



## Regulatory Analysis Requirements

### Committee on Regulation

Proposed Recommendation | June 14–15, 2012

#### Proposed Amendments

***This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).***

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.<sup>1</sup> 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,<sup>2</sup> intergovernmental relations,<sup>3</sup> constitutionally protected property rights,<sup>4</sup> or the  
9 well-being of families.<sup>5</sup>

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

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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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13 discuss the need for a proposed regulatory action, assess the costs and benefits of the proposal,  
14 and discuss alternative regulatory actions that could have been selected.<sup>6</sup> 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.<sup>7</sup>

18 Nevertheless, even relatively similar analytical requirements have distinct scopes,  
19 triggering events, and exceptions.<sup>8</sup> 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 ~~required~~implicated. For example, EO 12,866's  
23 analysis requirement applies in any rulemaking with an annual economic effect of \$100 million  
24 or more. In contrast, EOs 13,132 and 13,175 are triggered when a regulation has "substantial  
25 direct effects" on State or Native American tribal governments, respectively, but neither  
26 executive order defines the phrase, thereby allowing agencies to determine what constitutes a  
27 "substantial direct effect."<sup>9</sup> 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,<sup>10</sup> the numerous distinctions among the  
31 requirements complicate any effort to consolidate and streamline them.

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<sup>6</sup> 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>.

<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.



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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  
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.<sup>11</sup>

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—in seeking to assure that existing analytic requirements are~~  
47 ~~applied in the most efficient and transparent manner possible, the Conference does not~~  
48 ~~address whether the number or nature of those requirements might not be reduced in light of~~  
49 ~~their cumulative impact on agencies.~~

### RECOMMENDATION

<sup>11</sup> 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).

**Comment [CMA1]: Peter Strauss**

Explanation for proposed revision: While I accept the neutrality of the recommendation on this question, the complete absence of even a suggestion that the current level of demand might be harmful is unfortunate.



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50 1. The Executive Office of the President should request that an appropriate agency  
51 prepare and post on its website a chart listing the various cross-cutting analytical rulemaking  
52 requirements (i.e., those that apply generally to a group of agencies rather than a specific  
53 agency or issue); the chart should provide links to the relevant statutes and executive orders  
54 establishing these requirements.<sup>12</sup> The chart should be designed to serve as a useful resource  
55 to agencies for identifying analysis requirements that might apply; it would not constitute a  
56 formal “checklist” that agencies must complete or represent a judgment that an agency need  
57 comply only with the requirements enumerated in the list.

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

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

Comment [CMA2]: Alan Morrison Amendment

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

<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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70 5. In developing any future guidance on regulatory analysis requirements, OIRA should  
71 consider the cumulative impact of those requirements and, to the extent possible, integrate the  
72 requirements into existing formats for analysis.

73 6. In the preamble to each significant proposed or final rule, agencies should briefly  
74 indicate which of the cross-cutting and agency-specific or statute-specific regulatory analysis  
75 requirements arguably apply to the particular rulemaking under consideration, and why any  
76 specific requirement is not triggered.<sup>14</sup> In so doing, the agency may utilize the lists of  
77 regulatory analysis requirements described in the first and second recommendations. An  
78 example for a hypothetical regulation that might be construed to have potential effects on the  
79 economy, states, and the environment but that ultimately does not trigger any of the  
80 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
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<sup>14</sup> 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.

<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 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.”



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	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 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.

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

87 ~~8.~~ Congress and the Executive Office of the President should continue to reevaluate the  
88 appropriateness and coverage of cross-cutting analytical requirements.

**Comment [CMA3]: Siciliano Amendment**

Explanation for proposed revision:  
Recommendation #7 is unnecessary because Circular A-4, as written, already provides agencies with the flexibility to use different analyses based on the situation. OMB need not amend the Circular. Indeed, by making this recommendation, ACUS will imply that the current Circular is insufficiently limber to achieve our goal.

OMB Circular A-4 provides guidance that allows agencies to identify “an appropriate analytical approach to use,” particularly with regard to estimating costs and benefits. Agencies may tailor the method of regulatory analysis to the type of rule at issue without any change to OMB Circular A-4.

Amending Circular A-4 to specify the type of regulatory analysis required for each type of rule may make regulatory analysis requirements more rigid and limit agency ability to choose among analytic approaches for particular rules.

I am open to other solutions to this issue, including other ways to convey our point, as long as the new text does not involve amending Circular A-4 as currently presented.