

Chapter 2

Statutory and Executive Order Requirements for Conducting Economic Analyses

Agencies are subject to a number of statutes and executive orders (EOs) that direct the conduct of specific types of economic analyses.¹ Many of these directives are potentially relevant for all of EPA's programs while others target individual programs. This chapter highlights directives that may apply to all of EPA's programs.²

The scope of requirements for economic analysis can vary substantially. In some cases, a statute or EO may contain language that limits its applicability to only those regulatory actions, or rules, that fall above a specified threshold in significance or impact. Economic analysis may be necessary to determine if a regulatory action exceeds a significance or impact threshold, and thus falls in the class of regulatory actions targeted by the statute or EO. If a regulatory action must comply with the requirements of a given statute or EO, additional economic analysis (e.g., analysis of benefits and costs as required by EO 12866), procedural steps (e.g., consultation with affected state and local governments as required by EO 13132), or a combination of economic analysis and procedural steps may be required. This chapter describes the general requirements for economic analysis contained in selected statutes and EOs, identifies thresholds beyond which a regulatory action must follow additional economic analysis requirements, and provides further direction for analysts seeking guidance on compliance with the statute or EO.³ For each EO or statute highlighted in this chapter, references to applicable OMB and EPA guidelines are provided. Another resource for determining the type and scope of economic analysis required for a rule is a program's Office of General Counsel (OGC) attorney.⁴ Requirements of the statutes and EOs that do *not* necessitate economic analysis are not covered in this chapter.

1 For the text statutes and EOs appearing in this chapter, and guidance specific to them, or for more information on their implications for EPA rule development, visit the Action Development Process (ADP) Library on EPA's intranet <http://intranet.epa.gov/adplibrary> (accessed April 28, 2004, internal EPA document). Many of the citations for other applicable guidelines included in this section can be found at that site. Alternatively, information on statutes and EOs can easily be found using <http://usasearch.gov/>.

2 Statutory provisions that require economic analysis but apply only to specific EPA programs are not described here. However, analysts should carefully consider the relevant program-specific statutory requirements when designing and conducting economic analyses, recognizing that these requirements may mandate specific economic analyses.

3 Note that for some statutes and EOs, requirements for *proposed* regulatory actions may vary slightly from the requirements for *final* regulatory actions.

4 See U.S. EPA (2005b) for more information.

2.1 Executive Orders

2.1.1 Executive Order 12866, “Regulatory Planning and Review”

Threshold: Significant regulatory actions. A “significant regulatory action” is defined by Section 3(f)(1)-(4) as one that is likely to result in a rule that may:

- *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;*
- *Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;*
- *Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or*
- *Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.*

Any one of the four criteria listed above can trigger a regulatory action to be defined as “significant;” a regulatory action that meets the first criteria is generally defined as “economically significant.” While the determination of economic significance is multi-faceted, it is most often triggered by the \$100 million threshold. This threshold is interpreted as being *based on the annual costs or benefits of the proposed or finalized option*. If one rule option poses costs or benefits in excess of \$100 million, but the rule option to be proposed or finalized has costs and benefits that fall below the \$100 million range, the rule is not considered economically significant. The same definition applies whether the rule is regulatory or deregulatory in nature. In the case of a deregulatory rule with cost savings, transfers should not be netted out. For example, if there are additional costs in one market and cost savings in another, they should not be combined to get “net”

cost savings. If one company loses \$100 million in business to another company, that is sufficient for an economic significance determination, even if the net effect is zero. The EO is silent on whether the threshold should be adjusted for inflation. As such, nominal values have been used in practice, implying that as inflation increases the threshold becomes more stringent.

Requirements contingent on threshold: A statement of the need for the proposed action and an assessment of social benefits and costs (Section 6(a)(3)(B) are required. The requirements for BCA increase in complexity and detail for *economically significant rules* (i.e., those that fall under the definition in the first bullet above). For these rules, the EO requires that agencies conduct an assessment of benefits and costs of the action, that benefits and costs be quantified to the extent feasible, and that the benefits and costs of alternative approaches also be assessed (Section 6(a)(3)(C)).⁵

Guidance: Chapters 3 through 8 of this document provide guidance for meeting these requirements. OMB’s *Circular A-4* (2003) provides guidance to federal agencies on the development of regulatory analysis of *economically significant rules* as required by EO 12866. More specifically, *Circular A-4* is intended to define good regulatory analysis and standardize the way benefits and costs of federal regulatory actions are measured and reported. Chapter 9 of this document describes methods for analyzing and assessing distributional effects of a rule through EIA. Chapter 10 addresses how to assess environmental justice implications.⁶

5 EO 13422 and amended EO 12866 formerly required analysts to “identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem” and extended the BCA requirement to “significant” guidance documents. Although EO 13497, issued in January 2009, revoked EO 13422 together with any “orders, rules, regulations, guidelines, or policies” enforcing it, a subsequent memo issued by then Director of OMB Peter R. Orszag offering guidance on the implementation of the new EO indicated that “significant policy and guidance documents... remain subject to OIRA’s review.”

6 In its Statement of Regulatory Philosophy, EO 12866 states that agencies should consider the distributional and equity effects of a rule (Section 1(a)).

2.1.2 Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”

Threshold: No specific threshold; Agencies are required to “...identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...”

Requirements contingent on threshold: No specific analytical requirements.

Guidance: EPA issued interim guidance for considering environmental justice in the Action Development Process (U.S. EPA 2010); EPA and the Council on Environmental Quality (CEQ) have prepared guidance for addressing environmental justice concerns in the context of National Environmental Policy Act (NEPA) requirements [U.S. EPA 1998a and CEQ (1997)]. These materials provide guidance on key terms in the EO. Chapter 10 of this document addresses environmental justice analysis.

2.1.3 Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks”

Threshold: Economically significant regulatory actions as described by EO 12866 that involve environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children.

Requirements contingent on threshold: An evaluation of the health or safety effects of the planned regulation on children, as well as an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives the agency is considering.

Guidance: EPA has prepared guidance for rule writers on compliance with EO 13045 (U.S. EPA 1998b). EPA’s *Children’s Health Valuation*

Handbook (U.S. EPA 2003b) discusses special issues related to estimation of the value of health risk reductions to children. Guidance in Chapter 10 of this document addresses equity analyses focused on children.

2.1.4 Executive Order 13132, “Federalism”

Threshold: Rules that have “federalism implications” due to either substantial compliance costs or preemption of state or local law. Rules with federalism implications are defined as those rules “that have substantial direct effects on the States [including local governments], on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Rules may be considered to impose substantial compliance costs on state or local governments unless the costs are expressly required by statute or there are federal funds available to cover them.

Requirements contingent on threshold: Submission to OMB of a Federalism Summary Impact Statement and consultation with elected officials of affected state and local governments.

Guidance: Specific guidance on EO 13132 can be found in the internal EPA document *Guidance on Executive Order 13132: Federalism* (U.S. EPA 2008c).⁷

2.1.5 Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Threshold: Rules and policy statements that have tribal implications; that is, those that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

⁷ This document is located at <http://intranet.epa.gov/adplibrary/documents/federalismguide11-00-08.pdf> (accessed March 4, 2010, internal EPA document).

Requirements contingent on threshold: To the extent practicable and permitted by law, if a regulatory action with tribal implications is proposed and imposes substantial direct compliance costs on Indian tribal governments, and is not required by statute, then the agency must either provide the funds necessary to pay the tribal governments' direct compliance costs, or consult with tribal officials early in the process of regulatory development and provide to OMB a Tribal Summary Impact Statement.

Guidance: A tribal guidance document is currently under development by EPA's Regulatory Management Division.⁸ Guidance in Chapter 9 of this document addresses equity analyses focusing on minority populations.

2.1.6 Executive Order 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use"

Threshold: Rules that are a significant regulatory action under EO 12866 and that are likely to have significant adverse effects on the supply, distribution, or use of energy.

Requirements contingent on threshold: Submission of a Statement of Energy Effects to OMB. The Statement of Energy Effects addresses the magnitude of expected adverse effects, describes reasonable alternatives to the action, and describes the expected effects of such alternatives on energy supply, distribution, and use.

Guidance: EPA has prepared guidance on what effects might be considered significant in *Memorandum on Energy Executive Order 13211 — Preliminary Guidance (2008d)*. OMB has guidance for implementing EO 13211 as well.⁹

8 Please check the ADP Library on EPA's intranet, <http://intranet.epa.gov/adplibrary> (accessed April 8, 2010, internal EPA document) for the status of this guidance.

9 U.S. EPA 2008d, *Memorandum on Energy Executive Order 13211 — Preliminary Guidance*, located at <http://intranet.epa.gov/adplibrary/statutes.htm#energy> under the heading "Preamble Template" (accessed July 8, 2008, internal EPA document). OMB's guidance for implementing EO 13211 is located at http://www.whitehouse.gov/omb/memoranda/m01_27.html (accessed July 8, 2008).

2.2 Statutes

2.2.1 The Regulatory Flexibility Act of 1980 (RFA), as Amended by The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601-612)

Threshold: Regulations that have a significant economic impact on a substantial number of small entities, including small businesses, governments and non-profit organizations.

Requirements contingent on threshold: Preparation of a regulatory flexibility analysis, and compliance with a number of procedural requirements to solicit and consider flexible regulatory options that minimize adverse economic impacts on small entities.

Guidance: EPA has issued specific guidance for complying with RFA/SBREFA requirements in the internal document *EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (2006c)*.¹⁰

2.2.2 The Unfunded Mandates Reform Act of 1995 (UMRA) (P.L. 104-4)

Threshold one (Sections 202 and 205 of UMRA): Regulatory actions that include federal mandates "that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year."¹¹

Requirements contingent on threshold one: Section 202 of UMRA requires preparation of a written statement that includes the legal authority for the action; a BCA; a distributional analysis; estimates of macroeconomic impacts; and a description of an agency's consultation with elected representatives of the affected state, local, or tribal governments. Section 205 of UMRA

10 U.S. EPA 2006c, available at <http://intranet.epa.gov/adplibrary> (accessed May 1, 2008, internal EPA document).

11 Note that the threshold in this case is "adjusted annually for inflation" as opposed to the threshold under EO 12866.

requires an agency to consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative, or to publish with the final rule an explanation of why such alternative was not chosen.

Threshold two (Section 203 of UMRA): Regulatory requirements that might “significantly” or “uniquely” affect small governments.

Requirements contingent on threshold

two: Agencies must solicit involvement from, and conduct outreach to, potentially affected small governments during development and implementation.

Guidance: EPA has issued *Interim Guidance on the Unfunded Mandates Reform Act of 1995*, (1995b), and OMB provides general guidance on complying with requirements contingent on each of the two thresholds under UMRA.¹²

2.2.3 The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501)

Threshold: Actions (both regulatory and non-regulatory) that include record-keeping, reporting, or disclosure requirements or other information collection activities calling for answers to identical questions imposed upon or posed to ten or more persons, other than federal agency employees.

Requirements contingent on threshold: The agency must submit an information collection request (ICR) to OMB for review and approval and meet other procedural requirements including public notice. Note that 1320.3(c)(4)(ii) states that “any collection of information addressed to all or a substantial majority of an industry is presumed to involve ten or more persons.” However, OMB guidance on this issue indicates that if agencies have evidence showing that this presumption is incorrect in a specific situation (i.e., fewer than 10 persons would be surveyed), the agency may proceed with the collection without seeking OMB approval. Agencies must

be prepared to provide this evidence to OMB on request and abide by OMB’s determination as to whether the collection of information ultimately requires OMB approval.

Guidance: Both guidance and templates for completing an ICR and associated Federal Register (FR) notices can be found on EPA’s intranet site, “ICR Center.”¹³

¹² See U.S. EPA 1995b available at <http://intranet.epa.gov/adplibrary/statutes/umra.htm> (accessed December 21, 2010).

¹³ See <http://intranet.epa.gov/icrintra/> (accessed April 14, 2004, internal EPA document).

