



Regulatory Analysis Requirements

Committee on Regulation

Proposed Recommendation | June 14–15, 2012

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

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

¹ 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.

² 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").

³ See generally Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

⁴ See generally Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988).

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14 and discuss alternative regulatory actions that could have been selected.⁶ EO 13,132 requires
15 agencies to consider the impact of their regulations on State and local governments, and EO
16 13,175 similarly requires agencies to assess the impact of proposed rules on Native American
17 tribal governments.⁷

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

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

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

⁷ *Id.* at 50–51.

⁸ *Id.* at 44–48.

⁹ *Id.* at 50–51.

¹⁰ 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

39 In addition, the Conference asks the Executive Office of the President and Congress to
40 consider streamlining the existing regulatory analysis requirements. It encourages the
41 Executive Office of the President and Congress to consider consolidating certain analysis
42 requirements to the extent overlap exists and to promote uniformity in the determination of
43 whether any given analysis requirement applies. The Conference does not, however, take any
44 position on the appropriate number of regulatory analysis requirements or on the appropriate
45 scope of their coverage. Rather, the Conference proposes a set of reforms designed to ensure
46 that the existing requirements are applied in the most efficient and transparent manner
47 possible.

RECOMMENDATION

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

¹¹ Of course, 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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

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

60 3. In order to minimize the burden and duplication that agencies face in conducting
61 separate regulatory analyses, the Executive Office of the President and Congress should review
62 the current set of requirements to determine if any of them could be consolidated.

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

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

70 6. In the preamble to each significant proposed or final rule, agencies should briefly
71 indicate which of the cross-cutting and agency-specific or statute-specific regulatory analysis

¹² The Administrative Conference can provide appropriate assistance in accomplishing this endeavor.

¹³ 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.”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

72 requirements arguably apply to the particular rulemaking under consideration, and why any
73 specific requirement is not triggered.¹⁴ In so doing, the agency may utilize the lists of
74 regulatory analysis requirements described in the first and second recommendations. An
75 example for a hypothetical regulation that might be construed to have potential effects on the
76 economy, states, and the environment but that ultimately does not trigger any of the
77 associated regulatory analysis requirements is provided in the form of a chart¹⁵:

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 from the agency indicate that the proposed rule does not have disproportionately high and adverse health or environmental effects on minority or low-income

¹⁴ Of course, 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.

¹⁵ 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 would 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. Of course, 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.”



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

	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.

78 7. The Office of Management and Budget should consider amending Circular A-4 so as
79 to tailor the type of regulatory analysis required to the type of rule at issue. For example, the
80 type of analysis appropriate for understanding the effects of a rule that reduces exposure to
81 environmental pollution will be different than the analysis needed to understand the effects of
82 a rule that determines payments for medical services, or that establishes seasons for migratory
83 bird hunting.

84 8. Congress and the Executive Office of the President should continue to reevaluate the
85 appropriateness and coverage of crosscutting analytical requirements.