.⁵⁹ OIRA states, “Because knowledge of the effects of rules is widely dispersed in society, and because members of the public are likely to have useful information and perspectives, agencies should consider developing mechanisms to promote public consultation about existing rules on a continuing basis.”⁶⁰

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

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

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

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

Conclusion

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

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

⁶⁰ OIRA Memo 2011, *supra* note 4, at 5.

⁶¹ See Greenstone, *supra* note 24, at 119.

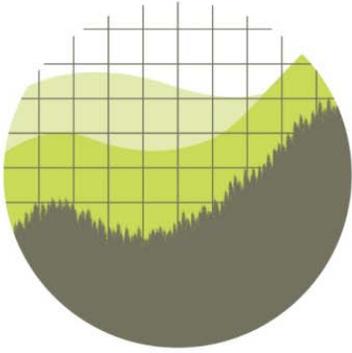
⁶² *Id.* at 121 (“As much as possible, these [RA] functions should be removed from political control and placed in independent hands.”).

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

Respectfully submitted,

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VIA ELECTRONIC SUBMISSION

Attention: Docket No. DOE-FRDOC-0001-1590

Subject: Comments on “Preliminary Plan for Retrospective Analysis of Existing Rules”
(April 29, 2011)

The Institute for Policy Integrity at New York University School of Law submits the following comments to the Department of Energy (“DOE”) in response to its preliminary plan for periodic retrospective review as required by Executive Order 13,563.¹ 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.

DOE’s Factors for Rule Selection and Prioritization Should Concentrate on Changed Circumstances and Updated Data

DOE currently does not list any clear criteria for selecting or prioritizing rules for retrospective review. In the area of rule selection, the overall 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 a stronger rule might better deliver net social benefits; new economic circumstances may have raised compliance costs, perhaps pointing to the need for more flexibility to restore efficiency; or new legislation may make a rule obsolete. 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.

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

Some of the rules DOE has identified as initial candidates seem at odds with these two criteria. For example, DOE proposes to review its draft policy for adopting full-fuel-cycle analysis, and to consider a phased-in approach. Given that action is still pending and has not yet been finalized, it is somewhat puzzling to now propose a retrospective review of this policy. In particular, it seems unlikely that any circumstances have changed since the draft policy was proposed, or that enough time has passed making new data on costs and benefits come to light. Stakeholders had ample time just last year to submit comments on the draft policy;² retrospective review is an opportunity to update and improve the efficiency and effectiveness of existing rules, not to rehash debates on still-pending or recently finalized rulemakings.

These two criteria—changed circumstances and updated data—should be clearly listed in DOE’s retrospective review plan, and rules should only be selected that fit the listed criteria. Outlining specific selection criteria will also help interested parties anticipate those regulations DOE is likely to review, which will improve the quality of public comments submitted.

The sheer volume of public comments should not be a guiding factor in selection or prioritization of review. The majority of regulations on DOE’s initial list of candidates for retrospective analysis were selected in response to public commentary.³ While public feedback can be incredibly useful in helping the agency to identify changed circumstances or updated data, the agency should resist the urge to lend any weight to public input purely because the commenter speaks strongly about a particular burden or benefit of the rule.

For example, DOE has proposed to extend the deadline for industry compliance with new energy efficiency certification and testing mechanisms, in response to stakeholder concerns about compliance costs.⁴ But DOE does not reveal whether this is new data on costs that has become available. Unless the comment offers specific information on why the rule is no longer functioning efficiently (i.e., because of changed circumstances or better data on costs and benefits), basing rule selection on public comments will simply be rehashing old debates. (If DOE’s original cost estimate was so off, the agency should also use the retrospective review process to consider why its estimate was off and how to prevent such misestimates in the future. DOE should compare ex ante versus ex post estimates for both costs and benefits of its rules.)

Factors for Rule Evaluation Should Focus on Increasing Cumulative Net Benefits

Once DOE has selected a rule for review, the evaluation should consist of simply comparing the full quantitative and qualitative costs and benefits of the feasible policy alternatives, and selecting the option that maximizes net benefits. The DOE Plan indicates it will use “net benefits or cost effectiveness ratios where appropriate.”⁵ DOE should follow the same best practices in its retrospective cost-benefit analyses as it does when conducting a regulatory impact analysis during the notice-and-comment process.⁶ This includes choosing an appropriate baseline and identifying the proper scope of the analysis.⁷ The Plan should direct DOE to pay special attention to any unquantified benefits and costs that might be easier to identify and measure after implementation of a regulation.

² For example, see the comments submitted by Policy Integrity.

³ See Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3,821, 3,822 (Jan. 18, 2011); DOE, Preliminary Plan for Retrospective Analysis of Existing Rules, at 3 (“DOE has already developed its first candidate list of rules for retrospective review...based in large part on the public comments received in response to DOE’s RFI.”) (Apr. 28, 2011), *available at* http://www.gc.energy.gov/documents/DOE_05_18_2011.pdf [hereinafter DOE Plan].

⁴ DOE Plan, at 4.

⁵ *Id.*, at 11 (explaining components of retrospective cost-benefit analysis).

⁶ See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, 14-42 (Sept. 17, 2003).

⁷ *Id.*, at 15.

The Plan also suggests DOE will use this opportunity to revisit the choice of discount rates and other practices of cost-benefit analysis. The retrospective review process may not be the best venue for changing DOE's application of cost-benefit analysis. A separate and more systematic update on procedures for economic analysis could be useful. At any rate, if DOE does revisit discount rates, the agency should carefully consider which discount rates are appropriate in the context of environmental and health impacts with long time horizons, such as climate change.⁸

DOE Should Use Retrospective Review to Improve Prospective Regulatory Analysis

DOE recognizes that retrospective review can be used to improve the underlying analyses used when passing regulations;⁹ thus, the Plan should address ways to promote the accuracy of this evaluation. DOE should compare the ex ante versus ex post values of both benefits estimates and cost estimates. For example, the Plan could propose a study of ex ante versus ex post estimates, randomly choosing a sufficiently large sample of rulemakings.¹⁰ Naturally, a threshold issue may be whether enough data exists on a regulation's ex ante and ex post estimates. This can systemically be incorporated into retrospective review if DOE conducts a study comparing estimates and actual values each biennial period.

DOE Should Design Rules That Monitor and Collect Data Necessary for Retrospective Review

DOE 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. In order for DOE to become "committed to maintaining a consistent culture of retrospective review and analysis,"¹¹ the Plan should clearly specify how DOE could use the entire rulemaking process to support the goals of retrospective review. Rules should be designed ex-ante so that they can be easily and effectively monitored and evaluated.

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, DOE 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."¹² New regulations should incorporate data collection on regulatory costs, benefits, distributional consequences and trends. Conclusions drawn from this information should be shared among DOE subagencies to enhance each expert's understandings of regulatory impacts during retrospective review.

Sincerely,

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⁸ See Michael A. Livermore & Richard L. Revesz, *Retaking Rationality* (2008).

⁹ DOE Plan, at 10.

¹⁰ It may be interesting to compare whether different estimation biases crop up in significant versus non-significant rules. However, agency resources and data availability may limit the ability of DOE to assess non-significant rules in detail. If feasible, though, DOE might consider separating out the two categories.

¹¹ DOE Plan, at 1.

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, *REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS* 53 (2007).