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

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Introduction

A conference held at Resources for the Future on April 7, 2011, explored whether greater use of economic analysis could improve regulatory policy at independent regulatory commissions (IRCs). The conference included speakers from a variety of backgrounds including several who have held senior positions in five different independent regulatory commissions. Their papers and presentations have led to a variety of findings and conclusions.

- Sally Katzen, of New York University School of Law, described how both the Reagan and Clinton administrations declined—for political and not legal reason—to extend the practice of centralized review of regulations to include the independent regulatory commissions.
- Arthur Fraas and Randall Lutter of Resources for the Future surveyed selected regulations of IRCs and found that, generally, the IRCs are conducting only a limited analysis—often only the limited discussion required by the Regulatory Flexibility Act and the Paperwork Reduction Act and without any clearly articulated (or established) standards for such analysis.
- Richard Morgenstern of Resources for the Future summarized his earlier research and the current literature regarding regulatory impact analyses of the U.S. Environmental Protection Agency, (EPA), and of executive branch agencies generally. He reported that participants in rule-writing at EPA claimed that conducting economic analysis raised estimated benefits and reduced cost and that the changes were large relative to the costs of the analysis.

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- Professor Howard Beales of George Washington University reports that the Federal Trade Commission (FTC) already pays substantial attention to the efficiency implications of its enforcement cases, and that additional regulatory analysis of its rulemakings is unnecessary because of existing procedural controls.
- Professor Thomas Hazlett of George Mason University Law School argued that the Federal Communications Commission (FCC) recent analyses are inadequate. He suggested that adopting a different institutional organization within the FCC could improve the role of economic analysis along the lines of the Department of Justice and the FTC.
- Professor Jody Freeman of the Harvard University Law School noted that economic analysis, although helpful, cannot dictate outcomes and needs to be conducted in a manner cognizant and respectful of its limitations given uncertainty and distributional issues.
- Alice Rivlin of the Brookings Institution made the case that the Federal Reserve should do more economic analysis of regulatory issues, at least in some cases, for example, where herd behavior is minimal. She stated that regulatory analysis would be more robust if reviewed by a respected authority. She also acknowledged that the quality of regulatory analysis at independent regulatory commissions could be improved by establishing standards for analysis.
- James Overdahl of National Economic Research Associates reported that the Securities and Exchange Commission (SEC) issues many major regulations with minimal economic analysis of their effects. He argued that economic analysis needs to be a higher priority at the SEC. Overdahl suggested that good intentions are not sufficient to sustain a consistent role for economic analysis and, as a result, some type of formal requirement will be necessary to institutionalize economic analysis at the SEC.
- Professor William Albrecht of the University of Iowa noted that the U.S. Commodities Futures Trading Commission (CFTC) currently faces an especially daunting task in issuing dozens of final rules under the deadlines of the Dodd-Frank financial reform legislation. He concluded that it would be useful to require the CFTC to provide more rigorous economic analysis, and that such analysis should help improve regulatory decisions.
- Finally, Carol Chodroff, Democratic Staff Director for the House Committee on the Judiciary reported interest among House members seeking reasonable reforms of Federal

regulation. She added that in trying to impose requirements for regulatory analysis on IRCs, it is important to preserve the independence of their regulatory authority and also to acknowledge that economic analysis cannot identify a unique regulatory outcome superior to all others.

Increasing the Use of Regulatory Analysis at IRCs

On the basis of the presentations at the conference, we believe that the development of standards for analysis would yield important improvements in IRC economic analysis and regulatory decisions.

Improvements in policymaking follow only if analysis meets appropriate standards. For IRCs generally, no such standards exist. (An exception is the NRC, which has issued its own guidelines, and has a policy of respecting the basic elements of E.O. 12866.) In our judgment, the standards for analysis would include several items.

I.Fundamentals

- a.Identification of market failure or other compelling need
- b.Baseline
- c.Identification of alternatives
- d.Cost estimation
- e.Benefit estimation
- f.Discounting
- g.Identification of unintended consequences
- h.Treatment of uncertainty
- i.Treatment of unquantifiable and nonmonetizable effects

II.Information disclosure

- a.Estimating effectiveness
- b.Estimating behavioral change
- c.Estimating the value of information

More broadly, issuance of such standards should not be left exclusively to the different IRCs. One approach would be to assign this task to the National Academy of Sciences Natural Resources Council, who would develop standards in conjunction with the chief economists of the IRCs, the Office of Management and Budget and the Council of Economic Advisers, through a process that would include public meetings. A second approach would borrow from similar standards already in existence. At the April 7 conference, James Overdahl identified UK

Financial Services Agency guidelines as a possible starting point for developing standards for U.S. financial agencies.

Conclusions

Participants in the conference generally agreed that the current level of analysis at most IRCs is inadequate and that additional steps should be taken to establish better economic analysis of IRC regulations. Most participants believed that such changes would result in improved IRC regulatory decisions.