

**Business Roundtable Comments on EPA Advance Notice of Proposed Rulemaking  
Increasing Consistency and Transparency in Considering Costs and Benefits  
in the Rulemaking Process**

Docket ID No. EPA-HQ-OA-2018-0107<sup>1</sup>

August 13, 2018

Introduction

Federal regulation has a profound effect on U.S. businesses. Business Roundtable recognizes that many regulations are essential and help ensure, among other things, that products are safe, the environment is adequately protected, and marketplaces are fair, open, and competitive. Regulations also impose significant costs on consumers and businesses and can affect economic growth and employment.<sup>2</sup> As a result, it is imperative that federal agencies carefully – and transparently – consider the positive and negative impacts of proposed rules. Cost-benefit analysis is the best available tool to evaluate these tradeoffs.

Most federal agencies — including the Environmental Protection Agency (EPA) — assess the costs and benefits of proposed and final regulations that could have a significant effect on the economy. Under federal policy since 1993, regulations should only proceed when the benefits justify the costs. Cost-benefit requirements have enjoyed broad bipartisan support since they were first introduced: They help to ensure that the tradeoffs inherent in any regulation are described, quantified and evaluated when regulatory options are proposed and before a rule is finalized. In short, cost-benefit analysis is essential to ensuring that federal regulators find the right balance between the positive impact rules are intended to produce and the costs those rules impose.

It is important that all federal agencies, including EPA, develop accurate and transparent cost-benefit analyses for economically significant regulatory actions.<sup>3</sup> Across the federal government, EPA’s rules accounted for more than 80 percent of the monetized benefits and more than 70 percent of the monetized costs of all regulations over the 10-year period from 2007-2016.<sup>4</sup> Rules made under the authority of the Clean Air Act account for more than 95

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<sup>1</sup> 83 Fed. Reg. 27524 (June 13, 2018). By notice published July 3, 2018, EPA extended the deadline for comments until August 13, 2018. See 83 Fed. Reg. 31098.

<sup>2</sup> See Greenstone, M., List, J.A., and Syverson, C. (2012). “The Effects of Environmental Regulation on the Competitiveness of U.S. Manufacturing.” National Bureau of Economic Research Working Paper 18392 (September 2012) (<http://www.nber.org/papers/w18392.pdf>).

<sup>3</sup> Section 6(a)(3)(C) of Executive Order 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993), requires agencies to conduct cost-benefit analyses on “significant regulatory action[s] within the scope of section 3(f)(1),” i.e., “any regulatory action that is likely to result in a rule that may . . . [h]ave 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.” These are conventionally referred to as “economically significant” regulatory actions.

<sup>4</sup> Office of Information and Regulatory Affairs, Office of Management and Budget (2018). 2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (Feb. 23, 2018) (“OMB 2017”), at 12 ([http://www.whitehouse.gov/wp-content/uploads/2017/12/draft\\_2017\\_cost\\_benefit\\_report.pdf](http://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf)). These

percent of the benefits attributable to EPA regulation.<sup>5</sup> Clearly, the processes and methods EPA uses to estimate regulatory costs and benefits are of critical importance and should represent best practices. EPA is among the best agencies at monetizing costs and benefits, yet it still has significant room for improvement — as the Office of Management and Budget (OMB) and the National Academy of Sciences have both noted.<sup>6</sup>

Business Roundtable commends EPA for committing to improve its process through regulation and seeking public comment through this Advance Notice of Proposed Rulemaking (ANPRM). Business Roundtable shares the agency’s desire to develop more accurate estimates of costs and benefits while clearly and transparently recognizing the limitations, uncertainty and imprecision associated with such analysis. This effort will better inform agency decision-makers, the regulated community and the public about a regulation’s likely impact — and, ultimately, create a more effective regulatory system.

### Statement of Interest

Business Roundtable is an association of chief executive officers of America’s leading companies working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy. Its CEO members lead companies with more than 16 million employees and more than \$7 trillion in annual revenues. As major employers in every state, Business Roundtable CEOs take seriously the responsibility of creating quality jobs. The CEOs are committed to joining communities, workers and policymakers to build a better future for the nation and its people. For the past 45 years, the membership of Business Roundtable has applied CEO expertise and experience to the major issues facing the nation. Through research and advocacy, Business Roundtable is a partner in promoting policies that spur job creation, improve U.S. competitiveness and strengthen the economy. Each year, Business Roundtable member companies provide health care and retirement benefits to tens of millions of Americans and their families, generate more than \$440 billion in revenues for small- and medium-sized businesses, invest \$130 billion annually in research and development, and contribute more than \$6 billion to charitable causes.

### Comments

Business Roundtable has long advocated a wide variety of reforms to improve the regulatory process and produce smarter regulations, including several improvements related to cost-benefit

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figures are based on the regulatory output of agencies whose rules are reviewed by OMB, and hence exclude independent agencies. *See id.* at 9.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *See id.* at 12-18. OMB 2017 identifies the assumptions underlying EPA’s benefits calculations, and notes that to the extent any of them is incorrect, the benefit ranges might be different. OMB also has “recommended that EPA begin to develop approaches to monetize and more explicitly consider the implications of these sources of uncertainty in its benefits and co-benefits analyses.” *Id.* at 18. *See also* National Research Council (2002). *Estimating the Public Health Benefits of Proposed Air Pollution Regulations*. Washington, DC: The National Academies Press. (<https://doi.org/10.17226/10511>); Institute of Medicine of the National Academies of Sciences (2006). *Valuing Health for Regulatory Cost-Effectiveness Analysis*, at 150-51, 156, 178-80. Washington, DC: The National Academies Press. (<https://doi.org/10.17226/11534>.)

analysis. The Roundtable is pleased that through this ANPRM, EPA has requested comment on whether and how it should promulgate regulations to provide a consistent and transparent framework for weighing costs and benefits in making its regulatory decisions. These comments include specific recommendations related to:

- (1) conducting cost-benefit analyses for all economically significant regulations;
- (2) improved accounting of ancillary benefits;
- (3) enhancing transparency; and
- (4) increased emphasis on retrospective review.

#### Requirement to Conduct Cost-Benefit Analyses for All Economically Significant Regulations

As an initial matter, EPA should explicitly state in regulation that the Administrative Procedure Act (APA) requires the agency to consider both costs and benefits when promulgating regulations unless expressly prohibited by law. For decades across administrations of both parties, executive orders have required agencies to take costs and benefits into account when choosing among regulatory options.<sup>7</sup> These directives were based on sound public policy. However, as EPA notes in the background section of this ANPRM, the Supreme Court has now clarified that consideration of costs and benefits, where permissible, can be necessary for a rule not to be considered arbitrary and capricious under the APA.<sup>8</sup>

In *Michigan v. EPA*,<sup>9</sup> the Court said that the only reasonable interpretation of statutory provisions authorizing regulation where “appropriate and necessary” is to pay “at least some attention to cost,” as well as benefits, adding that “it is unreasonable to read an instruction to an administrative agency to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost.”<sup>10</sup> Further, the justices agreed that “[c]ost is almost always a relevant – and usually, a highly important – factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing ‘a standard-setting process that ignore[s] economic considerations.’”<sup>11</sup>

EPA should, for the first time, clearly and unequivocally interpret this decision to require the agency to conduct cost-benefit analyses for all economically significant regulatory actions unless expressly forbidden by statute and to use the results of this analysis to inform its decision. Where EPA determines that particular statutes impose limitations or additional obligations beyond this general requirement, EPA could address those different provisions on a

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<sup>7</sup> See Executive Order 12866, Regulatory Planning and Review (2003), 58 Fed. Reg. 51735 (Oct. 4, 1993), §§ 1(a), 1(b)(6), 6(a)(3); Executive Order 12291, Federal Regulation (1981), 46 Fed. Reg. 13193 (Feb. 19, 1981), §§ 2, 3.

<sup>8</sup> See 5 U.S.C. § 706(2)(A).

<sup>9</sup> 576 U.S. \_\_\_, 135 S. Ct. 2699 (2015). In that case, the Supreme Court, in a 5-4 decision, ruled that EPA should have considered cost when it promulgated a rule to regulate emissions from power plants.

<sup>10</sup> *Id.* at 2707-2708.

<sup>11</sup> *Id.* at 2716-2717 (citation omitted).

by-exception or “additional rules” basis, as EPA has done in its rules addressing confidential business information under the Freedom of Information Act.<sup>12</sup>

### Accounting for Ancillary Benefits

Ancillary benefits — or reductions in emissions that were not the primary objective of a rule (also known as “co-benefits”) — play a central role in providing the economic justification for agency rules. As such, it is critical that all agencies, including EPA, make careful, appropriate and transparent assumptions regarding ancillary benefits, based on the best available evidence, and characterize the uncertainty of those assumptions in achieving the estimated benefits.

EPA has relied heavily on ancillary benefits recently in the cost-benefit analyses of several very costly regulations. Even though including ancillary benefits in cost-benefit analysis is both valid and consistent with OMB guidance, legitimate concerns exist relating to the substantial role these benefits play in justifying regulations. EPA and other agencies should address these concerns transparently, including addressing the potential for double-counting of benefits; scientific uncertainty; and determining whether direct regulatory approaches would be more effective and efficient.

EPA can adjust its cost-benefit procedures to address these concerns. For example:

- Consistent with OMB guidance, EPA should develop careful and, in some cases, multiple baseline scenarios to avoid double-counting. For example, EPA could use one baseline based solely on current standards and another based on the agency’s reasoned assumptions regarding the effect of all related pending regulations.
- EPA should continue to support research to reduce the uncertainty surrounding the impact of ancillary benefits, as recommended by OMB and the National Research Council.<sup>13</sup>
- EPA should more closely scrutinize rules that rely heavily on co-benefits for their economic justification. For example, if a rule’s cost-benefit analysis shows that co-benefits constitute a significant portion of the expected benefits, EPA should strongly consider an alternate regulatory approach that would achieve these benefits more directly (to the extent authorized by law).

### Enhancing Transparency

When agencies prepare regulatory impact analyses, OMB directs them to ensure that their analysis is transparent by clearly describing assumptions and methods and discussing uncertainties associated with estimates of costs and benefits.<sup>14</sup> OMB also requires agency analyses to be reproducible so that a qualified third party can clearly determine how estimates

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<sup>12</sup> See 40 C.F.R. Part 2, Subpart B.

<sup>13</sup> See, e.g., OMB 2017 at 12; National Research Council, *supra* note 6.

<sup>14</sup> See Office of Management and Budget, Circular A-4, Regulatory Analysis (Sept. 17, 2003).

and conclusions were developed.<sup>15</sup> However, in practice, agency assessments of costs and benefits often are not as transparent as they could be. As a result, reproducing these analyses can be difficult, if not impossible.<sup>16</sup>

Many, if not most, EPA benefit estimates are based on the Agency's assessment of risks. To be effective and comprehensive, the expected rulemaking should establish clear criteria for how EPA will perform risk assessments to ensure that the resulting estimates are objective and identify all policy assumptions and uncertainties. This will help the public and decision-makers understand the magnitude of the uncertainties and their effect on the potential risks. It will also help inform the uncertainties surrounding the benefit estimates that are based on these risk results.

To make the results of cost-benefit analyses more transparent and accessible, EPA should prepare a short, standardized summary (possibly in table form) that:

- clearly summarizes the results of the cost-benefit analysis (including relevant cost/benefit ranges and the extent to which the rule results in ancillary benefits);
- lists key assumptions that drive its cost-benefit analysis (including assumptions related to ancillary benefits);
- discusses the level of uncertainty of the cost-benefit analysis (including any underlying risk assessments);
- describes how dependent the analysis is on these assumptions; and
- provides a brief overview of the key limitations inherent in the analysis.

This information is often (although not always) contained in EPA's regulatory impact analyses, but given these analyses' length and complexity, it is usually difficult for policymakers or the public to access that information. The result often is that a "top line" number is seized upon by advocates for the rule to justify the costs imposed on consumers, businesses and the economy, when the true impact usually is more nuanced and complex.

### Retrospective Review

While effective EPA regulation is a necessary part of a well-functioning government, the steady increase in the number of regulations on the books underscores the importance of retrospective review, in which agencies periodically review select regulations to determine if the problems these rules were intended to address have been solved or could be addressed more cost-effectively. Accordingly, every presidential administration in the last three decades has called for agencies to conduct retrospective reviews of existing regulations. These efforts include:

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<sup>15</sup> *Id.*

<sup>16</sup> See Business Roundtable (2014). "Using Cost Benefit Analysis to Craft Smart Regulation: A Primer and Key Consideration for Congress and Federal Agencies," at 21-25. (<http://businessroundtable.org/sites/default/files/reports/BRT%20Cost-Benefit%20Analysis.pdf>.)

- President Reagan’s Task Force on Regulatory Relief;
- President George H.W. Bush’s Council on Competitiveness;
- President Clinton’s National Performance Review framework;
- President George W. Bush’s request for public nominations of problematic rules for review by the Office of Information and Regulatory Affairs (OIRA);
- President Obama’s Executive Order 13563 and Executive Order 13610, requiring covered agencies to submit retrospective review plans,<sup>17</sup> as well as additional OIRA guidance related to this effort;<sup>18</sup> and
- President Trump’s Executive Order 13771,<sup>19</sup> which requires agencies to rescind two old rules for every new significant rule they issue while ensuring that the cost of the new rule is no higher than the cost of the rescinded rules.

These efforts have historically achieved relatively little, as agencies, including EPA, rarely reassess existing regulations to determine whether they are still necessary and even more rarely amend or repeal rules based on retrospective review. Thus far, the Trump Administration has shown more commitment to the goal of reducing unhelpful regulations, both with respect to issuing fewer new economically significant rules and reviewing the merits of previously promulgated rules. However, EPA can still make significant improvements. Most important, EPA could incorporate a retrospective review plan into economically significant new rules before their implementation.

When agencies justify a regulation using an *ex-ante* cost-benefit analysis that projects large societal net benefits, it should be standard practice to periodically analyze the actual costs and benefits (including employment effects) generated by the regulation using an *ex-post* analysis. Such analyses, although historically uncommon, often reveal that agencies overestimate both costs and benefits (though experts disagree about which category is more prone to overstatement).<sup>20</sup> Agencies should focus their retrospective reviews on regulations

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<sup>17</sup> Executive Order 13563, Improving Regulation and Regulatory Review (2011), 76 Fed. Reg. 3821 (Jan. 21, 2011); and Executive Order 13610, Identifying and Reducing Regulatory Burdens (2012), 77 Fed. Reg. 28469 (May 14, 2012).

<sup>18</sup> Specifically, OIRA urged agencies that:

[F]uture regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of ‘actual results.’ To the extent permitted by law, agencies should therefore give careful consideration to how best to promote empirical testing of the effects of rules both in advance and retrospectively.

See Office of Information and Regulatory Affairs, Office of Management and Budget (2011). “Memorandum for Heads of Executive Departments and Agencies: Final Plans for Retrospective Analysis of Existing Rules.” (June 14, 2011).

(<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-25.pdf>.)

<sup>19</sup> Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (2017), 82 Fed. Reg. 9339 (Feb. 3, 2017).

<sup>20</sup> In 2005, OMB employed a methodology developed by Harrington, Morgenstern and Nelson to compare *ex-ante* and *ex-post* estimates of the costs and benefits of 47 rules and found that, while agencies tend to overestimate both costs and benefits in their regulatory impact analyses, the benefit overestimates are larger than the cost overestimates — thereby causing agencies to overstate cost-benefit ratios for these rules. In a similar follow-up study, Harrington agreed with OMB that agencies tend to overestimate both costs and benefits but did not find evidence of a systematic bias in cost-benefit ratios. See Office of Management and Budget (2005). “Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities.”

recommended by the general public, the regulated community and independent reviewers, for two reasons. First, agencies themselves may lack the resources and incentives to determine which regulations would benefit the most from such reviews. Second, rules vary significantly in terms of how unnecessarily burdensome – or subject to easy improvement – they are, and no one knows as well as those regulated by them. And in conducting retrospective reviews, the Agency needs to be mindful of the need for regulatory certainty. Such reviews should not be designed to change rules during the review period, but rather to determine, at the conclusion of the review period, whether rules meet their objectives in the most cost effective way possible.

Business Roundtable is encouraged by EPA’s inclusion in the ANPRM of questions regarding the extent to which new regulations should include up-front plans to systematically review them after a predetermined period to assess whether the agency’s *ex-ante* cost-benefit analysis was indeed accurate. Business Roundtable strongly supports such “prospective” retrospective review efforts, as they would be useful in identifying needed regulatory fixes and would inform EPA’s regulatory approach in future rulemakings. Developing a retrospective review plan with as many specifics as possible related to how the review should be conducted is also consistent with OMB guidance and recommendations from the Administrative Conference of the United States.<sup>21</sup>

Although recent legislative efforts to require a prospective retrospective review plan for all new “major” regulations have so far proved unsuccessful,<sup>22</sup> EPA should implement such measures voluntarily for rules it considers economically significant. For example, EPA should ensure that every new economically significant regulatory action has a prospective retrospective review plan in place that:

- specifies regulatory objectives;
- defines the metrics (ideally, public health or environmental outcomes) the agency will use to evaluate how well the rule accomplishes those objectives; and
- outlines a plan for collecting data on these metrics.

The draft plan should be issued along with the proposed rule, and should be as specific as possible regarding the data and methods it will use to evaluate the rule’s true *ex-post* impact. Such specificity would serve two goals: It would maximize the likelihood that the best metrics are chosen, and it would allow regulated entities to comment on the information collection burdens imposed by particular metrics.

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([https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2005\\_cb/final\\_2005\\_cb\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf)); and Harrington, W. (2006). “Grading Estimates of the Costs and Benefits of Federal Regulation: A Review of Reviews.” Resources for the Future, RFF DP 06-39, September 2006. ([www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-06-39.pdf](http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-06-39.pdf).)

<sup>21</sup> Administrative Conference of the United States (2014). “Recommendation 2014-5 – Retrospective Review of Agency Rules,” 79 Fed. Reg. 75114 (Dec. 17, 2014).

<sup>22</sup> See, e.g., S. 1817, the “Smarter Regulations Through Advance Planning and Review Act of 2015,” which was introduced in the 114<sup>th</sup> Congress in July 2015, but never enacted.

These actions will increase the likelihood that a robust retrospective review would actually occur (a bipartisan goal for decades). EPA might also consider selecting a small number of rules for retrospective review and conducting the review through a formal notice and comment process. Such an effort could help EPA improve the process it uses to systematically review the costs and benefits associated with other prior regulations.

### Conclusion and Summary of Recommendations

Given the major influence of ancillary benefits in assessing the cost-benefit of EPA rules, as well as the dominant influence EPA's rules have on government-wide costs and benefits of all regulations, extra caution is needed to ensure that the methodology and assumptions are being correctly applied and clearly explained and that alternate regulatory approaches are being actively considered (*e.g.*, regulating an ancillary pollutant directly).

As discussed above, Business Roundtable recommends:

1. EPA should commit to conducting cost-benefit analyses for all economically significant regulatory actions unless expressly forbidden by statute, and cost-benefit analyses should be used in good faith to inform EPA's regulatory approach, rather than used to justify a regulatory decision that has already been made.
2. When EPA relies heavily on ancillary benefits to justify a proposed rule, it should strongly consider whether an alternative regulatory approach would achieve the same benefits in a less costly and more efficient manner. In addition, EPA should continue to support research to reduce the uncertainty surrounding the impact of ancillary benefits, as recommended by OMB and the National Research Council.
3. EPA should prepare a short, standardized summary (possibly in table form) that clearly summarizes the results of the cost-benefit analysis (including relevant cost/benefit ranges and the extent to which the rule results in ancillary benefits); lists key assumptions that drive its cost-benefit analysis; discusses the level of uncertainty of the cost-benefit analysis; describes how dependent the analysis is on these assumptions; and provides a brief overview of the key limitations inherent in the analysis.
4. EPA should ensure that every new economically significant regulatory action has a prospective retrospective review plan in place that specifies regulatory objectives, defines the metrics to be used to evaluate the rule, and outlines a plan for collecting the data that will inform these metrics. With respect to existing rules, EPA could conduct retrospective review of a subset of selected regulations through a formal notice and comment process.

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