



Cost-Benefit and Other Analysis Requirements in the Rulemaking Process

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Summary

Regulatory analytical requirements (e.g., cost-benefit and cost-effectiveness analysis) have been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives. The current set of requirements includes Executive Order 12866 and OMB Circular A-4, the Regulatory Flexibility Act (RFA), and the Unfunded Mandates Reform Act (UMRA). These requirements vary in terms of the agencies and rules they cover, and the types of analyses that are required. The most extensive and broadly applicable of the requirements are in Executive Order 12866 and OMB Circular A-4, but they do not apply to independent regulatory agencies. The statutes that provide rulemaking authority to independent regulatory agencies often require them to “consider” regulatory costs and benefits, but do not specifically require cost-benefit analysis. An Office of Management and Budget report indicated that independent regulatory agencies did not estimate both costs and benefits for any of the major rules they issued in FY2010. Cabinet departments and other agencies estimated monetary costs and benefits for some, but not all, of their rules.

A number of bills have been introduced in the 112th Congress that would codify and expand the executive order’s requirements for cost-benefit analysis (S. 602, H.R. 1281, S. 1219, and H.R. 2204); apply the executive order’s principles to independent regulatory agencies (S. 358); require cost-benefit analysis for certain agencies’ rules (H.R. 1840, H.R. 2175, H.R. 2308, and S. 1292); or improve the implementation of the RFA and UMRA (S. 474, S. 1030, H.R. 527, S. 817, S. 1189, and H.R. 373). Enactment of some or all of these bills would add to the existing incrementally developed patchwork of analytical requirements, and some would significantly increase the number of rules for which analyses would be required.

Congress could decide to keep the existing analytical framework in place, or could enact one or more of these reform proposals. Another more comprehensive approach could be to consolidate all of the analytical requirements in one place, and perhaps expand those requirements to include more agencies or rules, or to require different types of analysis. To do so, or to simply cover independent regulatory agencies by the executive order, the President could arguably amend Executive Order 12866 and OMB Circular A-4, or Congress could enact legislation. Any such changes must be cognizant of the state of existing law in this area, and the resources and data required for agencies to carry out the analyses.

This report will not be updated.

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Introduction

A common concern voiced by proponents of regulatory reform in recent decades has been that the costs associated with certain regulations outweigh the benefits that the regulations are intended to provide. Another, and somewhat related, view is that more intelligent regulatory policies could achieve the same social goals (e.g., cleaner environment, safer workplaces) at less cost, or could achieve more ambitious goals at the same cost.¹ To improve the quality and effectiveness of federal rules and minimize burden, regulatory reform proponents have frequently advocated greater use of a range of analytic tools during the rulemaking process, including cost-benefit analysis (sometimes referred to as benefit-cost analysis) and cost-effectiveness analysis.²

Cost-benefit analysis, in this context, involves the systematic identification of all of the costs and benefits associated with a forthcoming regulation, including nonquantitative and indirect costs and benefits, and how those costs and benefits are distributed across different groups in society.³ A proposed regulatory requirement is judged to pass the “cost-benefit test” if the sum of its anticipated benefits outweighs, or otherwise justifies, the sum of its present and future costs in present value terms. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and comparing the costs of alternatives to reach that goal (e.g., in terms of dollars per life saved).

The prospective (also known as *ex ante*) estimates of benefits and costs that are done before rules are issued are necessarily uncertain and heavily dependent on numerous assumptions. Particularly difficult to quantify are long-term or uncertain effects of rules where subtle interactions between various factors are often not well understood or directly measurable. Cost-benefit analysis is particularly controversial when it seeks to rationalize inherent value trade-offs and to place a value on benefits not traded in the market (e.g., health or lives).⁴ Also, Congress has required cost-benefit analysis in some statutes (as discussed in detail later in this report), prohibited it in other statutes,⁵ and not precluded it in still other statutes.⁶ These issues notwithstanding, many

¹ See, for example, Tammy O. Tengs and John D. Graham, “The Opportunity Costs of Haphazard Social Investments in Life-Saving,” in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, Robert W. Hahn, ed. (New York: Oxford University Press, 1996). For a counter argument, see Richard W. Parker, “Grading the Government,” *The University of Chicago Law Review*, vol. 70 (Fall 2003), pp. 1345-1486.

² See, for example, Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002); and Robert W. Hahn and Cass R. Sunstein, “A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis,” Working Paper 02-4, AEI-Brookings Joint Center for Regulatory Studies, March 2002.

³ Cost-benefit analysis reportedly was introduced in the United States in the early 1900’s by the Army Corps of Engineers. See, for example, Richard O. Zerbe, Jr., “An Ethical Benefit-Cost Analysis,” Paper for Cost-benefit Conference, Northwestern University School of Law, September 2007, available at http://www.law.northwestern.edu/searlecenter/papers/Zerbe_CBApaper.pdf.

⁴ See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002).

⁵ *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

⁶ *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

economists believe that, when used carefully and with adequate data, cost-benefit analysis can be an effective tool in regulatory decision making.⁷

Although many federal agencies are currently required to prepare cost-benefit analyses and cost-effectiveness analyses for certain rules before they are published in the *Federal Register*, proposed legislation has been introduced in the 112th Congress to expand those requirements to more agencies and more types of rules, and to produce more detailed analyses. This report discusses those bills, but first describes the existing requirements for cost-benefit and other types of analysis in the federal rulemaking process. It also discusses options for changing the current set of analytical requirements. The report does not, however, attempt to address issues related to the quality of the analyses that agencies develop, or whether agencies use the results of cost-benefit analyses to guide decision making.⁸

Cross-Cutting Regulatory Analysis Requirements

The current set of regulatory analytical requirements has been established incrementally during the last 40 to 50 years through a series of presidential and congressional initiatives, including statutes, executive orders, circulars, and other documents. Those initiatives vary in terms of the agencies and rules they cover, and the types of analyses that are required. Most of the analytical requirements cover Cabinet departments and “independent agencies” such as the Environmental Protection Agency (EPA), but some also cover “independent regulatory agencies” such as the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Nuclear Regulatory Commission (NRC).⁹

Presidential Initiatives

Each President within the past 40 years has required some form of regulatory analysis before agencies’ rules are published in the *Federal Register*. For example:

⁷ See Kenneth J. Arrow, et al., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* (Annapolis: The Annapolis Center, 1996). More recently, an analysis of the comments submitted to the Office of Management and Budget in 2009 regarding possible changes to Executive Order 12866 concluded that none of the commenting regulatory scholars advocated that cost-benefit analysis should be abandoned, or that cost-benefit analysis alone should be the determinative factor in regulatory decisionmaking. See Helen G. Boutros, “Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone,” *Administrative Law Review*, vol. 62 (Winter 2010), pp. 252-253.

⁸ Various studies have been done over the years assessing the quality of agencies’ cost-benefit analyses. See, for example, U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 26, 1998; Richard D. Morgenstern, ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); and Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Washington: AEI Press, 1996).

⁹ As used in this report, the term “independent regulatory agencies” refers to the boards and commissions identified as such in the Paperwork Reduction Act (44 U.S.C. § 3502(5)), including the SEC, the FCC, the NRC, and the Federal Energy Regulatory Commission. The term “independent agencies” refers to other agencies that answer directly to the President, but are not part of Cabinet departments (e.g., EPA, the Social Security Administration, and the General Services Administration).

- In 1971, President Nixon required agencies to develop a summary of their regulatory proposals, a description of the alternatives that they considered, and the costs of those alternatives.¹⁰
- In 1974, President Ford required agencies to develop an “inflation impact statement” for each major proposed rule.¹¹
- In 1978, President Carter required agencies to prepare a regulatory analysis that examined the cost-effectiveness of the alternative regulatory approaches for major rules.¹²

Current broadly applicable cost-benefit analysis requirements in the rulemaking process are primarily traceable to President Reagan’s Executive Order 12291, which was issued in February 1981.¹³ Under that executive order, the “covered agencies” (Cabinet departments and independent agencies, but not independent regulatory agencies) were generally required to (1) refrain from taking regulatory action “unless the potential benefits to society for the regulation outweigh the potential costs to society,” (2) select regulatory objectives to maximize net benefits to society, and (3) select the regulatory alternative that involved the least net cost to society. The order also required covered agencies to prepare a “regulatory impact analysis” for each “major” rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of \$100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a determination of the net benefits of the rule, a description of alternative approaches that could substantially achieve the regulatory goal at lower cost, and an explanation of why those approaches were not selected.

Executive Order 12866

Executive Order 12291 remained in place until September 1993, when President Clinton issued Executive Order 12866.¹⁴ The Clinton executive order, which is still in effect, revoked the Reagan order, but established analytical principles and requirements that are similar (although not identical) to those it replaced. For example, in its “Statement of Regulatory Philosophy” in Section 1(a), Executive Order 12866 states that the “covered agencies” (again, Cabinet departments and independent agencies, but not independent regulatory agencies)¹⁵

should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies

¹⁰ For more information on this initiative, see http://www.thecre.com/ombpapers/20060130_nixon.html.

¹¹ Executive Order 11821, “Inflation Impact Statements,” 39 *Federal Register* 41501, November 29, 1974.

¹² Executive Order 12044, “Improving Government Regulations,” 43 *Federal Register* 12661, March 24, 1978.

¹³ Executive Order 12291, “Federal Regulation,” 46 *Federal Register* 13193, February 19, 1981.

¹⁴ Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. To view a copy of this order, see <http://www.whitehouse.gov/omb/inforeg/eo12866.pdf>.

¹⁵ Section 3(b) of Executive Order 12866 states that “‘Agency,’ unless otherwise indicated, means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).” Although the cost-benefit and rule submission requirements in the executive order do not apply to independent regulatory agencies, some parts do (e.g., Section 4(b) relating to the Unified Regulatory Agenda, and Section 4(c) relating to the Regulatory Plan).

should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

Section 1(b) of Executive Order 12866 delineates certain “Principles of Regulation” that covered agencies “should adhere to” (to the extent permitted by law and where applicable). For example, the agencies are told that they should:

- design their regulations “in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.”
- assess both the costs and the benefits of their intended regulations and, “recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”¹⁶
- tailor their regulations “to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.”

The heart of the economic analysis requirements is in Section 6 of Executive Order 12866, which differentiates between “significant” and “economically significant” rules. “Significant” rules are defined as those that satisfy any of four conditions:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.¹⁷

Rules fitting the first of these conditions are often referred to as “economically significant” or “major” regulatory actions.¹⁸

¹⁶ The requirement that agencies adopt regulations only if the benefits “justify” the costs was seen as a somewhat different threshold than the one in Executive Order 12291, which had required agencies to determine that regulatory benefits “outweigh” the costs.

¹⁷ Section 3(f) of Executive Order 12866.

¹⁸ The definition of an “economically significant” regulatory action is very similar to the definition of a “major rule” under the Congressional Review Act (5 U.S.C. § 804(2)): “(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”

Section 6(a)(3)(B) of Executive Order 12866 states that, for each “significant” regulatory action, covered agencies are to provide to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) a general “assessment of the potential costs and benefits of the regulatory action.” However, Section 6(a)(3)(C) of the executive order states that, for each “economically significant” regulatory action, agencies are to also provide to OIRA (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

In emergency situations, or when an agency is required by law to act more quickly than normal review procedures allow, the rulemaking agency is required to comply with the order’s requirements “to the extent practicable.”¹⁹ Section 10 of Executive Order 12866 states that nothing in the order affects otherwise available judicial review,²⁰ but goes on to say that the order “is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable by law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”

OMB Circular A-4

In January 1996, OIRA published a document that described “best practices” for preparing the economic analyses called for by the executive order.²¹ In essence, the best practices document said that the analysis should (1) clearly state the need for the proposed action (e.g., market failure) and make clear why federal regulation (as opposed to other methods such as state

¹⁹ Section 3(a)(3)(D) of Executive Order 12866.

²⁰ The Administrative Procedure Act (APA) provides that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.” 5 U.S.C. §§ 702, 704. Judicial review may be invoked under the APA if a plaintiff is “adversely affected or aggrieved” by any final agency action “within the meaning” of the statute at issue. 5 U.S.C. § 702. For more information, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Vanessa K. Burrows and Todd Garvey.

²¹ This “best practices” document was developed by an interagency group co-chaired by the Administrator of OIRA and a member of the Council of Economic Advisors. The document was revised and issued as guidance in 2000. To view a copy of the best practices document, see <http://www.whitehouse.gov/omb/inforeg/riaguide.html>.

regulation or subsidies) is the appropriate solution, (2) clearly show that the agency considered the most important alternative approaches, and (3) assess the incremental costs and benefits of the proposed action. The best-practices document also stated that cost-effectiveness analysis should be used where possible to evaluate alternatives.

In September 2003, OMB and the Council of Economic Advisors finalized OMB Circular A-4 on “Regulatory Analysis,” which refined and replaced the 1996 best practices document.²² The circular states that it was “designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”²³ It also states that a “good regulatory analysis should include the following three basic elements: (1) a statement 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 identified by the analysis.”²⁴

- With regard to need, OMB Circular A-4 states that the agency should describe the statutory or judicial directives that authorize the action, and describe the problem that it intends to address. The underlying problem can involve a market failure (e.g., a monopoly that adversely affects consumers, or inadequate information about a product) or other social purposes (e.g., to combat discrimination). The statement of need should also consider other alternatives to federal regulation, including the option of state or local regulation.
- After determining that federal regulation is needed, OMB Circular A-4 requires the agency to consider a “reasonable number” of alternative regulatory approaches available within the statutory authority provided to the agency. For example, the circular says agencies should consider different compliance dates, enforcement methods, levels of stringency, requirements based on firm size or geographic region; performance standards instead of design standards, market approaches instead of direct controls; and informational measures instead of regulation.
- With regard to analytical approaches, the circular states that agencies should use both cost-benefit analysis and cost-effectiveness analysis. When all benefits and costs can be expressed in monetary units, cost-benefit analysis can clearly indicate which approach is most efficient in terms of net benefits.²⁵ However, in many (and perhaps most) cases, agencies are not able to express all of the benefits or costs in monetary units. In such cases, OMB Circular A-4 states that cost-benefit analysis “is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs.”²⁶ Analysts should therefore attempt to quantify

²² OMB Circular A-4, “Regulatory Analysis,” September 17, 2003. The circular is available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/a-4.pdf. The circular took effect for economically significant proposed rules on January 1, 2004, and for economically significant final rules on January 1, 2005.

²³ *Ibid.*, p. 1.

²⁴ *Ibid.*, p. 2.

²⁵ For example, if Option A has expected costs of \$100 million and expected benefits of \$200 million, the net benefits are \$100 million. If Option B has expected costs of \$200 million, and expected benefits of \$400 million, the net benefits are \$200 million. In this scenario, Option B produces the largest net benefits.

²⁶ OMB Circular A-4, p. 10.

benefits or costs as much as possible (e.g., tons of pollution avoided, or the number of children who will not suffer discrimination), and “exercise professional judgment” in determining whether non-quantified factors are important enough to justify consideration of the regulation.

Although some contend that certain benefits cannot be monetized (e.g., deaths or illnesses avoided),²⁷ agencies have developed a variety of methods of doing so, often by determining the number of “statistical lives” that the rules are expected to extend or save, and then multiplying that number by an estimated “value of a statistical life” (VSL).²⁸ OMB Circular A-4 notes that academic studies have identified VSLs from \$1 million to \$10 million, but it does not recommend that agencies use a particular VSL. In 2009, the Department of Transportation’s (DOT’s) VSL was \$6.0 million while the Environmental Protection Agency’s (EPA’s) VSL was nearly \$7.9 million.²⁹

OMB Circular A-4 describes cost-effectiveness analysis as a way to “identify options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs.”³⁰ It allows analysts to compare a set of regulatory actions with the same primary outcome. For example, the analysis may indicate that one option costing \$100 million is expected to save 50 lives (i.e., \$2 million per life saved), while another option costing \$200 million is expected to save 200 lives during the same period (i.e., \$1 million per life saved).

The circular also discusses a variety of other economic analysis issues, including measuring costs and benefits against a baseline (i.e., the way the world would look absent the proposed regulation); discounting when benefits and costs do not occur within the same time period; and how uncertainty should be treated (e.g., ranges, probability distributions, and estimates of expected value). For particularly large rules with annual economic effects of \$1 billion or more, agencies are instructed to

present a formal quantitative analysis of the relevant uncertainties about benefits and costs. In other words, you should try to provide some estimate of the probability distribution of regulatory benefits and costs. In summarizing the probability distributions, you should provide some estimates of the central tendency (e.g., mean and median) along with any other information you think will be useful such as ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution.³¹

Finally, OMB Circular A-4 provides guidance on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act,³² and summarizes analytical requirements in other statutes and executive orders.

²⁷ Lisa Heinzerling and Frank Ackerman, “Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,” Georgetown University, 2002.

²⁸ For a summary of those efforts, see CRS Report R41140, *How Agencies Monetize “Statistical Lives” Expected to Be Saved By Regulations*, by Curtis W. Copeland.

²⁹ *Ibid.*

³⁰ OMB Circular A-4, p. 11.

³¹ *Ibid.*, p. 40.

³² In 2001, Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the “Regulatory Right-to-Know Act,” put in place a permanent requirement for an OMB report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President’s budget an “accounting statement and associated report” containing an estimate of the total costs and benefits (including (continued...))

Supplemental Publications

On October 28, 2010, OMB published an agency checklist for the regulatory impact analyses required by Executive Order 12866 and OMB Circular A-4.³³ It contains repeated references to provisions in the executive order and the circular, and states that nothing in the checklist “alters, adds to, or reformulates existing requirements in any way.” Among other things, the checklist asks whether the agency’s analysis (1) has a reasonably detailed description of the need for the regulatory action, (2) explains how the action will meet that need, (3) quantifies and monetizes the expected costs and benefits of the action to the extent feasible, (4) explains and supports a reasoned justification that the benefits of the regulatory action justify the costs, (5) assesses the potentially effective and reasonable alternatives to the action (including at least one alternative that is more stringent and less stringent), and (6) explains why the planned regulatory action is preferable to those alternatives.

On February 7, 2011, OMB published a document entitled *Regulatory Impact Analysis: Frequently Asked Questions*.³⁴ Again, OMB said “nothing said here is meant to alter existing requirements in any way.” Among other things, OMB indicated that:

- A rule may be considered “economically significant” if it is expected to have \$100 million in costs, benefits, or transfers in any one year, and rules that do not cross that threshold but could adversely affect a small sector of the economy and would threaten to create significant job loss would still be considered “economically significant.”
- Agencies’ regulatory impact analyses should be presented in plain language, and should include a clear executive summary of their central conclusions and an accounting statement with a table summarizing the expected costs, benefits, and transfers.
- When considering regulatory alternatives, agencies should begin by asking whether to regulate at all, and should consider deferring to regulation at the state or local level. If federal regulation is needed, agencies should consider analyzing at least three options: the preferred option, a more stringent option, and a less stringent one. Agencies should also generally include a sensitivity analysis showing how results can vary with changes in assumptions, data, and analytical approaches.

Executive Orders 13563 and 13579

Executive Order 13563, issued by President Obama in January 2011, reiterated many of the general principles of regulation in Executive Order 12866.³⁵ For example, it says covered

(...continued)

quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also required to contain an analysis of the impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth.

³³ See http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf for a copy of the checklist.

³⁴ See http://www.whitehouse.gov/sites/default/files/omb/circulars/a004/a-4_FAQ.pdf for a copy of this document.

³⁵ Executive Order 13563, “Improving Regulations and Regulatory Review,” 76 *Federal Register* 3821, January 21, 2011.

agencies (Cabinet departments and independent agencies) must (to the extent permitted by law): (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, (2) tailor regulations to impose the least burden on society, and (3) select regulatory approaches that maximize net benefits. It also directs agencies to “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” Section 6 of the executive order requires covered agencies to develop a plan under which they would periodically review their existing significant rules. Although the executive order does not apply to independent regulatory agencies, a February 2011 memorandum from the OIRA Administrator encouraged those agencies to “give consideration to all its provisions.”³⁶

In July 2011, President Obama issued Executive Order 13579, “Regulation and Independent Regulatory Agencies.”³⁷ The executive order encouraged independent regulatory agencies to comply with some of the principles in Executive Order 13563 that were directed to Cabinet departments and independent agencies (e.g., public participation, integration and innovation, flexible approaches, and science), and said independent regulatory agencies “should” develop a plan for the periodic review of their rules. In a separate memorandum issued the same day as the executive order, the President said he was doing so with “full respect for the independence of your agencies.”³⁸ Executive Order 13579 does not, however, directly apply the cost-benefit principles in Executive Orders 12866 or 13563 to independent regulatory agencies, and does not require them to conduct any type of economic analysis before issuing their rules.

Analytical Requirements in Other Executive Orders

In addition to the broadly applicable analytical requirements in Executive Order 12866 and related guidance, several other executive orders have required covered agencies (Cabinet departments and independent agencies) to analyze their regulations for particular purposes. For example:

- Executive Order 13045 on “Protection of Children from Environmental Health Risks and Safety Risks,” issued in April 1997, requires each covered agency, “to the extent permitted by law and appropriate, and consistent with the agency’s mission,” to “address disproportionate risks to children that result from environmental health risks or safety risks.”³⁹ For any substantive rulemaking action that “is likely to result in” an economically significant rule that concerns “an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children,” the agency must provide OIRA with “an evaluation of the environmental health or safety effects of the planned regulation on children,” as well as “an explanation of why the planned regulation is

³⁶ Memorandum from Cass R. Sunstein, Administrator of OIRA, “Executive Order 13563, ‘Improving Regulation and Regulatory Review,’” February 2, 2011, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

³⁷ Executive Order 13579, “Regulation and Independent Regulatory Agencies,” 76 *Federal Register* 41587, July 14, 2011.

³⁸ See <http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies>.

³⁹ Executive Order 13045, “Protection of Children From Environmental Health Risks and Safety Risks,” 62 *Federal Register* 19883, April 23, 1997.

preferable to other potentially and reasonably feasible alternatives considered by the agency.”

- Executive Order 13132 on “Federalism,” issued in August 1999, requires covered agencies to prepare a “federalism summary impact statement” whenever they issue a rule that has “significant federalism implications.”⁴⁰ The assessment is to contain “a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.” The executive order says the consultation and impact statement requirements apply “to the extent practicable.”⁴¹
- Executive Order 13211, issued in May 2001, requires covered agencies (to the extent permitted by law) to prepare and submit to OMB a “Statement of Energy Effects” for “significant energy actions.”⁴² The statement, which is to be published in the proposed rule and the final rule, is to include a detailed statement of “any adverse effects on energy supply, distribution, or use” for the action, and reasonable alternatives and their effects.

None of these executive orders apply to independent regulatory agencies, and all of them give federal agencies substantial discretion to define key terms (e.g., “disproportionately affect,” “significant federalism implications,” and “significant energy actions”) that determine the degree to which they cover agencies’ rules.

Congressional Initiatives

Congress has also required federal agencies to analyze the effect of certain rules before they are issued. Some of the requirements are potentially applicable to a range of agencies and regulations, while other requirements are focused on particular agencies or types of rules (e.g., those affecting the environment or small businesses). In addition to the cross-cutting requirements discussed below, there are many other requirements that are tied to particular agencies and statutes. For example, Section 1102(b) of the Social Security Act (42 U.S.C. §1302(b)) requires the Department of Health and Human Services to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals.⁴³

Unfunded Mandates Reform Act

The statutory provisions that most closely approximate the types of analysis required in Executive Order 12866 are in Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C.

⁴⁰ Executive Order 13132, “Federalism,” 64 *Federal Register* 43255, August 10, 1999.

⁴¹ Executive Order 12612, the previous executive order on federalism, also gave federal agencies broad discretion to determine the applicability of its requirements. GAO examined the implementation of this order and concluded that its analytical requirements were rarely implemented. See U.S. General Accounting Office, *Federalism: Previous Initiatives Have Had Little Effect on Agency Rulemaking*, GAO/T-GGD-99-3, June 30, 1999.

⁴² Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 *Federal Register* 28355, May 22, 2001.

⁴³ 42 U.S.C. § 1302. The department is not required to prepare the analysis if the final rule is issued without a prior notice of proposed rulemaking.

§§1532-1538).⁴⁴ Before promulgating a rule containing a mandate that may result in the expenditure of \$100 million or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate, UMRA requires covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to prepare a written statement containing (among other things) a “qualitative and quantitative assessment of the anticipated costs and benefits ... as well as the effect of the Federal mandate on health, safety, and the natural environment.” The written statement is also generally required to include estimates of future compliance costs, and any disproportionate budgetary effects on particular regions, governments, or segments of the private sector, and estimates of effects on the national economy, including effects on job creation, productivity, full employment, and international competitiveness. OIRA has primary responsibility for monitoring agency compliance with Title II of UMRA, and publishes an annual report on the implementation of Title II.⁴⁵ UMRA provides for limited judicial review of agency compliance with these analytical requirements. Specifically, Section 401(a)(2)(B) states that if an agency fails to prepare the written statement required in Section 202, “a court may compel the agency to prepare such written statement.”

As the Government Accountability Office (GAO, formerly the General Accounting Office) pointed out several times during the past 15 years, however, UMRA’s analytical requirements do not apply to most economically significant rules, give agencies substantial discretion regarding their implementation, and do not require agencies to do much more than is already required in Executive Order 12866. For example, the requirements in Section 202 of UMRA are not triggered if the agency issues a final rule without a previous notice of proposed rulemaking. (About half of all final rules do not have a prior proposed rule.)⁴⁶ Also, UMRA does not apply unless there are “expenditures” of at least \$100 million in a year (which may not be the same as “impact on the economy” or even “cost”), and does not apply to “voluntary” programs or conditions of federal financial assistance. Agencies do not have to estimate certain effects if they determine such estimates are not “reasonably feasible.” In February 1998, GAO reported that, because of the way the statute was written, Title II of UMRA had little effect on agencies’ rulemaking actions during its first two years of implementation.⁴⁷ In May 2004, GAO again reported that UMRA’s written statement requirements did not apply to most major or economically significant final rules issued in 2001 and 2002, even though some of the rules “appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act’s thresholds.”⁴⁸ In February 2011, GAO reiterated these conclusions, noting that there are at least 14 reasons why a rule would not be considered a “mandate” under UMRA.⁴⁹

⁴⁴ For an overview of UMRA, see CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger and Richard S. Beth.

⁴⁵ In recent years, OIRA’s annual report on UMRA has been combined with its report on the costs and benefits of federal regulations. See, for example, Office of Management and Budget, Office of Information and Regulatory Affairs, *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf.

⁴⁶ U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

⁴⁷ U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies’ Rulemaking Actions*, GAO/GGD-98-30, February 4, 1998.

⁴⁸ U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

⁴⁹ Testimony of Denise M. Fantone, Director, Strategic Issues, U.S. Government Accountability Office, before the (continued...)

National Environmental Policy Act

Other statutory analytical requirements have been enacted with regard to particular issues or constituencies. For example, the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§4321-4347) requires federal agencies to include in every recommendation or report related to “major Federal actions significantly affecting the quality of the human environment” a detailed statement on the environmental impact of the proposed action.⁵⁰ The environmental impact statement must delineate the direct, indirect, and cumulative effects of the proposed action. Agencies are also required to include in the statement (1) any adverse environmental effects that cannot be avoided should the proposal be implemented, (2) alternatives to the proposed action, (3) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (4) any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented. As discussed in a separate CRS report, just about every word in the term “major Federal actions significantly affecting the quality of the human environment” has been disputed, scrutinized, and defined by the courts.⁵¹

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612) requires federal agencies to assess the impact of their forthcoming regulations on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under the RFA, Cabinet departments and independent agencies as well as independent regulatory agencies must prepare a “regulatory flexibility analysis” at the time proposed and certain final rules are issued. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

However, these analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are initiated. Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and some agencies do not consider an RFA analysis to be required if the rule is expected to have significant positive effects on small entities.⁵²

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Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, House Committee on Oversight of Government Management, available at <http://www.gao.gov/products/GAO-11-385T>.

⁵⁰ For more information, see CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by Linda Luther.

⁵¹ CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by Kristina Alexander.

⁵² See, for example, U.S. Department of Health and Human Services, “Patient Protection and Affordable Care Act; Establishment of Consumer Operated and Oriented Plan (CO-OP) Program,” 76 *Federal Register* 43237, July 20, 2011, (continued...)

The RFA initially did not permit judicial review of agencies' actions under the act. However, amendments to the act in 1996 as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA, 5 U.S.C. §601 note) permitted judicial review regarding, among other things, agencies' regulatory flexibility analyses for final rules and any certifications that their rules will not have a significant impact on small entities. As a result, a small entity that is adversely affected or aggrieved by an agency's determination that its final rule would not have a significant impact on small entities could seek judicial review of that determination within one year of the date of the final agency action. In granting relief, a court may remand the rule to the agency or defer enforcement against small entities. For more than 25 years, however, courts have ruled that agencies need not prepare regulatory flexibility analyses if the effects of a rule on an industry are indirect.⁵³ Therefore, for example, if a federal agency is issuing a final rule establishing a health standard that is implemented by states or other entities, the federal agency issuing the rule need not prepare a regulatory flexibility analysis even if it is clear that the implementation ultimately will have significant effect on a substantial number of small entities.⁵⁴

GAO has examined the implementation of the RFA several times within the past 20 years, and a recurring theme in GAO's reports is a lack of clarity in the act and a resulting variability in its implementation. For example, in 1991 GAO reported that each of the four federal agencies that it reviewed had a different interpretation of key RFA provisions.⁵⁵ In 1994, GAO again reported that agencies' compliance with the RFA varied widely from one agency to another and that agencies were interpreting the statute differently.⁵⁶ In a 1999 report, GAO concluded that agencies had broad discretion to determine what the statute required.⁵⁷ In a 2000 report, GAO said that EPA had certified more than 95% of its final rules issued in the late 1990s, and characterized EPA as having a "high threshold" for analysis (albeit within the discretion permitted in the statute).⁵⁸ In all of these reports, GAO suggested that Congress consider clarifying the act's requirements

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in which the department said that the Centers for Medicare and Medicaid Services interprets the RFA analysis requirement "as applying only to regulations with negative impacts." However, the department said it routinely prepares a voluntary analysis when there are significant positive impacts.

⁵³ See, for example, *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985).

⁵⁴ For example, when EPA published a final rule establishing national ambient air quality standards (NAAQS) for particulate matter in October 2006, the agency certified the rule as not triggering the RFA "because NAAQS themselves impose no regulations on small entities." In its cost-benefit analysis for the rule, EPA estimated the cost of installing controls to meet the health standard at \$5.6 billion in 2020. See U.S. Environmental Protection Agency, "National Ambient Air Quality Standards for Particulate Matter; Final Rule," 71 *Federal Register* 61144, 61217. (EPA made the same argument in other rules. See U.S. Environmental Protection Agency, "Primary National Ambient Air Quality Standard for Sulfur Dioxide," 74 *Federal Register* 64810, at 64865, December 8, 2009; and "National Ambient Air Quality Standards for Carbon Monoxide," 76 *Federal Register* 8158, at 8195, February 11, 2011.) In a similar case (*American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999)), affirmed in part and reversed in part, *Whitman v. American Trucking Associations*, 532 U.S. 457 (2001), the U.S. Court of Appeals for the District of Columbia ruled that EPA had complied with the RFA because the states, not EPA, had the direct authority to impose requirements to control ozone and particulate matter consistent with EPA health standards.

⁵⁵ U.S. General Accounting Office, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16, January 11, 1991.

⁵⁶ U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105, April 27, 1994.

⁵⁷ U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

⁵⁸ U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, September 20, 2000, p. 31.

and/or give the Small Business Administration (SBA) or some other entity the responsibility to develop criteria for whether and how agencies should conduct RFA analyses.⁵⁹ In 2001, GAO testified that the promise of the RFA may never be realized until Congress or some other entity defines what a “significant economic impact” and a “substantial number of small entities” mean in a rulemaking setting.⁶⁰ However, other observers have indicated that the definitions of these terms should remain flexible because of significant differences in each agency’s operating environment.⁶¹

Paperwork Reduction Act

Other analytical requirements pertain to certain aspects of the rulemaking process, albeit not the rules themselves. The Paperwork Reduction Act (PRA) (44 U.S.C. §§3501-3520) was originally enacted in 1980, but was subsequently amended in 1986 and again in 1995. One of the purposes of the PRA is to minimize the paperwork burden for individuals, small businesses, and others resulting from the collection of information by or for the federal government. The act generally defines a “collection of information” as the obtaining or disclosure of facts or opinions by or for an agency (Cabinet departments and independent agencies as well as independent regulatory agencies) by 10 or more nonfederal persons. Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies’ regulatory provisions.⁶² The PRA requires agencies to justify any collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.

The original PRA established OIRA to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork burden and improve the management of information resources. Agencies must receive OIRA approval (signified by an OMB control number displayed on the information collection) for each collection request before it is implemented, and those approvals must be renewed at least every three years. Failure to obtain OIRA approval for an active collection, or the lapse of that approval, represents a violation of the act, and triggers the PRA’s public protection provision. Under that provision, no one can be penalized for failing to comply with a collection of information subject to the act if the collection does not display a valid OMB control number.⁶³ OIRA can disapprove any collection of

⁵⁹ Section 612 of the RFA requires the SBA Chief Counsel for Advocacy to “monitor” agencies’ compliance with the RFA, but does not require SBA to issue binding rules defining key terms.

⁶⁰ U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, April 24, 2001.

⁶¹ See, for example, page 17 of the SBA Office of Advocacy’s guidance on the implementation of the RFA, available at <http://www.sba.gov/sites/default/files/rfaguide.pdf>, which says “Significance should not be viewed in absolute terms...” For more information on the RFA, see CRS Report RL34355, *The Regulatory Flexibility Act: Implementation Issues and Proposed Reforms*, by Curtis W. Copeland.

⁶² For example, Environmental Protection Agency’s Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses to inform the public about chemical hazards in their communities. TRI reports require businesses in certain industries to report the quantity of any of more than 600 chemicals entering each environmental medium on site, transfers of the chemical in wastes to off-site locations, on-site treatment methods and efficiency, and source reduction and recycling activities.

⁶³ For an up-to-date inventory of OMB-approved information collections, see <http://www.reginfo.gov/public/do/PRAMain>.

information if it believes the collection is inconsistent with the requirements of the PRA. However, multi-headed independent regulatory agencies can, by majority vote of the leadership, void any OIRA disapproval of a proposed information collection.⁶⁴

Coverage of Analytical Requirements Varies

As the above discussion indicates, the cross-cutting executive order and statutory analytical requirements vary substantially in terms of the types and amount of analysis required, and the agencies and rules that they cover:

- Executive Order 12866 and OMB Circular A-4 contain the most detailed requirements, and cover all rules with a \$100 million annual “effect on the economy,” but the executive order and the circular do not apply to independent regulatory agencies.
- The Unfunded Mandates Reform Act contains analytical requirements that are somewhat similar to those in Executive Order 12866, but it applies to only a small percentage of the rules that are covered by the executive order because of substantial limitations in the scope of the act’s requirements (e.g., UMRA does not apply to independent regulatory agencies, or to rules that are conditions of financial assistance, rules issued without a notice of proposed rulemaking, or rules that do not require \$100 million in “expenditures” in a year).
- The Regulatory Flexibility Act is broader than either the executive order or UMRA in that it covers independent regulatory agencies, but the RFA does not apply to rules issued without a notice of proposed rulemaking, or to rules that the agencies certify will not have a “significant economic impact on a substantial number of small entities.” Some agencies certify that more than 90% of their rules will not have that impact, and therefore are not required to do the analysis.
- The Paperwork Reduction Act covers independent regulatory agencies, but it only covers agencies’ collections of information, not the rules themselves.

Table 1 below summarizes this information, showing that the requirement with most extensive analytical requirements and broad coverage (Executive Order 12866) does not apply to independent regulatory agencies, and the requirements that do apply to independent regulatory agencies (the RFA and the PRA) are more limited in the types of analysis required.

Table I. Depth and Coverage of Analytical Requirements Vary

Analytical Requirement	Cabinet Departments and Independent Agencies	Independent Regulatory Agencies
Extensive Analytical Requirements and Broad Rule Coverage		
Executive Order 12866 and OMB Circular A-4)	Yes	No

⁶⁴ 44 U.S.C. 3507(f). For more information on the PRA, see CRS Report R40636, *Paperwork Reduction Act (PRA): OMB and Agency Responsibilities and Burden Estimates*, by Curtis W. Copeland and Vanessa K. Burrows.

Analytical Requirement	Cabinet Departments and Independent Agencies	Independent Regulatory Agencies
Limited Analytical Requirements and/or Narrow Rule Coverage		
Other executive orders	Yes	No
Unfunded Mandates Reform Act	Yes	No
NEPA	Yes	Yes
Regulatory Flexibility Act	Yes	Yes
Paperwork Reduction Act	Yes	Yes

Source: CRS.

Analytical Requirements Applicable to Selected Independent Regulatory Agencies

Although independent regulatory agencies are not covered by the analytical requirements in Executive Order 12866 and OMB Circular A-4, that lack of coverage may be ameliorated if the individual statutes that provide rulemaking authority to these agencies require cost-benefit or other types of economic analysis. This section of the report examines the analytical requirements in the underlying statutes for selected independent regulatory agencies.

Economic Analysis and Banking Agencies

Because of concerns regarding the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010), on May 4, 2011, the 10 Republican Senators on the Senate Committee on Banking, Housing, and Urban Affairs jointly requested that the offices of the inspectors general (OIGs) for five independent regulatory agencies in the banking area provide them with information about the economic analysis requirements applicable to rulemaking in those agencies.⁶⁵ The five agencies were the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC). The five OIGs provided written responses to the Senators in June 2011, and those responses are summarized below.

Board of Governors of the Federal Reserve System

The OIG for the Board of Governors of the Federal Reserve System said that statutes related to the board’s rulemaking authority, including the Federal Reserve Act and the Bank Holding Company Act of 1956, “generally do not require economic analysis as part of the agency’s rulemaking activities.”⁶⁶ The OIG noted the applicability of the PRA and the RFA to the Board’s

⁶⁵ See <http://crapo.senate.gov/documents/RepublicanBankingCommitteeDoddFrankLetter.pdf> for a copy of this letter. The letter also asked the OIGs to describe internal policies and procedures governing economic analyses of proposed rules, the degree to which agency staff understand and follow applicable requirements, the qualifications of the staff who conduct the analyses, and other aspects of those analyses.

⁶⁶ Office of the Inspector General, Board of Governors of the Federal Reserve System, “Response to a Congressional (continued...)”

rulemaking, but said they only require “narrowly tailored evaluations of the rulemaking’s paperwork burden and effect on small entities, respectively.”⁶⁷

Securities and Exchange Commission

The SEC OIG report identified several statutory provisions that require the commission to analyze the impact of its rules.⁶⁸ For example, the report noted that the National Securities Market Improvement Act (15 U.S.C. §77b(b)) requires the SEC to consider whether an action “will promote efficiency, competition, and capital formation” whenever it is “engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest.” Also, Section 23(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. §78w(a)(2)) states that:

The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission’s or the Secretary’s determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.

The OIG noted that the RFA and the PRA apply to SEC rulemaking, and that Executive Order 12866 and OMB Circular A-4 do not apply. Nevertheless, the OIG said that “SEC Chairmen have made a commitment to Congress that the SEC will conduct cost-benefit or economic analyses in connection with its rulemaking activities,”⁶⁹ and said that “the Commission’s current rulemaking procedures are closely aligned with the requirements” of the executive order and the circular.⁷⁰ The OIG also noted that the SEC’s website states that “we take into account benefits and costs in our rulemakings [and] assess alternative regulatory approaches,” and that the SEC chairman stated during a congressional hearing in March 2011 that the SEC does conduct cost-benefit analyses.⁷¹

However, the OIG also pointed out that another SEC commissioner stated in a May 2011 speech that the “Commission has not engaged in a cost-benefit analysis of the rulemakings that were

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Request Regarding the Economic Analysis Associated with Specified Rulemakings,” June 13, 2011, p. 6. The report is available at http://www.federalreserve.gov/oig/files/Congressional_Response_web.pdf.

⁶⁷ Ibid., p. 7.

⁶⁸ Office of the Inspector General, U.S. Securities and Exchange Commission, “Report of Review of Economic Analyses Performed by the Securities and Exchange Commission in Connection with Dodd-Frank Rulemakings,” June 13, 2011, available at http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf (hereafter referred to as “OIG/SEC”).

⁶⁹ In support of this statement, the OIG noted that SEC Office of General Counsel officials quoted former SEC Chairman Arthur Levitt, who said there was an expectation that the SEC would perform cost-benefit analyses as part of the rulemaking process. See OIG/SEC, p. 4.

⁷⁰ OIG/SEC, p. 4.

⁷¹ Ibid., p. 5, citing testimony by SEC Chairman Mary Shapiro before the Subcommittee on Financial Services and General Government, House Committee on Appropriations, March 15, 2011.

essentially dictated by the law.”⁷² She reportedly went on to say that “By limiting our cost-benefit analysis to those measures over which the Commission has full discretion, we fail to consider all the costs and benefits that will result from a particular regulatory action.”⁷³

Federal Deposit Insurance Corporation

The FDIC OIG report noted the applicability of the RFA and the PRA, and said that the “Small Business Regulatory Enforcement Fairness Act also requires the FDIC to conduct cost-benefit analyses of final rules.”⁷⁴ However, that act only requires agencies to submit a cost-benefit analysis to the Government Accountability Office if the agency has prepared one for the final rule at issue.⁷⁵ The report noted that FDIC is not covered by Executive Orders 12866 and 13563 or OMB Circular A-4, but said the agency had issued a *Statement of Policy on the Development and Review of FDIC Regulations and Policies* that “generally addresses the spirit of, and principles found in, the two executive orders and OMB guidance.”⁷⁶

In terms of agency-specific requirements, the FDIC OIG report identified Section 302 of the Riegle Community Development and Regulatory Improvement Act (12 U.S.C. §4802(a)), which states:

In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest - (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.

⁷² Ibid., pp. 5-6, citing a speech by Commissioner Kathleen Casey at an SEC open meeting regarding rules for Nationally Recognized Statistical Rating Organizations held on May 18, 2011.

⁷³ In a somewhat related development, on July 22, 2011, the U.S. Court of Appeals for the District of Columbia vacated an SEC final rule on proxy access, saying the Commission acted arbitrarily and capriciously for having failed to assess the economic implications of a rule adequately. *Business Roundtable v. SEC*, D.C. Cir., No 10-1305, July 22, 2010. In particular, the Court said (on p. 7 of the opinion) that the SEC had “inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.” Citing an earlier case (*Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)), the Court said that the agency has a “statutory obligation to determine as best it can the economic implications of the rule.” Some observers believe that this case has “elevated the importance of economic analysis in rulemaking to implement” the Dodd-Frank Act. See, for example, Yin Wilczek, “D.C. Circuit’s Proxy Access Ruling Raises Importance of Economic Review, Panel Says,” *BNA Daily Report for Executives*, August 2, 2011, p. EE-4; and David S. Hilzenrath, “Wall Street Finds Relief in Court from SEC Rules,” *Washington Post*, August 12, 2011, p. A-10.

⁷⁴ Office of the Inspector General, Federal Deposit Insurance Corporation, “Evaluation of the FDIC’s Economic Analysis of Three Rulemakings to Implement Provisions of the Dodd-Frank Act,” Report No. EVAL-11-003, June 2011, p. 1 of the Executive Summary. The report is available at <http://www.fdicigo.gov/reports11%5C11-003EV.pdf>, and is hereafter referred to as “OIG/FDIC.”

⁷⁵ Specifically, the portion of SBREFA known as the Congressional Review Act states that rulemaking agencies must submit to GAO, and make available to each house of Congress, “a complete copy of the cost-benefit analysis of the rule, if any” (5 U.S.C. 801(a)(1)(b)(i)).

⁷⁶ OIG/FDIC, p. 1 of the Executive Summary.

Commodity Futures Trading Commission

The June 2011 CFTC OIG report noted that Section 15(a) of the Commodity Exchange Act (7 U.S.C. §19(a)) requires the agency to consider costs and benefits before issuing certain regulations.⁷⁷ Specifically, Section 15(a) states the following:

Before promulgating a regulation under this chapter ... , the Commission shall consider the costs and benefits of the action of the Commission. The costs and benefits of the proposed Commission action shall be evaluated in light of - (A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations.⁷⁸

In light of this requirement, in September 2010, the CFTC Office of General Counsel and Office of Chief Economist created a template for a uniform cost-benefit analysis methodology to be used in Dodd-Frank Act proposed rules.⁷⁹ That template stated, in part, that Section 15(a) “does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission ‘consider’ the costs and benefits of its actions.”⁸⁰ It went on to say that CFTC “could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.”

In May 2011, the same two offices developed “Staff Guidance on Cost-Benefit Considerations for Final Rulemakings under the Dodd-Frank Act.”⁸¹ In that guidance, CFTC staff were told to “consider costs and benefits in the Final Rulemakings utilizing the principles set forth in Executive Order 13563 in a manner that is reasonably feasible and appropriate, and consistent with the underlying statutory mandate [in Section 15(a) of the Commodity Exchange Act].” Rulemaking teams were allowed to “choose ... quantitative analysis to respond to comments received.”⁸² The guidance goes on to say that additional analysis is primarily needed when the comments raise specific concerns about costs and benefits, and that “[q]uantitative benefits need not always be greater than costs because there may be a statutory mandate or policy rationale behind the rule.”⁸³

⁷⁷ Office of the Inspector General, U.S. Commodity Futures Trading Commission, “A Review of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act,” June 13, 2011, available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf, and is hereafter referred to as “OIG/CFTC.” The CFTC OIG had previously issued an April 15, 2011, report in response to a congressional request entitled “An Investigation Regarding the Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act,” available at http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_041511.pdf.

⁷⁸ Subsection (a)(3) states that these requirements do not apply to “(A) An order that initiates, is part of, or is the result of an adjudicatory or investigative process of the Commission. (B) An emergency action. (C) A finding of fact regarding compliance with a requirement of the Commission.”

⁷⁹ OIG/CFTC, Exhibit 1.

⁸⁰ OIG/CFTC, p. 3.

⁸¹ *Ibid.*, Exhibit 2.

⁸² *Ibid.*, Exhibit 2, p. 3.

⁸³ *Ibid.*, Exhibit 2, pp. 6-7.

Comptroller of the Currency

Section 315 of the Dodd-Frank Act amended the PRA (44 U.S.C. §3502(5)) to designate OCC as an independent regulatory agency. Previously, OCC had been part of the Department of the Treasury, and therefore was subject to Executive Order 12866 and OMB Circular A-4, as well as the Unfunded Mandates Reform Act. As an independent regulatory agency, however, OCC is not subject to those requirements.

After discussing the applicability of analytical requirements in the RFA and the PRA, the OCC OIG report⁸⁴ noted requirements in the Riegle Community Development and Regulatory Improvement Act (“Riegle Act,” 12 U.S.C. §4802(a)), which states:

In determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency shall consider, consistent with the principles of safety and soundness and the public interest - (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of such regulations.

The term “Federal banking agencies” is defined in Section 4801 of the Riegle Act (12 U.S.C. §1813) as the “Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.” Therefore, although its OIG did not mention it, the Board of Governors of the Federal Reserve System also appears to be covered by this requirement.

Summary of the OIG Reports

Although the OIG reports identified statutory cost-benefit requirements that are applicable to all five of the independent regulatory agencies, those requirements are not as directive or as detailed as those in Executive Order 12866 or OMB Circular A-4. The statutory requirements often only require the agencies to “consider” costs and benefits, but do not specifically require the agencies to conduct a detailed analysis or to demonstrate that the benefits of their rules exceed or justify the costs. For example:

- The National Securities Market Improvement Act requires the SEC to “consider” whether an action “will promote efficiency, competition, and capital formation,” and the Securities Exchange Act of 1934 requires the agency to “consider” the impact that a rule would have on competition.
- The Riegle Act requires the FDIC, the OCC, and the Board of Governors of the Federal Reserve System to “consider ... any administrative burdens that such regulations would place on depository institutions ... [and] the benefits of such regulations.”
- The Commodities Exchange Act requires CFTC to “consider the costs and benefits of the action of the Commission.”

⁸⁴ Office of the Inspector General, Department of the Treasury, “Dodd-Frank Act: Congressional Request for Information Regarding Economic Analysis by OCC,” June 13, 2011, available at <http://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA-11-006.pdf>.

That lack of specificity notwithstanding, however, it is unclear how these agencies will be able to “consider” regulatory costs and benefits if they do not perform some type of systematic economic analysis of their proposed regulations. In the previously mentioned July 2011 decision by the U.S. Court of Appeals for the District of Columbia involving an SEC rule, the court said that the agency has a “statutory obligation to determine as best it can the economic implications of the rule.”⁸⁵

Consumer Financial Protection Bureau

Although not included in the 10 Senators’ May 4 letter to the OIGs, the Bureau of Consumer Financial Protection (often referred to as the Consumer Financial Protection Bureau, or CFPB) within the Federal Reserve System is also expected to issue Dodd-Frank Act regulations that will be of interest to financial institutions, the public, and Congress. CFPB was created by Title X of the Dodd-Frank Act, which consolidated many federal consumer protection responsibilities into the bureau. The act transferred supervisory and enforcement authority over a number of consumer financial products and services to the bureau on July 21, 2011. Title X and Title XIV of the act contain numerous provisions that require or permit the CFPB to issue regulations implementing the statute’s provisions.⁸⁶

Section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. §5512) establishes certain “standards of rulemaking” for CFPB. Specifically, it states that

the Bureau shall consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas.

Therefore, CFPB, like the other banking agencies, appears to be required to “consider” costs and benefits before issuing its rules, but is not specifically required to prepare detailed cost-benefit analyses to accomplish that goal.

Consumer Product Safety Commission

On July 7, 2011, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held a hearing at which several independent regulatory agencies testified about their response to the issuance of Executive Order 13563. One of the agencies represented at the hearing was the Consumer Product Safety Commission (CPSC). CPSC Commissioner Robert S. Adler testified that the commission has been required since 1981 amendments to the Consumer Product Safety Act to “conduct an extensive cost-benefit analysis when we promulgate safety rules.”⁸⁷ He said these provisions “easily match, if not surpass, in their stringency and scope the

⁸⁵ *Business Roundtable v. SEC*, D.C. Cir., No 10-1305, July 22, 2010, citing *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).

⁸⁶ For information on the rules that CFPB are expected to issue, see CRS Report R41380, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to be Issued by the Consumer Financial Protection Bureau*, by Curtis W. Copeland. For more information on CFPB itself, see CRS Report R41338, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau*, by David H. Carpenter.

⁸⁷ See <http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/070711/Adler.pdf>, p. 1.

cost-benefit provisions of the various executive orders on cost-benefit analysis recommended by the Office of Management and Budget.”⁸⁸ Specifically, he noted:

- 15 U.S.C. Section 2058(f)(1), which says “Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to - (A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce; (B) the approximate number of consumer products, or types or classes thereof, subject to such rule; (C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and (D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.”
- 15 U.S.C. Section 2058(f)(2), which says “The Commission shall not promulgate a consumer product safety rule unless it has prepared, on the basis of the findings of the Commission under paragraph (1) and on other information before the Commission, a final regulatory analysis of the rule containing the following information: (A) A description of the potential benefits and potential costs of the rule, including costs and benefits that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits and bear the costs. (B) A description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen. (C) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. The Commission shall publish its final regulatory analysis with the rule.”
- 15 U.S.C. Section 2058(3), which says “The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule) - (A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product; (B) that the promulgation of the rule is in the public interest; (C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product; (D) in the case of a rule which relates to a risk of injury with respect to which persons who would be subject to such rule have adopted and implemented a voluntary consumer product safety standard, that - (i) compliance with such voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or (ii) it is unlikely that there will be substantial compliance with such voluntary consumer product safety standard; (E) that the benefits expected from the rule bear a reasonable relationship to its costs; and (F) that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.”

⁸⁸ Ibid., pp. 2-3.

Commissioner Adler also noted, however, that the agency has issued only nine mandatory safety rules in the last 30 years, “opting instead to work with the voluntary standards sector and to negotiate individual Corrective Action Plans for the recall of specific hazardous products.”⁸⁹ He also said that certain labeling requirements do not require the same level of regulatory analysis as other types of safety rules.

Another perspective was offered by CPSC Commissioner Anne M. Northup, who said that most of the regulations mandated by the Consumer Product Safety Improvement Act of 2008 (CPSIA) are not required to be issued pursuant to the above-mentioned provisions that require cost-benefit analysis, and that the commission “has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.”⁹⁰ She also said that such an analysis would reveal that many of the regulations that the act required to be issued “cannot be justified.”

Implementation of Cost-Benefit Requirements

As noted previously in this report, Executive Order 12866 requires covered agencies to prepare cost-benefit analyses only if their rules are expected to be “economically significant” or “major” (e.g., are expected to have a \$100 million annual effect on the economy). A February 2011 CRS report examined 100 rules issued during calendar year 2010 that OIRA and the agencies considered to be “major,” and concluded that 37 of the rules appeared to be major because they involved annual transfers of \$100 million in funds from one party to another party, most commonly the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, special pay for members of the military, and crop payments).⁹¹ Ten other rules appeared to be major because they were expected to prompt \$100 million or more in annual consumer spending, or because they were establishing fees for the reimbursement of particular federal functions (e.g., issuance of passports and oversight of the nuclear power industry). Thirty-nine rules appeared to be major because they were expected to result in at least \$100 million in annual compliance costs, regulatory benefits, or both. In 20 of those 39 rules, estimated annual costs and benefits were both expected to exceed \$100 million. In 14 of the 20 rules, the agencies’ lowest estimates of regulatory benefits were larger than the highest estimated compliance costs. In only one rule were the lowest costs greater than the highest benefits, and the agency indicated that this result was caused by the lack of discretion provided in the underlying statute.⁹²

OMB Annual Reports on Costs and Benefits

OMB’s annual reports on the costs and benefits of regulations also indicate the extent to which federal agencies are estimating the costs and benefits of their rules.⁹³ In the 2011 report, reflecting

⁸⁹ Ibid., p. 1.

⁹⁰ See <http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/070711/Northup.pdf>, p. 5.

⁹¹ CRS Report R41651, *REINS Act: Number and Types of “Major Rules” in Recent Years*, by Curtis W. Copeland and Maeve P. Carey. The definitions of “economically significant” and “major” are almost identical.

⁹² Other rules appeared to be considered major because of increased costs or prices (albeit less than \$100 million per year), or for multiple reasons.

⁹³ In 2001, Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the “Regulatory Right-to-Know Act,” put in place a permanent requirement for an OMB report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the President’s budget an (continued...)

rules issued during FY2010, OMB reported that Cabinet departments and independent agencies issued a total of 66 “major” final rules.⁹⁴ For 18 of the rules, the issuing agencies quantified and monetized both benefits and costs, with annual costs estimated to be between \$6.5 billion and \$12.5 billion, and annual benefits estimated at between \$18.8 billion and \$86.1 billion. For 10 other rules, the agencies monetized only costs or benefits, but not both. For 32 rules, the agencies monetized only the transfer amounts. For six rules, the agencies did not quantify or monetize benefits or costs.

The OMB report also indicated that independent regulatory agencies issued 17 major final rules during FY2010. The agencies did not estimate both costs and benefits for any of the 17 rules. The SEC monetized costs for six of its nine rules, and in one joint rule issued by the Federal Reserve System and the Federal Trade Commission, the agencies assessed only costs. The Federal Reserve System issued five other rules, but did not provide monetized estimates of benefits for costs in any of them. OMB said that even when these agencies did cost-benefit analyses, it did “not know whether the rigor of the analyses conducted by these agencies is similar to that of the analyses performed by agencies subject to OMB review.”⁹⁵ OMB went on say the following:

We emphasize that for the purposes of informing the public and obtaining full accounting, it would be desirable to obtain better information on the benefits and costs of the rules issued by independent regulatory agencies. The absence of such information is a continued obstacle to transparency, and it might also have adverse effects on public policy.⁹⁶

Previous OMB Reports

Previous OMB reports evidenced the same patterns of analysis. For example:

- In the 2010 report (reflecting rules issued during FY2009), OMB reported that Cabinet departments and independent agencies issued 66 major final rules, and that they quantified and monetized both benefits and costs for 16 of the rules (with costs estimated to be between \$3.7 billion and \$9.5 billion, and benefits estimated at between \$8.6 billion and \$28.9 billion). Independent regulatory agencies issued 13 major final rules, and monetized both costs and benefits for one of the rules (issued by the SEC). In five other rules (three issued by the SEC and two issued by the NRC), the agencies monetized only costs. The Federal Reserve System did not provide information on benefits or costs for any of its three rules.⁹⁷

(...continued)

“accounting statement and associated report” containing an estimate of the total costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule.

⁹⁴ Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, June 2011, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

⁹⁵ *Ibid.*, p. 31.

⁹⁶ *Ibid.*

⁹⁷ See http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf for a copy of this report.

- In the 2009 report (reflecting rules issued during FY2008), OMB reported that Cabinet departments and independent agencies issued 42 major final rules, and that they quantified and monetized both benefits and costs for 13 of the rules (with costs estimated to be between \$7.9 billion and \$9.2 billion, and benefits estimated at between \$8.6 billion and \$39.4 billion). Independent regulatory agencies issued 11 major final rules, and monetized both costs and benefits for one of the rules (issued by the NRC). In two other rules (one each by the NRC and the Federal Energy Regulatory Commission), the agencies monetized only costs. The FCC did not provide information on costs or benefits for any of its four rules.⁹⁸

Appendix C of the 2011 OMB report provided information on the number of major rules issued by independent regulatory agencies during the 10-year period from October 1, 2000, through September 30, 2010. That information, shown in **Table 2** below, indicates that less than 40% of the major rules had “some” information on either benefits or costs.

**Table 2. Independent Regulatory Agencies and Cost-Benefit Analysis:
FY2001 Through FY2010**

Agency	Major Rules Issued	Major Rules with Some Benefit or Cost Information
Consumer Product Safety Commission	1	1
Federal Communications Commission	19	1
Federal Energy Regulatory Commission	1	1
Federal Reserve System	12	3
Federal Trade Commission	1	1
National Credit Union Administration	0	0
Nuclear Regulatory Commission	12	2
Pension Benefit Guaranty Corporation	0	0
Securities and Exchange Commission	45	9
Total	46	18

Source: OMB’s 2011 report on costs and benefits, Appendix C.

Preliminary Conclusions

The CRS and OMB reports suggest several broad conclusions about the current state of regulatory analysis. First, many of the rules for which agencies are required to prepare cost-

⁹⁸ See http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf for a copy of this report.

benefit analyses are “major” for reasons unrelated to regulatory compliance costs. Therefore, although economic analyses of these rules may be appropriate for transparency or other reasons, it may be unlikely that the analyses will result in significantly reduced compliance costs or increased regulatory benefits. Second, Cabinet departments and independent agencies like EPA are more likely to prepare cost-benefit analyses that produce monetized estimates of costs and benefits than independent regulatory agencies. However, not all rules issued by Cabinet departments and independent agencies contained such estimates. When monetary estimates of costs and benefits are available, estimated benefits are generally higher than estimated costs. Finally, some independent regulatory agencies (e.g., the SEC and the NRC) appear to be more likely to estimate at least the costs of their regulations than other independent regulatory agencies (e.g., the FCC and the Federal Reserve System).

Resources for the Future Conference

On April 7, 2011, Resources for the Future (RFF) held a conference entitled “Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Agencies?”⁹⁹ Some of the presenters at the conference discussed the degree to which certain independent regulatory agencies conducted economic analyses of their rules. For example:

- Professor Howard Beales, III of George Washington University said that the Federal Trade Commission (FTC) pays substantial attention to the efficiency implications of its enforcement cases, and that additional regulatory analysis of its rules is not needed because of existing procedural controls. He noted that FTC rulemaking is more elaborate than rulemaking in most other agencies, and that the statutory mandate to determine that certain practices are unfair or deceptive essentially amounts to a cost-benefit test.¹⁰⁰
- Professor Thomas Hazlett of George Mason University Law School said that the analyses in recent FCC rules has been inadequate, and suggested establishing an organization within the agency to improve the role of economic analysis.
- Alice Rivlin of the Brookings Institution said that the Federal Reserve System should do more economic analyses of some of its rules, and that the analyses could be improved by establishing standards for analysis and review by a respected authority.
- James Overdahl of National Economic Research Associates said that the SEC issues many major rules with little economic analysis of their effects, and that economic analysis should be a higher priority at the agency.

The conference summary prepared by Arthur Fraas and Randall Lutter of RFF (both of whom formerly worked at OIRA) stated that the participants “generally agreed that the current level of analysis at most [independent regulatory agencies] is inadequate and that additional steps should

⁹⁹ See <http://www.rff.org/events/pages/can-greater-use-of-economic-analysis-improve-regulatory-policy-at-independent-regulatory-agencies.aspx> for more information about this conference. Resources for the Future describes itself as “a nonprofit and nonpartisan organization that conducts independent research—rooted primarily in economics and other social sciences—on environmental, energy, natural resource and environmental health issues.”

¹⁰⁰ See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_Beales.pdf for a copy of his presentation.

be taken to establish better economic analysis of [independent regulatory agencies'] regulations.¹⁰¹

Regulatory Reform Legislation in the 112th Congress

A number of bills have been introduced in the 112th Congress that would codify, expand, or otherwise modify existing requirements for cost-benefit or other types of regulatory impact analysis. Some of the bills would expand the principles and requirements in Executive Order 12866 to all agencies or rules, some would require cost-benefit analysis by certain agencies, and other bills would modify the analytical requirements in the RFA or UMRA.

Expanding the Requirements for Cost-Benefit Analysis

S. 602: the Clearing Unnecessary Regulatory Burdens (CURB) Act

S. 602, introduced by Senator Susan Collins on March 16, 2011, would, if enacted, codify and expand some of the cost-benefit analysis requirements that are currently in Executive Order 12866. Specifically, the bill would generally require all agencies (including independent regulatory agencies) to submit cost-benefit analyses to OIRA for their “significant regulatory actions.”¹⁰² A “significant regulatory action” is defined in the bill as it currently is defined in Executive Order 12866—an action that is likely to result in a regulation that may

- (A) have an annual effect on the economy of \$100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (B) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (C) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (D) raise novel legal or policy issues arising out of legal mandates and the priorities, principles, and provisions of this section.

The bill would require agencies to quantify regulatory benefits and costs “to the extent feasible,” and to assess the costs and benefits “potentially effective and reasonably feasible alternatives to the planned significant regulatory action.”

¹⁰¹ See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_Summary.pdf for a copy of this summary.

¹⁰² Section 2(a)(2) of S. 602 defines an “agency” as having the same meaning as Section 3502(1) of title 44, United States Code. That provision defines an agency as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include - (A) the Government Accountability Office; (B) Federal Election Commission; (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.”

Analysis

S. 602 would expand the analytical requirements in Executive Order 12866 in two ways. First, the bill would include independent regulatory agencies like the SEC and the FCC, which are not currently covered by the analytical requirements in the executive order, and which are not currently required to submit their rules and analyses for review to OIRA. Requiring independent regulatory agencies to submit cost-benefit analyses for their significant rules to OIRA could put them more under the control of the President than ever before—perhaps in direct contravention of the statutes that created them in the first place. Notably, however, S. 602 does not require the agencies to submit their significant *rules* to OIRA—only the underlying cost-benefit analyses. If the bill is enacted, the President and OMB could arguably amend current procedures under Executive Order 12866 and require the independent regulatory agencies to submit their rules. On the other hand, S. 602 states that the cost-benefit analyses must be submitted “at such times specified by the Administrator.” Theoretically, therefore, the OIRA Administrator could use this authority to limit the effect of this requirement (e.g., requiring agencies to submit the analyses after the rules have been published and taken effect).

Second, even among agencies that are already covered by Executive Order 12866, S. 602 would greatly expand the number of rules subject to cost-benefit analysis. Currently, these agencies are required to prepare cost-benefit analyses only for “economically significant” rules that are submitted to OIRA (an average of about 100 regulatory actions per year during the past 10 years). S. 602 expands this requirement to all “significant” rules (about 650 regulatory actions per year). With the expansion of OIRA reviews to independent regulatory agencies and all significant regulatory actions, it is unclear whether current OIRA staffing would be sufficient to analyze and comment on all of these cost-benefit analyses.¹⁰³

H.R. 1281, the Restoring Economic Certainty Act of 2011

H.R. 1281, introduced by Representative Reid J. Ribble on March 31, 2011, would generally prohibit all federal agencies from taking rulemaking actions (with certain exceptions) during the two-year period starting 30 days after the date of enactment. At that 30-day point, each agency must begin preparing an economic impact statement for any rule that was “proposed but not promulgated” before the start of the moratorium period. The statement must be certified by the Director of OMB, and contain a detailed estimate of the rule’s annual costs and benefits, including the anticipated net impact on employment. Within 12 months of the start of the moratorium period, agencies must submit the economic impact statements relating to “all such pending rulemaking actions” to the “appropriate” congressional committees. After the two-year moratorium, agencies must include the statements in their rulemaking actions.

Analysis

It is unclear what the terms “proposed but not promulgated” and “all such pending rulemaking actions” mean, so the scope and effect of the bill’s analytical requirements are unclear. Nevertheless, because the bill would generally prohibit agencies from taking any rulemaking action for two years, it appears that the analytical requirements would only apply to the

¹⁰³ OIRA currently has about 50 staff members, of which about 30 do regulatory reviews and reviews of about 3,000 agency information collection requests per year.

exceptions to the moratorium during the two-year period (e.g., military and foreign affairs rules, and rules that repeal an existing rule). After the moratorium, the bill would require agencies to include an economic impact statement in each rule, including the hundreds of non-controversial administrative rules that agencies issue each year (e.g., temporary safety zones and traffic separation schedules).

S. 1219 and H.R. 2204, the Employment Impact Act of 2011

On June 16, 2001, Senator John Barrasso and Representative Lee Terry introduced S. 1219 and H.R. 2204, respectively, which would require all federal agencies to “include in every recommendation or report on proposals for legislation and other major Federal actions with potentially significant effects on jobs and job opportunities, a jobs impact statement.” The statement is to include (among other things) an assessment of the jobs that would be lost, gained, or sent overseas as a result of the proposed action; any adverse effect on jobs and job opportunities which could not be avoided; alternatives to the proposed action that could avoid negative impacts on jobs and job opportunities; and the relationship between any local short-term impacts on jobs and the maintenance and enhancements of long-term productivity and environmental values. Agencies are instructed to “take into account the cumulative impact on jobs and job opportunities of concurrently pending proposals affecting a particular industry or sector of the economy, and shall not make a finding of no significant impact solely on the basis of examining the impacts of a single proposal in isolation from other pending proposals.”

Analysis

Although some of the existing economic analysis requirements include effects on employment,¹⁰⁴ S. 1219 and H.R. 2204 are more specific in terms of they types of analyses required. However, the bills do not define the term “major Federal actions with potentially significant effects on jobs and job opportunities,” so it is not clear how many actions will trigger the requirement for a jobs impact statement. In similar situations (e.g., the Regulatory Flexibility Act), agencies have been given broad discretion to define such terms, and as a result, the agencies often certified that their actions did not trigger the analysis. To the extent that agencies conclude that their actions have the specified effects, some aspects of the analysis may be difficult to perform (e.g., identifying “the relationship between any local short-term impacts on jobs and the maintenance and enhancements of long-term productivity and environmental values,” and determining the “cumulative impact on jobs and job opportunities of concurrently pending proposals affecting a particular industry or sector of the economy”).

¹⁰⁴ For example, UMRA written statements are required to include estimates of effects on job creation, productivity, full employment, and international competitiveness. Section 6(a)(3)(C)(ii) of Executive Order 12866 states that the analysis is to include “any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness)....”

Applying the Executive Orders' Principles to Independent Regulatory Agencies

S. 358: the Regulatory Responsibility for Our Economy Act of 2011

S. 358, introduced by Senator Pat Roberts on February 15, 2011, would, if enacted, put into statute many of the broad regulatory principles enunciated in Executive Orders 12866 and 13563 (e.g., that federal agencies must adopt regulations only upon a reasoned determination that the benefits justify the costs to the extent permitted by law, tailor regulations to accomplish regulatory objectives while imposing the least burden on society, select regulatory approaches that maximize net benefits, and allow for public participation). The bill defines a covered “agency” to include independent regulatory agencies, and exempts certain types of regulations from these requirements (e.g., rules that pertain to military or foreign affairs functions, and that are limited to agency organization, management, or personnel matters).

Analysis

Senator Roberts said the bill would “strengthen and codify President Obama’s Executive Order from January 18 (Executive Order 13563),” and would ensure that provisions in the executive order would be implemented.¹⁰⁵ He also said that the legislation would improve on the executive order by including independent regulatory agencies. However, some of the standards in both the executive order and the proposed legislation may conflict with each other. For example, a regulatory option that imposes the “least burden on society” may not be the option that will “maximize net benefits.”¹⁰⁶ Also, even if S. 358 is enacted, significant regulations issued by independent regulatory agencies would not be reviewed by OIRA under the procedures currently in Section 6 of Executive Order 12866, so their regulations would not be independently analyzed for consistency with these legislative standards. Those agencies’ rules could, however, be made subject to review by OIRA by statute, or by the President amending Executive Order 12866.

Requiring Cost-Benefit Analysis for Certain Agencies’ Rules

H.R. 1840, CFTC and Cost-Benefit Analysis

H.R. 1840, introduced by Representative Michael K. Conaway on May 11, 2011, would amend Section 15(a) of the Commodity Exchange Act (7 U.S.C. §19(a)) to require CFTC to assess the quantitative and qualitative costs and benefits of upcoming regulations and to adopt a rule “only on a reasoned determination that the benefits of the intended regulation justify the costs of the intended regulation.” In making that determination, CFTC is required to evaluate a variety of factors, including the protection of market participants and the public, and whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

¹⁰⁵ Senator Pat Roberts, “Regulatory Responsibility for Our Economy Act of 2011,” remarks in the Senate, *Congressional Record*, daily edition, February 16, 2011, p. S766.

¹⁰⁶ For example, one regulatory option could have estimated costs of \$50 million and benefits of \$100 million, yielding net benefits of \$50 million. Another regulatory option could have estimated costs of \$100 million and benefits \$200 million, yielding net benefits of \$100 million. The first option would impose the least burden, while the second option would produce the largest net benefits.

Analysis

When H.R. 1840 was introduced, Representative Conaway said “Just as President Obama’s Executive Order directed government agencies to evaluate the cost of regulations on jobs and the economy, this bipartisan legislation will ensure the CFTC conducts a comprehensive qualitative and quantitative analysis of their proposed regulations.”¹⁰⁷ As noted previously, Section 15(a) of the Commodity Exchange Act currently only requires CFTC to “consider” the costs and benefits of its rules before they are issued. H.R. 1840 appears to require CFTC to assess regulatory costs and benefits for all of its rules, not just those that are “economically significant” or “significant.” Also, although the bill states that the cost-benefit assessments are to be done “through the Office of the Chief Economist,” it does not assign oversight responsibilities to anyone outside of the commission (e.g., to OIRA).

H.R. 2175, the Regulatory Balance Act

H.R. 2175, introduced by Representative Stephen Fincher on June 14, 2011, would require the Department of Agriculture (USDA), EPA, and the Food and Drug Administration (FDA) to “perform the cost-benefit analysis described in section 6(a)(3)” of Executive Order 12866 for “any proposed regulation that is determined to be a significant regulatory action” under the executive order. The analysis would have to be submitted to “the Congress” before the rule could take effect.

Analysis

Section 6(a)(3) of Executive Order 12866 contains two types of requirements for cost-benefit analysis. For rules considered “significant” under Section 3(f) of the order, Section 6(a)(3)(B)(ii) requires covered agencies to provide to OIRA a general “assessment of the potential costs and benefits of the regulatory action.” However, for rules considered “economically significant” under Section 3(f)(1) (e.g., those expected to have a \$100 million annual impact on the economy), Section 6(a)(3)(C) requires a more detailed analysis, including the “costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulatory action.” Because H.R. 2175 only specifies “Section 6(a)(3),” it is not clear which of these types of analyses is required.

The identified agencies are already required to conduct Section 6(a)(3)(B)(ii) analyses for significant rule. However, if the bill requires those agencies to conduct Section 6(a)(3)(C) analyses for all “significant” rules, then the number of cost-benefit analyses could increase substantially. For example, during calendar year 2010, OIRA reviewed 21 “economically significant rules” from EPA, and a total of 93 rules that were considered “significant.”¹⁰⁸

H.R. 2308, the SEC Regulatory Accountability Act

H.R. 2308, introduced by Representative Scott Garrett on June 23, 2011, would amend Section 23 of Securities Exchange Act of 1934 (15 U.S.C. 78w) and require the SEC to conduct a cost-

¹⁰⁷ See <http://conaway.house.gov/News/DocumentSingle.aspx?DocumentID=241028>.

¹⁰⁸ See <http://www.reginfo.gov/public/do/eoCountsSearch>.

benefit analysis before promulgating a regulation or issuing an order under applicable securities laws. Specifically, the bill states that the SEC shall:

(A) clearly identify the nature of the problem that the proposed regulation is designed to address, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted; (B) utilize the Office of the Chief Economist to assess the costs and benefits, both qualitative and quantitative, of the intended regulation or order and propose or adopt a regulation or order only on a reasoned determination that the benefits of the intended regulation or order justify the costs of the intended regulation or order; and (C) ensure that any regulation or order is accessible, consistent, written in plain language, and easy to understand and shall measure, and seek to improve, the actual results of regulatory requirements.

It also says that the commission “may” also take certain actions in making a reasoned determination of the costs and benefits of a potential regulation (e.g., consider the impact on capital formation, and determine whether, in choosing among alternative regulatory approaches, those approaches maximize net benefits).

Analysis

Representative Garrett said that the bill “would simply require the SEC to abide by President Obama’s executive order [Executive Order 13563].”¹⁰⁹ However, H.R. 2308 would appear to require the SEC to conduct cost-benefit analyses for all rules and orders, not just those that are economically significant (as is currently required in Executive Orders 12866 and 13563). Also, the SEC chairman has said that the agency already conducts cost-benefit analyses for its rules, and would comply with the executive order’s requirements. The SEC OIG’s June 2011 report indicated that the commission’s current rulemaking procedures were already “closely aligned” with the requirements relevant executive orders and OMB circulars.¹¹⁰ Therefore, some have questioned whether the bill would require SEC to do more than what is already being done.¹¹¹ On the other hand, the D.C. Court of Appeals decision in July 2011 suggests that the SEC may need to improve their analyses of the costs and benefits of proposed rules.¹¹²

S. 1292, the Employment Protection Act of 2011

S. 1292, introduced by Senator Pat Toomey on June 29, 2011, would require EPA to “analyze the impact on employment levels and economic activity,” “disaggregated by state,” before “promulgating any regulation or other requirement, issuing any policy statement, guidance document, or endangerment finding, implementing any new or substantially altered program, or denying any permit.” Each analysis is required to include “a description of estimated job losses and decreased economic activity due to the denial of a permit, including any permit denied under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)” GAO would be required to report annually to the Senate Committee on Environment and Public Works and the House

¹⁰⁹ See <http://garrett.house.gov/News/DocumentSingle.aspx?DocumentID=248496>.

¹¹⁰ OIG/SEC, p. 4.

¹¹¹ Yin Wilczek, “Garrett Introduces Bill to Require SEC to Consider Costs, Benefits of Rulemaking,” *BNA Daily Report for Executives*, July 5, 2011, p. EE-9.

¹¹² *Business Roundtable v. SEC*, D.C. Cir., No 10-1305, July 22, 2010.

Committee on Transportation and Infrastructure on the “economic models” that EPA used to carry out this requirement.

Analysis

Executive Order 12866 already requires EPA (and other covered agencies) to report on the costs of its “economically significant” regulations, including “any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness).” UMRA requires EPA to identify in its written statements “any disproportionate budgetary effects on particular regions, governments, or segments of the private sector, and estimates of effects on the national economy, including effects on job creation, productivity, full employment, and international competitiveness.” S. 1292 would greatly expand these requirements to cover all EPA regulations (not just those that are “economically significant” or subject to UMRA), as well as many other types of documents (i.e., guidance, endangerment findings, and permitting decisions). According to GAO’s database, in calendar year 2010, EPA issued a total of 446 final rules, of which 433 were considered “routine” actions (e.g., approval of state implementation plans, exemptions to pesticide tolerances).¹¹³ EPA was required to conduct cost-benefit analyses on only 10 of 446 rules that were considered “economically significant” or “major” rules (e.g., rules with a \$100 million annual effect on the economy). S. 1292 would require EPA to conduct analyses on all 446 rules, plus any other policy statements, guidance documents, endangerment findings, or permit denials. Also, some aspects of this bill are unclear (e.g., whether “promulgating a regulation” includes proposed rules or just final rules, and what constitutes a “substantially altered” program).

Improving the Implementation of the RFA and UMRA

Several bills have been introduced in the 112th Congress to improve the nature and scope of analyses required by the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. For example:

- Both S. 474, introduced by Senator Olympia Snowe on March 3, 2011, and S. 1030, introduced by Senator Snowe on May 19, 2011, would amend the RFA and require the agencies’ regulatory flexibility analyses to include indirect effects of their rules, include more detailed analyses, and cover significant guidance documents.
- H.R. 527, introduced by Representative Lamar Smith on February 8, 2011, would also require more detailed RFA analyses and consideration of indirect effects, but would also cover rules that are issued without a prior notice of proposed rulemaking and require the SBA Office of Advocacy to issue rules governing RFA compliance (which could include a definition of a “significant economic impact on a substantial number of small entities).
- Both S. 817, introduced by Senator Rob Portman on April 14, 2011, and S. 1189, introduced by Senator Portman on June 14, 2011, would, if enacted, change the definition of an “agency” to include independent regulatory agencies. S. 1189 would go further, however, by defining “cost” to include indirect effects,

¹¹³ GAO’s database is available at <http://www.gao.gov/legal/congressact/fedrule.html>.

requiring more detailed analysis, and eliminating several of the analytical exclusions (e.g., rules without a prior notice of proposed rulemaking, and rules that do not require \$100 million in “expenditures”).

- H.R. 373, introduced by Representative Virginia Foxx on January 20, 2011, would change the definition of an “agency” in UMRA to include independent regulatory agencies, expanding the act’s coverage to include “reasonably foreseeable indirect costs,” and cover rules that are currently not covered (e.g., rules without a prior notice of proposed rulemaking, and rules that are not “mandates”).

Analysis

While these bills may, if enacted, broaden the coverage of the RFA and UMRA, and require the agencies to include elements in their analyses that are not currently considered, they may not improve all aspects of the acts’ administration, and may not result in more analyses. For example, none of the RFA bills explicitly requires that the term “significant economic impact on a substantial number of small entities” be defined, which could result in agencies to continue to certify that their rules do not require analysis. Also, although S. 1189 and H.R. 373 could make UMRA applicable to more rules, and could require more detailed analysis, UMRA still would not require agencies to do much more than is currently required in Executive Order 12866 and OMB Circular A-4.

Concluding Observations

As the preceding discussion indicates, many federal agencies are already required to conduct cost-benefit and other types of analysis before they issue certain proposed or final rules. These requirements have been added incrementally by various statutes and executive orders during the past 40 to 50 years, and sometimes require agencies to perform the same general types of analyses. For example, virtually all of the elements of the written statements that agencies are required to prepare pursuant to UMRA were already required by Executive Order 12866 (e.g., quantitative and qualitative estimates of costs and benefits, effects on the national economy, consideration of a range of alternatives, selection of the alternative that is least costly, most cost-effective, or least burdensome, or an explanation of why that alternative was not selected). The drafters of UMRA appear to have recognized the overlap, stating in Section 202(c) of the statute (2 U.S.C. §1534) that an agency may prepare the written statement “in conjunction with or as part of any other statement or analysis.” Section 605(a) of the RFA (5 U.S.C. §605(a)) contains the same type of statement.

Also, many of the current requirements have substantial exclusions and exceptions, or give federal agencies substantial discretion to decide whether an analysis is required. For example, the RFA’s analytical requirements do not apply to rules that are issued without a prior notice of proposed rulemaking, and agencies can avoid regulatory flexibility analyses if they certify that their rules do not have a “significant” economic impact on a “substantial” number of small entities. UMRA does not apply to independent regulatory agencies, and contains more than a dozen other ways that “economically significant” rules would not be covered by its requirements. Executive orders on children, federalism, and energy permit agencies to escape coverage of their analytical requirements if they conclude the effects of their rules will not have “disproportionate” effects on children, will not have “significant federalism implications,” or do not involve

“significant energy actions.” Executive Order 12866 and OMB Circular A-4 contain some of the most inclusive and far-reaching analytical requirements, but they do not apply to independent regulatory agencies, or to rules that are not “economically significant.”

Proposed legislation in the 112th Congress would, if enacted, add to the existing patchwork of analytical requirements, expand the reach of the existing requirements, and/or close existing “loopholes.” For example, S. 602 would codify and expand the requirements in Executive Order 12866 to cover independent regulatory agencies, and to cover rules that are “significant” (not just those that are “economically significant”). As a result, agencies would have to do cost-benefit analyses for hundreds of additional rules each year, but the independent regulatory agencies would not have to submit the underlying rules to OIRA. H.R. 2175 may also expand cost-benefit analysis to “significant” rules, but only at USDA, EPA, and FDA. H.R. 2308 would require cost-benefit analysis for all rules issued by the SEC, regardless of their level of significance. S. 474 and S. 1030 would expand the RFA to significant guidance documents, and would require more detailed and extensive analysis. S. 1189 would expand UMRA to independent regulatory agencies, and cover many rules that were previously excluded.

Other bills would require agencies to prepare cost-benefit analyses for all of their rules, regardless of their size or degree of controversy. Doing so could delay hundreds of non-significant, administrative rules that industry and the public would often like to see in place (e.g., traffic separation schedules and temporary safety zones). Also, the newly required analyses could prove costly for the agencies to implement, and may produce little or no improvement in the rules themselves. Arguably, therefore, a universal cost-benefit analysis requirement might not pass a cost-benefit test.

Congressional Options

Congress could decide that none of the proposed legislative changes merit enactment, and thereby keep the existing analytical framework in place. Alternatively, Congress could decide to enact one or more of these bills, perhaps resulting in more analyses being performed, more detailed analyses, or both. However, even if most of the pending legislation is enacted, many significant rules may continue to be issued without certain types of analysis. For example, none of the bills would define the term “significant economic impact on a substantial number of small entities,” or specifically require an agency to do so.¹¹⁴ As a result, agencies would likely continue to have broad discretion to determine which rules do not require an RFA analysis. Other bills would not substantially change the nature or number of regulatory analyses that certain agencies would perform. Finally, enacting the bills would add to the existing, incrementally developed combination of statutes, executive orders, and OMB circulars that covers some agencies and rules but not others, and can be confusing to the agencies and the public.

Another, more comprehensive approach could be to consolidate all of the analytical requirements in one place, and perhaps expand those requirements to include more agencies or more rules, or to require different types of analysis for the rules that are covered. Since Executive Order 12866 and OMB Circular A-4 currently contain the most detailed and inclusive analytical requirements, perhaps the easiest way to accomplish that goal would be to add elements to the executive order

¹¹⁴ H.R. 527 would require SBA’s Office of Advocacy to issue rules governing RFA compliance, but does not specifically require that the rules define the term “significant economic impact on a substantial number of small entities.”

and circular and ensure that certain agencies and types of economic effects are included (e.g., effects on small entities, or state, local, or tribal governments). The President could arguably make most of these changes by amending the executive order and the circular without congressional action.¹¹⁵ In 2011, OMB said obtaining better information on the costs and benefits of independent regulatory agencies' rules was "desirable," and described the absence of such information as an "obstacle to transparency" that may be having "adverse effects on public policy."¹¹⁶ For more than 20 years, the Administrative Conference of the United States and the American Bar Association have recommended that independent regulatory agencies' rules be reviewed by OIRA.¹¹⁷

However, expanding the executive order's cost-benefit analysis requirements to independent regulatory agencies, and requiring those agencies to submit their covered rules and analyses to OIRA for review, may trigger resistance by those in Congress and elsewhere who believe these agencies should remain more independent of presidential influence than Cabinet departments or agencies like EPA. Sally Katzen, OIRA Administrator for five years during the Clinton Administration, favors expansion of the executive order's requirements to independent regulatory agencies, and has suggested that a "sense of the Congress" resolution indicating that such a course would be desirable "would go a long way to ameliorate any concerns in that regard."¹¹⁸

Another option would be amend the executive order to require independent regulatory agencies to prepare cost-benefit analyses, but not require them to submit their rules to OIRA for review.¹¹⁹ If Congress was to establish a "congressional office of regulatory analysis" as is contemplated in H.R. 214 (introduced by Representative Don Young on January 7, 2011), then perhaps the rules and analyses could be submitted there.¹²⁰ Or, to maintain a measure of independence, the independent regulatory agencies could be required to submit their rules and analyses to OIRA, but the agencies could be given the same type of authority they have with regard to PRA

¹¹⁵ Commenters at an April 2011 Resources for the Future conference stated that both President Reagan and President Clinton obtained legal opinions from the Office of Legal Counsel at the Department of Justice stating that Executive Orders 12291 and 12866 could cover independent regulatory agencies. However, the decision not to cover them was reportedly a political, not a legal, determination. See http://www.rff.org/Documents/Events/Workshops%20and%20Conferences/110407_Regulation_KatzenRemarks.pdf, pp. 2-3.

¹¹⁶ Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, June 2011, p. 31, available at http://www.whitehouse.gov/sites/default/files/omb/info/2011_cb/2011_cba_report.pdf.

¹¹⁷ Administrative Conference of the United States, ACUS Recommendation 88-1, "Presidential Review of Agency Rulemaking," 1988, available at <http://www.law.fsu.edu/library/admin/acus/305889.html>. Comments from the American Bar Association on presidential supervision on rulemaking, March 16, 2009 (citing House of Delegates, Recommendation: Presidential Review of Rulemaking (Annual Meeting 1990)), available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/ABANET_comments.pdf.

¹¹⁸ Testimony of Sally Katzen before the Senate Committee on Homeland Security and Governmental Affairs, "Federal Regulation: A Review of Legislative Proposals, Part II," July 20, 2011, available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6b0123b5-c6b2-42f2-9bfa-1b588af931d4. See also Sally Katzen, "Expand Centralized Regulatory Review to Independent Agencies," August 9, 2011, available at <http://www.law.upenn.edu/blogs/regblog/2011/08/expand-centralized-regulatory-review-to-independent-agencies.html>.

¹¹⁹ Sally Katzen has suggested that the rules could be submitted to GAO or the Congressional Budget Office. See Sally Katzen, "Expand Centralized Regulatory Review to Independent Agencies," August 9, 2011, available at <http://www.law.upenn.edu/blogs/regblog/2011/08/expand-centralized-regulatory-review-to-independent-agencies.html>.

¹²⁰ Other options include GAO or the Congressional Budget Office, although those agencies would likely require additional resources to take on this responsibility.

submissions—to override any objections from OIRA by a majority vote of the agency’s leadership.¹²¹

Codification of Executive Order’s Requirements

Alternatively, Congress could decide to enact legislation codifying and expanding the executive order’s requirements to cover independent regulatory agencies, and requiring different types of analyses. Supporters of this approach include Susan Dudley, OIRA Administrator for two years during the George W. Bush Administration, who has said codification could (1) signal congressional support for cost-benefit analysis principles, (2) apply the requirements to independent regulatory agencies, and (3) make compliance with the requirements judicially reviewable.¹²² She also said that legislation could emphasize certain types of analyses that have been found lacking (e.g., effects on employment or indirect effects). Support has also come from Professor Peter L. Strauss of Columbia Law School, who testified in February 2011 that codifying in one statute the analytic requirements in Executive Order 12866 and elsewhere, and “framing them to permit needed regulation to proceed efficiently, would in my judgment be a highly desirable step.”¹²³

Other observers, however, have opposed codification of the cost-benefit analysis requirements in Executive Order 12866. For example, Sally Katzen has said that (1) the executive order’s requirements have been successfully implemented for more than 30 years (as evidenced by the fact that OMB’s reports regularly show that the costs of rules exceed the benefits); (2) even if the executive orders were not working well, there is no evidence that putting the requirements in statutes would make them work better; (3) the executive orders permit Presidents to emphasize different things during their administrations, which would be lost if the requirements were put in statute; and (4) codification of cost-benefit analysis requirements “would be amending a host of previously enacted statutes that either are silent on the role of costs in the formulation of regulations or do not permit the consideration of such factors.”¹²⁴

Another option to cover all or some of the independent regulatory agencies by the requirements of Executive Order 12866 would be for Congress to amend the statutory definition of an “independent regulatory agency” that is referenced in the executive order. Executive Order 12866 defines an “agency” as (unless otherwise indicated) “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).” That definition (which is actually in 44 U.S.C. 3502(5)) lists the agencies considered to be independent regulatory agencies (e.g., CFTC, SEC, FCC, and the NRC), and also says it includes “any other similar agency designated by statute as a Federal independent regulatory agency or commission.” Congress could amend this provision,

¹²¹ See 44 U.S.C. 3507(f).

¹²² Testimony of Susan E. Dudley before the Senate Committee on Homeland Security and Governmental Affairs, “Federal Regulation: A Review of Legislative Proposals, Part II,” July 20, 2011, available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=6b0123b5-c6b2-42f2-9bfa-1b588af931d4, pp. 16-17.

¹²³ Testimony of Peter L. Strauss before the Subcommittee on Courts, Commercial and Administrative Law, House Committee on the Judiciary, “The APA at 65 – Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?,” February 28, 2011, available at <http://judiciary.house.gov/hearings/pdf/Strauss02282011.pdf>.

¹²⁴ Sally Katzen, “Why Congress Should Not Codify Cost-Benefit Analysis Requirements,” July 7, 2011, available at <http://www.law.upenn.edu/blogs/regblog/2011/06/why-congress-should-not-codify-requirements-for-economic-analysis-of-new-regulations.html>.

stating that, for purposes of Executive Order 12866, all or certain of these agencies would be covered by the analytical and/or rule submission requirements in the executive order.¹²⁵ This approach would not, however, prohibit the President or any future President from amending or revoking the executive order.

Contextual Considerations

Whether done by presidential or congressional action, any effort to consolidate or reform the analytical requirements in rulemaking should be cognizant of the state of existing law in this area. Congress has required cost-benefit analysis in some statutes, prohibited it in other statutes,¹²⁶ and not precluded it in still other statutes.¹²⁷ Both Executive Orders 12866 and 13563 contain the phrase “to the extent permitted by law” when referencing the principles of rulemaking and the analytical requirements, confirming that agencies must adhere to the requirements contained in their authorizing statutes, and may only apply the principles and procedures of the executive orders if the statutes permit them to do so. Should Congress decide to enact legislation superseding existing law, it should do so in full recognition of the likely consequences.

Presidential and congressional requirements for cost-benefit analysis should also recognize that data availability may be an implementation issue, and that additional resources may be necessary for the agencies conducting these analyses. In some cases, the data that agencies need to estimate the costs and benefits of their rules may not exist, or may only be available from regulated entities.¹²⁸ Although there is no “typical” cost-benefit analysis (just as there is no “typical” rule), the cost of conducting many individual regulatory analyses has been in the hundreds of thousands of dollars.¹²⁹ If more agencies are required to prepare more detailed analyses for more rules, it is unclear how the agencies will be able to do so without more resources.¹³⁰ As noted earlier in this report, if agencies are required to prepare cost-benefit analyses for rules that are not expected to

¹²⁵ The scope of any such amendment would likely need to be confined to Executive Order 12866 to avoid affecting other statutes and executive orders that reference the statutory definition of an independent regulatory agency.

¹²⁶ *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

¹²⁷ *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

¹²⁸ See, for example, Arthur Levitt, Jr., “Don’t Gut the S.E.C.,” *New York Times*, August 7, 2011, p. A19, who noted that when he was chairman of the SEC, the data needed to do a cost-benefit analysis was only available from large auditing firms, who would not provide the data. See also U.S. Government Accounting Office, *Federal Water Requirements: Challenges to Estimating the Cost Impact on Local Communities*, GAO-06-151R (December 1, 2005), which reported that local communities often lack the institutional knowledge or historical records on treatment technologies and, as a result, may not be able to provide cost information.

¹²⁹ A 1997 study by the Congressional Budget Office concluded that the median cost of 85 analyses conducted between 1990 and 1996 was \$270,000, but some of the analyses cost more than \$1 million. See Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, available at <http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf>. See also U.S. General Accounting Office, *EPA’s Costs of Preparing Regulatory Impact Analyses*, GAO/RCED-97-15R (December 6, 1996), which reported that 27 EPA analyses cost about \$13 million, or an average of about \$480,000 each. The cost of the individual studies ranged from \$46,000 to \$3.8 million.

¹³⁰ After the July 22, 2011, decision regarding the SEC’s proxy access rule, the Committee on Capital Markets Regulation (described on its website as an independent and nonpartisan 501(c)(3) research organization dedicated to improving the regulation of U.S. capital markets) released a statement saying, in part, that the SEC and other commissions “will not be able to do the necessary cost-benefit analysis without adequate funding,” and went on to say that “we support such funding.” See <http://www.capmktreg.org/pdfs/2011.07.27%20Proxy%20Access%20statement.pdf>.

be controversial and are unlikely to be improved as a result of the analysis, that type of requirement itself may not pass a cost-benefit test.

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