Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law

Hearing on "Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations"

July 12, 2012

SUMMARY

Retrospective review of existing rules is a vital, though often neglected, responsibility of federal regulatory agencies. The executive branch has had some success in inducing agencies to fulfill this responsibility, and there is an open question as to whether Congress needs to supplement its programs through legislation. However, assuming that Congress does decide to create a review program of its own, the program should have the following characteristics:

Selectivity – Agencies should have discretion to prioritize which rules to review, instead of having to review all of them indiscriminately. However, the executive and legislative branches and the public should have ample opportunity for input into these choices.

Affordability – Insofar as it chooses to mandate retrospective reviews, Congress should make available to agencies the resources they need to conduct rigorous evaluations.

Flexibility – Congress should avoid prescribing detailed instructions for the manner in which reviews will be conducted. The executive branch should have leeway to prescribe inquiries that reflect its regulatory philosophy.

Evenhandedness – Retrospective reviews may bring to light situations in which regulations should be strengthened instead of being weakened or eliminated. The review process should facilitate agencies' ability to act upon both types of proposals.

These criteria are largely based on recommendations of the American Bar Association and the Administrative Conference of the United States and, as such, merit careful consideration by the subcommittee.

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Chairman Coble, Ranking Member Cohen, and members of the subcommittee, it is a privilege for me to be able to appear before you today to discuss the timely subject of retrospective review of administrative agency rules.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. In this statement, I will draw upon advisory statements that the ABA and ACUS have adopted concerning procedures for retrospective review. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

I. BACKGROUND

I agree with what I gather is the fundamental premise that underlies this hearing: that regulatory agencies have a responsibility to engage periodically in a careful evaluation of their existing rules. Retrospective review, also known as the "lookback" process, is an important function, because rules often become obsolete or fail to work out as expected. Often the reasons for this failure could not have been anticipated when the rule was issued. Factual circumstances change, as do legal environments and political realities. In short, the tendency toward obsolescence is, to a large extent, simply a consequence of the complexities of life and the dynamic nature of our society.

Notwithstanding these good reasons to conduct retrospective review, agencies will not always engage in as much review as they should unless some external pressure is brought to bear. Inertia can take hold for a variety of reasons. Agencies are often focused on legal mandates to develop new regulations, or on their leadership's goals of fulfilling new policy initiatives, and so the less glamorous task of revisiting rules that are already on the books frequently takes a back

seat.

The tendency to shun retrospective review should not be overstated. Even where no external compulsion is involved, agencies do frequently reexamine their regulations and take curative action. Indeed, in 2007 the Government Accountability Office conducted a substantial study of more than 1300 reviews by nine agencies over a six year period and found that voluntarily initiated reviews actually occurred more frequently than mandatory ones (required by statute or executive order or directive).[1] In view of the structural factors that serve to reinforce inertia at the agency level, I do not think the GAO findings entirely undermine the case for an externally imposed program of retrospective reviews, but they would seem to counsel moderation in the design of such a program.

In any event, legislative and executive branch authorities have already taken a variety of steps to encourage agencies to reexamine and eliminate or modify outdated regulations. The Regulatory Flexibility Act requires agencies to review regulations that have a "significant economic impact upon a substantial number of small entities" at least once every ten years.[2] Moreover, presidential initiatives in this area date back at least to the Carter Administration[3] and have been pursued especially energetically during the past four presidential administrations. The first President Bush directed agencies to review all of their rules within a ninety-day period; President Clinton incorporated a retrospective review mandate into his executive oversight order; and the second President Bush solicited nominations from the public of specific rules that were in need of reform.[4]

Beginning in 2011, the Obama administration has pursued a particularly elaborate lookback policy. In Executive Order 13563,[5] the President called on all executive agencies to submit plans for retrospective review of their "significant" regulations to the Office of Regulatory Affairs (OIRA). A subsequent directive, Executive Order 13579, urged *independent* agencies to comply (voluntarily) with a similar process.[6] Finally, Executive Order 13610, which

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[1]Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-79, at 13-15 (2007).

[2]5 U.S.C. § 610 (2006).

[3]GAO Report, *supra* note 1, at 10.

[4]For details, see JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 356-59 (5th ed. 2012).

[5]76 Fed. Reg. 3821 (Jan. 18, 2011).

[6]76 Fed. Reg. 41587 (July 11, 2011). OIRA followed up on this order by issuing a guidance memorandum for independent agencies. OMB Memorandum M-11-28. In substance, this memorandum largely repeats the advice and policy positions that OIRA had directed to executive agencies in an earlier document, OMB Memorandum M-11-10. OIRA noted, however, that this guidance was "issued with full respect for the independence of [independent] agencies" and "not meant to be binding." OMB Memorandum M-11-28 at 1. Both memoranda are available at http://www.whitehouse.gov/omb/international_regulatory_cooperation.

was published two months ago, expanded on the prior orders by directing executive agencies to take "further steps . . . consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations."[7]

In a recent report by the Council of Economic Advisors, the administration has declared that these measures "are meant to ensure regular evaluation of the actual effects of regulatory mandates," so that "the process of retrospective review should become a standard part of the assessment of federal regulations."[8] The CEA also asserts that the plans submitted by executive agencies have produced more than 500 reform initiatives and will result in savings in excess of $10 billion over the next five years, with more savings to come from both executive and independent agencies.[9]

I do not suggest that the subcommittee needs to accept these claims at face value, but the administration's track record is at least a factor that the subcommittee should weigh carefully as it considers what further steps, if any, are needed. Reasonable minds might differ on the question of whether Congress should build upon these past efforts by enacting a legislative program for retrospective reviews. A statutory scheme would contribute stability and predictability to the process. On the other hand, it could potentially give rise to some of the very problems of obsolescence that I have mentioned in connection with regulations. A flawed legislative scheme is harder to repair than a flawed executive program.

Another reason why Congress might wish to prescribe a program of retrospective reviews is that it could make the requirements applicable to independent agencies, a step that presidential administrations have traditionally refrained from attempting to impose on their own. Even on that score, however, the need for such a requirement is unclear, because the present administration appears to have had a good deal of success eliciting voluntary participation by independent agencies in its recent lookback initiative. According to the CEA report, "By November 2011, approximately twenty independent agencies, including nearly all of the independent agencies with a substantial number of regulations, had responded to the President's call and released plans for retrospective review for comments by the public."[10] Again, the subcommittee may wish to make its own appraisal of the independent agencies' performance. At least at face value, however, the CEA report casts doubt on the premise that a statute could elicit wider participation by independent agencies with significant regulatory missions than has been achieved without one.

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[7] 77 Fed. Reg. 28,469 (May 10, 2012).

[8] COUNCIL OF ECONOMIC ADVISORS, SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 2 (2012), *available at* http://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf.

[9] *Id.* at 1.

[10] *Id.* at 10. For a compilation of the URLs for the independent agencies' plans, see *id.* at 16-17.

II. CRITERIA FOR A RETROSPECTIVE REVIEW STATUTE

Regardless of whether a statutory program of retroactive review is needed, I will assume for purposes of today's hearing that lookback legislation is a serious prospect. Accordingly, I will turn to questions about what such a statutory scheme should look like.

In this discussion I will draw on recommendations that the ABA and ACUS adopted in 1995 regarding retrospective reviews.[11] I am attaching the texts of these recommendations to this statement, and I will highlight a few of their key points in my remarks. Again, I am not speaking on behalf of either entity today, but I believe these recommendations contain a host of good ideas on retrospective review and merit careful consideration by the subcommittee. They are consensus pronouncements that reflect the assessments of experienced practitioners, agency personnel, and academics in the administrative law field.

More specifically, in this discussion I will emphasize four themes that I believe the subcommittee should take into account as it considers possible legislation on retrospective review: *selectivity*, *affordability*, *flexibility,* and *evenhandedness.*

A. Selectivity

In any sound scheme for retrospective review, priority-setting is essential. It is a mistake to require agencies to review all of their rules indiscriminately. As the Administrative Conference observed:

> Tight time frames or review requirements applicable to all regulations, regardless of their narrow or limited impact, may prevent agencies from being able to engage in a meaningful effort. It is important that priority-setting processes be developed that allow agencies, in consultation with the Office of Management and Budget and the public (including but not limited to the regulated communities), to determine where their efforts should be directed.[12]

More recently, this insight was borne out by the GAO report that I mentioned earlier. The GAO reported:

> Agencies that developed review programs with detailed processes for prioritizing which regulations to review reported that this prioritization facilitated their ability to address

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[11] *Federal Agency Reviews of Existing Regulations*, 120-2 A.B.A. ANN. REP. 48 (1995) (hereinafter ABA Resolution); ACUS Recommendation 95-3, Review of Existing Regulations, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

[12] ACUS Recommendation 95-3, *supra* note 11, pmbl.

> time and resource barriers to conducting reviews and allowed them to target their efforts at more useful reviews of regulations that were likely to need modifications. . . . Nonfederal parties that we interviewed also asserted that it is not necessary or even desirable for agencies to expend their time and resources reviewing all of their regulations. Instead, they reported that it would be more efficient and valuable to both agencies and the public for agencies to conduct substantive reviews of a small number of regulations that agencies and the public identify as needing attention.[13]

Indeed, GAO also found that reviews that an agency undertakes voluntarily are far more likely to lead to a conclusion that a rule needs revision than are mandatory reviews.[14]

The GAO report especially highlighted the problems that can develop out of retrospective review schemes in which an agency is expected to revisit all of its rules within a fixed time frame:

> To make efficient use of their time and resources, various agency officials said that they consider all relevant factors, including effectiveness and burden reduction, whenever they review an existing regulation. Therefore, when reviews that have predetermined or generic schedules and review factors (such as 10-year Section 610 reviews [under the Regulatory Flexibility Act]) arise, the agency might have already reviewed and potentially modified the regulation one or more times, based upon the same factors outlined in Section 610. The officials reported that, although the subsequent predetermined reviews are often duplicative and less productive, they nevertheless expend the time and resources needed to conduct the reviews in order to comply with statutory requirements. However, they reported that these reviews were generally less useful than reviews that were prompted because of informal industry and public feedback, petitions, changes in the market or technology, and other reasons. Furthermore, agencies expressed concerns about whether predetermined schedules may conflict with other priorities.[15]

These observations ring true.

I do not mean to imply that agencies should make their selections of rules to be reviewed in isolation from the rest of the world. On the contrary, OIRA, the White House, and the relevant oversight committees of Congress should all be able to play a role in the selection process, just as with other policy initiatives. The public should also have opportunities to nominate rules as

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[13]GAO Report, *supra* note 1, at 45-46.

[14]*Id.* at 30-34.

[15]*Id.* at 38. For fuller discussion, see *id.* at 38-39.

candidates for lookback review. The ABA and ACUS agreed with that sentiment,[16] but these organizations, speaking in 1995, could not have anticipated the rise of modern electronic technology. Today, the Internet provides a variety of convenient tools with which agencies can solicit and receive suggestions from members of the public.

Congress might also consider supporting the establishment of a special group to propose rules for review. It could perhaps make use of the existing structure of the Federal Advisory Committee Act[17] in creating such an entity. However, I would think of such a group as serving an advisory function, not as wielding power in its own right. An agency has responsibility for the entire portfolio of programs that it has been charged with administering, and it can be held politically accountable for its performance. But an external group that is concerned only with lookback issues would have no such perspective or accountability.

The law recognizes this idea indirectly by giving agencies broad discretion to decide whether or not to act favorably on a citizen petition for rulemaking. The agency does need to make a serious response to the petition, and its response will be judicially reviewable,[18] but the standard of review is narrow.[19] There are good reasons for the courts to show restraint in this area. As ACUS explained in its recommendation on retrospective reviews, rulemaking petitions

> should not be allowed to dominate the agency's agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations.[20]

Any legislation that Congress may develop to govern the retrospective review process should adhere to this insight as well.

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[16]ABA Resolution, *supra* note 11, ¶ 4(c); ACUS Recommendation 95-3, *supra* note 11, ¶ IV.

[17]5 U.S.C. App. 2 (2006).

[18]Auer v. Robbins, 519 U.S. 452, 459 (1997).

[19]Massachusetts v. EPA, 549 U.S. 497, 527 (2007).

[20]ACUS Recommendation 95-3, *supra* note 11, pmbl.

B. Affordability

My second criterion for a retroactive review statute is what I call *affordability*. By this term, I mean that lookback programs must be commensurate with the resources that Congress makes available to the agencies, both directly through its budget decisions and indirectly in terms of other assignments that it asks them to perform. Both the ABA and ACUS recommendations emphasized this linkage.[21] The resources that this exercise requires are not only monetary. They also include the attention that senior policy makers and their staff will have to devote to the review effort. Because I think retrospective reviews are worthwhile ventures, I would like to see Congress take steps to facilitate them, and this could entail an infusion of new budgetary resources to underwrite these ventures.

On the other hand, I would be concerned about the possibility that Congress might augment the agencies' retrospective review obligations as an "unfunded mandate," i.e., without also providing the resources that a serious review process should entail. The potential for painful tradeoffs between affirmative regulation and retrospective reviews is worrisome. For a number of years, agencies charged with protecting the public health, safety, environment, and financial security have been hard put to fulfill their regulatory missions because of budget constraints.[22] And today, of course, the trajectory seems to be headed toward even greater austerity. As all members of your subcommittee well know, last year's Budget Control Act prescribed significant reductions in discretionary spending, and this House has passed a budget plan that envisions much larger cuts. This trend does not bode well for the prospect of ambitious new ventures, other than at a significant cost to current operations.[23] I would consider that cost a very high a price to pay.

C. Flexibility

My third theme, *flexibility*, relates primarily to the manner in which reviews are conducted, rather than the selection of rules to be reviewed (although the two issues cannot be kept entirely separate, because the scope of the inquiry affects the number of rules that an agency can review). As the organizations from which I have been quoting in this statement have all

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[21] *See* ABA Resolution, *supra* note 11, ¶ 2 ("Congress should require review programs and, in so doing, should . . . ensure that agencies have adequate resources to conduct effective and meaningful reviews"); ACUS Recommendation 95-3, *supra* note 11, ¶ II ("The nature and scope of the review should be determined by, among other things, the agency's other responsibilities and demands on its resources.").

[22] *See* RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 54-71 (2010); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); *For Regulatory Agencies, Intrigue in an Otherwise Bleak Budget*, OMB WATCH, Feb. 12, 2010, *available at* http://www.ombwatch.org/node/10762.

[23] *See, e.g.*, Jonathan Weisman, *In Washington's New Mood of Austerity, Legislating Turns Into a Zero-Sum Game*, N.Y. Times, July 4, 2012.

cautioned, designers of a retrospective review program should bear in mind that agencies differ greatly in their structure and responsibilities. A one-size-fits-all approach would be too rigid.[24] This cautionary message would seem to be particularly apt in the case of a proposed *statutory* scheme, which would be difficult to amend if problems with the prescribed template were to develop

The ABA's recommendation, for example, advised that Congress should "avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies."[25] The resolution went on to identify some of the alternatives that might work best in varying circumstances, including "multi-agency reviews, review by broad categories of rules, specific subjects, or the impact on specific groups (such as small businesses or state or local governments), and 'clean-up' reviews which address problems such as outdated references, address changes, and obsolete requirements."[26]

Responsibility for fleshing out the general criteria in lookback legislation may appropriately be vested in the executive branch. One beneficial consequence of doing so is that Congress could thereby enable any given presidential administration to urge agencies to conduct reviews to carry forward the regulatory philosophy of that administration. Indeed, OIRA has already performed this function in the Obama administration's lookback program. As I said in the context of the selection of rules for review, the administration's choices and those of the agencies must be, and in practice surely will be, made in dialogue with the relevant committees of Congress as well as the general public.

D. Evenhandedness

Finally, insofar as the subcommittee does consider legislation that would prescribe detailed inquiries for an agency to apply in conducting retrospective reviews, I would hope that those criteria will be evenhanded in nature. Reconsideration of a rule that has been on the books for many years may reveal that the rule is either too broad or too narrow, too restrictive or too lenient. In a balanced lookback process, the agency should be open to uncovering problems that cut in either direction. As OIRA remarked in its guidance on EO 13563:

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[24] *See* GAO Report, *supra* note 1, at 49 ("To facilitate their reviews, agencies, to greater and lesser extents, have been developing written procedures, processes, and standards to guide how they select which rules to review, conduct analyses of those rules, and report the results. Given the multiple purposes and uses of reviews, we recognize that there is no 'one size fits all' approach."); ACUS Recommendation 95-3, *supra* note 11, pmbl. ("Given the difference among agencies, . . . processes for review of existing regulations should not be 'one-size-fits-all,' but should be tailored to meet agencies' individual needs. Thus, the President, as well as Congress, should avoid mandating standardized or detailed requirements.").

[25] ABA Resolution, *supra* note 11, ¶ 2.

[26] *Id.* ¶ 3.

> While systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking. Retrospective review may reveal that an existing rule is needed but has not operated as well as expected, and that a stronger, expanded, or somewhat different approach is justified.[27]

GAO's report on retrospective reviews offers a tangible example of this sort of beneficial updating proposal:

> OSHA's review of its mechanical press standard [prescribing safety precautions for the use of mechanical power presses] revealed that the standard had not been implemented since its promulgation in 1988 because it required a validation that was not available to companies. Consequently, OSHA is currently exploring ways to revise its regulation to rely upon a technology standard that industries can utilize and that will provide for additional improvements in safety and productivity.[28]

It is not hard to find other examples of situations in which a vigorous program of retrospective reviews could bring about a desirable strengthening of existing regulations. For instance, in an empirical study published a few years ago in the *Texas Law Review*, Professors Lynn Blais and Wendy Wagner found that the Environmental Protection Agency has frequently been slow to update pollution standards under the Clean Air Act and Clean Water Act to reflect evolving technological progress.[29] By law, these standards are supposed to be based on the best technology available, a benchmark that naturally changes over time. In practice, however, once a standard has been adopted, the agency and the public interest groups that would be inclined to support updating tend to direct their energies and limited resources toward other programs. Industry, on the other hand, typically adapts to the current level of regulation and has both the incentive and resources to resist efforts to reopen proceedings to bring the standards into line with current scientific and engineering knowledge.[30] Professors Blais and Wagner say that this same pattern has apparently been repeated in the context of other programs, including EPA's regulation of pesticides and toxic substances and OSHA's regulation of worker health and safety.[31]

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[27]OMB Memorandum M-11-10, *supra* note 6, at 4-5. OIRA repeated this advice in its guidance directed at retrospective reviews and other analyses by independent agencies. OMB Memorandum M-11-28, *supra* note 6, at 5 (elaborating on EO 13579).

[28]GAO Report, *supra* note 1, at 30-31.

[29]*See* Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1720-25 (2008).

[30]*Id.* at 1713-14.

[31]*Id.* at 1725-28.

I do not think that the accounts of underregulation that I have just mentioned are in any way incompatible with accounts of overregulation in other settings. Clearly, rules can become obsolete in either respect, or sometimes in both respects at once. I do believe, however, that a fairminded proposal for retrospective reviews should be capable of responding to both kinds of obsolescence. The relevant agency should solicit suggestions of both kinds from the public and interested organizations, and the decisionmaking criteria built into the program should facilitate both kinds of revisions.

In practice, the balance that a given presidential administration strikes between the two kinds of revision will, of course, reflect that administration's regulatory philosophy as well as the background political realities. The underlying legal framework, however, should be neutral, particularly if it is designed to last for many years. An evenhanded approach would, of course, provide the most credible path to attracting broadbased public support for retrospective review legislation.

This concludes my prepared statement, and I would be happy to respond to any questions you may have. Thank you again for the invitation to testify.

RESOLVED, That the American Bar Association recommends that the following principles should guide the review of existing regulations by federal administrative agencies with rulemaking authority:

1. Whether or not Congress enacts regulatory reform legislation, agencies should commit to a periodic review of their regulations to determine whether they should be revised or revoked with the goals of improving existing regulations, eliminating duplicative, obsolete, and inconsistent regulations, and better coordinating related regulations.
2. Congress should require review programs and, in so doing, should: (a) ensure that agencies have adequate resources to conduct effective and meaningful reviews, and (b) avoid mandating detailed requirements for review programs that do not take into account differences in statutory mandates and regulatory techniques among agencies.
3. Agencies should choose from different approaches to review the methods that are best tailored for particular situations. The approaches may include multiagency reviews, review by broad categories of rules, specific subjects, or the impact on specific groups (such as small businesses or state or local governments), and "clean-up" reviews which address problems such as outdated references, address changes, and obsolete requirements.

4. An effective and meaningful review program requires:
   a. the assignment of a senior level policy official to administer the review program to ensure the commitment of appropriate personnel and resources, the establishment of review priorities as necessary, and the enforcement of appropriate deadlines for considering and completing reviews;
   b. an internal process for assessing and revising rules that includes obtaining input from agency employees who routinely work with the applicable rules, such as inspectors, investigators, rule writers, policy analysts, and litigators;
   c. the establishment of methods to measure the success or failure of regulations and to obtain the information necessary to make such assessments, including information on costs, benefits, and changes in technology;
   d. evaluation of rules in light of legal requirements for review and such considerations as administration policy changes, cost and benefit data, technological and scientific changes, implementation, and enforcement difficulties, litigation, conflict or duplication with other rules, obsolescence, and information from the public such as complaints, rulemaking petitions, and requests for exemptions; and
   e. the effective involvement of the public, as appropriate, by:
      (1) reliance on general and specific requests for information, advance notices of rulemaking, electronic bulletin boards, public meetings, advisory committees, appointment of an ombudsman or other contact person to receive concerns or complaints, and other methods of inviting public comment;
      (2) publication of detailed procedures for the submission of rulemaking petitions, publication of petitions for public comment, and encouraging petitioners to obtain peer review of petitions or to use consensus petitions; and
      (3) public education explaining how the rulemaking process works and how it can be used to obtain the review of existing regulations.
5. Agencies should adopt regulations that are less likely to become obsolete or require amendment, such as performance standards or other rules that give regulated entities flexibility concerning methods of compliance, consensus standards, and rules that provide standards for automatic adjustments to a change in circumstance. Agencies should also establish formal programs for issuing interpretations to lessen confusion concerning existing rules.

Recommendation 95-3

Review of Existing Agency Regulations

Federal agencies generally have systems in place to develop new regulations. Once those regulations have been promulgated, the agency's attention usually shifts to its next unaddressed issue. There is increasing recognition, however, of the need to review regulations already adopted to ensure that they remain current, effective and appropriate. Although there have been instances where agencies have been required to review their regulations to determine whether any should be modified or revoked, there is no general process for ensuring review of agency regulations.

The Administrative Conference believes that agencies have an obligation to develop systematic processes for reviewing existing rules, regulations and regulatory programs on an ongoing basis. If Congress determines that such a review program should be mandated, it should allow the President and agencies maximum flexibility to design processes that are sensitive to individual agency situations and types of regulations. Thus, such legislation should assign to the President the responsibility for overseeing agency compliance through general guidelines that take into account agency resources and other responsibilities. The obligation to review existing regulations should be made applicable to all agencies, whether independent or in the executive branch.

Given the difference among agencies, however, processes for review of existing regulations should not be "one-size-fits-all," but should be tailored to meet agencies' individual needs. Thus, the President, as well as Congress, should avoid mandating standardized or detailed requirements. Moreover, the review should focus on the most important regulations and offer sufficient time and resources to ensure meaningful analysis. Tight time frames or review requirements applicable to *all* regulations, regardless of their narrow or limited impact, may prevent agencies from being able to engage in a meaningful effort. It is important that priority-setting processes be developed that allow agencies, in consultation with the Office of Management and Budget and the public (including but not limited to the regulated communities), to determine where their efforts should be directed.

Public input into the review process is critical. The Administrative Procedure Act already provides in section 553(e) for petitions for rulemaking, which allow the public to seek modifications or revocation of existing regulations

as well as ask for new rules. The Administrative Conference has in the past suggested some improvements in the ways agencies administer and respond to such petitions. See Recommendation 86-6, *Petitions for Rulemaking*. It suggests, among other things, that agencies establish deadlines for responding to petitions. The Conference reiterates that recommendation and proposes that, if necessary, the President by executive order or the Congress should mandate that petitions be acted upon within a specified time, for example 12-18 months.

Although petitions for rulemaking are a useful method for the public to recommend to agencies changes it believes are important, such petitions should not be allowed to dominate the agency's agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations. Agencies should also develop other mechanisms for public input on the priorities for review of regulations, as well as on the impact and effectiveness of those regulations.

Properly done, reviewing existing regulations is not a simple task. It may require resources and information that are not readily available. Each agency faces different circumstances, depending on the number of its regulations, their type and complexity, other responsibilities, and available resources. These processes must be designed so that they take into account the need for ongoing review, the agency's overall statutory responsibilities, including mandates to issue new regulations, and other demands on agency resources. Because there are relatively few successful well-developed models available and no widely accepted methodologies, the Conference recommends that agencies experiment with various methods. Such programs might explore different approaches with the aim of finding one (or several) that functions effectively for the particular agency. Agencies may want to look to activities at the state level, as well as the limited federal-level experience.

Review of existing regulations is primarily a management issue. As such, agency discretion must be recognized as important and judicial review should be limited. Agency denials of petitions for rulemaking under the APA are subject to judicial review, but courts have properly limited their scope of review in this context. There is no warrant for Congress to change current review standards, nor should any regularized or systematic program for review of existing regulations be subject to greater judicial scrutiny.

RECOMMENDATION

I. **Review Requirements**. All 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. If Congress decides to mandate such programs, it should limit that requirement to a broad review, assign to the President the responsibility for overseeing the review process, and specify that each agency design its own program.

II. **Focus of Regulation Review**. Systematic review processes should be tailored to meet the needs of each agency, focus on the most important regulations, and provide for a periodic, ongoing review. The nature and scope of the review should be determined by, among other things, the agency's other responsibilities and demands on its resources. Sufficient time should be provided to allow meaningful information-gathering and analysis.

III. **Setting Priorities**. Agencies should establish priorities for which regulations are reviewed when developing their annual regulatory programs or plans,[1] and in consultation with OMB and the public. In setting such priorities, the following should be considered:

A. whether the purpose, impact and effectiveness of the regulations have been impaired by changes in conditions;[2]

B. whether the public or the regulated community views modification or revocation of the regulations as important;

C. whether the regulatory function could be accomplished by the private sector or another level of government more effectively and at a lower cost; and

D. whether the regulations overlap or are inconsistent with regulations of the same or another agency.

Agencies should not exclude from their review those regulations for which statutory amendment might be required to achieve desired change. Agencies should notify Congress of such regulations and the relevant statutory provisions.

IV. **Public Input**

A. Agencies should provide adequate opportunity for public involvement in both the priority-setting and review processes. In addition to reliance on requests

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[1] *See* Executive Orders 12,498 ("Regulatory Program" required by President Reagan) and 12,866 ("Regulatory Plan" required by President Clinton).

[2] *See* (V)(B), *infra*.

for comment or other recognized means such as agency ombudsmen[3] and formally-established advisory committees, agencies should also consider other means of soliciting public input. These include issuing press releases and public notices, convening roundtable discussions with interested members of the public, and requesting comments through electronic bulletin boards or other means of electronic communication.

B. The provisions of 5 USC section 553(e) authorizing petitions for rulemaking also provide a method for reviewing existing regulations. These provisions should be strengthened to ensure adequate and timely agency responses.[4] Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time. Congress should not modify the current limited judicial review standard applicable to petitions for rulemaking.

V. **Agency Implementation of Regulatory Review Processes**

A. Agencies should provide adequate resources to and ensure senior level management participation in the review of existing regulations.

B. As part of the review process, agencies should review information in their files as well as other available information on the impact and the effectiveness of regulations and, where appropriate, should engage in risk assessment and cost-benefit analysis of specific regulations.

C. In developing processes for reviewing existing regulations, agencies should consider:

1. *Frequency of review*: Regulations could be reviewed on a pre-set schedule (e.g., regulations reviewed every [x] years; a review date set at the time a new regulation is issued; regulations subject to "sunset" dates) or according to a flexible priority list.

2. *Categories of regulations to be reviewed*: Regulations could be reviewed by age, by subject, by affected group, by agencies individually or on a multi-agency basis.

D. Agencies should consider experimenting with partial programs and evaluate their effectiveness.

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[3] *See* ACUS Recommendation 90-2, *The Ombudsman in Federal Agencies.*

[4] *See* Recommendation 86-6, *Petitions for Rulemaking.*