

FLAGGED FOR REVIEW: IMPLEMENTING ANALYSIS OF DISTRIBUTIONAL CONSEQUENCES IN THE RETROSPECTIVE REVIEW PROCESS

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INTRODUCTION	191
I. DISTRIBUTIONAL CONSEQUENCE ANALYSIS	194
A. <i>Executive Mandates</i>	197
B. <i>Existing Agency Efforts</i>	202
C. <i>Judicial Review</i>	206
II. FLAGGING RULES FOR REVIEW	207
A. <i>Data Collection</i>	208
III. RETROSPECTIVE REVIEW METHODOLOGIES	208
A. <i>Relation to Cost-Benefit Analysis</i>	208
B. <i>Sorting Through Reliance Interests</i>	210
IV. RECOMMENDATIONS	211
A. <i>Refining The Method</i>	211
B. <i>Transparency Challenges</i>	213
C. <i>Personnel Challenges</i>	214
CONCLUSION	214

INTRODUCTION

In January 2021, President Biden issued a memorandum to the Office of Management and Budget (OMB) titled “Modernizing Regulatory Review.”¹ The memorandum (“Biden Memo”) instructs the director of OMB to begin working on recommendations for regulatory review to promote a host of

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1. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,223 (Jan. 26, 2021).

goals; among them: economic growth, social welfare, and racial justice.² It specifies that OMB should propose procedures for review that take distributional consequences of regulatory initiatives into account, anticipating that reviewing rules with a focus on distributional consequences will require agencies to adopt additional procedures to accommodate this analysis in the rulemaking and rule rescission process.³ There have been robust discussions of how distributional consequences can be integrated into regulatory impact analysis prior to a rule's adoption.⁴ Examination of how analyses of adopted rules and regulatory programs should adapt to accommodate consideration of a rule's distributional consequences has received less attention.⁵ OMB's recommendations on how agencies should treat distributional consequences in the retrospective review process will be significant for future reviews, especially to the extent existing rules did not undergo distributional consequence analysis prior to adoption and create burdens on marginalized groups mentioned in the Biden Memo.⁶

Retrospective Review

Periodic regulatory review, or retrospective review, is how agencies analyze the impact of promulgated regulations to determine the extent to

2. *Id.* (outlining goals of “public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations.”).

3. *See id.* at 7,223–24 (tasking the Office of Management and Budget (OMB) director with proposing procedures accounting for distributional consequences—the ways in which benefits and burdens of a regulation are spread across different communities); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1491 (2018) (helpfully characterizing assessment of a regulation's net benefits as a focus on “increasing the size of the pie,” compared to a focus on distributional consequences as focusing on the “size of each slice.”).

4. *See Revesz, supra* note 3, at 1568–69 (discussing the Environmental Protection Agency's (EPA's) distributional impact analysis at the regulatory impact analysis stage and proposing the development of an interagency working group to address distributional concerns raised via regulatory impact analyses); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance* 4 (Univ. of Chi. Pub. L., Working Paper No. 767, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796235 (examining a method for evaluating distributional consequences at the regulatory impact analysis stage by incorporating distributional weights into cost–benefit analyses) (citing Matthew D. Adler, *Benefit-Cost Analysis and Distributional Weights: An Overview*, 10 REV. ENV'T ECON. & POL'Y 264, 264–85 (2016)).

5. *See, e.g.,* Stuart Shapiro, *Regulatory Analysis Needs to Catch Up on Distribution*, THE REGUL. REV. (Feb. 15, 2021), <https://www.theregreview.org/2021/02/15/shapiro-regulatory-analysis-needs-distribution/> (discussing this adaptation, primarily within the context of regulatory impact analysis, instead of retrospective review).

6. The retrospective review process is a process by which executive agencies periodically review promulgated regulations. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993).

which adopted regulations accomplish stated goals.⁷ Executive mandates have subjected agencies to retrospective review requirements since the Carter Administration.⁸ Some agencies create their own frameworks for retrospective review, while others promulgate regulations which require retrospective review of regulations or regulatory programs at statutorily pre-defined intervals.⁹ The retrospective review requirement has evolved, with succeeding presidential administrations adding new analytical requirements.¹⁰ In two executive orders, President Obama made clear that the retrospective review requirement impacts both executive and independent agencies.¹¹

The goals outlined in the executive orders on retrospective review are a way for each succeeding administration to shape a regulatory agenda.¹² Generally, the stated goals for executive-mandated retrospective review involve ensuring regulations promote public welfare and are not unduly burdensome.¹³ Agencies submit reports to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) about the status of rules undergoing retrospective analyses.¹⁴

Traditionally, OIRA has produced guidance instructing agencies on the best practices for regulatory review, with agencies compiling reports to inform OMB on the rules that have been selected for review, the problem the rule seeks to

7. *See id.* (requiring agencies to periodically review existing significant regulations to promote achievement of regulatory objectives and presidential priorities).

8. *See* Exec. Order No. 12,044, 43 Fed. Reg. 12,661, 12,661 (Mar. 24, 1978); *see also* 86 Fed. Reg. 36,075, 36,080 (July 8, 2021) (Administrative Conference of the United States (ACUS) Report citing Joseph E. Aldy, *Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy*, Administrative Conference of the United States, 27 (Nov. 17, 2014) (highlighting past retrospective reviews beginning with the Carter Administration)).

9. *See* Administrative Conference Recommendation 2021–22, 86 Fed. Reg. 36,075, 36,080 (July 8, 2021) (describing examples of the review requirements imposed by the Clean Air Act and the TREAD Act).

10. *See infra* note 11 (exemplifying the evolution of regulatory review mandates since the Carter Administration, such as a specific focus on burden reduction for small businesses, and the inclusion of the requirement that retrospective reviews occur at set intervals).

11. Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587, 41,587 (July 14, 2011) (applying the review requirements to independent agencies).

12. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 70,913, 70,916 (Nov. 16, 2011).

13. *E.g.*, Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821 (Jan. 21, 2011) (outlining goals of public health, economic welfare, safety, and environmental protection in addition to burden reduction).

14. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003) (directing agencies to submit a plan to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA)).

address, and the schedule for review.¹⁵ Agency procedure for retrospective review varies widely.¹⁶ The outcomes of these reviews are similarly variable.¹⁷

This Comment discusses how distributional consequence analysis should be integrated into each phase of the retrospective review process, outlining procedures OIRA can recommend to agencies to analyze distributional consequences in a manner that promotes equitable outcomes in retrospective review processes. Part I discusses the evolution of executive calls for agencies to assess distributional consequences when evaluating existing regulatory programs, highlighting agency efforts to analyze distributional consequences of regulations in both rulemaking and rule rescission contexts. Part II explores the process agencies use to select rules for retrospective review, examining the interaction between rule-selection procedures and information-gathering procedures critical to determining whether a review is likely to generate distributional findings warranting a modification or rescission. Part III delves into the methodology of the distributional consequence analysis, discussing the challenges agencies face when weighing distributional consequences against reliance interests. Part IV outlines procedures OMB should include in its agency guidance to assist with identifying distributional priorities, targeting rules likely to generate distributional findings, effectively communicating findings, and evaluating lessons learned from the distributional inquiry.

I. DISTRIBUTIONAL CONSEQUENCE ANALYSIS

Since the Reconstruction Era, marginalized communities have borne unique consequences of agency interpretations that become codified in rulemakings.¹⁸ Today, agencies can recognize distributional consequences

15. *Id.*; see also Revesz, *supra* note 3 (questioning whether OMB is the agency best positioned to assess and mitigate distributional consequences posed by regulatory programs).

16. U.S. GOV'T. ACCOUNTABILITY OFF., GAO 07-791, GOVERNMENT ACCOUNTABILITY OFFICE REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE TRANSPARENCY OF RETROSPECTIVE REVIEWS 13 (2007) [hereinafter REEXAMINING REGULATIONS]; see also Administrative Conference Recommendation, 86 Fed. Reg. 36,075, 36,080 (July 8, 2021) (discussing the variation between statutorily-mandated periodic review and elective review); LORI S. BENNEAR & JONATHAN B. WIENER, PERIODIC REVIEW OF AGENCY REGULATION (June 7, 2021) (report to the Admin. Conf. of the U.S.) at 49 (finding inconsistency in agency implementations of periodic reviews).

17. See REEXAMINING REGULATIONS, *supra* note 16, at 13 (noting the processes and standards guiding reviews and the level of documentation varied across agencies).

18. See, e.g., Karen M. Tani, *Administrative Constitutionalism at the Borders of Belonging*, 167 U. PA. L. REV. 1603, 1616–17 (2019) (describing the restrictive reading of the terms slavery and involuntary servitude by the Freedmen's Bureau in the years following the passage of the Thirteenth Amendment and the resulting impact on the contract labor system in which many former slaves worked). See also *id.* at 1604–05 nn.1–5. (discussing other administrative

of interpretations, rules, and regulatory programs by understanding and searching for three ways adverse consequences of a rule or regulatory program tend to manifest.¹⁹ First, distributional consequences are relevant where a rule furthers a specific harm to a vulnerable community that the rule intended to prevent or inadequately addresses.²⁰ Second, distributional consequences are relevant where there exists a harm to a marginalized community that the rule did not envision or account for.²¹ Third, distributional consequences are important where a rule confers benefits to a marginalized group to a lesser degree than it confers benefits to other groups.²²

Agencies have raised distributional concerns in both rulemaking and rule rescission contexts.²³ Some rulemakings have addressed the potential for distributional effects of rules on vulnerable communities, such as racial minorities, immigrants, and low-wage workers.²⁴ This potential for distributional effects has been recognized in energy, labor, environmental protection, and transportation contexts.²⁵

Analyzing the nature and scope of the distributional consequences of a regulation involves assessing the impact of the rule on a particular marginalized or vulnerable community, rather than assessing the impact of the rule in relation to the general welfare.²⁶ Calls to assess distributional

constitutionalists' efforts to chronicle disparate impacts to marginalized communities in environmental regulation, education, housing, food and drug policy, and communications).

19. *Infra* Part I.B.

20. See Letter from Russell T. Vought, OMB Acting Director, to Elaine L. Chao, U.S. Dep't of Transp. (July 12, 2019) (on file with author) (discussing potential distributional harms of proposed Corporate Average Fuel Economy (CAFE) penalty).

21. *Infra* Part I.B. (discussing the distributional harm of contribution to workplace fissuring).

22. See *id.* (highlighting the EPA's discussion of inequitably distributed forgone benefits).

23. See OFF. OF AIR QUALITY PLAN. & STANDARDS, EPA-452/R-18-001, EPA REGULATORY IMPACT ANALYSIS FOR THE PROPOSED RECONSIDERATION OF THE OIL AND NATURAL GAS SECTOR EMISSION STANDARDS FOR NEW, RECONSTRUCTED, AND MODIFIED SOURCES, 4–39 (2018) [hereinafter EPA REGULATORY IMPACT ANALYSIS] (rulemaking discussing potential distributional consequences on communities with disproportionate pollutant exposure); Recission of Joint Employer Status Under the Fair Labor Standards Act Rule, 29 C.F.R § 791 (Mar. 12, 2021) (rule rescission referencing distributional harms of the existing joint employer status rule).

24. See 29 C.F.R § 791 (discussing concerns about workplace fissuring negatively impacting low wage workers).

25. See EPA REGULATORY IMPACT ANALYSIS, *supra* note 23, at 4–39; 29 C.F.R. § 791; *Sierra Club v. U.S. Dep't of Energy*, 703 F. App'x 1, 3 (D.C. Cir. 2017); Letter from Russell T. Vought, *supra* note 20.

26. Kenta Tsuda, *Making Bureaucracies Think Distributively: Reforming the Administrative State with Action-Forcing Distributional Review*, 7 MICH. J. ENV'T & ADMIN. L. 131, 165–66 (2017).

consequences come at a time where the White House has issued an executive order requesting information on how agencies plan to engage stakeholders to focus on promoting equity in rulemaking by improving outreach to underserved communities throughout the rulemaking process.²⁷ Underlying this executive order is the idea that OMB should focus on ensuring marginalized communities are not excessively burdened by new and existing regulations.²⁸

President Biden issued an executive order, titled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” the same week as the Biden Memo.²⁹ The executive order highlights a number of new initiatives designed to promote racial equity, including: a call to study access to participation in the rulemaking process; instructions for agency heads to provide reports on topics related to promoting equity in access to agency services and contracting opportunities; and a request for agency heads to study whether new regulations may be necessary to advance equity.³⁰ The Biden Memo is of greater relevance to the procedural discussion of distributional consequence analysis in relation to the retrospective review process than the executive order, but the executive order offers insight into the landscape of administrative reforms targeting equity, and thus, can be read in tandem with the policy goals of the Biden Memo.³¹

In addition to having similar aims as the distributional consequence language in the Biden Memo, the executive order can provide useful information about the groups the Biden Memo envisioned being encompassed by the terms “disadvantaged, vulnerable, and marginalized communities.”³² The executive order notes agencies should consult with members of communities who have been “historically underrepresented” in the federal government and who have been either underserved or subject to

27. See Exec. Order No. 18,985, 86 Fed. Reg. 7,009, 7,009 (Jan. 25, 2021).

28. Daniel Kuehn, *Biden’s Executive Orders Inject Racial Equity into Regulatory Review*, URB. INST. (Mar. 18, 2021), <https://www.urban.org/urban-wire/bidens-executive-orders-inject-racial-equity-regulatory-review>; Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24,029, 24,031 (May 5, 2021) (requesting information on approaches to promote equity and better serve communities which have been currently or historically underserved).

29. Exec. Order No. 18,985, 86 Fed. Reg. at 7,009.

30. *Id.* at 7,009–11.

31. *Compare* Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,223 (Jan. 26, 2021), *with* Exec. Order No. 18,985, 86 Fed. Reg. at 7,009–11 (highlighting similar reforms to promote equity within federal government management and in how stakeholder contributions are considered in agency processes, with the executive order carrying greater relevance to this analysis because of its explicit instruction to the OMB director to propose procedures for distributional consequence analysis).

32. See Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,223.

discrimination in federal programs.³³ The executive order does not name which communities have been historically underrepresented, implying this is a task for agencies to assess.³⁴ Though it does not provide an exhaustive list of communities to whom agencies should prioritize outreach efforts, it does mention establishing an equitable data working group, in doing so, listing a number of demographic variables that have not been traditionally disaggregated that are important to study in relation to promoting equity.³⁵ Those demographic groups include race, ethnicity, gender, disability, demographic status, or other key demographic variables.³⁶ In response to the executive order, OMB published a study identifying methods to assess equity in federal government operations.³⁷

A. Executive Mandates

To be clear, the Biden Memo is far from the first call for assessment of the distributional consequences of regulations; rather, it is a recent articulation of the policy objectives that have been furthered in past decades.³⁸ Regulatory review processes have gradually evolved toward focusing on analyzing an increasing number of consequences of regulations.³⁹ When combined with an administrative focus on equity, this evolution has resulted in a shift toward assessing the extent to which a rule burdens a particular marginalized group.⁴⁰ The Biden Memo did not create a complete swing in

33. Exec. Order No. 18,985, 86 Fed. Reg. at 7,011.

34. *See id.*

35. *Id.* Alondra Nelson & Clarence Wardell III, *An Update from the Equitable Data Working Group*, THE WHITE HOUSE (July 27, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/07/27/an-update-from-the-equitable-data-working-group/> (noting that the Equitable Data Working Group has been an inter-agency collaboration).

36. Nelson & Wardell, *supra* note 35.

37. See Off. of Mgmt. & Budget, EXEC. OFF. OF THE PRESIDENT, Study to Identify Methods to Assess Equity: Report to the President (2021), 31, https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf (recommending strategies for outreach to underserved and marginalized communities, noting they must be “tailored to fit the specific circumstances that communities face to make participation a realistic option.”).

38. *See* Exec. Order No. 12,044, 43 Fed. Reg. 12,661, 12,661 (Mar. 23, 1978) (developing processes for evaluating meaningful alternatives and ensuring costs and burdens on the public are minimized before regulations are issued); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993) (ordering agencies to submit to OIRA their plans to make regulatory programs more effective and less burdensome); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011) (outlining broad policy objectives of accountability and burden reduction).

39. *Infra* notes 45, 47–48.

40. *See* Exec. Order No. 18,985, 86 Fed. Reg. 7,009, 7,009 (Jan. 25, 2021) (highlighting disparities, circumstances necessitating “. . . an ambitious whole-of-government equity agenda . . .”).

a new direction, but rather it built upon regulatory review ideas gradually developed over the course of previous administrations.⁴¹ Agencies have exemplified this development toward distributional consequence analysis. For example, the Environmental Protection Agency (EPA) mentioned assessing the distributional consequences of regulations as early as 1994.⁴² Distributional consequence analysis is not new, though it is receiving increasing prominence after the Biden Memo. A search of the *Federal Register* for the term distributional consequences generates seventeen results, with eight of the seventeen documents published within the past year.⁴³

In the first form of executive-mandated regulatory review, the Carter Administration in 1978 noted that agencies should focus on the impact on the general economy, in addition to the impact of the rule on individual industries, regions, or levels of government.⁴⁴ In the first executive order mandating regulatory review, the enumeration of individual industries, regions, and levels of government indicates an acknowledgment that the impact on the general economy is not the only metric by which to evaluate the efficacy of a regulation.⁴⁵ The 1978 executive order also envisioned entities that might experience specific harms from a regulation providing feedback, via a public comment mechanism.⁴⁶ The inclusion of a public comment mechanism signaled acknowledgment that particular groups may be burdened more extensively by a regulation, thereby deserving particular consideration and the opportunity to provide feedback during the rulemaking process.⁴⁷

41. See Exec. Order No. 12,044, 43 Fed. Reg. at 12,611 (emphasizing the need to provide early participation and comment by state and local governments, small businesses, other organizations, and public individuals); Exec. Order No. 12,866, 58 Fed. Reg. at 51,740 (encouraging state, local, and tribal governments to specifically assist in the identifications of policies that impose considerable or unique burdens on those governmental entities); Exec. Order No. 13,563, 76 Fed. Reg. at 3,821 (signifying the expansion of a regulatory review agenda over succeeding administrations to include requirements that review be periodic and assess impacts on individual industries).

42. See 59 Fed. Reg. 170 (proposed September 2, 1994) (to be codified at 40 C.F.R. pt. 745) (describing higher concentration of lead-based paint in older and low-cost units).

43. Federal Register Document Search as of July 15, 2021. Available at <https://www.federalregister.gov/documents/search?conditions%5Bterm%5D=%22distributional+consequences%22>.

44. Exec. Order No. 12,044, 43 Fed. Reg. at 12,663.

45. See *id.* at 12,663, 12,668 (mandating regulatory analyses for rules with the potential for cost increases in individual industries).

46. *Id.* at 12,661–62.

47. See *id.* at 12,665–67 (calling for a public comment mechanism available to individual members of the public, in addition to local governments and industry representatives).

The 1980s ushered in a new focus on the unique burdens regulations posed on particular classes of small businesses; Congress's adoption of the Regulatory Flexibility Act, requiring specific assessment of the impact of rules on small businesses, is indicative of this objective.⁴⁸ The Regulatory Flexibility Act requires analysis of impacts on small businesses prior to adoption of the regulation, rather than post-adoption, but it made way for calls to assess impacts on specific entities—small businesses, small organizations, and governments of towns with a population of less than 50,000 people—argued to be more vulnerable to burdens posed by a regulation.⁴⁹ The congressional findings and statement of purpose of the law indicate a groundwork for eventual calls for distributional considerations.⁵⁰ Regulatory Flexibility Act analyses remain part of the regulatory impact analysis.⁵¹ Present in the Regulatory Flexibility Act, but less present in other forms of precursors to calls for distributional considerations, is the idea of reciprocity—that the extent of a burden on a particular community should be proportionate to that community's participation in causing the underlying issue the rule attempts to regulate.⁵² Critical to the evolution of the calls to assess distributional consequences is the idea that some entities are impacted by a regulation who would not otherwise have their considerations heard in the retrospective analysis.⁵³

Similarly, in the 1990s, the Clinton Administration's executive order mandating periodic review of economically significant regulations also mentioned assessing the impact of regulations on entities of different sizes.⁵⁴ President Clinton's executive order pushed forth the idea that quantitative calculations reached as the result of a cost-benefit analysis may not be the exclusive metric by which to evaluate a regulation.⁵⁵ The executive order

48. See 5 U.S.C. § 601(3) (defining small business concern); The Regulatory Flexibility Act, 5 U.S.C. §§ 601–612.

49. Regulatory Flexibility Act, 5 U.S.C. §§ 601, 603–05.

50. See *id.* §§ 601–612; see also *The Regulatory Flexibility Act*, SMALL BUS. ADMIN., <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/> (last visited Feb. 19, 2022) (Congressional declaration of purpose indicating the requirement for special analysis of a rule's impact in relation to a particular community, small entities, was intended to promote "health, safety, environmental, and economic welfare").

51. *Id.* at § 2 (noting that smaller entities can be harmed by governmental efforts to address problems not caused by smaller entities).

52. See Regulatory Flexibility Act, 5 U.S.C. §§ 601–612; § 601(A)(2) (containing Congress's statement of purpose).

53. See *id.* §§ 601–04.

54. Exec. Order No. 12,866, 58 Fed. Reg. 51,736 (Oct. 4, 1993).

55. See *id.* ("[E]ach agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.").

acknowledged the existence of “qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”⁵⁶ This is a significant precursor to the Biden Administration’s conception of distributional consequence analysis because the executive order acknowledges that information relevant to burdens posed by a rule has not been quantitatively documented in some instances, complicating quantifying harms to certain communities.⁵⁷

The Clinton Administration’s emphasis on both quantitative and qualitative harms in the regulatory review process made way for consideration of the types of evidence mentioned in the public feedback mechanism envisioned in Biden’s executive order on advancing racial equity.⁵⁸ The Clinton Administration’s emphasis on both qualitative and quantitative harms takes on distributional implications when combined with the inclusion of the requirement that the review be periodic.⁵⁹ With a timeline for review of certain rules or regulatory programs, there exists an implicit acknowledgment that changes in circumstances or demographics can warrant a reconsideration of the arguments for adoption of a rule.⁶⁰

The number of entities named for particular consideration in the regulatory review process has continued to expand.⁶¹ OMB’s Circular A-4 guidance on regulatory analysis mentions requirements for several other analyses of impacts of regulations on specific sub-groups including analyses of environmental impact (National Environmental Policy Act), environmental health impacts affecting children (Executive Order 13,045), and energy effects (Executive Order 13,211).⁶² The OMB Circular A-4 guidance defined distributional effects of regulations, noting that impacts of regulatory actions can be divided differently among different sectors of the population, with the corollary that benefits of

56. *Id.* at 51,735.

57. *See id.* at 51,735–36.

58. *See id.* at 51,735 (identifying both quantitatively and qualitatively documented burdens). President Biden’s racial equity executive order similarly envisions both quantitative and qualitative analyses. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

59. *See* Exec. Order No. 12,866, 58 Fed. Reg. at 51,740 (requiring agencies to “periodically review . . . existing significant regulations”); OFF. OF MGMT. & BUDGET, *supra* note 14, at 14 (mentioning benefits and costs associated with a regulation can fluctuate over time, which can warrant consideration of intertemporal distributional consequences).

60. *See* Exec. Order No. 12,866, 58 Fed. Reg. at 51,740.

61. *See* OFF. OF MGMT. & BUDGET, *supra* note 14, at 14 (2003).

62. *See, e.g.*, 62 Fed. Reg. 19,885, 19,885 (Apr. 23, 1997) (basing additional executive requirements for review of regulatory impact on children on “[a] growing body of scientific knowledge demonstrat[ing] that children may suffer disproportionately from environmental health risks and safety risks.”).

regulations can also be divided unevenly over time.⁶³ It recommended agency analyses describe distributional benefits and costs, also giving way to the assessment of intertemporal effects.⁶⁴

The regulatory review executive order that mirrors the Biden Memo most closely is the executive order issued under the Obama Administration.⁶⁵ There is great similarity between the goals of review in the Biden Memo and the goals mentioned in the Obama executive order.⁶⁶ Issued a decade apart, both orders contain similar language focused on efforts to reform regulatory review, but the Biden Memo instructs agencies to ensure regulations “do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”⁶⁷ Efforts to assess distributional consequences in regulatory impact analyses largely did not come to fruition during the Obama Administration.⁶⁸ Similar to the Biden Memo, the Obama Administration’s executive order on regulatory review provides few details on the weight that agencies should give to each benefit and which analyses should take priority.⁶⁹ It is clear that President Biden aimed to revisit that effort with a renewed focus.⁷⁰ OMB’s recommendations to agencies about methodologies for distributional consequence analysis may influence the extent to which this analysis takes hold.⁷¹ The executive orders issued during the

63. See OFF. OF MGMT. & BUDGET, *supra* note 14, at 14 (discussing “intertemporal distributional consequences,” highlighting the need for agencies to assess the “streams of benefits and costs over time” to account for how a regulation may burden one generation in comparison to another).

64. *Id.*

65. Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821 (Jan. 21, 2011) (Obama Administration order on improving regulation and regulatory review).

66. Compare Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,223 § 2 (Jan. 26, 2021) (directing OMB to create recommendations aimed at improving and modernizing regulatory review in order to “promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations”), with Exec. Order No. 13,563, 76 Fed. Reg. at 3,821 (discussing using regulatory review to promote goals of modernizing regulatory programs, burden reduction, and economic welfare). The executive order is similar to a presidential memorandum; both documents contain presidential directives, but the executive order is distinct from memoranda in that it carries a requirement for the President to invoke legal authority for the directive and for OMB to assess the impact of the directive on the federal budget. *Executive Order, Proclamation, or Presidential Memorandum?*, LIBR. OF CONG. (last visited Feb. 19, 2021), <https://guides.loc.gov/executive-orders/order-proclamation-memorandum> (explaining the similarities and differences between memos and executive orders).

67. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,223 § 2(b)(ii).

68. See Revesz, *supra* note 3, at 1491.

69. Exec. Order No. 13,563, 76 Fed. Reg. at 3,821–22.

70. See Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,223 § 1 (noting that the Biden Memo “reaffirms the basic principles” of Exec. Order No. 13,563).

71. Susan E. Dudley, *Distributional Effects in Regulatory Impact Analysis*, GEO. WASH. REGUL.

Trump administration did not offer specific instructions to agencies to address distributional concerns when considering the efficacy of regulations.⁷²

Most recently, the Biden Memo noted agencies should assess the extent to which existing regulations promote “public health, economic growth, social welfare, racial justice, environmental stewardship, and the interests of future generations.”⁷³ The origin of the language in the Biden Memo about “disadvantaged, marginalized or vulnerable communities” is not clear; however, it is likely presidential memoranda reflect influence by policymakers within the White House, as well as the executive agencies who report to OIRA.⁷⁴

Additional context about the origin of the Biden Memo might assist in understanding which groups it aims to prioritize when agencies assess distributional consequences in relation to “disadvantaged, vulnerable, or marginalized communities.”⁷⁵ The simultaneous executive order on equity can provide some indicators of which communities the Biden Memo envisions ought to be the focus of efforts to disaggregate demographic data.⁷⁶ It also may be difficult to trace the origin of the “distributional consequences” language in recent history because calls to assess the impacts of regulations on particular vulnerable communities are not new.⁷⁷

B. Existing Agency Efforts

Existing efforts to perform distributional analyses can be classified into three categories: efforts to mitigate inequitable distribution of burdens; efforts to remedy unanticipated consequences; and efforts to account for inequitable distribution of benefits.⁷⁸

STUD. CTR. (May 12, 2021), <https://regulatorystudies.columbian.gwu.edu/distributional-effects-regulatory-impact-analysis> (highlighting the importance of OMB’s action on distributional consequence analysis in the Regulatory Impact Analysis context).

72. See Revesz, *supra* note 3, at 1491 (2018) (citing Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,093 (Mar. 28, 2017)).

73. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,223 (noting that OMB’s recommendations should “propose procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”).

74. See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) (discussion of regulated entities maintaining a back-and-forth feedback process with OIRA); Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,223.

75. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,233; *supra* note 41.

76. *Supra* note 41.

77. *Supra* Part I.A. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. at 7,223 § 2(b)(ii).

78. See BENNEAR & WIENER, *supra* note 16 at 7–9 (discussing circumstances that can lead to consequences that were not anticipated at the regulatory impact analysis stage, such as changes in evidence, policy, and affected populations).

Efforts to Mitigate Inequitable Distribution of Burdens:

Several agencies have focused on analyzing distributional consequences where potential existed for a regulation to carry inequitable compliance costs.⁷⁹ Compliance costs become relevant in distributional consequence analyses to the extent increased compliance costs result in price increases that impact low-income consumers or generate employment effects in a particular region or industry impacting a vulnerable community.⁸⁰

OMB's arguments against raising the Corporate Average Fuel Economy (CAFE) civil penalty rate from \$5.50 to \$14.00 provide an example of a situation where distributional arguments proved influential due to the rule's anticipated price effects and resulting likelihood of disproportionately burdening low-income consumers.⁸¹ Even where the statute authorizing the civil penalty rate did not define what constituted a negative economic impact, OMB concurred with the National Highway Traffic Safety Administration (NHTSA)'s analysis in part due to the concentration of negative economic impacts in the automobile manufacturing industry.⁸² The letter from OMB references regional employment impacts, noting that the potential for the rule adjustment to contribute to higher vehicle prices would unequally burden low-income consumers.⁸³

A takeaway from NHTSA's treatment of the CAFE civil penalty rate is that flagging economic impacts creating distributional consequences can entail considering the scope and regional distribution of impacts envisioned by the statute.⁸⁴ Price effects were a feature, not a flaw, of the CAFE civil penalty rate. However, NHTSA expressed concern about the way the intended price impacts were likely to disproportionately impact consumers, rather than the manufacturers who were the intended target of the penalty.⁸⁵ Analysis of potential price and employment effects represents one way agencies have evaluated distributional consequences of proposed rules; price effect discussions are relevant to a retrospective analysis because of the

79. See Letter from Russell T. Vought, *supra* note 20; EPA REGULATORY IMPACT ANALYSIS, *supra* note 23, at 4–39 (highlighting distributional harms spurred by price effects).

80. See Letter from Russell T. Vought, *supra* note 20, at 5 (noting compliance costs of a proposed penalty could increase prices for domestic automobile producers, creating price effects disproportionately burdening low-income consumers).

81. See *id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See Civil Penalties, 86 Fed. Reg. 3,016, 3,016, 3,021 (Jan. 14, 2021) (to be codified at 49 C.F.R. pt. 578) (discussing industry "reliance" on the current CAFE penalty rate, indicating the National Highway Traffic Safety Administration's (NHTSA's) anticipation that manufacturers represent the intended regulated entity).

opportunity for continued assessment of economic consequences after a rule's adoption and implementation.

Efforts to Accommodate Unanticipated Consequences of Regulations:

The Department of Labor, in a rulemaking months after the Biden Memo, rescinded a Fair Labor Standards Act (FLSA) rule due to its insufficient consideration of the rule's effect on conditions for workers.⁸⁶ Citing the Biden Memo, the agency issued a proposed rulemaking raising distributional arguments in support of rescinding an existing joint employer rule, because of the rule's potential to burden low-income workers and other vulnerable groups by contributing to workplace fissuring.⁸⁷ In the Notice of Proposed Rulemaking, the Department of Labor noted that economic analysis indicated rescission of the FLSA rule could unduly impact workers in low-wage industries because low-wage industries see a greater magnitude of FLSA violations.⁸⁸

In its discussion of potential distributional consequences of the Joint Employer Status Rule, the Department of Labor cited concerns about the ability of low-wage workers to collect back wages owed under the FLSA.⁸⁹ In NHTSA's CAFE rule, the Agency anticipated a general price effect, but expressed concern about the inequitable burden of the price effect on low-income consumers.⁹⁰ Rather than raising issue with the concentration of anticipated burdens of a regulation, the Department of Labor rescinded the FLSA rule in part due to an unintended harm uniquely felt by a vulnerable community.⁹¹ Price effects are felt by consumers and employers at large; here, the impact of workplace fissuring is a potential effect of the rule change that would exclusively be experienced by the vulnerable groups mentioned in the Joint Employer Status rulemaking.⁹²

86. Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, Department of Labor Wage and Hour Division, 86 Fed. Reg. 40,939, 40,950–52 (July 30, 2021) (to be codified at 29 C.F.R. § 791).

87. Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, Department of Labor Wage and Hour Division, 86 Fed. Reg. 14,038, 14,045–46 (Mar. 12, 2021) (to be codified at 29 C.F.R. § 791).

88. See *id.* at 14,045 (citing ANNETTE BERNHARDT, RUTH MILKMAN & NIK THEODORE, NAT'L EMP. L. PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009) (finding Fair Labor Standards Act violations are concentrated in low-wage industries).

89. Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, Department of Labor Wage and Hour Division, 86 Fed. Reg. at 14,048 (to be codified at 29 C.F.R. § 791).

90. Civil Penalties, 86 Fed. Reg. at 3019.

91. Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, Department of Labor Wage and Hour Division, 86 Fed. Reg. at 40,950–52 (Mar. 12, 2021) (to be codified at 29 C.F.R. § 791).

92. Compare Rescission of Joint Employer Status Under the Fair Labor Standards Act

Efforts to Narrow Unequal Distribution of Benefits:

Expanding the conception of distributional consequence analysis to look at where benefits are disproportionately shared, in addition to where burdens are disproportionately shared, broadens the types of rules that might be eligible for distributional review.⁹³ However, just as understanding the distribution of burdens poses information-gathering challenges for agencies, understanding the distribution of benefits can be similarly challenging.⁹⁴ In a regulatory impact analysis of a rule related to emission standards, EPA mentioned that assessing health benefits of a rule can be challenging because the extent to which benefits from an environmental protection regulation are experienced depends on the correlation of atmospheric pollutants to housing and work locations, which can be difficult to isolate and study.⁹⁵ In the regulatory impact analysis, EPA did not quantify the extent to which health benefits of the regulation might be forgone if a change was instituted, instead describing qualitatively in the report that the forgone benefits were expected to be unequally distributed.⁹⁶

By moving beyond where harms are distributed and searching for unequally distributed benefits and unanticipated consequences brought about by regulations, agencies may be able to select candidates for review that can provide benefits for marginalized groups without drawing significant pushback from stakeholders who have reliance interests. With a broader conception of the types of rules that might warrant analysis of distributional consequences, however, the challenge for agencies remains prioritizing candidates for retrospective review given resource constraints.⁹⁷

Rule, Department of Labor Wage and Hour Division, 29 C.F.R. § 791 (Mar. 12, 2021) (identifying how an employer's ability and power to act in retaliation may be a relevant factor for determining employer status, while an employee's economic dependence on the potential joint employer is not relevant for the determination), *with* Letter from Russell T. Vought, OMB Acting Dir., to Elaine L. Chao, U.S. Dep't of Transp. (July 12, 2019) (on file with author) (defining the affected population broadly as consumers in the NHTSA correspondence and narrowly in the Wage and Hour Division rule as workers in low-wage industries).

93. EPA REGULATORY IMPACT ANALYSIS, *supra* note 23, at 4–39 (Oct. 15, 2018) (noting measuring allocation of benefits proves difficult, implying there are some number of rules that disproportionately share benefits).

94. *See supra* note 92.

95. EPA REGULATORY IMPACT ANALYSIS, *supra* note 23, at 4–39.

96. *Id.*

97. Aldy, *supra* note 8, at 1002.

C. *Judicial Review*

Justifying Rule Recissions and Modifications

Incorporating distributional consequence analysis in the retrospective review process might result in no change to a rule, a rule recission, or a rule modification. Where the outcome of the retrospective review is a rule modification or a rule recission, agencies can anticipate challenges brought by parties who had reliance interests on the rule that was modified.⁹⁸

The arbitrary and capricious standard sets the lower bound for when revoking a regulation is impermissible.⁹⁹ With regards to distributional consequences highlighted during retrospective review, the question is what the lowest distributional harm must be to justify a rule change.¹⁰⁰ The same justification standard applies to rule promulgation and rule recission, hence the question for distributional harms flagged under a regulatory impact analysis will likely be interpreted as the same standard for distributional harms flagged under retrospective review.¹⁰¹

Parties in reliance may argue that distributional impact analysis at the retrospective review stage is not fundamentally distinct from the cost-benefit balancing test used during the regulatory impact analysis stage.¹⁰² This argument contends that instead of balancing the costs and benefits to general welfare, the test is balancing benefits to specific marginalized groups in relation to the benefits to parties with reliance interests.¹⁰³

98. *E.g.*, Civil Penalties, 86 Fed. Reg. 3,016, 3,021 (Jan. 14, 2021) (to be codified at 49 C.F.R. pt. 578) (noting existence of manufacturer “reliance” on the current CAFE penalty rate).

99. *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 42 (1983) (defining the arbitrary and capricious standard for evaluating rescissions: “[i]f Congress established a presumption from which judicial review should start, that presumption . . . is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record.”).

100. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,223 (Jan. 26, 2021) (“[T]aking into account distributional consequences of regulations” implies that the accounting of distributional consequences will be outcome-determinative in a retrospective review process in at least some instances. To determine in which instances the accounting of distributional consequences of regulations will be outcome-determinative, the question is what the lowest harm must be to justify a rule change, absent other agency findings the rule should be modified).

101. *See State Farm*, 463 U.S. at 41 (holding the rescission of a standard is subject to the same evaluation standard as a rule promulgation).

102. Some proposals for distributional consequence analysis have envisioned cost-benefit methodologies expanding to incorporate assessment of distributive costs and benefits. *See* Shapiro, *supra* note 5 (citing John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 523–24 (2008) (explaining the suggestion to incorporate distributional consequence analysis within the cost-benefit methodology agencies use to conduct regulatory impact analyses by “modif[ying]” the “soft benefit-cost test”).

103. *See supra* note 102.

Without a methodology for incorporating analysis of distributional harms into cost-benefit analyses, agencies will need to develop explanations for how the incorporation of the two methodologies differ, rather than merely stating distributional harms were assessed.¹⁰⁴ Providing greater detail about not just the methodology used after a rule was selected for review, but also the method used to select the rule or program for retrospective review makes retrospective review more transparent and aids agencies in overcoming potential judicial challenges to the justification for the action prompted by the retrospective review.

Comparing Agency Rule Change Explanations to Justifications for the Biden Memo

Statements from former OIRA officials indicate OIRA review is not typically promulgated from the White House alone; rather, agencies provide input throughout the process.¹⁰⁵ With this in mind, it seems likely that the distributional consequence language in the Biden Memo was informed by an evolution of a goal for review, rather than an immediate shift. Agencies can state they have considered distributional consequences with regards to a rule, but further explanation on the methodology is also necessary to better ensure the analyses conducted are in accordance with the intent of the instruction to the OMB Director.¹⁰⁶

II. FLAGGING RULES FOR REVIEW

Prior to engaging in the analysis of the distributional consequences of a regulation or regulatory program, agencies first select rules and programs that make good candidates for review and provide justifications for the rules they select.¹⁰⁷ It is important not to focus solely on identifying areas where the retrospective review is likely to generate a distinct finding from the regulatory impact analysis. This is one method of highlighting rules that might be good candidates for review; however, to the extent that distributional considerations were not undertaken at the regulatory impact analysis stage when the rule was proposed, the retrospective review might not create a direct comparison, since the regulation is assessed in relation to a different group of interest.¹⁰⁸

104. *See* *Sierra Club v. U.S. Dep't of Energy*, 703 F. App'x 1 (D.C. Cir. 2017) (stating distributional harms were assessed without identifying the methodologies the agency used).

105. Sunstein, *supra* note 74, at 1840.

106. *See, e.g., Sierra Club*, 703 F. App'x at 1 (where the Department of Energy stated distributional consequences were considered).

107. *See* Aldy, *supra* note 8, at 55 (discussing examples of inadequate explanations of the methodology used to select rules for retrospective review).

108. *See* Shapiro, *supra* note 5 (insinuating that analysis of distributional impacts in the regulatory impact analysis stage can make way for useful comparisons at the retrospective review stage).

A. Data Collection

Data collection is an important feature of the rule selection process in addition to the review methodology. The request for information OMB issued in May 2021 represents an example of an effort to gather demographic data to assist with analyzing the extent to which marginalized groups are uniquely burdened by federal programs.¹⁰⁹ The task force outlined in the executive order can also help facilitate the creation of strategies to disaggregate demographic data key to answering questions about whether regulations pose distributional consequences worth mitigating via rescission or modification.¹¹⁰

One example of an agency soliciting public comment on retrospective review agendas is EPA's May 2021 proposed hydrofluorocarbon baseline rule.¹¹¹ In the proposal, EPA specifically mentioned seeking comments on whether any remedies could help the program avoid some of the anticipated distributional consequences and input on the existence of other regulatory entities that might be better positioned to regulate the producers of the chemical in a way that minimizes the undue burden.¹¹² Seeking advance input, as EPA did in the proposed hydrofluorocarbon baseline rule notice, can help facilitate the information-gathering necessary to inform a retrospective review agenda that considers the consequences. In addition to soliciting comments on rule selection, agencies can also use data on the number of requests for rule exemptions or waivers as information that can "flag" a rule as likely to benefit from a review.¹¹³

III. RETROSPECTIVE REVIEW METHODOLOGIES

A. Relation to Cost-Benefit Analysis

Agencies commonly use cost-benefit analysis as a method of evaluating the efficacy of prospective rules.¹¹⁴ The methodology was adopted as there has become an increased focus on evidence-based policymaking; conducting a

109. See Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24,029, 24,029–30 (May 5, 2021) (outlining the request for information as agencies conduct internal assessments to promote equity).

110. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223, 7,233 (Jan. 26, 2021).

111. EPA Phasedown of Hydrofluorocarbons: Establishing the Allowance Under the American Innovation and Manufacturing Act, 40 C.F.R. §§ 9, 84 (May 19, 2021).

112. *Id.*

113. See BENNEAR & WIENER, *supra* note 16, at 52 (highlighting the Department of Transportation's use of waiver request data as a "flag" for when rules warrant revisiting via periodic review due to changed circumstances).

114. *E.g.*, DAVID PERKINS & MAEVE CAREY, CONG. RSCH. SERV., R44813, COST-BENEFIT ANALYSIS AND FINANCIAL REGULATOR RULEMAKING (2017); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993).

cost-benefit analysis allows decisionmaking to occur based on a numerical indicator of the likely impact of a rule on society when compared with adoption of both an alternative rule or adoption of no rule.¹¹⁵ Cost-benefit analysis weighs a proposed or existing rule's net cost against its net benefit and adds justification to the rule adoption where the benefits of the rule justify the costs.¹¹⁶

The realm of affected stakeholders for the purpose of a cost-benefit analysis is broad; the methodology assesses a rule's economic impact on public welfare as a whole, instead of evaluating the rule's impact on a specific group of parties that share a common reason why the regulation may prove to be particularly burdensome.¹¹⁷ Cost-effectiveness analysis, similar to cost-benefit analysis, is a method of comparing outcomes of varying regulatory schemes.¹¹⁸ Like cost-benefit analysis, cost-effectiveness analysis considers net impacts on society, rather than isolating impacts on particular entities.¹¹⁹

Assessments of distributional consequences of regulations can result in distinct outcomes from cost-benefit analyses.¹²⁰ Distributional consequence analysis focuses specifically on the burden of a regulation on a particular group, such as racial minorities or children.¹²¹ To the extent that the burden of a rule when considered in relation to a particular group is of greater significance than the burden of a rule when considered in relation to the general welfare, these methodologies—assuming costs are appropriately estimated—should result in divergent outcomes. Distributional consequence analysis could be integrated into the cost-benefit analysis methodology.¹²²

Some proposals have included weighing costs and benefits according to their income distributive effects to integrate analysis of distributional consequences into the cost-benefit analysis.¹²³ This integration seems promising, but a methodology incorporating analysis of distributional consequences into cost-benefit analysis would ideally account for individuals' utility of income, not simply quantifying the fixed harm in relation to

115. PERKINS & CAREY, *supra* note 114.

116. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 219 (2009) (holding the agency's interpretation of the Clean Water Act permitted an interpretation that cost-benefit analysis was appropriate).

117. *See* OFF. OF MGMT. & BUDGET, *supra* note 14, at 14.

118. *See id.* at 11 (mentioning cost-effectiveness analysis as an alternate methodology to cost-benefit analysis).

119. *Id.*

120. Tsuda, *supra* note 26, at 165.

121. *Id.* at 165–66.

122. *See* Graham, *supra* note 102 at 421–22 (outlining a proposal to do so).

123. *See* Hemel, *supra* note 4 (citing Miqdad Asaria, Susan Griffin & Richard Cookson, *Distributional Cost-Effectiveness Analysis*, MED. DECISION MAKING 8 (2016)).

individuals' income.¹²⁴ Accounting for utility provides more information about the scope of harm in relation to the group studied. Dated proposals on distributional consequence analysis indicate the integration has not yet proven feasible due to the lack of a methodology that encompasses individuals' utility of income.¹²⁵ Throughout efforts to update the guidance contained in the Circular A-4, it would be useful for OIRA to inquire about the extent to which that methodological limitation remains.

Updating the Circular A-4 has been discussed at length, with the Biden Memo including an instruction to do so, but it is worth noting that an update to the OMB Circular A-4 should include recommendations for how agencies should weigh distributional consequence analysis in relation to competing regulatory priorities.¹²⁶ OIRA's guidance should also discuss how agencies should determine which groups are centered in the analysis. This determination requires weighing undue distributional consequences in relation to the benefits or lessened harms accrued by parties who have reliance interests.

B. *Sorting Through Reliance Interests*

In analyzing the impact of existing rules or regulatory programs on marginalized groups, agencies can make their analysis more thorough and potentially more averse to potential litigation challenging the outcome of the review to the extent they can anticipate which parties have developed or are likely to develop reliance interests in the continuation of the rule or program.¹²⁷ Developing an understanding of which parties retain reliance interests will likely not prove difficult because agencies can look to comments received during the initial notice-and-comment process to understand which parties or entities provided information supporting the benefits of the rule that was ultimately adopted.¹²⁸ However, if a significant amount of time has passed since the adoption of the rule which is likely the case if the rule is entering the retrospective review stage, the reliance interests may differ from those that existed at the time of the

124. Tsuda, *supra* note 26, at 166.

125. *Id.*

126. Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223 (Jan. 26, 2021); Richard L. Revesz, *A New Era for Regulatory Review*, THE REG. REV. (Feb. 16, 2021) <https://www.theregreview.org/2021/02/16/revesz-new-era-regulatory-review/> (discussing the age of the Circular A-4, suggesting revisions to modernize the document).

127. *E.g.*, Civil Penalties, 86 Fed. Reg. 3,016, 3,021 (Jan. 14, 2021) (to be codified at 49 C.F.R. pt. 578) (considering feedback from manufacturers representing reliance interests who expressed the CAFE penalty rate was determinative in operational decisionmaking).

128. Cass R. Sunstein, *Practically Binding: General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 501 (2016).

rule's adoption; assessing whether such a change has occurred requires industry and circumstantial understanding.¹²⁹

If a retrospective review results in a rule change or rule modification, agencies must then develop a method of assessing whether consequences disproportionately burdening a marginalized or vulnerable group outweigh the reliance interests of the entities or groups benefitting most from the regulation. Whether workers in specific industries or certain regions should be included within the disadvantaged groups referenced in the Biden Memo will likely be notable, especially given the tendency for price effect analyses to focus on low-income and low-wage workers.¹³⁰

IV. RECOMMENDATIONS

A. Refining The Method

As the efforts to institute distributional consequence analysis in retrospective reviews are realized, OIRA must develop recommendations about the procedures agencies should use to communicate findings of the distributional consequence analyses to promote transparency, improve the methodology via lessons learned, and ensure consequences assessed are well-documented for use in future periodic reviews.

One of OIRA's recommendations to agencies should deal with the data collection mechanisms during the retrospective review process.¹³¹ OIRA should emphasize the importance of maintaining sufficient data collection to make this decision, even where regulatory agendas vacillate with succeeding administrations.

OIRA should recommend that agency solicitations for public comments on retrospective review agendas mention the agency's specific focus on targeting rules likely to generate findings of burdensome distributional consequences. Waiting to analyze distributional consequences after rules have been selected for review is too late in the process.¹³² If agencies wait to engage in meaningful data collection after rule-selection has occurred, they are likely to only flag rules revealing unequal distribution of anticipated consequences, but it is likely they will fail to select rules carrying inequitable distribution of unanticipated consequences and rules with inequitable distribution of benefits.¹³³

129. See OFF. OF MGMT. & BUDGET, *supra* note 14, at 14 (discussing analysis of intertemporal distributional effects, consequences of regulations are not necessarily evenly distributed over time).

130. See, e.g., Recission of Joint Employer Status Under the Fair Labor Standards Act Rule, 29 C.F.R. § 791 (Mar. 12, 2021).

131. *Supra* Part D

132. *Supra* Part I.B.

133. *Supra* Part I.B.

OIRA should recommend distributional considerations influence the methods agencies use to select rules for review, encouraging agencies to use data gathered as part of OMB's request for information on equitable practices in government as a starting point for distributional considerations.¹³⁴ The responses received for the questions asking about methods and strategies for advancing equity on agency priorities will likely yield responses that can inform agency approaches to selecting rules for review.¹³⁵ The responses to the request for information can add insight into which areas may have unintended consequences brought about by an existing rule or regulatory program that were not identified in the initial review.¹³⁶

OIRA can also guide agencies toward indicators of distributional inequities by effectively exploring what information gleaned in the regulatory impact analysis stage can be useful in the retrospective analysis. Agencies can retain responses to alternative proposals they were required to consider but ultimately did not adopt.¹³⁷ These alternatives might inform the rule selection process and help agencies implement analysis of distributional consequences of regulations earlier in the process by understanding whether support or opposition to one or more alternatives comes from members of the marginalized groups the Biden Memo references.

OIRA should also consider the procedural differences when recommending how agencies evaluate rules with inequitable concentration of the magnitude of burdens and how agencies evaluate rules with burdens unique to a particular marginalized group.¹³⁸ Where there exist unique burdens, OIRA should consider how this carries specific data collection challenges prior to the rule selection process. Where a vulnerable community bears a unique burden posed by a regulation, it may require agencies to devote resources to seeking out information.

134. See *Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government*, 86 Fed. Reg. 24,029 (May 5, 2021).

135. *Id.* at 24,030.

136. *Id.* at 24,029–32.

137. *New York v. U.S. Dep't of Health and Hum. Servs.*, 414 F. Supp. 3d 475, 557 (S.D.N.Y. 2019) (holding that where an agency's actions constitute substantive rulemaking, it has the obligation to consider alternatives). See also Christopher Carrigan & Stuart Shapiro, *Increasing Early, Transparent, Consideration of Regulatory Alternatives*, THE REGUL. REV. (Nov. 10, 2021), <https://www.theregreview.org/2021/11/10/carrigan-shapiro-transparent-consideration-reg-alternatives/> (noting agencies frequently consider a range of regulatory alternatives but documentation of alternatives considered occurs more frequently in regulatory impact analyses, which are less accessible to the public than Notices of Proposed Rulemaking).

138. *Supra* note 92 (contrasting analysis of unique burdens versus disproportionate concentration of burdens).

Providing clear instructions for agencies on how to identify groups for whom distributional consequences should be assessed and how those consequences should be weighed in relation to the reliance interests presented by groups benefitting most from a rule will prove challenging. This is largely because of the great deal of variation within agency structures. Agencies with a single department head may have broader ability to modify the distributional consequence analysis via modifying the agency's regulatory agenda. Agencies with a single department head may have broader ability to modify the distributional consequence analysis via modifying the agency's regulatory agenda than agencies with multiple commissioners, each of whom may reflect competing views about how to measure consequences, despite the potential for greater continuity.¹³⁹ To promote continuity, it is helpful to frame the review as not only looking for harm, but also searching for benefits to provide the agency with knowledge of the types of rules that have generated value.¹⁴⁰ OIRA should encourage agencies to conduct distributional consequence analysis to look for unequally distributed burdens, unequally distributed benefits, and unintended consequences.¹⁴¹

B. Transparency Challenges

Some scholars have raised issues with the idea that retrospective reviews rely on cost-benefit analysis, arguing that factors like the personnel tasked with review and the degree of transparency about the retrospective review process have a bigger impact on its efficacy than the methodology itself.¹⁴² These critiques are important and potentially suggest that reforms to the methods of analysis be implemented in tandem with efforts towards transparency.¹⁴³ These transparency efforts can be part of the effort to refine the methodology, by documenting lessons learned from each iteration of retrospective review. OIRA should also recommend agencies document whether the review was outcome determinative—whether the retrospective review resulted in a rule modification or rule rescission. This documentation can assist with further refining the distributional methodology.

139. *Supra* note 16.

140. *Supra* note 95.

141. *Id.*

142. Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325 (2014).

143. *See id.* at 340 (noting agencies have made comments about regulatory review to OMB, but those comments have not been made public).

C. Personnel Challenges

OIRA should consider the literature on cognitive biases to which regulators are subject and consider how cognitive biases impact regulators' ability to conduct reviews of distributional consequences of regulations which they themselves have promulgated.¹⁴⁴ Access to information that conflicts with regulatory impact assessments or conflicts with regulators' assumptions about the effects of the rulemaking's early steps may prove useful in helping to contradict the confirmation bias which tends to inhibit ability to evaluate the efficacy of adopted rules.

In addition to considering psychological studies, OIRA should develop an interdisciplinary approach to its recommendations on distributional consequences. It is clear that there can be a role for contributions of scholars outside the fields of law and economics; for example, administrative constitutionalists, historians who study the role the agencies have played in American lives, can provide evidence documenting the types of groups who have been particularly harmed that the Biden Memo cites, helping agencies better understand the ways in which marginalized communities have been presently and historically underserved by the federal government.¹⁴⁵

The types of engagement necessary to integrate assessment of distributional consequences of regulations may come from less traditionally relied-upon sources. In addition to gathering more data in the present term, identifying ways rules have historically promoted distributional harms will assist in targeting outreach to communities who have been harmed and promoting targeted mechanisms of soliciting feedback about which regulatory rules or programs to prioritize for review. Documenting this process and which materials the officials tasked with review rely on is critical.¹⁴⁶

CONCLUSION

OMB currently has an opportunity to consider how to fully realize the calls for assessment of distributional impacts that have persisted throughout the past few decades. Integrating assessment of distributional consequences into the retrospective review process requires OIRA to recommend agencies consider the likelihood of finding distributional harms prior to selecting rules for review. Implementing analysis of distributional consequences during the

144. See Susan E. Dudley & Zhoudan Xie, *Designing a Choice Architecture for Regulators*, PUB. ADMIN. REV. 151–56 (2019) (discussing the “institutional incentives and constraints under which regulators make decisions”).

145. Tani, *supra* note 18, at 1606.

146. See Dudley & Xie, *supra* note 144, at 154 (highlighting biases that affect regulators' ability to effectively identify which information sources they used to reach a decision).

retrospective review process, after rules have been selected for review, will not result in sufficient exposure to information that promotes holistic review and decisionmaking. OIRA should recommend procedures that focus on information-gathering prior to the rule-selection phase.

In addition to focusing on the timing of information-gathering, OIRA should also ensure its methodology recommendations help agencies realize the potential for learning after the retrospective review has been conducted. In creating recommendations that promote documenting lessons learned, outcomes of reviews, and which data agencies relied on in their decisionmaking, OIRA can help agencies revisit distributional consequences, and create a system that analyzes impacts of regulations on marginalized groups in future cycles of periodic review. OIRA should also recommend agencies focus on longevity of data collection to further this goal. To engage groups that have not traditionally engaged with the rulemaking process as extensively, OIRA should weigh psychological evidence and historical evidence, emphasizing to agencies the importance of creating holistic retrospective review processes.