



## Benefit-Cost Analysis at Independent Regulatory Agencies

### Committee on Regulation - Draft Recommendation

(Feb. 15, 2013)

There are a variety of ways to assess the value or impact of regulations on society, one of which is benefit-cost analysis, a process by which one attempts to assess the overall benefits that a contemplated action will create and the aggregate costs it will impose on society, and then determine whether the former justify the latter.<sup>1</sup> Though some have disputed the utility of benefit-cost analysis in rulemaking,<sup>2</sup> it is used frequently in the regulatory process and can help ensure that decision makers fully contemplate the risks and rewards of any proposed strategy.<sup>3</sup>

Since 1981, executive branch agencies (i.e., Cabinet departments and freestanding executive agencies like the Environmental Protection Agency) have been required by executive order to conduct benefit-cost analysis for major or economically significant rules. In that year, President Ronald Reagan issued Executive Order (EO) 12,291,<sup>4</sup> in which he instructed executive

---

<sup>1</sup> See Office of Management and Budget, Circular A-4, September 17, 2003, *available at* [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](http://www.whitehouse.gov/omb/circulars_a004_a-4/). The literature on economic analysis, including prior recommendations of the Administrative Conference, has used the term “cost-benefit analysis” in lieu of or in addition to “benefit-cost analysis.” Circular A-4 uses the term “benefit-cost analysis,” and this recommendation will therefore utilize the same terminology.

<sup>2</sup> Critics of benefit-cost analysis contend that it ignores transcendent values that cannot be easily quantified, that benefits can often be difficult to monetize, that it tends to overestimate costs, and that it undervalues future benefits through the application of discounting methodologies. See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1557–60, 1580–81 (2001).

<sup>3</sup> See Administrative Conference of the United States, Recommendation 79-4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 44 Fed. Reg. 38,826 (July 3, 1979) (“Wise decisionmaking presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other.”); Cass R. Sunstein, *The Office of Information & Regulatory Affairs: Myths and Realities*, \_\_ HARV. L. REV. \_\_, \_\_ (forthcoming 2013) (“Cost-benefit analysis can be exceedingly important, and in the Obama Administration, several steps were taken to strengthen it, contributing to a situation in which the net benefits of economically significant rules were extraordinarily high.”); cf. RICHARD L. REVEZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 10 (Oxford Univ. Press 2008) (“Although cost-benefit analysis, as currently practiced, is . . . biased against regulation, those biases are not inherent to the methodology. If those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis.”).

<sup>4</sup> Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

branch agencies that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society.”<sup>5</sup> In addition, for “major rules” (e.g., those likely to result in “[a]n annual effect on the economy of \$100 million or more”),<sup>6</sup> executive branch agencies were required to analyze the costs and benefits of proposed and final rules, and to submit those rules and analyses to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget before publication in the Federal Register.<sup>7</sup> Subsequent administrations have promulgated similar executive orders, generally reaffirming the importance of benefit-cost analysis and OIRA review in the issuance of such rules.<sup>8</sup>

Independent regulatory agencies,<sup>9</sup> unlike executive branch agencies, have traditionally not been subject to the formal benefit-cost analysis requirements imposed by executive order,<sup>10</sup> though several recent Presidents have encouraged independent regulatory agencies to voluntarily apply the principles contained in the relevant executive orders.<sup>11</sup> Some agency organic acts or other statutes require certain independent regulatory agencies to conduct benefit-cost analyses or consider the economic effects of their decisions, though the requirements vary significantly from agency to agency. For instance, some agencies (e.g., the Consumer Product Safety Commission)

---

<sup>5</sup> *Id.* § 2(b).

<sup>6</sup> *Id.* § 1(b).

<sup>7</sup> *Id.* § 3; *see also* Sunstein, *supra* note 3, at \_\_\_.

<sup>8</sup> *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (President Clinton) (requiring that regulatory benefits “justify” the costs); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 14, 2011) (President Obama); *see also* Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989) (commending the practice of White House review of agency regulations begun in the Reagan Administration, suggesting guidelines for the enhanced openness of that review, and recommending the reconsideration of existing rules looking toward the repeal of unnecessary regulations).

<sup>9</sup> As a general matter, “independent regulatory agencies” are those whose heads possess “for cause” removal protection and that enjoy some degree of independence from the executive branch. DAVID E. LEWIS & JENNIFER L. SELIN, ACUS SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 49 (1st ed., GPO 2012).

<sup>10</sup> Exec. Order No. 12,866, § 3(b), 58 Fed. Reg. 51,735, 51,737 (Oct. 4, 1993). Some contend that the Reagan and Clinton Administrations were advised by the Office of Legal Counsel (OLC) within the Department of Justice that the President could require independent regulatory agencies to prepare benefit-cost analyses and submit their rules to OIRA. However, no such OLC opinions appear to have been issued. *See* Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* 20–24 (Jan. 10, 2013), *available at* <http://www.acus.gov/sites/default/files/documents/Econ%20Analysis%20Independent%20Reg%20Agencies-Draft%20Report-2-15-13.pdf>.

<sup>11</sup> *See, e.g.*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (urging independent regulatory agencies to comply with the requirements set forth in EO 13,563).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

are required to prepare a formal regulatory analysis statement that describes expected costs and benefits prior to issuing certain rules.<sup>12</sup> Other agencies (e.g., the Commodity Futures Trading Commission (CFTC) and the Securities & Exchange Commission (SEC)) are required to “consider” costs and benefits or other factors associated with their rules, but are nominally under no obligation to prepare a formal benefit-cost analysis.<sup>13</sup> Still other agencies (e.g., the Federal Communications Commission and the Nuclear Regulatory Commission) are not formally subject to any economic analysis requirements for most of their rules. In addition, all independent regulatory agencies are subject to certain cross-cutting statutes that may require some type of economic analysis, such as the Regulatory Flexibility Act<sup>14</sup> and the Paperwork Reduction Act.<sup>15</sup>

The Conference believes that it is in the interest of the independent regulatory agencies, the executive branch, Congress, and the courts that independent regulatory agencies’ current practices relating to benefit-cost analysis be documented. In this light, the report supporting the recommendation examined the existing efforts of independent regulatory agencies to analyze regulatory benefits and costs in major rulemakings and sought to correct any misconceptions regarding whether such agencies factor benefits and costs into their decisionmaking.<sup>16</sup> The report suggests that, in many instances, independent regulatory agencies quantify at least some of the costs (and, to a lesser extent, the benefits) created by rules they adopt and, in other instances, such agencies provide at least qualitative descriptions of the associated benefits and costs.<sup>17</sup> The report also suggests that the awareness of these actions by independent regulatory agencies may not be widely understood.

---

<sup>12</sup> 15 U.S.C. § 2058(f).

<sup>13</sup> CFTC is required to “consider the costs and benefits” of the agency’s action before issuing certain rules and orders. 7 U.S.C. § 19(a). The SEC is required, when it is engaged in rulemaking under certain statutory provisions, to “consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” 15 U.S.C. § 77b(b). Though some courts have applied this language in a manner that effectively imposes a requirement to prepare a quantitative analysis of regulatory costs and benefits, *see Business Roundtable v. Sec. & Exch. Comm’n*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011), the relevant statutory language does not provide that the agency must quantify the economic effects of its rules.

<sup>14</sup> 5 U.S.C. §§ 601–12.

<sup>15</sup> 44 U.S.C. §§ 3501–21.

<sup>16</sup> *See Copeland, supra* note 10, at 63–108.

<sup>17</sup> *See id.*



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The recommendation takes no position on whether independent regulatory agencies should be subject to additional benefit-cost analysis requirements (e.g., those emanating from EO 12866) or whether such agencies should independently undertake economic analyses beyond those required by statute. Nonetheless, this recommendation aims to encourage the diffusion of certain practices that independent regulatory agencies (and other agencies) have developed in conducting economic analyses. The Administrative Conference recognizes that increasing the attention paid to the economic impacts of proposed and final rules necessarily requires independent regulatory agencies to make significant tradeoffs among competing priorities, and may result in the substantial use of agency resources, delay in the rulemaking process, and the need to acquire relevant expertise (e.g., hiring staff economists). Nevertheless, some independent regulatory agencies are already subject to economic analysis requirements, and others have voluntarily undertaken such analyses.<sup>18</sup>

The recommendation, first, examines various policies and practices used in some of the independent regulatory agencies and offers a series of straightforward proposals to encourage their use in other agencies. Second, the recommendation highlights a series of analytical practices that OMB Circular A-4 recommends to executive agencies, and encourages independent regulatory agencies to consider whether those practices may be useful in their own regulatory programs for major rules. The recommendation does not seek to establish as a one-size-fits-all approach, and each agency must tailor the analyses it conducts, economic or otherwise, to accord with relevant statutory requirements and regulatory priorities to ensure proper use of limited agency resources. Finally, though the recommendation takes no position on whether Congress should extend economic analysis requirements, it proposes that, to the extent it does so, it should provide resources sufficient to achieve that mandate.

---

<sup>18</sup> See, e.g., Copeland, *supra* note 10, at 99 (describing the FCC's increased usage of benefit-cost analysis in light of EO 13,579).



## Recommendation

### A. Encouraging the Diffusion of Policies and Practices

1. Each independent regulatory agency should develop and keep up to date written economic analysis guidance tailored to its particular statutory and regulatory environment. That guidance should be designed to help ensure that any economic analysis the agency undertakes is soundly developed, transparent, consistently conducted, and contributes to agency compliance with applicable statutes and other rulemaking requirements.

2. To the extent that an independent regulatory agency is statutorily required to prepare an economic analysis for a proposed or final rule or voluntarily chooses to do so, the analysis should be developed as early in the rulemaking process as reasonably practical. Once prepared, the analysis may need to be updated as the agency becomes aware of new information that may affect the rulemaking or if changes are otherwise made to the rule text.

3. When an independent regulatory agency determines that additional analytical expertise or experience may be helpful to conduct any economic analysis that it undertakes, it should, to the extent applicable, consult with other agencies (e.g., through the Council of Independent Regulatory Agencies) and/or with OIRA (perhaps using memoranda of understanding to document the nature of the relationship). This consultation could address such issues as how certain costs and benefits could be quantified.

4. Independent regulatory agencies and OIRA should use whatever flexibilities exist within the Paperwork Reduction Act to expedite the collection of information needed in agencies' economic analyses.<sup>19</sup>

### B. Highlighting OMB-Recommended Analytical Practices

5. Independent regulatory agencies should consider structuring their economic analyses in terms of three general principles: (a) identify the need for the regulation; (b) examine

---

<sup>19</sup> See also Administrative Conference of the United States, Recommendation 2012-4, ¶ 3, *Paperwork Reduction Act*, 77 Fed. Reg. 47,800, 47,808 (Aug. 10, 2012).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

plausible alternative regulatory approaches; and (c) estimate, to the extent possible, the benefits and costs of the rule and those alternatives.

6. Consistent with applicable laws and agency resources, independent regulatory agencies should consider using, as appropriate, a pre-statute analytical baseline in their benefit-cost analysis that includes both statutorily mandated requirements and those resulting from the agency's discretion. 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 regulatory burden.

7. Independent regulatory agencies' regulatory analyses should be as transparent and reproducible as possible. In particular, agencies should consider disclosing how the analyses were conducted, posting the analyses on their websites and other appropriate online fora, and summarizing the methods and results in the notice of proposed rulemaking or preamble to a final rule. Agencies should not, however, do so in a way that harms their ability to effectively conduct their activities (such as requiring the disclosure of supervisory information) or breach confidentiality or privacy restrictions.

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 rules.

### **C. Funding for Additional Benefit-Cost Analysis Requirements**

9. To the extent that Congress requires (or authorizes the President to require) independent regulatory agencies to do benefit-cost analyses of their proposed or final rules: (a) the analysis requirements should be limited to "major" or "economically significant" rules and (b) additional funding for those analyses should be provided to the agencies, either through direct appropriations (in agencies that rely on appropriated funds) or through an authorization to collect additional fees (in agencies authorized to collect fees sufficient to offset their appropriation each year).