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Attention: Docket No. EPA-HQ-OA-2011-0156

Subject: Comments on EPA's Preliminary Plan for Periodic Retrospective Reviews of Existing Regulations (May 24, 2011)

The Institute for Policy Integrity at New York University School of Law submits the following comments to the Environmental Protection Agency ("EPA") in response to its proposed plan ("Plan") for 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.²

EPA's retrospective review efforts should aim to enhance net regulatory benefits, whether that means eliminating, modifying, or expanding an existing regulation. EPA 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 alone 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.

Reviews should then be prioritized to maximize net benefits and conserve agency resources. Paperwork burden reductions can be cost-benefit justified, but other areas where net benefits can be maximized should also be given adequate agency attention. Finally, rule reassessment should be based on a balanced cost-benefit analysis and distributional analysis that investigate all quantitative and qualitative costs and benefits of various policy alternatives. The Plan should not focus only on ways to reduce costs by decreasing regulation; instead, it should also encourage analysts and the public to explore efficient revisions that might expand the scope of an existing rule.

Because such balanced reassessments require data on a rule's effectiveness, EPA should also develop ways to build requirements for monitoring and data collection into its new rules, in anticipation of future retrospective review. Retrospective review is also an opportunity to assess whether prospective analysis of new rules is accurate, by comparing *ex ante* versus *ex post* benefit estimates as well as cost estimates. Last, EPA should ensure that the Plan includes adequate public participation at every stage of the rulemaking process.

¹ Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3,821, 3,822 (Jan. 18 2011); EPA, IMPROVING OUR REGULATIONS: A PRELIMINARY PLAN FOR PERIODIC RETROSPECTIVE REVIEWS OF EXISTING REGULATIONS (May 24, 2011), *available at* <http://www.epa.gov/improvingregulations> [hereinafter EPA Plan].

² Policy Integrity would also like to direct EPA's attention to our comments submitted during the agency's initial call for public input.

EPA's Factors for Rule Selection, Prioritization, and Evaluation Should Focus on Net Benefits

EPA's plan lists a single set of criteria to govern the entire retrospective review process,³ even though that process contains several distinct steps: identifying candidates for review; prioritizing which rules should be reviewed; and conducting the retrospective evaluations. While all stages share the overarching goal of enhancing net regulatory benefits, providing more targeted criteria for each separate step might better direct analysts' attention, conserve agency resources, and clarify for the public the agency's basis for various decisions.

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 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.

EPA's criteria ask whether the rule's benefits still justify its costs, now that time has passed.⁴ While that question may be relevant to rule evaluation, it does not help the agency identify which rules should be selected in the first place. EPA should clearly list two primary factors for rule selection: whether circumstances have changed, and whether there is updated data on costs and benefits. Outlining specific selection criteria will also help interested parties anticipate those regulations EPA is likely to review, which will improve the quality of public comments submitted.

EPA's initial list of candidates for retrospective analysis does not specify the basis for the selection of each rule, and some selections seem motivated by factors not well aligned with the main goal of retrospective review. For example, EPA's first selection is the Lead Renovation, Repair, and Painting Program, even though that rule was most recently revised in May 2010.⁵ The agency does not explain what changed circumstance or new data justifies revisiting this rule so soon. Indeed, the only obvious factor for its selection is that public comments requested its review.⁶ 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. 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.

By comparison, review of the rule on Vapor Recovery Systems is well justified, because a change in technology has altered the benefits of the original regulation.⁷ Similarly, on rules like the National Primary Drinking Water Standards for Lead and Copper (originally promulgated in 1991), enough

³ EPA Plan, *supra* note 1, at 37-39.

⁴ *Id.* at 38.

⁵ *Id.* at 15.

⁶ *Id.* (marking the rule with an asterisk, indicating the review was suggested by public comment).

⁷ *Id.* at 16.

time has passed that new data may be available to evaluate how well the rule is performing.⁸ All the rules EPA selects for review should feature these types of characteristics.

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,⁹ which suggests that there may be significant missed opportunities for cost-effective regulation that maximizes social benefits. EPA's Plan notably does address regulatory inaction with respect to updating New Source Performance Standards under the Clean Air Act.¹⁰ To promote this goal in future retrospective reviews, review of inaction could be systematized by including a specific step or criterion for the review of pending and recently denied public petitions and other areas of regulatory gaps, to see whether changed circumstances or updated data now warrant new regulations.

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

Currently, the Plan explains that "future review priorities will be determined by: comments gather from the public, other federal agencies, and EPA experts; the expertise of EPA offices writing the regulations; priorities of the day, such as judicial rulings, emergencies, etc.; the principles and directives of EO 13,563; and agency resources."¹¹ To start, as explained above, the sheer volume of public comments should not be a guiding factor in selection or prioritization of review; instead public comments should be used to help the agency identify changed circumstances and updated data. The guiding factor for rule prioritization should be which reviews offer the greatest potential to enhance net regulatory benefits.

Agency resources are another legitimate factor for prioritization, but presently EPA's plan does not provide much substance or specificity on how the agency will prioritize reviews based on resource constraints. EPA should add specific factors that will help it conserve agency resources, such as prioritizing review of "significant" regulations and of rules that are already scheduled by statute for mandatory review (like Section 610 reviews).

Based on which rules have been selected during this initial round, it also seems EPA is prioritizing reviews of inefficient paperwork burdens. Streamlining paperwork requirements and harnessing the latest digital technologies to reduce compliance costs are worthwhile goals, and EPA 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. Paperwork reduction opportunities should definitely be included in the rule selection process, but such regulations should only be prioritized for review when the agency believes these rules represent the best opportunity to enhance net benefits. Other 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 criteria for rule evaluation reflect a slight deregulatory bias. For example, EPA asks whether the benefits of the rule still justify its costs now that time has passed, but does not inquire into whether net benefits have grown. Likewise, the Plan looks for ways to alter regulations to achieve greater cost effectiveness while maintaining the same environmental results, but does not

⁸ *Id.* at 29.

⁹ See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1271-80 (2006).

¹⁰ EPA Plan, *supra* note 1, at 22.

¹¹ *Id.* at 10.

seek to identify opportunities to modify rules that might enhance environmental benefits without significantly increasing costs. Once EPA 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. EPA should follow the same best practices in its retrospective analyses as it does when conducting a regulatory impact analysis during the notice-and-comment process.¹² This includes choosing an appropriate baseline and identifying the proper scope of the analysis.¹³ The Plan should direct EPA to pay special attention to any unquantified benefits and costs that might be easier to identify and measure after implementation of a regulation.

To evaluate rules, a balanced cost-benefit analysis should also be accompanied by a balanced distributional analysis. Currently, the Plan does look at the cumulative burdens on regulated parties, with special attention to small businesses and local governments.¹⁴ Though review of small business and local government impacts may be statutorily required, a broader distributional analysis may better comport with the goals of Executive Order 13,563.¹⁵ 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 EPA should be careful with its word choice, remembering 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. There are notable exceptions, such as the call to consider strengthening the regulation of pesticide application.¹⁶ But more generally, 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.

EPA Should Design Rules that Monitor and Collect Data Necessary for Retrospective Review

EPA 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 EPA "intends to apply the principles and directives of EO 13,563 to both retrospective review of existing regulations and the development of new regulations,"¹⁷ the Plan does not clearly specify how it will use the entire rulemaking process to support the goals of retrospective review.

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, EPA 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."¹⁸

EPA Should Study Ex Ante versus Ex Post Benefits as well as Costs

The Plan recognizes that retrospective review creates an opportunity to assess the quality of prospective regulatory analyses as well, by proposing a study of ex ante versus ex post cost

¹² See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, 14-42 (Sept. 17, 2003).

¹³ *Id.* at 15.

¹⁴ EPA Plan, *supra* note 1, at 38.

¹⁵ Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011) (noting the need for agencies to consider "fairness" and "human dignity").

¹⁶ EPA Plan, *supra* note 1, at 30.

¹⁷ *Id.* at 5.

¹⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 53 (2007).

estimates.¹⁹ However, benefits can be as easily over- or under-estimated as costs during initial analyses. The study should therefore compare the ex ante versus ex post values of both benefits estimates and cost estimates.

The agency should also reconsider its methodology for this study. The Plan explains that EPA will select five rules, but it does not detail how these rules will be chosen, whether five is a sufficiently large sample size, and what will guarantee the rules studied will be broadly representative of EPA rulemakings. In order to ensure impartial and useful results, the Plan should require that a sufficiently large sample size, reflecting the full range of regulations promulgated by EPA,²⁰ be chosen randomly. Naturally, a threshold issue may be whether enough data exists on a regulation's ex ante and ex post estimates.

EPA Should Actively Seek Public Participation During All Steps in Retrospective Review

EPA's guidelines for retrospective review should strive for both public participation and transparency in accordance with Executive Order 13,563. The current Plan takes many important steps toward that goal: for example, the Plan proposes to use the Rulemaking Gateway website, an innovative approach that will allow the public to track regulation selection and subsequent review.²¹ But some of the information relevant to EPA's retrospective review will not be published until the *Semiannual Regulatory Agenda*.²² EPA needs to ensure that stakeholders have a reasonable opportunity to comment on this part of the retrospective review plan as well. Additionally, the Plan needs to clarify if and when the actual rule reevaluations will be presented for public inspection and comment; currently, the Plan seems to only accept public feedback during the initial rule selection. During that initial phase, stakeholders may be overwhelmed by efforts to comment on the vast number of regulations that EPA may possibly select for review; it is important that the public has had sufficient time to weigh in on those regulations actually chosen for review.

Sincerely,

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¹⁹ EPA Plan, *supra* note 1, at 23.

²⁰ 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 EPA to assess non-significant rules in detail. If feasible, though, EPA might consider separating out the two categories.

²¹ EPA Plan, *supra* note 1, at 40.

²² *Id.* at 40-1.