



**DRAFT: FOR COMMITTEE REVIEW**

**3-20-12**

## **Committee on Regulation**

### **Proposed Recommendation | Regulatory Analysis Requirements**

Over the past several decades, the United States Congress and President have imposed numerous regulatory analysis requirements on administrative agencies in connection with their rulemaking activities. These requirements include relatively sweeping measures designed to ensure that agencies' regulations advance legitimate goals, such as Executive Order 12,866's requirement that agencies analyze the benefits and costs of proposed regulations,<sup>1</sup> as well as more specific mandates that agencies take into account certain factors when drafting regulations, including the proposed rules' effects on small businesses,<sup>2</sup> federal-state relations,<sup>3</sup> constitutionally protected property rights,<sup>4</sup> or the well-being of families.<sup>5</sup>

Agencies must, of course, consider many relevant factors when enacting regulations, and the various analytical requirements imposed by statute and executive order ensure that agencies address certain important issues that are likely to recur in various regulatory scenarios. Nevertheless, the sheer number of regulatory analysis requirements and the complexity of the analyses they require can impose significant burdens on administrative agencies. One administrative law scholar recently opined that "the patchwork of statutes and executive orders by which these analysis requirements have been imposed and the interrelations between these various statutes and executive orders have created a confusing labyrinth through which agencies

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<sup>1</sup> See generally Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>2</sup> See Regulatory Flexibility Act, 5 U.S.C. § 603-04 (requiring agencies to do initial and final "regulatory flexibility" analyses, describing the impact of the rule on "small entities").

<sup>3</sup> See generally Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 10, 1999).

<sup>4</sup> See generally Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 15, 1988).

<sup>5</sup> See generally Pub. L. No. 105-277, § 654, 112 Stat. 2681, 2681-528-30 (1998).



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seeking to adopt rules must grope.”<sup>6</sup> In this light, the various regulatory analysis requirements may contribute to the “ossification” of the regulatory process, preventing agencies from achieving their regulatory mandates by subjecting them to a bevy of technical requirements that unnecessarily protract the process of adopting new regulations.<sup>7</sup>

The Conference takes no position on the propriety of the various analysis requirements imposed upon agency rulemaking activities by statute and executive order, each of which can further important regulatory goals but also can impose procedural burdens on the rulemaking process.<sup>8</sup> Rather, in this study,<sup>9</sup> the Conference has sought to identify mechanisms to streamline the regulatory analysis process to ensure that agencies fulfill the various requirements in the most efficient manner possible and to enhance the transparency of the process by encouraging agencies to explicitly identify which of the various regulatory analysis requirements apply to any given rulemaking.

### RECOMMENDATION

1. The Office of Information and Regulatory Affairs (OIRA) should prepare a list of the generally applicable regulatory analysis requirements imposed by statutes and executive orders

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<sup>6</sup> Mark Seidenfeld, *A Table of Requirements for Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 535 (2000).

<sup>7</sup> See e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1429–36 (1992).

<sup>8</sup> *But see* Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (1993) (“Statutes such as the Regulatory Flexibility Act, which requires a special analysis of virtually all rules’ effects on small business, may have laudable intentions, but their requirements are often both too broadly applicable and not sufficiently effective in achieving their goals. If such requirements are imposed, Congress should focus them more narrowly, by, for example, confining their application to significant rules or particular categories of rules.”).

In Recommendation II(C) of 93-4, the Conference recommended that “Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues. If Congress nonetheless determines that such analytical requirements are necessary, Congress should structure its requirements more narrowly (e.g., by confining their application to the most significant rules or to rules likely to be affected by the stated concern)” (footnote omitted).

<sup>9</sup> See Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform* (February 23, 2012), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf>.



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(including both those that apply only to executive agencies as well as those applicable to both executive and independent regulatory agencies). It should post this list on its website, and each requirement so listed should contain a link to the applicable statute or executive order. To the extent certain regulatory analysis requirements are agency-specific or statute-specific, affected agencies should post a list of all applicable requirements on their websites, along with links to the underlying statutes.

2. In the preamble to each substantive rule adopted, agencies should briefly indicate which of the generally applicable regulatory analysis requirements and those applicable only to the agency at issue apply in the particular rulemaking under consideration. Where the inapplicability of a particular requirement is not obvious, agencies should provide a brief explanation of why the relevant requirement is not triggered. (An example might be a rule that has a large annual effect on the economy, but that effect is below \$100 million per year, thereby failing to trigger the analytical requirements in Executive Order 12866). Where certain requirements will clearly not apply (e.g., a rule relating to the scientific evidence required to obtain approval of a new drug that clearly has little to no effect on energy policy), the agency can simply summarily note those requirements' inapplicability.

3. Congress and the President should continue to reevaluate the appropriate coverage of crosscutting analytical requirements. That reevaluation should particularly focus on whether to adjust the coverage of analytical requirements that GAO and others have identified as giving agencies substantial amounts of discretion, and of requirements that are so limited that, while



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they must be considered in most rulemakings, are deemed inapplicable to most of them.<sup>10</sup> In any event, Congress and the President should index any monetary thresholds for analysis to inflation.

4. The Office of Management and Budget should consider amending Circular A-4 so as to tailor the type of regulatory analysis to the type of rule at issue. Traditional cost-benefit analysis seems most appropriate for rules that would impose \$100 million or more in annual compliance costs (indexed to inflation) or that would result in major increases in costs or prices. Alternative types of analyses (more in the nature of accounting balance sheets) may be more appropriate for rules increasing or decreasing federal transfer payments by at least \$100 million annually or setting fee structures that are expected to produce \$100 million or more in annual revenues. Additional analysis may be unnecessary for rules that qualify as “major” or “economically significant” merely because they stimulate consumer spending.

5. OIRA should issue a notification to agencies advising them that a single analysis can, in some instances, satisfy more than one of the applicable analytical requirements and informing them that they need not prepare a separate analysis for each applicable requirement in such instances of overlap.

6. In order to minimize the number of separate requirements that agencies must consult in conducting regulatory analysis, the President should consider reviewing the current set of requirements imposed by executive order to determine if some or all of them could be consolidated into a single executive order.

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<sup>10</sup> See also Recommendation 93-4, *supra* note 8 (urging Congress to “reconsider the need” for regulatory review requirements that “necessitate broadly applicable analyses or action to address narrowly focused issues” and, to the extent Congress reaffirms such requirements, to “structure the requirements more narrowly (e.g., by confining their application to the most significant rules or to rules likely to be affected by the stated concern)”).