

Consumer Rights Regulatory Engagement and Advocacy Project
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Working with Cost-Benefit Analysis as an Advocate

Why engage in cost-benefit analysis?*

Advocates have often chafed at cost-benefit analysis for being about numbers rather than people and argued it is slanted toward business interests. But, at its core, cost-benefit analysis reflects the commonsense idea that rules should be effective and serve their intended ends. When those ends are ensuring public health and safety or promoting fair and equitable access to credit, for example, cost-benefit analysis necessarily engages with the human impact of different policy choices. Every day advocates see that impact on the communities and people they serve. Advocates' deep familiarity with how regulations play out in real life gives them a competitive advantage in cost-benefit analysis.

Cost-benefit analysis is often framed as neutral and objective. When advocates present familiar arguments in cost-benefit language, they both maximize their impact and re-shape the data that “matter.” Using the language of cost-benefit analysis to explain how people are harmed by unjust policies makes it more likely that your arguments will be heard, understood, and judged credible and relevant by regulators. And, if an agency fails to consider relevant cost-benefit information in rulemaking, the rule is more likely subject to challenge under the Administrative Procedure Act.

This guide can help you engage in cost-benefit analysis. We give a general overview of what agencies are required to consider in cost-benefit analysis, so that you can focus on the most common legal requirements in developing your strategies. We list common alternative approaches for regulations for you to highlight in your work with agencies. To help you use the language of cost-benefit analysis, we provide a chart listing the common considerations in cost-benefit analysis. It provides brief definitions and examples to help you translate jargon into familiar concepts and experiences. We conclude with strategies for maximizing your impact.

Requirements for agencies

Most federal agencies are required to conduct a regulatory impact analysis on all significant rulemakings. Three main documents cover executive agencies' duties: [EO 12866](#), [EO 13563](#), and [Circular A-4](#). Circular A-4 goes into lengthy, but excellent, detail about how agencies can conduct cost-benefit analysis and what agencies should consider. When agencies fail to consider relevant information, possible alternatives, or contradict evidence in their own record, their rulemaking is subject to being overturned under the Administrative Procedure Act as “arbitrary and capricious.”



“RIA”
Regulatory
Impact Analysis
includes cost-
benefit analysis
and the need for
the rule.

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Agencies are generally instructed to:

1. Consider all costs and benefits to consumers, industry, and others
2. Quantify costs and benefits as accurately as possible[†]
3. Compare the regulation to a baseline without regulation, and only adopt a rule when benefits “justify” the cost
4. Maximize net benefits when possible, i.e., create regulations that are cost effective
5. Consider alternative forms of regulating and explain their preference[†]

Pro Tip: OIRA hosts [12866 meetings](#), open to the public and available via teleconference, where advocates have another opportunity to voice concerns about costs and benefits to their communities and share lived experiences.

Cost-benefit analysis necessarily involves normative tradeoffs and assessments of qualitative benefits, as well as dollars and cents calculations of costs and benefits. While agencies are instructed to quantify what they can, the governing federal documents make clear that agencies can and should take into account impacts such as distributional effects and harms to equity that can be harder to quantify but that nonetheless get at the core work of racial and economic justice.

Independent regulatory agencies

Independent agencies, as defined in the Paperwork Reduction Act, 44 U.S.C. § 3502(5), are not directly subject to Executive Order 12866 or the White House’s Office of Information Regulatory Affairs (OIRA) review. However, OIRA makes the determination of major rule status for all agencies, including independent agencies and, in that capacity, will generally insist on an analysis consistent with Circular A-4. Additionally, independent agencies sometimes have their own statutory requirements or internal policies and procedures for cost-benefit analysis. When working with an independent agency, advocates should consider what standards that agency follows.

Example: Per 12 U.S.C. § 5512(b), the Consumer Financial Protection Bureau, an independent regulatory agency, is instructed to consider:

- costs and benefits to consumers and financial institutions,
- reductions in access to financial products or services, and
- impacts on rural consumers.

The CFPB has made a practice of quantifying what it can and assessing the qualitative impacts rather than trying to weigh costs and benefits against each other.

[†] These requirements are stricter when a rule is “economically significant,” having an annual effect of at least \$100 million or adversely affecting the economy.

Common alternative approaches for regulations

- ❑ Different requirements for smaller firms under the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601-612
- ❑ Different requirements for markets in rural or underserved areas
- ❑ Temporary patches, delayed implementation, and mandated retrospective reviews
- ❑ Approaches that encourage behavior (principle-based regulation) rather than strict rules that mandate or prohibit behavior (prescriptive regulation)
- ❑ Bright line rules vs. flexible rules
 - Businesses sometimes prefer bright line rules because they are easier to follow, but those rules can sometimes let harmful behavior through the cracks or be overly restrictive, particularly in changing circumstances.
 - The cost of flexible rules can be increased litigation and compliance uncertainty, while some benefits, like reduced harm/compensating harm, can be harder to quantify with flexible rules than bright line rules.

Common considerations in cost-benefit analysis[‡]

Framing your arguments using common cost-benefit analysis terminology can make it easier for regulators to understand and find persuasive your argument.

CONCEPT	DEFINITION	EXAMPLE
MARKET POWER	A few (1-4) companies use their bargaining power to push for more profitable terms	Consumers often have only a couple choices for telephone and internet service providers. Choices are often even more limited in rural areas.
EXTERNALITY	A transaction has costs to people on the outside	Fossil fuel companies sell oil to industry and consumers, but the effects of climate change also fall on other countries and future generations.
CONSUMER WELFARE	The total gains to consumers within a market	A consumer might be able to purchase a product for \$100 even when they would have paid \$150.
ASYMMETRIC INFORMATION	One party has access to information that would affect the transaction	Consumers might know more about their risk of defaulting, or industry might know more about the harmful effects of a product.

[‡] Adapted from Howell E. Jackson & Paul Rothstein, *The Analysis of Benefits in Consumer Protection Regulations*, 9 Harv. Bus. L. Rev. 197, 232 (2019).

COGNITIVE BIAS	Human error in judgment	People might be optimistic, pessimistic, impatient, discriminatory, or prone to believing that current conditions will continue, even in an environment subject to change.
DIFFERING ABILITIES	Not all people have the same physical or mental abilities	Some people may not understand financial terms; others may have difficulty with physical tasks.
DISTRIBUTIONAL EFFECTS	Costs of a program fall to one group, while benefits accrue to another group	A rule that limits liability for companies shifts costs to people they injure.
IMPLEMENTATION	Costs incurred when the industry adapts to a rule	Businesses may need new offices, procedures, technology, or personnel.
ENFORCEMENT	Rules can sometimes be enforced by the federal, state, or local government, or by private parties in court	Antitrust laws are enforced by DOJ, FTC, State AG's, companies, and consumers, which enables enforcement even when public enforcement budgets are limited.

Strategies to make cost-benefit analysis work for advocates

- ❑ Consider framing your arguments using language from Circular A-4, the governing statute, or the common considerations chart.
 - ➔ Using the language of the statute or framing it in common cost-benefit terms can make your information more relevant and harder to ignore for the agency.
- ❑ Where you see distributional effects, point them out.
 - ➔ A policy that imposes the heaviest burden on low-income consumers or marginalized communities is a serious problem.
 - ➔ Alternatively, you can defend a distributional effect on a principled basis.

Example: A decision by the Federal Reserve Board to regulate overdraft fees under Regulation E instead of Regulation Z over a decade ago enabled the growth of overdraft fees. The vast majority of those fees, \$11.68 billion in 2019 alone, are paid by just 9% of all checking account holders. Those fees help subsidize free checking accounts, mostly enjoyed by borrowers with larger account balances. In other words, the current regulation of overdraft fees arguably has a distributional effect transferring wealth from borrowers with low account balances who frequently overdraft to borrowers with larger account balances who are able to access free checking accounts.

- ❑ Talk about your experiences and the experiences of those you work with. Stories about real people provide a powerful punch. You can make that punch stronger if you put it in context.

- What does the specific case tell us about the larger problem? How representative is the specific case? How common is the larger problem?
- Aggregate anecdotes and case studies rather than only presenting isolated examples. How many clients does your office see with the same problem?
- What about a problem is relevant to your clients? What harms are they most sensitive to? How do those harms impact their lives?
- ❑ Quantify what you can and engage with the arguments about cost or regulatory burden.
 - Consider doing surveys—of your clients, your colleagues, or other organizations. Say as much as you can about who responded and any relevant demographics or affiliations.
 - Point out exaggerations and poor data in business comments.
 - Challenge agency assumptions. Are assumptions consistent with prior rulemakings? With the best data available? Are the discount rates used by the agency reasonable?

Example: Two often highly contested assumptions are the price of carbon emissions and quality-adjusted life years (QALYs).

- The EPA in 2016 estimated world costs for a ton of carbon at \$50, whereas the EPA in 2018 limited the scope to the U.S., thus reducing costs to \$7.
- In 2016, the yearly discount was 2.5-5%, and in 2018 it was 3-7%, which had the effect of minimizing future impacts. See OIRA 2.0 for further discussion.
- QALYs usually assume that the lives of chronically ill and disabled people are less valuable and place a lower value on treatments that extend their lives.

- Harms to dignity and privacy can be hard to assign a dollar value to, but they can be quantified. How many people suffer from the harm? What harms predominate?
 - For ideas on measuring harms to dignity, and, by extension, other intangible harms, see Dignity as a Value in Agency Cost-Benefit Analysis.
- ❑ Consider other ways the agency could measure the true extent of the problem.
 - Suggest what the questions are an agency needs to ask.
- ❑ Look at what the agency is using as its baseline (i.e., the state of the world without the rule) for comparison to the costs and benefits of the proposed rule.
 - When an agency implements a statute, it generally must use as its baseline the world before the statute and rule go into effect. Only where an agency can clearly separate the mandatory (or self-effectuating) and discretionary parts of such a rule may the agency use a baseline that assumes the statute, but not the rule, is in effect, and only for estimating the effects of discretionary parts of the rule.
 - Has the agency correctly identified the world in the absence of the regulation? What happens if the agency does nothing?

- Does the agency use a different baseline for costs and benefits, effectively under- or overstating the impacts?

Example: When the CFPB rescinded the 2017 Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans, it assumed a world with the 2017 rule in effect, because, in the absence of the rescission rulemaking, the 2017 rulemaking would have gone into effect. As a result, the CFPB found that the primary impact of the rescission rule was to increase payday lending. The CFPB used simulations of what would have happened had the 2017 rule been allowed to go into effect to quantify how much payday lending increased from the baseline.

- ❑ Point out any inconsistency where a policy fails to achieve the stated goal, or where an alternative could achieve that goal better.
 - What is the goal? What are related goals?
 - Are there regulatory alternatives the agency hasn't considered? The agency can't adopt an alternative in a final rule if it didn't solicit comment on it, but it also can't finalize a rule without considering all the alternatives.
 - What are the problems and limitations with the agency's current approach?

Final Considerations

Cost-benefit analysis is a powerful tool for holding agencies accountable. Advocates can and should use the language of cost-benefit analysis to advance their arguments with agencies in rulemaking, with OIRA when it is evaluating the accuracy of the cost-benefit analysis, and ultimately, if necessary, in litigation against the agency for arbitrary and capricious action in violation of the APA. Congressmembers and their staff may also be interested in using cost-benefit analysis, as reframed by advocates, in letters to agencies, oversight hearings, and budget hearings in particular.

In reshaping the language of cost-benefit analysis to include the lived experiences of our communities, we are reshaping the law to center and reflect those experiences and lives.