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Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Commissions?

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Opening Remarks

Sally Katzen*

Thank you for the kind introduction. I was asked to set the table for this conference—to provide some history and context for the discussions that will take place throughout the day.

Jumping right in, we will be talking about the status and future of economic analysis at so-called Independent Regulatory Commissions or IRCs: those multi-headed regulatory commissions—such as the Securities and Exchange Commission (SEC), Federal Communications Commission (FCC), Federal Trade Commission (FTC), and Federal Energy Regulatory Commission (FERC)—whose members do not serve at the pleasure of the president and can be removed from office only for cause. Thus "independent"—as in independent from the president—is their first name and the generally accepted defining characteristic that distinguishes them from Executive Branch regulatory agencies, such as those agencies that are tucked in a Cabinet Department (such as the Occupational Safety and Health Administration [OSHA] in the Department of Labor) or exist on a stand-alone basis but are clearly situated in the Executive Branch (as is the Environmental Protection Agency [EPA]).

As for "economic analysis" I am thinking cost–benefit analysis or cost–effectiveness analysis, but expect more discussion about this term from the stellar economists assembled here today.

So, some history. Requirements for economic analysis in support of, or as justification for, important (usually high-profile) regulatory proposals adopted through rulemaking—typically proceedings under Section 553 of the Administrative Procedure Act—have been around for a long time.

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President Nixon established a Quality of Life Analysis. Subsequently President Ford directed agencies to conduct an inflationary impact analysis. President Carter asked the Regulatory Analysis Working Group, where I served as chief counsel, to review and conduct regulatory analyses of the various agencies.

All of these presidents required some form of economic analysis—typically cost–benefit analysis—to support major or significant rulemaking proposals, so that decisionmakers (if not the public) could assess the consequences of the rule, the good and the bad, the costs or burdens, and the reduction of risk or other benefits that were expected to result from the rule.

Then, President Reagan institutionalized the requirement for cost–benefit analysis for rulemakings, along with a process for centralized review of that analysis by the Office of Management and Budget (OMB; more accurately, the Office of Information and Regulatory Affairs [OIRA] within OMB) to ensure that the benefits of the proposed rule outweighed its costs.

The requirement for economic analysis for important regulations was retained by President Clinton, with the addition of some language that attempted to account for the fact (and I think it is a fact) that benefits may be more difficult to quantify (and monetize) than costs but are nonetheless essential to consider. And that requirement—for economic analysis—has remained in effect through the administration of President George W. Bush and was recently affirmed (or reaffirmed) by President Obama.

President Reagan's Executive Order (EO) 12291, which set forth the requirement for economic analysis to accompany important regulations, was consequential in a number of respects, besides reflecting significant confidence (if not almost a religious faith) in economic analysis. But for our purposes, one significant feature is its application only to Executive Branch agencies. This was a deliberate decision not to extend its reach in requiring economic analysis to the IRCs.

The drafters of President Reagan's EO had sought the wise counsel of the Office of Legal Counsel (OLC) at the Department of Justice, who concluded that the president did possess the constitutional authority to extend the analytical requirements, and the requirement for OIRA review, to the IRCs. But President Reagan's advisers chose not to do so—for political, not legal, reasons.

Twelve years later, the drafters of President Clinton's EO returned to OLC and asked the same questions and got the same answers: the president could, if he chose to do so, extend the

analytical and review requirements that were being applied to Executive Branch agencies to the IRCs. Again the drafters of the EO declined to do so—for political, not legal, reasons.

Let me say that again, President Reagan's advisers and President Clinton's advisers both declined to include IRCs in their executive orders—not because they did not have the authority to do so, but rather for political reasons. In both cases, it was clear that the executive orders were taking a very big step—President Reagan in establishing decisional criteria based on economic analysis and for President Clinton in retaining a centralized review process that had been strongly criticized by Democrats in Congress and opposed by significant parts of his base. In both cases, it was enough to take these steps without further antagonizing those on the Hill who saw the "independence" of IRCs as insulating or protecting them from edicts of the president.

With the benefit of hindsight, presidential advisers today might reach a different judgment. One could argue that the problems that plague our nation do not fit neatly into one agency. Consider the recent financial meltdown, which implicated multiple agencies, including both Executive Branch agencies (for example, Treasury) and IRCs (such as the Federal Reserve and SEC). So, please at least for today's purposes, leave the lawyers out of this, or just humor me, and assume that analytical requirements can be imposed on the IRCs by the president, and surely, if all else fails, by the Congress.

I want to take something else off this table I am setting and that is the mechanics of how such a requirement for economic analysis would be enforced—that is, how the analytical work done by the IRCs would be reviewed and/or approved.

With Executive Branch agencies, OIRA staff regularly reviews the regulatory impact analyses (RIAs) that accompany important draft proposed and final rules before they are officially signed by the issuing agency and published in the *Federal Register*. The OIRA staff communicates its views concerning the RIAs, formally or informally, to the agency staff, who generally pay attention to, and usually heed, the critiques and suggestions from OIRA; if there is disagreement, there is an informal process for “elevating the issue” to the more senior staff or even to the political appointees, where ultimately there is a meeting of the minds.

While the way Executive Branch agencies and IRCs conduct rulemaking is for all practical purposes the same, the differences between the two types of agencies in terms of their structure and their relationship to the president suggests that the enforcement of any requirement for economic analysis should not—possibly, cannot—be the same. If there is disagreement about the sufficiency of the supporting economic analysis, the administrator of OIRA cannot easily negotiate with the chair of an IRC, who in any event cannot necessarily speak for the other

members of the commission. But there are other ways of getting the attention, and possibly the acquiescence, of the IRC without compromising its independence when it disagrees and does not want to acquiesce in OIRA's assessment.

Consider, for example, the solution that Congress came up with when it was authorizing OIRA to review Information Collection Requests (that is, government forms) from all agencies, both those in the Executive Branch and the IRCs. OIRA was able to approve or disapprove paperwork from Executive Branch agencies directly, but when it disapproved paperwork from an IRC, the IRC was able to void any disapproval by majority vote, explaining the reasons for its decision to do so.

A variation on that for review of rulemaking proposals could be that OIRA provide its views in writing to the IRC, and that document would be presented to the commission (presumably in a public meeting) where the critiques and suggestions could be discussed and accepted or dismissed per the will of the commission before final approval of the regulatory action. Here would be a strong incentive to deal with the feedback on the merits, not only because of the public meeting, but also because such a document would almost invariably be included in the administrative record before the court in any judicial review of the rule.

An alternative approach would be to designate an entity outside the Executive Office of the President—indeed, an entity outside the Executive Branch all together—as the reviewer of the economic analysis undertaken by the IRCs. Two obvious candidates are the Government Accountability Office (GAO) and the Congressional Budget Office (CBO). The former already has some analytical capacity that could be directed to this effort and the latter was given a limited (a sort of “check-the-box”) role in reviewing and commenting (to Congress) on the regulations issued by IRCs under the Congressional Review Act.

Neither of these entities has the expertise or experience that OIRA has, but both have the “virtue” of being identified with Congress rather than the president, which may be important to those who read “independent” as independent of only one political player, and not the other political player, namely the Congress. I will confess to some bewilderment about this distinction. It seems to be that if you want independence (or at least insulation) from politics—for instance, no one wants to see the president messing with monetary policy a few weeks before an election—you would want independence (or insulation) from the other political branch as well.

But we don't need to pick an alternative or resolve any of these issues. Again, please trust or humor me, that there are elegant solutions for *how* to do it, *if* and that is the question for today—if it is appropriate, if it is desirable, if it is (or would be) good government to require the

IRCs to engage in rigorous economic analysis in the course of developing and promulgating their rules. That is what we should be focusing on today.

The conference has been organized to explore how such requirements have worked in Executive Branch agencies. How are the IRCs doing in this regard? Could they do better? Should they do better? Are there differences in the types of analyses they should undertake?

These questions are not solely academic—though this group here today should understand there is nothing wrong with academic studies—because we are about to see a very large increase in regulations from IRCs. Under the recently enacted Dodd-Frank financial reform legislation alone, for example, there are over 100 rulemakings expected in the near future. Given that it is important to get it right, let's talk (and document) the merits of economic analysis.