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Regulatory Impact Analysis: The Cornerstone of Regulatory Reform

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Congress has a diverse array of proposed regulatory reforms vying for attention, from targeted reforms aimed at providing relief to small businesses to broad-based reforms of the rulemaking process. Setting priorities will be a challenge, but the common objective is clear: solving more problems at a lower cost with fewer regulations.

To ensure that this happens, decision makers must understand the likely consequences of regulations before they propose them. Therefore, any effective regulatory reform must require agencies to first conduct a complete analysis of regulatory proposals and their alternatives before they write proposed and final regulations. For this reason, comprehensive regulatory impact analysis (RIA) is the cornerstone of regulatory reform.

THE GOAL: SOLVE MORE PROBLEMS AT LOWER COST WITH FEWER REGULATIONS

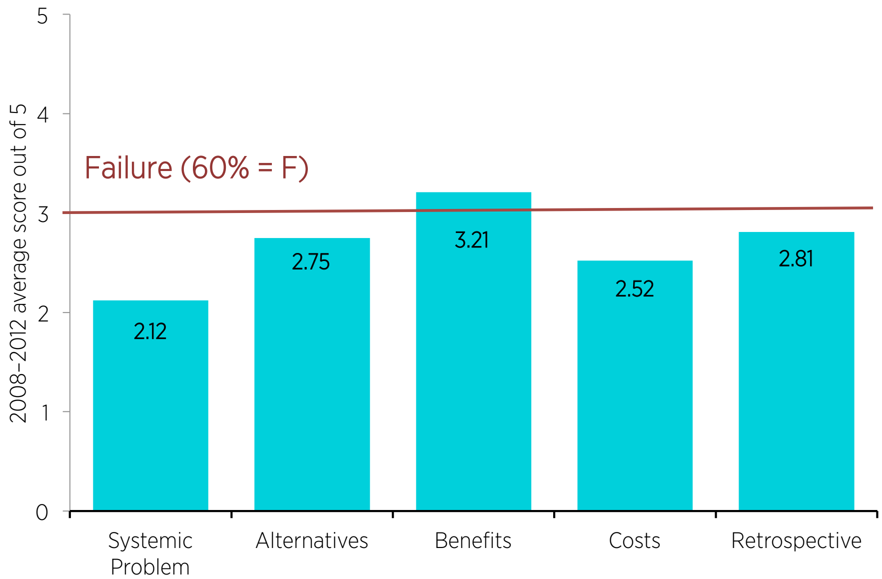
In general, the only way we improve our standard of living is by improving productivity—that is, achieving more with less. This principle applies to government as well as to families and business firms. Regulatory reform should enable regulatory agencies to solve more problems at lower cost with fewer regulations.

Presidents of both parties have articulated this goal in the past when proposing requirements to guide executive branch regulatory review:

- President Carter's Executive Order 12044 directed that regulations "shall achieve legislative goals effectively and efficiently. They shall not impose unnecessary burdens."[1]

- President Reagan's Executive Order 12291 was intended in part to "reduce the burdens of existing and future regulations, increase agency

FIGURE 1. REGULATORY REPORT CARD SCORES, 2008–2012



Source: Authors' calculations based on data downloaded from www.mercatus.org/reportcards.

accountability for regulatory actions . . . and insure well-reasoned regulations."[2]

- President Clinton's Executive Order 12866, which currently governs regulatory planning and review, stated that the American people deserve "a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society."[3]
- President Obama's Executive Order 13563 articulated the same goals as Executive Order 12866 and added that the regulatory system "must measure, and seek to improve, the actual results of regulatory requirements."[4]

ANALYSIS IS NECESSARY TO ACHIEVE THE GOAL

Regulatory agencies and elected leaders need four critical pieces of information to ensure that regulations solve more problems at lower cost:

1. **Systemic Problem:** Understanding the nature of the problem is vital to crafting a solution that will actually work. Decision makers need to know whether a large and ongoing problem exists that a regulation could substantially alleviate.
2. **Alternative Solutions:** Decision makers should know about alternative forms of regulation and alternatives to regulation that are appropriate for the problem they seek to solve.
3. **Benefits and Costs:** Decision makers should understand what outcomes each alternative is likely to achieve that affect citizens' quality of life (benefits) and what good things the regulated entities, consumers, and other stakeholders must sacrifice in order to achieve the desired outcomes (costs).
4. **Success Defined:** Good intentions are not proof that a regulation will achieve the desired results. Decision makers should know what counts as success and how it can be measured to track the regulation's effectiveness in the future.

A complete RIA supplies this information. Without this information, regulators and the elected leaders who oversee them are flying blind.

Scholarly research consistently finds that executive branch regulatory impact analysis is often seriously incomplete.[5] Most recently, the Mercatus Center's Regulatory Report Card series has assessed the quality and use of analysis for executive branch regulations proposed between 2008 and 2012.[6] The average score for economically significant, "prescriptive" regulations that contain mandates or prohibitions was 31.2 out of 60 possible points—equivalent to an "F."[7] As figure 1 shows, the average RIA would earn an "F" on all the critical criteria listed above. Independent agencies, which are not covered by the regulatory impact analysis requirements in executive orders, often produce even worse analysis.[8]

READY-FIRE-AIM RULEMAKING

For two-thirds of the regulations evaluated in the Regulatory Report Card series between 2008 and 2012, agencies provided no explanation of how they used the RIA to inform their decisions.[9]

Agency managers often make decisions about regulation before the regulatory analysis is completed or sometimes before it is even conducted. Economists and other analysts are then expected to craft an analysis that supports the decision instead of performing an objective analysis to help managers make a better decision.[10]

STATUTORY REQUIREMENTS AND JUDICIAL REVIEW ARE NECESSARY TO ACHIEVE HIGH-QUALITY ANALYSIS

The primary enforcement mechanism for current regulatory analysis requirements is review by the Office of Information and Regulatory Affairs (OIRA). There is some evidence that OIRA review has produced better analysis.[11] But as figure 1 demonstrates, the overall quality of analysis clearly falls far short of standards outlined in executive orders and OMB guidance.

Agencies often produce mediocre regulatory analysis in spite of executive orders and OIRA review. This happens for two related reasons. First, since executive orders are the president's instructions to agencies, agencies can ignore the analytical requirements when the White House decides that other priorities take precedence.[12] Second, OIRA review essentially means that the administration reviews its own regulations. Since OIRA's decision to block a regulation can be appealed to the vice president, the OIRA administrator can credibly threaten to block a regulation only if he knows he can win the ensuing political argument within the administration.

A statutory requirement that agencies conduct regulatory impact analysis and explain how it informed their decisions, combined with judicial review to ensure that the analysis and explanation meet minimum quality standards, would provide a much stronger enforcement mechanism. Courts routinely weigh the strength of conflicting evidentiary claims, guided by statutory language specifying the standards for review. There is no reason courts could not perform the procedural task of checking to see that agencies adequately perform the analysis the statute instructs them to perform and clearly explain how the analysis affected their decisions about regulations.

Judicial review gives stakeholders an opportunity to ensure that RIAs sufficiently identify the problem and that there is a thorough review of the benefits and costs of options to solve the problem. For example, the Securities and Exchange Commission (SEC) has statutory language that courts have interpreted to require benefit-cost analysis of certain SEC regulations. After losing several court cases due to insufficient analysis, the SEC issued new staff guidance on regulatory analysis based on the principles executive branch agencies must follow.[13]

CONGRESSIONAL OVERSIGHT REQUIRES HIGH-QUALITY ANALYSIS

Congress cannot conduct effective oversight of regulation without a high-quality RIA, an essential part of the administrative record. To achieve this goal, both regulators and legislators need to understand the root causes of the problems they seek to solve, the benefits and costs of regulatory choices, and the outcomes that will indicate success. Likewise, congressional committees can exercise robust oversight of existing regulatory programs if they have good information about the outcomes the regulation is intended to achieve and results that actually occur. A high-quality RIA can provide that information. A statutory requirement for regulatory impact analysis, coupled with judicial review, will help ensure that Congress receives the high-quality analysis it needs.

CONCLUSION

Regulatory reforms that genuinely promote the public interest would allow the regulatory system to solve more problems at lower cost with fewer regulations. To achieve this goal, both regulators and legislators need to understand the root causes of the problems they seek to solve, the benefits and costs of alternative solutions, and the outcomes that will indicate success. Executive orders have motivated agencies to conduct regulatory impact analysis, but a stronger enforcement

mechanism is needed. A statutory requirement for regulatory impact analysis would help ensure that regulatory decisions are made based on genuine knowledge of regulation's likely effects.

NOTES

1. Exec. Order No. 12,044, 43 Fed. Reg. 12,661, § 1 (Mar. 24, 1978).

2. Exec. Order No. 12,291, 46 Fed. Reg. 13,193, preamble (Feb. 19, 1981).

3. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, preamble (Oct. 4, 1993).

4. Exec. Order No. 13,563, 76 Fed. Reg. 3821, §1 (Jan. 21, 2011).

5. See Art Fraas and Randall Lutter, "The Challenges of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4," *Annual Review of Resource Economics* 3, no. 1 (2011): 71–85; Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* (Fall 2009): 1–96; Robert W. Hahn, Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader, and Petrea Moyle, "Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866," *Harvard Journal of Law and Public Policy* 23, no. 3 (2001): 859–71; Robert W. Hahn and Patrick Dudley, "How Well Does the Government Do Cost-Benefit Analysis?," *Review of Environmental Economics and Policy* 1, no. 2 (2007): 192–211; Robert W. Hahn and Robert Litan, "Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe," *Journal of International Economic Law* 8, no. 2 (2005): 473–508; Robert W. Hahn, Randall W. Lutter, and W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2000).

6. The Report Card's methodology is described in Jerry Ellig and Patrick McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* 32, no. 5 (2012): 855–80. Scores for 2008–2012 are summarized in Jerry Ellig, "Improving Regulatory Impact Analysis through Process Reform," Testimony before the US Congress Joint Economic Committee (2013), http://www.jec.senate.gov/public//index.cfm?a=Files.Serve&File_id=4ab151c8-c772-4da7-93b2-048a848ec613.

7. "Economically significant" regulations adversely affect the economy or have an annual effect on the economy of $100 million or more. "Prescriptive" regulations are what most people think of when they think of regulations: they mandate or prohibit certain activities. This is distinct from budget regulations, which implement federal spending programs or revenue collection measures. See Patrick A. McLaughlin and Jerry Ellig, "Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Bush II Administration," *Administrative Law Review* 63 (2011): 179–202.

8. Arthur Fraas and Randall L. Lutter, "On the Economic Analysis of Regulations at Independent Regulatory Commissions," *Administrative Law Review* 63 (2011): 213–41; Jerry Ellig and Hester Peirce, "SEC Regulatory Analysis: 'A Long Way to Go and a Short Time to Get There,'" *Brooklyn Journal of Corporate, Financial & Commercial Law* 8, no. 2 (Spring 2014): 361–437.

9. Jerry Ellig and James Broughel, "How Well Do Federal Agencies Use Regulatory Impact Analysis?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, July 2013), http://mercatus.org/publication/how-well-do-federal-agencies-use-regulatory-impact-analysis.

10. Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Working Paper No. 08-15, Mercatus Center at George Mason University, Arlington, VA, July 2008), http://mercatus.org/publication/influence-regulatory-economists-federal-health-and-safety-agencies; Wendy E. Wagner, "The CAIR RIA: Advocacy Dressed up as Policy Analysis," in *Reforming Regulatory Impact Analysis*, ed. Winston Harrington et al. (Washington, DC: Resources for the Future, 2009), 57.

11. Research finds that OIRA review is associated with higher-quality regulatory analysis. See Jerry Ellig and Rosemarie Fike, "Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis" (Working Paper No. 13-13, Mercatus Center at George Mason University, Arlington, VA, July 2013), http://mercatus.org/publication/regulatory-process-regulatory-reform-and-quality-regulatory-impact-analysis; and Stuart Shapiro and John F. Morrall III, "Does Haste Make Waste? How Long Does It Take to Do a Good Regulatory Impact Analysis," *Administration & Society* 20, no. 1 (2013).

12. Recent obvious cases are the Obama administration's first set of interim final regulations implementing the Affordable Care Act and the Bush administration's interim final security regulations adopted after 9/11. The analyses accompanying both sets of regulations were seriously incomplete. See Jerry Ellig and Christopher J. Conover, "Presidential Priorities, Congressional Control, and the Quality of Regulatory Analysis: An Application to Healthcare and Homeland Security," *Public Choice* 161, no. 3–4 (2014): 305–20. More generally, administrations of both parties tend to demand less extensive analysis from agencies whose policy priorities and viewpoints are closer to those of the administration. See Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations," *Regulation & Governance* 7 (2013): 161.

13. See Ellig and Peirce, "SEC Regulatory Analysis."