From: Alan Morrison
Sent: Tuesday, April 02, 2013 5:34 PM
To: Reeve Bull
Subject: Re: Documents for April 2 Meeting

I do not have a word document and so I will make my few comments about each draft in this email.

* * * *

Independent Agencies & Cost-Benefit

Page 3, last sentence. Whose awareness are we talking about. Should it by "of" not "by" reg agencies? And who does not widely understand whatever it is that is being understood?

Page 4, 1st para, like 4 - "diffusion" should be "dissemination". I do not understand the next sentence starting with The Admin Conf - I would surely delete the tradeoffs phrase b/c it seems confusing

Next para, second line, delete "straightforward" - redundant - all ACUS proposals meet that test. Later in that para, sentence beginning The recommendation - words seems to be missing after establish or perhaps just delete "as." Further in that sentence, I would add "its own" before reg priorities.

Thanks all for now.

I have two suggestions: when you send around drafts, at least for comm, send word version. Second, your copy that you use at the meeting should be triple space with wide margins so that you can interlineate all the comments from both before the meeting and after it. Very hard to keep track of them all.

Good luck, Alan

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

COMMISSIONER NANCY A. NORD

April 4, 2013

Paul R. Verkuil, Chairman
H. Russell Frisby, Chairman, Committee on Regulation
Administrative Conference of the United States
1120 20th Street, N.W., Ste. 706 South
Washington, D.C. 20036

VIA E-MAIL

Dear Paul and Russell:

Thank you for giving me the opportunity to participate in the recent meeting of the Committee on Regulation on the use of benefit-cost analysis (BCA) at independent agencies. This letter summarizes my oral comments on the use of BCA at the U.S. Consumer Product Safety Commission and makes suggestions on the Committee's draft recommendations.

For over 30 years, the CPSC has had the statutory requirement, when issuing product-specific safety rules, to do BCAs that include the review of regulatory alternatives. Any safety rule we issue must impose the least burdensome requirement that adequately addresses the risk that prompts the rule. In 2008, Congress enacted a statute that made this analysis optional for a particular class of products.[20] Since that time the agency has not regularly done BCA for safety rules or for rules of general applicability. We generally have done the analyses required by the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA).

In the eight years I have served as a Commissioner at the CPSC, I have been called upon to deliberate on rules that have been subject to benefit-cost analysis and those that have not. In my experience, BCA has proved

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[20] Consumer Product Safety Improvement Act, Pub. L. 110-314, 122 Stat. 3016 (Aug. 14, 2008).

to be a very useful tool in helping frame rational rules that address specific quantified risks. I am also convinced that the use of BCA has helped achieve buy-in, if not support, from those being regulated. In contrast, where we have declined to do this analysis, costs and benefits have not been quantified and ways to lower costs have not been systematically addressed in the context of the rule. As a result we have imposed regulatory burdens that are more substantial than needed.

With this experience in using BCA as a regulatory tool, I offer the following comments about the draft recommendations:

- **Recommendation 3**—The suggestion that agencies consult with OIRA is useful, especially for small agencies such as the CPSC which has limited capacity for economic analysis. In addition, such consultation can provide a way to connect costs and benefits to larger priorities.
- **Recommendation 5**—I agree that BCA must include an analysis of regulatory alternatives if it is to be a useful tool for regulators. I believe that a fourth principle could be added that would encourage an explanatory statement if the agency picks an alternative that is not the most cost-effective.
- **Recommendation 6**—To the extent that costs are imposed by statutory mandates, I believe that it is helpful to call out those costs to the extent possible. While BCA is a tool for regulators, it also serves to inform the public and the Congress. In the case of the CPSC, in 2010 we proposed a rule that did not go through a full BCA but the RFA analysis we did do pointed to extraordinary costs being imposed by a rule mandated by Congress and augmented with additional requirements by the agency.[21] Congress's reaction was to pass Public Law 112-28 which directed the agency to seek ways to lower the costs associated with the rule and report to Congress if we needed additional authorities to achieve such results.[22] I give this as an example of positive Congressional reaction to having an economic analysis (albeit, an incomplete one) that included the costs associated with complying with statutory mandates as interpreted by the agency.

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[21] *See* Testing and Labeling Pertaining to Product Certification, 75 Fed. Reg. 28,336 (proposed May 10. 2010) (to be codified at 16 C.F.R pt. 1107).

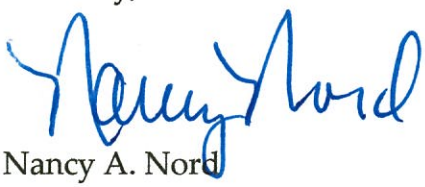
[22] 125 Stat. 273 (Aug. 12, 2011).

- **Recommendation 9**—I would recommend either deleting this recommendation entirely or substantially changing it. First, it could be read to mean that ACUS takes a position on the question of the applicability of executive orders to independent agencies. While this is an important legal question which should be resolved, this recommendation should be neutral on that question. I am concerned by the recommendation that the analysis be limited to major rules. For an agency like the CPSC—which issues few "major" rules—our safety rules can have a significant impact on industry sectors and product classes, and it is for that reason that Congress requires such analyses of us. These are exactly the types of rules that benefit from this analysis. Should this recommendation stand as written, I have no doubt that it will be used to support arguments that would limit the CPSC's use of BCA.

I recognize that ACUS is not taking a position on whether the use of BCA should be expanded. From my experience, doing this analysis is an important tool when trying to reach decisions about regulations. However, if it is to be a useful tool, the analysis must be done in a neutral manner, and not used only when it points in the direction of a favored result.

Again, thank you for affording me the opportunity to participate in your discussion of this important topic.

Sincerely,



Nancy A. Nord

Commissioner

U.S. Consumer Product Safety Commission

[Susan Dudley Comment - 4/10/13]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Benefit-Cost Analysis at Independent Regulatory Agencies

Committee on Regulation - Draft Recommendation

(Apr. 4, 2013)

Regulatory analysis attempts to understand the likely effects of regulations before they are issued. Office of Management and Budget (OMB) Circular A-4 describes benefit-cost analysis (sometimes referred to as cost-benefit analysis) as "a primary tool used for regulatory analysis."[1] Although some regulatory benefits and costs are difficult to quantify or monetize, those preparing such analyses generally attempt to estimate the overall benefits that a forthcoming rule will create as well as the aggregate costs that it will impose on society, and then determine whether the former justify the latter. Some observers have disputed its utility in rulemaking,[2] but benefit-cost analysis (and other forms of regulatory analysis) can help ensure that decision makers fully contemplate the risks and rewards of any proposed regulatory strategy.[3] Benefit-cost analysis can also improve transparency, helping to ensure that the public and Congress understand why regulatory decisions are made.

Comment [SED1]: Your edits went a long way toward addressing my comment and this intro sentence attempts to clarify that BCA is a tool in the RIA kit

[1] *See* Office of Management and Budget, Circular A-4, September 17, 2003, *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/. The literature on regulatory analysis, including prior recommendations of the Administrative Conference, has used 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. In this recommendation, the term "regulatory analysis" includes a variety of analyses that agencies may prepare before issuing final rules, including (but not limited to) benefit-cost analysis.

[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 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 (Oxford Univ. Press 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.").

For more than 30 years, Cabinet departments and independent agencies like the Environmental Protection Agency have been required by executive orders to conduct benefit-cost analyses for their "major" or "economically significant" rules (e.g., those likely to result in annual costs, benefits, or transfer payments of $100 million or more).[4] In 1981, President Ronald Reagan issued Executive Order (EO) 12,291,[5] which instructed those agencies to analyze the costs and benefits of proposed and final "major rules," and to submit ~~those~~ their rules and analyses to the Office of Information and Regulatory Affairs (OIRA) within OMB before publication in the Federal Register.[6] Subsequent administrations have reaffirmed the importance of benefit-cost analysis and OIRA review in the issuance of such rules. For example, EO 12,866,[7] issued by President Bill Clinton in 1993 and still in effect, requires Cabinet departments and independent agencies to assess the costs and benefits of "~~economically~~ significant" proposed and final rules, and to submit those rules and analyses to OIRA for review.[8] EO 12,866 also states that these agencies should propose or adopt a regulation only after determining that the benefits of the intended regulation justify its costs.[9]

Comment [SED2]: 12291 required all rules, not just major, to be reviewed.

Comment [SED3]: EO 12866 does not limit this to economically significant (nor does it ever define economically significant). See 6(a)(3)(B).

[4] According to OMB Circular A-4, transfer payments are monetary payments from one group to another that do not affect total resources available to society. The most common form is the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, and Medicare or Medicaid funds, and crop payments). In 2010, more than one-third of all major rules were 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.

[5] Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

[6] *Id.* § 3; *see also* Sunstein, *supra* note 3, at __.

[7] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (President Clinton).

[8] Id. § 6(a)(3).

[9] Id. § 1(b)(6). *See also* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (President Obama) (which also states 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) (commending the practice of White House review of agency regulations begun in the Reagan Administration, suggesting guidelines for the enhanced openness of that review, and recommending the reconsideration of existing rules looking toward the repeal of unnecessary regulations).

Independent regulatory agencies[10] have traditionally not been subject to the formal benefit-cost analysis requirements imposed by executive order,[11] although several recent Presidents have encouraged those agencies to voluntarily apply the principles contained in the relevant executive orders.[12] All independent regulatory agencies are subject to certain crosscutting statutes that may require some type of regulatory analysis, such as the Regulatory Flexibility Act[13] and the Paperwork Reduction Act.[14] In addition, some agency organic acts or other statutes require certain independent regulatory agencies to conduct benefit-cost analyses or consider certain economic effects of their regulations, although the requirements vary significantly from agency to agency. For instance, some agencies (e.g., the Consumer Product Safety Commission) are required to prepare a formal regulatory analysis statement that describes expected costs and benefits prior to issuing certain rules.[15] Other agencies (e.g., the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC)) are required to "consider" costs and benefits or other factors associated with their rules, but are nominally under no obligation to prepare a formal benefit-cost analysis.[16] Still other agencies (e.g., the Federal Communications Commission and the Nuclear Regulatory Commission) are not subject to any formal regulatory analysis requirements for most of their rules.

[10] 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., GPO 2012).

[11] Exec. Order No. 12,866, § 3(b), 58 Fed. Reg. 51,735, 51,737 (Oct. 4, 1993).

[12] *See, e.g.*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (which says independent regulatory agencies "should promote" the goal in Exec. Order 13563 of producing a "regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It also says independent regulatory agencies "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.").

[13] 5 U.S.C. §§ 601–12.

[14] 44 U.S.C. §§ 3501–21.

[15] 15 U.S.C. § 2058(f).

[16] 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 prepare a quantitative analysis of regulatory costs and benefits, *see Business 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.

The Conference believes that it is in the interest of the independent regulatory agencies, the executive branch, Congress, and the courts that independent regulatory agencies' current practices relating to benefit-cost analysis be documented. In this light, the report supporting the recommendation examined efforts by independent regulatory agencies to analyze regulatory benefits and costs in recent major rules, and whether the agencies factor benefits and costs into their decision making.[17] The report indicated that, in many instances, independent regulatory agencies quantify at least some of the costs (and, to a lesser extent, the benefits) created by rules they adopt and, in other instances, such agencies usually provide at least qualitative descriptions of the associated benefits and costs. The report also discusses several factors that the agencies said affected their ability to quantify and monetize regulatory costs and benefits. For example, several agencies mentioned the Paperwork Reduction Act approval process as inhibiting their ability to gather the data needed to prepare regulatory analyses in a timely fashion.[18]

~~Although the~~This recommendation ~~takes no position on whether independent regulatory agencies should be subject to additional analytical requirements (e.g., the benefit-cost analysis requirements in EO 12,866), it~~ aims to encourage the broader adoption of certain practices that some independent regulatory agencies (and other agencies) have developed in conducting regulatory analyses. The Administrative Conference recognizes that increasing the attention paid to the impacts of proposed and final rules necessarily requires independent regulatory agencies to make significant tradeoffs among competing priorities, and may result in the substantial use of agency resources, delay in the rulemaking process, and the need to acquire relevant expertise (e.g., hiring staff economists). Nevertheless, some independent regulatory agencies are already subject to benefit-cost and other types of regulatory analysis requirements, and others have voluntarily undertaken such analyses.[19]

Comment [SED4]: I think the edit you and Curtis made was OK, but thought the consensus at the meeting was to be silent on whether ACUS was taking a position.

[17] *See* Curtis W. Copeland, Economic Analysis and Independent Regulatory Agencies (Mar. 29, 2013), at 60-107, available at http://acus.gov/sites/default/files/documents/Copeland%20CBA%20Report%203-29-13.pdf.
[18] *See* Administrative Conference of the United States, Recommendation 2012-4, ¶ 3, *Paperwork Reduction Act*, 77 Fed. Reg. 47,800, 47,808 (Aug. 10, 2012), which recommended that agencies "should use all available processes for OMB approval for information gathering," including "OMB's available generic clearances and fast track procedures.".
[19] *See, e.g.*, Copeland, *supra* note 17, at 99 (describing the FCC's increased usage of benefit-cost analysis in light of EO 13,579).

The recommendation, first, identifies various policies and practices used in several of the independent regulatory agencies and offers a series of proposals to encourage their use in other agencies. Second, the recommendation highlights a series of analytical practices that OMB Circular A-4 recommends to executive agencies, and encourages independent regulatory agencies to consider whether those practices may be useful in their own regulatory programs ~~for major rules~~. The recommendation does not seek to establish a one-size-fits-all approach to regulatory analysis, and each agency must tailor the analyses it conducts to accord with relevant statutory requirements, ~~and~~ its own regulatory priorities, and the potential impact of the analysis on regulatory decision making to ensure proper use of limited agency resources. ~~Finally, although the recommendation takes no position on whether Congress should extend existing regulatory analysis requirements to independent regulatory agencies, it proposes that, to the extent it does so, Congress should focus those requirements on "major" or "economically significant rules," and should provide resources sufficient to achieve that mandate. Focusing on those larger rules would minimize the resources required for analysis,[20] while maximizing the potential impact of those analyses on regulatory decision making.~~

Comment [SED5]: Unnecessary especially given next sentence about tailoring. Note that executive branch agencies are required to prepare and provide OIRA with an assessment of the potential benefits and costs of all significant rules, not just major rules.

Comment [SED6]: I don't think ACUS should draw such a bold line when presidents have not done so. Instead, I suggest addressing this point in the previous sentence that recognizes that different levels and types of analyses will be appropriate in different situations. Drawing an all or nothing line at $1 million doesn't make sense.

~~[20] Between January 2007 and December 2012, federal agencies published 19,246 final rules, of which 485 were considered "major" rules. See Copeland, *supra* note 17, 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.~~

Recommendation

A. Encouraging the Diffusion of Certain Policies and Practices

1. Each independent regulatory agency should develop and keep up to date written guidance regarding the preparation of benefit-cost and other types of regulatory analyses. That guidance should be tailored to the agency's particular statutory and regulatory environment, and should be designed to help ensure that any regulatory analysis the agency undertakes is soundly developed, transparent, consistently conducted, and contributes to agency compliance with applicable statutes and other rulemaking requirements. To accomplish this goal, independent regulatory agencies may choose to adopt or adapt the regulatory analysis practices described in OMB Circular A-4.

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

3. When an independent regulatory agency determines that additional analytical expertise or experience may be helpful to prepare a regulatory analysis, it should, as appropriate, consult with other agencies (e.g., through the Council of Independent Regulatory Agencies) and/or with OIRA. This consultation could address such issues as how certain costs and benefits could be quantified or monetized.

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

B. Highlighting OMB-Recommended Analytical Practices

5. Independent regulatory agencies should consider structuring their regulatory analyses in terms of three general principles: (a) identify the need for the regulation; (b) examine

plausible alternative regulatory approaches; and (c) estimate, to the extent possible, the benefits and costs of ~~the rule and~~ those alternatives.

6. Consistent with applicable laws and agency resources, independent regulatory agencies should consider including in their regulatory analyses not only those actions that are within the agency's statutory discretion, but also those actions that are statutorily mandated. Showing the effects of both types of actions (separately, whenever possible) can improve regulatory transparency and allow the public to understand whether the agency or Congress is responsible for regulatory burden.

7. Subject to the limitations of law and good practice, independent regulatory agencies' analyses should be as transparent and reproducible as possible. In particular, agencies should consider disclosing how the analyses were conducted, posting the analyses on their websites and other appropriate online fora, and summarizing the methods and results in the notice of proposed rulemaking or preamble to a final rule.

8. ~~For "major" or "economically significant" rules, i~~Independent regulatory agencies should consider including in the notice of proposed rulemaking and in the preamble to the final rule a summary statement or table concisely showing the agencies' overall estimates of the benefits, costs, and transfer payments of regulatory actions and alternatives, including any benefits or costs that could not be quantified or monetized.

~~**C. Funding for Additional Benefit-Cost Analysis Requirements**~~

9. ~~If Congress decides to establish new requirements that independent regulatory agencies prepare benefit-cost or other types of analyses of their proposed or final rules: (a) the new analysis requirements should be limited to "major" or "economically significant" rules, and (b) additional funding for those new analyses should be provided to the agencies, either through direct appropriations (in agencies that rely on appropriated funds) or through an authorization to collect additional fees (in agencies authorized to collect fees sufficient to offset their appropriation each year).~~

Comment [SED7]: I didn't notice this before, but it assumes the agency has chosen the rule already, which is inconsistent with 2.

Comment [SED8]: This doesn't capture the point about baseline, which I think is worth making. My recollection was that between Dooling & Rostker, along with committee discussion, we had reasonable language.

Comment [SED9]: Same reasons as explained above

Comment [SED10]: I think this is inappropriate for several reasons, and think it is best just to delete. 1) since we are making no recommendation on whether analysis should be required, this is unnecessary (and even gratuitous). 2) Suggestion that Congress could be the only source of requirements is controversial and unnecessary. 3) limiting analysis to major or economically significant rules is inconsistent with current practice for exec branch agencies, as well as for some independent regulatory agencies (such as CPSC). 4) additional fund requirement presumes that agencies have optimal funds now, and that reallocation of efforts could not improve effectiveness, and we have no evidence of that.

From: Dooling, Bridget C.E. **Sent:** Thursday, April 11, 2013 7:15 PM
To: Reeve Bull
Subject: Independent Agencies & Benefit-Cost Analysis

Hi Reeve –

Regarding Draft Rec #4, we have some suggested edits, consistent with what I tried to articulate at the Committee meeting. I'm starting from the version Susan sent me yesterday:

#4. Consistent with applicable laws and the procedures and flexibilities permitted in the Paperwork Reduction Act, independent regulatory agencies and OIRA should facilitate the timely collection of high quality information ~~needed in~~ that may be used to support the agencies' regulatory analyses.

Just let me know if you have any questions!

Bridget

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Benefit-Cost Analysis at Independent Regulatory Agencies

Committee on Regulation - Draft Recommendation

(Apr. 4, 2013)

~~Office of Management and Budget (OMB) Circular A-4 describes b~~Benefit-cost analysis (sometimes referred to as cost-benefit analysis) ~~as~~is ~~"a primary tool used for regulatory analysis."~~one of the primary tools used in regulatory analysis to anticipate and evaluate the likely consequences of rules.[1] Although some regulatory benefits and costs are difficult to quantify or monetize, those preparing such analyses generally attempt to estimate the overall benefits that a ~~forthcoming~~proposed or final rule w~~ill~~ould create as well as the aggregate costs that it w~~ill~~ould impose on society, and then determine whether the former justify the latter. Some observers have disputed its utility in rulemaking,[2] but benefit-cost analysis (and other forms of regulatory analysis) can help ensure that decisionmakers fully contemplate the risks and rewards of any proposed regulatory strategy.[3] Benefit-cost analysis can also improve transparency, helping to ensure that the public and Congress understand why regulatory decisions are made.

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[1] *See* Office of Management and Budget, Circular A-4, September 17, 2003, *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4/ (hereinafter "OMB Circular A-4"). The literature on regulatory analysis, including prior recommendations of the Administrative Conference, has used 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. ~~In this recommendation, the term "regulatory analysis" includes a variety of analyses that agencies may prepare before issuing final rules, including (but not limited to) benefit-cost analysis.~~

[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 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 (Oxford Univ. Press 2008) ("Although cost-benefit analysis, as

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

For more than 30 years, Cabinet departments and independent agencies like the Environmental Protection Agency have been required by executive orders to conduct benefit-cost analyses for their "major" or "economically significant" rules (e.g., those likely to result in annual costs, benefits, or transfer payments ~~of $100 million or more).~~[4] of $100 million or more). In 1981, President Ronald Reagan issued Executive Order (EO) 12,291,[5] which instructed those agencies to analyze the costs and benefits of proposed and final "major rules," and to submit those rules and analyses to the Office of Information and Regulatory Affairs (OIRA) within OMB before publication in the Federal Register.[6] Subsequent administrations have reaffirmed the importance of benefit-cost analysis and OIRA review in the issuance of such rules. ~~For example~~Currently, EO 12,866,[7] issued by President Bill Clinton in 1993 ~~and still in effect~~, requires Cabinet departments and independent agencies to a~~ssess~~nalyze the costs and benefits of "~~economically~~ significant" proposed and final rules, and to submit those rules and analyses to OIRA for review.[8] EO 12,866 also states that these agencies should propose or adopt a regulation only after determining that the benefits of the intended regulation justify its costs.[9]

Comment [SED1]: "economically significant" is not used in 12866.

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] ~~According to OMB Circular A-4, t~~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~~ 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 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.

[5] Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[6] *Id.* § 3; *see also* Sunstein, *supra* note 3, at __. Under EO 12,291, agencies were required to submit all draft proposed and final rules to OIRA for review but were only required to do benefit-cost analyses for major rules.

[7] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (President Clinton).

[8] Id. § 6(a)(3). EO 12,866 requires covered agencies to submit all "significant" draft proposed and final rules to OIRA for review but requires benefit-cost analyses only for "economically significant" rules.

[9] Id. § 1(b)(6); *see also* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (President Obama) (~~which also~~ state~~s~~ing 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).

Independent regulatory agencies[10] have traditionally not been subject to the formal benefit-cost analysis requirements imposed by executive order,[11] although several recent Presidents have encouraged those agencies to voluntarily apply the principles contained in the relevant executive orders.[12] All independent regulatory agencies are subject to certain crosscutting statutes that may require some type of regulatory analysis, such as the Regulatory Flexibility Act[13] and the Paperwork Reduction Act.[14] In addition, some agency organic acts or other statutes require certain independent regulatory agencies to conduct benefit-cost analyses or consider certain economic effects of their regulations, although the requirements vary significantly from agency to agency. For instance, some agencies (e.g., the Consumer Product Safety Commission) are required to prepare a formal regulatory analysis statement that describes expected costs and benefits prior to issuing certain rules.[15] Other agencies (e.g., the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC)) are required to "consider" costs and benefits or other factors associated with their rules, but are nominally under no obligation to prepare a formal benefit-cost analysis.[16] Still other agencies (e.g., the Federal Communications Commission and the Nuclear Regulatory Commission) are not subject to any formal regulatory analysis requirements for most of their rules.

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[10] 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).

[11] *See, e.g.*, Exec. Order No. 12,866, *supra* note 7, § 3(b), which generally defines an "agency" to exclude independent regulatory agencies. However, independent regulatory agencies are covered by the planning requirements in section 4 of the executive order.

[12] *See, e.g.*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) (~~which says~~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 ~~states~~ that independent regulatory agencies "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").

[13] 5 U.S.C. §§ 601–12.

[14] 44 U.S.C. §§ 3501–21.

[15] 15 U.S.C. § 2058(f).

[16] 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 prepare a quantitative analysis of regulatory costs and benefits, *see Business 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.

The Conference believes that it is in the interest of the independent regulatory agencies, the executive branch, Congress, and the courts that independent regulatory agencies' current practices relating to benefit-cost analysis be documented. In this light, the report supporting the recommendation examined efforts by independent regulatory agencies to analyze regulatory benefits and costs in recent major rules, and whether the agencies factor benefits and costs into their decisionmaking.[17] The report indicated that, in many instances, independent regulatory agencies quantify at least some of the costs (and, to a lesser extent, the benefits) created by rules they adopt and, in other instances, such agencies usually provide at least qualitative descriptions of the associated benefits and costs. The report also discusses several factors that the agencies said affected their ability to quantify and monetize regulatory costs and benefits. For example, several agencies mentioned the Paperwork Reduction Act approval process as inhibiting their ability to gather the data needed to prepare regulatory analyses in a timely fashion.[18]

~~Although the~~ This recommendation ~~takes no position on whether independent regulatory agencies should be subject to additional analytical requirements (e.g., the benefit-cost analysis requirements in EO 12,866), it aims to~~ encourages agencies to voluntarily ~~the broader~~ adopt~~ion of~~ certain practices that some independent regulatory agencies (and other agencies) have developed in conducting regulatory analyses. The Administrative Conference recognizes that increasing the attention paid to the impacts of proposed and final rules necessarily requires independent regulatory agencies to make significant tradeoffs among competing priorities, and may result in the substantial use of agency resources, delay in the rulemaking process, and the need to acquire relevant expertise (e.g., hiring staff economists). Nevertheless, some independent regulatory agencies are already subject to benefit-cost and other types of regulatory analysis requirements, and others have voluntarily ~~undertaken~~conducted such analyses, and the Conference therefore wishes to highlight innovative practices undertaken by these agencies.[19]

[17] *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.
[18] *See* 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").
[19] *See, e.g.*, Copeland, *supra* note 17, at 99 (describing the Federal Communications Commission's increased usage of benefit-cost analysis in light of EO 13,579).

The recommendation, first, identifies various policies and practices used in several of the independent regulatory agencies and offers a series of proposals to encourage their use in other agencies. Second, the recommendation highlights a series of analytical practices that OMB Circular A-4 recommends to executive agencies, and encourages independent regulatory agencies to consider whether those practices may be useful in their own regulatory programs ~~for major rules~~. The recommendation does not seek to establish a one-size-fits-all approach to regulatory analysis, and each agency must tailor the analyses it conducts to accord with relevant statutory requirements, ~~and~~ its own regulatory priorities, and the potential impact of the analysis on regulatory decisionmaking to ensure proper use of limited agency resources. Finally, ~~although the recommendation takes no position on whether Congress should extend existing regulatory analysis requirements to independent regulatory agencies, it~~the recommendation proposes that, to the extent ~~it does so,~~ Congress decides to impose to new regulatory analysis requirements, it should focus those requirements on "major" or "economically significant rules," and should provide resources sufficient to achieve that mandate. Focusing on those larger rules would minimize the resources required for analysis,[20] while maximizing the potential impact of those analyses on regulatory decisionmaking.

Comment [r2]: Some have proposed striking this language and urging agencies to consider these practices to all rules for which they conduct benefit-cost analysis, including non-major rules.

Comment [SED3]: Note that this is not the case for exec branch agencies. Rather the level of analysis varies with impact of rule.

Comment [r4]: Some have proposed deleting recommendation 9 (*see* infra). If the committee ultimately decides to do so, these sentences should also be deleted.

RECOMMENDATION

Encouraging the Diffusion of Certain Policies and Practices

1. Each independent regulatory agency should develop and keep up to date written guidance regarding the preparation of benefit-cost and other types of regulatory analyses. That guidance should be tailored to the agency's particular statutory and regulatory environment, and should be designed to help ensure that any regulatory analysis the agency undertakes is soundly developed, transparent, consistently conducted, and contributes to agency compliance with applicable statutes and other rulemaking requirements. To accomplish this goal, independent

[20] Between January 2007 and December 2012, federal agencies published 19,246 final rules, of which 485 were considered "major" rules. See Copeland, *supra* note 17, 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.

regulatory agencies may choose to adopt or adapt the regulatory analysis practices described in OMB Circular A-4 or any successor government-wide guidance.

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

3. When an independent regulatory agency determines that additional analytical expertise or experience may be helpful to prepare a regulatory analysis, it should, ~~as~~to the extent appropriate, consult with other agencies (e.g., through the Council of Independent Regulatory Agencies) and/or with OIRA. This consultation could address such issues as how certain costs and benefits could be quantified or monetized.

4. Consistent with applicable laws and the procedures and flexibilities permitted in the Paperwork Reduction Act, independent regulatory agencies and OIRA should facilitate the timely collection of high quality information ~~needed to~~ that may be used to support ~~prepare~~the agencies' regulatory analyses.

Highlighting OMB-Recommended Analytical Practices ~~for Major Rules~~

5. Independent regulatory agencies should consider the appropriateness of the analytical guidance provided in OMB Circular A-4 when evaluating regulations and structuring their regulatory analyses in terms of three general principles: (a) identify the need for the regulation; (b) examine plausible alternative regulatory approaches; and (c) estimate, to the extent possible, the benefits and costs of ~~the rule and~~ those alternatives.

6. Consistent with applicable laws and agency resources, independent regulatory agencies should consider including in their regulatory analyses assessments ~~not only~~of the impact of not only those actions that are within the agency's statutory discretion~~,~~ but also of those actions that are statutorily mandated. Showing the effects of both types of actions (separately, whenever possible) can improve regulatory transparency and allow the public to understand whether the agency or Congress is responsible for regulatory burden.

Comment [r5]: See comment 1.

Comment [SED6]: Reeve – you can delete your comment 7, and we can wait to see if OIRA suggests alternate language

Comment [r7]: Susan Dudley plans to supply proposed language here.

7. Subject to the limitations of law and good practice (including preventing the disclosure of information obtained or developed in the course of regulation or supervision of financial institutions, proprietary information or trade secrets, privileged information, or other similar confidential information that would be protected by a Freedom of Information Act exemption or other law), independent regulatory agencies' regulatory analyses should be as transparent and reproducible as possible. In particular, agencies should consider disclosing how the analyses were conducted, posting the analyses on their websites and other appropriate online fora, and summarizing the methods and results in the notice of proposed rulemaking or preamble to a final rule.

8. Independent regulatory agencies should consider including in the notice of proposed rulemaking and in the preamble to each proposed or final rule a summary statement or table concisely showing the agencies' overall estimates of the rule's expected total benefits, costs, and transfer payments of regulatory actions and alternatives, including any benefits or costs that could not be quantified or monetized.

Comment [r8]: The committee should consider whether the proposed addition would impose an excess burden on agencies by requiring them to describe costs and benefits of rejected alternatives.

Funding for Additional Benefit-Cost Analysis Requirements

9. If Congress decides to establish new requirements that independent regulatory agencies prepare benefit-cost ~~or other types of analyses~~ of their proposed or final rules: (a) the new analysis requirements should be limited to "major" or "economically significant" rules, and (b) additional funding for those new analyses should be provided to the agencies, either through direct appropriations (in agencies that rely on appropriated funds) or through an authorization to collect additional fees (in agencies authorized to collect fees sufficient to offset their appropriation each year).

Comment [r9]: Some recommend adding a comma after rules, followed by "Congress should consider whether." Some have also proposed deleting this recommendation entirely.