



**November 9, 2011**

**Comments on  
"Regulatory Analysis Requirements Draft Outline,"  
by Curtis W. Copeland<sup>1</sup>**

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**COMMENTS ON "SPECIFIC RESEARCH QUESTIONS"**

1. Types of analysis required. The taxonomy of regulatory analyses is straightforward. However, it appears to exclude regulatory analysis requirements established by agencies themselves, pursuant to the agency head's own authority; by Congress the Administrative Procedure Act, as a requirement for reasoned decision making; or by Congress to implement statutory directives.
  - a. The exclusion of these other regulatory analysis requirements implicitly presumes that agencies would conduct no regulatory analysis before deciding whether to take action or what action to take.
  - b. Though Environmental Impact Statements are mentioned in passing, the outline does not seem to go anywhere with this. It would be useful to know how the various regulatory analysis requirements compare with NEPA's EIS requirement on each of the margins below, as the EIS provides an especially useful baseline insofar as regulations are treated as exempt from the definition of "major federal action" in 40 C.F.R. § 1508.18 and related requirements.

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<sup>1</sup> Curtis W. Copeland, "Regulatory Analysis Requirements Draft Outline," <http://www.acus.gov/wp-content/uploads/downloads/2011/11/Review-of-Regulatory-Analysis-Outline.pdf> (posted by ACUS November 2, 2011).

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- c. What is the value-added of this task? Mr. Copeland expects to show only what is already known—that agencies face multiple analytic requirements.
2. Overlapping/duplicative analytical requirements.
    - a. Genuine duplication may not be as common as usually believed. Care must be taken to distinguish between genuine duplication (i.e., the imposition of identical analytic requirements multiple times or places) with superficial duplication (e.g., the imposition of analytic requirements that seem to be identical but which are different when examined carefully).
    - b. Superficial duplication often masks major differences. For example, EO 12866 and RFA both require “cost” estimates, but the definition of cost in the latter (“direct cost to small entities”) is very different, and a subset of, the definition in the former (“social opportunity cost”).
    - c. Thus, it is insufficient to look just at analytic terms and assume that they have the same meaning. Genuine overlap/duplication may be less pronounced than inconsistency.
    - d. Inconsistency sometimes appears to have been intended. A clue can be observed when the definition of a crucial term *does not* rely on a cross-reference, but easily could have.
    - e. What is the value-added of this proposed task? Mr. Copeland expects to show what is already known—that agencies attempt to combine analyses whenever possible.
  3. Costs and benefits of regulatory analysis. Mr. Copeland likely will not be able to obtain reliable estimates or accurately interpret the figures he obtains.
    - a. Unless they contract out for the entire work product, agencies are unlikely to maintain records with sufficiently

- fine granularity to estimate expenditures on individual analyses.
  - b. Even if they have such records, *expenditure* is not *cost*.
  - c. Analytical costs borne by private parties will be missed. These include:
    - i. The cost of performing analyses to verify agency estimates.
    - ii. The cost of performing analyses agencies decline to perform correctly or at all.
  - d. How would the "benefits" of regulatory analysis be defined? Benefits to the agency? To the public? A clear and reasonable definition is essential before proceeding further.
  - a. What is the value-added of this task? Mr. Copeland intends to rely on agency documentation, an approach that can be predicted to yield information of little value.
4. Agency compliance with analytic requirements.
- a. OMB reviews all RIAs but does not publicly opine about agency compliance. Its annual Reports to Congress incorrectly imply that noncompliance isn't a problem. OMB treats all agency estimates equally valid and reliable, without bias, error, excess precision, or uncertainty).
  - b. SBA-Advocacy *may* do the same for IRFAs, but it also does not opine systematically about agency compliance.
  - c. GAO makes no meaningful effort to evaluate compliance.
  - d. Various nongovernmental attempts have been made over the past 15+ years to measure or monitor agency compliance. These efforts are bounded by Belzer (1999)<sup>2</sup>

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<sup>2</sup> Richard B. Belzer, 1999. *CSAB Project on Regulatory Oversight: Study Protocol 1*," Center for the Study of American Business, Washington University in St. Louis (evaluative criteria in Appendices A-G).

and Ellig and Morrall (2010).<sup>3</sup> Each has had a fatal defect (e.g., CSAB's was too comprehensive to be implementable at reasonable cost; Mercatus' is too superficial).

e. How will compliance be measured in this study?

5. Accuracy of ex ante estimates.

- a. Accuracy is collinear with, and hard to distinguish from, compliance except in extreme cases (e.g., the absence of analysis).
- b. Accuracy must be distinguished from precision.
- c. False precision must be distinguished from true precision.
- d. What is the value-added of this task? Mr. Copeland expects to show that "regulated entities/others disagree with agencies' estimates of costs and/or benefits," a fact that is well known.

6. Ossification resulting from regulatory analysis.

- a. Ossification is a conclusion famously reached by McGarrity (who opposes most analytic requirements) based on anecdote and rumor. An attempt to test this hypothesis might be useful, but it would be a heroic task almost certainly beyond what Mr. Copeland can do.
  - i. Multiple confounders must be managed to tease out the effects of analytic requirements.
  - ii. Delay (a sensitive but not selective proxy for ossification) must be balanced by the benefit of better regulation (if any).
  - iii. Among these benefits is an increased likelihood of successful legal defense (i.e., reduced delay).
- b. No benefits could be obtained from analysis if agencies did not implement previous ACUS Recommendations (e.g.,

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<sup>3</sup> Jerry Ellig and John Morrall, 2010. *Assessing the Quality of Regulatory Analysis*, Mercatus Center, George Mason University.

85-2.1: “Regulatory analysis can be most useful to agency decisionmakers in identifying regulatory options if the regulatory analysis function is an integral part of the agency decisionmaking process,” emphasis added).

- i. Deciding to ignore analysis in decision making is not chargeable as a cost to the analytic requirement.
  - ii. Benefit should be estimated as what could have been obtained had the decision maker chosen to utilize it.
- c. Is this hypothesis testable? How? If not, is it worth performing research?

7. Results used in decision making.

- a. Benefits of analysis cannot be estimated without first taking this into account.
- b. Mr. Copeland should reverse the order of questions 6 and 7 and attempt to answer this question conditional on whether the agency used analysis to inform decision making.
  - i. Where analysis was not used, what was the potential increase in net benefit?
  - ii. Where analysis was used, what was the estimated increase in net benefit?
- c. Is this task researchable? Mr. Copeland expects to “examine rules and related analyses to determine whether there is evidence that the agencies used the results in decision making.” Where in these documents will such evidence be located?
- d. Timing. Mr. Copeland proposes to “determine at what point in the rulemaking process agencies conducted the analysis.”
  - i. The key question is whether analysis was performed first (and thus could have informed decision making)

or second (and thus was intended to justify decisions already made).

- ii. Answers to this question would be extremely valuable, for they speak specifically to the question whether process reform should seek to expedite the analytic stage much earlier in the regulatory development process.
- iii. Mr. Copeland's methodology here is sketchy.

### **COMMENTS ON "OVERALL METHODOLOGY"**

1. Interviews are a problematic research strategy.
  - a. They are useful for generating hypotheses and possible fact-checking, but Mr. Copeland appears intent on using them for inferential purposes (see bullets 1 and 3).
  - b. Mr. Copeland proposes a sample of persons/organizations to interview that reflects built-in selection bias, gives equal weight irrespective of expertise (e.g., of the 4 organizations listed, only Mercatus has relevant expertise; the others have policy interests that are variously affected by regulatory analysis and thus varying interest in quality).
  - c. Accuracy of responses cannot be verified; strategic behavior is highly likely.
  - d. Interviews are likely to yield predictable answers.
2. Mr. Copeland's sample is likely to suffer selection biases that make it impossible to generalize.
  - a. 2010 only. Is it representative? Of what?
  - b. "Selected agencies" only. (Ditto.)
  - c. "At least 2 rules from" each selected agency only. (Ditto.)
  - d. This sample is missing dogs that don't bark, e.g.:

- i. Major rules without analyses.
- ii. Rules that were major but misclassified, plausibly to avoid analytic requirements.

### **SUGGESTED ALTERNATIVES**

1. Limit the project to tasks that are:
  - a. Researchable;
  - b. Can plausibly test interesting hypotheses; and
  - c. Reveal something we do not already know.
2. Broadly compare agency performance today with performance in the pre-analytic era (1970s). (This better utilizes Mr. Copeland’s decades of experience.)
3. Identify top (say) three procedural barriers to improved quality. Some possibilities come to mind:
  - a. Timing. If regulatory analyses are not performed before decisions are made, then they cannot improve decision making.
  - b. Independence. Do agency analysts have sufficient independence from agency program officials to perform analysis without bias?
  - c. Accountability.
    - i. Are there any rewards for quality? Are there penalties?
    - ii. Are there any penalties for error? Are there rewards?