

October 14, 2014

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Dear Committee Members:

Thank you so much for your collective efforts on this project. The draft recommendation highlights many important considerations for how agencies should conduct retrospective review. I've wondered, though, whether we might be able to go a bit further, looking beyond factors to be considered in the prioritization and performance of retrospective analyses to address best practices touching on other aspects of the process. We all know the principal challenges with retrospective review – resource constraints and competing priorities. Those impediments are unlikely to go away. But we now have several years of experience under the Obama Administration's execution of the Executive Order and relevant OMB guidance and perhaps the outcomes of various approaches could yield pertinent learning. The thought is that if we can identify practices that have worked, or those that sounded good in theory but proved inefficient in reality, perhaps we can help agencies apply their scarce resources as productively as possible in this area.

If this concept has any force, here are some potential areas of inquiry:

- **Personnel/Organization.** As Professor Aldy noted, most agencies vested control over the process in a high-ranking official such as a deputy secretary or general counsel.¹ A number created department-wide working groups to address the issue.² At least one agency indicated that it would create a department-wide “Analytics Team” to centralize and share technical resources.³ In a recent GAO roundtable, six of nine agencies surveyed reported that “a standard centralized review process to develop retrospective review plans and track the progress of outcomes was a helpful strategy.”⁴

Can we memorialize some of these lessons, to the extent we agree with them? What are some common elements of the “standard centralized review process” across agencies? Are any of the department-wide working groups or analytics teams still functioning, and if so, what might account for their success? One focus of agency review plans was

¹ See Aldy Report at 51; Government Accountability Office, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals* [“GAO Report”] at 20.

² See GAO Report at 20.

³ Department of Health and Human Services, *Plan For Retrospective Review of Existing Rules* [“HHS Plan”] at 22 (Aug. 22, 2011).

⁴ See GAO Report at 20.

ACUS Committee on Regulation

October 14, 2014

Page 2

whether agencies built in independence between rulemaking arms and those conducting retrospective reviews: has this factor proven feasible and/or helpful?

- **Structure of Review Cycle.** As Professor Aldy documented, some agencies endeavor to review all of their regulations over a fixed timeframe, others follow a formal multiphase review cycle that targets only a portion of the agency's regulations, and yet others proceed more informally.⁵ Have particular formalities proven helpful or merely created unproductive burdens? Some agencies have initiated their second (or more) rounds since the initial burst of activity in 2011.⁶ Did those rounds come too soon, or not soon enough?

Like all aspects of this process, the structure of the review cycle is certainly not "one size fits all." But it might be possible to identify factors agencies may consider as they find the structure that works best for them.

- **Collecting Input.** The draft recommendation properly highlights the importance of collecting outside input in the process. In accordance with the President's executive orders, agency review plans contained numerous varying strategies for collecting input from stakeholders, agency employees, and the public at large.⁷ Surely some have worked better than others. For example, a recent Department of Transportation presentation on retrospective review highlighted the value of requiring pre-registration in public meetings, as it "allowed [DOT] to add structure and organization to the public meeting."⁸ DOT also told GAO that it found using advisory committees early in the process to be helpful.⁹ But DOT further indicated that comments from an IdeaScale website (highlighted in its 2011 plan) were less helpful and created burdens on the agency.¹⁰

⁵ See Aldy Report at 40-41.

⁶ See, e.g., U.S. Department of Homeland Security, *Final Plan for the Retrospective Review of Regulations*, at 43 (Aug. 22, 2011) (indicating that second cycle would begin in 2014).

⁷ See, e.g., Department of Energy, *Final Plan for Retrospective Analysis of Existing Rules*, at 4 (Aug. 23, 2011) (indicating that it would publish notice in Federal Register every six months inviting feedback on existing rules); HHS Plan at 19-20 (discussing Public Participation Task Force).

⁸ See Kathryn Sinniger, Assistant General Counsel for Regulation and Enforcement, *U.S. Department of Transportation's Retrospective Review of Rulemaking*, Office of the Federal Register Liaison Conference ("DOT Presentation"), at 10 (June 5, 2014).

⁹ See GAO Report at 22.

¹⁰ DOT Presentation at 10; see also Department of Transportation, *Plan for Implementation of Executive Order 13,563: Retrospective Review and Analysis of Existing Rules*, at 11 (Aug. 2011).

Should we consider identifying a list of practices, however minor or ambitious, that have helped agencies balance (1) open public access, (2) usefulness of commentary and (3) administrative burdens?

- **Prioritization Process.** As noted above, the draft recommendation properly emphasizes key factors for agencies to consider as they prioritize regulations for retrospective analysis. Should we consider whether we can mine agency review plans and other sources for additional factors?

Aside from these factors, perhaps there is more that could be said about the processes an agency uses to conduct the prioritization. For example, DHS reported to the GAO that compiling normalized costs and benefits and the small entity impacts of each regulation into a database has been a useful tool to identify major cost drivers and candidates for retrospective analysis.¹¹ Are there other processes that agencies follow to organize their prioritization efforts that have been effective and may be transferable?

- **Retrospective Analysis Process.** Paragraph 10 of the draft recommendation suggests that OMB consider issuing guidance for retrospective analysis similar to OMB Circular A-4, and paragraph 6 provides factors that likely would be a part of such a document. I wonder if there are other aspects of the process of a retrospective analysis that we might discuss, whether that be in how a retrospective analysis is phased within the agency, how it leverages and at the same time departs from processes used in prospective regulatory impact analyses, and how agencies deal with common questions, like collecting data or finding an appropriate baseline.

GAO reported that agencies planned 665 and completed at least 246 retrospective analyses in response to EO 13,563.¹² Presumably this burst of activity required agencies to provide some guidance to their analysis teams, or the analysis teams developed standard processes that might be replicated. While a full guidance document likely would best be developed by OMB, it may be appropriate for us to suggest certain elements that the committee identifies as useful.

- **Reporting Requirements.** Professor Aldy discusses how the semiannual progress reports mandated by EO 13,610 risk becoming a “paperwork effort” that inefficiently consumes retrospective review resources.¹³ Yet at the same time, the GAO report

¹¹ See GAO Report at 22.

¹² See *id.* at 9.

¹³ See Aldy Report at 40-41.

ACUS Committee on Regulation
October 14, 2014
Page 4

discussed how these progress reports may not be adequate to inform the public of planned retrospective analyses.¹⁴ How time-consuming are these reports and how much do they encourage vs. crowd out productive activity? Does the OIRA template that agencies fill in seek the “right” information? Have academics and the public found these reports useful and if not, what additional information might be helpful?

Depending on how these questions are answered, we might consider recommending modifications to this requirement. For example, would less frequent but more in-depth reports promote more productive activity and be more useful to the public?

Thank you again for your attention to this inarguably vital enterprise. I look forward to further discussion.

Sincerely,



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¹⁴ See GAO Report at 16-17.