Agency Economists

Committee on Regulation

Proposed Recommendation for Committee | October 17~~September 25~~, 2019

For more than four decades, executive branch agencies[1] have been required to conduct a regulatory impact analysis (RIA) when they develop a "significant regulatory action"—a rule that is likely to have an annual economic impact exceeding $100 million.[2] "Significant regulatory actions" must be accompanied by an explanation of the need for and potential benefits and costs of the regulation.[3] Some executive branch and independent agencies are also subject to statutory requirements for benefit-cost analysis or other forms of economic analysis, which may apply to certain programs or to all rules they promulgate.[4]

The economic analysis agencies produce ~~in response to these legal requirements is~~ can be an extremely valuable tool for anticipating and evaluating the likely consequences of proposed

---

[1] ~~In general~~As used in this Recommendation, the term "agency" ~~as used in this Recommendation~~ refers to ~~a~~the specific governmental unit ~~with statutory authority for the development of regulations~~that is conducting analysis in connection with regulations it may issue, rather than referring to the larger parent agency in which some such units are embedded ~~such as~~ (e.g., the Occupational Safety and Health Administration ~~, and not to~~in lieu of the ~~larger Departments, such as the~~ Department of Labor~~, in which they may be embedded~~). Of course, when the parent agency is itself issuing a rule, the term "agency" is intended to encompass it.

[2] Exec. Order No. 12,044, *Improving Government Regulation*, 43 Fed. Reg. 12,661 (March 23, 1978); Exec. Order No. 12,291, *Federal Regulation*, 46 Fed. Reg. 13,193 (Feb.17, 1981), Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993), Exec. Order No. 13,563, *Improving Regulatory Planning and Review*, 76 Fed. Reg. 3,821 (Jan. 18, 2011). In addition to planned rules the will have an annual economic impact of $100 million or more, a "significant regulatory action" includes any regulatory action that will (a) adversely affect the economy or segments of the economy, (b) interfere with another agency's actions, (c) materially alter the budget or affect required transfer payments, or (d) raise novel legal or policy issues arising out of legal mandates. Exec. Order No. 12,866 §3(f)(1)-(4).

[3] Exec. Order No. 12,866, *supra* note 2~~1~~, §6(a)(3)(B).

[4] *See, e.g.*, 7 U.S.C. § 19(a) (CFTC); 15 U.S.C. § 77b(b) (SEC); 15 U.S.C. § 2058(f) (CPSC). All federal agencies, moreover, are obligated to participate in a regulatory planning process that requires a preliminary impact analysis developed at least in part by agency economists. Exec. Order No. 12,866, *supra* note 2, §4(c).

Formatted: Font: Times New Roman

Formatted: Font: Times New Roman

Formatted: Font: Times New Roman, 10 pt

Formatted: Font: Times New Roman, 10 pt

Formatted: Font: Italic

Formatted: Font: 10 pt, Italic

rules.[5] ~~An agency's economic analysis sometimes assesses other potential results of a regulation, such as cost-effectiveness, economic feasibility, or distributional consequences.~~

Several Conference recommendations have sought to improve the quality and transparency of agency economic analysis.[6] The Conference has not, however, addressed the organizational structure of the economic analysis function, an issue that may to a degree be influenced by existing executive order requirements for specific agency structures to oversee required impact analyses.[7]

At present, some agencies task a centralized unit of economists with conducting all regulatory economic analyses ("functional" organization). Examples include the Federal Communications Commission's Office of Economics and Analytics and the Federal Trade Commission's Bureau of Economics.[8] Both units are independent of the offices that write regulations, but they conduct economic analyses to inform decisions about regulations. At other agencies, economists are spread amongst an agency's program divisions, working alongside

[5] The basic elements of this analysis include (1) an assessment of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2003). An agency's economic analysis sometimes assesses other potential results of a regulation, such as cost-effectiveness, economic feasibility, or distributional consequences.

[6] *See, e.g.*, Admin Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2,139 (Feb. 6, 2019); Admin Conf. of the U.S., Recommendation 2013-2, *Benefit-Cost Analysis at Independent Regulatory Agencies*, 78 Fed. Reg. 41,352 (July 10, 2013); Admin Conf. of the U.S., Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801 (Aug. 10, 2012); Admin. Conf. of the U.S., Recommendation 88-7, *Valuation of Human Life in Regulatory Decisionmaking*, 53 Fed. Reg. 39,586 (Oct. 11, 1988); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28,364 (July 12, 1985).

[7] For example, Executive Order 12,866, *supra* note 2, §6(a)(2), requires that agencies designate a Regulatory Policy Officer who "shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive Order." *See also* Exec. Order No. 13,777, *Enforcing the Regulatory Reform Agenda*, §2(a), 82 Fed. Reg. 12,285 (March 1, 2017) (requiring agencies to designate a Regulatory Reform Officer and a Regulatory Reform Task Force to "oversee the implementation of regulatory reform initiatives and policies . . . ."). An early Conference study (that did not ultimately produce a recommendation) by then Professor Stephen Breyer advocated for a more prominent role for economists in agencies and erecting a centralized apparatus for review of economic analyses (a proposal that came to fruition with the creation of the Office of Information and Regulatory Affairs (OIRA)). Stephen G. Breyer, *Role of Economic Analysis in the Regulatory Agencies* (Oct. 12, 1973) (report to the Admin. Conf. of the U.S.).

[8] Jerry Ellig, Agency Economists 13, 21 (Sept. 3, 2019) (report to the Admin. Conf. of the U.S.), https://acus.gov/report/.

Formatted: No Spacing, Space After: 0 pt

Formatted: Font: Times New Roman, 10 pt

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Italic

other rule development staff~~rule-writers and attorneys~~ ("divisional" organization). At the ~~Environmental Protection Agency (EPA)~~ Department of Energy, for example, the economists who produce RIAs that accompany regulations ~~are usually located~~ work under the supervision of ~~in~~ the program offices ~~(Air, Water, etc.)~~ that write the regulations. ~~Finally, many~~ Still other agencies have economists dispersed through various program divisions, as in the divisional mode of organization, but also have economists in a central office that reviews draft regulations and the accompanying economic analyses ("hybrid" organization). Examples of hybrid organizations include the National Center for Environmental Economics at the Environmental Protection Agency, the chief economist's office in the Department of Agriculture, and the ~~d~~Director of ~~r~~Regulatory ~~a~~Analysis in the Office of the General Counsel at the Department of Transportation.[9] Of course, an agency may have multiple distinct entities tasked with performing economic analysis, and each such entity may fall under a different organizational heading. This is especially true with large or geographically widespread agencies.

~~While Each of these distinct organizational structures may blend together to some degree within large or geographically diverse agencies, e~~Each of these structures has inherent strengths and weaknesses.[10] For instance, a functional organization is likely to limit the number of day-to-day interactions that economists have with rule-writers, lawyers, and other non-economists within the agency, whereas a divisional organization may impair the objectivity of economic analysis if the economists seek to avoid conflict with their non-economist supervisors. Decision-making authorities, practices, and procedures can be crafted to support the strengths and mitigate the weaknesses of the chosen organizational structure. The challenge for each agency is to find the blend of organizational structure, practices, and procedures that will enable the agency to successfully fulfill its economic analysis ~~obligations~~ objectives.

This Recommendation offers best practices and factors for agencies to consider in designing their economic analysis programs. It does not recommend that agencies should afford greater prominence to economics than to any other discipline in the rule development process. It

[9] *Id*. at 30.

[10] *Id*. at 9.

Commented [KH1]: DOE is a more appropriate example of an agency with a purely divisional organizational structure, while EPA has a hybrid structure.

Formatted: Font: Times New Roman

does not recommend any one form of organization over another and is sensitive to the fact that each agency will want ~~need~~ to tailor its economic analysis program to fit its individual needs. Rather, it focuses on ways to ensure that structure, practices and procedures complement each other, forming a coherent system for producing high-quality economic analysis that informs regulatory decisions and is consistent ~~complies~~ with the elements set forth in relavant Executive Orders and OMB guidance (*e.g.*, ~~requirements of~~ Executive Order 12,866 and ~~and~~ OMB Circular A-4), and both agency-specific and cross-cutting statutes ~~such as the~~ (e.g., the Regulatory Flexibility Act~~,~~[11]) that require economic analysis.

Formatted: Font: Italic

Formatted: Font: Times New Roman

[11] 5 U.S.C. §§ 601-612.

Formatted: Font: Times New Roman

Formatted: Font: Times New Roman, 10 pt

Formatted: Font: 10 pt

Formatted: Font: Times New Roman, 10 pt

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION

Agency Consideration of Structure and Function of Economists

> **Commented [KH2]:** The Committee voted to retain language that is structure-specific, but recognizes that individual elements can apply across structures.

1. Agencies that ~~are required by executive order or statute to~~ conduct regulatory impact analysis or another form of economic analysis should consider whether the existing organizational structure for economists allows the agency to produce ~~sound~~~~successfully fulfill its~~ objective, consistent, and high-quality economic analysis ~~obligations~~. Regulatory Policy Officers (or analogous agency officials) ~~w~~should meet with relevant decisionmakers to assess the organizational structure's contribution to the quality and use of economic analysis.

2. In reviewing their organizational structures, agencies should consider how best to provide their economists ~~the pros and cons of each structure. Ideally, the organizational structure should give economists~~ the independence to develop objective regulatory analysis that is consistent with best professional practice~~,~~ and ensures compliance with all ~~as well as~~ analytic requirements ~~consistent with the requirements of~~ (such as those contained in Executive Order 12,866 and OMB Circular A-4~~;~~). ~~and~~ Organizational structure should also promote the flow of ~~this~~ analysis to decision-makers, including ~~rule-writers and attorneys~~ rule-writers and other rule development staff as early in the decision making process as feasible. Relevant ~~pros and cons~~ organizational structures include the following:

> **Commented [KH3]:** The Committee voted in principle to remove the "pro and con" language and use alternative phrasing.

   a. "Functional" organizations that have a centralized economics unit tend to have the following strengths and weaknesses:

      1) ~~Pros: Economists~~ This structure may enable economists~~be able~~ to produce more objective, consistent, and high-quality analysis due to greater independence, collaboration with peers, economies of scale, ongoing professional development, and recruiting advantages.

2) ~~Cons:~~ Because they are often physically separated from day-to-day events in the program offices, e~~E~~conomists may be less informed about critical details of pending regulatory issues and lack interactions with other experts in the development of a rule.~~problems~~. The physical separation may also ~~enable~~create an incentive for ~~and~~ the program office to ~~more strongly~~ ~~may be better able to~~ resist collaboration with the central economics office.

b. "Divisional" organizations that locate economists in program offices tend to have the following ~~features~~strengths and weaknesses:

1) ~~Pros:~~ This structure can allow e~~E~~conomists ~~may~~ to produce analysis ~~more directly relevant~~ that is closely focused ~~to~~ on program-specific regulatory issues,~~decisions~~ and can ~~have~~ facilitate ~~early~~earlier involvement in the development of regulations.

2) ~~Cons:~~ Economists working within this structure may feel pressure to produce less objective analysis in order to support program office decisions, and they may have fewer opportunities to develop professional skills through interaction with ~~other~~ economists located in other offices.

c. "Hybrid" organizations that locate economists in program offices but also have a centralized economic review function ~~may~~tend to have the following ~~features~~strengths and weaknesses:

1) ~~Pros: M~~This structure may combine the benefits of divisional organization with a centralized quality control function and expanded opportunities for skill development.

2) ~~Cons:~~ Economists working in program offices ~~can~~may still be marginalized by other rule development staff and face career disincentives to informing the central economics office ~~of that fact~~when they disagree with the quality or objectivity of a regulatory analysis.

3. Agencies that are standing up a new economic analysis unit or that are considering restructuring an existing economic analysis unit ~~should~~ may wish to ~~carefully consider~~ evaluate these ~~pros and cons~~ potential strengths and weaknesses in deciding what type of

structure ~~they wish~~ to adopt. Agencies should further consider taking specific steps to promote high-quality, objective economic analysis. Although these recommended steps may be associated with specific organizational structures, they may also generally apply to the development of economic analyses across all organizational structures.

~~4. Agencies that are not currently required to conduct economic analysis but wish to build or improve their capabilities to do so should carefully consider each of these options above.~~

~~**Structure Specific Recommendations**~~

~~5.~~4. ~~Particularly relevant to A~~agencies ~~that have chosen a more functional organization structure, should consider taking t~~The following steps can be taken to minimize the ~~potential drawbacks~~risks associated with ~~that approach~~walling off economists in an independent unit, which are especially likely to emerge when an agency has adopted a functional structure:

a. ~~Ensure that economists are~~ The agency should consider including economists ~~included~~ on multidisciplinary regulatory development teams, along with ~~rule-writers and attorneys~~ other rule development staff, from the outset;

b. The agency should ~~Ensure that economists have~~ provide economists with a path to make independent recommendations to higher-level decision-makers; and

c. ~~Give~~ The agency should allow the head of the economics office the opportunity to express concerns about the quality of economic analysis to the agency head.

~~6.~~5. ~~Particularly relevant to A~~agencies ~~that have chosen a more divisional organization, should consider taking t~~The following steps can be taken to minimize the ~~potential drawbacks~~risks associated with ~~that approach~~diluting economists' influence by dispersing them through the agency, which are especially likely to emerge when an agency has adopted a divisional structure:

a. Provide, where feasible, that economists in the program offices working within a multidisciplinary team operate under the general supervision of a senior-level

Commented [KH4]: The Committee voted to make these changes.

Commented [RB5]: This seems to match what the committee voted to do, but I'm not sure it really works.

First, I see "taking specific steps to promote high-quality, objective economic analysis" as conceptually distinct from "considering the strengths and weaknesses" of the various forms. It should be its own recommendation.

Second, I don't really follow the sentence starting "Although"—there are not "recommended steps" in recommendation 2; it's just a listing of the pros and cons of the various structures. If anything, this fits better after the next set of recommendations (i.e., after recommendation 5).

Commented [KH6]: The Committee voted to strike this paragraph in its entirety.

Commented [KH7]: The Committee voted to strike this section heading.

Commented [KH8]: The Committee emphasized the importance of independence of the economist in the rule development process.

economist~~ within the agency~~. [ML alternative language: Ensure that the supervisory structure does not create disincentives for economists to offer objective, independent economic analysis.]

b. Empower a central economics office at the agency level to:

1) Serve as a quality check on economic analyses developed by the program offices;

2) In coordination with agency Regulatory Policy Officers (or analogous agency officials), ~~S~~standardize and disseminate high-quality analytical methods; and

3) Conduct longer-term research and development to inform future regulatory proceedings

c. Provide~~Give~~ the central economics review office with a pathway~~the opportunity~~ to express concerns about the quality of economic analysis to the agency head.

Recommendations Applicable to All Organizational Forms

~~7.~~6.To promote meaningful consideration of economic analysis early in the decision-making process, agencies should consider developing guidance clarifying that economists will be involved in regulatory development before significant decisions about the regulation are made. Agencies should make this guidance publicly available by posting it on their websites.

~~8.~~7.~~To further promote meaningful consideration of economic analysis early in the decision-making process, agencies planning unusually large or complex rulemakings should consider issuing an advance notice of proposed rulemaking, a notice of data availability, or some other form of public notice that includes a preliminary economic analysis of alternatives during the development of agency regulatory plans and budgets under applicable executive orders, a~~Agencies should involve their relevant economic units ~~at this stage~~in the process of developing agency regulatory plans and budgets under applicable executive orders in order to promote meaningful consideration of economic analysis while a rule is being shaped.

~~9.~~8. Agency~~ies should consider assigning~~ Regulatory Policy Officers or other analogous agency officials should ~~rely on a specific economics unit with the responsibility~~ collaborate with agency economists to articulate relevant analytical methods and offer training, workshops, and assistance in economic analysis to others within the agency.