Response to Questions for the Record from Representative Scott Fitzgerald

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1. In your testimony, you discussed the costs that regulations impose upon the economy and how the regulatory impact analyses performed by agencies in the rulemaking process often underestimate these costs. Do you think that agencies are doing a thorough enough job to ascertain the true cost of new regulations? If not, what can be done to ensure that agencies provide the public with a comprehensive understanding of the cost of regulations during the rulemaking process?

Regulatory impact analyses (RIAs) and regulatory flexibility analyses (RFAs) have been a feature of the federal regulatory process for several decades. In theory, analyses such as these help regulatory agencies ensure that new regulations solve a significant problem at a reasonable cost. To know whether a regulation solves a significant problem at a reasonable cost, the regulatory agency needs to know whether a significant problem exists, the root cause of the problem, alternative solutions that address the root cause, the effectiveness of each alternative in solving the problem, the benefits to society of each alternative, and the costs to society of each alternative. This is the information that RIAs and RFAs could provide.

Unfortunately, the vast majority of new regulations avoid analysis.[1] Historically, RIAs are produced for less than one percent of all new rules.[2] Similarly, initial RFAs are often not produced when the promulgating agencies certify (often incorrectly) that a new regulation would not affect small entities.[3]

Another misconception is that the analyses accompanying proposed regulations are rational and dispassionate tools that ensure new regulations deliver more benefits than costs and avoid disproportionately impacting small businesses when possible. In reality, RIAs are often of such low quality that their usefulness in informing decisions on what and how to regulate is dubious.[4] Furthermore, because RIAs are typically produced by the same agency that is promulgating a new regulation, the analysis often resembles advocacy for a decision that was made before the analysis was even begun—an attempt to persuade the reader that the new regulation will lead to

[1] Patrick A. McLaughlin and Casey B. Mulligan, "Three Misconceptions about Federal Regulation," *Journal of Benefit-Cost Analysis* 13, no. 3 (2022): 287–309, https://doi.org/10.1017/bca.2022.13.
[2] McLaughlin and Mulligan.
[3] Keith W Holman, "The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?" *Fordham Urban Law Journal* 33, no. 4 (2006): 101–18.
[4] Jerry Ellig and Patrick A. McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* 32, no. 5 (May 2012): 855–80, https://doi.org/10.1111/j.1539-6924.2011.01715.x.

substantial net benefits, rather than a sober assessment and comparison of the net benefits of a set of different regulatory options, including the option of not regulating.

These flaws surrounding RIAs and RFAs stem from two features of the regulatory process. First, to ensure that RIAs and RFAs are truly dispassionate analyses, we need to reconsider who produces them. While there is value in attaching an economist to the team that is crafting a new regulation within an agency, the risk of such setups is that the economist could be influenced to try to use the analysis as an opportunity to demonstrate that the agency is making the best possible choice. In other words, when an analysis is produced by the agency that is promulgating the new regulation, the result can be mere advocacy, dressed up as scientific analysis.[5]

Better oversight would help minimize this problem. Bills such as the Prove It Act of 2025 (H.R. 1163) would empower a separate set of analysts to assess the quality of some of the analyses related to new rulemakings and give them some authority to force an agency to improve the quality of its analysis if it is insufficient.

Second, there simply are not enough resources dedicated to the production of RIAs. More manpower would help increase the percentage of regulations that are analyzed and could also help increase the quality of RIAs. But as noted above, it may not be ideal to simply allocate more manpower to the agency promulgating a new regulation. An alternative approach could involve setting up a new office designed explicitly to produce RIAs. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) examines agency-produced RIAs, but it is relatively understaffed and does not produce RIAs itself. If another office, housed, for example, within the Council of Economic Advisers, were charged with streamlined production of independent RIAs, there would finally be an element of "competition" inside the executive branch. For years, regulatory economists have complained that there is a monopoly of sorts on the production of RIAs—only the promulgating agency produces the RIAs.[6] Creating a separate group of economists who are independent of the regulators could break this stranglehold on the production of estimates of benefits and costs of new rules. Furthermore, it would have the added benefit of independence. Finally, if analyses are produced independently and relatively early in the rulemaking process, staff in OIRA, relevant congressional committees, and the Small Business Administration would be able to use the analyses in their oversight capacities.

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[5] Christopher Carrigan and Stuart Shapiro, "What's Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit–Cost Analysis," *Regulation & Governance* 11, no. 2 (June 2017): 203–12, https://doi.org/10.1111/rego.12120.

[6] Strictly speaking, anyone could produce an RIA. But only the promulgating agency can produce an RIA before announced a proposed rulemaking. All others must await the publication of the proposed rule before beginning any analysis. Even worse, if they want their analysis to be considered by the promulgating agency, they must then produce any analysis quickly enough to submit it to the agency during the comment period—typically 45 to 60 days.

In summary, the concerns about the quality of regulatory analyses are very valid. Independent researchers have shown that the quality of analyses produced by regulatory agencies is often insufficient. Proposals such as the Prove It Act would help increase the quality of analyses by empowering another body with a greater oversight role. To further address the quality issue, as well as to expand the number of proposed rules that are accompanied by high quality analyses, policymakers should consider creating an office, possibly within the Council of Economic Advisers, that is charged with the independent production of RIAs.