Summary Report:
Penn Dialogue on Regulatory Excellence

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Best-In-Class Regulator Initiative

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The Penn Program on Regulation (PPR) launched a "Best-in-Class" Regulator Initiative in November, 2014. Funded by the Alberta Energy Regulator, the Initiative has sought to develop a framework for assessing excellent regulatory performance. As part of the Initiative, PPR organized a workshop on March 19-20, 2015 at the University of Pennsylvania Law School that brought together about forty experts from around the world to identify strategies needed to achieve regulatory excellence. This report synthesizes and summarizes the discussion that took place at that expert dialogue.

The Dialogue

The Penn Dialogue, as with the Initiative as a whole, aimed to generate ideas about what constitutes regulatory excellence and how the leaders of regulatory organizations can know when they have succeeded. Over the past few decades, regulation has emerged as one of the most vital functions of government. Around the world, regulators are called upon to advance crucial missions that combine the goals of economic growth and public protection from harm. In the pursuit of these missions, regulators routinely confront challenging demands and must at times make difficult tradeoffs. Especially if regulatory decisions will sometimes inevitably generate conflict and controversy, how can regulators know that they are performing well? What does excellent regulatory performance look like?

The Penn Dialogue sought answers to these questions by bringing together a diverse group of about forty academic experts, regulatory officials, industry representatives, environmental group leaders, and other experts from Canada, the U.S., and elsewhere around the world. Moderated by Professor Cary Coglianese, the dialogue helped define attributes of "best-in-class" regulatory performance and develop ideas for a framework that could be used to evaluate a regulator's progress towards becoming an excellent regulator. To stimulate discussion, approximately fifteen dialogue participants wrote discussion papers that were circulated in advance. A list of these contributing authors, along with other dialogue attendees, is attached as Appendix B. Copies of the discussion drafts can be found online at the Best-in-Class Regulator Initiative's website, www.bestinclassregulator.org. Expanded versions of these and other papers will appear in a book that will be published by the Brookings Institution Press.

This report is a synthesis of the general discussion at the Penn Dialogue. The dialogue aimed to encourage the robust exchange of ideas more than to achieve a consensus; accordingly, although note-takers took copious notes, the two days were conducted on a "not for attribution" basis under the Chatham House rule. The ideas contained in this report do not necessarily represent the opinion or position of any dialogue participant or their affiliated institutions. They also do not necessarily reflect the views of the report's authors, the Penn Program on Regulation, the University of Pennsylvania, or the Alberta Energy Regulator.

Attributes of Excellent Regulators

The dialogue's first objective was to identify common attributes of excellence that apply in all regulatory settings. By design, dialogue participants spanned multiple countries and worked in a variety of regulatory fields. They recognized that regulators share a core set of management objectives, such as solving problems, promoting compliance, acting fairly, minimizing wasteful spending, and maintaining accountability to the public. With these common objectives in mind, participants raised and discussed ten main attributes of excellence and key issues associated with each.

Mission Clarity

Many participants agreed that, to be excellent, a regulator needs a clear mission to guide its activities. Clarity can help keep the regulator from being distracted by transitory political issues and ever-present industry influence. In the words of one participant, "it is much easier for a regulator if the objective is clear, because government continuously thinks of other things that they want you to do and industry is a constant road-block." Clarity helps internally by focusing the regulator's personnel and offering everyone in the agency a guide for purposes of priority-setting. It also helps externally, offering a benchmark for outside overseers.

Although many participants indicated that a regulator should strive to achieve excellence within the scope of its mission, participants expressed differing views over the proper source of that mission. Some saw the role of the regulator as being defined solely by expressions of public preferences, either the regulator's grant of authority from the legislature or other expressions of public opinion. For example, in the words of several participants:

- "The statute gives the regulator a box. The regulator has discretion within the box, but it can't get out of the box."
- The key "is what [the legislature] told them to do, not market failures or information asymmetries."
- "It's no use having a vision if it's against your mandate or against public support."

No matter how the primacy of legislation is expressed, under this view excellence is defined in terms of fulfilling the mission given to the regulator by others. If that mission is crabbed or flawed, a regulator might still be excellent as long as it still does the utmost possible within the scope of the mission granted to it.

Others expressed the view that a regulator must possess an independent "moral compass" that guides its actions, even if this means that the regulator engages in activities that might draw opposition or raise controversy. One participant noted "the political process focuses on 'squeaky wheels'" but that "the excellent regulator fights the power to capitulate to those interests." Some participants added that following a moral compass is critical to protect minority positions and vulnerable citizens from the "tyranny of the majority."

Still others espoused a hybrid view according to which the excellent regulator should act in a manner that is "politically attuned, but consistent with its moral compass." In the words of another participant, "treating the long-term interests of the public rather than the pressures of the moment doesn't seem incompatible with democratic government." Another participant observed that "one of the goals of the regulator is to translate its statutory mission into a broader framework and mission such that community can understand what needs to be done and get on board."

Autonomy

According to a common view expressed at the dialogue, excellent regulators must be political responsive but also still sufficiently independent to rely upon sound expert analysis, remaining free from undue influence by politicians and industry.

As already noted, a clear mission can help ensure that independence but, according to a few participants, so too could sources of funding that were not tied to annual legislative appropriations. At least one participant noted that funding mechanisms linked to industrial output, such as user fees, might help promote independence from the legislature only to create a kind of dependency on industry.

Some participants cautioned that regulators should not always be independent, particularly where underlying value judgments were at issue. Regulators too far removed from normal public accountability, they worried, could act irresponsibly or in ways that are out of touch with the views of the public it is supposed to serve. In fact, as one participant noted, in parliamentary systems regulatory authority will often reside within ministries that lack formal independence, as they are officially headed by elected officials.

Even in other political systems, the heads of regulatory bodies may serve at the pleasure of elected officials and in reality lack total independence. As other participants noted, there can be a difference between *de jure* independence and *de facto* independence. Even with formal legal structures that promote independence, such as restrictions on removal of the head of a regulatory body, regulators are still ultimately subject to on political pressures. As their authority can always be revoked or modified be a legislature, all regulators surely need to recognize political realities.

The term "independence," one participant suggested, sounds too absolute. A better alternative, which many participants endorsed, would be "autonomy." Autonomy accommodates the notion that there can be varying degrees of regulatory independence and that what matters is less the nature of an institution's structures than how much real leeway the regulator has to make expert judgments that advance overall public value.

Intergovernmental Cooperation

No matter how autonomous they may be from elected officials, regulators operate in complex governmental systems in which other governmental bodies can at times possess authority that affects issues related to the regulator's mission. An excellent regulator, it was suggested, finds effective ways to cooperate with other governmental bodies to advance its mission and deliver public value.

Several participants noted that regulators are often faced with requests from the public or the regulated community that relate to issues which may lie at least somewhat outside of the scope of the regulator's authority. Others observed that in the course of its day-to-day, on-the-ground operations, a regulator will often identify policy issues or gaps that need to be addressed.

Most participants seemed to agree that an excellent regulator builds strong relationships and lines of communication with policymakers and sister agencies. By maintaining sound working relationships, regulators are able to communicate policy-related concerns to the appropriate authority and work collaboratively to solve problems when the need arises.

Several participants noted that a regulator that responds to a problem by simply saying that "it's not our job" will not likely satisfy the public. Even when a problem really is not of the kind that the regulator is formally directed to solve, the public expects solutions. Trite disavowals of responsibility for problems related to the regulator's mandate are likely to be perceived as stonewalling and could erode public confidence in the regulator. As one participant commented "it's human nature for members of the public to assume that 'I can't help you' means 'I *won't* help you.'"

An excellent regulator, many participants suggested, will find some way to address legitimate public frustrations. That could take the form of helping citizens find their way to the appropriate agency or office that can address a problem. In the face of a real policy gap, it could mean the regulator itself drawing on its goodwill with policymakers to bring issues to their attention and persuade them to take action. Or it could mean the regulator creates forums for the public to air grievances, discuss issues, and help inform study by the regulator, even if the regulator yet lacks the authority to take more substantive action.

Sound decision-making

One of the biggest challenges regulators face stems from the need to set priorities and make tradeoffs among competing objectives, especially when a regulator had been given multiple missions to accomplish.

Participants differed somewhat in the emphasis they gave to different sources of information on which the regulator should rely in setting priorities and making decisions. Some attendees emphasized the importance of public opinion as a basis for action. One participant argued that a regulator should "prioritize what the citizens value." Another noted that a regulator should try to "prioritize what its constituency values because public acceptance of regulation is really important."

However, most participants acknowledged limitations in public knowledge, indicating that a regulator must take into account both public views and expert opinion. Sometimes, as one participant noted, "the public can be wrong." Another put it this way: "there are public opinions worthy of respect and those that are not worthy of respect. A good regulator knows the difference."

Several participants commented on the challenges regulators face in even determining what the public's opinion might be on the kind of low-salience issues that regulators often confront. Some participants favored direct assessment of public opinion through public polling, while others favored using policymakers and their positions as a proxy for public opinion. One participant stated that "the role of the elected representative is to represent the public" and therefore "the regulator's 'constituency' is the legislature."

Many others recommended that regulators rely on expert analysis to make decisions and set priorities. For example, one participant said that the excellent regulator will "embrace science, technology and economics." Another noted that the regulator's "role is to make the right technical decisions. In some cases, people will be happy. Other times, not."

Still others recommended a hybrid approach, with one participant distinguishing technical decisions from "value laden" decisions: "When regulatory decisions involve value judgments, I am not sure that the people to be making those decisions are the technical experts…If the decision is value-laden, then accountability to the politicians is more important."

Many participants noted that an excellent regulator would use only reliable data when making decisions. Such data can also help the regulator obtain buy-in from the public and regulated entities: "Regulation by guess and shock-and-awe is insufficient," said one participant, continuing that "you must be data-driven and fact-based with good analysis." Sound, evidence-based decision making may also strengthen the regulator's reputation, a resource upon which it can draw in the future to be more effective. Regulatory leaders "generate new information to improve decision-making, and to inform other key folks."

Of course, data are not always available nor do they answer every question. Data do not provide a "mechanistic" resolution of policy decisions; the excellent regulator still must draw on "judgment and wisdom," said one participant.

Participants also considered the proper role for economic considerations in regulatory decisions, especially when regulators are charged principally with reducing public health risks. Some participants expressed the view that economic factors like costs, foreign investment opportunities, and job growth were critical considerations for a modern regulator. One participant noted that many countries have even imposed an affirmative duty on regulators to consider the economic impacts of their decisions. Some others expressed concern that economic considerations could come to dominate regulatory decision-making, a special concern given how well-organized industry groups are motivated by costs to try to influence what regulators do.

One participant mentioned a "one-in-one-out" policy as a possible means of disciplining regulatory decision making. Under this policy, regulators are only allowed to adopt a new rule if they simultaneously eliminate an old rule. Several participants expressed strong disapproval of this approach, arguing that the test of sound decision making should not be something mechanical like the number of rules, but rather it should be the net public value of regulatory impacts. They said that the chief focus of the regulator should not be on regulation *per se*, but on problem-solving.

Finally, participants discussed the challenges of long-term vs. short-term decision-making. Several participants noted that elected politicians are often reluctant to support policies that impose costs in the short-term in exchange for benefits in the long-term. As one participant noted, the "not in my term of office" (NIMTOF) problem can be as prevalent as the "not-in-my-backyard" (NIMBY) phenomenon. One way for politicians to avoid having to make costly short-term decisions is to pass the buck to regulators. For this reason, regulators may face a disproportionate share of the responsibility for addressing problem situations where, as one participant noted, "the public harm is spread either temporally or spatially." Consequently, when it comes to assessing the soundness of any particular regulator's decisions – or its overall excellence, for that matter – outside observers would appear do better if they adopt a long-term perspective.

Expertise with Humility

Sound decision-making requires a regulator with expert knowledge. Participants agreed that regulators need a great deal of technical expertise about the industry, its operations and impacts, and any relevant fields of science, engineering, risk analysis, and economics. As one participant put it, "you must have a regulator that knows what it is doing."

In addition to technical expertise, regulators need other skillsets. "Regulation is an extremely dynamic process," noted one participant, adding that "the problems being addressed aren't always technical but require leadership skills and engagement with the public." Another participant suggested that regulators would do well to add social scientists and management experts to their cadres of engineers, analysts, and scientists.

Especially because industry can pay higher salaries, regulators around the world constantly face the challenge of finding and maintaining an educated, highly qualified workforce. A clear mission of public service can help regulators attract and motivate a dedicated staff.

Although they agreed that the best regulators will comprise a highly expert workforce, many dialogue participants also advised that regulators show humility. One participant lamented that "regulator overconfidence is very common," while another stressed that regulators should not act as "arrogant know-it-alls" but instead should "authentically engage with others and show a little humility."

No matter how expert regulatory staffs might be, they will rarely if ever never know as much about the businesses they regulate as do the managers and employees of those firms. Furthermore, without asking and actively listening, regulators cannot really understand the interests and concerns of community members who might be affected by regulated firms. Robust public engagement – an issue separately discussed more fully later in this report – manifests an appropriate degree of humility, said several participants.

Participants emphasized that, to make their best decisions, regulators need to understand the limits of their competencies are and seek outside views on a regular basis. As one participant put it, an excellent regulator "has a sophisticated approach to bringing in others to help develop solutions, harvesting information from the outside."

Boldness

Participants discussed what a regulator should do when a problem calls out for action that pushes the envelope of the regulator's legal authority. Several participants supported taking action when significant public health consequences are at stake. For example, one participant noted that a regulator has "to have courage to lead, set the example, and make bold moves."

Other participants were less supportive of a regulator ever taking action in tension with its legal authority. Such action, it was suggested, would be crusading, not leading. One participant stressed that "the regulator's role is implementation versus making policy."

Others argued that the nature of regulatory leadership will depend on the circumstances. As one participant put it, the public does need "charismatic leaders, but it needs institutionalization as well."

Many participants seemed to agree that, even without becoming a crusader, a regulator can and should try to leverage even small windows of opportunity to address problems that fall under its ambit. Crises and media storms can open these policy windows and give the responsible regulator an opportunity to initiate efforts to improve its own management or improve its regulatory authority. For example, one participant suggested that public outrage a few years ago over finding lead in painted toys provided consumer protection regulators an opportunity to transform their overall regulatory efforts.

Responsive, Robust Enforcement

Effective enforcement is one of the hallmarks of regulatory excellence. One participant even called it the "biggest thing." High-quality enforcement depends on reliable monitoring and inspection capabilities as well as an ability when necessary to impose robust, credible consequences for noncompliance.

Several participants recommended regulators adopt a responsive approach to regulatory enforcement. Such an approach relies on "strategies much more nuanced than 'gotcha' enforcement," said one participant. Another participant characterized the proper role of a regulator as more of a persuader than a punitive enforcer: "A regulator can get away with some use of the 'stick' but should primarily rely on persuasion." Still another participant advised regulators to find problems but then "work with industry to get there."

In addition to persuasion, several participants recommended engaging industry leaders and using positive incentives to secure compliance. Others suggested efforts to recognize and reward businesses for going "beyond compliance."

Agility, Learning, and Adaptation

The regulator's environment is constantly changing. Businesses routinely enter and exit the regulated sector, and those that remain are often innovating in their products and processes in ways that implicate regulation. In such an environment, regulators need to remain vigilant and agile, willing to respond to change, learn from experience, and innovate themselves.

Regulators should be "learning from other regulators, learning over time and learning from history," said one participant. Yet several participants thought that too few regulators sought to innovate and learn from experience. "Most regulators are stuck doing what they did yesterday," said one participant. Regulatory excellence depends not only on innovation in the face of changed circumstances but also diligent efforts at continuous improvement.

Just as the excellent regulator will seek continuously to learn and improve, it will also keep up with changes in technology related to its work as a regulator. For example, some regulators may be able to incorporate new sensor technology into their inspection and enforcement routines. All regulators should consider how social media and other information communication technologies might affect these efforts to engage with members of the public.

Transparency and Public Engagement

Many participants believe that effective public engagement—including transparency—is essential for a regulator to be excellent. Effective public engagement provides regulators with helpful information and can help strengthen a regulator's credibility. Although busy regulatory staff might understandably consider public engagement a burden, participants generally thought that an investment in outreach and public communication would make a regulator ultimately more effective and would also provide it with reputational benefits.

To be meaningful, public engagement depends on transparency, as members of the public need information about what actions the regulator is taking in order to provide informed input. Participants believed that transparency was critical for achieving accountability, creating public trust, and building credibility. In addition, in a world in which it is difficult for regulators to document success, making information about the regulator's actions can help the regulator build a reputation for diligence.

Participants differed slightly about the appropriate nature or degree of transparency. The principal view was that regulators should provide a high level of visibility into their actions by making meetings open to the public, being transparent about decision-making, and offering reasons for actions taken. Some participants cautioned against intruding too much on the regulator's deliberative process, suggesting that protecting the privacy of internal deliberations can help create the conditions for healthy debate inside a regulator's offices or the gathering of sensitive operational information from regulated entities. Another participant noted that transparency can make it more difficult for the regulator to control messaging about its actions because disclosed information can be "used to tell the regulator's stories in ways it may not agree with."

Some participants believed that an excellent regulator would seek affirmatively to "tell its own story" to the public, in contrast to many regulators' main strategy of "staying out of the media." The advent of social media means, according to one participant, that "regulators are now required to speak up and clarify what they do and don't do—and to tell a story about the performance of the industry they are regulating." If regulators are not proactive about communicating with the public, the "void will be filled by people with an agenda," said another participant.

Other participants cautioned against regulators trying too explicitly to make a sales pitch to the public. Regulators, they noted, face a complicated communications climate. In some countries, regulators must coordinate their messaging with an oversight or policy-making body. In addition, several participants noted that criticism comes with the territory, so bad press is to be expected on occasion and regulators need to have a thick skin. They also need to resist the temptation at times to be drawn into larger policy issues which they are not able to address.

Most participants also recognized that communication must occur in two directions. As important as it might be for the regulator to tell its story, it is even more important for the regulator to listen actively to public concerns. One participant distinguished "drive-by consultation" from meaningful engagement. The former is something that simply involves checking a box after a meeting with affected individuals; the latter can only be realized by a sincere attempt to listen to all the concerns expressed by those who are interested in the regulator's decisions – something that might require multiple meetings.

Reputation

Participants discussed the importance of credibility and reputation. One participant offered the example of the California Air Resources Board, which had apparently earned a reputation among the public and lawmakers as a highly professional and competent organization. As a result, when new issues, such as climate change, emerged on the public agenda in California, the legislature gave the Board new, wide authority: "What enabled legislators to give the California Air Resources Board more authority? Its track record."

Yet a reputation for excellence does not always follow from successful regulatory outcomes. In large part, a regulator's success is often unobservable. It is the accident that did not occur, the fraudulent transaction that did not take place, or the cancer case that was avoided. For this reason, "it is difficult for a regulator to demonstrate success, and build its reputation, based on avoided outcomes, as opposed to tangible results."

Another difficulty can arise when a regulator has been given multiple, conflicting mandates. If the regulator cannot pursue one mandate without detracting from the other one, it cannot help but appear to be failing. Sometimes a regulator has a mandate both to promote and regulate an industry. It may well fail to do well in meeting either mandate, but if it manages to doing well on one of them, it risks looking inadequate at the other.

A number of participants warned against regulators focusing too much on reputation, not merely because its construction lies ultimately outside the regulator's control. They worried that too much focus on reputation could skew a regulator's motivations and actions. These participants believed that excellent outcomes should be pursued for their own sake, in terms of promoting public value – not because they will necessarily bolster the regulator's reputation. As one participant noted, "reputation is only a tool and means to an end, not an end in itself."

Measuring Excellence

The regulator's reputation, and its overall level of political and public support, could be thought of as a type of performance yardstick. But if reputations do not always correlate with real successes, might more meaningful measures of excellence exist? How does a regulator know if it is doing better (or worse) today than it did five years ago? The second objective of the Penn Dialogue was to identify some answers to these measurement questions. Attendees discussed what to measure, the purposes of measurements, and the qualities of metrics, raising both the positive potential for performance measurement as well as some of its possible pitfalls.

What to Measure?

To the question of what to measure, the short answer is to measure the attributes of excellence. But regulators need to know more than that. Before collecting any measurements, regulators need to answer a conceptually prior question: To what do the attributes apply? Of course, the intuitive answer might be "the regulator." Yet the dialogue surfaced three distinct, but complementary, aspects of the regulator to which the attributes might apply: its characteristics, actions, and outcomes.

Characteristics refer to what the regulator *is*. Is it, for example, sufficiently autonomous, expert, transparent, or agile? *Actions* are what the regulator *does*. They include making rules and directives, conducting inspections, and communicating with the public and the regulated community. *Outcomes* are what the regulator *achieves*, both substantively and perceptually. The substantive outcomes should reflect progress towards achieving a regulator's mandate or mission, such as improving public health, protecting the environment, or promoting economic development. The regulator's reputation is a key perceptual outcome.

Participants emphasized how important substantive outcomes are to any measurement of a regulator's excellence. But they differed in terms of these outcomes relative importance as well as the role for other ways of measuring regulatory excellence.

Many participants thought that if the regulator is "delivering the goods" in terms of achieving its statutory mandate, that is what matters most. One participant even suggested it can be "very dangerous" not to focus on outcomes: "Unless you stay focused on the outcomes, you can end up doing activities that you think are important but that aren't where the problem really is."

Others recommended focusing on characteristics as well as outcomes. One participant argued that, while a good regulator might be able to achieve excellent outcomes at a particular time and place, a regulator with excellent characteristics will be able to ensure that results can be achieved on an ongoing basis. Still other participants suggested that while characteristics like transparency, agility, and humble were necessary for all regulators, they were not sufficient for a regulator to achieve excellence.

Measuring actions looked promising to a number of participants, especially when outcomes are hard to measure. Outcomes can be hard to measure when they take the form of avoiding low-probability events or delivering benefits far into the future. In such cases, actions might be a useful measure – or better still would be some measurable intermediate outcomes (or outputs) created by those actions. These actions or outputs could be used as a proxy for outcomes. But, as one participant noted, reliable proxy measures need to be supported by research showing that they comprise good indicators of the ultimate outcome of concern.

One participant made a point to explain how characteristics, actions, and outcomes are interrelated. Focusing only on one of the three dimensions of excellence might make a regulator blind to interrelationships and lead to eventual failure down the line. Excellence, it was suggested, needs to be aligned across all three dimensions.

Purposes of Measurement

In deciding how to measure performance, the regulator should first decide how it plans to use measurement. What will be its purpose? Participants suggested there is no single answer to this question. The purpose of measurement can and will vary, and excellent regulators will select different metrics for different purposes – and different audiences. Some metrics will guide internal management decisions, while others will be needed to help the regulator tell its story to external audiences. Participants identified three main, complementary purposes of performance measurement: benchmarking; internal improvement; and external accountability and communication.

1. <u>Benchmarking</u>. Participants first indicated that measurement could support a kind of "constructive comparison" of a regulator's performance against its so-called peers as well as against itself over time.

Although some participants recognized the value a regulator could gain by comparing itself to other regulators, such an approach demands common data protocols and methods. Furthermore, as some participants noted, finding comparable regulators against which to benchmark is not as straightforward as it might seem. Each regulator's circumstances might well be unique in terms of the number, sizes, and capacities of regulated firms and the conditions under which they operate – not to mention differences in public and legislative preferences, values, and priorities. As one participant put it, "what might be excellence for one regulator may not be for other regulators."

At least one participant still believed that it was not only possible but important to create comparisons across regulators, doing as best as one could. If nothing else, others suggested, even if precise quantitative measures cannot be meaningfully applied across different regulators, regulators can still gain new ideas and generate other kinds of valuable learning when they make even qualitative comparisons with other regulators. As one participant put it, the "function of measurement is to raise good questions" – a goal that can sometimes be achieved just as well if not better by making detailed, contextual comparisons than by trying to produce abstract, hard-to-interpret comparative scores or rankings.

2. Internal Improvement. Another primary purpose of performance measurement is for internal problem-solving and continuous improvement. The process of measurement itself forces regulatory managers to clarify objectives and helps them better align resources with those objectives. Excellent regulators, one participant explained, use measurement systems to "communicate goals, illuminate what works and what works better, motivate people both internally and externally, identify problems and determine how to tailor treatment." Another participant said that "a regulator needs to look back at decisions and learn whether it is doing well or poorly and inform the public about its performance." Participants suggested that too few regulators seek to use measurement for internal continuous improvement.

A few participants suggested that performance measurement will best drive improvement when it is used as a clear basis for evaluating programs and assessing personnel, with real consequences for those programs and workers not performing well. Other participants cautioned against using measurement to reward and punish individual employees, noting that doing so can create perverse incentives and encourage people to game the system. In addition, aspects of the regulator's performance that cannot be easily measured may no longer receive adequate attention. To avoid these problems, several participants recommended that performance data should be used for "exploration, not exploitation." In other words, measurement should support organizational learning by "identifying tasks and processes to improve, exploring new things or imagining doing things differently, and identifying performance gaps and opportunities to make improvements."

An attitude of humility and willingness to learn is vital to make the most of performance measurement. Regulators need to be as eager to learning from failures and mistakes as to document successes.

One participant explained that retrospective evaluations of regulations serve as a vital complement to prospective tools like benefit-cost analysis. Retrospective studies of regulations provide data that can be useful when making future decisions. They allow regulators to evaluate and improve prospective risk assessment and benefit-cost analysis. In addition to evaluating rules, participants advised regulators to monitor enforcement efforts as well, striving to improve the efficiency of their methods for identifying and targeting violations.

3. Accountability and Communication. Performance measurement can also serve the purpose of accountability and of communicating the regulator's "story." Participants noted the increasing public demand for information about regulatory operations and results. Today, the regulator's story "must be fed by legitimate metrics and must be transparent about what needs to be improved," one participant stated.

When using performance data to communicate with different audiences—the public, policymakers, the regulator's workforce – different types of data and analysis might be needed for different groups. A regulator may find it should provide information tailored to the needs of each particular audience. Of course, too much tailoring can become burdensome, especially if it calls for gathering and analyzing more data.

In addition to collecting different kinds of data, when performance measurement is used to communicate the regulator's story to others the regulator must process and interpret its data for the targeted audience. It is not enough just to dump data on a website. The regulator needs to consider thoughtfully how those data should be analyzed, framed, and presented to different audiences.

Participants discussed the value that openness about performance measurement can provide when a regulator faces a crisis or fails to perform as expected. Through honest performance measurement, the regulator may be able to strengthen its credibility. Such measurement provides a basis for the regulator to explain why it might be having trouble and, more importantly, assure the public that the regulator is taking problems seriously. Of course, another participant cautioned that even a robust performance measurement system will not guarantee that a regulator garners a positive reputation or receives the benefit of the doubt when a crisis hits.

Implementation Considerations

As should be evident already, building an effective performance system requires considerable thought and care. Participants discussed several practical issues regulators ought to take into account when implementing performance measurement.

1. Quantitative, qualitative, and perceptual Metrics. Participants discussed different types of metrics that a regulator could use to measure performance. Most participants thought that regulators need a combination of qualitative and quantitative data to get the clearest picture of a regulator's performance. One participant explained that in some cases quantitative performance data can identify problems but that more qualitative investigation is still needed to identify the causes of these problems and craft effective solutions.

Public opinion data were discussed by a number of participants. Some suggested using public polling, while others cautioned that polling is not likely to work if people are uninformed. Other participants recommended getting outside input through focus groups, advisory committees, and peer review processes.

Participants offered other examples of possible metrics, including: near misses; leading and lagging indicators; data on decision-making processes; and various characteristics of the regulator (such as the makeup of its board of directors, to evaluate its overall representativeness).

Several participants observed that, even when they incorporate seemingly objective data, performance management systems are still fundamentally socially constructed. After all, they are created by people and can be affected by their biases, interests, political predispositions, and policy preferences. As one participant put it, “choices on measures and their interpretation are made by human beings and can be informed by the preferences and the power of people at the table.”

In addition to influencing the types of metrics selected, the larger political climate can also affect the receptivity of regulatory and political leaders to the results generated by a performance measurement system. One participant reported that a performance system developed in one federal administration in the United States proved to be largely irrelevant due to acrimonious tensions between the president and Congress.

2. Designing measurement. Although the choice of specific measures to use will be something that each regulator must decide, dialogue participants discussed a variety of principles to guide the design of a measurement system.

One overarching principle is that regulators should tie metrics to outcomes. As one participant put it, “In the context of ‘what do we want to measure,’ we must first look at ‘what do we want to accomplish.’” Some participants recommended that, once priorities have been set, regulators should gather data on a cascading set of performance objectives, such as, in the words of one participant, the “conditions you want to deal with, harmful incidents you want to prevent, and risks that create harmful incidents.”

One participant shared a collection of ten principles for regulators to consider when designing performance measurement systems:

(1) minimize burdens by giving each performance measure a purpose;

(2) don’t attach strong incentives to performances you can’t measure properly;

(3) avoid mechanistic decision rules as this removes quality and judgment;

(4) choose measures that reflect risks and include measures to balance tradeoffs;

(5) be wary of aggregating performance data and rankings;

(6) keep in mind that performance data do not, by themselves, show causation;

(7) ask the public questions that they can comment on intelligently;

(8) get public input early;

(9) choose measures that can tell an external story about how you are doing; and

(10) focus on performance gaps.

As these principles suggest, designing appropriate and effective performance measurement needs to be approached with care. One participant specifically advised against adopting "pre-cooked, off-the-shelf" metrics, such as ones borrowed from the private sector.

3. Number of Metrics. Several participants raised the issue of how many metrics to use. Some participants noted that having too few metrics makes it difficult to understand a large regulator's overall performance and to address the needs of the regulator's different public audiences. But gathering too much data seemed problematic as well, with one participant noting "too many regulators sit on way too much information they will never use." One participant suggested that a dozen, or possibly at most two dozen, metrics would probably be in the right range.

Participants stressed that performance measurement demands time and effort. Employees must fill out forms and enter data. The best performance measurement systems, said some participants, will minimize burdens and ensure that every measure used has a clear a purpose. Several participants stressed the importance of "fresh and frequent data" and therefore recommended reviewing data on a regular basis.

Limitations of Performance Metrics

Regardless of the specific metrics used, participants generally agreed that creating an effective measurement systems, while valuable, are no panacea. Some participants stressed the importance of keeping a system simple and focusing on metrics that are capable of being measured, while other participants were more generally skeptical about performance measurement systems given their complexities and potential pitfalls. Although most participants seemed to reject such extreme skepticism and affirmed that metrics and data-gathering can be useful ways for a regulator to assess its performance, many acknowledged that performance measurement does face several limitations.

1. Moving Targets. A regulator's performance – as with its excellence – is dynamic, changing as conditions and industry practices change. One participant put it this way: "Context matters. Do we define excellence now and declare 'We're good'? No – it's incredibly dynamic throughout the entire process." The dynamic nature of regulatory performance adds another difficulty for performance measurement, necessitating that both metrics and performance goals change over time.

Yet if metrics change in response to changes in the regulatory environment, then it will be hard for regulators to assess their progress. Analyzing performance over time requires data consistency over time. For this reason, regulators need to plan change carefully, avoiding what one participant described as a tendency in his organization for performance measurement systems to change every time managers "read a new book."

Outcomes do need to be evaluated over time, but participants also stressed that regulators should think about what is the right period of time. Some projects or policies may look like failures in the short term, but if continued will have the desired outcome over a longer period of time. Likewise, some projects or policies may appear effective in the short term and yet later, when subjected to more rigorous evaluation, be judged to be ineffective.

2. Attribution. Many participants emphasized the importance of being able to attribute outcomes to a regulator's actions. Most performance measurement systems can at best reveal correlations between actions and outcomes, but a correlation is not the same as causation. Participants recommended that in addition to systems that track performance overall, the best regulators will also target specific programs or practices for closer scrutiny through evaluation research that seeks to make causal attribution. One participant, a former head of a regulatory agency, noted that "we always dedicated at least some resources to rigorously evaluating some of our policies."

Some participants stressed that performance measurement systems should be built around those outcomes that the regulator can actually control. Performance reports should be structured, in the words of one participant, "to send the message back about what is and what is not within the regulator's control."

3. Access to Data. Getting access to data, particularly data that reside in the hands of regulated firms, can be a daunting challenge for regulators. In some cases, needed data may not be available at all and new efforts to generate data must be initiated. Even so, as one participant noted, "to get better indicators, you have to get people to report." Building new reporting systems takes time and resources, especially before an evaluator can have confidently validate that data are being recorded accurately and reliably.

Some of the risks that regulators aim to prevent arise only infrequently, such as low-probability catastrophes. In these cases, performance measurement necessitates building systems for reporting "near-misses" or gathering other data on proxies for the infrequent outcomes.

4. Resources. Collecting and analyzing new data can be expensive. And no matter whether they derive from new or existing sources, raw data are of little use to regulators or the public. Regulators must analyze data and construe its meaning. To make data actionable, regulators need both adequate information technology and human capital. But too many regulators lament the lack of funds for state-of-the art information technology and other resources necessary to collect and use data well. In the words of one participant, "there is a new world of data. I would like to be better at using it. But time, money, resources—where does it come from? How can I convince the governor or legislature for an upgrade to our IT systems?"

5. Gamesmanship. Participants cautioned that regulators should take seriously the possibility that employees, regulated firms, or others will game performance measurement systems. Relatedly, some participants questioned whether regulators could ever reliably measure their own performance, suggesting that every regulator will tend to think of itself as being "above average." One participant offered an example of a performance measurement system where the metrics were designed to show positive performance.

To counteract gamesmanship and bias, some participants recommended that a separate government office or a third-party auditor be used to conduct performance assessments. Other participants recommended partnering with think-tanks and academic institutions to evaluate regulatory performance.

6. Aggregation. Performance data are sometimes aggregated to create performance "scores" and rankings. Although some participants acknowledged that this type of aggregation could be useful, it was also widely recognized that aggregation needed to be handled with care: "There are real challenges with aggregating metrics to create rankings," noted one participant. Another warned that "summative measures can disguise what goes into those measures; sometimes the ingredients that go into measures are not very high in quality."

In addition, aggregation can mask tradeoffs. Some participants suggested that trying to combine two or more performance measures that conflict and are tracked in different units could render meaningless any attempt to create overall performance scores.

Some participants nevertheless thought that aggregation had a positive potential to engage the public and help a regulator tell its story. The challenges with scoring have "to be balanced against the conversation that it launches," one participant said. "The problem," he continued, "is often not in the aggregation, but how it is presented. If presented well, it gets people engaged, and the value of engagement is not to be underestimated."

7. Goals. Setting goals—and measuring progress toward their achievement—can help catalyze positive organizational change. But participants differed about whether a regulator's goals should be ambitious and aspirational or more realistic and achievable. Some thought that goals should be aspirational so as to motivate personnel to reach their utmost potential. Yet if goals are too ambitious, the regulator may take a reputational risk if they are not met. On the other hand, as one participant noted, "If you under-promise, nobody pays attention."

8. Leadership v. measurement. Although many participants supported performance measurement as a tool for regulatory improvement, some participants pointed out that simply measuring performance is insufficient to achieve improvement. Rather, leadership is needed. As one participant put it, "systems of performance measurements cannot accomplish what strong leadership can. They can support it, but not replace it." Another participant stressed that measurement systems will only work well if they are embedded in the organization and are clearly embraced by regulatory leadership.

Conclusion

By bringing together regulatory experts from around the world, the Penn Dialogue succeeded in eliciting a set of common attributes that could be used to define regulatory excellence across different policy fields and societies. The dialogue did not aim to reach a consensus, but nevertheless ten major attributes seem to have emerged as leading candidates:

- Mission clarity
- Autonomy
- Intergovernmental cooperation

- Sound decision-making
- Expertise with humility
- Boldness
- Agility, learning, and adaptation
- Transparency and public engagement
- Reputation

Participants emphasized that excellent regulators seek to listen actively to the public and may be able to bolster their own credibility by engaging in meaningful, ongoing communication with the legislature and the public. To be able to attain excellence, regulators ultimately need strong leadership, a smart and dedicated workforce, and state-of-the-art information systems.

With respect to measurement issues, the overall thrust of the dialogue made clear that performance measurement is valuable but no panacea – nor is it easy to execute in a meaningful way. Nevertheless, the best way to implement performance measurement will begin with an inquiry into what the regulator seeks to accomplish – both substantively and in terms of why it is seeking to measure its performance. Is the regulator trying to learn how to do better? Or is it trying to convince overseers and the public that it is doing well? Only after the purpose is clear can regulators begin to identify appropriate metrics and gather data.

Even then, while performance data can be extremely helpful for tracking progress and making improvements, it will not be sufficient for achieving those objectives. Regulators should resist what one participant called a "method-of-the-month" mindset that places all hope in getting the "right" performance measurement and thinking that all else will follow from there. Instead, with a leadership team and organizational culture focused on delivering public value and making continuous improvements, regulators can undertake the serious effort it takes to construct useful measurement systems and undertake the other actions needed to remain constantly in pursuit of regulatory excellence.

APPENDIX A: AGENDA

Defining and Measuring Regulatory Excellence

University of Pennsylvania Law School
Philadelphia, Pennsylvania
March 19-20, 2015

Defining Excellence: Thursday March 19

Welcome, Introductions, and Context-Setting

- Wendell Pritchett, Dean and Presidential Professor, Penn Law
- Jim Ellis, CEO, Alberta Energy Regulator
- Cary Coglianese, Edward B. Shils Professor of Law; Director, Penn Program on Regulation, Penn Law

Lunch: A Common Case Study

To provide everyone a common frame of reference for our discussions to follow, we will hear from a former regulator who worked to bring one of the largest industries under his agency's regulatory authority. This common case will raise many of the issues we will be exploring: what defines regulatory excellence, and how does one measure it?

- Ted Ruger, Professor of Law; Deputy Dean; Dean-designate, Penn Law
- Opening Keynote: "Tackling Tobacco: Lessons in Regulatory Leadership"
  The Honorable Dr. David A. Kessler, former Commissioner of the U.S. Food and Drug Administration

Session 1: Regulatory Leadership and Accountability

As the lunch presentation will be open to the Penn Law community as well as participants in the Dialogue, we have asked Dr. Kessler to join us after lunch for a brief follow-on discussion in our dialogue group. This will afford us an intimate opportunity to exchange on some of the lessons presented at lunch.

- The Honorable Dr. David A. Kessler, former Commissioner of the U.S. Food and Drug Administration

Session 2: Defining the Regulator's Mission

We start by asking: "Excellence at what?" Even when working in the same general regulatory field, different regulators may have differently defined missions. What defines a regulator's mission? And what is a regulator to do when its general mission calls for it to address problems that, either because they are new or fall in the gaps, are not precisely covered by existing policy directives?

- Dan Esty, Yale University
- Shelley Metzenbaum, Volcker Alliance

Session 3: Attributes of Excellence: What Makes Some Regulators Better Than Others?

We next turn to the question of whether more generalizable attributes of excellence can be articulated that apply to regulators anywhere, regardless of differences in their particular missions. Should such attributes capture characteristics, actions, or outcomes?

- Neil Gunningham, Australian National University
- Wendy Wagner, University of Texas Law School
- Adam Finkel, University of Pennsylvania

Reception and Dinner

- Keynote: Dame Deirdre Hutton, Chair, UK Civil Aviation Authority

Measuring Excellence: Friday March 20

Session 4: Performance Metrics and Aggregation

It's not enough to define excellence. To know if a regulator is moving toward excellence, measures are needed. What are the qualities of good metrics? How should performance on varied metrics be aggregated in assessing a regulator's overall degree of excellence?

- Robert Baldwin, London School of Economics
- Marcus Peacock, George Washington University

Session 5: Risk-Based Performance Management

How should risk affect judgments about regulators' performance? What does it mean for a regulator to be risk-based? What is risk-based performance management?

- Bridget Hutter, London School of Economics
- Howard Kunreuther, University of Pennsylvania
- David Vogel, University of California, Berkeley

Session 6: Seeking Satisfaction or Substantive Results?

Some metrics of excellence might be related to decision-making or public engagement processes*, while others will be focused on* substantive *outcomes. Some might be operationalized using surveys of satisfaction (expert or public), while others could be based on more objective measures. Finally, some methods of measurement might simply take temperatures, while others seek to attribute, causally, any changes in metrics to particular actions by the regulator. How should regulators confront these choices?*

- John Graham, Indiana University
- Kathryn Harrison, University of British Columbia
- Donald Moynihan, University of Wisconsin

Conclusion: Bringing It All Together: Building a System of Regulatory Excellence

APPENDIX B: DIALOGUE PARTICIPANTS

Robert Baldwin
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Valerie Baron
University of Pennsylvania Law School

Alan M. Barstow
Director, Organizational Dynamics, University of Pennsylvania

Darryl Biggar
Special Economic Advisor, Australian Energy Regulator

Rob Brightwell
Deputy Director, Operations & Communications, Better Regulation Executive, UK Department of Business, Innovation and Skills

Filippo Cavassini
Policy Analyst, OECD

Tim Church
Vice President, National, International Stakeholder and Government Relations, The Alberta Energy Regulator

Cary Coglianese
Edward B. Shils Professor of Law and Professor of Political Science; Director, Penn Program on Regulation, University of Pennsylvania Law School

Angus Corbett
University of Pennsylvania Law School

Jim Ellis
President and Chief Executive Officer, The Alberta Energy Regulator

Ted Enoch
Penn Project on Civic Engagement

Dan Esty
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John D. Graham
Dean, School of Public & Environmental Affairs at Indiana University; former Administrator, Office of Information & Regulatory Affairs

Neil Gunningham
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Elise Harrington
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Kathryn Harrison
Professor, University of British Columbia

Brad Herald
Vice President, Western Canada, Canadian Association of Petroleumm Producers (CAPP)

John Hollway
Associate Dean; Executive Director of the Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Law School

Bridget Hutter
Professor of Risk Regulation, London School of Economics and Political Science

Dame Deirdre Hutton
Chair, Civil Aviation Authority

David A. Kessler
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Matt Lepore
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Shelley Metzenbaum
President, The Volcker Alliance

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Adam Peltz
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Dan Walters
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Peter Watson
Chair and CEO, National Energy Board