ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Economists

Committee on Regulation

Proposed Recommendation | December 12, 2019

Federal regulatory agencies are subject to various requirements to conduct economic analysis when they prepare new regulations. Executive Order 12,866[1] requires that agencies (other than what it designates as "independent regulatory agencies")[2] conduct a "regulatory impact analysis" (RIA) for their "significant regulatory actions," which include regulations likely to have an annual economic impact exceeding $100 million.[3] The RIAs that accompany these regulations explain the potential benefits and costs of the planned regulation.[4] Many of these agencies, along with several independent regulatory agencies, are likewise required by statutes and other executive orders[5] to conduct some form of economic analysis. The analysis requirements imposed by these statutes and executive orders are cross-cutting in certain cases

[1] Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[2] It excludes "independent regulatory agencies"—those listed in 44 U.S.C. § 3502(5)—from the requirement to prepare an RIA for their rulemakings. *See* Exec. Order No. 12,866, *supra* note 1 § 3(b). These independent agencies include most regulatory boards and commissions (*e.g.*, the National Labor Relations Board, the Federal Energy Regulatory Commission, and the Consumer Product Safety Commission).

[3] *Id*. § 3(f)(1). "Significant regulatory action" also 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. *Id*. §§ 3(f)(2)–(4).

[4] *Id*. § 6(a)(3)(B).

[5] *See*, *e.g.*, Exec. Order No. 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7,629 (Feb. 11, 1994), Exec. Order No. 13,132, *Federalism*, 64 Fed. Reg. 43,255 (Aug. 10, 1999), Exec. Order No. 13,272, *Proper Consideration of Small Entities in Agency Rulemakings*, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

(e.g., under the Regulatory Flexibility Act[6] and the Unfunded Mandates Reform Act[7]), and agency- or program-specific in other cases.[8]

The regulatory economic analysis agencies produce can be an extremely valuable tool for anticipating and evaluating the likely consequences of proposed and final regulations and informing agency decisions.[9] Several Conference recommendations have sought to improve the quality and transparency of agency regulatory economic analysis.[10] The Conference has not, however, addressed the organizational structure[11] of the economic analysis function.[12]

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[6] 5 U.S.C. §§ 601–612.

[7] 2 U.S.C. § 1501 *et seq*.

[8] *See e.g.*, 7 U.S.C. § 19(a) (Commodity Futures Trading Commission), 15 U.S.C. § 77b(b) (Securities Exchange Commission), 15 U.S.C. § 2058(f) (Consumer Product Safety Commission); *see also* Curtis Copeland, Regulatory Analysis Requirements: A Review and Recommendations for Reform (Mar. 3, 2012) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/curtis-copelands-report-regulatory-analysis-requirements. All federal agencies, moreover, must participate in a regulatory planning process that requires a preliminary impact analysis developed at least in part by agency economists. *See* Exec. Order No. 12,866, *supra* note 1, § 4(c).

[9] 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.

[10] *See, e.g.*, Admin Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2139 (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).

[11] The way agencies structure their economic impact analyses can, for example, be influenced by executive orders. Executive Order 12,866 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." Exec. Order No. 12,866, *supra* note 1, § 6(a)(2); *see also* Exec. Order No. 13,777, *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12,285 § 2(a) (Mar. 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").

[12] An early Conference study by then-Professor Stephen Breyer advocated for a more prominent role for economists in agencies and erecting a centralized apparatus for review of economic analysis (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 126, 129 (Oct. 12, 1973) (report to the Admin. Conf. of the U.S.).

At present, some agencies[13] 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.[14] 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 distributed amongst an agency's program divisions, working alongside other rule development staff ("divisional" organization). At the Department of Energy, for example, the economists who produce RIAs that accompany regulations work under the supervision of the program offices that write the regulations. Still other agencies have economists distributed 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 Office of the Chief Economist in the Department of Agriculture, and the Director of Regulatory Analysis in the Office of the General Counsel at the Department of Transportation.[15] 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.

Each of these structures has inherent strengths and weaknesses. For instance, a functional organization may 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

[13] As used in this Recommendation, the term "agency" refers to the specific governmental unit that conducts the regulatory analysis, rather than to a parent agency (e.g., the Occupational Safety and Health Administration rather than the Department of Labor). Of course, when the parent agency is itself issuing a regulation, the term "agency" is intended to encompass it.

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

[15] *Id*. at 30.

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 objectives.

This Recommendation offers factors for agencies to consider in designing their economic analysis programs. It does not recommend that agencies should afford greater or lesser prominence to economics as compared to any other discipline in the rule development process. It also does not address whether agencies should adopt any form of organization over another and recognizes that each agency will want 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 with the elements set forth in relevant executive orders, Office of Management and Budget guidance (e.g., Executive Order 12,866 and OMB Circular A-4), and both agency-specific and cross-cutting statutes that require economic analysis.

RECOMMENDATION

Agency Consideration of Structure and Function of Economists

1. Agencies that conduct regulatory impact analysis or another form of economic analysis should consider whether their existing organizational structure for economists allows the agency to produce objective, consistent, and high-quality economic analysis. Regulatory Policy Officers (or analogous agency officials) should meet with relevant decision makers 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 independence to develop objective regulatory analysis consistent with best professional practice to ensure compliance with all analytic requirements (such as those contained in Executive Order 12,866 and Office of Management and Budget Circular A-4). The organizational structure should also promote the flow of information

among decision makers, rule-writers, economists, and other rule development staff as early in the decision-making process as feasible. Relevant organizational structures include the following:

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

    1) This structure may enable economists 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) This structure may result in economists being physically separated from day-to-day events in the program offices, thereby causing them to be less informed about critical details of pending regulatory issues. The physical separation may also create an incentive for the program office to resist collaboration.

b. Divisional organizations, which locate economists in program offices, tend to have the following strengths and weaknesses:

    1) This structure can allow economists to produce analysis that is closely focused on program-specific regulatory issues and can facilitate earlier involvement in the development of regulations.

    2) 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 economists located in other offices.

c. Hybrid organizations, which locate economists in program offices but also have a centralized economic review function, tend to have the following strengths and weaknesses:

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

        2) Economists working in program offices may still be marginalized by other rule development staff and face career disincentives to informing the central economics office 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 may wish to evaluate these potential strengths and weaknesses in deciding what type of structure to adopt. Agencies should further consider taking specific steps to promote high-quality, objective economic analysis. Although these steps may be associated with specific organizational structures, they may also generally apply to the development of economic analyses across all organizational structures.
4. The following steps can be taken to minimize the risks associated with walling off economists in an independent unit, which are especially likely to emerge when an agency has adopted a functional structure:
    a. The agency should consider including economists on multidisciplinary regulatory development teams, along with other rule development staff, from the outset;
    b. The agency should provide economists with a process to ensure their analysis is provided to higher-level decision makers; and
    c. The agency should allow the head of the economics office to express concerns about the quality of economic analysis to the agency head.
5. The following steps can be taken to minimize the risks associated with diluting economists' influence by dispersing them through the agency, which are especially likely to emerge when an agency has adopted a divisional structure:
    a. The agency should ensure that the supervisory structure does not create disincentives for economists to offer objective economic analysis;
    b. The agency, to the extent feasible, should 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), standardize and disseminate high-quality analytical methods; and
3) Conduct longer-term research and development to inform future regulatory proceedings.

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

Recommendations Applicable to All Organizational Forms

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.
7. Agencies should involve their relevant economic units 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.
8. Agency Regulatory Policy Officers or other analogous agency officials should collaborate with agency economists to articulate relevant analytical methods and offer training, workshops, and assistance in economic analysis to others within the agency.