August 13, 2018

Acting Administrator Andrew Wheeler
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process; Advanced Notice of Proposed Rulemaking
Docket No. EPA-HQ-OA-2018-0107, 83 Fed. Reg. 27524

*Submitted electronically via regulations.gov*

Dear Acting Administrator Wheeler:

The American Chemistry Council[1] (ACC) is pleased to submit these comments in response to the Environmental Protection Agency's (EPA) advance notice of proposed rulemaking (ANPRM) regarding application of cost-benefit analysis in regulatory decision making. ACC has for many years called for an improved regulatory assessment model that reflects cumulative impacts of regulations; for application of consistent standards for the consideration of scientific data regardless of source; and for greater transparency in the rulemaking process so methodologies and consequences can be more clearly understood.[2] ACC is strongly supportive of this effort by EPA to improve the consistency and transparency of the agency's consideration of costs and benefits in the rulemaking process.

It is now a well-established principle with academics, policymakers, and the public that agencies should regulate only when the benefits of regulation outweigh the cost.[3] Executive Order 12866 embodies this principle. EPA should consistently seek to maximize net benefits by requiring full cost-benefit balancing

[1] The American Chemistry Council represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $797 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

[2] See, e.g., Testimony of Michael P. Walls, ACC, Assessing the Cumulative Impact of Regulation on U.S. Manufacturers, House Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending (March 9, 2011).

[3] The net impacts of regulation can be positive, neutral, or negative. When the costs of regulation exceed the benefits, net impacts on society are negative. "Excessive or poorly designed regulations…can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and ongoing paperwork, retard innovation, reduce productivity, and accidentally distort private incentives." Office of Management and Budget, Office of Information and Regulatory Affairs, Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997), at p. 10.

when implementing regulatory statutes, with exceptions only where such cost-benefit review is prohibited by statute. We commend EPA for opening this docket and engaging stakeholders in dialogue about improved approaches to cost-benefit review, and look forward to the agency's proposed rule.

We offer several specific suggestions for consideration in the proposed rule.

**Statutory Requirements**

EPA specifically requests comment on opportunities and challenges associated with promulgating regulations to govern EPA's approach to cost and benefit considerations in future rulemakings. Certainly, a consistent and uniform approach across statutes would be beneficial, as this would provide maximum predictability to stakeholders and would reduce transaction costs. That said, regulations must implement statutes, and EPA notes in the ANPRM that there is variation in the suite of laws that EPA administers regarding the application and scope of cost-benefit considerations. Thus, a unified regulatory approach could be undertaken to the extent that this is consistent with statutory provisions.[4] Otherwise, priority should be accorded to unifying cost-benefit approaches under the Clean Air Act.[5]

We note that recent U.S. Supreme Court decisions have now clarified that agencies have broad discretion to interpret statutes that are silent or ambiguous on cost-benefit analysis as allowing it to proceed.[6] Importantly, the 2015 *Michigan v. EPA* opinion articulates the principle that unless a statute otherwise prohibits it, "an agency must take costs into account in some manner before imposing significant regulatory burdens" (emphasis added). Thus, given the overriding value of cost-benefit analysis in the context of environmental regulation, it should be universally and comprehensively applied by EPA unless prohibited by statute.

**Executive Branch Requirements**

Executive Order 12866 should be followed except where prohibited by statute. Likewise, the proposal should require EPA to follow OMB's "best practices" as described in OMB Circular A-4. Any analysis of a proposed regulation should (1) clearly explain the need for the proposed regulatory action, (2) indicate that EPA considered an appropriate range of alternative approaches (including no regulation), while justifying the range of alternatives considered, and (3) weigh the costs and benefits of the proposed regulation.[7] EPA's analysis must, to the greatest extent feasible, include a detailed accounting of the expected costs and benefits of the action and plainly demonstrate that the benefits justify the costs.[8] Quantified cost-benefit analyses[9] should be the default requirement,[10] such that the agency

[4] As part of this effect, EPA should now consider its statutes in light of the decisions in Entergy Corp. v. Riverkeeper, 556 U.S. 208 (2009) and Michigan v. EPA, 576 U.S. ___ (2015), and, "unless prohibited by law," implement those statutes with cost-benefit analysis, and with cost-benefit balancing.
[5] Whole economy modeling should be the standard modeling tool for Clean Air Act regulations.
[6] See note 4, *supra*.
[7] See Maeve P. Carey, Cost-Benefit and Other Analysis Requirement in the Rulemaking Process, CRS Report R41974 at 6 (December 9, 2014) (examining Executive Order 12866 and OMB Circular A-4).
[8] *Id.* at 10.
[9] In Business Roundtable v. SEC, the D.C. Circuit held that an agency statutorily authorized to conduct a cost-benefit analysis must quantify costs and benefits. 647 F.3d 1144 (D.C. Cir. 2011). The Court explained that SEC "failed adequately to quantify the certain costs or to explain why those costs could not be quantified" and "neglected to support its predictive judgments." 1148-49.

should justify deviation from the default (i.e., if quantified cost-benefit analysis is not feasible in a particular situation, EPA should justify this choice and offer a rationale why it is appropriate for the regulatory action to move forward).

Quantified analyses benefit EPA and stakeholders. Quantified analyses that emphasize monetary costs and economic consequences better equip stakeholders and reviewers to examine and understand regulatory proposals, in turn better enabling them to offer comment and alternative approaches. Quantified analyses also reduce bias and arbitrary choices in the decision making process.

**Cumulative Impacts**

Consideration of cumulative impacts is currently a requirement of Executive Order 12866, which requires that EPA

> tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulation.[11]

As a counterpart, Circular A-4 provides best practices to agencies on elements of conducting a comprehensive economic impact assessment.[12] These principles should be included in any agency-wide proposed regulation.

**Objective Risk Assessments**

For regulation that seeks to reduce health or environmental risks, effective cost-benefit analysis cannot be conducted without effective underlying risk assessments. ACC noted in its 2011 testimony:

> A typical chemical risk assessment requires numerous default assumptions to address uncertainty (e.g., assuming a particular impact of a chemical at human exposures below the lowest dose tested in laboratory animals). Sometimes, the Agency must choose between its default assumption and actual data that contradict the chosen assumption. Unfortunately, EPA often chooses to maintain a default assumption even in cases where weight of the scientific evidence would suggest otherwise. Such decisions create a disincentive for the collection and use of data and undermine the scientific credibility of the regulatory process. The problem occurs across program offices at EPA, but most notably in the Integrated Risk Information System (IRIS) program under the Office of Research and Development.[13]

Assertions that the application of IRIS assessments, public health goals, and similar agency outputs in regulation have zero economic impact are misplaced. They should be subject to cost-benefit review and included in cumulative impact review with agency products that have similar impacts.

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[10] Quantitative cost-benefit analysis promotes consistency and transparency. See Using Cost-Benefit Analysis to Craft Smart Regulation, Business Roundtable (December 2014), https://www.businessroundtable.org/sites/default/files/
[11] Executive Order 12866, Section 1(b)(11).
[12] Office of Management and Budget, Circular A-4, 15.
[13] See note 2, *supra*.

**Systematic Retrospective Review**

The proposed rule should require a systematic retrospective review plan to be included in new EPA-administered regulations. Systematic review helps improve consistency and transparency in regulatory decision making. ACC supports adoption of the Administrative Conference of the United States' (ACUS) recommendation for systematic review, which encourages agencies to establish a framework for future reassessment of regulations and to include portions of the framework in the preamble. The framework should include the following elements: 1) the methodology by which the agency intends to evaluate the efficacy of and the impacts caused by the regulation; 2) a clear statement of the rule's intended regulatory results with some measurable outcome(s); 3) key assumptions underlying any regulatory impact analysis being performed on the regulation; 4) a target time frame or frequency with which the agency plans to reassess the proposed regulation; and 5) a discussion of how the public and other governmental agencies (federal, state, tribal, and local) will be involved in the review.[14]

**Transparency of Describing Methodology**

EPA requested comment on what increased agency transparency and consistency in cost-benefit analysis would look like. We recommend that EPA ensure, at a minimum, that the agency use the same approach to describing its cost-benefit analysis in regulatory preambles. The cost-benefit discussion should be offered in a dedicated section of the preamble, supported by a narrative discussion of the agency's approach. This should include a description of assumptions made, modeling used, handling of uncertainties, and approach to discount rate. Total benefits and costs, annualized benefits and costs, and duration (time frame) should also be presented in a summary graph or table.

**Annualized Costs**

Although EPA generally describes annualized costs in its rulemakings, it does not consistently explain duration -- the time frame over which it annualizes costs. The proposed rule should include this requirement. Inclusion of the time frame will allow stakeholders a more meaningful opportunity to offer comment, and will help avoid selection of inappropriately short --- or long -- periods used to annualize costs. The agency should also require provision of total corresponding capital costs and annual operating and maintenance costs with total annualized costs.

**Unknown/Unidentified Controls**

In some cases, EPA has monetized certain "unknown" or "unidentified" controls in regulatory cost estimates. The agency should provide a clear and thorough explanation of the methodology and assumptions used to monetize the costs of controls that do not yet exist. This is particularly important when considered together with potential job losses or plant closures as a regulatory cost.

**Representation of Uncertainty**

A final benefits estimate should be accompanied by a description of uncertainty factors and their handling. Confidence intervals or another appropriate measure should be used and described as

[14] See, ACUS Recommendation 2014-5, Retrospective Review of Agency Rules, available at https://www.federalregister.gov/documents/2014/12/17/2014-29546/adoption-of-recommendations

appropriate. Uncertainties should also be quantified in final benefits estimates. We also recommend that EPA articulate uniform requirements to be used for "stacking" uncertainties when underlying analyses are rolled up into a final benefits estimate. For example, if EPA applies an uncertainty factor of 10x to the use of a toxicology assessment, 10x for an epidemiological review, 10x for emissions data, and so forth, the uncertainty factors may inappropriately multiply in the final benefits estimate, skewing an accurate assessment of uncertainty.

**Stranded Costs**

Certain regulatory actions assume that some plants will cease operations rather than incur the cost of complying with burdensome and costly regulatory requirements. Where regulatory action is anticipated to result in plant closures, EPA should include the costs of compliance for these plants in total cost projections. In cases where EPA excludes the costs of compliance for these plants, it should account for stranded costs that may not be recoverable by the plant owner.

**Non-Domestic Costs and Benefits**

Unless a statute requires consideration of international impacts of regulatory action, international impacts should be excluded from the cost-benefit analysis. The Clean Power Plan has often been used to illustrate this problem, where EPA used global benefits to adjust its total benefit calculations and to justify direct costs of $11.9 billion.[15]

**Co-Benefits**

Co-benefits should not be considered in the benefits calculations. As many stakeholders have noted, co-benefits can be inappropriately used to override the direct costs of a rule. Direct benefits should be the focus of cost-benefit analysis. The Mercury and Air Toxics Standards for Power Plants rule (almost all benefits tied to reduction of particulate matter rather than regulation of mercury) is an example of the misuse of co-benefits to justify a direct costs override.[16]

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Thank you for the opportunity to provide comment on the ANPRM. We look forward to the opportunity to comment on EPA's forthcoming proposed rule.

Sincerely,

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American Chemistry Council

[15] 80 Fed. Reg. 61661.
[16] 77 Fed. Reg. 9304.