

Comment from Richard Morgenstern and Art Fraas, Members of the Public
April 22, 2021

To: ACUS-Committee on Administration and Management, Committee Chair Aaron Nielson,
Staff Counsel Leigh Anne Schriever, and Consultants Lori Benneer and Jonathan Wiener

Re: Periodic Review of Agency Regulation

Richard Morgenstern and Art Fraas respectfully submit these comments on the ACUS project on Periodic Review of Agency Regulation. Richard Morgenstern and Art Fraas are researchers with substantial experience with the federal regulatory system, having spent several decades in government service working to improve the quality of regulatory studies of all types. They have published extensively in the field. Currently, they are senior fellow and visiting fellow at Resources for the Future. RFF has been a pioneer in applying benefit-cost analysis in the regulatory environment with the aim of improving regulatory outcomes.

We believe it is important to distinguish between the retrospective review as typically carried out by past administrations and retrospective analysis of major regulations. Historically, administration initiated retrospective reviews have been largely checkbox, paperwork exercises rather than an in-depth retrospective evaluation of the benefits and costs of existing regulations. Aldy (2014) notes, for example, that the National Performance Review focused on identifying outdated, obsolete, and inefficient regulations.

Retrospective analysis, on the other hand, is a rigorous analysis designed to identify the causal effects—benefits and costs—of a regulation. We believe this kind of detailed analysis of regulations should be an essential component of government efforts to look back at past regulatory performance and provide a basis for future improvements.

Anticipating a retrospective analysis as a part of a new rulemaking offers three important advantages: (1) it encourages fine tuning of the rule to achieve the desired objectives; (2) it places in the rule a statement of the methods, data requirements, etc. for the future retrospective analysis thereby promoting greater transparency; and (3) it establishes the necessary processes and requirements (e.g., data collection) for that analysis. We believe these are important advantages over a later ex post decision to conduct retrospective analysis.

Comments on Recommendations:

Recommendation 2. For rules not subject to statutory periodic retrospective review requirements, agencies should decide whether to establish a periodic retrospective review regime. In doing so, agencies should consider the benefits of periodic retrospective review, including potential gains from learning, and the costs, including administrative burden and policy instability.

We would suggest that a one-time retrospective analysis of key rules--a review assessing the various benefit and cost categories (including unanticipated effects) and the distribution of these effects--would be a major step forward. In considering whether to establish additional periodic reviews for some rules, agencies should consider whether there would be diminishing returns to subsequent analytical reviews.

Recommendation 10. Agencies should decide how to best structure their staffing of periodic retrospective reviews to foster a culture of retrospective review.

The draft set of approaches set out in recommendation 10 focus on agency-based mechanisms for retrospective review. Our experience is that review groups set up within the scope of agency control are potentially subject to capture and as a result the resulting reviews are less informative and effective. Others have offered similar observations. [Morgenstern (2018), Coglianese (2013), Greenstone (2014), See (2006)]

We recommend that agencies should develop arrangements that encourage independent, third-party retrospective review. [Aldy (2014), Morgenstern (2018), Greenstone (2014)] Such arrangements could involve the collection and public distribution of key data, and/or the support of independent retrospective studies, administered by NSF or other scientific bodies.

Recommendation 11. To satisfy the Evidence Act's requirements to create Learning Agendas and Annual Evaluation Plans, agencies should undertake and document the following activities as they carry out periodic retrospective review:

-- With respect to section (a), We endorse the importance of setting out precise questions to be addressed by the review, such as examining the nature and distribution of the benefits and costs, developing a benefit-cost analysis (with comparison to a counterfactual scenario), or considering effects on a particular sector of the economy. In our view, it would be grossly inadequate if the inquiry were to focus solely on how frequently regulations should be reviewed.

—With respect to sections (b), (c), and (d), we endorse the importance of describing the information needed for the review, the methods to be used in conducting the review, and the likely challenges of carrying out the review.

We believe that the best approach for achieving this objective is to include this discussion as part of the agency rulemaking and to incorporate the required instruments and processes within the rule. [Aldy (2014), ACUS (2014)]

Recommendation 12: A body or expert entity with interagency responsibilities should regularly convene agencies to identify and share best practices on periodic retrospective review, addressing questions such as how to improve timeliness and analytic quality of reviews and the optimal frequency of discretionary reviews.

We recommend that OMB should formalize guidance for retrospective evaluation of rules. These requirements should be based on identifying the real impacts of the regulations and ought to include the availability of a relevant control group and the associated data for estimating compliance costs and effectiveness (or benefits). [Cropper et al. (2017), ACUS (2014)]

Richard ‘Dick’ Morgenstern's research focuses on the economic analysis of environmental issues with an emphasis on the costs, benefits, evaluation, and design of environmental policies, including economic incentive measures. His research also focuses on climate change, including the design of cost-effective policies to reduce emissions in the United States and abroad. Immediately prior to joining RFF, Morgenstern was senior economic counselor to the undersecretary for global affairs at the U.S. Department of State. Previously he served at the U.S. Environmental Protection Agency, where he acted as deputy administrator (1993); assistant administrator for policy, planning, and evaluation (1991-93); and director of the Office of Policy Analysis (1983-95). Formerly a tenured professor at the City University of New York, Morgenstern has taught at the Wharton School of the University of Pennsylvania, Yeshiva University, American University and the University of Ottawa (where he was a Fulbright Scholar, 2016-17). He has served on expert committees of the National Academy of Sciences and as a consultant to various state, national and international organizations.

Art Fraas joined RFF as a Visiting Fellow in April 2009 after serving in senior positions within the federal government. In 2008, he retired after 21 years as chief of the Natural Resources, Energy, and Agriculture Branch, Office of Information and Regulatory Affairs, Office of Management and Budget. Much of his work has examined the federal regulatory process, with a particular focus on environmental regulations, including a variety of issues related to energy and the environment, the development of retrospective analyses of major environmental rules, the treatment of uncertainty in regulatory analysis, and the potential regulation of greenhouse gases under the Clean Air Act. Before joining the OMB, Fraas was a senior economist at the Council on Wage and Price Stability, a staff member of the Senate Judiciary Subcommittee on Antitrust and Monopoly, an assistant professor of economics at the US Naval Academy, and a staff economist with the Federal Reserve System

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