



DRAFT: FOR COMMITTEE REVIEW

4-24-12

Committee on Regulation

Proposed Recommendation | Regulatory Analysis Requirements

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

Some of the regulatory analysis requirements created by statute and executive orders have similar elements. For instance, the Regulatory Flexibility Act (RFA), Paperwork Reduction Act (PRA), Unfunded Mandates Reform Act (UMRA), and EO 12,866 all require agencies to discuss the need for a proposed regulatory action, assess the costs and benefits of the proposal, and discuss alternative regulatory actions that could have been selected.⁶ EO 13,132 requires

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).

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>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

agencies to consider the impact of their regulations on State and local governments, and EO 13,175 similarly requires agencies to assess the impact of proposed rules on Native American tribal governments.⁷

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

In this Recommendation, the Conference has sought to ensure that agencies fulfill the various regulatory analysis requirements in the most efficient manner possible, and to enhance the transparency of the process by encouraging agencies to identify explicitly which of the

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

requirements apply to any given rulemaking. Specifically, agencies should be able to refer to a comprehensive list of applicable regulatory analysis requirements, and they should explain which requirements are triggered in any given case. In addition, the Conference asks the President and Congress to consider streamlining the existing regulatory analysis requirements. It encourages the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget to consider consolidating certain analysis requirements to the extent overlap exists and urges Congress and the President to promote uniformity in the determination of whether any given analysis requirement applies.

RECOMMENDATION

1. The Office of Information and Regulatory Affairs (“OIRA”) should prepare and post on its website a chart listing the various cross-cutting analytical rulemaking requirements (i.e., those that apply generally to a group of agencies rather than a specific agency); the chart should provide links to the relevant statutes and executive orders establishing these requirements.
2. To the extent certain regulatory analysis requirements are agency-specific or statute-specific, affected agencies should post a list of all such additional requirements (beyond the cross-cutting requirements posted by OIRA, as described in Recommendation 1) on their websites, along with links to the underlying statutes.
3. In order to minimize the burden and duplication that agencies face in conducting separate regulatory analyses, OIRA should review the current set of requirements to determine if some or all of them could be consolidated.¹¹ In the interim, OIRA should issue a notification to agencies advising them of instances in which a single analysis can satisfy more than one of the applicable

¹¹ For example, Executive Orders 13,132 and 13,175 could be combined into a single executive order requiring agencies to consider the impact of their regulations on State, local, and tribal governments.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

analytical requirements, and informing them that they need not prepare a separate analysis for each applicable requirement in such instances of overlap.

4. In developing any future guidance or requirements for agency impact requirements, OIRA should carefully consider the cumulative impact of those requirements and, to the extent possible, integrate them into existing formats for analysis.
5. In the preamble to each significant proposed or final rule, agencies should briefly indicate which of the regulatory analysis requirements apply to the particular rulemaking under consideration. Agencies should provide a brief explanation of why relevant requirements are not triggered. In so doing, the agency may utilize the list of regulatory analysis requirements prepared by OIRA (as described in the first recommendation) and provide a brief explanation for why each relevant requirement does not apply. An abbreviated example of such a chart for a hypothetical regulation that might be construed to have potential effects on the economy, states, and the environment but that ultimately does not trigger any of the associated regulatory analysis requirements is provided below¹²:

Executive Order 12,866	Proposed rule will have an annual impact on the economy of \$60 million and therefore does not meet the \$100 million threshold; the proposed rule does not otherwise trigger the Executive Order's analysis requirement.
Executive Order 12,898	Data indicates that the proposed rule does not have disproportionately high and adverse health or environmental effects on minority or low-income populations.

¹² As a general matter, the various regulatory analysis requirements will generally 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

Executive Order 13,132	Proposed rule primarily affects private manufacturers, and will therefore not impose substantial direct compliance costs on State or local governments.
------------------------	---

6. Congress and the President should continue to reevaluate the appropriate coverage of crosscutting analytical requirements. Among other things, that reevaluation should focus on the appropriate level of discretion agencies should possess to determine whether or not such requirements are triggered.¹³ The Conference takes no position on whether Congress and the President should eliminate analysis requirements that accord a high degree of discretion to agencies in determining their applicability, curtail the level of agency discretion, or pursue some other course.

7. Congress and the President should index any monetary thresholds for analysis to inflation.¹⁴ OIRA should annually publish a list identifying which monetary thresholds are affected and the amount by which they must be adjusted in response to inflation.

8. The Office of Management and Budget should consider amending Circular A-4 so as to tailor the type of regulatory analysis to the type of rule at issue. Traditional cost-benefit analysis seems most appropriate for rules that would impose high annual compliance costs (at an

¹³ See, e.g., U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to be Clarified*, GAO-01-669T (Apr. 24, 2001); U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirement Vary*, GAO/GCD-99-55 (Apr. 2, 1999); U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GCD-94-105 (Apr. 27, 1994); U.S. General Accounting Office, *Regulatory Flexibility Act: Internal Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16 (Jan. 11, 1991).

¹⁴ Beginning with President Carter's issuance of Executive Order 12,044 in 1978, a regulation that has an annual impact on the economy exceeding \$100 million must be analyzed to determine whether the proposed regulation is necessary and whether it is the least burdensome alternative (and, pursuant to later executive orders, whether its purported benefits exceed associated costs). This threshold has been reaffirmed in subsequent executive orders, including EO 12,291 (Reagan), EO 12,866 (Clinton), and EO 13,563 (Obama), though it has not been indexed for inflation. As a result, more rules are currently covered than would have been covered at the time that these executive orders were issued. In contrast, the \$100 million threshold in UMRA is indexed for inflation. See also Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 104-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

identified level indexed to inflation) or that would result in major increases in costs or prices. Alternative types of analyses (more in the nature of accounting balance sheets) appear more appropriate for rules simply increasing or decreasing federal transfer payments (e.g., Medicare reimbursements or grants-in-aid) by the indexed amount or setting fee structures (e.g., for nuclear power plant inspections) that are expected to produce at least the indexed amount in annual revenues. Rules that qualify as “major” or “economically significant” merely because they stimulate consumer spending (e.g., setting migratory bird hunting seasons) might not be subject to any special analysis requirement.