



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

JAN 27 2016

The Honorable Ron Johnson  
Chairman, Committee on Homeland Security and Government Affairs  
United States Senate  
Washington, D.C. 20510

Dear Chairman Johnson:

Enclosed are responses prepared by the Department of the Interior to the questions for the record submitted following the November 5, 2015, oversight hearing before your Subcommittee on Regulatory Affairs and Federal Management on "Agency Progress in Retrospective Review of Existing Regulations".

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti  
Legislative Counsel  
Office of Congressional and  
Legislative Affairs

Enclosure

cc: The Honorable Thomas Carper, Ranking Member  
Committee on Homeland Security and Government Affairs

**Post-Hearing Questions for the Record  
Submitted to Ms. Elizabeth Klein  
From Senator James Lankford**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

**Senator Lankford**

*On Consulting with the Small Business Community and State Regulators*

1. In your testimony, you stated that Interior “had not at this point engaged specifically to the small business community” but stated that this was an area of improvement for the Department. What actions does the Department intend to take to better engage this community?

*DOI Response:* The Department continues to work towards our goal of increasing public interest and engagement in the process of improving our regulations. We value the unique perspective that small businesses can provide into our regulatory activities and we continue to work towards improving small business participation through our Public Engagement Plan. Through our ongoing public outreach efforts, we hope to build upon the feedback we receive from small businesses during the implementation of regulations.

Although our outreach has not been directed to any specific groups, we are continually exploring avenues to target the small business community in our outreach efforts, while ensuring that we value comments from all sources and do not weigh one source over another. We welcome engagement with the small business community and we look forward to working with them and this Committee to strengthen our outreach efforts.

2. How could your department better leverage the insights and resources of the Small Business Administration’s (SBA) Office of Advocacy?

*DOI Response:* The Department benefits from the input of other federal agencies, including the Small Business Administration, during the inter-agency review process. Specifically, when the Department proposes significant regulatory actions, these regulations are initially submitted for review to the Office of Information and Regulatory Affairs (OIRA) pursuant to EO 12866. OIRA facilitates inter-agency dialogue by obtaining feedback from other federal agencies, including the Small Business Administration Office of Advocacy. The Department then has the opportunity to evaluate and respond to other agencies feedback, which often leads to further clarification and refinement.

3. How could your department better consult with state regulators to ensure that regulations do not conflict with or duplicate state requirements?

***DOI Response:*** DOI bureaus regularly work closely with state regulators, both informally and to discharge the agency’s outreach responsibilities under the Unfunded Mandates Reform Act and EO 13132 – Federalism. Those affected by both state and Federal regulations also have opportunities to present their views during proposed rule comment periods, during OIRA’s EO 12866 review process, and during the normal course of business interactions. While we have not received any specific comments on this issue during our outreach on retrospective review, we would be happy to receive any new information or suggestions and we will continue to seek opportunities to better coordinate with state regulators.

*On Defining the Universe of Retrospective Reviews*

4. Retrospective reviews are not clearly defined in existing executive orders. For example, Executive Order 13563 merely directs agencies to “facilitate the periodic review of existing significant regulations...” Executive Order 13610 directs agencies to prioritize initiatives that will produce monetary savings, reductions in paperwork, reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. In the absence of a clear directive as to what constitutes a retrospective review as mandated by executive orders, how does your agency define the term?

***DOI Response:*** It is our view that EOs 13563 and 13610 provide agencies with appropriate discretion to prioritize which rules necessitate retrospective review. As noted in our testimony, not all rules are appropriate for retrospective review, and review for the sake of review may not be the best use of limited resources. At the Department, we seek to identify rules for retrospective review that further our mission. With limited resources, it is important to prioritize the regulations we select for review.

- a. A couple of Interior’s retrospective reviews focus on administrative matters streamlining and updating. For example, a project on the “Enterprise Forms System” was cited as an ongoing retrospective review. The proposal was summarized as a “consolidate[ion of] all DOI forms electronically in a way that they can be pre-populated and completed online.” Would this be better characterized as a platform update than a retrospective review analysis?

***DOI Response:*** We would categorize a successful retrospective review effort as any action that reviews and improves an existing requirement to reach a better result for those affected. The Enterprise Forms System is a good example of a retrospective review initiative meeting the requirements set out in EO 13563. As we reported in our most recent report to OIRA, we anticipate savings of approximately 30,000 hours from this initiative. The effort will make the forms more accessible, save time and money, increase consistency, and decrease the potential for human error. We view these results as consistent with the intent of retrospective review.

*On Regulatory Flexibility Act Review and other Statutorily-Required Reviews*

5. In 2014, in assessing retrospective review processes for Administrative Conference of the United States, Professor Joseph Aldy of Harvard's Kennedy School found that after reviewing 25 rules identified in agency reports on their progress implementing retrospective review, only 14 explicitly referenced retrospective review in the rule-making.<sup>1</sup> He posited that this suggested that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. How has your agency made the distinction between reviews in response to Executive Order 13563 and other efforts already underway or responses to new mandates?

*DOI Response:* The Department does not draw a distinction between improvements in regulations obtained as a result of a specific retrospective review effort versus improvements gleaned from feedback through the ordinary course of regulatory implementation. In fact, the retrospective review initiative can serve to help the agency focus and sharpen reform efforts even if a reform were already at some stage of development outside of the EO-driven process. The Department utilizes all opportunities to improve regulations for the benefit of the regulated public. We have identified some actions for retrospective review that would have been done in the normal course of our business and routinely seek opportunities to improve our regulations, even without requirements to retrospectively review our regulations.

6. The Regulatory Flexibility Act (RFA) Section 610 requires that rules with a significant economic impact on a substantial number of small entities be reviewed within ten years of promulgation, but in the past the Government Accountability Office (GAO) has found that not all agencies interpret the requirement consistently.<sup>2</sup> In addition, other statutes mandate retrospective review of certain regulations. How have initiatives in response to the President's Executive Order 13563 aligned with other retrospective review initiatives, such as those undertaken under RFA Section 610 or other specific statutory review requirements?

*DOI Response:* Whether initiated in conformity with an EO, statutory mandate, or through feedback gleaned from the implementation of a regulation, retrospective review initiatives require the Department to coordinate throughout the Department and across the Federal government, in order to ensure efficient regulatory review and to efficiently manage resources and regulate in a way that is smart, efficient, effective and not more burdensome than necessary to meet our goals.

- a. Please describe the rigor of Section 610 reviews. For example, is cost-benefit analysis typically conducted in the course of these reviews at your agency?

*DOI Response:* Generally cost-benefit analysis is conducted at the time the Department is promulgating a rule. If the Department determines a cost benefit

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<sup>1</sup> Joseph Aldy for the Administrative Conference of the United States. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 48 (November 17, 2014).

<sup>2</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY WIDELY, GAO/GGD-99-55, 11 (Apr. 2, 1999)

analysis is necessary, whether through a retrospective review or otherwise, we would conduct the cost-benefit analysis during the process of promulgating the revision.

- b. What lessons has the agency learned from conducting additional reviews consistent with other statutory mandates that have facilitated this retrospective review initiative?

***DOI Response:*** We have learned that it is best to prioritize retrospective regulatory reviews on the basis of the potential to achieve significant quantifiable monetary savings or reductions in paperwork burdens, as well as those that reduce unjustified burdens or otherwise simplify requirements imposed on businesses, including small businesses. Some rules may be on the books for many years and do not warrant agency time and resources to conduct a retrospective review. Other rules may require updating more frequently. It makes more sense to focus on revising rules that would most benefit the public and small businesses.

### *On Quantifying Cost Savings*

7. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that agencies quantified cost savings in the progress updates for 38 of the 246 completed analyses in their scope, half of which were related to information collection burdens.<sup>3</sup> Why are cost savings not consistently quantified?

***DOI Response:*** Cost savings are not always quantified because data may not be available, data collection must be made consistent with existing resources and not all of the actions have discernible cost savings. Many actions are intended to clarify and simplify regulations to improve compliance, as well as increasing the effectiveness and efficiency of implementation. Cost savings are more likely to be available for information collection burdens because those numbers are available as part of the information collection process.

- a. When costs savings were quantified, GAO found that agencies most often attributed those savings to reduced information collection burdens. What other cost savings have resulted from these retrospective reviews?

***DOI Response:*** It is likely that agencies most often attributed savings to reduced information collection burdens because information collection burdens are always quantified. Regulatory actions do not necessarily have quantified impacts, particularly when a rule clarifies language or otherwise improves the effectiveness and efficiency of implementation. Even when impacts are not quantifiable, however, costs and benefits may still be realized.

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<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS, GAO-14-268 (Apr. 11, 2014)

- b. What are the challenges in quantifying the results of these reviews and how could we do better at reporting that progress?

***DOI Response:*** Where a retrospective review action involves a rulemaking, results are quantified in accordance with OMB Circular A-4. Circular A-4 directs agencies to quantify all potential incremental benefits and costs to the extent feasible. For actions that are intended to clarify regulations or otherwise improve implementation, it may only be possible to describe the impacts in qualitative terms.

#### *On Record of Results of Reviews*

8. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that more than 90 percent of the retrospective review analyses they examined ended in a determination to revise, clarify, or eliminate regulatory text.<sup>4</sup> Would you attribute this success to how your agencies prioritized the regulations you reviewed or simply that a lot of regulations currently on the books are ripe for updates?

***DOI Response:*** The 90 percent figure cited by the April 2014 GAO report can most likely be attributed to the process used by agencies to prioritize regulations for review. DOI, for example, selects rules for regulatory review that we believe may justify the review, such as our recent final rule that revised and updated regulations governing the process for Federal acknowledgement of Indian tribes. Regulations selected for retrospective review should be based upon an agency's judgment, based on public feedback, agency analysis, or other contributing factors, of the best candidates for review. In order to do this DOI relies on four general factors: (1) is the rule obsolete due to changes in the law or practice; (2) is the rule duplicative or incompatible with other rules; (3) has the rule been reviewed in the last 10 years; or (4) is the rule considered overly burdensome or unnecessarily restrictive based upon public or internal comments. We believe that using this filter allows us to better target those rules most in need of review; a complete review of all regulations would be much less efficient.

- a. How many of these reviews could be considered low-hanging fruit? Should we expect this level of success going forward?

***DOI Response:*** It is difficult to forecast the percentage of retrospective reviews that would lead to revisions, clarifications or the elimination of text as reported by GAO; however, selecting appropriate candidates for retrospective review increases the chances retrospective review will produce a high rate of alternations of existing regulations.

#### *On Rigor and Scope of Retrospective Review*

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<sup>4</sup> GAO-14-268

9. In his analysis of retrospective reviews for Mercatus, Mr. Randall Lutter notes, “Very few retrospective analyses of extant federal regulations provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective analyses that Harrington, the OMB, and Simpson reviewed provide information only about costs, about a key but incomplete measure of benefits... or about both costs and a poor proxy for benefits...”<sup>5</sup> Do your retrospective review analyses attempt to quantify costs, or benefits, or both?

*DOI Response:* Our retrospective review analyses quantify both costs and benefits, to the extent they are reasonably and economically obtainable, and in accordance with the procedures in OMB Circular A-4.

- a. Does your office have the capacity to collect data to conduct effective retrospective reviews that include cost-benefit analysis? If not, why not?

*DOI Response:* DOI performs an evaluation of costs and benefits as part of the rulemaking process when revising a rule on its retrospective review report. When prioritizing which rules are good candidates for a retrospective review, we have a general sense that the benefits of the revisions will exceed the costs, though the quantifiable impacts may not be determined until the proposed rule is developed.

- b. Would it be beneficial for your agency to have your retrospective review obligations delegated to a specialized office charged with doing just that?

*DOI Response:* Executive Orders 13563 and 13610 direct OIRA to coordinate retrospective review among federal agencies. While OIRA currently coordinates regulatory activities under EO 12866, it is important that the office that coordinates retrospective review is centrally involved in the coordination of the Administration’s regulatory agenda, rather than an outside organization that may not have sufficient knowledge of the Department’s mission and corresponding priorities.

10. In his analysis of retrospective reviews for Mercatus, Mr. Lutter notes, “The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow.” The 2015 OECD Regulatory Policy Outlook stated that “OECD countries could be more strategic and systemic in their evaluation efforts by conducting comprehensive reviews that assess the cumulative impact of laws and regulations in a sector as a whole, with a particular focus on the policy outcomes.”<sup>6</sup> Our proposed legislation, S. 1817 The Smarter Regs Act of 2015, directs OMB to encourage and assist agencies to “streamline and coordinate the assessment of major rules with similar or related regulatory objectives” for just this purpose. When contemplating which rules to review, have

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<sup>5</sup> Randall Lutter, Working Paper: The Role of Retrospective Analysis and Review in Regulatory Policy, MERCATUS CTR. NO. 12-14 (Apr. 2012).

<sup>6</sup> *OECD Regulatory Policy Outlook 2015* (The Organization for Economic Co-operation and Development, 2015) available at <http://www.oecd.org/governance/regulatory-policy/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm>.

you ever considered conducting simultaneous reviews on related rules or rules that affect a certain sector of industry?

*DOI Response:* This past year, we focused on regulations that would promote the trust relationship between Indian tribes and the Federal government. We have been able to make improvements that will benefit Native Americans and tribes, including revising regulations governing the process for Federal acknowledgement of Indian tribes and updating and making less burdensome regulations on obtaining rights-of-way across Indian lands. We are also reviewing regulations for grants to tribally controlled colleges, the Housing Improvement Program, the Indian Child Welfare Act, forestry activity on Indian land, and tribal energy resource agreements.

- a. Have you ever considered a large retrospective review on a regulatory framework?

*DOI Response:* As noted, over the past year, we have focused our retrospective review efforts on regulations that promote the trust relationship between Indian tribes and the Federal government.

- b. What barriers exist to this type of review?

*DOI Response:* The Department has directed our limited resources toward prioritizing retrospective review efforts on mission objectives and areas that we expect will achieve the best results. Where warranted, DOI will consider a wholesale review of regulations that impact a particular sector but it is important that the additional time and financial resources will be reasonably expected to lead to substantive improvements of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.

- c. How have you worked with interagency partners as you have reviewed existing regulations?

*DOI Response:* Many of the actions on the Department's retrospective review report have been deemed by OIRA to be significant under EO 12866. Significant regulatory actions are reviewed by interagency partners as part of OIRA's procedures under EO 12866. We also note that there are several actions on our retrospective review report that are being jointly issued by the Fish and Wildlife Service and National Marine Fisheries Service to improve the implementation of the Endangered Species Act. These actions include regulations on incidental take statements, designating critical habitat, defining "destruction or adverse modification of critical habitat", petitions to list or delist species under ESA, and the process for consultation for projects that are intended to restore habitats when the effect of the project will be beneficial.

11. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*<sup>7</sup>, GAO recommended that OIRA work with the agencies to improve how retrospective reviews could be used to inform progress towards agency priority goals under the GPRA Modernization Act of 2010.<sup>8</sup> This included actions such as (1) identifying whether a regulation contributes to an agency priority goal as one criterion for prioritizing reviews, and (2) by including in the scope of retrospective reviews the regulations that collectively contribute to an agency priority goal. What actions has your agency taken to better align retrospective reviews with GPRAMA agency priority goals?

*DOI Response:* The Department continues to ensure candidates for retrospective review align with Departmental priorities in order to efficiently manage our resources. For example, our recent final rule revised and updated regulations governing the process for Federal acknowledgement of Indian tribes. This final rule not only promotes a more transparent, timely and consistent process, but furthered the Department's goal of promoting the trust relationship between Indian tribes and the Federal government.

#### *On Planning for Review*

12. OMB Memorandum M-11-19 directed agencies to design and write future regulations in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. ACUS recommendation 2014-5 suggested that agencies, when appropriate, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. On November 3, 2015, the GW Regulatory Studies Center issued *Learning from Experience: Retrospective Review of Regulations in 2014*<sup>9</sup>, which reviewed 22 significant and economically significant rules and found that none of them included a plan to conduct retrospective review of the rule after implementation. How has your agency responded to that OIRA directive and what have you learned through those efforts?

- a. What actions does your agency plan to take to ensure that planning for future reviews is part of the procedures for drafting new regulations?

*DOI Response:* We are evaluating appropriate mechanisms to incorporate future evaluations of effectiveness. For example, when the Bureau of Safety and Environmental Enforcement proposed its Well Control rule, the agency asked for public comment on the development of a probabilistic risk assessment methodology that might assist the agency in evaluating the potential effectiveness of any given requirement and asked for comment on how a data collection program to support such

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<sup>7</sup> GAO-14-268

<sup>8</sup> GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (Jan. 4, 2011).

<sup>9</sup> Sofie E. Miller, *Learning From Experience: Retrospective Review of Regulations in 2014* (The George Washington University Regulatory Studies Center, Working Paper, 2015), available at <http://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>.

an assessment could be developed. We are evaluating potential options to incorporate review procedures where appropriate.

13. The Department of Transportation (DOT) maintains a plan on its website to ensure that all regulations are reviewed every ten years. Each DOT agency divides its rules into 10 different groups, and analyzes one group each year. They request public comment on the timing of the reviews through the Regulatory Agenda (for example, if a particular rule should be reviewed earlier and why). Would something like this be viable at your agency?

*DOI Response:* Regulations selected for retrospective review should be based upon an agency's judgment, informed by significant outreach, of the best candidates for review. Our approach has been to integrate retrospective review into the culture of DOI and to identify candidates that are most likely to improve the regulatory process and further the mission and policy priorities of DOI. We acknowledge that some current regulations are decades old and have not kept pace with existing practices, and the Department's retrospective review reports have tracked progress in revising several of such regulations. We are continuing to evaluate our process of identifying opportunities for retrospective review, using an approach that is best suited to the structure and diverse missions within the Department.

- a. How do you ensure that cyclical reviews are apparent to your stakeholders to give them an opportunity to comment?

*DOI Response:* As noted in our testimony, we are working to foster greater public participation and an open exchange of ideas through the publishing of our Public Engagement Plan in December 2014. We have found that our most effective tool in obtaining feedback from stakeholders is through our direct interactions with stakeholders when conducting regulatory activities. Our bureau staffs work closely with the regulated community and receive frequent feedback on what works or does not work. We also maintain a retrospective review website and an email address that is available at all times for public comment.

#### *Reporting Outcomes of Retrospective Review*

14. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO recommended that OIRA work with agencies to improve the reporting of retrospective review outcomes, including providing more comprehensive information about completed reviews.<sup>10</sup> What actions has your agency taken to ensure that retrospective review reporting is more accessible and transparent?

*DOI Response:* We have published Federal Register notices asking for public comment, our retrospective review plan and reports are available to the public, we maintain a website

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<sup>10</sup> GAO-14-268

devoted to retrospective review, and we maintain an email address ([regsreview@ios.doi.gov](mailto:regsreview@ios.doi.gov)) that the public may use anytime to comment.

## Senator Heitkamp

1. A critical component of retrospective review is ensuring that the public has the opportunity to provide feedback on whether regulations are in fact achieving their intended objective. However, all too often we hear from the general public, small business, and other regulated entities, that they feel disconnected from the rulemaking process, or that their voices are not being heard.

- a. Could each of you address how your agencies engage the public and seek feedback outside of the general notices published in the Federal Register?

*DOI Response:* The Department continues to work towards our goal of increasing public interest and engagement in the process of improving our regulations. As noted in our testimony, we are working to foster greater public participation and an open exchange of ideas through the publishing of our Public Engagement Plan in December 2014. We have found that our most effective tool in obtaining feedback from stakeholders is through our direct interactions with stakeholders when conducting regulatory activities. Our bureau staffs work closely with the regulated community and receive frequent feedback on what works or does not work. Specifically, as it applies to Indian tribes, our commitment to formal consultation has proven to be a very effective tool. We also maintain a retrospective review website and an email address that is available at all times for public comment.

- b. Do you find that the Federal Register is still the most effective means of providing notice and receiving useful feedback to help identify public concerns?

*DOI Response:* Although we find the Federal Register to be a necessary, useful and central location to provide the public with notice of agency rules and activities, and provides the key tool where anyone, not just particular, well-positioned stakeholders, can interact with the rulemaking process, generally the feedback we receive from our direct interactions with small businesses, tribes, and other stakeholders as we work with them in implementing regulations is at least as important, and often provides more direct suggestions for improvement.

2. When examining retrospective review, we often discuss cost benefit analysis to determine whether or not a rule is achieving its stated objective. However, part of this information collection requires the solicitation of data from regulated entities.

- a. Do you find that current retrospective reviews are stymied by the strict requirements of the Paperwork Reduction Act?

*DOI Response:* We apply cost-benefit analysis to rules under development, consistent with the procedures in OMB Circular A-4. It is typically not necessary to conduct a detailed analysis of a regulation in order to reach a general conclusion that the benefits of revising it would exceed the costs. The Paperwork Reduction Act (PRA) typically is not a limiting factor in collecting general information from the public, as is often done through notifications in the Federal Register or other types of more-focused outreach. To the extent the PRA applies to more targeted collections of information, it is important that any data collected from regulated entities as part of a retrospective review has practical utility and comports with other parameters set forth in the PRA and its implementing regulations.

- b. Would we see an increased effectiveness of the retrospective review process if we were to exempt retrospective review activities from the Paperwork Reduction Act?

*DOI Response:* We obtain most input for retrospective review from our regular interaction with those who are affected by our regulations. We have also published Federal Register notices requesting comment on retrospective review. These efforts have not triggered the requirements of the Paperwork Reduction Act. Any subsequent revision of rules would be conducted consistent with all applicable laws, regulations, and Executive Orders.

3. During our subcommittee's maiden hearing, we invited witness from diverse backgrounds to discuss the Federal government's regulatory framework. I took the opportunity to discuss retrospective review with that panel as well. One thing I heard from both witnesses was that there needs to be a dedicated funding stream in support of retrospective review activities.

- a. Based on current expectations of the President, as outlined in Executive Order 13563, are resources being dedicated to retrospective review at the detriment of the mission objectives of the agency?

*DOI Response:* DOI has focused its retrospective review efforts on Departmental priorities to make the best use of our limited resources.

- b. What resources do your agencies need to effectively and efficiently carry out retrospective review while maintaining overall operational awareness?

*DOI Response:* DOI has tried to be as effective and efficient as possible in doing retrospective review, as we believe it is part of our mission. We will continue to do this and appreciate the subcommittee's recognition that this is important.

4. In a previous hearing, Mr. Neil Eisner, a Senior Fellow at the Administrative Conference of the United States, advocated strengthening the culture of review within the Federal agencies. In his opinion there is a focus, especially among senior officials, on creating something new rather than fixing something old.

- a. What actions are taken within each of your agencies to ensure that the workforce buys into the reality that ensuring the effectiveness of existing regulations is just as important as ensuring new rulemaking is of the highest caliber?

*DOI Response:* Through our Plan for Retrospective Regulatory Review, we have conveyed across the Department the importance of EO 13563, which calls for "periodic review of existing regulations". As noted in our testimony, the Department has made retrospective review an explicit and permanent part of our planning process. Each Department bureau and office is asked to identify at least one regulation for review each year. In considering regulations for review, we ask them to consider if a rule (1) is obsolete due to changes in the law or practice; (2) is duplicative or incompatible with other rules; (3) has been reviewed in the last 10 years; or (4) is considered burdensome or unnecessarily restrictive based upon public or internal comments. In addition, significant effort is focused on ensuring the effectiveness of existing regulations. The vast majority of rulemaking efforts at DOI generally involve amending existing regulations. Our most valuable input is from small businesses, tribes, and others who tell us what is or isn't working with our existing regulations.

5. Understanding that good retrospective review often require examination of highly technical subject matter, it is important that agencies have a highly skilled and specialized work force to conduct retrospective reviews in an effective manner.

- a. Having completed a number of retrospective reviews up to this point, what are some the challenges you have found as it relate to workforce, in completing retrospective review effectively?

DOI Response: The greatest challenge is in making the best use of our employee resources. The employees who conduct retrospective review are also responsible for other program duties and for developing other regulations that are also critical to mission goals.

- b. Do you think the Federal Governments could do more to able to attract [sic]

DOI Response: We seek the most highly skilled and specialized employees that we can hire. These employees develop new regulations and are also responsible for conducting retrospective review of existing regulations. We seek to maximize their effectiveness by prioritizing retrospective review efforts on mission objectives and areas that we expect will achieve the best results.

- c. Do you have dedicated staff focused on reviewing existing rules?

DOI Response: No. The DOI staff that does retrospective review is the same staff that develops new regulations that also support our mission. They also have other responsibilities related to their program and area of expertise.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 08 2016

OFFICE OF  
CONGRESSIONAL AND  
INTERGOVERNMENTAL  
RELATIONS

The Honorable James Lankford  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your November 20, 2015, letter and the opportunity to respond to the questions for the record from the Senate Committee on Homeland Security and Governmental Affairs' hearing on November 5, 2015, entitled *Agency Progress in Retrospective Review of Existing Regulations*. Enclosed are our responses to your questions.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Thea Williams, in the EPA's Office of Congressional and Intergovernmental Relations, at [williams.thea@epa.gov](mailto:williams.thea@epa.gov) or at (202) 564-2064.

Sincerely,

A handwritten signature in black ink that reads "Nichole Distefano".

Nichole Distefano  
Associate Administrator

Enclosure

**Post-Hearing Questions for the Record  
Submitted to Mr. Bill Nickerson  
From Senator James Lankford**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

*On Reviewed Regulations*

1. The EPA began a new review process to streamline Significant New Alternatives Program (SNAP) reviews of potential alternatives to ozone-depleting chemicals that manufacturers could use in consumer products (such as aerosol cans, adhesives, cleaning solvents, refrigeration, and air conditioning systems). The EPA estimates that these efforts could reduce EPA's review time for SNAP submittals from an average of 65 weeks to an average of 19-24 weeks (a 60%-70% improvement). While I applaud this result, why was this streamlining process not begun earlier?

**RESPONSE:** The EPA continually looks for ways to improve the efficiency of our programs. Over the past 20 years, the SNAP program has reviewed over 400 alternatives considering such factors as flammability, toxicity, local air quality impacts, ecosystem effects, occupational and consumer health and safety impacts, ozone depletion potential and global warming potential. On the basis of those assessments, the EPA has issued 20 rulemakings and 30 notices to facilitate the introduction of lower risk alternatives into the marketplace. Additionally, our participation in the Lean Government program provided an opportunity to streamline our program and achieve significant benefits for both the agency and our stakeholders. For more information about the Lean government program visit [www.epa.gov/lean](http://www.epa.gov/lean).

2. In February 2014 EPA issued a final rule that established a framework for collecting hazardous waste shipment data electronically, replacing a burdensome paper manifest system that requires six-copy forms to be completed, carried and signed manually. Why did the EPA wait until 2014 to finalize a rule that eliminated the requirement for a six-copy form that needed to be completed manually?

**RESPONSE:** The EPA issued its final regulation on the use of electronic manifests in February 2014 in response to a statutory mandate that was contained in the Electronic Hazardous Waste Manifest Establishment Act (e-Manifest Act). The e-Manifest Act was enacted in October 2012, and required the EPA to issue implementing regulations for an electronic manifest within one year of enactment. The e-Manifest Act required the EPA to develop a national electronic manifest system, and required that the cost of developing and operating this system be offset by user fees. The EPA could not develop a final regulation for electronic manifesting until the e-Manifest legislation authorizing the system was enacted. The EPA was able to issue the final regulation shortly after the e-Manifest Act's one-year milestone.

It should be noted that the e-Manifest Act and the February 2014 regulation do not entirely eliminate the six-copy paper manifest form. The e-Manifest Act provides that electronic manifests shall be an option for manifest users, so the EPA's implementing regulations for the

Act likewise provide that users may elect to use either electronic or paper manifests in the future.

*On Consulting with the Small Business Community and State Regulators*

3. In your oral testimony, you cited the Small Business Administration's (SBA) Office of Advocacy as one tool your agency uses to get feedback from small businesses. Please elaborate on your department's use of the SBA Office of Advocacy.
  - a. How could your department better leverage the insights and resources of the Office of Advocacy?

**RESPONSE:** The EPA has several established mechanisms for working with SBA's Office of Advocacy.

- The EPA staff and managers regularly participate in roundtable discussions organized by the SBA's Office of Advocacy.
- The SBA's Office of Advocacy staff participate with the EPA on all Small Business Advocacy Review panels for proposed rules that may have a significant impact on a substantial number of small entities.
- When the EPA announces a review of a regulatory action under section 610 of the Regulatory Flexibility Act (RFA), the SBA distributes the announcement to their stakeholder groups.
- The EPA's Office of Small Business Programs organizes semiannual meetings with senior agency officials and stakeholders, and the SBA's Office of Advocacy is invited to these meetings.
- The SBA's Office of Advocacy participates in the Office of Management and Budget (OMB)-led interagency review of agency regulations.

4. How could your department better liaise with state regulators to ensure that regulations do not conflict with or duplicate state requirements?

**RESPONSE:** Since many agency programs are implemented by the states, we have close working relationships with them across many of our programs. The EPA facilitates interactions with state and local governments and coordinates those activities with our regional offices around the nation. In addition, the EPA holds regular outreach meetings with the Environmental Council of the States, Council of State Governments, National Conference of State Legislatures, and the National Governors Association and leads implementation of the National Environmental Performance Partnership System, which manages and monitors environmental issues with both national associations and individual state and local governments while focusing the EPA and state resources on the most pressing environmental problems. Each regulation issued by the EPA specifically addresses the agency's consideration of potential intergovernmental impacts consistent with the mandates in the Unfunded Mandates Reform Act and the Federalism Executive Order (E.O.) 13132. In addition, agency programs have direct connections to state regulators and the EPA often addresses program implementation issues collaboratively.

### *On Soliciting Comments from the Public*

5. In preparation for conducting retrospective reviews as directed under Executive Order 13563, agencies have reached out for public comment in a variety of ways. Please elaborate on the advantages you witnessed in holding public hearings.
  - a. How do hearings differ from other ways to get feedback from the public, for example, through receipt of comments in online dockets?
  - b. What were some advantages and disadvantages of this approach?

**RESPONSE:** The EPA uses a variety of external mechanisms to identify and evaluate potential retrospective reviews. The EPA's Retrospective Review Plan was developed after extensive public outreach that sought input on an agency plan for retrospective review, as well as on possible reforms to modify, streamline, expand or repeal existing regulations. That outreach included 20 public meetings, town halls, and Webinars with over 600 participants. The EPA also solicited comments via a Federal Register notice. Since 2011, the EPA has maintained an open comment docket and an e-mail address for public feedback on the existing Plan for Periodic Retrospective Review of Existing Regulations and the subsequent progress reports. In 2015, the EPA also issued another Federal Register notice soliciting comments on issues related to retrospective review.

Regardless of how the EPA receives this information, specific suggestions regarding how rules could be modified accompanied by data or other detailed information that supports the request are the types of responses that are most useful to the agency. While public meetings can potentially reach a slightly different audience than do Federal Register notices, in our experience, the feedback from public meetings tends to be more general than the feedback received in writing. Large, broad public-meetings focused generally on retrospective review are also very resource-intensive, requiring significant amounts of time to organize and run. In addition to public meetings and Federal Register notices, the EPA also regularly meets with stakeholder and advisory groups such as the Environmental Council of the States and the National Drinking Water Advisory Committee on a variety of issues and has found the feedback regarding retrospective review offered at these types of meetings to be helpful.

### *On Defining the Universe of Retrospective Reviews*

6. Retrospective reviews are not clearly defined in existing executive orders. For example, Executive Order 13563 merely directs agencies to "facilitate the periodic review of existing significant regulations..." Executive Order 13610 directs agencies to prioritize initiatives that will produce monetary savings, reductions in paperwork, reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. In the absence of a clear directive as to what constitutes a retrospective review as mandated by executive orders, how does your agency define the term?

**RESPONSE:** At the EPA, retrospective reviews can take a variety of forms and may be guided by the purpose and principles stated in E.O. 13563 or applicable statutes. Regular assessment of past regulatory actions is integral to the EPA's core mission and responsibilities and is often

mandated by statute. For example, the Clean Air Act (CAA) requires a review of National Ambient Air Quality Standards actions every five years. New Source Performance Standards and Maximum Achievable Control Technology must be reviewed every eight years. Under the Safe Drinking Water Act (SDWA), the EPA is required to review National Primary Drinking Water Regulations every six years. In addition to these statutorily mandated reviews, the EPA undertakes discretionary reviews, including those highlighted in our Retrospective Review Plan.

#### *On Regulatory Flexibility Act Review and other Statutorily-Required Reviews*

7. In 2014, in assessing retrospective review processes for Administrative Conference of the United States, Professor Joseph Aldy of Harvard's Kennedy School found that after reviewing 25 rules identified in agency reports on their progress implementing retrospective review, only 14 explicitly referenced retrospective review in the rule-making.<sup>1</sup> He posited that this suggested that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. How has your agency made the distinction between reviews in response to Executive Order 13563 and other efforts already underway or responses to new mandates?

**RESPONSE:** As noted above, regular assessment of past regulatory actions is integral to the EPA's core mission. Reviews undertaken in response to E.O. 13563 are highlighted in our Retrospective Review Plan and progress reports.<sup>2</sup> The EPA does not generally discuss in the preamble whether or not a specific rule was part of our original Plan or was an action later added to our progress report; therefore the absence of this information should not be taken as an indicator that a particular review was in progress at the time our Plan was developed. In addition, the EPA has added numerous reviews to our progress reports since our initial Retrospective Review Plan was developed. Nearly all of the actions identified in our current Retrospective Review Plan are in addition to those reviews required by statute.

8. The Regulatory Flexibility Act (RFA) Section 610 requires that rules with a significant economic impact on a substantial number of small entities be reviewed within ten years of promulgation, but in the past the Government Accountability Office (GAO) has found that not all agencies interpret the requirement consistently.<sup>3</sup> In addition, other statutes mandate retrospective review of certain regulations. How have initiatives in response to the President's Executive Order 13563 aligned with other retrospective review initiatives, such as those undertaken under RFA Section 610 or other specific statutory review requirements?
- Please describe the rigor of Section 610 reviews. For example, is cost-benefit analysis typically conducted in the course of these reviews at your agency?
  - What lessons has the agency learned from conducting additional reviews consistent with other statutory mandates that have facilitated this retrospective review initiative?

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<sup>1</sup> Joseph Aldy for the Administrative Conference of the United States. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 48 (November 17, 2014).

<sup>2</sup> <http://www.epa.gov/laws-regulations/retrospective-review-history>

<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIE'S INTERPRETATIONS OF REVIEW REQUIREMENTS VARY WIDELY. GAO/GGD-99-55. 11 (Apr. 2, 1999)

**RESPONSE:** Section 610 of the RFA provides that agencies shall review rules to “minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes.” In doing so, agencies are charged with considering the following factors:

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The EPA uses the Semiannual Regulatory Agenda, which publishes in the Federal Register every six months, to announce the initiation and conclusion of these 610 reviews. Upcoming reviews are also listed on the EPA’s Web site.<sup>4</sup> As directed under E.O. 13563, in the EPA’s 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*, the EPA committed to combining retrospective reviews of rules under RFA 610 with other statutorily-required reviews, such as those required under the CAA or SDWA, whenever feasible. The EPA’s retrospective review initiatives taken in response to E.O. 13563 are in addition to statutory reviews we already conduct under Section 610 of the RFA, the CAA, SDWA, and other statutes.

#### *On Quantifying Cost Savings*

9. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that agencies quantified cost savings in the progress updates for 38 of the 246 completed analyses in their scope, half of which were related to information collection burdens.<sup>5</sup> Why are cost savings not consistently quantified?
  - c. When costs savings were quantified, GAO found that agencies most often attributed those savings to reduced information collection burdens. What other cost savings have resulted from these retrospective reviews?
  - d. What are the challenges in quantifying the results of these reviews and how could we do better at reporting that progress?

**RESPONSE:** Lack of monetization does not mean that costs and benefits are not realized. Cost savings that can be realized in retrospective review include not only monetary savings from reduced regulatory requirements and reductions in paperwork burdens, but also harder to quantify savings from activities such as streamlined permitting or review processes and greater use of advanced technology.

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<sup>4</sup> <http://www.epa.gov/reg-flex/section-610-reviews>

<sup>5</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS*, GAO-14-268 (Apr. 11, 2014)

Consistent with the direction provided in E.O. 13610, there has been a focus on reducing paperwork burden as part of our efforts in retrospective review. Since rules that require information collection have estimates of the costs associated with that information collection as required by the Paperwork Reduction Act, it tends to be easier to quantify and monetize the savings from paperwork burden reduction.

#### *On Record of Results of Reviews*

10. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that more than 90 percent of the retrospective review analyses they examined ended in a determination to revise, clarify, or eliminate regulatory text.<sup>6</sup> Would you attribute this success to how your agencies prioritized the regulations you reviewed or simply that a lot of regulations currently on the books are ripe for updates?
- e. How many of these reviews could be considered low-hanging fruit? Should we expect this level of success going forward?

**RESPONSE:** As stated in the EPA's 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*, the EPA determined its review priorities by gathering comments from the public, other federal agencies, and agency experts; aligning reviews with agency and The Administration's priorities; conforming to the principles and directives of E.O. 13563; and determining appropriate effort within the scope of current agency resources. Using these criteria, the EPA was able to determine the most appropriate items for review, and has subsequently added additional items to the Retrospective Review Plan using these same criteria. We believe this method has been effective at identifying actions that may warrant review and will continue to serve the interests of both the EPA and the public going forward.

#### *On Rigor and Scope of Retrospective Review*

11. In his analysis of retrospective reviews for Mercatus, Mr. Randall Lutter notes, "Very few retrospective analyses of extant federal regulations provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective analyses that Harrington, the OMB, and Simpson reviewed provide information only about costs, about a key but incomplete measure of benefits... or about both costs and a poor proxy for benefits..."<sup>7</sup> Do your retrospective review analyses attempt to quantify costs, or benefits, or both?
- f. Does your office have the capacity to collect data to conduct effective retrospective reviews that include cost-benefit analysis? If not, why not?
- g. Would it be beneficial for your agency to have your retrospective review obligations delegated to a specialized office charged with doing just that?

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<sup>6</sup> GAO-14-268

<sup>7</sup> Randall Lutter, Working Paper: The Role of Retrospective Analysis and Review in Regulatory Policy, MERCATUS CTR. NO. 12-14 (Apr. 2012).

**RESPONSE:** Retrospective reviews that occur through standard rulemaking procedures generally attempt to quantify the costs and benefits of the regulatory revision resulting from the review. However, sufficient data and information may not be available to conduct a detailed assessment of the costs and benefits of these reviews. Collection of additional information may require approval under the Paperwork Reduction Act and may also impose additional paperwork burden on the entities regulated by the action under review. Since retrospective reviews relate back to a particular regulatory action or program, the EPA generally believes that it is often beneficial for staff who are familiar with that regulatory action or program and have relevant skills and experience with that regulatory action or program to work on the retrospective review.

12. In his analysis of retrospective reviews for Mercatus, Mr. Lutter notes, “The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow.” The 2015 OECD Regulatory Policy Outlook stated that “OECD countries could be more strategic and systemic in their evaluation efforts by conducting comprehensive reviews that assess the cumulative impact of laws and regulations in a sector as a whole, with a particular focus on the policy outcomes.”<sup>8</sup> Our proposed legislation, S. 1817, The Smarter Regs Act of 2015, directs OMB to encourage and assist agencies to “streamline and coordinate the assessment of major rules with similar or related regulatory objectives” for just this purpose. When contemplating which rules to review, have you ever considered conducting simultaneous reviews on related rules or rules that affect a certain sector of industry?

- h. Have you ever considered a large retrospective review on a regulatory framework?
- i. What barriers exist to this type of review?
- j. How have you worked with interagency partners as you have reviewed existing regulations?

**RESPONSE:** The EPA’s focus has been on those regulations or requirements identified by our stakeholders and the public through our outreach efforts. As such, the reviews reflect their interests, either in terms of individual regulations and requirements or particular programs. The EPA has undertaken broader reviews, including an action to reduce State Implementation Plan backlogs and reduce future processing time, and an action to streamline SNAP reviews. We work with interagency partners on our retrospective reviews in that other federal agencies can and have suggested rules for review, and any reviews that affect other agencies that are done through rulemaking would be submitted to OMB for interagency review under E.O. 12866.

13. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*,<sup>9</sup> GAO recommended that OIRA work with the agencies to improve how retrospective reviews could be used to inform progress towards agency priority goals under the GPRA Modernization Act of 2010.<sup>10</sup> This included actions such as (1) identifying whether a regulation contributes to an agency priority goal as one criterion for prioritizing reviews, and (2) by including in the scope of retrospective reviews the regulations that

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<sup>8</sup> *OECD Regulatory Policy Outlook 2015* (The Organization for Economic Co-operation and Development, 2015) available at <http://www.oecd.org/governance/regulatory-policy/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm>.

<sup>9</sup> GAO-14-268

<sup>10</sup> GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (Jan. 4, 2011).

collectively contribute to an agency priority goal. What actions has your agency taken to better align retrospective reviews with GPRAMA agency priority goals?

**RESPONSE:** The EPA established an Agency Priority Goal related to burden reduction of 1 million hours by the end of fiscal 2015. The EPA has achieved this goal, in part through work on actions identified in the agency's retrospective review plan under E.O. 13563.

#### *On Planning for Review*

14. OMB Memorandum M-11-19 directed agencies to design and write future regulations in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. ACUS recommendation 2014-5 suggested that agencies, when appropriate, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. On November 3, 2015, the GW Regulatory Studies Center issued *Learning from Experience: Retrospective Review of Regulations in 2014*<sup>11</sup>, which reviewed 22 significant and economically significant rules and found that none of them included a plan to conduct retrospective review of the rule after implementation. How has your agency responded to that OIRA directive and what have you learned through those efforts?

k. What actions does your agency plan to take to ensure that planning for future reviews is part of the procedures for drafting new regulations?

**RESPONSE:** Through its focus on Next Generation Compliance,<sup>12</sup> the EPA has demonstrated its commitment to issuing regulations that are as effective and efficient as they can be in achieving their intended benefits. The EPA is committed to writing rules that are designed to promote compliance and to facilitate retrospective review, in part by collecting appropriate data that can be used by the agency, the regulated community, state and local governments, and the public to facilitate implementation, measure, and verify environmental results. Our Next Generation Compliance effort has a variety of components including efforts to design regulations and permits that are easier to implement, with a goal of improved compliance and environmental outcomes; to use and promote advanced emissions/pollutant detection technology so that regulated entities, the government, and the public can more easily see pollutant discharges, environmental conditions, and noncompliance; shift toward electronic reporting to help make environmental reporting more accurate, complete, and efficient while helping the EPA and co-regulators better manage information, improve effectiveness and transparency; and expand transparency by making information more accessible to the public.

The public is also welcome to send additional suggestions for regulations that may be appropriate for review to [ImprovingRegulations.SuggestionBox@epa.gov](mailto:ImprovingRegulations.SuggestionBox@epa.gov) or through the docket associated with our retrospective review plan.<sup>13</sup>

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<sup>11</sup> Sofie E. Miller, *Learning From Experience: Retrospective Review of Regulations in 2014* (The George Washington University Regulatory Studies Center. Working Paper, 2015). available at <http://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>.

<sup>12</sup> <http://www.epa.gov/compliance/next-generation-compliance>

<sup>13</sup> <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OA-2011-0156>

15. The Department of Transportation (DOT) maintains a plan on its website to ensure that all regulations are reviewed every ten years. Each DOT agency divides its rules into 10 different groups, and analyzes one group each year. They request public comment on the timing of the reviews through the Regulatory Agenda (for example, if a particular rule should be reviewed earlier and why). Would something like this be viable at your agency?

1. How do you ensure that cyclical reviews are apparent to your stakeholders to give them an opportunity to comment?

**RESPONSE:** The EPA administers a variety of programs and rules based on a wide number of governing statutes. Approximately 60% of the rules on the EPA's Semiannual Regulatory Agenda are statutorily-required reviews of existing regulations. Nearly all of the actions included in the EPA's Retrospective Review Plan were added in addition to reviews required under statutes such as the CAA, SDWA, and RFA. The EPA's stakeholders are invited to participate in the EPA's rulemaking process by reviewing and sending feedback or suggestions on actions included in our Regulatory Agenda and our Retrospective Review Plan. Since 2011, the EPA has maintained an open comment docket and an e-mail address for public feedback on the existing *Plan for Periodic Retrospective Review of Existing Regulations* and the subsequent progress reports. In 2015 the EPA also issued another Federal Register notice soliciting comments on issues related to retrospective review. Any interested party may provide comment during the proposal phase of any given the agency rulemaking.

#### *Reporting Outcomes of Retrospective Review*

16. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*,<sup>14</sup> GAO recommended that OIRA work with agencies to improve the reporting of retrospective review outcomes, including providing more comprehensive information about completed reviews. What actions has your agency taken to ensure that retrospective review reporting is more accessible and transparent?

**RESPONSE:** The EPA provides information in two locations on its public Web site about the semiannual progress reports. Each semiannual report is posted on our Web site and contains a column entitled "status of initiative," so that users can locate actions that are new, newly completed, or ongoing.<sup>15</sup> The EPA also continues to maintain an open docket for feedback from the public on our retrospective review process or ongoing actions and we maintain communication through [ImprovingRegulations.SuggestionBox@epa.gov](mailto:ImprovingRegulations.SuggestionBox@epa.gov), which was first provided in our 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*. The EPA indicated which actions in its Semiannual Regulatory Agenda are also retrospective review actions under E.O. 13563.

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<sup>14</sup> GAO-14-268

<sup>15</sup> <http://www.epa.gov/laws-regulations/documents-retrospective-review>



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 08 2016

OFFICE OF  
CONGRESSIONAL AND  
INTERGOVERNMENTAL  
RELATIONS

The Honorable Heidi Heitkamp  
Ranking Member  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, D.C. 20510

Dear Senator Heitkamp:

Thank you for your November 20, 2015, letter and the opportunity to respond to the questions for the record from the Senate Committee on Homeland Security and Governmental Affairs' hearing on November 5, 2015, entitled *Agency Progress in Retrospective Review of Existing Regulations*. Enclosed are our responses to your questions.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Thea Williams, in the EPA's Office of Congressional and Intergovernmental Relations, at [williams.thea@epa.gov](mailto:williams.thea@epa.gov) or at (202) 564-2064.

Sincerely,

A handwritten signature in black ink that reads "Nichole Distefano".

Nichole Distefano  
Associate Administrator

Enclosure

**Post-Hearing Questions for the Record  
Submitted to Mr. William Nickerson  
From Senator Heidi Heitkamp**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

1. A critical component of retrospective review is ensuring that the public has the opportunity to provide feedback on whether regulations are in fact achieving their intended objective. However, all too often we hear from the general public, small business, and other regulated entities, that they feel disconnected from the rulemaking process, or that their voices are not being heard.
  - a. Could each of you address how your agencies engage the public and seek feedback outside of the general notices published in the Federal Register?
  - b. Do you find that the Federal Register is still the most effective means of providing notice and receiving useful feedback to help identify public concerns?

**RESPONSE:** Publishing notices in the Federal Register has been an effective mechanism for the EPA to provide information and solicit feedback from the public on retrospective review. The regulated community recognizes the Federal Register as a regular source for information on the EPA actions as well as a portal for communicating thoughts and suggestions with the agency. The EPA has published three notices requesting input pertaining to retrospective review which resulted in over 1,400 suggestions, many of which helped guide our selection of actions for review.

Beyond use of the Federal Register, the EPA also uses other methods to engage the public on retrospective review. One of the agency’s most important assets is the relationship program and regional offices have with key stakeholders. The EPA managers and staff are in frequent contact with the regulated community before, during and following the development of agency rules. The EPA also utilizes formal meetings, both virtual and in-person to solicit feedback on retrospective reviews. In 2011, the EPA conducted twenty public meetings and town halls as well as a number of Web based dialogues related to retrospective review. More recently, the agency has reached out to small businesses, the SBA’s Office of Advocacy, trade associations, as well as state and local officials to meet and obtain their suggestions for retrospective review.

Additionally, the EPA has maintained an open docket and dedicated email for the public to provide input. Regardless of how the EPA receives feedback, specific suggestions regarding how rules could be modified along with data or other detailed information that supports the request is most useful to the agency. While public meetings may sometimes reach a slightly different audience than do Federal Register notices, in our experience, the feedback from public meetings tends to be more general than feedback received in writing.

2. When examining retrospective review, we often discuss cost benefit analysis to determine whether or not a rule is achieving its stated objective. However, part of this information collection requires the solicitation of data from regulated entities.

- a. Do you find that current retrospective reviews are stymied by the strict requirements of the Paperwork Reduction Act?
- b. Would we see an increased effectiveness of the retrospective review process if we were to exempt retrospective review activities from the Paperwork Reduction Act?

**RESPONSE:** The Paperwork Reduction Act does mandate that the EPA meet certain requirements before collecting information from the public. The EPA is often limited to publicly available, industry-level data when assessing costs of existing rules. In theory, access to facility-level data could prove useful in assessing costs and benefits, however, there would still be additional challenges to developing detailed cost estimates of regulatory actions. Acquiring detailed cost information would place additional paperwork burden on regulated entities. It also can be challenging to separate regulatory compliance costs at the firm level from unrelated costs that were incurred at the same time. In general, the Paperwork Reduction Act has not proved a barrier to the EPA's retrospective review program.

3. During our subcommittee's maiden hearing, we invited witness from diverse backgrounds to discuss the Federal government's regulatory framework. I took the opportunity to discuss retrospective review with that panel as well. One thing I heard from both witnesses was that there needs to be a dedicated funding stream in support of retrospective review activities.
  - a. Based on current expectations of the President, as outlined in Executive Order 13563, are resources being dedicated to retrospective review at the detriment of the mission objectives of the agency?
  - b. What resources do your agencies need to effectively and efficiently carry out retrospective review while maintaining overall operational awareness?

**RESPONSE:** Roughly 60% of the rules on the EPA's Regulatory Agenda are retrospective reviews required by various statutes, so considerable resources are already being spent on this effort. The agency's current level of resources can support our obligations under existing statutes and our current efforts to respond to E.O. 13563.

4. In a previous hearing, Mr. Neil Eisner, a Senior Fellow at the Administrative Conference of the United States, advocated strengthening the culture of review within the Federal agencies. In his opinion there is a focus, especially among senior officials, on creating something new rather than fixing something old.
  - a. What actions are taken within each of your agencies to ensure that the workforce buys into the reality that ensuring the effectiveness of existing regulations is just as important as ensuring new rulemaking is of the highest caliber?

**RESPONSE:** The workforce and senior officials are responsive to stakeholder concerns and feedback on both retrospective reviews and new actions. The EPA is interested in addressing situations where the expected human health and environmental benefits associated with one of our actions are not being realized, in addition to developing new mechanisms to protect human health and the environment. A significant portion of the actions in the EPA's Regulatory Agenda already are retrospective reviews. Further, ensuring rules are effective is a high priority among senior officials at the EPA.

5. Understanding that good retrospective review often require examination of highly technical subject matter, it is important that agencies have a highly skilled and specialized work force to conduct retrospective reviews in an effective manner.
  - a. Having completed a number of retrospective reviews up to this point, what are some the challenges you have found as it relate to workforce, in completing retrospective review effectively?
  - b. Do you think the Federal Governments could do more to able to attract
  - c. Do you have dedicated staff focused on reviewing existing rules?

**RESPONSE:** The EPA workforce is already experienced doing retrospective reviews because they are built into many of our core statutory responsibilities. Approximately 60% of the actions on the EPA's Regulatory Agenda are retrospective reviews required by various statutes. For this reason, and because it is often beneficial to have staff who are familiar with the underlying action since those staff have relevant knowledge, skills and experience, we do not have separate, dedicated staff working solely on retrospective review. In addition, through recent efforts to promote Next Generation Compliance, the agency has provided rule writing staff with additional training and resources to design rules that are easier to implement, with a goal of improved compliance and environmental outcomes.

**Post-Hearing Questions for the Record  
Submitted to Ms. Megan Uzzell  
From Senator James Lankford**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

*On Soliciting Comments from the Public*

**1. In preparation for conducting retrospective reviews as directed under Executive Order 13563, Labor used an interactive website so that stakeholders could comment and vote on others’ comments. Please elaborate on Labor’s choice to use an interactive website rather than collecting comments on the Federal Register.**

**a. What were some advantages and disadvantages of this approach?**

**Answer:** The Federal Register serves many important functions and for a wide-array of stakeholders it is an important place to gain knowledge about government activities. Accordingly, the Department published notices about our retrospective review engagement opportunity in the Federal Register. We recognize that there is not a one size fits all approach to engagement and that is why the Department uses a range of tools to seek input. For example, the Federal Register is not interactive and not every stakeholder community may have familiarity with it. The Department was interested in using a tool that provided for active engagement and could reach stakeholders who may not have otherwise participated in the process. That is why in 2011 and 2015, we elected to collect our comments on an interactive website, allowing our stakeholders to provide comments as well as view, vote on, and comment on each other’s suggestions in real time. This also allowed stakeholders to address how suggestions could be implemented and improved. Providing notice of our website-based process in the Federal Register thus allowed us to reach a broad range of stakeholders.

**b. What actions did Labor take to ensure that comments received through the interactive website were still available and accessible on the Federal Register?**

**Answer:** The Department has archived both our 2011 and 2015 suggestions in a docket on regulations.gov – the same website to which comments are often submitted in response to publications in the Federal Register.

**c. During the hearing, you stated that Labor did not disadvantage a rule that may impact only a small number of stakeholders as a candidate for retrospective review. How did Labor ensure that the voting aspect of its interactive website did not lead to favoring the review of outdated regulations that affect many stakeholders?**

**Answer:** The interactive website allowed our stakeholders to view, vote on, and even comment on each other’s suggestions in real time; however, no bar – numerical or otherwise – was

established to limit review of suggestions or dictate the outcome of the review. Every suggestion that was received was reviewed and considered by the Department.

*On Consulting with the Small Business Community and State Regulators*

- 2. In your oral testimony, you cited the Small Business Administration’s (SBA) Office of Advocacy as one tool you use to get feedback from small businesses. Please elaborate on your department’s use of the SBA Office of Advocacy.**

**Answer:** The Department is committed to conducting substantial outreach in the development, dissemination, and implementation of items on our regulatory agenda. Because the SBA Office of Advocacy represents the interests of small businesses, by engaging with them we are better positioned to ensure more small businesses are represented in our stakeholder engagements. Frequently, we host listening sessions on particular items on our regulatory agenda that include small businesses or we participate in listening sessions hosted by the Office of Advocacy. We also periodically participate in quarterly stakeholder sessions convened by the Office of Advocacy on a range of issues.

- a. How could your department better leverage the insights and resources of the Office of Advocacy?**

**Answer:** The Department values our engagement with the Office of Advocacy and believes we appropriately leverage the insights and resources of this office. We also have a robust record of our own engagement with business stakeholders and will continue our commitments.

- 3. How could your department better liaise with state regulators to ensure that regulations do not conflict with or duplicate state requirements?**

**Answer:** The Department of Labor administers and enforces more than 180 federal laws. In fulfilling its obligations under these laws, the Department is committed to conducting substantial outreach, including to state regulators, in the development, dissemination, and implementation of our regulatory agenda. When appropriate, we review and account for relevant state laws and regulations in the development of our regulations, for example, to calculate the projected costs and benefits of our proposals. We do not hesitate to reach out to state regulators when needed in order to ensure that our laws and regulations are implemented in harmony with state laws and regulations to the extent possible.

*On Defining the Universe of Retrospective Reviews*

- 4. Retrospective reviews are not clearly defined in existing executive orders. For example, Executive Order 13563 merely directs agencies to “facilitate the periodic review of existing significant regulations...” Executive Order 13610 directs agencies to prioritize**

**initiatives that will produce monetary savings, reductions in paperwork, reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. In the absence of a clear directive as to what constitutes a retrospective review as mandated by executive orders, how does your agency define the term?**

**Answer:** The Office of Management and Budget provides guidance to the Department on how to conduct retrospective reviews. The Department has experience from completing 14 retrospective review initiatives. Additionally, when questions do arise, OMB is available to provide specific, well-tailored feedback on the Department's retrospective review efforts.

Thus far, the Department has focused our retrospective review initiatives on efforts to streamline, update, and modernize our existing regulations in line with governing law, Executive Orders, OMB guidance, stakeholder input, and agency priorities. Our retrospective review efforts often involve notice-and-comment rulemaking to revisit existing regulations. On a case-by-case basis as appropriate, we are also prospectively including plans to do retrospective reviews in our rulemakings.

*On Regulatory Flexibility Act Review and other Statutorily-Required Reviews*

**5. In 2014, in assessing retrospective review processes for Administrative Conference of the United States, Professor Joseph Aldy of Harvard's Kennedy School found that after reviewing 25 rules identified in agency reports on their progress implementing retrospective review, only 14 explicitly referenced retrospective review in the rule-making.<sup>1</sup> He posited that this suggested that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. How has your agency made the distinction between reviews in response to Executive Order 13563 and other efforts already underway or responses to new mandates?**

**Answer:** Retrospective review analysis is an integral part of the Department's rulemaking efforts and we work to identify new opportunities for retrospective review through a variety of mechanisms: robust stakeholder input, agency identification, and prospective retrospective reviews embedded in new regulations from their initial promulgation, to name a few. Each of these initiatives is included on our semiannual retrospective review reports, as directed by OIRA pursuant to EO 13563.<sup>2</sup>

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<sup>1</sup> Joseph Aldy for the Administrative Conference of the United States. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 48 (November 17, 2014).

<sup>2</sup> Memorandum from Cass Sunstein (Oct. 26, 2011),

<https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/implementation-of-retrospective-review-plans.pdf>.

**6. The Regulatory Flexibility Act (RFA) Section 610 requires that rules with a significant economic impact on a substantial number of small entities be reviewed within ten years of promulgation, but in the past the Government Accountability Office (GAO) has found that not all agencies interpret the requirement consistently.<sup>3</sup> In addition, other statutes mandate retrospective review of certain regulations. How have initiatives in response to the President's Executive Order 13563 aligned with other retrospective review initiatives, such as those undertaken under RFA Section 610 or other specific statutory review requirements?**

**Answer:** Each of these authorities contributes to the Department's overall retrospective review agenda. There can be overlaps between the requirements. We will continue working to ensure our agenda appropriately prioritizes retrospective reviews in relationship to the Department's other efforts.

**a. Please describe the rigor of Section 610 reviews. For example, is cost-benefit analysis typically conducted in the course of these reviews at your agency?**

**Answer:** The Department conducts retrospective reviews consistent with Section 610 of the Regulatory Flexibility Act of 1980. OSHA's process is instructive, and its Excavations Standard retrospective review has been hailed as an example of a successful review by SBA Advocacy.<sup>4</sup> After OSHA selects a standard for lookback review, it gathers information from affected parties about their experience with the standard, including with regards to the original cost-benefit analysis, and OSHA reviews relevant, available health, safety, economic, statistical, and feasibility data. OSHA also determines if there has been a material change in circumstances since the standard was issued.

OSHA publishes a Federal Register notice announcing the lookback review and requests information from the public on their experience with the standard. The notice also announces any OSHA-sponsored public meetings on the lookback review.

After all of the data and information for the lookback review are gathered and analyzed, OSHA prepares a report that presents the results of the lookback review and the Agency's resulting conclusions about whether to maintain, modify, or rescind the standard. Following a review by OSHA, the Department of Labor, and the Office of Management and Budget, the report is made available to the public. OSHA finally publishes a Federal Register notice that announces the conclusion of the lookback review, summarizes the results, and announces the public availability of the report.

OSHA has one such review currently underway, involving OSHA's Bloodborne Pathogens standard. As described in the process outlined above, that review included a solicitation of public

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<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIE'S INTERPRETATIONS OF REVIEW REQUIREMENTS VARY WIDELY, GAO/GGD-99-55, 11 (Apr. 2, 1999)

<sup>4</sup> *Id.* at p.84-85.

comment on ways to modify the standard to reduce the regulatory burden on small businesses. OSHA maintains a website summarizing the results of its eight previous 610 reviews.<sup>5</sup>

**b. What lessons has the agency learned from conducting additional reviews consistent with other statutory mandates that have facilitated this retrospective review initiative?**

**Answer:** Section 610 reviews are important. They are, however, only one component of our broader efforts on retrospective review. The Department recognizes the importance of retrospective review and it is part of our consideration when we decide which rules to add to the regulatory agenda or to prioritize among our regulatory initiatives. But, in keeping with the spirit of Section 610, the Department has also included retrospective analysis requirements in certain new regulations to facilitate evaluation of their impact. For example, the Department's Mine Safety and Health Administration announced in its 2014 Respirable Dust Final Rule (79 Fed. Reg. 24,814) that it will conduct a retrospective review to evaluate the data collected using continuous personal dust monitors in 2017. *Id.* at 24,867. OSHA's Final Rule on Recordkeeping and Reporting Requirements – moving from the Standard Industrial Classification System to the North American Industry Classification System for determining which industries are low-hazard and potentially exempt from recordkeeping requirements – also includes a commitment to conduct a retrospective review of the agency's recordkeeping regulations.

*On Quantifying Cost Savings*

**7. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that agencies quantified cost savings in the progress updates for 38 of the 246 completed analyses in their scope, half of which were related to information collection burdens.<sup>6</sup> Why are cost savings not consistently quantified?**

**Answer:** The Department's retrospective review efforts often result in notice-and-comment rulemaking to streamline, update, and modernize our existing regulations. These rulemaking efforts are conducted in line with governing laws and executive orders, including EO 12866, which requires the use of regulatory impact analysis in certain circumstances. Costs and benefits are quantified, monetized, or analyzed qualitatively consistent with OMB's guidance in Circular A-4.<sup>7</sup>

**a. When costs savings were quantified, GAO found that agencies most often attributed those savings to reduced information collection burdens. What other cost savings have resulted from these retrospective reviews?**

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<sup>5</sup> <https://www.osha.gov/dea/lookback.html>.

<sup>6</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS*, GAO-14-268 (Apr. 11, 2014)

<sup>7</sup> OMB, Memorandum to Agency Heads, Circular A-4 (Sep. 17, 2003),

[https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

**Answer:** Information collection is only one source of cost savings in the Department’s retrospective reviews. For example, OSHA’s third Standards Improvement Project relaxed the frequency of maritime rigging inspections from every four years to every five years. As the Final Rule explained, the new requirement for rigging inspections reduced total number of each year by 20 percent (i.e., by 301 inspections), resulting in an annual employer cost savings of \$168,560.<sup>8</sup>

**b. What are the challenges in quantifying the results of these reviews and how could we do better at reporting that progress?**

Quantifying the economic effects of a rulemaking effort can be challenging absent relevant research that establishes reliable models. Because such research is often not available, conducting such analysis may not represent the best use of resources.

The biannual retrospective review reporting template provides sufficient direction for reporting the progress of these reviews. The Department will continue to ensure transparency in its conclusions of such reviews.

*On Record of Results of Reviews*

**8. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that more than 90 percent of the retrospective review analyses they examined ended in a determination to revise, clarify, or eliminate regulatory text.<sup>9</sup> Would you attribute this success to how your agencies prioritized the regulations you reviewed or simply that a lot of regulations currently on the books are ripe for updates?**

**Answer:** Since the EO’s release in 2011, the Department has completed 14 retrospective review initiatives, each of which has resulted in changes to regulatory text. The Department is strategic in its selection of rules to retrospectively review in order to maintain the ability to achieve our mission while reducing burden. The Department’s commitment to robust external stakeholder engagement to identify opportunities for retrospective review has also been a key to our success.

**a. How many of these reviews could be considered low-hanging fruit? Should we expect this level of success going forward?**

Resources to conduct retrospective review necessarily compete with other priorities. The Department has already identified many of the opportunities to simply rescind outdated regulations and taken action accordingly. But the Department is always seeking opportunities to conduct additional retrospective reviews and to advance such reviews is a priority for DOL. For

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<sup>8</sup> OSHA, Standards Improvement Project Final Rule, 76 Fed. Reg. 33,590 (2011), <https://www.gpo.gov/fdsys/pkg/FR-2011-06-08/pdf/2011-13517.pdf>.

<sup>9</sup> GAO-14-268

example, in coming years, the Department will begin to pursue the “prospective” retrospective reviews that have been built into recent priority rulemakings. While there are limited available “low-hanging fruit” options, the Department is not shying away from its commitment to drive retrospective review.

### *On Rigor and Scope of Retrospective Review*

**9. In his analysis of retrospective reviews for Mercatus, Mr. Randall Lutter notes, “Very few retrospective analyses of extant federal regulations provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective analyses that Harrington, the OMB, and Simpson reviewed provide information only about costs, about a key but incomplete measure of benefits... or about both costs and a poor proxy for benefits...”<sup>10</sup> Do your retrospective review analyses attempt to quantify costs, or benefits, or both?**

**Answer:** The Department’s retrospective review efforts often result in notice-and-comment rulemaking to streamline, update, and modernize our existing regulations. These rulemaking efforts are conducted in line with governing laws and executive orders, including EO 12866, which requires the use of regulatory impact analysis in certain circumstances. Consistent with OMB’s guidance in Circular A-4, costs and benefits are quantified and monetized when possible—typically relative to the original estimate of the standard’s cost and benefits, or, at a minimum, analyzed qualitatively.<sup>11</sup>

**a. Does your office have the capacity to collect data to conduct effective retrospective reviews that include cost-benefit analysis? If not, why not?**

Each agency that pursues rulemaking as part of the Department’s retrospective review efforts conducts cost-benefit analysis as required under EO 12866.

**b. Would it be beneficial for your agency to have your retrospective review obligations delegated to a specialized office charged with doing just that?**

No, retrospective review efforts require program-specific expertise, which places each agency in the best position to pursue its own retrospective review efforts. Among other challenges, centralizing retrospective review efforts would result in far less efficient rulemaking efforts.

**10. In his analysis of retrospective reviews for Mercatus, Mr. Lutter notes, “The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow.” The 2015 OECD Regulatory Policy Outlook stated**

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<sup>10</sup> Randall Lutter, Working Paper: The Role of Retrospective Analysis and Review in Regulatory Policy, MERCATUS CTR. NO. 12-14 (Apr. 2012).

<sup>11</sup> OMB, Memorandum to Agency Heads, Circular A-4 (Sep. 17, 2003), [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

that “OECD countries could be more strategic and systemic in their evaluation efforts by conducting comprehensive reviews that assess the cumulative impact of laws and regulations in a sector as a whole, with a particular focus on the policy outcomes.”<sup>12</sup> Our proposed legislation, S. 1817 *The Smarter Regs Act of 2015*, directs OMB to encourage and assist agencies to “streamline and coordinate the assessment of major rules with similar or related regulatory objectives” for just this purpose. When contemplating which rules to review, have you ever considered conducting simultaneous reviews on related rules or rules that affect a certain sector of industry?

**Answer:** OSHA’s Standards Improvement Project rulemakings provide a prime example of how a retrospective review initiative can consider related rules covering a certain industry. In fact, OSHA’s upcoming Standards Improvement Project IV rulemaking builds upon a 2012 request for information that sought to identify opportunities to streamline or modernize primarily construction industry standards.<sup>13</sup> The NPRM is expected to cover a number of OSHA standards that affect construction.

**a. Have you ever considered a large retrospective review on a regulatory framework?**

**Answer:** See prior answer.

**b. What barriers exist to this type of review?**

**Answer:** This type of review is always constrained by agency rulemaking resources. As explained above, rigorous and effective retrospective review requires the same agency expertise as any rulemaking effort. These efforts must therefore be pursued and prioritized in the context of other regulatory efforts.

**c. How have you worked with interagency partners as you have reviewed existing regulations?**

**Answer:** The Department values interagency efforts to improve retrospective review. For example, the Department has coordinated with interagency colleagues on best practices to manage a robust stakeholder engagement effort to identify candidates for retrospective reviews.

**11. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*<sup>14</sup>, GAO recommended that OIRA work with the agencies to improve how retrospective reviews**

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<sup>12</sup> OECD Regulatory Policy Outlook 2015 (The Organization for Economic Co-operation and Development, 2015) available at <http://www.oecd.org/governance/regulatory-policy/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm>.

<sup>13</sup> 77 Fed. Reg. 72,781 (Dec. 6, 2012),

[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=FEDERAL\\_REGISTER&p\\_id=23534](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=23534).

<sup>14</sup> GAO-14-268

**could be used to inform progress towards agency priority goals under the GPRA Modernization Act of 2010.<sup>15</sup> This included actions such as (1) identifying whether a regulation contributes to an agency priority goal as one criterion for prioritizing reviews, and (2) by including in the scope of retrospective reviews the regulations that collectively contribute to an agency priority goal. What actions has your agency taken to better align retrospective reviews with GPRAMA agency priority goals?**

**Answer:** As with any agency, the Department will always have limited resources when it comes to pursuing regulatory efforts. Each agency has to prioritize its rulemaking efforts – including retrospective review initiatives – and GPRA goals are a factor in setting priorities. Stakeholder engagement efforts can nonetheless help identify retrospective review efforts that can align with GPRA goals.

### *On Planning for Review*

**12. OMB Memorandum M-11-19 directed agencies to design and write future regulations in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. ACUS recommendation 2014-5 suggested that agencies, when appropriate, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule’s preamble. On November 3, 2015, the GW Regulatory Studies Center issued *Learning from Experience: Retrospective Review of Regulations in 2014*<sup>16</sup>, which reviewed 22 significant and economically significant rules and found that none of them included a plan to conduct retrospective review of the rule after implementation. How has your agency responded to that OIRA directive and what have you learned through those efforts?**

**Answer:** The Department has taken steps to include retrospective analysis requirements in new regulations to facilitate evaluation of their impact. For example, the Department’s Mine Safety and Health Administration announced in its 2014 Respirable Dust Final Rule that it will conduct a retrospective review to evaluate the data collected using continuous personal dust monitors in 2017. Also, OSHA’s Final Rule on Recordkeeping and Reporting Requirements – moving from the Standard Industrial Classification System to the North American Industry Classification System for determining which industries are low-hazard and potentially exempt from recordkeeping requirements – also includes a commitment to conduct a retrospective review of the agency’s recordkeeping regulations.

**a. What actions does your agency plan to take to ensure that planning for future reviews is part of the procedures for drafting new regulations?**

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<sup>15</sup> GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (Jan. 4, 2011).

<sup>16</sup> Sofie E. Miller, *Learning From Experience: Retrospective Review of Regulations in 2014* (The George Washington University Regulatory Studies Center, Working Paper, 2015), available at <http://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>.

**Answer:** As discussed in the prior answer, the Department’s agencies have included retrospective analysis requirements in new regulations to facilitate evaluation of their impact. The Department will continue to identify such opportunities.

**13. The Department of Transportation (DOT) maintains a plan on its website to ensure that all regulations are reviewed every ten years. Each DOT agency divides its rules into 10 different groups, and analyzes one group each year. They request public comment on the timing of the reviews through the Regulatory Agenda (for example, if a particular rule should be reviewed earlier and why). Would something like this be viable at your agency?**

**Answer:** The Department would be pleased to consult with DOT to learn more about its processes and outcomes.

**a. How do you ensure that cyclical reviews are apparent to your stakeholders to give them an opportunity to comment?**

**Answer:** The Department finds that engaging stakeholders – both internal and external – is a particularly fruitful way to identify opportunities for retrospective review. Some of the Department’s most successful, win-win efforts have come from stakeholder suggestions – like OSHA’s mechanical power press requirements, mentioned previously. While the Department has several day-to-day mechanisms for soliciting such feedback, periodic broader efforts to solicit opportunities for retrospective review are useful as well. This year, for example, the Department launched a broad, technology driven stakeholder engagement effort to solicit ideas from internal and external stakeholders alike. This year’s stakeholder engagement efforts – combined with a number of permanent labor certification program (PERM) – specific listening sessions – encouraged the Department to announce in its February 2015 Retrospective Review Report that the Employment and Training Administration would undertake a reform of the PERM program regulations.

#### *Reporting Outcomes of Retrospective Review*

**14. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*<sup>17</sup>, GAO recommended that OIRA work with agencies to improve the reporting of retrospective review outcomes, including providing more comprehensive information about completed reviews. What actions has your agency taken to ensure that retrospective review reporting is more accessible and transparent?**

**Answer:** The Department is committed in making retrospective review reporting more accessible and transparent. The Department has adopted OIRA’s new template for biannual retrospective review reports – launched in February 2015 – which provides more comprehensive

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<sup>17</sup> GAO-14-268

information about reviews that are underway and recently completed, adding fields for: noting which initiatives are new versus those that are ongoing; listing the regulatory flexibilities included in each rule (such as pilot projects, safe harbor exemptions, sunset provisions, trigger provisions, streamlined requirements, state flexibilities, or other similar strategies); and any methods planned to engage the public in identifying improvements (such as public comment, analyses, third party assessments, etc.).

**Post-Hearing Questions for the Record  
Submitted to Ms. Megan Uzzell  
From Senator Heidi Heitkamp**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

- 1. A critical component of retrospective review is ensuring that the public has the opportunity to provide feedback on whether regulations are in fact achieving their intended objective. However, all too often we hear from the general public, small business, and other regulated entities, that they feel disconnected from the rulemaking process, or that their voices are not being heard.**
  - a. Could each of you address how your agencies engage the public and seek feedback outside of the general notices published in the Federal Register?**

**Answer:** The Department finds that engaging stakeholders – both internal and external – is a particularly fruitful way to identify opportunities for retrospective review. Some of the Department’s most successful, win-win efforts have come from stakeholder suggestions. While the Department has several day-to-day mechanisms for soliciting such feedback, periodic broader efforts to solicit opportunities for retrospective review are useful as well. In 2015, for example, the Department launched a broad, technology-driven stakeholder engagement effort to solicit ideas from internal and external stakeholders alike. Our 2015 stakeholder engagement efforts—combined with a number of permanent labor certification program (PERM) specific listening sessions—encouraged the Department to announce in its February 2015 Retrospective Review Report that the Employment and Training Administration would undertake a reform of the PERM program regulation. We have also established an email address ([retrospectivereview@dol.gov](mailto:retrospectivereview@dol.gov)) to give the public a mechanism to provide retrospective review suggestions anytime.

- b. Do you find that the Federal Register is still the most effective means of providing notice and receiving useful feedback to help identify public concerns?**

**Answer:** The Federal Register serves many important functions, and for a wide array of stakeholders, it is an important place to gain knowledge about government activities. Accordingly, the Department published notices about our retrospective review engagement opportunity in the Federal Register. We recognize that there is not a one-size-fits-all approach to engagement, and that is why the Department uses a range of tools to seek input. For example, the Federal Register is not interactive, and not every stakeholder community may have familiarity with it. The Department was interested in using a tool that provided for active engagement and could reach stakeholders who may not have otherwise participated in the process. That is why in 2011 and 2015 we elected to collect our comments on an interactive website, allowing our stakeholders to provide comments as well as view, vote on, and comment on each other’s suggestions in real time. This also allowed stakeholders to address how suggestions could be implemented and improved. Providing notice of our website-based process in the Federal

Register thus allowed us to reach a broad range of stakeholders while still leveraging the benefits of an interactive website.

**2. During our subcommittee's maiden hearing, we invited witness from diverse backgrounds to discuss the Federal government's regulatory framework. I took the opportunity to discuss retrospective review with that panel as well. One thing I heard from both witnesses was that there needs to be a dedicated funding stream in support of retrospective review activities.**

**a. Based on current expectations of the President, as outlined in Executive Order 13563, are resources being dedicated to retrospective review at the detriment of the mission objectives of the agency?**

**Answer:** Resources such as human capital dedicated to retrospective review flow from the same streams as non-retrospective review regulatory work. The Department will always have limited resources when it comes to pursuing regulatory efforts. Thus, resources to conduct retrospective review necessarily compete with other priorities, and a dedicated funding stream alone will not resolve that inherent tension. In particular, it is important to note that successful retrospective review efforts generally require the same sorts of subject matter expertise as affirmative rulemaking, so generalized resources are insufficient to conduct retrospective reviews in particular subject areas.

**b. What resources do your agencies need to effectively and efficiently carry out retrospective review while maintaining overall operational awareness?**

**Answer:** As with any agency, the Department will always have limited resources, funding, and human capital when it comes to pursuing our regulatory goals. Each of our agencies has to view all of our rulemaking through the lens of prioritization.

**3. In a previous hearing, Mr. Neil Eisner, a Senior Fellow at the Administrative Conference of the United States, advocated strengthening the culture of review within the Federal agencies. In his opinion there is a focus, especially among senior officials, on creating something new rather than fixing something old.**

**a. What actions are taken within each of your agencies to ensure that the workforce buys into the reality that ensuring the effectiveness of existing regulations is just as important as ensuring new rulemaking is of the highest caliber?**

**Answer:** The Department has driven and embraced culture change, and our employees share the view that existing regulations should be just as effective as the new regulations we are drafting. The Department is strategic in its selection of rules to retrospectively review in order to maintain the ability to achieve our mission while reducing burden. The Department's commitment to robust internal and external stakeholder engagement and acknowledgment of participation in the

process to identify opportunities for retrospective review has also been a key to our success. We have also built “prospective retrospective reviews” into several of our highest priority rules, including MSHA’s respirable dust final rule, which requires the agency to conduct a retrospective review of the effectiveness of a new technology that we are requiring (continuous personal dust monitors) beginning on February 1, 2017.

**4. Understanding that good retrospective review often require examination of highly technical subject matter, it is important that agencies have a highly skilled and specialized work force to conduct retrospective reviews in an effective manner.**

- a. Having completed a number of retrospective reviews up to this point, what are some the challenges you have found as it relate to workforce, in completing retrospective review effectively?**

**Answer:** The Department will always have limited resources when it comes to pursuing our regulatory goals. Each of our agencies has to view all of our rulemaking through the lens of prioritization, and our teams draw on subject matter experts in both rulemaking and implementation. In addition, the expectation that some have that retrospective review regulations should account for a full quantification of the economic effects of the rulemaking is challenging to overcome. It is not always appropriate, nor are reliable models always available, to permit such an analysis. It is important to establish an understanding of the need for flexibility in the various types of retrospective reviews that can be conducted.

- b. Do you think the Federal Government could do more to be able to attract and retain employees with the expertise needed to do federal rulemaking or retrospective review?**

**Answer:** We think that we have the tools necessary to attract and retain top-level talent. However, as stated above, lack of resources continue to place a strain on federal employees.

- c. Do you have dedicated staff focused on reviewing existing rules?**

**Answer:** Retrospective review analysis is an integral part of the Department’s rulemaking efforts, and we work to identify new opportunities for retrospective review through a variety of mechanisms. One mechanism is by convening an interagency working group of regulatory leads that gathers and shares best practices. This interagency working group can help analyze the results of our robust stakeholder engagement efforts to identify candidates for retrospective reviews. In addition to this, as described above, the Department encourages component agencies to start building prospective retrospective reviews into their rules.

**Post-Hearing Questions for the Record  
Submitted to Mr. Christopher Zehren  
From Senator James Lankford**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

*On Reviewed Regulations*

**Question:**

1. In May, USDA’s Rural Housing Service proposed aligning application requirements for community facilities grants with the lending industry. As a result, the agency estimates that approximately 90 applicants each year (such as towns, non-profits, and federally-recognized tribes) will not be required to provide an “examination opinion”, which costs an average of \$45,000. This change will save the public approximately \$4 million a year. While I applaud this effort, why was this not implemented earlier?

**Answer:**

Appropriate changes were implemented after input from stakeholders was received and analysis on how to implement the improved services was completed.

**Question:**

2. USDA completed the direct certification process, which allows local education agencies to get a child’s SNAP documentation from the State or local program office, so low-income families don’t have to submit a separate paper application. This eliminated an estimated 113,000 hours of paperwork. Why wasn’t this done earlier?

**Answer:**

Appropriate changes were implemented after input from stakeholders was received and analysis on how to implement the improved services was completed. The law requiring the change imposed a mandatory phase-in period of three years beginning in School Year 2006–2007.

*On Consulting with the Small Business Community and State Regulators*

**Question:**

3. How could your department better leverage the insights and resources of the Small Business Administration’s (SBA) Office of Advocacy?

**Answer:**

Like other Federal agencies, the Office of Advocacy has an opportunity to provide input on USDA's draft regulations through the interagency regulatory review process administered by the Office of Information and Regulatory Affairs. Any comments received through this process are addressed prior to taking final action. USDA agencies have also been active participants in regulatory roundtables sponsored by the Office of Advocacy. These roundtables provide a forum for small businesses to be heard and provide input on regulatory strategies and program operations of greatest interest to them. In 2014, former SBA Administrator Karen Mills and Secretary Vilsack signed a Memorandum of Understanding to better serve rural small businesses. This close working relationship allows our agencies to make Federal financial resources more accessible and to increase access to private investment capital for small rural businesses.

**Question:**

4. In your testimony, you mentioned that USDA has the opportunity to give input to Congress as the Farm Bill is periodically reauthorized to improve the way that your programs are implemented. Please describe USDA's process to gather feedback from stakeholders after new regulations are promulgated to inform subsequent reauthorizations.

**Answer:**

USDA has a variety of mechanisms to stay connected with our stakeholders. We find that no one method of contact works across the diverse network of USDA programs and stakeholder groups. As a result, USDA employs a wide range of means of staying in touch with our stakeholders, including: over 160 Federal Advisory Committees and Advisory Boards, like the National Advisory Committee on Meat and Poultry Inspection, National Advisory Council on Maternal, Infant, and Fetal Nutrition, and the Advisory Committee on Biotechnology and 21st Century Agriculture; joint USDA and private sector boards, like the Federal Crop Insurance Board of Directors; Requests for Information and Advance Notices of Proposed Rulemakings published in the Federal Register; stakeholder meetings and roundtables; consultations with Tribal governments; participation in annual and ad hoc stakeholder events and meetings; and informal conversations between USDA field staff and individual stakeholders.

- a) Please provide an example of such feedback being relayed and implemented in the latest Farm Bill reauthorization.

**Answer:**

In preparation for a Farm Bill, USDA agencies review what has been learned during its communications with stakeholders. This input is considered as USDA develops issues and analysis used in working with Congress on the development of a Farm Bill. The input from

stakeholders is not just to USDA, but directly to the appropriate members of Congress deliberating on and passing authorization for USDA programs. Based on this input, the most recent Farm Bill resulted in several major changes, including, but not limited to, the elimination of direct payments, creation of the regional conservation partnership program to target resources where they are needed most, strengthening conservation compliance, and streamlining rural business programs.

**Question:**

5. How could your department better liaise with state regulators to ensure that regulations do not conflict with or duplicate state requirements?

**Answer:**

USDA's regulatory agencies have memoranda of understanding (MOUs) with relevant state agencies that delineate how the federal and state authorities will cooperate and interact. MOUs typically address coordination where each party accounts for their own regulatory authority to ensure regulations do not conflict or are duplicative. The agreements typically include processes to share information to ensure effective enforcement and program administration. In addition, USDA's Office of External and Intergovernmental Affairs (OEIA) serves as the liaison to elected and appointed officials of State, county, local, and Tribal governments and other stakeholders. OEIA maintains a close working relationship with the National Association of States Departments of Agriculture (NASDA) and meets with NASDA regularly to receive input on issues of importance to them. The Office of Tribal Relations (OTR) serves as a single point of contact for Tribal issues and works to ensure that relevant programs and policies are efficient, easy to understand, accessible, and developed in consultation with the American Indians and Alaska Native constituents they impact.

*On Defining the Universe of Retrospective Reviews*

**Question:**

6. Retrospective reviews are not clearly defined in existing executive orders. For example, Executive Order 13563 merely directs agencies to "facilitate the periodic review of existing significant regulations..." Executive Order 13610 directs agencies to prioritize initiatives that will produce monetary savings, reductions in paperwork, reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. In the absence of a clear directive as to what constitutes a retrospective review as mandated by executive orders, how does your agency define the term?

**Answer:**

The Department has not defined the term retrospective review, but rather has adhered to the language in the Executive Orders. Executive Order 13563 directs agencies to “modify, streamline, expand, or repeal” rules determined to be “outmoded, ineffective, insufficient, or excessively burdensome.” Executive Order 13610 directs agencies to give priority to “those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens.”

*On Regulatory Flexibility Act Review and other Statutorily-Required Reviews*

**Question:**

7. In 2014, in assessing retrospective review processes for Administrative Conference of the United States, Professor Joseph Aldy of Harvard’s Kennedy School found that after reviewing 25 rules identified in agency reports on their progress implementing retrospective review, only 14 explicitly referenced retrospective review in the rule-making.<sup>1</sup> He posited that this suggested that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. How has your agency made the distinction between reviews in response to Executive Order 13563 and other efforts already underway or responses to new mandates?

**Answer:**

USDA does not distinguish the initiatives identified in its retrospective review status updates from other regulatory efforts prompted by legislative reauthorizations, Section 610 reviews, or other legislative requirements for reviewing regulatory and paperwork burdens.

**Question:**

8. The Regulatory Flexibility Act (RFA) Section 610 requires that rules with a significant economic impact on a substantial number of small entities be reviewed within ten years of promulgation, but in the past the Government Accountability Office (GAO) has found that not all agencies interpret the requirement consistently.<sup>2</sup> In addition, other statutes mandate retrospective review of certain regulations. How have initiatives in response to the President’s Executive Order 13563 aligned with other retrospective review initiatives, such as those undertaken under RFA Section 610 or other specific statutory review requirements?

**Answer:**

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<sup>1</sup> Joseph Aldy for the Administrative Conference of the United States. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 48 (November 17, 2014).

<sup>2</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIE’S INTERPRETATIONS OF REVIEW REQUIREMENTS VARY WIDELY, GAO/GGD-99-55, 11 (Apr. 2, 1999)

USDA routinely aligns efforts to simplify regulations and reduce the reporting burdens on the public under Executive Orders 13563 and 13610, as well as actions required by legislative reauthorizations. USDA establishes regulatory priorities twice each year to coincide with the development of the Unified Regulatory Agenda. These actions have been a critical element of USDA's strategy to better serve our customers and have complemented efforts to streamline administrative processes and optimize program efficiency.

**Question:**

- a) Please describe the rigor of Section 610 reviews. For example, is cost-benefit analysis typically conducted in the course of these reviews at your agency?

**Answer:**

Reviews conducted pursuant to section 610 of the Regulatory Flexibility Act (RFA) do not require a formal cost benefit analysis. Section 610 specifies several criteria that agencies follow to identify and evaluate the need for revisions of regulations. Should the Section 610 review identify the need for a rulemaking, agencies will conduct a cost-benefit analysis to support the rulemaking.

**Question:**

- b) What lessons has the agency learned from conducting additional reviews consistent with other statutory mandates that have facilitated this retrospective review initiative?

**Answer:**

USDA has learned that it needs to continuously review and update regulations to ensure they are most effective, least burdensome, and meeting the needs of stakeholders. We accomplish this through ongoing, routine engagement with stakeholders and activities related to the periodic reauthorization of legislative authorities. We also must ensure that our limited staff and resources are targeted to initiatives that will achieve the greatest improvement in program performance.

*On Quantifying Cost Savings*

**Question:**

9. In the April 2014 GAO report Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals, GAO found that agencies quantified cost savings in the progress updates for 38 of the 246 completed analyses in their

scope, half of which were related to information collection burdens.<sup>3</sup> Why are cost savings not consistently quantified?

**Answer:**

USDA uses the best available data and information to calculate cost savings. Cost savings are not quantified when a burden reduction initiative results in a program efficiency that allows the agency to reallocate resources to programmatic activities that improve customer service or break down barriers to participation, when the initiative is a government-wide effort for management reform, or when the agency is engaged in an ongoing effort whose outcome is not yet measurable. Initiatives that require rulemaking will meet the analytical requirements of Executive Order 12866, which include a cost-benefit analysis for significant or economically significant rules. Agencies will make every effort to quantify the impact of these actions, but may not be able to if data is not reasonably available or if the anticipated outcome is not measurable. When quantification of a particular benefit or cost is not possible, the agency will select the alternative that maximizes net benefits, while also taking into consideration qualitative benefits and costs.

**Question:**

- a) When costs savings were quantified, GAO found that agencies most often attributed those savings to reduced information collection burdens. What other cost savings have resulted from these retrospective reviews?

**Answer:**

USDA's retrospective review initiatives have resulted in a variety of program reforms, including program efficiencies that allow the agency to allocate resources to higher priority programmatic activities, clarification of program requirements that breakdown barriers to participation and streamline administrative review, and public and health cost savings due to the avoidance or mitigation of foodborne illness risk. For example, the Food Safety and Inspection Service published a final rule reflected in the USDA retrospective review plan that modernized the approach to poultry slaughter inspection. The peer-reviewed risk assessment estimates that this new approach to inspection will prevent approximately 5,000 foodborne illnesses each year. The cost-benefit analysis estimates a benefit of approximately \$16.8 million per year in the second year of implementation due to programmatic savings of \$10 million and health benefits of \$6.8 million, with higher savings in the out-years.

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<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS, GAO-14-268 (Apr. 11, 2014)

**Question:**

- b) What are the challenges in quantifying the results of these reviews and how could we do better at reporting that progress?

**Answer:**

The difficulties agencies encounter when conducting retrospective analysis are not unique, have been well documented, and are not dissimilar to factors that hinder prospective analysis. A significant barrier is access to data necessary to evaluate the overall impact of a regulatory action. For instance, while agencies have access to administrative and economic data useful for estimating the costs coming into compliance, estimating the benefits attributed to those actions can be complex and require data not readily available. Difficulties also arise when examining empirical data and separating the effect of the regulation from other factors. One obstacle is that the Paperwork Reduction Act requires agencies to confine data requests from regulated entities and program participants to information needed to effectively administer the program and ensure program integrity. These requirements make it difficult to acquire data solely for analytical purposes. While agencies employ a number of methods to facilitate the acquisition of data and improve analyses, these efforts need to minimize the burden placed on firms and individuals and must be done within constrained resources.

USDA regularly posts status reports on its retrospective review efforts for review by the public through the OIRA website (<https://www.whitehouse.gov/omb/oira/regulation-reform>) and the USDA website ([http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA\\_OPEN](http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_OPEN)). In addition, USDA provides a link to its status reports in the annual Statement of Regulatory Priorities released by OMB in the fall. Further, the USDA request for information seeking public input on the USDA's retrospective review efforts highlights USDA's key accomplishments and ongoing activities pursuant to its efforts to reduce regulatory burdens. A centralized location for posting these reports makes it easier for the public to keep up-to-date with USDA's progress.

*On Record of Results of Reviews*

**Question:**

10. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that more than 90 percent of the retrospective review analyses they examined ended in a determination to revise, clarify, or eliminate regulatory text.<sup>4</sup> Would you attribute this success to how your agencies prioritized the regulations you reviewed or simply that a lot of regulations currently on the books are ripe for updates?

**Answer:**

To ensure the highest priority needs are met, USDA conducts a top-to-bottom regulatory review twice each year as part of the development of the unified regulatory agenda. As part of this review, agencies identify specific topics, regulations, and paperwork collections that are outmoded, ineffective, or excessively burdensome, particularly those identified in comments received in response to the USDA retrospective review plan. Agencies are also directed to review economically significant rules issued over the last 10 years and the most burdensome paperwork collections to identify potential areas of reform. Agency submissions are evaluated and a set of regulatory priorities is established based on the following criteria: Urgency for improving customer service by means of simplification, streamlining, or improved quality of information collection procedures; comments from stakeholders; resource capacity and potential approval process timeline; and likelihood of statutory change. Both the 2014 Farm Bill and Healthy, Hunger-Free Kids Act of 2010 introduced numerous program reforms that eliminated obsolete and underperforming provisions, simplified the administration of programs, and improved program outcomes, while generating significant budgetary savings. While not formal retrospective reviews, implementing these periodic reauthorizations work in concert with our regulatory review efforts.

**Question:**

- a) How many of these reviews could be considered low-hanging fruit? Should we expect this level of success going forward?

**Answer:**

USDA's approach to retrospective review is based on senior level commitment and broad agency engagement; a robust, ongoing dialogue with stakeholders; and a results-oriented approach. This is reflected in USDA's Regulatory Agenda and Statement of Regulatory Priorities, which reflect a significant effort by agencies to advance the Department's successful record on improving

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<sup>4</sup> GAO-14-268

regulations. The process of continuously reviewing and updating regulations to address improvements in technology, emerging threats, and other changes, allows USDA to implement significant regulatory reforms and achieve administrative efficiencies that result in improved customer service and program performance. Further, the periodic reauthorization of many of USDA's statutes has paved the way for program reforms that are consistent with the goals of the Executive Order 13563.

*On Rigor and Scope of Retrospective Review*

**Question:**

11. In his analysis of retrospective reviews for Mercatus, Mr. Randall Lutter notes, "Very few retrospective analyses of extant federal regulations provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective analyses that Harrington, the OMB, and Simpson reviewed provide information only about costs, about a key but incomplete measure of benefits... or about both costs and a poor proxy for benefits..."<sup>5</sup> Do your retrospective review analyses attempt to quantify costs, or benefits, or both?

**Answer:**

As indicated in USDA's periodic status reports, USDA initiated 22 priority initiatives, 9 of which have been completed. These initiatives have reduced regulatory burden by over 475,000 hours. For actions resulting in rulemaking, agencies have estimated the benefits as part of the cost-benefit analyses conducted in support of the rulemaking. Agencies make every effort to quantify costs and benefits to the extent that data is reasonably available to measure them and quantification of a particular benefit or cost is possible.

**Question:**

- a) Does your office have the capacity to collect data to conduct effective retrospective reviews that include cost-benefit analysis? If not, why not?

**Answer:**

In recent years, USDA has experienced a reduction in its regulatory capacity due to constrained budgets. To address this, USDA has implemented a top-to-bottom regulatory review to ensure that agency resources are targeted to those initiatives that will achieve the greatest improvement in performance. We have also aligned the regulatory review efforts with actions taken to implement periodic reauthorization of legislative authorities. Improved information technology and data sharing with other Federal agencies has provided USDA greater access to data

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<sup>5</sup> Randall Lutter, Working Paper: The Role of Retrospective Analysis and Review in Regulatory Policy, MERCATUS CTR. NO. 12-14 (Apr. 2012).

important to conducting effective retrospective review. Overall, these efforts have allowed agencies to effectively balance the need for retrospective review with implementing legislative authorities and the need for effective operation of a program on a day-to-day basis.

**Question:**

- b) Would it be beneficial for your agency to have your retrospective review obligations delegated to a specialized office charged with doing just that?

**Answer:**

Creating a special office charged with ensuring that USDA is meeting its obligations under Executive Order 13563 would be duplicative of actions agencies already are taking to coordinate regulatory review with stakeholders. Agencies actively solicit public input on their regulatory strategies and retrospective review plans through routine stakeholder interactions. In addition advisory committees, industry boards, consumer organizations, and other professional panels play a significant role ensuring USDA's regulations and other program requirements are the most effective. Agencies also use Tribal consultation to provide information and receive direct input from the Native Americans on regulatory actions. Because USDA staff are geographically dispersed and have constant, one-on-one interactions with the public, customers are able to provide USDA employees immediate feedback on agency operations. In addition, periodic changes in legislative authority creates an ongoing opportunity for our stakeholders and Congress to directly weigh in on many of the major programs administered by the Department and to provide feedback on regulations in place to implement the programs being reauthorized.

**Question:**

12. In his analysis of retrospective reviews for Mercatus, Mr. Lutter notes, "The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow." The 2015 OECD Regulatory Policy Outlook stated that "OECD countries could be more strategic and systemic in their evaluation efforts by conducting comprehensive reviews that assess the cumulative impact of laws and regulations in a sector as a whole, with a particular focus on the policy outcomes."<sup>6</sup> Our proposed legislation, S. 1817 The Smarter Regs Act of 2015, directs OMB, to encourage and assist agencies to "streamline and coordinate the assessment of major rules with similar or related regulatory objectives" for just this purpose. When contemplating which rules to review, have you ever considered conducting simultaneous reviews on related rules or rules that affect a certain sector of industry?

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<sup>6</sup> *OECD Regulatory Policy Outlook 2015* (The Organization for Economic Co-operation and Development, 2015) available at <http://www.oecd.org/governance/regulatory-policy/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm>.

**Answer:**

USDA's Food Safety and Inspection Service (FSIS) undertook a sector-wide re-evaluation of the poultry slaughter inspection system. On January 27, 2012, FSIS published a proposed rule to modernize poultry slaughter inspection ("Modernization of Poultry Slaughter Inspection," 77 FR 13512). This rule, finalized in August 2014, amended the poultry products inspection regulations to establish the New Poultry Inspection System (NPIS). FSIS coordinated extensively with the National Institute for Occupational Safety and Health, and the Occupational Safety and Health Administration to address worker safety and health issues associated with the rule. NPIS allows establishments more control over their production process, and removes unnecessary regulatory obstacles to innovation while improving the effectiveness of poultry slaughter inspection and overall food safety.

**Question:**

- a) Have you ever considered a large retrospective review on a regulatory framework?

**Answer:**

USDA routinely analyzes the effectiveness of its regulations and has undertaken the following regulatory actions that make significant changes to its regulations:

- In 2010, the Risk Management Agency eliminated hundreds of pages of regulations and significantly reduced the paperwork burden on hundreds of thousands of small businesses, including producers, insurance agents, and loss adjusters.
- In April 2011, the Food Safety and Inspection Service (FSIS) implemented the Voluntary Cooperative Interstate Shipment Program that provided state-inspected establishments the option to ship meat and poultry products across state lines. This is the first significant change in the state inspection program since it was implemented decades ago. By participating in this voluntary program, smaller state-inspected establishments are able to access larger markets.
- In June 2011, the Food and Nutrition Service (FNS) published a final rule that modified provisions of two interim rules to improve program integrity and simplify program requirements for the Child and Adult Care Food Program. These changes reflected the experience of State agencies and the Department in implementing the two interim rules over several years. FNS conducted an extensive data collection and analysis under the Child Care Assessment Project that evaluated implementation of the rules by family day care home sponsors and providers.
- In January 2012, FSIS issued a proposed rule that it finalized in July 2014 that moved away from a system devised and designed as far back as 1957, when individual inspectors focused

on issues involving quality assurance and not so much on food safety. By publishing this rule, FSIS now has the ability to place trained inspectors where they can better ensure food is being processed safely. These improvements made use of sound science to modernize food safety procedures and prevent thousands of illnesses each year.

- In March 2012, the Animal and Plant Health Inspection Service (APHIS) published a proposed rule to complete efforts to modernize its import regulations for bovine spongiform encephalopathy (BSE). When the final rule published in November 2013, the United States demonstrated to the international community its commitment to base BSE regulations on internationally accepted scientific literature and standards set by the World Organization for Animal Health (OIE). The final regulation allowed for the safe trade of cattle and cattle products valued in the billions of dollars, while protecting producers and consumers in the United States from the introduction of BSE.
- In April 2012, the Forest Service published a planning rule which updated a planning process the agency had used since 1982. The Forest Service carefully considered over 250,000 comments received on the proposed rule and draft environmental impact statement. This careful consideration exemplified the collaborative effort that drove this rulemaking. The new rule placed increased emphasis on providing opportunities for public participation in the planning process.
- In March 2014, FNS issued a final rule revising food packages for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). This rule completed implementation of the first comprehensive revisions to the WIC food packages since 1980. The revisions were designed to improve the nutrition and health of the nation's low-income pregnant women, new mothers, infants and young children by providing more healthy choices to meet their needs during critical periods of growth and development. The modifications in the final rule reflect the experiences of WIC State agencies in implementing an interim rule, while continuing to fulfill the intent of the recommendations of the Institute of Medicine (IOM) of the National Academies that serve as the basis for the WIC food package changes.
- After publishing a proposed rule in April 2014, APHIS published a final rule in October 2015 that changed the way it calculates fees to recoup the costs of conducting agricultural quarantine inspections (AQI) at U.S. ports of entry. The adjustments are the first changes to AQI user fees in nearly a decade and will ensure that the AQI program will have the financial stability it needs to continue the critical work of keeping U.S. agriculture safe and productive. The revised AQI fee structure ensures that no one party pays more than the costs of the services they incur. APHIS worked with an independent accounting firm to review the AQI fee structure and carefully considered a number of alternatives for revising the user fees.

- In June 2015, FSIS published an affirmation of an interim rule culminating a 10-year effort to encourage firms to take meaningful steps to further reduce the incidence of *Listeria monocytogenes* (Lm) in Ready-to-Eat Meat and Poultry Products. The final rule adopted an innovative approach that provides the industry a set of alternatives that provide them flexibility in how they achieve improved food safety performance without relying on narrowly prescriptive command and control policies. In return, FSIS advised firms that it would conduct more testing at establishments if their Lm control measures provide less potential risk reduction than other available control measures. As an incentive, firms were encouraged to make food safety enhancement claims on their RTE product labels that describe the processes used to eliminate or reduce Lm, or suppress its growth in products. This option gives companies an opportunity to inform consumers about the extra steps companies have taken to enhance the safety of their products. FSIS made minor changes to regulatory provisions in response to comments that the Agency received and on the basis of experience in implementing the interim final rule, rigorous evaluation, and feedback received during outreach and training sessions.

**Question:**

- b) What barriers exist to this type of review?

**Answer:**

Conducting these types of reviews requires a high level of pre-planning and stakeholder involvement, extensive coordination with Federal and state partners, and the updating of information technology and other administrative systems. Most reforms are adopted through a process that entails a significant level of public participation, and thus requires a significant amount of time to complete. Agencies must also take into consideration agency resources and competing priorities. Although reviews will evaluate feasible options, they must operate within the scope and limits of their legislative authority.

**Question:**

- c) How have you worked with interagency partners as you have reviewed existing regulations?

**Answer:**

Rules are developed through an interagency regulatory review process administered by the Office of Information and Regulatory Affairs. The interagency regulatory review process provides an agency an opportunity to review another agency's rule of interest. OMB works to develop consensus, while balancing priorities of the Administration and reducing duplication.

**Question:**

13. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*<sup>7</sup>, GAO recommended that OIRA work with the agencies to improve how retrospective reviews could be used to inform progress towards agency priority goals under the GPRAMA Modernization Act of 2010.<sup>8</sup> This included actions such as (1) identifying whether a regulation contributes to an agency priority goal as one criterion for prioritizing reviews, and (2) by including in the scope of retrospective reviews the regulations that collectively contribute to an agency priority goal. What actions has your agency taken to better align retrospective reviews with GPRAMA agency priority goals?

**Answer:**

USDA identified three short-term Agency Priority Goals (APG) for fiscal years (FYs) 2014 and 2015 within the GPRAMA framework. These APGs aligned with USDA regulatory review efforts in the following ways:

- To support the APG on rural prosperity, the Rural Business Service (RBS) published the final rule for the Rural Energy for America Program (REAP) that resulted in a 20 percent reduction in the number of hours need to complete technical reports for applications with total project costs between \$80,000 to \$200,000; the elimination of reports for projects lower than \$80,000; and a 50 percent reduction in the number of hours it takes to complete the narrative portion of the application.
- To support the soil conservation APG, the Natural Resources Conservation Service (NRCS) implemented the Conservation Delivery Streamlining Initiative (CDSI) – Client Gateway (CG). When fully implemented the initiative will allow NRCS field staff to spend more time on conservation planning in the field with customers, reduce the time needed to implement cost-share contracts, and provide more flexibility for customers. NRCS estimates the cumulative time savings may be as high as 110,000 hours resulting from reduced travel time by clients to NRCS offices.
- To support the food safety APG, FSIS implemented the Modernization of Poultry Slaughter Inspection rule. This rule modernized young chicken and turkey slaughter inspection in the United States by focusing FSIS inspection resources on the areas of the poultry production system that pose the greatest risk to food safety. The final rule reduces costs by making better use of Agency inspection resources and improving the effectiveness of inspection systems and will result in a reduction of foodborne illness.

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<sup>7</sup> GAO-14-268

<sup>8</sup> GPRAMA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (Jan. 4, 2011).

## *On Planning for Review*

### **Question:**

14. OMB Memorandum M-11-19 directed agencies to design and write future regulations in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. ACUS recommendation 2014-5 suggested that agencies, when appropriate, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. On November 3, 2015, the GW Regulatory Studies Center issued *Learning from Experience: Retrospective Review of Regulations in 2014*<sup>9</sup>, which reviewed 22 significant and economically significant rules and found that none of them included a plan to conduct retrospective review of the rule after implementation. How has your agency responded to that OIRA directive and what have you learned through those efforts?

### **Answer:**

USDA established criteria for identifying and selecting initiatives for retrospective review. One of those criteria is the likelihood of Congressional action. The Department has found that reauthorizations provide an ongoing opportunity for our stakeholders and Congress to directly weigh in on many of the major programs administered by the Department and to provide feedback on regulations in place. For example, many of the provisions in the 2014 Farm Bill expire in 2018 and will be subject to continued Congressional oversight during the development of the next farm bill.

In addition, agency regulations routinely request that the public provide comments for how the agencies can develop regulations that are more effective and less burdensome on the public, including the submission of data that can be used to evaluate the costs and benefits of regulations. Agencies are also collecting program information useful for retrospective review outside of the regulatory process. For example, rural development and international food assistance programs collect program metrics through the application process that can be used to evaluate how well programs are achieving their goals. Inspection programs have access to compliance data and other program data that is used to evaluate the impact of regulations. The Food and Nutrition Service routinely conducts studies assessing the impact of nutrition assistance programs on addressing food insecurity. USDA has also made significant investments in information technology to collect program data that will support retrospective review, such as the Conservation Effects Assessment Project for the Natural Resources Conservation Service and the Public Health Information System for the Food Safety and Inspection Service.

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<sup>9</sup> Sofie E. Miller, *Learning From Experience: Retrospective Review of Regulations in 2014* (The George Washington University Regulatory Studies Center, Working Paper, 2015), available at <http://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>.

**Question:**

- a) What actions does your agency plan to take to ensure that planning for future reviews is part of the procedures for drafting new regulations?

**Answer:**

USDA will continue to conduct a top-to-bottom regulatory review twice each year as part of the development of the unified regulatory agenda. During this review, agencies will identify specific activities, regulations, and paperwork collections that are outmoded, ineffective, or excessively burdensome, particularly those identified in comments received in response to the USDA retrospective review plan. Agencies will continue to review economically significant rules issued over the last 10 years and the most burdensome paperwork collections to identify potential areas of reform. Significant and economically significant regulations will continue to undergo rigorous review within the Department and by the Office of Management and Budget.

**Question:**

15. The Department of Transportation (DOT) maintains a plan on its website to ensure that all regulations are reviewed every ten years. Each DOT agency divides its rules into 10 different groups, and analyzes one group each year. They request public comment on the timing of the reviews through the Regulatory Agenda (for example, if a particular rule should be reviewed earlier and why). Would something like this be viable at your agency?

**Answer:**

USDA agencies review existing regulations on an ongoing basis. If regulations are found to need revision, agencies initiate rulemaking actions taking into account agency priorities and resources. USDA's review of existing regulations follow requirements of Section 610 of the Regulatory Flexibility Act, whereby rules that may have a substantial impact on small entities were reviewed within 10 years of publication of the final rule. These reviews are identified in the Unified Regulatory Agenda published twice each year and are identified in agency websites. USDA also publishes a Request for Information from the public at the time the regulatory agenda is published that identifies USDA's regulatory review efforts and requests the public to submit recommendations for retrospective review. Moreover, the periodic reauthorization of Farm Bill and the child nutrition programs, roughly every five years, provides an ongoing opportunity for our stakeholders and Congress to directly weigh in on the programs administered by the Department, as well as the implementing regulations.

**Question:**

- a) How do you ensure that cyclical reviews are apparent to your stakeholders to give them an opportunity to comment?

**Answer:**

On a periodic basis, the Office of Management and Budget and USDA post progress reports on their respective websites for the public to review. The Unified Regulatory Agenda identifies USDA regulatory actions supporting the Department's retrospective review efforts and upcoming section 610 reviews. In addition, USDA highlights and lists retrospective review efforts in the annual Statement of Regulatory Priorities released by OMB in the fall. Since the release of the USDA retrospective review plan, USDA has continued to publish a Federal Register notice requesting public comment on its retrospective review efforts following the release of the Regulatory Agenda. This is supplemented by agency officials highlighting agency plans in routine meetings with stakeholders and encouraging their involvement and comments. Additionally, as part of an agency's process for conducting section 610 reviews, they publish a Federal Register notice inviting the public to submit written comments on the existing regulation under review.

*Reporting Outcomes of Retrospective Review*

**Question:**

16. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO recommended that OIRA work with agencies to improve the reporting of retrospective review outcomes, including providing more comprehensive information about completed reviews.<sup>10</sup> What actions has your agency taken to ensure that retrospective review reporting is more accessible and transparent?

**Answer:**

USDA reports on the status of its retrospective review are available to the public through the Office of Information and Regulatory Affairs (OIRA) website (<https://www.whitehouse.gov/omb/oira/regulation-reform>) and the USDA website ([http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA\\_OPEN](http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_OPEN)). In addition, USDA provides a link to its status reports in the annual Statement of Regulatory Priorities released by OMB in the fall. The USDA request for information (RFI) seeking public input on the USDA's retrospective review efforts also highlights USDA's key accomplishments and ongoing activities pursuant to its efforts to reduce regulatory burdens. Stakeholders may submit comments

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<sup>10</sup> GAO-14-268

electronically to the Federal eRulemaking Portal, by e-mail, or by regular mail. USDA posts all comments submitted in response to the RFI. The primary repository for supporting documents, including analyses, is found through [Reginfo.gov](http://Reginfo.gov), which is maintained by the Office of Management and Budget. Should an individual wish to get more information on rulemaking or adjustments to information collections, the status report provides the Regulatory Identification Number (RIN) and the Office of Management and Budget Control Number, which allows individuals to access the additional detail through [Reginfo.gov](http://Reginfo.gov).

**Post-Hearing Questions for the Record  
Submitted to Mr. Christopher Zehren  
From Senator Heidi Heitkamp**

**“Agency Progress in Retrospective Review of Existing Regulations”  
November 5, 2015**

**Question:**

A critical component of retrospective review is ensuring that the public has the opportunity to provide feedback on whether regulations are in fact achieving their intended objective. However, all too often we hear from the general public, small business, and other regulated entities, that they feel disconnected from the rulemaking process, or that their voices are not being heard.

- a) Could each of you address how your agencies engage the public and seek feedback outside of the general notices published in the Federal Register?

**Answer:**

USDA agencies take numerous measures to engage stakeholders in the development of their regulations. In addition to publishing regulations in the *Federal Register*, agencies actively solicit public input on their regulatory strategies and retrospective review plans through routine stakeholder interactions, such as, constituent newsletters, policy area-specific listening sessions, roundtables, conferences, speeches, and other stakeholder forums. Agencies have also used social media to inform the public of their regulatory strategies and gather input on specific regulations. Advisory committees, industry boards, consumer organizations, and other professional panels play a significant role in getting the word out about regulations and gathering input from their members. Agencies also use Tribal consultation to provide information and receive direct input from the Native Americans on regulatory actions. All of these actions help agencies publicize the availability of documents published in the *Federal Register* and bring these documents to the attention of a wider audience.

Because USDA staff are geographically dispersed and have constant, one-on-one interactions with the public, customers are able to provide USDA employees immediate feedback on agency operations. In addition, periodic changes in legislative authority creates an ongoing opportunity for our stakeholders and Congress to directly weigh in on many of the major programs administered by the Department and to provide feedback on regulations in place to implement the programs being reauthorized. For example, to facilitate the implementation of the Agricultural Act of 2014 and the Healthy, Hunger-Free Kids Act (HHFKA) of 2010, USDA agencies held numerous stakeholder engagement meetings. Because of this robust, ongoing dialogue with stakeholders, if something is not working or can be done a better way, agencies hear about it.

**Question:**

- b) Do you find that the Federal Register is still the most effective means of providing notice and receiving useful feedback to help identify public concerns?

**Answer:**

While the *Federal Register* is a valuable tool for soliciting public comment on specific regulatory proposals, USDA has found that the most effective means for gathering public input for developing a regulatory strategy that incorporates retrospective review continues to be through ongoing routine engagement with stakeholders.

**Question:**

When examining retrospective review, we often discuss cost benefit analysis to determine whether or not a rule is achieving its stated objective. However, part of this information collection requires the solicitation of data from regulated entities.

- a) Do you find that current retrospective reviews are stymied by the strict requirements of the Paperwork Reduction Act?

**Answer:**

The Paperwork Reduction Act (PRA) requires agencies confine data requests to information needed to effectively administer the program and ensure program integrity. These requirements make it difficult to acquire data solely for analytical purposes.

- b) Would we see an increased effectiveness of the retrospective review process if we were to exempt retrospective review activities from the Paperwork Reduction Act?

**Answer:**

We obtain most input for retrospective review from our regular interaction with those who are affected by our regulations and Federal Register notices requesting comment on retrospective review. The PRA typically is not a limiting factor in collecting general information from the public, as is often done through notifications in the Federal Register or other types of more-focused outreach. To the extent the PRA applies to more targeted collections of information, it is important that any data collected from regulated entities as part of a retrospective review has practical utility and comports with other parameters set forth in the PRA and its implementing regulations.

**Question:**

During our subcommittee's maiden hearing, we invited witness from diverse backgrounds to discuss the Federal government's regulatory framework. I took the opportunity to discuss

retrospective review with that panel as well. One thing I heard from both witnesses was that there needs to be a dedicated funding stream in support of retrospective review activities.

- a) Based on current expectations of the President, as outlined in Executive Order 13563, are resources being dedicated to retrospective review at the detriment of the mission objectives of the agency?

**Answer:**

Since President Obama issued Executive Order 13563, USDA has initiated a rigorous, open, and robust review of its regulations, data sharing, and paperwork collections that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify streamline, expand, or repeal them accordingly. This effort has been a critical element of our strategy to better serve our customers and has complemented efforts to streamline administrative processes and optimize efficiency. Further, the periodic reauthorization of many of USDA's statutes through the Agricultural Act of 2014 and the Healthy, Hunger-Free Kids Act of 2010, have paved the way for implementing numerous program reforms that are consistent with the goals of the Executive Order 13563. As a result, USDA has been able to achieve its objectives, while operating within constrained funding levels.

**Question:**

- b) What resources do your agencies need to effectively and efficiently carry out retrospective review while maintaining overall operational awareness?

**Answer:**

USDA has been able to balance effectively the need for retrospective review, while maintaining overall program awareness within available resources. To make the best use of available funds and staff years and achieve results important to our stakeholders, USDA used retrospective review to place an emphasis on streamlining administrative processes and reducing barriers to participation in USDA programs. These initiatives have worked in concert with the implementation of the periodic reauthorizations of a majority of USDA's legislative authorities to improve program performance and integrity.

**Question:**

In a previous hearing, Mr. Neil Eisner, a Senior Fellow at the Administrative Conference of the United States, advocated strengthening the culture of review within the Federal agencies. In his opinion there is a focus, especially among senior officials, on creating something new rather than fixing something old.

- a) What actions are taken within each of your agencies to ensure that the workforce buys into the reality that ensuring the effectiveness of existing regulations is just as important as ensuring new rulemaking is of the highest caliber?

**Answer:**

To ensure that agencies are focused on improving the effectiveness of existing regulations as well as ensuring new rulemaking is of the highest caliber, USDA put in place a rigorous policy of regulatory review that coincides with the development of the unified regulatory agenda twice each year. USDA recognizes that the problems agencies are addressing through regulation are constantly changing and require modification in order to take into account advances in technology, changes in behavior, and other factors contributing to the effectiveness of regulatory actions. As part of the USDA regulatory review process, agencies are directed to identify where existing regulations and information collections can be improved, especially economically significant rules issued over the last 10 years and the most burdensome paperwork collections. Further, periodic changes in legislative authority contribute to USDA's effort to modernize its regulations and reduce paperwork burdens. For example, the Agricultural Act of 2014 and the Healthy, Hunger-Free Kids Act (HHFKA) of 2010, have both introduced numerous program reforms that eliminate obsolete and underperforming provisions, simplify the administration of programs, and improve program outcomes.

**Question:**

Understanding that good retrospective review often require examination of highly technical subject matter, it is important that agencies have a highly skilled and specialized work force to conduct retrospective reviews in an effective manner.

- a) Having completed a number of retrospective reviews up to this point, what are some the challenges you have found as it relate to workforce, in completing retrospective review effectively?

**Answer:**

Between 2010 and 2015, USDA's operating budget is down 10 percent and staffing is down 11 percent overall with some agencies down much more. This makes it difficult for agencies not only to maintain staffing levels as people retire or leave the government, but provide the training needed to improve the analytical skills of its employees. Agencies must continually balance the need for retrospective review with implementing legislation and the effective day-to-day management of its programs.

- b) Do you think the Federal Governments could do more to able to attract?

**Answer:**

I am unaware of any a particular instances in which an agency was not being able to attract individuals with the expertise needed to conduct retrospective review.

- c) Do you have dedicated staff focused on reviewing existing rules?

**Answer:**

USDA agencies are organized differently. A number of agencies have staff dedicated to the development and analysis of regulations. However, a majority of agencies do not have staff dedicated to this purpose. In these instances regulatory development and analysis is only a part of an employee's overall responsibility. As a result, the need for rulemaking must be balanced with the need for effective operation of a program on a day-to-day basis.

**Question:**

Mr. Zehren, I know that the USDA is in a particularly different position when it comes to reviewing existing regulations. According to your testimony, a large percentage of the rules the USDA issues are based on the reauthorization of the Farm Bill. How has the USDA balanced reviewing existing regulations, when so many of your rules are based on reauthorization major bills?

**Answer:**

To ensure the highest priority needs are met, USDA conducts a top-to-bottom regulatory review twice each year as part of the development of the unified regulatory agenda. As part of this review, agencies identify specific topics, regulations, and paperwork collections that are outmoded, ineffective, or excessively burdensome, particularly those identified in comments received in response to the USDA retrospective review plan. Agencies are also directed to review economically significant rules issued over the last 10 years and the most burdensome paperwork collections to identify potential areas of reform. Agency submissions are evaluated and a set of regulatory priorities is established based on the following criteria: Urgency for improving customer service by means of simplification, streamlining, or improved quality of information collection procedures; comments from stakeholders; resource capacity and potential approval process timeline; and likelihood of statutory change. Both the 2014 Farm Bill and Healthy, Hunger-Free Kids Act of 2010 introduced numerous program reforms that eliminated obsolete and underperforming provisions, simplified the administration of programs, and improved program outcomes, while generating significant budgetary savings.