ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Economists

Committee on Regulation

Proposed Recommendation for Committee | September 25, 2019

For more than four decades, executive branch agencies have been required to conduct a regulatory impact analysis (RIA) when they develop "economically significant regulations," defined as rules that are likely to have an annual economic impact exceeding $100 million.[1] Other "significant regulations" issued by executive branch agencies, defined to include all "economically significant regulations" and a handful of other relatively important regulations, must be accompanied by an explanation of the need for and potential benefits and costs of the regulation.[2] 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.[3]

The economic analysis agencies produce in response to these legal requirements is an extremely valuable tool for anticipating and evaluating the likely consequences of proposed rules.[4] An agency's economic analysis sometimes assesses other potential results of a regulation, such as cost-effectiveness, economic feasibility, or distributional consequences.

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[1] 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).

[2] Exec. Order No. 12,866, *supra* note 1, §6(a)(3)(B). 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. *Id.* §3(f)(1)-(4).

[3] *See, e.g.*, 7 U.S.C. § 19(a) (CFTC); 15 U.S.C. § 77b(b) (SEC); 15 U.S.C. § 2058(f) (CPSC).

[4] 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

Several Conference recommendations have sought to improve the quality and transparency of agency economic analysis.[5] The Conference has not, however, addressed the organizational structure of the economic analysis function.[6]

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.[7] 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 rule-writers and attorneys ("divisional" organization). At the Environmental Protection Agency (EPA), for example, the economists who produce RIAs that accompany regulations are usually located in the program offices (Air, Water, etc.) that write the regulations. Finally, many 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 include the National Center for Environmental Economics at the EPA, the chief economist's office in the Department

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proposed action and the main alternatives. See Office of Management and Budget, Circular A-4, "Regulatory Analysis" 2 (Sept. 17, 2003).

[5] *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).

[6] 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.).

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

of Agriculture, and the director of regulatory analysis in the Office of the General Counsel at the Department of Transportation.[8]

Each of these organizational structures has strengths and weaknesses.[9] 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.

This Recommendation offers best practices and factors for agencies to consider in designing their economic analysis programs. It does not recommend any one form of organization over another and is sensitive to the fact that each agency will 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 complies with the requirements of Executive Order 12,866 and OMB Circular A-4.

RECOMMENDATION

Agency Consideration of Structure and Function of Economists

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

[8] *Id*. at 30

[9] *Id*. at 9.

organizational structure for economists allows the agency to successfully fulfill its economic analysis obligations.

2. In reviewing their organizational structures, agencies should consider the pros and cons of each structure. Ideally, the organizational structure should give economists the independence to develop regulatory analysis consistent with the requirements of Executive Order 12,866 and OMB Circular A-4; and promote the flow of this analysis to decision-makers, including rule-writers and attorneys. Relevant pros and cons include the following:
    a. "Functional" organizations that have a centralized economics unit
        1) Pros: Economists may be able to produce more objective, consistent, and high-quality analysis due to greater independence, collaboration with peers, economies of scale, and recruiting advantages.
        2) Cons: Economists may be less informed about critical details of regulatory problems and the program office may be better able to resist collaboration.
    b. "Divisional" organizations that locate economists in program offices
        1) Pros: Economists may produce analysis more directly relevant to regulatory decisions and can have early involvement in the development of regulations.
        2) Cons: Economists may produce less objective analysis in order to support program office decisions, and they may have fewer opportunities to develop skills through interaction with other economists.
    c. "Hybrid" organizations that locate economists in program offices but also have a centralized economic review function:
        1) Pros: May combine the benefits of divisional organization with a centralized quality control function and opportunities for skill development.
        2) Cons: Economists in program offices can still be marginalized and face career disincentives to informing the central economics office of that fact.
3. Agencies that are standing up a new economic analysis unit or that are considering restructuring an existing economic analysis unit should carefully consider these pros and cons in deciding what type of structure they wish to adopt.

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. Agencies that have chosen a functional organization should consider taking the following steps to minimize the potential drawbacks associated with that approach:
    a. Ensure that economists are included on multidisciplinary regulatory development teams, along with rule-writers and attorneys, from the outset;
    b. Ensure that economists have a path to make independent recommendations to higher-level decision-makers; and
    c. Give the head of the economics office the opportunity to express concerns about the quality of economic analysis to the agency head.
6. Agencies that have chosen a divisional organization should consider taking the following steps to minimize the potential drawbacks associated with that approach:
    a. Provide, where feasible, that economists in the program offices operate under the supervision of a senior-level economist within the agency.
    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) Standardize and disseminate high-quality analytical methods; and
        3) Conduct longer-term research and development to inform future regulatory proceedings
    c. Give the central economics review office the opportunity to express concerns about the quality of economic analysis to the agency head.

Recommendations Applicable to All Organizational Forms

7. 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. 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.
9. Agencies should consider assigning a specific economics unit with the responsibility to articulate relevant analytical methods and offer training, workshops, and assistance in economic analysis to others within the agency.