

**SMARTER REGULATIONS THROUGH  
RETROSPECTIVE REVIEW**

**EXECUTIVE OFFICE OF THE PRESIDENT**

**COUNCIL OF ECONOMIC ADVISERS**



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## EXECUTIVE SUMMARY

A well-functioning regulatory system must engage in careful prospective analysis of the consequences of regulations. For over thirty years, Presidents have recognized this point and required agencies to analyze, in advance, both the benefits and the costs of significant regulations.

To achieve the best results, however, such a system must also scrutinize existing rules to ensure that they are not outmoded, ineffective, insufficient, or excessively burdensome. As stated by President Obama in Executive Order 13563 (“Improving Regulation and Regulatory Review”), issued on January 18, 2011, our regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.”

Retrospective analysis is an important complement to prospective analysis. In some cases, prospective analysis of costs and benefits will be highly uncertain; retrospective analysis can provide valuable additional information and ultimately lead to better regulations. In other cases, prospective analysis may have been highly accurate, but changed circumstances will suggest that a new and different approach would now be superior. In light of technological innovations, new developments in the private sector, or actions by state and local governments, retrospective analysis might reveal that existing regulations should be streamlined, modified, expanded, or repealed. Those outside of government will often have indispensable information about the actual effects of regulatory requirements, and may well be able to provide valuable suggestions about potential improvements, including streamlining or repeal.

In Executive Order 13563, issued on January 18, 2011, President Obama directed *executive agencies* to follow new cost-saving, burden-reducing requirements before issuing regulations. He also called for an unprecedented government-wide review of existing significant regulations. As a result of that Executive Order, executive agencies have produced more than two dozen plans, with over 500 reform initiatives.

In March, for example, the Department Labor published a final rule that will bring our warning labels for hazardous chemicals in line with those of a number of other nations.<sup>1</sup> That rule will save employers a great deal of money on training and updating of materials; improve safety and health protections for American workers; and reduce trade barriers for chemical manufacturers that sell their products abroad. The overall five-year savings will be in excess of \$2.5 billion, most of it in the form of reduced costs for employers.

Just a small fraction of the reform initiatives, already finalized or formally proposed to the public, will produce savings in excess of \$10 billion over the next five years. As the agencies’ plans are implemented, and as new reforms are added, significantly larger savings are expected.

In Executive Order 13579 (“Regulation and Independent Regulatory Agencies”), issued on July 11, 2011, the President asked the *independent regulatory agencies* to follow the core principles

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<sup>1</sup> 77 FR 17574 (March 26, 2012).

of Executive Order 13563 and to develop retrospective review plans. Almost twenty independent agencies have produced such plans for public scrutiny, with a number of substantial initiatives. For example, the Federal Communications Commission has already repealed 190 regulations.

Concurrently with the issuance of this report, the President is signing an Executive Order designed to institutionalize the process of retrospective review. That Executive Order calls for public participation in that process; for prioritization of those reforms that promise significant quantifiable savings to the American public; and for regular reporting, to the public, on progress and timelines. These requirements of participation, prioritization, and accountability are meant to ensure regular evaluation of the actual effects of regulatory mandates. With that step, the process of retrospective review should become a standard part of the assessment of federal regulations. The results should include substantial increases in benefits and substantial decreases in costs.

## **I. The Role of Retrospective Analysis**

### *Prospective and Retrospective Analysis*

Careful assessment of both benefits and costs is essential to the design of smart regulations. That point has been recognized in federal practice since 1981, when President Reagan issued Executive Order 12291. That Executive Order stated that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society” and that “[r]egulatory objectives shall be chosen to maximize the net benefits to society.” Similar principles were established in Executive Order 12866, issued by President Clinton in 1993.

Over the last three decades, every American president has endorsed the idea that careful assessment of benefits and costs should accompany the issuance of economically significant regulations, both proposed and final.<sup>2</sup> In addition, every American president over the last three decades has endorsed the idea that, to the extent permitted by law, agencies must show that the benefits of regulations justify the costs and that they have selected the approach that maximizes net benefits. Executive Order 13563, issued by President Obama, explicitly refers to those requirements and specifically directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible” and to “maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts; and equity).”

It follows that before an economically significant regulation is proposed or finalized, agencies must estimate, to the extent feasible, both the benefits and costs of relevant alternatives and, to the extent permitted under the applicable statute, select the alternative that maximizes net benefits (while “recognizing that some benefits and costs are difficult to quantify”). Benefit-cost

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<sup>2</sup> A regulatory action is economically significant if it is anticipated “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities”<sup>58</sup> FR 51735 (Oct 4, 1993).

analysis promotes transparency about the various options and clarifies the need to make tradeoffs. A regulation that is expected to eliminate 90% of certain harmful emissions at a cost of \$100 million per year may well generate higher net benefits than one that eliminates 98% of those emissions at a cost of \$1 billion per year.

Consider a recent example of changes during rule development. EPA's final rule for airport de-icing operations will reduce pollutants discharged by airports to waters.<sup>3</sup> Initially, EPA proposed a rule that was estimated to have cost \$91 million per year and that would have removed 45 million pounds of pollutants (ammonia and chemical oxygen demand) from the nation's waters per year. That worked out to a cost of \$2.02 per pound of pollutant discharge avoided. As a result of the concerns raised during the public comment period about the cost and feasibility of the proposed requirements as well as further EPA analysis, EPA decided to adopt a different, more cost-effective, approach that will remove fewer pounds of pollutants, but at a cost of only \$0.21 per pound of pollutant discharge avoided. EPA also worked with industry to develop a voluntary program to promote cost-effective approaches.

Prospective analysis is indispensable. Even if done well, however, the calculation of net benefits may be highly uncertain. In some cases, prospective analysis may be accurate, but changed circumstances may suggest that a new approach would be far better. In light of technological innovations, developments in the private sector, or the actions of state and local governments, retrospective analysis might reveal that existing regulations should be expanded, streamlined, modified, or repealed altogether. Regardless of the quality of the prospective analysis, it is crucially important, in the words of Executive Order 13563, "to measure, and to seek to improve, the actual results of regulatory requirements."

In many cases, regulatory agencies can and should carefully evaluate how existing regulations have been performing, and how the actual benefits and costs compare with those that were estimated in advance. Were the benefits and costs higher or lower than anticipated? Has technology changed since the regulation was put into place, making an alternative approach superior? Have other, more recent regulations reduced or eliminated the need for this one? Have developments in the private sector made the regulation unnecessary or less beneficial? Those questions suggest that regulatory agencies should conduct retrospective analysis of major regulations on the books.

Retrospective analyses have long been recommended by informed observers. For example, Professor Michael Greenstone, a former Chief Economist at the Council of Economic Advisers, has written: "The single greatest problem with the current system is that most regulations are subject to a cost-benefit analysis only in advance of their implementation. That is the point when the least is known and any analysis must rest on many unverifiable and potentially controversial assumptions."<sup>4</sup> By contrast, retrospective analysis examines how regulations have actually worked. Retrospective analysis can support modifications to existing regulations. It can also help agencies learn how to conduct more accurate prospective analysis. If agencies conduct

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<sup>3</sup> See <http://water.epa.gov/scitech/wastetech/guide/airport/index.cfm>.

<sup>4</sup> Michael Greenstone, "Toward a Culture of Persistent Regulatory Experimentation and Evaluation," in David Moss and John Cisternino, eds., *New Perspectives on Regulation*, The Tobin Project, 2009, p. 113.

retrospective analyses, and are able to learn from them, they may improve their prospective estimates as a result. Smart regulation combines prospective analysis and retrospective studies.

### *Existing Research and New Directions*

Existing research on the relationship between prospective and retrospective analysis remains in its earliest stages, but it does provide valuable information. Some people believe that agencies typically overstate the benefits and understate the costs of rules; other people believe that agencies typically understate the benefits and overstate the costs. There are numerous empirical questions here, and current research suggests that both of those views lack support.

The Office of Information and Regulatory Affairs (OIRA) examined such research in its 2005 and 2011 Reports to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities.<sup>5</sup> In its 2005 report, OIRA presented a meta-analysis with a preliminary overview of various retrospective analyses, based on an examination of 47 case studies.<sup>6</sup> The meta-analysis found that agencies had a tendency to overestimate both benefits and costs. It also found that agency estimates of the benefit-cost ratio were accurate about one-fourth of the time, and that agencies were slightly more likely to overestimate than to underestimate such ratios.

More recently, Harrington (2006) reaches related but somewhat different conclusions, based on a comparison of the predicted and actual benefits and costs of 61 regulations.<sup>7</sup> The author found that both benefits and costs were overestimated with roughly equal frequency. In 24 cases, the rules had a higher benefit-cost ratio than anticipated. In 21 cases, the rules had a lower benefit-cost ratio than anticipated. In 16 cases, the actual ratio was roughly equal to the ratio predicted in advance.

Retrospective analysis can lead to modifications that increase net benefits. However, retrospective analysis itself is costly, and if every rule were subject to such analysis, the costs of the enterprise could exceed the benefits. Agencies should limit retrospective analysis to rules that have significant economic impacts and should focus their efforts on rules for which there is

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<sup>5</sup> Office of Management and Budget, Office of Information Regulatory Affairs, Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Dec 2005), online at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005\\_cb/final\\_2005\\_cb\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf) (visited May 3, 2012); Office of Management and Budget, Office of Information Regulatory Affairs, Validating Regulatory Analysis: 2011 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Jun 2011), online at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf) (visited May 3, 2012).

<sup>6</sup> Office of Management and Budget, Office of Information Regulatory Affairs, Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," Office of Management and Budget, Office of Information and regulatory Affairs. (Dec 2005), online at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005\\_cb/final\\_2005\\_cb\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf) (visited May 3, 2012)

<sup>7</sup> Harrington (2006) "Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews," *Resources for the Future* Discussion Paper No. 06-39 (September).

reason to believe that the prospective estimates of benefits or costs may differ significantly from those actually realized.<sup>8</sup>

Retrospective analysis can help to promote the streamlining or repeal of less effective rules and the maintenance, strengthening, or expansion of those that work well in practice. In general, retrospective review is most naturally understood as a way of assessing rules that have been in operation and on the books for a sufficient period to allow careful study. In some cases, however, when new information becomes available soon after a rule is issued, a prompt reassessment could be warranted.

## II. Executive Agencies

On January 18, 2011, President Obama issued Executive Order 13563, “Improving Regulation and Regulatory Review,” which states that our regulatory system must “protect public health and welfare while also promoting economic growth, innovation, competitiveness, and job creation.” Among other things, and to the extent permitted by law, the Executive Order:

- *Requires agencies to consider costs and benefits, to ensure that the benefits justify the costs, and to select the least burdensome alternatives.* As noted, the Executive Order places an emphasis on the need to “measure, and seek to improve, the actual results of regulatory requirements.”
- *Requires increased public participation.* The order directs agencies to promote an open exchange with State, local, and tribal officials; experts in relevant disciplines; affected stakeholders; and the public in general. Bringing rulemaking into the twenty-first century, it requires use of the Internet to promote such an exchange. It also directs agencies, even in advance of rulemaking, to seek the views of those likely to be affected. That emphasis on public participation reflects recognition of the dispersed nature of knowledge and the fact that federal officials can learn a great deal from those in the private sector and those who work in State, local, and tribal governments.
- *Directs agencies to take steps to harmonize, simplify, and coordinate rules.* The order emphasizes that some sectors and industries face redundant, inconsistent, or overlapping requirements. To reduce costs and to increase simplicity, it calls for greater coordination within and across agencies. That provision is connected with the general effort to assess the cumulative effects of regulations and to reduce cumulative burdens where appropriate.
- *Directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.* Such approaches, avoiding mandates and bans, may

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<sup>8</sup> See, for example, the discussion of retrospective analysis in Harrington, Morgenstern, and Nelson (1999) “On the Accuracy of Regulatory Cost Estimates,” *Resources for the Future* Discussion Paper No. 99-18 (January).

include, for example, public warnings, appropriate default rules, or provision of information in a form that is clear and salient.

The Executive Order also calls for a government-wide review of regulations on the books: a “lookback” at existing federal regulations. The requirement of retrospective analysis, closely connected with the emphasis on the need to measure “actual results,” directs agencies to review their significant rules, and to determine, on the basis of that review, which of those should be streamlined, relaxed, expanded, or eliminated. One of the central goals of that approach is to reduce unnecessary regulatory burdens and costs on individuals, businesses, and State, local, and tribal governments.

In general, the Executive Order calls for “periodic review of existing significant regulations.” More particularly, it requires each executive agency to produce preliminary plans, within 120 days, “under which the agency will periodically review its existing significant regulations.”

Over twenty executive departments and agencies have released retrospective review plans to remove, streamline, or modify unjustified rules and paperwork requirements.<sup>9</sup> The plans include 500 initiatives. Many of those initiatives will reduce costs, simplify the regulatory system, and eliminate redundancy and inconsistency. Just a small fraction of the reform initiatives, already finalized or formally proposed to the public, are expected to save more than \$10 billion over the next five years. As the plans are implemented, the ultimate savings are expected to exceed that figure by a substantial margin. Some of the proposed initiatives represent a fundamental rethinking of how things have long been done. For example, a number of initiatives involve shifting from paper to electronic reporting. Those efforts can save money for both the private and the public sector. Other reforms ensure that the Code of Federal Regulations does not refer to outdated information or impose rules that fit poorly with significantly changed circumstances.

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<sup>9</sup> White House Regulation Reform, online at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system> (visited May 3, 2012).

### **DOT Lookback Plan**

The Department of Transportation (DOT) developed its retrospective review plan after seeking input from the public through a Federal Register notice and through a public meeting. DOT took a number of additional steps to ensure that the widest possible audience received notice of its request for participation in this important project. DOT issued a press alert, sent out a series of emails to a broad range of groups, and posted information on the Secretary of Transportation's Blog, with special alerts for updates. DOT also used creative methods to promote public access and participation. For example, it created a website using IdeaScale to provide the public with an alternative means to provide written feedback in a less formal manner. IdeaScale permits participants to discuss ideas with others and to agree or disagree with them, making it particularly useful for individuals and small entities, including local and tribal governments. IdeaScale also helps participants refine their suggestions and gather additional information or data to support those suggestions.

DOT's plan lays out steps to develop a strong culture of retrospective review within the Department. It also clearly identifies factors and processes that DOT will use to set priorities, including an initial list of 78 regulations for which action will be taken. DOT also identifies an additional 56 regulations, some of which warrant further study before deciding on a course of action to amend the regulations.

DOT's plan summarizes public comments and provides responses and action items based on those comments. The plan includes a large number of initiatives spanning multiple areas, including aviation, maritime, highways, motor carriers, railroads, hazardous materials and pipelines, traffic safety, and general consumer regulations. DOT identifies noteworthy reform efforts ranging from improving efficiency in reviewing transportation projects for environmental impacts, to improving aircraft certification to avoid compliance problems.

The DOT lookback plan pays special attention to reducing regulatory burdens on small businesses and state and local governments. The plan identifies over two dozen potential reform efforts that would save small businesses money. For example, one of DOT's noteworthy reform efforts aims to codify regulations to prevent duplicative drug and alcohol testing, which would be particularly helpful for small businesses.

Many of the reforms result from public input and outreach. Several agencies, including the Environmental Protection Agency (EPA) and DOT, held public meetings where stakeholders were invited to provide specific suggestions for reform. Some agencies, including the Department of Labor (DOL), created dedicated webpages to receive input on possible ideas for retrospective review. Agency final plans, available on agency Open Government websites, summarize the input received from the public.

Here are some examples of reform initiatives that are expected to generate substantial private-sector savings:



- The Department of Health and Human Services (HHS) is finalizing rules to remove unnecessary regulatory and reporting requirements now imposed on hospitals and other healthcare providers, saving more than \$5 billion over the next five years.<sup>10</sup>
- DOL has finalized a rule to simplify and to improve hazard warnings for workers, producing net benefits over \$2.5 billion over the next five years while increasing safety.<sup>11</sup>
- DOT is finalizing a rule that would eliminate unnecessary regulation of the railroad industry, saving up to \$340 million in the near future, and avoiding the risk that regulatory costs will be passed on to consumers.<sup>12</sup>
- HHS has finalized a rule to allow greater flexibility for telemedicine providers, making medical advice more available at remote rural areas and saving millions of dollars in the process.<sup>13</sup>
- EPA is planning a rule to reduce burdens on hazardous waste generators by moving from paper-based to electronic reporting; when implemented, that rule could save up to \$600 million over five years.<sup>14</sup>
- DOL has issued a final rule that will remove over 1.9 million annual hours of redundant reporting burdens on employers and save more than \$200 million in five-year costs.<sup>15</sup>
- EPA is finalizing a rule to eliminate the obligation for many states to require air pollution vapor recovery systems at local gas stations since modern vehicles already have effective air pollution control technologies. The anticipated five-year savings are over \$400 million, a number that take into account the costs associated with the removal of vapor recovery equipment and the use of less expensive conventional equipment on the gasoline dispensers, as well as reductions in record-keeping requirements and other operating costs.<sup>16</sup>
- DOT is finalizing a rule to extend compliance dates on traffic control requirements (which would, among other things, require states and localities to change street signs), saving millions of dollars in the process.<sup>17</sup>
- The Departments of Commerce and State are undertaking a series of steps to eliminate unnecessary barriers to exports, including duplicative and unnecessary regulatory

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<sup>10</sup> For the proposed rules, see 76 FR 65891 (Oct 24, 2011); 76 FR 65909 (Oct 24, 2011).

<sup>11</sup> 77 FR 17574 (March 26, 2012) (cited in note 1).

<sup>12</sup> For the proposed rule, see 76 FR 63899 (August 24, 2011).

<sup>13</sup> 75 FR 29479 (May 26, 2010).

<sup>14</sup> Environmental Protection Agency, Improving Our Regulations: Final Plan for Periodic Retrospective Reviews of Existing Regulations 35–36 (Aug 2011), online at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/environmental-protection-agency-regulatory-reform-plan-august-2011.pdf> (visited Sept 6, 2011).

<sup>15</sup> 76 FR 33590 (June 8, 2011).

<sup>16</sup> For the proposed rule, see 76 FR 41731 (July 15, 2011).

<sup>17</sup> For the proposed rule, see 76 FR 46214 (August 2, 2011).

requirements, thus reducing the cumulative burden and uncertainty faced by American companies and their trading partners.<sup>18</sup>

#### **Retrospective Review Accomplishments to Date**

- **Over 500 initiatives** identified in agency retrospective review plans
- **Over 50** of those initiatives already issued as proposed rules
- **Over 50** of those initiatives already issued as final rules

Many of the regulatory changes put forward by executive branch agencies focus specifically on small businesses. For example:

- The Department of Defense issued a new rule to accelerate payments on contracts to as many as 60,000 small businesses, thus improving their cash flow.<sup>19</sup>
- The Small Business Administration is adopting a single electronic application to reduce the paperwork required of certain lenders, a step that will in turn benefit small business borrowers who seek relatively small amounts of capital to grow and succeed.<sup>20</sup>
- DOT has outlined an initiative that would harmonize the Hazardous Material Regulations with the most recent edition of the International Atomic Energy Agency requirements for the transportation of Class 7 (radioactive) materials to update, clarify, correct, or provide relief from certain regulatory requirements applicable to the transportation of those materials. DOT expects the rule to result in cost savings for all affected small businesses by easing the regulatory compliance costs for shippers and carriers engaged in international commerce, including trans-border shipments within North America.<sup>21</sup>

In line with the general effort to eliminate unjustified costs and red tape, President Obama issued, on May 1, 2012, an Executive Order, “Promoting International Regulatory Cooperation,” which is designed, when consistent with domestic law and national priorities and prerogatives, to spur efforts to harmonize and coordinate regulatory requirements across countries, to promote

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<sup>18</sup> Department of Commerce, Plan for Retrospective Analysis of Existing Rules 3–6 (Aug 18, 2011), online at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentofcommerceregulatoryreformplanaugust2011a.pdf> (visited Sept 6, 2011).

<sup>19</sup> 76 FR 23505 (November 18, 2011).

<sup>20</sup> Small Business Administration, Final Plan for Retrospective Analysis of Existing Rules (Aug 19, 2011), online at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/smallbusinessadministrationregulatoryreformplanaugust2011.pdf> (visited May 9, 2012).

<sup>21</sup> 76 FR 50332 (August 12, 2011).

consistent standards, and to minimize unnecessarily divergent rules that companies face when they do business across national boundaries. That Executive Order requires the retrospective review process to consider initiatives for revisiting existing rules to foster harmonization.

### **III. Independent Regulatory Agencies**

In July 2011, spurred in part by recommendations from the President's Jobs Council, the President issued Executive Order 13579, "Regulation and Independent Regulatory Agencies," calling on the independent agencies to follow executive agencies in conducting a regulatory lookback to identify rules that warrant reassessment. Independent agencies were asked to produce preliminary plans to reevaluate and streamline their existing regulations, and to seek public comments on those plans. That was the first time in history that a President has issued an Executive Order asking independent agencies to produce retrospective review plans for public scrutiny.

Executive Order 13579 also states that independent regulatory agencies, no less than executive agencies, should "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It asks them to follow the key principles in Executive Order 13563, including public participation; harmonization and simplification of rules; flexible approaches that reduce costs; and scientific integrity.

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. The independent agency plans describe substantial efforts to reduce burdens. Here are a few highlights:

- The Federal Communications Commission has eliminated 190 rules, many of which are no longer needed as a result of technological advances. The Fairness Doctrine is among the rules eliminated by the FCC.
- The Federal Deposit Insurance Corporation is undertaking a new initiative to streamline requirements imposed on community banks.
- The Office of the Comptroller of the Currency is currently reassessing all of its regulations to integrate the rules governing Federal savings associations and the rules for national banks and identify outmoded or burdensome regulations.
- The Federal Energy Regulatory Commission is developing a proposed rule that would save an estimated \$440,000 annually by eliminating redundant reporting requirements for natural gas companies.
- The Federal Reserve has started an internal review of its process for reviewing applications for mergers and other acquisitions. That step has the potential to reduce inefficiencies and delays in the mergers and acquisitions application process.

- The Federal Trade Commission, working with the U.S. Department of Justice, has revised the Hart-Scott-Rodino Transmittal Rule and streamlined the premerger notification form to reduce the filing burden on companies seeking merger approval. The changes should reduce the time required to prepare responses for filings, with an estimated net reduction of 2 hours and \$920 in labor costs per filing.
- The Commodity Futures Trading Commission has been examining and revising a number of its regulations as part of its implementation of the Dodd-Frank Act.

We anticipate that significant savings will result from these initiatives as well.

#### **IV. Conclusion: The Prospects for Retrospective Review**

Prospective review of the costs and benefits of regulation has become a standard part of modern government. Retrospective analysis, focusing on actual results, is an important complement to prospective analysis. A well-functioning regulatory system uses the best available techniques to quantify benefits and costs in advance. But it also engages in continuing scrutiny of existing requirements, to identify opportunities to decrease costs, increase benefits, or both.

In some cases, prospective analysis of costs and benefits will be uncertain; retrospective analysis can provide valuable information and spur better approaches. In other cases, prospective analysis may be accurate, but changed circumstances may suggest that a new approach would be far better. In light of technological innovations, developments in the private sector, or the actions of state and local governments, retrospective analysis might reveal that existing regulations should be streamlined, modified, expanded, or repealed altogether. Those outside of government will often have indispensable information about the actual effects of regulatory requirements. They will then be able to provide valuable suggestions about potential improvements, perhaps including streamlining or repeal.

For all of these reasons, retrospective review can and should become routine at regulatory agencies. The process of retrospective analysis has already produced over 500 reform proposals. We have noted that a small fraction of those, already finalized or formally proposed to the public, will produce more than \$10 billion in five-year savings. As the plans are implemented and expanded, far greater savings are expected.

To create an ongoing process of retrospective analysis, and a continuing culture of both prospective and retrospective evaluation, agencies should use the best available techniques to assess the net benefits of regulation, both in the initial design of rules and through retrospective review. While agencies have made significant progress on the process of retrospective review, there is always room for improvement. As agencies conduct both prospective and retrospective review of regulations, in order to maximize net benefits and thus to eliminate unjustified costs, agencies should consider innovative practices such as:

- **Learn from State and local examples.** States and localities often implement regulations in advance of federal regulations and, therefore, provide agencies with what is essentially

a laboratory for road-testing different policy options and programs. In certain circumstances, agencies can learn from those examples and can pick and choose those that demonstrated the highest net benefits in practice. Similarly, agencies can test regulatory alternatives in advance through pilot projects.<sup>22</sup>

- **Third-Party Evaluations.** During the public comment period, agencies often receive benefit-cost analyses conducted by stakeholders, industry, public advocacy groups, Congress, academia, various think-tanks, non-profit organizations, and sometimes state and local governments. The affected public often has useful information about the actual impacts of a particular regulation. Agencies can engage the public on independent third-party evaluations of their regulations. Agencies can also create working groups of experts from academia, think-tanks, and industry and other affected stakeholders to evaluate how to incorporate third-party evaluations and how to use information from the public for internal decision-making.
- **Flexibilities such as Sunsets and Safe harbors.** Sometimes agencies do not have enough information to decide whether to apply a regulatory provision to all entities or whether they should limit the scope of regulation. Those situations can occur if there is a great deal of empirical uncertainty, as, for example, when agencies are projecting impacts into the far future, when costs and benefits are hard to specify in advance, or when there is great potential for adverse unintended consequences of regulation. In those situations, agencies can incorporate flexibilities such as sunsets, safe harbors, or exemptions to minimize unintended consequences and to test impacts on a more limited basis before expanding to more entities.<sup>23</sup>
- **Incentives.** Incentives can be used to encourage agencies to be aggressive and creative with their lookback efforts. Under one possible format, a panel of prominent economists and other experts could assess agency plans and help to generate best practices.

Concurrent with the issuance of this report, on May 10, 2012, the President is issuing an Executive Order to institutionalize the process of retrospective review. The Executive Order notes that “further steps should be taken, 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.”

Consistent with that direction, this Executive Order calls for public participation in the process of retrospective review; for prioritization of those reforms that promise significant quantifiable savings to the American public; and, to the extent practicable and permitted by law, for giving

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<sup>22</sup> An emerging literature explores potential methods of evaluation, including randomized trials and quasi-experimental methods. See, for example, Michael Greenstone, “Toward a Culture of Persistent Regulatory Experimentation and Evaluation,” in *New Perspectives on Regulation*, David Moss and John Cisternino (Eds.). Cambridge, MA: The Tobin Project, Inc. 2009.

<sup>23</sup> Note that sunsets and safe harbors built into regulations on a case by case basis are very different from categorical or sweeping legislative sunsets of regulations, which could well force agencies to spend unnecessary resources on further rulemaking, even on non-controversial regulations.

special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses.

Perhaps most importantly, the Executive Order calls for regular reporting to the public on progress and timelines in implementing retrospective review. With this historic step, the process of retrospective analysis, no less than prospective analysis, will become a standard part of the assessment of federal regulations.

## Appendix A: List of Executive Agency Retrospective Review Plans

Name of Agency	URL
<b>USDA</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Agriculture%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Agriculture%20Final%20Plan.pdf</a>
<b>Commerce</b>	<a href="http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules">http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules</a>
<b>Council on Environmental Quality</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Council%20on%20Environmental%20Quality%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Council%20on%20Environmental%20Quality%20Final%20Plan.pdf</a>
<b>DOD</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Defense%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Defense%20Final%20Plan.pdf</a>
<b>DOJ</b>	<a href="http://www.justice.gov/open/doj-rr-final-plan.pdf">http://www.justice.gov/open/doj-rr-final-plan.pdf</a>
<b>DOL</b>	<a href="http://www.dol.gov/regulations/EO13563Plan.pdf">http://www.dol.gov/regulations/EO13563Plan.pdf</a>
<b>DOT</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Transportation%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Transportation%20Final%20Plan.pdf</a>
<b>Education</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Education%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Education%20Final%20Plan.pdf</a>
<b>Energy</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Energy%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Energy%20Final%20Plan.pdf</a>
<b>EPA</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Environmental%20Protection%20Agency%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Environmental%20Protection%20Agency%20Final%20Plan.pdf</a>
<b>FAR</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Federal%20Acquisition%20Regulatory%20Council%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Federal%20Acquisition%20Regulatory%20Council%20Final%20Plan.pdf</a>
<b>GSA</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/U.S.%20General%20Services%20Administration%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/U.S.%20General%20Services%20Administration%20Final%20Plan.pdf</a>
<b>HHS</b>	<a href="http://www.hhs.gov/open/execorders/13563/finalplan.html">http://www.hhs.gov/open/execorders/13563/finalplan.html</a>
<b>DHS</b>	<a href="http://www.dhs.gov/xlibrary/assets/dhs-ogc-final-retrospective-review-plan-8-22-11-final.pdf">http://www.dhs.gov/xlibrary/assets/dhs-ogc-final-retrospective-review-plan-8-22-11-final.pdf</a>
<b>HUD</b>	<a href="http://portal.hud.gov/hudportal/documents/huddoc?id=eo_13563.pdf">http://portal.hud.gov/hudportal/documents/huddoc?id=eo_13563.pdf</a>

<b>Name of Agency</b> (continued)	<b>URL</b>
<b>Interior</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Interior%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Interior%20Final%20Plan.pdf</a>
<b>NASA</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/National%20Aeronautics%20and%20Space%20Administration.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/National%20Aeronautics%20and%20Space%20Administration.pdf</a>
<b>OPM</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Office%20of%20Personnel%20Management%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Office%20of%20Personnel%20Management%20Final%20Plan.pdf</a>
<b>SBA</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Small%20Business%20Administration%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Small%20Business%20Administration%20Final%20Plan.pdf</a>
<b>SSA</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Social%20Security%20Administration%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Social%20Security%20Administration%20Final%20Plan.pdf</a>
<b>State</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20State%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20State%20Final%20Plan.pdf</a>
<b>Treasury</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Treasury%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Treasury%20Final%20Plan.pdf</a>
<b>Veterans Affairs</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Veterans%20Affairs%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Department%20of%20Veterans%20Affairs%20Final%20Plan.pdf</a>



## Appendix B: List of Independent Agency Retrospective Review Plans

Name of Agency	URL
<b>Advisory Council on Historic Preservation</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Advisory%20Council%20on%20Historic%20Preservation%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Advisory%20Council%20on%20Historic%20Preservation%20Final%20Plan.pdf</a>
<b>Consumer Financial Protection Bureau</b>	<a href="http://www.gpo.gov/fdsys/pkg/FR-2011-12-05/pdf/2011-31030.pdf">http://www.gpo.gov/fdsys/pkg/FR-2011-12-05/pdf/2011-31030.pdf</a>
<b>Commodities Future Trading Commission (CFTC)</b>	<a href="http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oirastatusreport110711.pdf">http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oirastatusreport110711.pdf</a> .
<b>Consumer Product Safety Commission</b>	<a href="http://www.cpsc.gov/businfo/frnotices/fr12/regreview.pdf">http://www.cpsc.gov/businfo/frnotices/fr12/regreview.pdf</a>
<b>Equal Employment Opportunity Commission</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/U.S.%20Equal%20Employment%20Opportunity%20Commission%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/U.S.%20Equal%20Employment%20Opportunity%20Commission%20Final%20Plan.pdf</a>
<b>Farm Credit Administration</b>	<a href="http://www.fca.gov/Download/RetrospectiveAnalysisOfExistingRules.pdf">http://www.fca.gov/Download/RetrospectiveAnalysisOfExistingRules.pdf</a>
<b>Federal Communications Commission</b>	<a href="http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310874A1.doc">http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310874A1.doc</a> .
<b>Federal Deposit Insurance Corporation</b>	<a href="http://www.fdic.gov/regulations/laws/plans/index.html">http://www.fdic.gov/regulations/laws/plans/index.html</a> .
<b>Federal Energy Regulatory Commission</b>	<a href="http://www.ferc.gov/legal/maj-ord-reg/retro-analysis/ferc-eo-13579.pdf">http://www.ferc.gov/legal/maj-ord-reg/retro-analysis/ferc-eo-13579.pdf</a>
<b>Federal Housing Finance Agency</b>	<a href="http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/html/2011-24405.htm">http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/html/2011-24405.htm</a> .
<b>Federal Maritime Commission</b>	<a href="http://www.fmc.gov/assets/1/News/Retrospective%20Review_Plan_Public_Announcement_11_4_2011.pdf">http://www.fmc.gov/assets/1/News/Retrospective%20Review_Plan_Public_Announcement_11_4_2011.pdf</a>
<b>Federal Reserve</b>	<a href="http://www.federalreserve.gov/generalinfo/foia/regulatory-burden-reduction-111115.pdf">http://www.federalreserve.gov/generalinfo/foia/regulatory-burden-reduction-111115.pdf</a>
<b>Federal Trade Commission (FTC)</b>	<a href="http://www.ftc.gov/ftc/regreview/index.shtml">http://www.ftc.gov/ftc/regreview/index.shtml</a>
<b>National Credit Union Administration</b>	<a href="http://www.ncua.gov/News/Documents/NW20111110EO-13579.pdf">http://www.ncua.gov/News/Documents/NW20111110EO-13579.pdf</a>
<b>National Labor Relations Board</b>	<a href="https://nrlb.gov/sites/default/files/documents/2901/nrlb_plan_for_retrospective_analysis_of_existing_rules.pdf">https://nrlb.gov/sites/default/files/documents/2901/nrlb_plan_for_retrospective_analysis_of_existing_rules.pdf</a>

<b>Name of Agency</b> (continued)	<b>URL</b>
<b>Nuclear Regulatory Commission</b>	<a href="http://pbadupws.nrc.gov/docs/ML1126/ML112690277.pdf">http://pbadupws.nrc.gov/docs/ML1126/ML112690277.pdf</a>
<b>Office of the Comptroller of the Currency</b>	<a href="http://www.occ.gov/topics/laws-regulations/increasing-regulatory-effectiveness.pdf">http://www.occ.gov/topics/laws-regulations/increasing-regulatory-effectiveness.pdf</a> .
<b>Pension Benefit Guaranty Corporation</b>	<a href="http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Pension%20Benefit%20Guaranty%20Corporation%20Final%20Plan.pdf">http://exchange.regulations.gov/exchange/sites/default/files/doc_files/Pension%20Benefit%20Guaranty%20Corporation%20Final%20Plan.pdf</a>
<b>Railroad Retirement Board</b>	<a href="http://www.rrb.gov/pdf/blaw/EO13579.pdf">http://www.rrb.gov/pdf/blaw/EO13579.pdf</a> .
<b>Securities and Exchange Commission</b>	<a href="http://www.sec.gov/rules/other/2011/33-9257.pdf">http://www.sec.gov/rules/other/2011/33-9257.pdf</a>
<b>Surface Transportation Board</b>	<a href="http://www.stb.dot.gov/decisions/ReadingRoom.nsf/WEBUNID/6C0D4C27C150D6D28525792100534402?OpenDocument">http://www.stb.dot.gov/decisions/ReadingRoom.nsf/WEBUNID/6C0D4C27C150D6D28525792100534402?OpenDocument</a> .