

**Business Roundtable Comments on EPA Notice of Proposed Rulemaking on
“Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean
Air Act Rulemaking Process”**

Docket ID No. EPA-HQ-OAR-2020-00044¹

August 3, 2020

Introduction

Business Roundtable has long advocated a wide variety of reforms to improve the regulatory process, including improvements related to cost-benefit analysis.² Cost-benefit analysis (CBA) has been a key component of federal regulatory policy for many decades. As the Environmental Protection Agency (EPA) has noted in the preamble to this proposed rule, since 1981 most federal agencies, including EPA, have been required to assess the costs and benefits of proposed and final regulations that could have a significant effect on the economy. CBA has enjoyed bipartisan support across multiple administrations.

A well-conducted CBA helps ensure that the tradeoffs inherent in any regulation are described, quantified and evaluated when regulatory options are proposed and before a rule is finalized. Given the important role that CBA plays in ensuring that federal regulators find the right balance between the positive impacts rules are intended to produce and the costs those rules impose, it is important that this analysis be as rigorous and transparent as possible and developed in accordance with best practices from the economic, engineering, physical and biological sciences.

EPA’s proposed rule would codify widely-accepted regulatory best practices that Business Roundtable has long advocated and believes are necessary to ensure that Clean Air Act rules are developed by consistently using the best scientific information available and with greater transparency regarding their benefits and costs. Business Roundtable commends EPA for this comprehensive, thoughtful effort to improve the rulemaking process.

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.

Business Roundtable exclusively represents chief executive officers (CEOs) of America’s leading companies. These CEO members lead companies with more than 15 million employees and more than \$7 trillion in annual revenues. As major employers in every state, Business

¹ 85 Fed. Reg. 35612 (June 11, 2020). By notice published June 19, 2020, EPA extended the deadline for comments until August 3, 2020. *See* 85 Fed. Reg. 37057.

² *See* Business Roundtable, “Using Cost Benefit Analysis to Craft Smart Regulation: A Primer and Key Consideration for Congress and Federal Agencies” (2014) (BRT CBA Primer).

(<https://s3.amazonaws.com/brt.org/archive/reports/BRT%20Cost-Benefit%20Analysis.pdf>)

Roundtable CEOs take seriously the responsibility of creating quality jobs with good wages. These leaders join with communities, workers and policymakers to build a better future for the nation and its people.

For more than 45 years, the membership of Business Roundtable has applied CEO expertise to the major issues facing the nation. Through research and advocacy, Business Roundtable advocates policies to spur job creation, improve U.S. competitiveness and strengthen the economy.

Comments

As we noted in our comments on the Advanced Notice of Proposed Rulemaking (ANPRM) on this topic, EPA is considered to be among the best agencies at monetizing the costs and benefits of its proposed regulations.³ But it still has room for significant improvement, as the Office of Management and Budget (OMB) and the National Academy of Sciences have both noted.⁴ Business Roundtable commends EPA for its efforts to improve continuously the quality, consistency and transparency of the analysis describing the benefits and costs of its Clean Air Act rules and supports EPA's codification of best practices to achieve this goal. The comments that follow generally support the proposed rule and, to the extent we have a view, provide recommendations on issues where EPA has requested comment.

In brief, we support:

1. Requiring CBA for all economically significant regulations;
2. Using CBA to inform the development of regulatory alternatives, and regulating only when benefits justify costs, except to the extent the Clean Air Act requires otherwise;
3. Using the best scientific practices from the economic, engineering, physical and biological sciences;
4. Enhancing transparency by more clearly presenting data relating to benefits, including co-benefits, and ensuring that benefits are not double counted; and
5. Requiring that economically significant rules include a plan for assessing how well they accomplish their regulatory goals.

The only caveat to our support is EPA's proposal to consider studies only where the pollutant analyzed in the study matches the pollutant of interest in the regulation, if the provision is intended to prevent the presentation of any or all ancillary benefits. As discussed further below, a limitation that could be construed as preventing any consideration of ancillary benefits would conflict with OMB Circular A-4⁵ and best practices for CBAs.

³ See Business Roundtable ANPRM Comments (Aug. 13, 2018) at 2, available at <https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0107-1186>; see also BRT CBA Primer, *supra*, at 15, Figure 5.

⁴ See Business Roundtable ANPRM Comments at 2.

⁵ Office of Management and Budget, Circular A-4, "Regulatory Analysis," 68 Fed. Reg. 58366 (Oct. 9, 2003), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

Codification of Requirement to Conduct Benefit-Cost Analysis on all Economically Significant Clean Air Rules

Business Roundtable strongly supports codification of a requirement to conduct CBAs on all economically significant Clean Air Act rules.⁶ The Roundtable believes EPA’s legal analysis in the preamble to the proposed rule clearly illustrates why it is required to do so. The Supreme Court has clarified that consideration of costs and benefits, where permissible, can be necessary for a rule not to be considered arbitrary and capricious. In *Michigan v. EPA*,⁷ the Court concluded 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.”⁸ Further, all 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’”⁹

Cost-benefit analysis for economically significant regulations is required by E.O. 12866¹⁰ and the Unfunded Mandates Reform Act of 1995¹¹ and, as noted in the preamble to this proposed rule, has been upheld by the Supreme Court. In those circumstances where EPA is statutorily prohibited from considering costs in its rules, such as setting National Ambient Air Quality Standards for criteria pollutants under the Clean Air Act, EPA’s long-standing practice has been nonetheless to prepare a Regulatory Impact Analysis, including benefits and costs, to better inform decision-makers and the public.¹² That choice is good public policy, because CBA is the cornerstone of sound, informed rulemaking. Having the best scientific and economic information available in the rulemaking process leads to more informed decision-making and ultimately better rules. We support EPA’s codification of this requirement into its regulations.

We also urge the Agency to go further and to commit to using cost/benefit analysis to inform its development of regulatory options at the early stage of a rulemaking, rather than only creating a CBA at the conclusion to justify the Agency’s choice of preferred option.¹³ As Circular A-4 explains, a CBA “provides a formal way of organizing the evidence on the key effects – good and bad – of the various alternatives that should be considered *in developing regulations*.”¹⁴ Consistently, the Regulatory Accountability Act would require proposed major rules to include

⁶ EPA has proposed to require CBAs for all “significant” rules, as defined in Section 3(f) of E.O. 12866 or so designated by the Administrator. Proposed § 83.1. Business Roundtable’s principal concern is “economically significant” rules, as defined by Section 3(f)(1).

⁷ 135 S. Ct. 2699 (2015).

⁸ *Id.* at 2702-2708.

⁹ *Id.* at 2716-2717 (citation omitted).

¹⁰ E.O. 12866, “Regulatory Planning & Review,” 58 Fed. Reg. 51735 (Oct. 4, 1993), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

¹¹ See 2 U.S.C. § 1532(a).

¹² See Richard Morgenstern, “A Half Century of Economics at EPA,” Resources Magazine, Resources for the Future (June 15, 2020), available at <https://www.resourcesmag.org/archives/half-century-economics-epa/>.

¹³ BRT’s CBA Primer discusses this problem at 26.

¹⁴ Circular A-4 at 1-2 (emphasis added).

an initial discussion of the costs and benefits of regulatory alternatives considered by the agency.¹⁵ In the final rule, EPA should require that proposed economically significant Clean Air Act rules include a discussion of how the agency used CBA considerations to develop regulatory alternatives, except where prohibited by statute.

Finally, we also urge EPA to state in the final rule that it will promulgate economically significant Clean Air Act regulations only when it can reasonably determine that the quantifiable and nonquantifiable benefits of the intended action justify the costs, unless the statute requires a different determination. Since 1993, E.O. 12866 has expressed the principle that agencies should regulate only when they can reasonably determine that benefits justify costs.¹⁶ The proposed standard would not require direct benefits to exceed costs. In addition, EPA could also consider ancillary benefits, and costs, to help evaluate regulatory outcomes as described in Circular A-4.

Best Practices for Development of Benefit-Cost Analysis

Business Roundtable supports EPA's proposal to codify into regulation best practices for the conduct and presentation of the CBA. Specifically, we support the requirement that all CBAs, where practicable:

- Quantify all benefits and costs;
- Monetize all quantified benefits and costs by following well-defined economic principles using well-established economic methods;
- Qualitatively characterize benefits and costs that cannot effectively be quantified or monetized; and
- Explain any departure from the best practices for the CBA described in Circular A-4.

Despite our support for most of EPA's proposed rule, Business Roundtable is concerned about the potential interpretation of EPA's statement in its proposed rule that, when EPA seeks to link regulatory benefits to scientific studies, EPA will take into account studies only where "[t]he pollutant analyzed in the study matches the pollutant of interest in the regulation."¹⁷ As written, this statement could be construed as limiting the consideration, analysis and presentation of benefits to only the targeted pollutant of the regulation.¹⁸ If true, this approach would conflict with OMB Circular A-4,¹⁹ which the proposal correctly characterizes as reflecting "best practices" for risk analysis. If EPA means only that the study should analyze the relevant pollutant rather than a surrogate, that would not raise concerns. EPA should clarify this section to ensure that ancillary benefits are considered and evaluated, even if they are linked to pollutants that are indirectly of interest in the regulation. To the extent a study is not directly

¹⁵ See, e.g., S. 3208, the Regulatory Accountability Act (introduced Jan. 16, 2020), § 3(b)(new 5 U.S.C. § 553(c)(1)(C)(v)).

¹⁶ See E.O. 12866, § 1(b)(6).

¹⁷ 85 Fed. Reg. 35620, Proposed § 83.3(a)(9)(i)(B).

¹⁸ 85 Fed. Reg. 35622, Proposed § 83.4(b)(1).

¹⁹ See Circular A-4 at 26 ("Your analysis should look beyond direct benefits . . . and consider any important ancillary benefits . . .").

linked to the pollutant of interest in the regulation, the CBA should clearly note the limitations, relevance and uncertainty associated with the study, not ignore it entirely.

When co-benefits dominate the benefits side of the equation, EPA can:

- Support research to reduce the uncertainty surrounding the impact of ancillary benefits, as recommended by OMB and the National Research Council;²⁰ and
- Strongly consider an alternate regulatory approach that would achieve these benefits more directly in manner consistent with statutory intent. Instead of regulating the pollutant as a co-benefit, EPA should consider regulating the pollutant under the statutory provision established by Congress under the Clean Air Act for its regulation.

As EPA notes in the preamble, EPA can also develop multiple baseline scenarios to avoid double-counting—a concern that most commonly involves ancillary benefits.²¹ 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. This is consistent with OMB Circular A-4.²²

EPA notes that disaggregating benefits into those targeted and those ancillary to the statutory objective might identify whether there may be more efficient ways of obtaining ancillary benefits. We agree. We believe that EPA’s proposed transparency provisions will allow the Agency to clearly present all the data from relevant studies and their limitations.

Increasing Transparency

Business Roundtable strongly supports EPA’s proposal to increase the transparency in the presentation of the data generated through the CBA. When agencies prepare regulatory impact analyses, OMB Circular A-4 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.²³ Circular A-4 also says that “[a] good analysis should be transparent and your results must be reproducible.”²⁴ The Roundtable thus strongly supports EPA’s proposal that CBAs be “reproducible to the extent possible.”²⁵ Making the data and models used in a CBA public to the fullest extent permitted by law, as EPA has proposed,²⁶ is an essential prerequisite to reproducibility.

²⁰ See, e.g., OMB, 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) at 12, available at http://www.whitehouse.gov/wp-content/uploads/2017/12/draft_2017_cost_benefit_report.pdf; National Research Council, *Estimating the Public Health Benefits of Proposed Air Pollution Regulations* (2002), available at <https://doi.org/10.17226/10511>.

²¹ 85 Fed. Reg. 35617, 35618-35619.

²² See Circular A-4 at 20.

²³ See Circular A-4 at 17.

²⁴ *Id.*

²⁵ Proposed § 83.3(a)(11)(i).

²⁶ Proposed § 83.3(a)(12).

EPA also has requested comment on whether, in addition to the presentational requirements proposed in Section IV.C of the preamble, EPA should require a detailed disaggregation of both benefit and cost categories within the table that summarizes the overall results of the CBA in the preamble of future significant CAA rulemakings.²⁷ Business Roundtable recognizes the complexity and imprecision involved in preparing and presenting fairly data derived from even the most rigorously prepared CBA. Recognizing these limitations, we believe the overriding goal of the Agency should be to present data regarding benefits and costs in an objective way and as accessible to decisionmakers and the public as possible. As a practical matter, achieving this goal should include disaggregation of data to the extent it is possible to do so. Transparency and accessibility require it.

As Business Roundtable recommended in its comments on the ANPRM in this proceeding, “[t]o 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 limitation inherent in the analysis.²⁸

Such a concise, standardized presentation would make useful information more accessible to decision-makers and the public and help improve confidence in EPA’s rulemaking process. This information should be included in both the preamble to a proposed rule and the RIA to improve its accessibility and transparency.

Retrospective Review

Business Roundtable strongly supports EPA’s suggestion that each new economically significant regulation include an up-front plan to systematically review the actual costs and benefits resulting from the rule, after a predetermined period, to assess whether the agency’s *ex-ante* cost-benefit analysis was indeed accurate. We believe it should be standard practice to periodically analyze the actual costs and benefits (including employment effects) generated by a regulation in an *ex-post* analysis, and we elaborated upon the benefits of such “prospective” retrospective review efforts in our comments to the ANPRM.²⁹ Such retrospective review efforts are strongly

²⁷ 85 Fed. Reg. 35624

²⁸ Business Roundtable ANPRM Comments, p. 5.

²⁹ *Id.* at 5–8.

supported by the Administrative Conference of the United States³⁰ and recommended in OMB guidance.³¹

In the preamble to the current proposal, EPA has requested more specific comments on this issue. We provide them below:

- *What form should a requirement take in the case of CAA regulations? For example, should the requirement pertain to analysis of an individual rule or a review of the cumulative burden of a set of rules regulating the same or related entities?*

The fundamental goal of retrospective review is to specify the regulatory objectives of a rule and to evaluate how well the rule accomplishes those objectives. Thus, where multiple rules are directed toward the same objective, it may be sensible to review them collectively, to evaluate how well they accomplish that objective. Ideally, such a review would allow EPA to determine whether one rule accomplishes a given goal more cost-effectively than another. That finding would provide justification, if legally permissible, for EPA to retain or emphasize the former and deemphasize or repeal the latter.

Also, EPA should focus its retrospective reviews on regulations recommended by the public, the regulated community and independent reviewers, for two reasons. First, EPA 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.

- *Should it be applicable to all parts of CAA or just some provisions?*

Business Roundtable has historically supported legislation that would require agencies to conduct prospective regulatory reviews of economically significant regulations.³² However, if a new, less burdensome regulation offers the promise of more cost-effectively achieving the goals of an existing, more burdensome regulation, that new regulation would be a prime candidate for prospective retrospective review.

- *What are the advantages and disadvantages of such a requirement? How can the Agency overcome the challenges conducting retrospective analysis in cases where the EPA's ability to collect information about the costs of compliance is limited or otherwise influenced by other statutes?*

³⁰ Administrative Conference of the United States. Recommendation 2014-5, “Retrospective Review of Agency Rules,” 79 Fed. Reg. 75114 (Dec. 17, 2014).

³¹ See OMB, “Memorandum for Heads of Executive Departments and Agencies: Final Plans for Retrospective Analysis of Existing Rules” (June 14, 2011), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-25.pdf>:

[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 consider how best to promote empirical testing of the effects of rules both in advance and retrospectively.

³² See, e.g., S. 3208, § 3(b)(new 5 U.S.C. § 553(l)).

The defining characteristic of prospective regulatory review is that a new rule would include a retrospective review plan that would specify regulatory objectives; define the metrics (ideally, evidenced-based public health or environmental outcomes) the agency would use to evaluate how well the rule accomplishes those objectives; outline how the Agency would collect data on these metrics; and specify a time frame for conducting the retrospective analysis (e.g., 5-10 years after the rule is promulgated). A 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 provide multiple benefits, including:

- Ensuring the agency appropriately considers how best to measure the rule's effect *before* moving forward;
- Allowing for public input that could produce higher-quality metrics for use in the retrospective review;
- Allowing regulated entities to comment on the information collection burdens imposed by particular metrics, thereby enabling EPA to take steps to minimize those burdens while collecting the necessary data;
- Allowing the Agency to comply with the Paperwork Reduction Act (PRA) in the course of the rulemaking, rather than having to conduct a separate PRA approval process later; and
- Enabling the Agency and regulated entities to determine monitoring or other information collection requirements up-front, while the rule is being developed, rather than having to search for or estimate data after the fact.

Conclusion and Summary of Recommendations

Business Roundtable again commends EPA for this thoughtful and comprehensive proposed regulation which would update EPA's Clean Air Act rulemaking process to incorporate many widely accepted regulatory best practices regarding cost-benefit analysis. Specifically, we support EPA's proposal to, where practicable:

- Quantify all benefits and costs;
- Monetize all the quantified benefits and costs by following well-defined economic principles using well-established economic methods;
- Qualitatively characterize benefits and costs that cannot effectively be quantified or monetized;
- Characterize uncertainties; and
- Explain any departure from the best practices for the CBA described in Circular A-4.

One concern we have with EPA's proposed rule is whether it intends to consider only studies where the pollutant analyzed in the study matches the pollutant of interest in the regulation, and to limit its detailed presentation of benefits accordingly. We urge EPA to clarify its intent in this respect. As we noted above, the CBA can clearly note the relevance, limitations and uncertainties associated with such studies, but it should not ignore entirely studies that may be relevant.

We also urge EPA to:

- Use CBA to inform its development of regulatory options at the early stage of a rulemaking, rather than only creating a CBA at the conclusion to justify the Agency's choice of preferred option; and
- Promulgate economically significant regulations only when it can reasonably determine that the benefits of the intended action justify the costs, except to the extent the Clean Air Act requires otherwise.

We also support EPA's proposed transparency and presentational provisions but believe that EPA CBAs should include a standardized summary that would make their key elements more accessible to decisionmakers and the public. This information should be included in both the preamble to a proposed rule and the RIA. Finally, we urge EPA to include in all economically significant new regulations a plan for retrospective review to determine how well the regulation accomplishes its objective. This will enable regulations to be improved or scaled back and will also help improve the accuracy of CBA in future rulemakings.

For further information about these comments, please contact:

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