



## Administrative Conference Recommendation 2012-1

### Regulatory Analysis Requirements

Adopted June 14, 2012

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

Some of the regulatory analysis requirements created by statute and executive orders have similar elements. For instance, the Regulatory Flexibility Act (RFA), Paperwork Reduction Act (PRA), Unfunded Mandates Reform Act (UMRA), and EO 12,866 all require agencies to discuss the need for a proposed regulatory action, assess the costs and benefits of the proposal,

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<sup>1</sup> See generally Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Independent regulatory agencies, as defined in the Paperwork Reduction Act, 44 U.S.C. § 3502(5), are not subject to that requirement.

<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. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

<sup>4</sup> See generally Exec. Order No. 12,630, 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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and discuss alternative regulatory actions that could have been selected.<sup>6</sup> EO 13,132 requires agencies to consider the impact of their regulations on State and local governments, and EO 13,175 similarly requires agencies to assess the impact of proposed rules on Native American tribal governments.<sup>7</sup>

Nevertheless, even relatively similar analytical requirements have distinct scopes, triggering events, and exceptions.<sup>8</sup> For instance, although UMRA and EO 12,866 cover the same agencies and require similar types of analysis, UMRA covers far fewer rules than the executive order. The various requirements also differ in the amount of discretion provided to agencies to determine whether an analysis is required. For example, EO 12,866's analysis requirement applies in any rulemaking with an annual economic effect of \$100 million or more. In contrast, EOs 13,132 and 13,175 are triggered when a regulation has "substantial direct effects" on State or Native American tribal governments, respectively, but neither executive order defines the phrase, thereby allowing agencies to determine what constitutes a "substantial direct effect."<sup>9</sup> As a result, agencies may adopt differing perspectives on events that implicate any given regulatory analysis requirement, thereby resulting in inconsistency throughout the government. Therefore, although certain aspects of the various analysis requirements could theoretically be consolidated,<sup>10</sup> the numerous distinctions among the requirements complicate any effort to consolidate and streamline them.

In this Recommendation, the Conference has sought to ensure that agencies fulfill the various regulatory analysis requirements in the most efficient manner possible and to enhance

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<sup>6</sup> Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform* 51 (Feb. 23, 2012) (report to the Administrative Conference of the United States), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/03/COR-Copeland-Report-CIRCULATED.pdf>.

<sup>7</sup> *Id.* at 50–51.

<sup>8</sup> *Id.* at 44–48.

<sup>9</sup> *Id.* at 50–51.

<sup>10</sup> For instance, an economic analysis performed under EO 12,866 might also meet the requirements of UMRA in those instances wherein an agency is subject to both requirements. *Id.* at 55.



the transparency of the process by encouraging agencies to identify explicitly which of the requirements apply to any given rulemaking and why any applicable analytical requirements are not triggered. Also, agencies should be able to refer to a comprehensive list of cross-cutting regulatory analysis requirements, and they should identify any agency-specific or statute-specific requirements applicable to their rules.<sup>11</sup>

In addition, the Conference asks the Executive Office of the President and Congress to consider streamlining the existing regulatory analysis requirements. It encourages the Executive Office of the President and Congress to consider consolidating certain analysis requirements to the extent overlap exists and to promote uniformity in the determination of whether any given analysis requirement applies. Although the Conference seeks to assure that existing analytic requirements are applied in the most efficient and transparent manner possible, it does not address whether the number or nature of those requirements might not be reduced in light of their cumulative impact on agencies.

## RECOMMENDATION

1. The Executive Office of the President should request that an appropriate agency prepare and post on its website a chart listing the various cross-cutting analytical rulemaking requirements (i.e., those that apply generally to a group of agencies rather than a specific agency or issue); the chart should provide links to the relevant statutes and executive orders

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<sup>11</sup> Agencies should consider the applicable regulatory analysis requirements throughout rulemaking proceedings and should not limit this process to the period immediately preceding the issuance of a notice of proposed rulemaking. In this light, agencies should be guided by Administrative Conference Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, which sets forth “specific advice on the use and limits of regulatory analysis and on integration of regulatory analysis into the agency rulemaking process.” Administrative Conference of the United States, Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28,364 (July 12, 1985) (preamble). Specifically, the recommendation states that “[i]f regulatory analysis is to be used in a rulemaking, the agency decisionmaking process should be structured to involve agency regulatory analysts early in the evolution of the rule, before alternatives have been eliminated. Regulatory analysis should not be used to produce post hoc rationalizations for decisions already made, nor should it be allowed to unduly delay rulemaking proceedings.” *Id.* ¶ 2(a).



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establishing these requirements.<sup>12</sup> The chart should be designed to serve as a useful resource to agencies for identifying analysis requirements that might apply; it would not constitute a formal “checklist” that agencies must complete or represent a judgment that an agency need comply only with the requirements enumerated in the list.

2. To the extent certain regulatory analysis requirements are agency-specific or statute-specific, affected agencies should prepare and post on their websites a list of all such additional requirements (beyond the cross-cutting requirements described in Recommendation 1), along with links to the underlying statutes.

3. In order to minimize the burden and duplication that agencies face in conducting separate regulatory analyses, the Executive Office of the President and Congress should review requirements on an ongoing basis to determine if any of them should be consolidated or eliminated.

4. The Office of Information and Regulatory Affairs (OIRA) should notify agencies that an analytical requirement for which it plays a central coordinating role might be satisfied by another applicable analytical requirement, and that the agencies may not need to prepare a separate analysis to satisfy the former requirement in such instances.<sup>13</sup>

5. In developing any future guidance on regulatory analysis requirements, OIRA should consider the cumulative impact of those requirements and, to the extent possible, integrate the requirements into existing formats for analysis.

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<sup>12</sup> The Administrative Conference can provide appropriate assistance in accomplishing this endeavor.

<sup>13</sup> Agencies should also be aware that certain analysis requirements outside of the purview of OIRA can be satisfied by performing similar analysis under a separate requirement. See, e.g., Unfunded Mandates Reform Act, 2 U.S.C. § 1532(c) (“Any agency may prepare any statement required under subsection (a) of this section in conjunction with or as a part of any other statement or analysis, provided that the statement or analysis satisfies the provisions of subsection (a) of this section.”); Regulatory Flexibility Act, 5 U.S.C. § 605(a) (“Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.”).



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6. In the preamble to each significant proposed or final rule, agencies should briefly indicate which of the cross-cutting and agency-specific or statute-specific regulatory analysis requirements arguably apply to the particular rulemaking under consideration, and why any specific requirement is not triggered.<sup>14</sup> In so doing, the agency may utilize the lists of regulatory analysis requirements described in the first and second recommendations. An example for a hypothetical regulation that might be construed to have potential effects on the economy, states, and the environment but that ultimately does not trigger any of the associated regulatory analysis requirements is provided in the form of a chart<sup>15</sup>:

Executive Order 12,866	OIRA has determined that the proposed rule will not have an “annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities,” and does not trigger the additional information requirements of § 6(a)(3)(C) of EO 12,866.
Executive Order 12,898	Data available to the agency indicate that the proposed rule

<sup>14</sup> As explored above, agencies should not treat this merely as a checklist and instead should consider the various analysis requirements throughout the rulemaking process. *See supra* note 11. This recommendation is merely intended to ensure that the agency provides the public a brief explanation of its determination that certain analysis requirements do not apply.

<sup>15</sup> As a general matter, the various regulatory analysis requirements will fall into three potential categories: (a) the analysis requirement applies to the rulemaking; (b) the analysis requirement does not apply to the rulemaking but its inapplicability is not immediately clear without additional explanation; and (c) the analysis requirement clearly does not apply to the rulemaking. An agency could use a chart similar to the exemplar provided for analysis requirements that fall into the second category. It would actually perform the analysis requirements falling into the first category, and it would not need to explain the inapplicability of requirements falling into the third category. An agency could choose to provide an explanation for the inapplicability of requirements in the third category. For instance, with respect to the analysis requirement created by the Assessment of Federal Regulation and Policies on Families (Pub. L. No. 105-277, § 654), an agency might add an entry to the chart stating “Proposed rule will not affect family well-being.”



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	does not have disproportionately high and adverse health or environmental effects on minority or low-income populations.
UMRA	Proposed rule will not “result in aggregate expenditure by State, local, and tribal governments, or by the private sector, of \$100,000,000 or more in any one year (adjusted annually for inflation)” and therefore does not trigger UMRA requirements.