



Benefit-Cost Analysis at Independent Regulatory Agencies

Committee on Regulation

Proposed Recommendation | June 13–14, 2013

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 Benefit-cost analysis (also known as cost-benefit analysis) is one of the primary tools
2 used in regulatory analysis to anticipate and evaluate the likely consequences of rules.¹
3 Although some regulatory benefits and costs are difficult to quantify or monetize, those
4 preparing such analyses generally attempt to estimate the overall benefits that a proposed or
5 final rule would create as well as the aggregate costs that it would impose on society, and then
6 determine whether the former justify the latter. Some observers have disputed its utility in
7 rulemaking,² but benefit-cost analysis (and other forms of regulatory analysis) can help ensure
8 that decisionmakers fully contemplate the risks and rewards of any proposed regulatory
9 strategy.³ Benefit-cost analysis can also improve transparency, helping to ensure that the public
10 and Congress understand why regulatory decisions are made.

¹ See Office of Management and Budget, Circular A-4 (Sept. 17, 2003), available at http://www.whitehouse.gov/omb/circulars_a004_a-4/ (hereinafter "OMB Circular A-4"). Much of the literature on regulatory analysis, including prior recommendations of the Administrative Conference, uses 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.

² Critics of benefit-cost analysis contend that it ignores 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).

³ 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



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11 For more than 30 years, Cabinet departments and other executive agencies like the
12 Environmental Protection Agency (but not independent regulatory agencies⁴ such as the Federal
13 Trade Commission (FTC)) have been required by executive orders to conduct benefit-cost or
14 other types of regulatory analyses for their “major” or “economically significant” rules.⁵ In 1981,
15 President Ronald Reagan issued Executive Order (EO) 12,291,⁶ which instructed covered
16 executive agencies to prepare regulatory impact analyses of their draft proposed and final
17 major rules (including a description of benefits and costs), and to submit all of their draft rules
18 to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and
19 Budget (OMB) before publication in the Federal Register. Subsequent administrations have
20 reaffirmed the importance of benefit-cost analysis and OIRA review. Currently, EO 12,866,
21 issued by President Bill Clinton in 1993, requires Cabinet departments and other covered
22 executive agencies to “assess both the costs and benefits of the intended regulation and,
23 recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation

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. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 10 (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.”).

⁴ 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., 2d Printing Mar. 2013). Under Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), the term “agency” excludes independent regulatory agencies. *Id.* § 3(b). However, independent regulatory agencies are covered by the planning requirements in section 4 of the executive order.

⁵ “Major” and “economically significant” rules include (but are not limited to) rules likely to result in annual costs, benefits, or transfer payments of \$100 million or more. See Congressional Review Act, 5 U.S.C. § 804(2); Exec. Order No. 12,866, *supra* note 4, § 3(f)(1). Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB Circular A-4, *supra* note 1. The most common form is the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, and crop payments). In 2010, more than one-third of all major rules were so categorized because of the amount of transfer payments. See U.S. Cong. Research Service, *REINS Act: Number and Types of “Major Rules” in Recent Years*, R41651, Feb. 21, 2011, by Curtis W. Copeland and Maeve Carey.

⁶ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (revoked by § 11 of EO 12,866).



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24 only upon a reasoned determination that the benefits of the intended regulation justify its
25 costs.”⁷ It also requires them to assess the costs and benefits of “significant” draft proposed
26 and final rules submitted to OIRA for review, and to conduct more thorough analysis of
27 economically significant draft **proposed and final** rules.⁸

28 As noted previously, independent regulatory agencies traditionally have not been
29 subject to the formal benefit-cost analysis requirements imposed by executive order, although
30 several recent Presidents have encouraged those agencies to voluntarily apply the principles
31 contained in the relevant executive orders.⁹ **Virtually All** independent regulatory agencies are
32 subject to certain crosscutting statutes that may require some type of regulatory analysis, such
33 as the Regulatory Flexibility Act¹⁰ and the Paperwork Reduction Act.¹¹ In addition, some
34 independent regulatory agencies’ organic acts or other statutes require them to conduct
35 benefit-cost analyses or to consider certain economic effects of their regulations, although the
36 requirements vary significantly from agency to agency. For instance, some agencies (e.g., the
37 Consumer Product Safety Commission) are required by statute to prepare a formal regulatory
38 analysis statement that describes expected costs and benefits prior to issuing certain rules.¹²
39 Other agencies (e.g., the Commodity Futures Trading Commission (CFTC) and the Securities and

⁷ Exec. Order No. 12,866, *supra* note 4, § 1(b)(6).

⁸ *Id.* § 6(a)(3); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (President Obama) (stating that the benefits of proposed and final rules must “justify” the costs); Administrative Conference of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989) (suggesting guidelines for the enhanced openness of executive regulatory review and recommending the reconsideration of existing rules looking toward the repeal of unnecessary regulations).

⁹ *See, e.g.*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (stating that independent regulatory agencies “should promote” the goal, articulated in EO 13,563, of producing a “regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation” and “should comply” with the provisions in EO 13,563 regarding public participation, integration and innovation, flexible approaches, and science “[t]o the extent permitted by law”).

¹⁰ 5 U.S.C. §§ 601–12.

¹¹ 44 U.S.C. §§ 3501–21.

¹² 15 U.S.C. § 2058(f).



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40 Exchange Commission (SEC)) are required by statute to “consider” costs and benefits or other
41 factors associated with some of their rules, but are nominally under no obligation to prepare a
42 formal benefit-cost analysis.¹³ Still other agencies (e.g., the Federal Communications
43 Commission and the Nuclear Regulatory Commission) are not subject to any formal regulatory
44 analysis requirements for most of their rules.

45 The Conference believes that it is in the interest of the independent regulatory agencies,
46 the executive branch, Congress, and the courts that independent regulatory agencies’ current
47 practices relating to benefit-cost analysis be documented. In this light, the report supporting
48 the recommendation examined efforts by independent regulatory agencies to analyze
49 regulatory benefits and costs in recent major rules.¹⁴ It also examined whether the agencies
50 factor benefits and costs into their decisionmaking. The report indicated that, in many
51 instances, independent regulatory agencies quantify at least some of the costs (and, to a lesser
52 extent, the benefits) created by the major rules they adopt and, in other instances, such
53 agencies usually provide at least qualitative descriptions of the associated benefits and costs.
54 The report also discusses several factors that the agencies said affected their ability to quantify
55 and monetize regulatory costs and benefits. For example, several agencies mentioned the
56 Paperwork Reduction Act approval process as inhibiting their ability to gather the data needed
57 to prepare regulatory analyses in a timely fashion.¹⁵

¹³ 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). Although some courts have applied this language in a manner that effectively imposes a requirement to quantitatively analyze regulatory costs and benefits, see *Bus. 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. Interpretation of this provision has been a matter of debate.

¹⁴ See CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 60–107 (Mar. 29, 2013), available at <http://acus.gov/sites/default/files/documents/Copeland%20CBA%20Report%203-29-13.pdf>.

¹⁵ Cf. Administrative Conference of the United States, Recommendation 2012-4, *Paperwork Reduction Act*, ¶ 3, 77 Fed. Reg. 47,800, 47,808 (Aug. 10, 2012) (recommending that agencies “use all available processes for OMB approval for information gathering,” including “OMB’s available generic clearances and fast track procedures”).



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58 This recommendation encourages agencies to voluntarily adopt certain practices that
59 some independent regulatory agencies (and other agencies) have developed when conducting
60 regulatory analyses for major rules. The Administrative Conference recognizes that increasing
61 the attention paid to the economic impact of proposed and final rules necessarily requires
62 substantial use of limited agency resources. This requires independent agencies to make
63 significant tradeoffs among competing priorities and may delay the rulemaking process.
64 Nevertheless, some independent regulatory agencies are already subject to benefit-cost and
65 other types of regulatory analysis requirements, and others have voluntarily conducted such
66 analyses, and the Conference therefore wishes to highlight innovative practices undertaken by
67 these agencies.¹⁶

68 The recommendation, first, identifies various policies and practices used in several of the
69 independent regulatory agencies and offers a series of proposals to encourage their use in other
70 agencies. For example, it recommends that each independent regulatory agency develop
71 written guidance on the preparation of benefit-cost and other types of regulatory analyses.
72 Such guidance should be designed to help ensure that any regulatory analysis the agency
73 undertakes is soundly developed, transparent, consistently conducted, and contributes to
74 agency compliance with applicable statutes and other rulemaking requirements. Second, the
75 recommendation highlights a series of analytical practices that OMB Circular A-4 recommends
76 to Cabinet departments and other executive agencies for their major rules, and the
77 recommendation encourages independent regulatory agencies to consider whether those
78 practices may be useful in the development of their major rules. For example, it recommends
79 that agencies' analyses be as transparent and reproducible as practicable, subject to the
80 limitations of law and applicable policies (including preventing the disclosure of proprietary
81 information or trade secrets, or other confidential information). The recommendation does not
82 seek to establish a one-size-fits-all approach to regulatory analysis, and recognizes that each
83 agency must tailor the analyses it conducts to accord with relevant statutory requirements, its

¹⁶ See, e.g., Copeland, *supra* note 14, at 99 (describing the Federal Communications Commission's increased usage of benefit-cost analysis in light of EO 13,579).



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84 own regulatory priorities, and the potential impact of the analysis on regulatory decisionmaking
85 to ensure proper use of limited agency resources. Finally, the recommendation proposes that,
86 to the extent Congress decides to impose new regulatory analysis requirements on
87 independent regulatory agencies, Congress should consider giving those agencies the discretion
88 to scale the analyses to the significance of the rules, and should consider the agency resources
89 needed to satisfy such requirements.¹⁷

Recommendation

90 **Encouraging the Diffusion of Certain Policies and Practices**

91 1. Each independent regulatory agency should develop and keep up to date written
92 guidance regarding the preparation of benefit-cost and other types of regulatory analyses. That
93 guidance should be tailored to the agency's particular statutory and regulatory environment. To
94 accomplish this goal, independent regulatory agencies may choose whether or not to adopt or
95 adapt the regulatory analysis practices described in OMB Circular A-4 or any successor
96 government-wide guidance.

97 2. If an independent regulatory agency prepares a regulatory analysis for a
98 proposed or final rule, the analysis should be developed as early in the rulemaking process as
99 reasonably practical. Once prepared, the analysis may need to be updated as the agency
100 becomes aware of new information that may affect the rulemaking, or if changes are made to
101 the substance of the rule.

102 3. If an independent regulatory agency determines that additional analytical
103 expertise or experience may be helpful to prepare a regulatory analysis (e.g., determining how

¹⁷ Between January 2007 and December 2012, federal agencies published 19,246 final rules, of which 485 were considered "major" rules. See Copeland, *supra* note 14, at Table 1. Expanding the rules on which regulatory analysis is required from "economically significant" or "major" rules to rules considered "significant" under EO 12,866 would likely quintuple the number of analyses required. See <http://www.reginfo.gov/public/do/eoCountsSearch> for data on this issue.



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104 certain costs or benefits could be quantified or monetized), it should, to the extent appropriate,
105 consult with other governmental entities with expertise in this area.

106 4. Consistent with applicable laws and the procedures and flexibilities permitted in
107 the Paperwork Reduction Act, independent regulatory agencies and OIRA should facilitate the
108 timely collection of information necessary to develop the agencies' regulatory analyses.

109 **Recommended Practices for Major Rules**

110 5. Independent regulatory agencies should consider the appropriateness of the
111 analytical guidance provided in OMB Circular A-4 when developing regulatory analyses for
112 major rules. They should consider structuring their analyses of those rules in terms of three
113 general principles: (a) identify the need for the regulation; (b) examine plausible alternative
114 regulatory approaches; and (c) estimate, to the extent possible, the benefits and costs of the
115 proposed rule and the primary alternatives.

116 6. Consistent with applicable laws and agency resources, independent regulatory
117 agencies should consider including in their regulatory analyses assessments of the impact of not
118 only those actions that are within the agency's statutory discretion but also of those actions
119 that are statutorily mandated. Agencies should consider showing the effects of both types of
120 actions ~~(separately, when practicable) in order to improve regulatory transparency and allow~~
121 ~~the public to understand whether the agency or Congress is responsible for any regulatory~~
122 ~~costs, benefits, or transfers.~~

123 7. Subject to the limitations of law and applicable policies, independent regulatory
124 agencies' regulatory analyses should be as transparent and reproducible as practicable. In
125 particular, agencies should consider disclosing how the analyses were conducted, posting the
126 analyses on their websites and other appropriate online fora, and summarizing the methods
127 and results in the preambles of the notice of proposed rulemaking and the final rule.

128 8. Independent regulatory agencies should consider including in the preambles of
129 the notice of proposed rulemaking and the final rule a summary statement or table concisely

Comment [CMA1]: Council Amendment (Cass):
If the proposed edits do not pass as part of the
manager's amendment, then we would propose
striking the final sentence entirely.



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130 showing the agencies' overall estimates of the expected total benefits, costs, and transfer
131 payments of regulatory actions and the primary alternatives, including any benefits or costs that
132 could not be quantified or monetized.

133 **Recommendations to Congress**

134 9. If Congress decides to establish new requirements that independent regulatory
135 agencies prepare benefit-cost analyses of their proposed or final rules, it should consider giving
136 the agencies (a) ~~giving the agencies~~ the flexibility to scale the analyses to the significance of the
137 rules and (b) the agency resources needed to satisfy such requirements.