

Comment from Robert Girouard, Government Member
May 5, 2021

Comment on lines 26-27: This sentence is difficult to understand. How about: “And it can help agencies determine the accuracy of the assessments they made before their regulations were issued, with regard to likely regulatory impact”

Comment on lines 36-38: There should be a better way to say this. But first it would help to understand what the drafter means by “costs . . . associated with uncertainty.” Direct costs to the regulated party (such as risk insurance)? Or costs to society (such as disincentives to invest in a regulated sector)? If there isn’t an easy way to articulate these costs, why not just refer to the uncertainty itself? *E.g.*, “And periodic retrospective review can also entail uncertainty concerning whether a regulation will be retained or modified.”

Comment on footnote 13: The citation in footnote 13 should be changed. 5 U.S.C. 306 does not directly refer to “learning agendas” and “annual evaluation plans.” Rather, OMB created the concept of a “learning agenda” in OMB Memo M-19-23 of July 10, 2019. OMB noted that a “learning agenda” corresponds to the requirement in 5 U.S.C. 312(a) for an “agency evidence-building plan.” OMB noted that the separate requirement for an “annual evaluation plan” comes from 5 U.S.C. 312(b). So I think the citation should be something like: “5 U.S.C. 312(a)-(b); OMB Memo M-19-23 of July 10, 2019, as supplemented by OMB Memo M-20-12 of March 10, 2020. *See* <https://www.whitehouse.gov/omb/information-for-agencies/evidence-and-evaluation/>.”

Edit on Recommendation 6: Change language to “publishing them in the *Federal Register*”

Comment on Recommendation 12: I think we should amend this text, since regulatory review fulfills the Evidence Act’s requirements only if the questions to be addressed and the methods to be followed are actually integrated into the agency’s learning agenda and annual evaluation plan. *See* OMB Memo M-19-23, at 14 (“Learning agendas . . . identify, prioritize, and establish strategies to develop evidence to answer important short- and long-term strategic questions (i.e., questions about how the agency meets its mission(s), including about how . . . regulations function both individually and in combination)”), and at 34 (evaluation plans “explain how, taken together, the planned evaluation activities help to answer the priority evaluation questions identified in the learning agenda”). How about: “Consistent with the Evidence Act, agencies should incorporate periodic retrospective reviews in their Learning Agendas and Annual Evaluation Plans, and should undertake and document the following activities:”.

Comment on Recommendation 12(c): Selecting “those approaches that maximize net benefits” is one of the “Principles of Regulation” set forth in section 1(b) of E.O. 12866, so I think it’s fine to include it. But it seems anomalous to include only this consideration while omitting others. Section 5 of E.O. 12866 specifically states that one goal of periodic retrospective review of significant rules is to ensure that regulations are consistent with the Principles of Regulation, but that other goals include reducing regulatory burden; determining whether regulations have become unjustified or unnecessary as a result of changed circumstances; confirming that regulations are both compatible with each other and not duplicative or inappropriately

burdensome in the aggregate; ensuring that regulations are consistent with the President's priorities; and otherwise improving the effectiveness of existing regulations. We could change the text of recommendation 12(b) to say that the questions are "keyed to the factors set forth in section 5 of Executive Order 12866 for periodic review of existing significant regulations."