

EFFICIENCY ANALYSIS WOULD AID REGULATORY POLICYMAKING IN SOUTH CAROLINA

James Broughel

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General Government Legislative Subcommittee

March 21, 2019

Dear Chairwoman Cobb-Hunter and members of the General Government Legislative Subcommittee:

My name is James Broughel, and I am a senior research fellow at the Mercatus Center at George Mason University and an adjunct professor of economics and law at George Mason University. In my capacity as a researcher, I have recently produced a report analyzing the regulatory environment in South Carolina.

Based on textual analysis of the *South Carolina Code of State Regulations* (SCCSR), my research has demonstrated that the SCCSR contained 4.7 million words as of February 2019. It would take an individual about 263 hours—or about six and a half weeks—to read the entire SCCSR. That’s assuming the reader spends 40 hours per week reading and reads at a rate of 300 words per minute. Of those 4.7 million words, 78,676 are restrictive terms, by which I mean the words and phrases *shall*, *must*, *may not*, *prohibited*, and *required*—terms that can signify legal constraints and obligations placed upon citizens.

With so much regulation on the books, it is important that legislators ensure these mandates and prohibitions are solving real problems and doing so at a reasonable cost. One way to help guarantee that rules are fact-based, efficient, and supported by the latest scientific and technical evidence is through the use of analytical tools such as cost-benefit analysis.

There is a long bipartisan history of support for cost-benefit analysis for federal regulations in Washington, DC. For example, Gerald Ford was the first president to issue an executive order requiring economic analysis for major federal regulations. Since then, presidents of both parties, including Presidents Carter, Reagan, Clinton, and Obama have reaffirmed the importance of subjecting regulations to the scrutiny of economic analysis. Most US states are much further behind in this regard, but legislation like House Bill 3113 that is currently before this subcommittee would advance the use of evidence-based policy in South Carolina, making South Carolina a model for other states.

I submit the attached research as part of my written testimony. I thank you for your time and consideration and am happy to answer any questions you may have.

Sincerely,

James Broughel, PhD
Senior Research Fellow, Mercatus Center at George Mason University

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The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.

ATTACHMENTS (3)

James Broughel, “A Snapshot of South Carolina Regulation in 2019” (Mercatus Policy Brief)

James Broughel and Chad Reese, “Getting State Economic Analysis Right: A Q&A with James Broughel,” *The Bridge*, November 1, 2018

James Broughel and Patrick A. McLaughlin, “Principles for Constructing a State Economic Analysis Unit” (Mercatus Policy Primer)

A Snapshot of South Carolina State Regulation in 2019

78,676 Restrictions, 4.7 Million Words, and 6.5 Weeks to Read

James Broughel

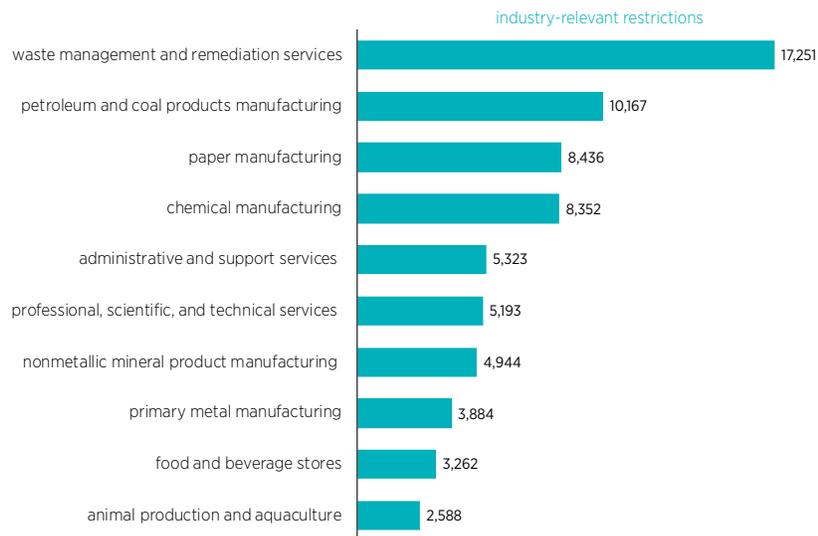
March 2019

It would take an ordinary person more than two and a half years to read the entire *US Code of Federal Regulations* (CFR), which contained nearly 104 million words in 2017.¹ The sheer size of the CFR poses a problem not just for the individuals and businesses that want to stay in compliance with the law but also for anyone interested in understanding the consequences of this massive system of rules. States also have sizable regulatory codes, which add an additional layer to the large body of federal regulation. A prime example is the online version of the *2019 South Carolina Code of State Regulations* (SCCSR).²

Researchers at the Mercatus Center at George Mason University developed State RegData, a platform for analyzing and quantifying state regulatory text.³ State RegData captures information in minutes that would take hours, weeks, or even years to obtain by reading and counting. For example, the tool allows researchers to identify the industries that state regulation targets most by connecting text relevant to those industries with restrictive word counts. These regulatory restrictions are instances of the words and phrases *shall*, *must*, *may not*, *prohibited*, and *required*, and they can signify legal constraints and obligations.⁴ As shown in figure 1, the three industries with the highest estimates of industry-relevant restrictions in the 2019 SCCSR are waste management and remediation services; petroleum and coal products manufacturing; and paper manufacturing.

State RegData also reveals that the 2019 SCCSR contains 78,676 restrictions and 4.7 million words. It would take an individual about 263 hours—or about six and a half weeks—to read the entire SCCSR. That’s assuming the reader spends 40 hours per week reading and reads at a rate of 300 words per minute. By comparison, there are 1.09 million additional restrictions in the federal code.⁵ Individuals and businesses in South Carolina must navigate these different layers of restrictions to remain in compliance.

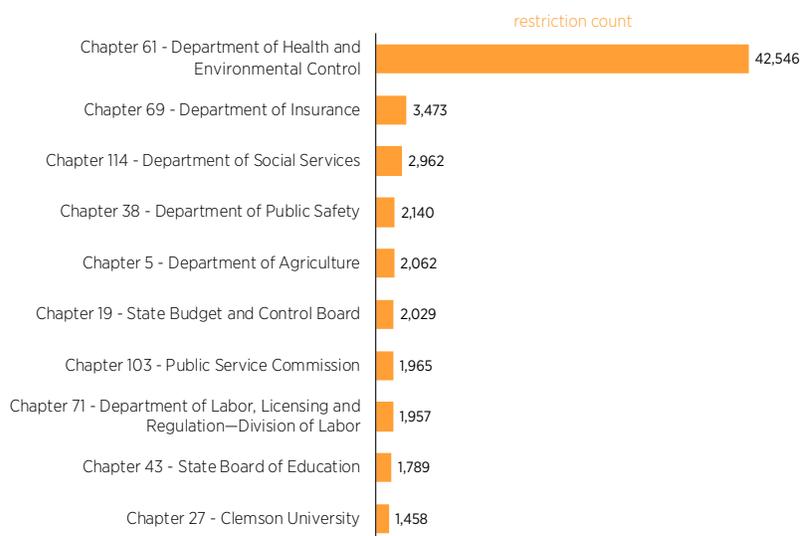
Figure 1. Top 10 Industries Targeted by South Carolina State Regulation in 2019



Source: State RegData (South Carolina data), <https://quantgov.org/state-regdata/>.

The chapters in the SCCSR are organized by the department, commission, board, or other entity that oversees particular rules. Figure 2 shows that chapter 61 of the SCCSR, associated with the Department of Health and Environmental Control, contains 42,546 restrictions. By this measure, this is the biggest chapter in the SCCSR. Coming in second is chapter 69, associated with the Department of Insurance, with 3,473 restrictions.

Figure 2. Top 10 Chapters in the SCCSR by Number of Restrictions in 2019



Source: State RegData (South Carolina data), <https://quantgov.org/state-regdata/>.

Federal regulation tends to attract the most headlines, but it is important to remember that the nearly 104 million words and 1.09 million restrictions in the federal code significantly understate the true scope of regulation in the United States. States like South Carolina write millions of additional words of regulation and tens of thousands of additional restrictions. State-level requirements carry the force of law to restrict individuals and businesses just as federal ones do.

Researchers are only beginning to understand the consequences of the massive and growing federal regulatory system on economic growth and well-being in the United States.⁶ Meanwhile, the effects of state regulation remain largely unknown. If this snapshot of South Carolina regulation in 2019 is a good indicator, then the states are also active regulators, suggesting that the full impact of regulation on society is far greater than that of federal regulation alone.

ACKNOWLEDGMENT

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ABOUT THE AUTHOR

James Broughel is a senior research fellow at the Mercatus Center at George Mason University. Broughel has a PhD in economics from George Mason University. He is also an adjunct professor in the economics department and the law school at George Mason University.



QuantGov

This regulatory snapshot was produced in part using **QuantGov**, a policy analytics platform that facilitates analysis of the causes and effects of various government actions. The QuantGov project treats policy text as data, allowing researchers to quickly and effectively examine broad policies (as articulated in bodies of text) by using some of the latest advances from data science, such as machine learning and other artificial intelligence technology. The Mercatus Center's team of data engineers, analysts, and developers created this platform and continually utilize and update it to produce data that support a variety of research products and to provide policymakers with data that inform positive policy change. More information is available at quantgov.org.

Patrick A. McLaughlin
Policy Analytics Director

Stephen Strosko
Data Engineer

Jonathan Nelson
Software Developer

Thurston Powers
Data Analyst

NOTES

1. This assumes the person reads 300 words per minute for 40 hours per week with two weeks of vacation per year. See Patrick A. McLaughlin and Oliver Sherouse, RegData US 3.1 Annual (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, <https://quantgov.org/state-regdata/>; Patrick A. McLaughlin, Oliver Sherouse, Daniel Francis, Michael Gasvoda, Jonathan Nelson, Stephen Strosko, and Tyler Richards, “RegData 3.0 User’s Guide,” accessed February 15, 2018, <https://quantgov.org/regdata/users-guide/>.
2. South Carolina Legislature, “South Carolina Code of State Regulations,” accessed February 20, 2019, <https://www.scstatehouse.gov/coderegs/statmast.php>.
3. State RegData is part of a broader project called QuantGov, which seeks to quantify legal text. See Patrick A. McLaughlin and Oliver Sherouse, “QuantGov—A Policy Analytics Platform,” QuantGov, December 20, 2017. Data for South Carolina are available at <https://quantgov.org/state-regdata/>.
4. Restrictions can also occur in legal text for other purposes, such as for definitional purposes. At times, restrictions may relate to government employees rather than the private sector.
5. McLaughlin and Sherouse, RegData US 3.1 Annual (dataset); McLaughlin et al., “RegData 3.0 User’s Guide.”
6. See, for example, Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, “The Cumulative Cost of Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2016).



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Expert Commentary

Nov 1, 2018

Getting State Economic Analysis Right

A Q&A with James Broughel

Authors:

James Broughel, Senior Research Fellow @JamesBroughel, Chad Reese, Managing Editor

In a recent study, “Principles for Constructing a State Economic Analysis Unit,” James Broughel and Patrick McLaughlin outline how economic analysis can help state regulatory agencies adhere to principles of high-quality regulation, such that rules are more likely to achieve significant benefits for the public at a reasonable cost. Their paper emphasizes that the institutions tasked with producing analysis must be sufficiently insulated from politics, and analysis must be timely for it to be useful and effective.

In this interview, Chad Reese sits down with Mercatus senior research fellow James Broughel to discuss some common questions that have arisen in response to this research.

In your paper, you and Patrick McLaughlin discuss the importance of maintaining independence from politics. Why is an independent economic analysis unit important? Don't we want oversight from judges and legislators in some cases?

Analysis should be independent of politics, but that's not the same thing as independent of oversight. Oversight is very important, in fact. Unfortunately, there is no way to completely insulate analysis from politics. Analysts come to the table with their own sets of beliefs and personal biases, just like everyone else. However, some institutions are more likely to achieve greater objectivity and freedom from politics than others.

Where do you think these units ought to be located in order to obtain this independence?

One way to ensure a basic level of objectivity is to separate the role of regulator from the role of analyst. This can be done within an agency by setting up an analysis office that is independent of the program offices that write and implement regulations. The Federal Communications Commission recently set up a structure along these lines.

Alternatively, analysis responsibilities could be removed from agencies altogether. For example, the state of Virginia has tasked the Planning, Evaluation, and Regulation division within the state Department of Planning and Budget with producing economic analysis for rules.

On the other hand, there is no reason why this analysis needs to be produced in the executive branch of state government or even within the government. In fact, removing analysis functions from the executive branch could help insulate analysis from the political influence of the governor. Federal analysis offices like the Congressional Budget Office, the Congressional Research Service, and the Government Accountability Office are examples of legislative-branch agencies that are generally trusted to be objective.

States might also consider the model in Washington State. The Washington State Institute for Public Policy (WSIPP) is a public research group, created by the state legislature, that is periodically charged with producing benefit-cost analysis of existing state programs. The WSIPP maintains a close connection with a public university in the state, Evergreen State College, which highlights another option available to state governments. States can utilize academic experts at state universities. This could be done, for example, if a legislature were to commission evaluations of particular rules or programs from academics (similar to how the WSIPP works), pay for sabbaticals for professors in order for government programs to be analyzed, or tie funding for state

universities to conditions requiring economic analysis be produced for the government.

There seems to be concern among some legislatures about the potential cost of setting up a new analysis unit? Is it possible to make the economic analysis unit both effective and inexpensive? And who has the specialized knowledge to run or work for the unit?

In the policy paper Patrick McLaughlin and I wrote together, the word “unit” was used somewhat loosely. Analysis needs to be done by individuals with relevant expertise, but that doesn’t necessarily mean a new “unit” needs to be established. Many states already have institutions where these responsibilities could sensibly be housed without creating a new bureaucracy.

For example, Pennsylvania has an Independent Regulatory Review Commission, as well as an Independent Fiscal Office. Either of these existing entities would be a logical place to house analysis responsibilities.

That said, states generally lack the personnel capable of doing this kind of work, which requires technically trained experts with a background in benefit-cost analysis. Either some new workers will have to be hired, or the work will have to be contracted from experts outside the government.

But it’s important to remember that the benefits of analysis can easily pay for these extra costs. If an analyst finds a way to implement a multi-million dollar rule more inexpensively, the savings could easily pay for the analyst’s entire lifetime salary many times over. When we are dealing with rules that impact a state’s entire economy, small improvements add up quickly. Paying for a few extra workers is cheap in comparison.

Currently, many states have analysis requirements in place, but they often don’t invest resources so that the analysis is done seriously. If states don’t rely on trained experts, the quality of analysis will be poor. Additionally, the more resources invested, the more programs can be analyzed. So there are clear tradeoffs to consider. The decision about how much to invest is going to vary by state depending on resources available.

What powers should the unit have? Should it be allowed to, for example, send regulations back to agencies or turn them over to the legislature for approval? What if the role of the unit is scaled back such that it just reviews regulations and their accompanying analysis but doesn’t independently produce the analysis?

Poor analysis probably should be grounds for a regulation to be returned to the regulator so it can do a better job. Regulatory agencies are delegated the power to write regulations based on their expertise. If they fail to utilize that expertise, then there is no particular advantage to having regulators write law as opposed to legislators, and there are lots of disadvantages since regulators are less accountable to the public than elected officials.

That said, it’s not clear to me that the analysis unit is the best entity to return rules. The Office of Information and Regulatory Affairs at the federal level, known as OIRA, reviews regulations and their accompanying analysis and can return regulations to agencies to be reworked if the analysis is deemed sufficiently poor in quality or if the agency has overlooked certain critical information. However, rules aren’t returned by OIRA very often, even though most regulations have either no analysis or very incomplete analysis, accompanying them.

That’s a real problem, and it suggests that just having the unit review regulations, even while giving it the power to return regulations, may not be sufficient. Analysis production should be independent of rule-writing and enforcement activities, and a better place to house the review function might be in the courts. The courts are already tasked with vacating regulations when certain legal criteria are not met. Furthermore, regulatory

agencies are very attuned to the possibility of court challenges, so if they see poor analysis as opening the door to a rule being overturned by a judge, they will take analysis much more seriously. In fact, Mercatus research has found that oversight from the courts corresponds with higher quality analysis.

A meaningful peer review process could also help ensure analysis is high quality, but it might be better for scrutiny to come from experts outside the government—for example, at academic institutions. That way reviewers aren't overseen by political personnel. A problem with OIRA review at the federal level is that OIRA is overseen by the White House and hence its reviews can be influenced by politics.

Should the unit produce analyses of existing regulations or just new ones that have yet to go into effect? What about emergency regulations implemented on short notice due to safety?

To some extent, this will depend on resources available, but ideally, analysis should occur for both new and existing regulations. Historically, benefit-cost analysis has been applied to new regulations and only very rarely to existing regulations. This is not ideal, of course. Ideally, we want to be able to learn from past experience and apply those lessons as we go about crafting new policies, such that policymaking works in an iterative process.

Additionally, analysis can complement other review efforts, such as periodic reviews, legislative reviews, sunset reviews, or red tape cutting efforts that states have in place. These kinds of efforts are often hindered by the fact that decision makers lack high-quality information about how well rules are working or are likely to work. Without reliable information, risk-averse policymakers often choose to maintain the status quo, and as a result, many regulatory reform efforts don't work as well as they should. It's not surprising President Trump has also made analysis an important part of his regulatory reduction efforts.

As far as emergency rules are concerned, these rules, when they are in response to a genuine emergency—a natural disaster, an act of terrorism, an outbreak of disease, a war, and so on—should be allowed to go into effect without analysis. But these rules should not remain in effect long term. Emergency regulations should be temporary and should have to be replaced with permanent rules that go through ordinary rulemaking procedures, once the emergency has subsided. Rulemaking procedures establish needed checks and balances, one of which should be the scrutiny of economic analysis.

Would it be beneficial to have the unit only look at regulations that have a certain level of impact? If so, what should that level be? Who determines if the level has been reached?

It will be hard to subject all rules to meaningful benefit-cost analysis. Some system of prioritization is probably needed to determine which rules get scrutiny. For existing rules, one option is to have a legislative committee make individual requests for analysis of specific rules or programs. Such a process might be driven largely by constituent concerns, for example. This approach has an advantage in that it is democratic and is responsive to the concerns of the public. However, it will not always guarantee that all high-impact rules are scrutinized.

Alternatively, a trigger mechanism could be set up to determine which rules get reviewed. Triggers are usually based on economic impact, and several states already have triggers for some regulatory procedures, which could serve as a model.

For example, Wisconsin requires legislative approval for regulations costing \$10 million or more over any two-year period. At the federal level, executive branch rules with an annual impact over \$100 million require benefit-cost analysis, though presumably the threshold should be set lower for state regulations.

The analysis unit, or a similar body like a fiscal note office, is a logical entity to determine whether a trigger is met. Alternatively, the regulating agency could make an initial determination about whether a rule meets a threshold, but some other entity should probably have to certify the agency's determination is correct.

What happens after the analyses are produced? How do we prevent agencies/executives/lawmakers from ignoring the findings?

Ultimately, the decision of whether and how to regulate is a political one, not purely an analytic one. So long as the analysis is objective, transparent, and available in a timely manner, then it is doing its job. Legislators and regulators are free to ignore analysis if they so choose, but they should explain their decisions when they do so, and ultimately, if policymakers ignore crucial evidence that is pertinent to a rulemaking, it is the job of voters to hold them accountable.

What's most important is that the relevant tradeoffs are identified and reported in a transparent manner, so that decision makers and the public are aware of these tradeoffs before regulations go into effect or are allowed to remain in place.

Photo credit: Pennsylvania General Assembly

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Principles for Constructing a State Economic Analysis Unit

James Broughel and Patrick A. McLaughlin

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James Broughel and Patrick A. McLaughlin. "Principles for Constructing a State Economic Analysis Unit." Mercatus Policy Primer, Mercatus Center at George Mason University, Arlington, VA, 2018.

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Federal regulatory agencies produce economic analyses of the likely impacts of their largest regulations—a requirement of executive branch agencies that was formalized throughout the 1970s and early 1980s. Since then, states have also experimented with enhancing their analytic capabilities. However, the states are far behind the federal government when it comes to incorporating technical analysis and evidence into regulatory decision-making.

We outline some principles, primarily derived from the federal regulatory process, that can guide the creation and structure of an economic analysis unit operating within a state government. The federal process for analyzing and reviewing regulations offers valuable insights into best practices for an economic analysis unit within state government. Namely, the process by which regulations are created should help ensure that any regulation proposed focuses on solving a real problem and that all feasible solutions are considered. The economic analysis itself should be objective and subject to third-party review.

Furthermore, while these lessons are directly relevant to the creation of a unit whose task is to produce economic analyses of new regulations, lessons can also be extended to other analytical tasks, such as analyzing the budgetary impacts of proposed policies or retrospective (i.e., backward-looking) analysis of legislation, regulation, or other policies that are already in place.

BACKGROUND ON FEDERAL REGULATORY ANALYSIS AND REVIEW

The federal regulatory process has included requirements for economic analysis since the 1970s, although the use of benefit-cost analysis in the federal government

has roots that trace back as far as the 1930s.¹ Gerald Ford was the first president to issue executive orders requiring economic analysis for some regulations.² This tradition was continued when, in 1978, President Carter issued Executive Order 12044,³ which required regulatory agencies to perform economic analysis for major regulations and to weigh their prospective economic consequences. The order also tasked agencies with conducting a review of their existing regulations on the books. In 1980, with the signing of the Paperwork Reduction Act, the Carter administration also oversaw the creation of what would become the centralized review office for regulations—the Office of Information and Regulatory Affairs (OIRA)—that was housed within the Office of Management and Budget (OMB).

Although OIRA was originally tasked primarily with reviewing paperwork-related aspects of regulation, subsequent executive orders, such as Executive Order 12291 issued by President Reagan,⁴ broadened the scope of OIRA’s mission to include review of regulations and their accompanying analysis. The OMB had already been playing a less formal role in reviewing regulations throughout much of the 1970s,⁵ but the Reagan order made this role more explicit.

The executive order that currently governs the US regulatory analysis and review process is Executive Order 12866, issued in 1993 by President Bill Clinton.⁶ The order, which remains in effect, requires that “significant” regulations undergo review by OIRA and that regulations with an annual impact of over \$100 million be accompanied by a regulatory impact analysis (RIA).

OIRA review helps ensure the quality of regulations and their economic analyses by acting as an external reviewer, providing feedback, and recommending changes to analysis and rules.⁷ Even though it is applied to only a small percentage of all new regulations, OIRA review—and the concept of independent review of regulations in general—offers a model that could be implemented or expanded upon in other contexts.

1. Jim Tozzi, “OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding,” *Administrative Law Review* 63, Special Edition: OIRA Thirtieth Anniversary (2011): 37–69.

2. Exec. Order No. 11821, 3 C.F.R. 926 (1975); Exec. Order No. 11949, 3 C.F.R. 161 (1977).

3. Exec. Order No. 12044, 3 C.F.R. 152 (1978).

4. Exec. Order No. 12991, 46 Fed. Reg. 13193 (February 17, 1981).

5. Jim Tozzi, “OIRA’s Formative Years.”

6. Exec. Order No. 12866, 58 Fed. Reg. 190 (1993).

7. Patrick A. McLaughlin and Jerry Ellig, “Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration,” *Administrative Law Review* 63 (2011): 179–205.

PRINCIPLES FOR HIGH-QUALITY REGULATION

In its role as reviewer, OIRA tries to ensure that regulations are based upon sound, up-to-date, and credible evidence. OIRA's role and principles of rule-making outlined in Executive Order 12866 merely reflect a bipartisan consensus around the commonsense notion that regulations should solve real problems at an acceptable cost.

The regulatory process should help regulators achieve this goal, and therefore its design incorporates a few basic instructions and principles towards that end:

1. Regulations should solve a real, widespread problem;
2. Multiple alternative forms of regulation (and alternatives to regulation) should be considered;
3. Policymakers should aim to provide the most benefits to the public for the least cost; and
4. Regulations should not unfairly benefit some groups or technologies at the expense of others.⁸

Despite widespread agreement on these principles, however, they are inconsistently followed, both by OIRA and by regulatory agencies throughout the federal government.⁹ This highlights how good intentions and good instructions are not enough to ensure sound decision-making and high-quality regulation. In order for the principles of good rulemaking to be followed, the body that produces or reviews analysis must be designed in such a way that these principles and objectives are not only achievable, but are actually achieved.

8. These general principles and others can be found in Jerry Ellig, "Ten Principles for Better Regulation" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2013). They are based on principles set forth under Executive Order 12866 as well as guidelines from the OMB.

9. As evidence, the Mercatus Center's Regulatory Report Card evaluated the quality and use of agencies' regulatory impact analyses from 2008 to 2013. Quality of RIAs varies widely, and most RIAs are incomplete in the sense that they do not include one or more critical elements of analysis, as outlined in Executive Order 12866 and OMB guidelines on regulatory analysis. See Mercatus Center at George Mason University, "Regulatory Report Card," accessed February 21, 2018, <https://www.mercatus.org/tags/regulatory-report-card>.

GUIDELINES FOR THE CREATION OF A STATE ECONOMIC ANALYSIS UNIT

Independence and Objectivity

Despite bipartisan consensus about the merits of economic analysis and third-party review of regulations, the federal process is far from perfect. For example, analysis is often constructed after a decision to regulate has already been made, a problem that is sometimes referred to as the “ready, fire, aim” problem in rule-making.¹⁰ A clear danger of crafting analysis too late is that it will be used as a tool to justify regulations, rather than to inform how regulations are designed.¹¹ This is especially relevant when considering that the heads of regulatory agencies are political appointees, so the chain of command ensures that regulatory decisions are necessarily political.

Some have argued that granting analysts independence from politics could lead to more apolitical regulatory decision-making, for example, by separating analytic responsibilities from the program offices that design and execute regulatory programs. Agencies like the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and the National Highway Traffic Safety Administration rely on economists in an autonomous departmental office.¹² But given that these agencies are still run by political personnel, it is likely that analytic functions will need to be more insulated from politics than this, perhaps by completely removing analytic functions from regulatory agencies or perhaps even from the executive branch. However, even a perfectly independent economic analysis unit would still likely require some form of third-party oversight, as we discuss below.

10. Jerry Ellig, “Ready, Fire, Aim!': A Foundational Problem with Regulations,” *Economic Perspectives*, Mercatus Center at George Mason University, November 6, 2015.

11. We know that this problem exists because interviews with federal agency economists reveal that they are sometimes tasked with producing analysis to justify, rather than to inform, regulatory decisions. See, for example, Stuart Shapiro, *Analysis and Public Policy Successes, Failures and Directions for Reform* (Cheltenham, UK: Edward Elgar Publishing, 2016); and Richard Williams, “The Influence of Regulatory Economists in Federal Health and Safety Agencies” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2008).

12. Stuart Shapiro and Laura Stanley, “Economists in the Bureaucracy: A Question of Autonomy” (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, 2016).

Timing

Aside from politics, an additional reason why analysis may be overly political or may not be used in decision-making relates to timing. Analysis needs to be produced early enough in the rulemaking process so that it can inform decisions. Too often, analysis is crafted too late to be useful. Colorado, for example, has demonstrated the capability to produce or commission quality analysis at times.¹³ However, the requirements for analysis in the state are only triggered after a regulation is formally proposed.¹⁴ This backwards process practically invites analysis to be used to justify a predetermined decision.

Even requiring analysis alongside a proposed rule may not be early enough. At the federal level, it is not uncommon for agencies to analyze just one alternative—the regulation being proposed or finalized—which suggests that no other alternatives were seriously considered.¹⁵ A simple way around this problem is to tie analysis to an advance notice of proposed rulemaking (ANPRM) that occurs prior to a regulation being formally proposed. In the ANPRM, the regulating agency could present multiple regulatory options it is considering, along with an accompanying analysis of those options, and would then seek public feedback on this information before moving forward with a proposed rule.

External Review

Some kind of third-party oversight is likely necessary to limit the influence of politics and to ensure that agencies design regulations based on fact rather than just good intentions. The OIRA model at the federal level partially fulfills these needs, but it has often proven to be insufficient. Another model might be the example of the United Kingdom. As part of its Better Regulation initiative, impact assessments sometimes receive scrutiny from volunteer economists or other experts inside or outside of the government.¹⁶

Oversight by the courts is yet another option for third party oversight. As Patrick A. McLaughlin, Jerry Ellig, and Michael Wilt recently wrote,

13. James Broughel, “Advancing Evidence-Based Regulation in Colorado” (Testimony before the Colorado House Business Affairs and Labor Committee, Mercatus Center at George Mason University, Arlington, VA, February 1, 2018).

14. James Broughel, “Advancing Evidence-Based Regulation in Colorado.”

15. Jerry Ellig and James Broughel, “Regulatory Alternatives: Best and Worst Practices” (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, 2012).

16. National Audit Office, *Submission of Evidence: Controls on Regulation*, 2012, 26, 30.

Judicial review can give stakeholders an opportunity to challenge [economic analyses] that are incomplete or that ignore important evidence in the rulemaking record.

Courts currently examine the quality of an agency's regulatory impact analysis or other economic analysis only under specific limited circumstances, such as when the analysis is mandated by statute or the agency itself refers to the analysis as justification for its decisions. Surveying these court decisions, scholars have found examples of courts competently and carefully assessing the agency's treatment of all major elements of regulatory impact analysis: analysis of the systemic problem, development of alternatives, and estimation of the benefits and costs of the alternatives. Agencies typically improved their analysis in response to court decisions that remanded regulations. When appeals courts examine regulatory agencies' economic analysis, they show no pro- or anti-regulatory bias in their rulings, and they actually uphold regulations more frequently than they strike them down.¹⁷

Thus, there is good reason to believe that analysis will be higher quality when there is a danger that poor analysis will result in a regulation being challenged in court.

CONCLUSION

Regulatory agencies should craft regulations with as much information as is readily available, so they can reasonably anticipate rules' effects. Regulating in the dark should not be an option. To achieve these goals, the regulatory process must incorporate economic analysis in a way that ensures both quality and usefulness. Lessons from both the successes and the failures of the federal regulatory experience offer a potential roadmap for states wishing to establish an economic analysis unit. The principles outlined here can be helpful as policymakers aim to design institutions that serve that public interest and advance the principles of high-quality regulation.

17. Patrick A. McLaughlin, Jerry Ellig, and Michael Wilt, "Comprehensive Regulatory Reform," Mercatus Policy Primer, 2017. Internal citations omitted.

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