Regulatory Analysis Requirements
Draft Outline
Curtis W. Copeland

Background

Numerous regulatory analytical requirements have been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives. The current set of such requirements includes those in Executive Order 12866 (and the associated OMB Circular A-4), the Regulatory Flexibility Act (RFA), the Unfunded Mandates Reform Act (UMRA), and various other statutes and executive orders. Concerns have been raised that the cumulative and uncoordinated nature of these analytical requirements may have resulted in a rulemaking process that is less efficient and effective than it could be. ACUS has previously recommended procedures for performing regulatory analyses, and ways to make those analyses more transparent to the public.[1]

Overall Research Objective

Comprehensively study the regulatory analysis requirements that federal agencies must follow in promulgating regulations, with particular emphasis on studying how the goals of the analysis requirements could be achieved more efficiently; consider whether there is any duplication in the analysis requirements that could be eliminated or whether the requirements could otherwise be rationalized or streamlined while continuing to serve their valuable goals.

Scope Limitation: Agencies are also required to carry out other types of rulemaking procedures (e.g., the notice and comment requirements in the Administrative Procedure Act, submission of rules to OMB under EO12866, and submission of rules to GAO and Congress under the Congressional Review Act). This research will not include those types of non-analytic requirements.

Specific Research Questions

1. What types of analyses are currently required when federal agencies issue proposed and final rules?
2. In what ways do these analytic requirements overlap/duplicate each other? In what ways are they different? Can they be combined? Would doing so be more efficient/effective?
3. What are the costs and benefits of carrying out these analytic requirements?
4. To what extent do the agencies comply with the statutory and executive order requirements for such analyses?
5. How accurate are the agencies' ex ante estimates of costs and benefits?

[1] See, for example, ACUS Recommendations 79-4 and 85-2, available at http://www.acus.gov/acus-recommendations/.

6. Have the analytic requirements "ossified" or measurably slowed down the rulemaking process?
7. Are the results of the analyses used in regulatory decision making?

Overall Methodology

1. Examine and summarize the existing literature regarding each of the specific research questions. Also interview individuals and organizations that have examined agencies' regulatory analyses.
2. Examine the "major rules" that were issued by selected agencies during calendar year 2010 to determine what types of analyses the agencies performed. Examination of these rules and their related regulatory analyses can also address many of the other specific research questions (e.g., the extent to which the analysis requirements overlap/duplicate each other, compliance with the basic requirements for such analyses, and use of the results in decision making). Agencies will be selected based on the number of major rules issued, and will include a mixture of cabinet departments, independent agencies, and independent regulatory agencies. The agencies will include at a minimum the Departments of Agriculture, Energy, Health and Human Services (HHS), the Interior, and Transportation; the Environmental Protection Agency (EPA); the Federal Reserve System; and the Securities and Exchange Commission (SEC). At least two rules will be examined from each of these departments and agencies, which more from agencies that issue the most such rules (e.g., HHS, EPA, and SEC).
3. Conduct structured interviews with rulemaking officials in the agencies and discuss each of the specific research questions, at times referencing information from particular major rules examined in step 2. Also interview officials at the Office of Management and Budget (OMB), the Government Accountability Office (GAO), the Small Business Administration's Office of Advocacy, and representatives of other organizations that have been interested in these issues (e.g., the Chamber of Commerce, the Mercatus Center, the Center for Progressive Reform and OMB Watch), as well as others who have written about these issues.

Report Outline

1. Number and Nature of Analytical Requirements

a. The existing literature indicates that more than a dozen analytical requirements currently apply to federal rulemaking, including:

- Section 6(a)(3)(B) of Executive Order 12866 (and OMB Circular A-4);
- Sections 603 and 604 of the RFA;
- Sections 3506 and 3507 of the Paperwork Reduction Act;
- Section 202 of UMRA;

- the National Environmental Policy Act of 1969 (NEPA); and
- various executive orders requiring analysis of the impacts of rules on federalism (EO13132); Indian tribal governments (EO13175); "takings" (EO12630); environmental health and safety risks to children (EO13045); and energy supply, distribution, or use (EO13211).

The number and types of regulatory analyses that federal agencies must conduct vary by type of agency and type of rule. For example, the cost-benefit analysis requirements in Executive Order 12866 cover "economically significant" proposed and final rules that are issued by cabinet departments and independent agencies like EPA, but do not apply to rules that are not economically significant or to rules that are issued by independent regulatory agencies like the SEC.

Also, some of the analytical requirements contain exclusions and exceptions that limit their applicability. For example, GAO reported that there are at least 14 reasons why a rule would not be covered by UMRA's written statement requirements (e.g., no prior notice of proposed rulemaking, or a condition of financial assistance).[2] Other analytical requirements give agencies substantial discretion to decide whether the requirements apply to certain rules. For example, the RFA allows agencies to avoid initial and final regulatory flexibility analyses if they certify that their rules will not have a "significant economic impact on a substantial number of small entities." Because the RFA does not define that term, agencies have substantial discretion to do so.

In addition to these crosscutting requirements, the statutes underlying the agencies' rules may also require agencies to conduct certain analyses, or to "consider" the expected costs and benefits of their rules. The specific nature of these requirements varies by agency, and sometimes varies by rule within the agency (depending upon what statutory authority is being relied upon to issue the rule).

b. Results from review of agencies 2010 major rules (TBD). Expected to demonstrate the above-described patterns of analytic coverage (cross-cutting and agency/rule-specific requirements).

c. Results from structured interviews (TBD). Primarily expected to identify agency or rule-specific statutory requirements for analysis, and confirm the coverage limitation of certain requirements.

---

[2] Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight of Government Management, available at http://www.gao.gov/products/GAO-11-385T.

2. Overlap/Duplication of Analytic Requirements

a. Some of the applicable analytical requirements appear to require the same or similar types of information. For example, both Executive Order 12866 and UMRA require agencies to describe the statutory authority for a proposed rule, to identify and consider regulatory alternatives, and to assess the benefits and costs anticipated from the regulatory action. Other requirements appear to require different types of information. For example, UMRA also requires agencies to include an analysis of the extent to which costs imposed on state, local, and tribal governments may be paid for by the federal government, and the extent to which federal resources are available to carry out the mandate. UMRA also requires agencies to identify any disproportionate budgetary effects on particular regions, governments, or segments of the private sector, and estimates of effects on the national economy, including effects on job creation, productivity, full employment, and international competitiveness. These elements are not specifically required in Executive Order 12866.

b. Results from review of major rules (TBD). Expected to demonstrate that agencies often consolidate regulatory analysis requirements into a single analysis, with subparts for certain issues (e.g., RFA analysis).

c. Results from structured interviews (TBD). Expected to reveal how agencies view and deal with the analytic requirements (e.g., whether treated as separate analyses or as a single analysis). Will also obtain their views as to whether certain requirements could be consolidated/eliminated, and whether doing so would save time and/or money.

3. Costs and Benefits of the Analyses

a. Various studies during the past 30 years have provided information on the costs of doing cost-benefit and other types of regulatory impact analyses (RIAs). The studies indicate that: (1) just as there is no "typical" rule, there is no "typical" cost-benefit or other type of analytic study; and (2) federal agencies often do not have systematic data on analytic costs. The Government Accountability Office (GAO), the Congressional Budget Office (CBO), and other researchers have reported that the cost of individual RIAs varies widely, from less than $100,000 to more than $5 million, with an average study costing between $800,000 and $1.2 million (all in 2011 dollars). In 1995, EPA estimated that it spent about $120 million per year ($178 million in 2011 dollars) performing the required risk assessments and cost-benefit analyses.[3] Of that total, EPA said that $55 million paid the salaries of 690 agency staff members, and the remaining $65 million went to contractors.

[3] Letter from the Environmental Protection Agency, Office of Policy, Planning and Evaluation, to Congressman Cardiss Collins, House committee on Reform and Oversight, May 17, 1995.

The benefits associated with the analyses are more difficult to quantify, and appear related to the subsequent research question of whether the analyses are used in agency decision making. However, agencies have generally indicated that the benefits of the analyses (in terms of lowered compliance costs and/or increased regulatory benefits) are worth the costs incurred in conducting the studies. Small changes to rules from these studies can lower costs/increase benefits far in excess of the cost of the studies.

b. Results from review of major rules (TBD). Will review agency documentation for any information on the costs or benefits associated with the analyses conducted.

c. Results from structured interviews (TBD). Expected to reveal whether agencies maintain data on the costs or benefits of the analyses, and if not, how those costs could be estimated. Will inquire about the costs of individual studies as well as total costs per year.

4. Quality of the Agencies' Analyses

a. Studies by GAO and other researchers during the past 30 years have indicated that the quality of the agencies' regulatory analyses varies. Most commonly, the researchers indicate that the agencies sometimes did not: (1) consider all relevant alternatives to the proposed regulations; (2) identify certain benefits or costs of the proposed regulation; (3) identify and compare the costs and benefits of different regulatory alternatives; (4) identify the economic and other assumptions underlying the analyses, or the degree of uncertainty in those assumptions; or (5) prepare executive summaries of the analyses.

b. Results from review of major rules (TBD). Will review rules to determine whether agencies satisfied the basic statutory and executive order requirements for analyses (e.g., for rules subject to OMB Circular A-4, whether the agencies included a statement of need, identified a range of regulatory alternatives, and determined the costs and benefits of those alternatives). Will also determine whether the analyses were available to the public.

c. Results from structured interviews (TBD). Will discuss results of review of major rules with officials, determining why certain actions were/were not taken.

5. Accuracy of Agencies Cost and Benefit Estimates

a. It may not be possible to determine with any degree of precision the actual costs or benefits associated with federal regulatory requirements. Data are often not available to determine actual compliance costs because regulated entities do not

maintain systems that can differentiate those costs from other costs.[4] Regulated entities also indicate that they would take many of the required actions in the absence of regulations, and that state and local government requirements are sometimes more stringent the federal rules. Even when cost or benefit data are available, the quality of the data may be questionable.[5] For these and other reasons (e.g., lack of resources), agency estimates of regulatory costs and benefits have only rarely been done. Such studies are typically done by outside researchers, and often indicate that agencies ex ante estimates of compliance costs are too high when compared to ex post compliance data.[6] Reasons cited for such overestimates include the effect of technological innovation, inaccurate estimates of the quantity of regulatory effects, changes to rules after cost estimates are conducted, and a tendency to estimate the maximum cost rather than the mean. In 2005, OMB reported on such comparisons for 47 rules issued between 1975 and 1996 by five agencies, and indicated that agencies tended to overestimate both regulatory costs and benefits (if they were estimated at all).[7]

b. Results from review of comments/alternative studies of major rules (TBD). Expected to show that regulated entities/others disagree with agencies' estimates of costs and/or benefits

c. Results from structured interviews (TBD). Will ask whether agencies have conducted or are aware of ex post studies of regulatory costs and benefits.

6. Ossification of Rulemaking Process

---

[4] U.S. General Accounting Office, *Regulatory Compliance for NIH Grantees*, GAO/HEHS-96-90R, March 25, 1996; and U.S. General Accounting Office, *Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies*, GAO/GGD-97-2, November 18, 1996.

[5] U.S. General Accounting Office, *Water Pollution: Proposed Pretreatment Standards for Industrial Laundries*, GAO/RCED-99-42R, January 20, 1999; and Ruth Ruttenberg and Associates, Inc., "Not Too Costly, After All: An Examination of the Inflated Cost-Benefit Estimates of Health, Safety and Environmental Protections," February 2004, available at http://www.citizen.org/documents/ACF187.pdf.

[6] Thomas O. McGarity and Ruth Ruttenberg, "Counting the Cost of Health, Safety, and Environmental Regulation," *Texas Law Review*, volume 80 (June 2002), pp. 1997-2058; and Winston Harrington, Richard D. Morgenstern, and Peter Nelson, "On the Accuracy of Regulatory Cost Estimates," *Journal of Policy Analysis and Management*, volume 19 (2000), pp. 297-322.

[7] U.S. Office of Management and Budget, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, December 2005, available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf.

a. Some previous studies (e.g., McGarity) suggest that the accumulation of analytic requirements has "ossified" the rulemaking process, resulting in slower rule issuance and fewer rules overall. However, other studies (e.g., Yackee and Yackee, Coglianese) suggest that these requirements have not slowed rulemaking, and that federal agencies are still able to issue thousands of final rules each year.

b. Results from review of major rules (TBD). Expect to be able to show how long it took for the agencies to issue the major rules, and whether the analytical requirements significantly extended the time required. However, it may be difficult to determine when the rulemaking process started, and the precise impact of the analytical requirements on the time required to issue rules.

c. Results from structured interviews (TBD). Will discuss evidence from their major rules and discuss the impact of the analytical requirements on rulemaking more generally.

7. Use of Analysis in Decision making

a. More than 25 years ago, ACUS recommended ways to integrate regulatory analysis into decision making.[8] Some previous studies have indicated that economic analyses have been used to improve agency decision making, resulting in reduced costs, increased benefits, or both.[9] However, these and other studies have also indicated that the analyses sometimes played only a minor role in decision making, primarily justifying decisions that have already been made.

b. Results from review of major rules (TBD). Will examine rules and related analyses to determine whether there is evidence that the agencies used the results in decision making. Will also determine at what point in the rulemaking process agencies conducted the analysis.

c. Results from structured interviews (TBD). Expect to obtain testimonial evidence regarding how the agencies (and others) use the results of the analysis in decision making, both overall and in the context of individual major rules. Will also inquire whether analyses have resulted in rules not being issued.

8. Conclusions and Recommendations

[8] ACUS Recommendation No. 85-2, July 1985.

[9] Richard D. Morgenstern, ed., *Economic Analysis at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); and U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 26, 1998.

a. To what extent do the analytical requirements established by Congress and various Presidents during the previous 40 to 50 years represent a consistent and rational set of requirements?

b. Are changes to those requirements advisable to make them more efficient and/or effective? If so, what changes would best accomplish those goals?

c. What are the potential advantages and disadvantages of a consolidation of these requirements to the agencies, OMB, Congress, and the public?