



Institute for
Policy Integrity

new york university school of law

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Committee on Regulation
Administrative Conference of the United States
Comments@acus.gov

Subject: Committee on Regulation—Comments on Draft Recommendations for Benefit-Cost Analysis at Independent Regulatory Agencies (proposed February 15, 2013)

The Institute for Policy Integrity at NYU School of Law submits the following comments on the ACUS Committee on Regulation’s draft recommendations for benefit-cost analysis at independent regulatory agencies. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

In its final recommendations on regulatory analysis, the Committee on Regulation should make the following changes:

Encourage broader application of cost-benefit analysis to significant rulemakings by independent regulatory agencies, where appropriate. The draft recommendations “take no position on whether independent regulatory agencies should be subject to additional benefit-cost analysis requirements.” In general, the application of cost-benefit analysis and regulatory review to executive branch agencies has the potential to enhance regulatory efficiency and promote more transparent and rational decisionmaking.¹ The same advantages could be achieved for independent agencies, and there is no legal barrier to such an extension.² The ACUS recommendations, therefore, should affirmatively encourage the appropriate application of cost-benefit analysis to significant rulemakings by independent agencies.

The draft recommendations should **avoid the implication that the President currently lacks the legal authority to require cost-benefit analysis from independent agencies.** To that end, the following edit to draft recommendation #9 is advisable:

To the extent that Congress or the President requires ~~(or authorizes the President to require)~~ independent regulatory agencies to do benefit-cost analysis

Do not limit the scope of future cost-benefit requirements to only “economically significant” rules. Draft recommendation #9 advises Congress and the President to limit any requirements for cost-benefit analysis by independent agencies to major or economically significant rules. Compared to the requirements for executive agencies, this limited scope would exclude from rigorous cost-benefit analysis rules that are significant because they would “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health

¹ RICHARD REVESZ & MICHAEL LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

² Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)* (NYU Public Law & Legal Theory Working Paper No. 350, Aug. 2012).

or safety, or State, local, or tribal governments or communities.”³ It would also exclude from the more general requirements for cost-benefit assessments any rules that are significant because they “raise novel legal or policy issues.”⁴ There is no meaningful distinction between independent and executive agencies that would warrant a narrower scope of analysis for the former versus the latter.⁵ Therefore, the following edit to draft recommendation #9 is advisable:

(a) the analysis requirements should be limited to ~~“major” or “economically significant”~~ rules

Recommend establishing a peer review and public comment process for the development of written economic analysis guidance. The draft recommendations advise independent agencies to develop written economic analysis guidance. Some executive agencies, notably EPA, already have such written guidance, refined and vetted over the course of many years. The recommendations could refer to EPA’s guidelines as a model or, at least, an example. Agencies should also be advised to follow EPA’s process for developing those guidelines, which includes an extensive peer review and external review process and allows for public comments.⁶ ACUS has issued several recommendations that recognize the value of public comments.⁷ These draft recommendations should build on that position by advocating for independent agencies to use peer review and public comments to improve the quality of their written guidance. The following edit to draft recommendation #1 would accomplish these goals:

Each independent regulatory agency should develop and keep up to date written economic analysis guidance tailored to its particular statutory and regulatory environment. The guidance should be developed through a process that includes peer review and public comments, such as the process used by EPA in the development of its written guidance, and both the drafts and the final guidance document should be published online.

Recommend publication and summarization of economic analyses in time to allow for meaningful public comment. The draft recommendations advise agencies to post regulatory analyses online and to summarize the analysis “in the notice of proposed rulemaking *or* preamble to a final rule” (emphasis added). Given the value of public comments, the full regulatory analysis should be made available in time for meaningful public comment. Waiting to summarize and disclose the analysis until publication of the final rule’s preamble will be too late. Therefore, the following change should be made to draft recommendation #7:

... summarizing and disclosing the methods and results in the notice of proposed rulemaking ~~or preamble to a final rule.~~

Emphasize that non-monetized benefits and costs are equally important as monetized effects, and should be included in any summary statements or tables. Draft recommendation #8 encourages agencies to use a summary table showing overall estimates of “monetized benefits, costs, and transfer payments.” OIRA’s *Circular A-4* details how non-monetized and even non-quantified costs and benefits can be crucial to economic analysis. That document strongly recommends the inclusion of qualitative effects and explains how “break-even” or “threshold” analysis can be used to give a more rigorous treatment to non-quantified benefits.⁸ The template OIRA provides for summary accounting statements similarly includes lines both for quantified but

³ See Exec. Order No. 12,866, § 3(f)(1).

⁴ See *id.* § 3(f)(4).

⁵ See Datla & Revesz, *supra* note 1.

⁶ See EPA, *How Were the Guidelines Produced?*, <http://yosemite.epa.gov/ee/epa/eed.nsf/pages/guidelines.html#howproduced> (discussing peer review by EPA’s Science Advisory Board). The Science Advisory Board proceedings are, in turn, open to public comment.

⁷ *E.g.*, ACUS Recommendation No. 2011-2, *Rulemaking Comments* (2011).

⁸ OIRA, *Circular A-4*, at 2 (2003).

unmonetized effects and for unquantified effects.⁹ ACUS should avoid the implication that non-monetized benefits and costs are less important than monetized impacts. To that end, the following edit should be made to draft recommendation #8:

Independent regulatory agencies should consider including in the notice of proposed rulemaking and in the preamble to a final rule a summary statement or table concisely showing the agencies' overall estimates of ~~monetized~~ benefits, costs, and transfer payments for ~~major~~ significant rules, including both quantifiable and non-quantifiable effects. The summary may be based on the accounting statement template provided by OIRA.

Eliminate the recommendation on baselines. Draft recommendation #6 contains confusing language and instructions. For example, the draft advises agencies to consider using “a pre-statute analytical baseline . . . that includes both statutorily mandated requirements and those resulting from the agency’s discretion.” To start, saying that the “pre-statute baseline” includes statutory requirement is confusing. Second, it is unclear what a “pre-statute baseline” means. If it means a baseline rooted in the time period before the statute was enacted, that may not always be appropriate: for example, if there is a long lag between statutory enactment and the proposed regulation, economic and technological conditions may have changed substantially during the intervening years. If it means imagining a hypothetical current world where the relevant statute does not exist, developing such a baseline may be needlessly complicated, when a simple “no regulatory action” baseline may suffice.

The recommendation goes on to advise that “showing both types of effects (separately, whenever possible) should improve transparency and allow the public to understand whether Congress or the agency is responsible for the regulatory burden.” Again, this language is confusing. The recommendation seems to advise routinely using multiple, separate baselines, despite the fact that, due to their added complexity, multiple baselines are usually reserved for appropriate cases, and are not the default analytical choice. Moreover, the distinction drawn between congressional and agency responsibility for a regulatory burden is confusing. All agency actions will ultimately be based on congressional delegations of authority, and so Congress is essentially “responsible” for all regulatory burdens. If the intended distinction is between statutes that prescribe the exact regulatory form and stringency for an agency to promulgate, and those that leave some measure to discretion to agencies, that feature certainly may be important to the public debate, but it is not immediately clear how it relates to the baseline. The ACUS committee might review EPA’s *Guidelines for Preparing Economic Analyses* for a discussion of how statutory enactment relates to behavioral changes relevant to setting analytical baselines.¹⁰

Sincerely,

Michael A. Livermore
Jason A. Schwartz

INSTITUTE FOR POLICY INTEGRITY
NEW YORK UNIVERSITY SCHOOL OF LAW

⁹ OIRA, Summary Accounting Statement Form, http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a04_form.pdf.

¹⁰ See EPA, *Guidelines for Preparing Economic Analysis*, ch. 5 (2010).