Legislative Notes: The Economic Impact Disclosure Act

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LEGISLATIVE NOTES

THE ECONOMIC IMPACT DISCLOSURE ACT

State administrative agencies have substantial power to regulate the economic transactions of private individuals.\(^1\) Since the applicable statutory guidelines are often vague or ambiguous, agencies enjoy considerable discretion in their exercise of that power.\(^2\) Certain doctrines have been developed to limit the discretion of regulatory agencies, notably an insistence on procedural safeguards and a requirement that the agency have substantial evidence to support its factfinding.\(^3\) Yet, these doctrines have not been a sufficient check on the discretion of the administrative agencies.

While the traditional concern with agency discretion is that agency decision-making will be biased in favor of the regulated industries,\(^4\) agencies are also criticized for failing to investigate the impact of their policies on the regulated client and the resulting cost to consumers.\(^5\) This failure prevents the agency from responding adequately to the legitimate interests of either the business

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\(^1\) Examples of the various types of state agencies can be found in I F. COOPER, STATE ADMINISTRATIVE LAW 2 (1965). Although many state agencies are not directly concerned with regulating private economic transactions, this note focuses upon the effect of the Economic Impact Disclosure Act, see Part II infra, on state agencies acting in their regulatory capacities.

\(^2\) State courts have been more willing to strike down broad delegations of power to administrative agencies than have the federal courts. See 1 F. COOPER, supra note 1, at 31-91. Yet, Cooper concludes that "almost any extent of discretionary power may be delegated if public safety is significantly involved, and if there is need for the exercise of an expert judgment which the agency undoubtedly possesses, and if its procedures afford fair hearings, and adequate judicial review is provided." Id. at 91.


community or consumers. This note examines a recently developed procedure designed to improve the agency decision-making process by requiring economic prediction of the effect which agency activities will have prior to agency action.

In particular, this note examines three issues. Part II focuses on whether requiring a detailed economic impact statement, applicable to all state agencies, establishes an appropriate method for generating and disclosing relevant economic information to agency decision makers and the public. Part III discusses whether economic analysis provides an objective technique which can effectively limit the discretionary powers of state administrative agencies. Part IV evaluates the probable impact of this economic information upon the agency decision-making process. This note concludes that a formal, judicially reviewable procedure for predicting economic impacts is not justified given its considerable costs and its limited potential either for reducing agency discretion or for increasing agency responsiveness.

I. IMPACT STATEMENTS

An impact statement is a procedural mechanism designed to improve agency decision-making and to limit agency discretion. It differs from other legislative controls over administrative action, such as a legislative veto or committee oversight, since it prescribes procedures for agency evaluation of the proposed action and consideration of possible alternatives rather than relying upon legislative review of a final agency action. A prescriptive limitation of this type should be more effective than other techniques of legislative control since it alleviates the inability of the legislature to review effectively more than a handful of the agency’s actions.  

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6 As examples of bills imposing a broad-ranging requirement of economic analysis and disclosure, this note examines a Florida bill which was passed and subsequently repealed and a similar bill considered in Michigan. See text accompanying notes 24-27 infra.

7 Effective legislative oversight of the activities of administrative agencies is rare because of the complexity of the subject matter, the lack of adequate staff, the inaccessibility of independent information, and the lack of political benefits from participation in oversight activities. Pearson, Oversight: A Vital Yet Neglected Congressional Function. 23 Kan. L. Rev. 277, 281-83 (1975). For a brief discussion of some recent proposals to insure more effective congressional oversight over the federal regulatory bureaucracy, see Ribicoff, supra note 5, at 421-27.

Florida and Michigan both provide for committee oversight over proposed administrative rules. For a description of the history and present operation of the oversight process in the two states, see Note, Can the Joint Administrative Procedures Committee Adequately Solve Administrative Conflict?. 4 Fla. St. U. L. Rev. 350, 350-51, 357-58 (1976).
The pioneering effort in impact statements was the National Environmental Policy Act of 1969 (NEPA). NEPA requires all federal agencies to prepare an environmental impact statement before undertaking any activity which will have significant environmental consequences. By requiring preparation prior to agency activity, Congress sought to provide decision-makers with detailed information as an aid in determining whether to proceed with a program or project, and to disclose to the public relevant environmental information on proposed agency activity.

Fulfilling these dual purposes requires an elaborate series of steps in the preparation of environmental impact statements. The federal agencies must develop criteria for identifying those actions likely to require environmental impact statements. If the agency determines that a contemplated project requires the preparation of a statement, a draft environmental impact statement must be prepared. The draft statement is then reviewed by other federal and state agencies and made available for public comment. The final environmental impact statement is then prepared with the agency

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9 NEPA requires all agencies of the federal government to:
   include in every recommendation or report on proposals for legislation and other
   major Federal actions significantly affecting the quality of the human environment,
   a detailed statement by the responsible official on—
   (i) the environmental impact of the proposed action,
   (ii) any adverse environmental effects which cannot be avoided should the
        proposal be implemented,
   (iii) alternatives to the proposed action,
   (iv) the relationship between local short-term uses of man’s environment and the
        maintenance and enhancement of long-term productivity, and
   (v) any irreversible and irretrievable commitments of resources which would be
        involved in the proposed action should it be implemented.
10 Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974); Calvert Cliffs’ Coord. Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971).
11 See generally 40 C.F.R. § 1500.6 (1975); Baum, Canary, Reeve & Scott, Negative NEPA: The Decision Not to File, 6 Env. Law 309 (1976).
12 The Council on Environmental Quality’s guidelines offer an optimistic appraisal of the role of draft environmental impact statements in the decision-making process.
   It is important that draft environmental impact statements be prepared and
   circulated for comment . . . as early as possible in the agency review process in
   order to permit agency decision-makers and outside reviewers to give meaningful
   consideration to the environmental issues involved. In particular, agencies should
   keep in mind that such statements are to serve as the means of assessing the
   environmental impact of proposed agency actions, rather than as a justification for
   decisions already made. This means that draft statements on administrative actions
   should be prepared and circulated for comment prior to the first significant point of
   decision in the agency review process.
40 C.F.R. § 1500.7(a) (1975). Others have questioned whether these guidelines are an accurate reflection of the actual agency decision-making process. See notes 19-21 and accompanying text infra.
13 40 C.F.R. § 1500.9 (1975).
responding to the questions and criticism raised in the reviewing process.¹⁴

Judicial review of the final environmental impact statement assures the integrity of the process. The courts have been quite strict with federal agencies, invalidating agency proposals for failure to prepare a statement,¹⁵ for failure to consider impacts in sufficient detail,¹⁶ for improperly segmenting a project,¹⁷ and for failure to consider alternatives in an adequate fashion.¹⁸ Environmentalists have effectively used litigation to assure agency compliance with the procedural requirements of NEPA.

Despite the expenditure of substantial agency resources both in statement preparation and in litigation, it is not clear that environmental impact statements have caused agency decision-making to be more responsive to environmental concerns.¹⁹ Commentators have noted that the environmental impact statement has not stimulated inquiry into possible alternatives, but has been offered as a post hoc justification for the agency's decision.²⁰ Rather than rendering the federal decision-making process more responsive, the environmental impact statement requirement has consumed considerable agency resources and has often caused environmentalists to expend their resources focusing on the procedure of statement preparation rather than on the substantive decision.²¹

¹⁴ 40 C.F.R. § 1500.10 (1975).
¹⁵ Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973); Green County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).
¹⁶ Ecology Center of La., Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975); Prince George's County v. Holloway, 404 F. Supp. 1181 (D.D.C. 1975).
¹⁷ The problem of improper segmentation seems to be endemic to highway programs. See, e.g., Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972).
Despite criticism of the effectiveness of the environmental impact statement process, legislators have increasingly turned to the impact statement as a method to limit the discretion exercised by administrative agencies. While there have been recent federal innovations, the most notable expansion of the concept has come at the state level. Several states have considered, and a few states have passed, proposals which would require economic impact statement (EIS) preparation prior to certain types of legislative and administrative actions.


23 The following proposals for an analysis of the economic impact of various actions have been enacted: California Ass. Con. Res. 133, 1975-76 Reg. Sess. (1976) (legislative analyst to prepare a statement evaluating the effect of a pending bill on employment), and Ass. Con. Res. 211, 1975-76 Reg. Sess. (1976) (legislative analyst to prepare a statement analyzing the cost to citizens of pending bills); The Florida Economic Impact Disclosure Act of 1975, ch. 76-1, 1976 Fla. Laws 1 (requiring an economic impact statement to be prepared prior to agency action, see Part II infra), repealed by Act of June 28, 1976, ch. 76-276, § 5, 1976 Fla. Laws 750 (limited the preparation of economic impact statements to agency rules); Act of September 5, 1975, Pub. A. 79-790, 1975 Ill. Laws 2455 (amending ILL. REV. STAT. ch. 111-½, § 1006 (1973)) (requires an economic impact statement to be prepared for certain existing and proposed rules and regulations of the Pollution Control Board); Act of May 23, 1975, ch. 688, § 4, 1975 Nev. Stats. 1387 (amending NEV. REV. STAT. § 218.2725 (1973)) (requires the preparation of a fiscal note for bills having a financial impact on a local government); Act of March 28, 1975, ch. 15, 1975 S.D. Sess. Laws 40 (codified in S.D. COMPIL. LAWS ANN. § 1-26-4.2 (1976 Supp.)) (requires a financial note stating the effect of a proposed rule on the revenues, expenditures, or fiscal liability of the state or its subdivisions); Act of March 24, 1976, ch. 117, 1975-76 2d Ex. Sess. Wash. Laws 414 (requires state and local governmental entities with rule-making authority to adopt procedures to insure that economic values are given appropriate consideration).

The following proposals to require various types of economic analysis were considered: Indiana S.B. 414, 99th Cen. Ass. (1976) (would require the legislative council to develop criteria for determining which legislative proposals shall be subject to the preparation of impact statements detailing the cost to citizens of the proposed action); Michigan H.B. 6423, 78 Legis., Reg. Sess. (1976) (discussed in detail in Part II infra); Michigan S.B. 1008 and S.B. 1074, 78th Legis., Reg. Sess. (1976) (would require an economic impact statement for proposed legislation and administrative rules); New York A.B. 9343, 199th Sess. (1976) (would require an EIS for proposed agency rules and regulations); Pennsylvania S.B. 1248, Session of 1975 (would mandate a study of the costs and benefits of environmental protection and pollution control statutes); Pennsylvania H.B. 1557, Session of 1975 (would require an EIS to be prepared for proposed bills and regulations dealing with environmental protection or pollution control); Pennsylvania H.B. 2052, Session of 1976 (would create a
This note examines Florida H.B. 874,\textsuperscript{24} which was passed by the state legislature and repealed shortly thereafter, and Michigan H.B. 6423,\textsuperscript{25} which was considered by the Michigan legislature in 1976.\textsuperscript{26} Both bills are entitled the Economic Impact Disclosure Act and, except for a few provisions, they are identical.\textsuperscript{27} These bills would apply to more types of administrative agency activity and would require more factors to be considered in the assessment of economic impact than do existing statutes or other proposed bills. Thus, the Economic Impact Disclosure Act is a particularly useful vehicle for examining the virtues and faults of legislation mandating a formal procedure for economic analysis within the agency decision-making process.

\section*{II. The Economic Impact Disclosure Act}

\subsection*{A. General Provisions}

The Act expands and formalizes the procedure by which administrative agencies assess the probable economic effects of their actions. Although most agencies currently analyze the economic effect of proposed actions,\textsuperscript{28} the bills would standardize the procedure for all state agencies. The basic statutory command is that "Every agency, in advance of agency action, shall justify its proposed action by preparing an economic impact statement using professionally accepted methodology, with quantification of data to the extent possible giving effect to both short- and long-term consequences."\textsuperscript{29}

1. Scope—Two definitions reveal the breadth of the statutory requirement of EcIS preparation. "Agency" is defined to include state departments, boards, commissions, and any other agency in-


\textsuperscript{26} The legislative history of the two bills is discussed in Part II B infra.

\textsuperscript{27} These bills are hereinafter referred to as the Economic Impact Disclosure Act except when there is a reference to a specific bill.

\textsuperscript{28} Staff of the Michigan House Committee on Appropriations, Analysis of Michigan H.B. 6423, (June 21, 1976) [hereinafter cited as Appropriations Committee Analysis]; Michigan Department of Management and Budget, Analysis of H.B. 6423 (July 9, 1976) [hereinafter cited as Michigan DMB Analysis].

\textsuperscript{29} Florida H.B. 874, ch. 76-1, § 4(1), 1976 Fla. Laws 2; Michigan H.B. 6423, § 3(1) (1976).
state government. Furthermore, the Michigan version requires local governmental subdivisions to prepare an EcIS unless the action taken is "specifically authorized by a local elected board or official." Under these provisions all state agencies involved in significant regulatory activities would be required to file an EcIS in appropriate circumstances.

The definition of the agency activities which trigger the EcIS is crucial to the ultimate success of the procedure. An overly broad definition will produce a flood of statements, preventing agency decision-makers and interested parties from focusing on those situations in which economic analysis might point out deficiencies in the contemplated activities. In addition, preparation of the statement could become a mere pro forma exercise generating considerable paperwork with little potential for insightful analysis. A narrow definition which excludes important and significant agency activity from the economic analysis requirement should also be avoided.

The drafters of Florida H.B. 874 chose to exclude very little from their definition of agency action.

"Agency action" means any action by an agency or subdivision thereof which may have substantial economic impact upon any person. Substantial economic impact may occur through a related series of agency decisions which individually may not have substantial economic impact, but which cumulatively have substantial impact. Agency action includes, but is not limited to, all rules, . . . policy statements, agency bulletins, and internal agency procedures and other agency decisions which may have substantial economic impact.

There are few activities of state agencies which are not included in such a broad definition. Implementation of the bill would likely produce a virtual flood of impact statements.

The drafters of the Economic Impact Disclosure Act implicitly recognized the delay that will be caused by preparation of the EcIS and the need for state agencies to act promptly in certain circumstances, even if some information is not available. As a result, certain agency actions are not made subject to the requirements of

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31 Michigan H.B. 6423, § 2(b) (1976).
32 Florida H.B. 874, ch. 76-1, § 3(2), 1976 Fla. Laws 1: The Michigan version, H.B. 6423, does not include an enumeration of the various types of agency activity that fall within the definition of agency action. Arguably, the definition of agency action will not be as broad as in Florida H.B. 874. However, since local government agencies are covered by the Michigan bill, the total number of statements filed may still be at least as great in Florida.
the Act. Chief among these exclusions are legislative actions, emergency rules or purchases, and "ministerial" activities.

2. Content—The Act lists certain information which must be included in the economic impact statement.

(a) A description of the action proposed, the purpose for taking the action, the legal authority for the action, and the plan for implementing the action.
(b) A determination that the action is the least cost method for achieving the stated purpose.

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33 Florida exempted the following agency actions from the coverage of the Act:
   (1) The collection and payment of social security funds, retirement funds, or employee benefit funds.
   (2) Participation in any federal program, if under federal law the participation would be prevented by compliance with this act.
   (3) All emergency rules, or emergency purchases, . . . ; provided however, within a reasonable period of time after the action, an appropriate economic impact statement shall be prepared.
   (4) All legislative actions . . . .
   (5) All purchases by any state agency which have a fair market or monetary value which is less than $50,000.
   (6) Ministerial action by an agency which complies with applicable statutes and rules.
   (7) Action by a state agency which is required by law to be maintained as confidential.
   (8) The preparation and sale of all bonds . . . .
   (9) Expenditures of money from trust funds . . . .
   (10) Judicial actions by the judicial branch of government, and by the Industrial Relations Commission.
   (11) Judicial or quasi-judicial functions of [several other state agencies].
   (12) Action taken by the State Board of Administration.
   (13) The prosecution of civil, criminal or administrative actions before any court or before an administrative hearing officer.
   (14) Actions involving persons in the custody of the state . . . .


34 Even though legislative actions are excluded from the coverage of the Act, a member of the Florida legislature may request that an agency prepare an economic impact statement on any proposed legislation which has a direct relationship to the agency. Florida H.B. 874, ch. 76-1, § 6, 1976 Fla. Laws 2. The exclusion of legislative activity is somewhat puzzling given the greater potential of legislation to affect significantly economic activity. See note 51 infra. Certain states have provided a limited form of economic analysis for proposed legislation, known as a fiscal note. E.g., Wis. STAT. § 13.10 (1973). Fiscal notes are limited to a prediction of the effect of the proposed legislation on the expenditures or revenues of state or local governments. Thus, fiscal notes are much less comprehensive than economic impact statements.

35 The exclusion of ministerial activities from the requirements of the Act could be a potent source of confusion. Distinguishing between ministerial and discretionary administrative acts is also crucial in determining whether mandamus will lie to compel an official to perform a duty imposed by law. See W. GELTHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 151-60 (6th ed. 1974). This distinction has caused the courts a great deal of trouble in the mandamus setting and its importation into the scope of economic impact statements is unwise. Professor Jaffe has concluded:

The notion that each administrative act can be classified a priori either as "ministerial" or "discretionary" is unsound and unworkable. If the mandamus cases in any one state are studied as a body, it will be found impossible to reconcile the decisions simply by assigning each to one or the other class. The classification is illusory; it is apt to label the result rather than explain it.

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965).
(c) A comparison of the cost benefit relation of the action to nonaction.
(d) A determination that the action represents the most efficient use of public and private resources.
(e) A determination of the effect of action on competition.
(f) A conclusion as to the economic impact of the proposed agency action on preserving an open market for employment.
(g) A conclusion as to the economic impact upon all persons substantially affected by the action, including an analysis containing a description as to which persons will bear the costs of the action and which persons will benefit directly and indirectly from the action.36

The agency will exercise considerable discretion in predicting these various impacts. The admonition to use professionally accepted methodology37 does not significantly restrict this discretion as there are no standards yet developed against which to compare the techniques used by the agency. To be meaningful the EcIS should include an explanation of the technique used to measure and balance impacts in addition to a prediction of those impacts.38

The requirement that the agency determine that the action is the least cost method of achieving the stated purpose could be a significant limitation upon agency discretion. Narrowly construed, it would mandate that economic efficiency, defined in terms of government expenditures, is the overriding consideration in agency decision-making.39 This approach differs considerably from the existing procedure in which the agency is allowed to consider other noneconomic factors in arriving at its decision.40

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37 See text accompanying note 29 supra.
38 See Part III infra.
39 The title of “Economic Impact Disclosure Act” is somewhat misleading. The Act goes beyond disclosure of predicted economic impacts to require that the agency choose the most efficient alternative to achieve the stated purpose. Governor Askew, in his letter vetoing Florida H.B. 874, stated:

[The language of the bill that an economic impact statement must contain a determination that the agency action is the least-cost method of achieving a stated purpose may be interpreted as limiting the options open to the agency. A narrow view of the “costs” of a course of action would preclude consideration of non-monetary impacts and not serve the public interest.]

Letter from Governor Reubin Askew to Secretary of State Bruce A. Smathers (June 27, 1975) [hereinafter cited as VETO MESSAGE] (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM].

There is a potential conflict between a narrowly construed “least cost” requirement and the requirement that the action be the most efficient use of resources. Quite conceivably, an increased expenditure could result in a more efficient use of resources, as measured by a cost-benefit ratio or some other formula. In some situations the two requirements may be incompatible.

40 A more traditional concern has been that the agency weighs economic factors too heavily at the expense of other values which are not as easily quantified. See remarks of Senator Jackson, note 79 infra; Stewart, supra note 3, at 1704.
3. Public and Judicial Review—In addition, the Act provides a mechanism for public participation in the activities of state agencies. The Michigan version, H.B. 6423, requires that economic impact statements be filed in the office of the county clerk, and that the statements be made available to the public. Judicial review over agency implementation of the Act may be obtained by any "aggrieved person." Courts are given a significant oversight function over agency preparation of the statements.

The court . . . may review . . . the timeliness of the filing of the economic impact statement and the adequacy of the statement to determine whether or not the statement was prepared in accordance with [the requirements of the Act].

The acting agency shall not be accorded a presumption of expertise and a person challenging the action shall have the burden of proving the case only by a preponderance of the evidence. 43

The likelihood that litigation will be a principal method of ensuring agency compliance has been enhanced by provisions giving the court discretion to award costs and attorneys' fees to the prevailing party. Under the Florida version, the EcIS was to be part of the record for judicial review under the Florida Administrative Procedure Act. 44

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41 Michigan H.B. 6423, § 3(3) (1976).
42 Id. § 7(1). The question of identifying an "aggrieved person", that is, one who will have standing to seek judicial review of the agency preparation of the EcIS is similar to that arising under state and federal Administrative Procedure Acts. The Michigan law provides, "When a person . . . is aggrieved by a final decision or order . . . the decision or order is subject to direct review, by the courts as provided by law." MICH. COMP. LAWS § 24.301 (1970). The federal Administrative Procedure Act states: "A person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). The businesses directly regulated by state agencies will be able to show economic "injury in fact" and should have no problem with standing. More difficult problems may arise with respect to consumers and consumer groups. In Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), the Court laid down two criteria a party must satisfy in order to obtain judicial review of an agency action under the A.P.A. The plaintiff must allege injury in fact and the interest asserted must arguably be within the zone of interests protected or regulated by the relevant statute. Id. at 152-53. Consumers or consumer groups should be able to assert that their interest in the effective administration of state regulatory agencies is within the zone of interests protected by the Economic Impact Disclosure Act. See Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097 (D.C. Cir. 1970), in which the court stated: "Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit." Consumers also should be able to establish an injury in fact given the willingness of the courts to follow an "attenuated line of causation" flowing from the agency action to the consumer. See United States v. Students Challenging Regulatory Agency Procedure, 412 U.S. 669, 688 (1973).
44 Id. § 7(4).
45 FLA. STAT. §§ 120.50 - .73 (1973). Florida H.B. 874 originally had a section dealing specifically with judicial review, but it was deleted by floor amendments. The final version merely requires the EcIS to accompany proposed rules filed under the Administrative Procedure Act. Florida H.B. 874, ch. 76-1, § 5, 1976 Fla. Laws 2.
B. Legislative History

Florida H.B. 874 was passed by the legislature in 1975, but was vetoed by Governor Askew. While stating that he supported the basic concept behind the bill,46 the Governor voiced objection to numerous aspects of the bill and revealed his fear that "a potential exists for the requirement to be used as a tool to stymie the proper operation of government."47 The legislature overrode his veto on April 8, 1976, and as a result, the Florida Economic Impact Disclosure Act of 1975 was scheduled to take effect on July 1, 1976.48 The discussion spurred by the veto and override led to the repeal of the Economic Impact Disclosure Act before it became effective.49 It was feared that the scope of agency activity covered by the Act was too broad and that the day-to-day activities of the government would be severely curtailed.50 The same bill also amended the Florida Administrative Procedure Act to require an economic impact statement for administrative rules,51 but internal agency procedures, agency bulletins and other agency activities are no longer subject to the requirement. The EcIS is part of the record which is reviewed by the Administrative Procedure Committee of the legislature before the rule is promulgated.52

Michigan's version of the Economic Impact Disclosure Act was never passed by its legislature. The Michigan House of Representatives passed H.B. 6423, unanimously and without amendment, within three weeks of its introduction.53 The Michigan Senate State Affairs Committee held public hearings,54 studied the issues involved more carefully, and never reported the bill out of committee.

46 Governor Askew stated: "I completely support the basic concept behind the bill. The executive branch of government, as well as the legislature, should be cognizant of the economic impact of its actions and should be able to justify those actions in view of the impact." VETO MESSAGE, supra note 39.

47 Id.


51 FLA. STAT. § 120.54 (1973) was amended to require that, prior to the adoption, amendment, or repeal of any rule, the agency must prepare an economic impact statement and include a summary of the estimated economic impact in its notice of intended action. In addition, the legislature is required to consider the economic impact that proposed legislation will have upon the public and affected agencies. However, no law can be declared invalid for failure of the legislature to comply with the requirement. Act of June 28, 1976, ch. 76-276, § 3, 1976 Fla. Laws 752.


54 See Michigan Senate Journal, 78th Legis., Reg. Sess., 1826, September 13, 1976. The author is indebted to the Michigan Senate State Affairs Committee staff which provided background material and analyses of Michigan H.B. 6423.
C. Purposes

The Economic Impact Disclosure Act seeks to remedy the failure of state agencies to consider adequately the economic impact which contemplated actions have on individuals and the business community. From a broader perspective, however, the Act may be viewed as another legislative attempt to limit the discretionary power of state agencies through procedures altering and constricting the decision-making process. The Act is thus designed to ensure the responsiveness of agency activity to the public interest and to the legislative intent embodied in the applicable statute. The framers of the Act attempted to achieve this purpose by full investigation and disclosure of the economic consequences of agency actions. In addition, the agency’s discretion is curbed by requiring that the agency action be the one most justified, determined by reference to economic criteria. The availability of economic information is designed to prevent unintended and unforeseen economic costs to consumers and the business community. Public participation and judicial review are designed to improve agency decision-making by preventing actions based upon obviously biased agency evaluations and by allowing close scrutiny of the justifications offered for agency actions.

In theory, the Economic Impact Disclosure Act has the potential to generate significant cost savings for the state. The requirements that a cost-benefit analysis be made and that the agency determine, and presumably select, the least cost alternative certainly evidence a legislative intent to promote efficient use of government resources through statement preparation as well as to promote agency responsiveness. In the long run, the EcIS could be a significant tool in coordinating the activities and planning among state agencies and with the legislature.

55 The findings and intent section of Florida H.B. 874 (1976) is illustrative.

The Legislature finds that a state agency should not regulate or restrict the freedom of any person to conduct his affairs, use his property or deal with others on mutually agreeable terms unless it finds, after full consideration of the effect of agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of Florida. The Legislature further recognizes that agency action taken without evaluation of its economic impact may have unintended effects which may include barriers to competition, reduced economic efficiency, unjustified transfers of value from one person to another, reduced consumer choice, increased producer and consumer costs and restrictions on employment. Accordingly it is the continuing responsibility of agencies to analyze the economic impact of agency actions and reevaluate the economic impact of agency actions to determine that the actions promote the public interest.

56 See Appropriations Committee Analysis, supra note 28.
57 See Stewart, supra note 3, at 1674-76.
58 Michigan DMB Analysis, supra note 51. Michigan Department of Social Services, Analysis of H.B. 6423 (July 16, 1976) [hereinafter cited as Department of Social
Underlying these justifications is a perception of the decision-making process as a basically rational system susceptible to improvement by requiring the decision-maker to gather and evaluate more information. This approach views the agency decision-makers as value-free administrators choosing the proper alternative from among the various possible means of solving a problem or achieving some clearly defined goal. An EcIS would further rationalize the process by providing more information for the decision-maker and by affording public disclosure to aid interested parties in challenging agency action. These two assumptions, that a "correct" decision or alternative exists, and that a rational value-free process will help the agency reach that decision, are examined in Part III, but it should be noted that the purposes and procedures of the bill implicitly rest on a model of decision-making that is widely disputed.

D. Criticisms

Despite its purpose of increasing the responsiveness of state agencies, the Economic Impact Disclosure Act would further slow the already cumbersome processes of government. An initial delay for statement preparation would be necessary if the economic impact statements are to provide relevant information. This delay may be appropriate for those decisions which have significant long-run social and economic consequences which are not clearly understood. But the scope of the Economic Impact Disclosure Act extends far beyond these decisions into the daily activities of state agencies. Agency responsiveness is not increased by a procedure, applicable to all state agencies, which indiscriminately mandates a formal procedure for such a wide range of agency activities.

SERVICES ANALYSIS; MICHIGAN DEPARTMENT OF CIVIL SERVICE, ANALYSIS OF H.B. 6423 (Aug. 5, 1976) [hereinafter cited as DEPARTMENT OF CIVIL SERVICE ANALYSIS].

Agency decision-makers should seek to further the values of the legislature rather than their personal value preferences or those of some other group which is not politically responsive. As some observers have stated: "Agencies would be said to fail when they reach substantive policy decisions (including decisions not to act) that do not coincide with what the politically accountable branches of government would have done if they had possessed the time, the information, and the will to make such decisions." Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395, 1399 (1975).

See Part IV infra.

See note 105 and accompanying text infra.

This criticism is particularly applicable to Florida H.B. 874. See VETO MESSAGE, supra note 39; Part II A, supra.

As the Ash Council Report stated, "Accountability and fairness, however, include not only arriving at a correct disposition, but its timely implementation. Indeed, where the effort is to respond to dynamic economic and social problems, the timing of the response often is of critical significance." THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE REORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT AGENCIES 53 (1971).
For an uncertain time after the effective date of the Act, the probability of delay will be particularly great since agencies currently lack the expertise necessary to prepare an adequate economic impact statement. The expansive judicial review granted by the Act will enable parties aggrieved by agency action to obtain injunctive or other relief at least until the agencies develop the expertise necessary to withstand close judicial scrutiny. The delay caused by statement preparation will be further exacerbated by judicial review of the statement.

It is not clear, however, that expansive powers of judicial review would effectively ensure agency compliance with the goals of the Act. The courts are not equipped to decide whether the agency is using the most accurate or reliable economic techniques in its measurements of the various factors. Thus, an examination of an agency's economic predictions is not an effective method of checking unwanted agency activity, especially when the court would retain its traditional powers to halt agency activity that violates constitutional, statutory, or procedural dictates.

Because of the potential for delay, the expansion of judicial review to include an examination of the adequacy of the economic impact statement is not warranted.

State agencies will incur significant additional costs if they are required to produce detailed economic analyses. Additional staff

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64 Appropriations Committee Analysis, supra note 28; Michigan DMB Analysis, supra note 28; Department of Social Services Analysis, supra note 58.

65 The Michigan Department of Civil Service was particularly sensitive to the problem of litigation disrupting agency activities.

Development of adequate procedures and practices by which agencies become capable of fulfilling the requirements of this bill may take two to five years, according to experts in the field of management. It hardly seems advisable to expose government agencies to potential court suits on a process which may be in developmental stages for the next two to five years.

Michigan Civil Service Analysis, supra note 59.

66 See United States v. Topco Assocs., 405 U.S. 596, 609 (1972), in which the Court stated, "[C]ourts are of limited utility in examining difficult economic problems." See also Stewart, supra note 3, at 1710-11.

67 The Michigan Administrative Procedure Act provides an example of the scope of judicial review.

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.
(b) In excess of the statutory authority or jurisdiction of the agency.
(c) Made upon unlawful procedure resulting in material prejudice to an agency.
(d) Not supported by competent, material and substantial evidence on the whole record.
(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
(f) Affected by other substantial and material errors of law.

would be required to prepare the EcIS's\(^{68}\) and additional legal expenses could be expected as a result of the increased litigation. The delays and increased costs would be justified if increased efficiency and more responsive agency decisions resulted. The expectation of efficiency and responsiveness must be evaluated in terms of the utility of this type of economic analysis in limiting the discretionary powers of state agencies and its role in the agency decision-making process.

III. THE USE OF ECONOMIC ANALYSIS

The Economic Impact Disclosure Act is an attempt to structure administrative decisions through economic techniques.\(^{69}\) Through resort to supposedly unbiased economic data, administrative agencies are to arrive at the preferable regulatory decision, thereby avoiding claims that the agency has abused its discretion. One commentator has observed that use of economic techniques is to "hold out a generalized method of reaching unique or non-discretionary policy solutions which merit acceptance because they are the result of technical or value free procedures of social choice."\(^{70}\)

Economic analysis gives "the appearance of value-free rationality at work."\(^{71}\) By isolating the crucial economic variables and applying scientific methodology to measure the effect of alternate actions, the decision-maker is presented with a quantified evaluation of the relative desirability of each choice. The requirement that the decision-maker pick the alternative which the economic analysis shows to be the most justified is designed to eliminate discretion from the decision. Such an approach ignores the analyst's discretion in selecting and measuring the probable impacts of alternatives and also the importance of noneconomic, nonquantifiable values to the decision-maker and to the larger society.

The analyst who prepares an EcIS operates with tremendous

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\(^{68}\) The Michigan Department of Public Health estimated that Department expenditures for statement preparation would be $234,967 yearly. It estimated that seven program analysts and seven support personnel would be required. MICHIGAN DEPARTMENT OF PUBLIC HEALTH, ANALYSIS OF H.B. 6423 (June 21, 1976).

\(^{69}\) See Heller, The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development, 1976 WISC. L. REV. 385, 386, where the author states that "the use of economic techniques to structure legal decisions has been the most important development in recent jurisprudential theory... It is against the inadequacy of traditional doctrine to satisfactorily resolve innovative problems that the emergence of legal economics must be understood."

\(^{70}\) Id. at 387.

\(^{71}\) Kramer, Policy Analysis as Ideology, 35 PUB. AD. REV. 509, 509 (1975).
leeway. Although the variables for consideration are outlined and the Act requires "professionally accepted methodology," the analyst will exercise discretionary judgment in defining the variables, in predicting the long-term effects of a policy choice, and in the selection of alternatives to be considered. In addition, the results of a "scientific" economic analysis will reflect the ideology of the analyst. His ideological perspective will undoubtedly lead the analyst to inquire into certain effects, to ignore others, and to alter the weights accorded to various factors. In particular, three categories of interests or values are likely to be accorded insufficient weight by policy analysts: those too widely diffused to be strongly advocated by any interested party; those associated with future generations; and those not associated with human factors. The conclusion drawn from the economic analysis will be shaped by the perspective of the analyst. This, even supposedly value-free economic analysis involves significant administrative discretion in its preparation.

Other shortcomings of economic analysis also prevent non-discretionary, objective administrative decisions. To rank alternatives involves an assumption about society's preferences for goods and services. Otherwise, the relative desirability of each alternative cannot be ascertained. The problem arises in determining which set of preferences should be used. To use a set of existing preferences ignores both the tremendous impact of government policies on future preferences and the desirability of altering present preferences to achieve long-term goals. To rank alternatives according to the analyst's conception of which preferences should be encouraged and which should be ignored destroys any semblance of objectivity, but the heart of government policymaking is to make precisely such choices.

Economic analysis cannot provide a "correct" solution to the regulatory problems which confront an administrative agency. Because the ideologies of policy analysts differ, respectable economic justifications can be advanced for a number of different alternatives. Even without the influence of ideology, the information

72 See text accompanying note 29 supra.
73 In this context, "ideology" refers to a belief or value system consisting of attitudes toward the various societal institutions and processes. It provides a picture of the world by organizing its complexity into a reasonably simple and understandable framework. See L. Sargent, Contemporary Political Ideologies I (1972).
74 Kramer, supra note 71, at 509.
76 This criticism of economic analysis is more fully developed in Stewart, supra note 3, at 1704-06. See notes 84-86 and accompanying text infra.
77 Federal housing and transportation policies since World War II have had a tremendous impact upon present preferences and lifestyles. See id., at 1706 n.179.
necessary to resolve questions concerning optimal economic efficiency may be impossible or prohibitively expensive to obtain.\textsuperscript{78} The information presented to the decision-maker by economic analysis does not reveal a clearly superior choice. Indeed, economic efficiency is not and should not be the sole criterion. Nonquantifiable values play an equally important role and may override economic ones. Where these values are important considerations they should be disclosed and made subject to public inspection. Economic analysis is no substitute for the normative and political considerations which motivate decision-makers. Placing economic impact in a preeminent position obscures the identity and importance of these nonquantifiable criteria. If the decision-maker is required to offer an economic impact statement to justify his decision, there is sufficient leeway in statement preparation to enable him to do so.

\textbf{IV. Administrative Decision-Making}

The Economic Impact Disclosure Act attempts to place detailed information at the disposal of the decision-maker so that he will be able to arrive at the optimal solution to a perceived problem. Like NEPA,\textsuperscript{79} the Act is an attempt to render the decision-making

\textsuperscript{78} For an example of the complexities and problems associated with applying sophisticated economic techniques to determine the optimal number of vacation homes, see Heller, \textit{supra} note 69, at 395-438.

\textsuperscript{79} NEPA attempts to rationalize the agency decision-making process by requiring a comprehensive plan of environmental management. Senator Henry M. Jackson, the sponsor of NEPA, explicitly rejected the incremental model of decision-making, discussed in Part IV B \textit{infra}, as an acceptable guide for agency decision-making.

Over the years, in small but steady and growing increments, we in America have been making very important decisions concerning the management of our environment. Unfortunately, these haven't always been very wise decisions. Throughout much of our history, the goal of managing the environment for the benefit of all citizens has often been overshadowed and obscured by the pursuit of narrower and more immediate economic goals.

It is only in the past few years that the dangers of this form of muddling through events and establishing policy by inaction and default have been very widely perceived. . . .

This report proposes that the American people, the Congress, and the administration break the shackles of incremental policy-making in the management of natural resources.

process more responsive to considerations which the legislature believes have been given insufficient weight. Attention must be given to the decision-making in order to insure that the probable effect of EcIS's on administrative decision-making will be to provide information that will impact on the process in a meaningful manner.

A. The Rational Model

The traditional view of the decision-making process is a rational system in which the relevant actor becomes aware of a problem, weighs alternative solutions, and then chooses a solution based upon his estimate of their respective merits. The successful operation of the rational model imposes certain requirements. The decision-maker must have detailed information about alternative courses of action and their consequences. There must be a generally accepted set of values to serve as a basis for the selection of goals and to judge the desirability of various alternatives. The decision-maker must calculate the desirability of each alternative based upon its utility in furthering those values. Finally, the most desirable policy alternative must be selected. Thus, under the rational model the decision-maker is clearly able to separate the means and ends, facts and values, and can comprehensively survey the alternatives to arrive eventually at the optimal solution to the problem.

An economic impact statement is designed to operate within the context of this rational model. The EcIS provides the decision-maker with detailed information on the predicted effect of an action. The list of factors to be considered is an attempt to define the values which the government agency should promote. The listing of alternatives should define the scope of the decision-maker's inquiry. In theory, the EcIS should quantify the merit of each alternative, enabling the decision-maker to choose the alternative best suited to deal with the problem in light of the defined values.

The rational model is not a sufficiently realistic description of decision-making in administrative agencies. The model ignores

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80 The rational model of the decision-making process seems to be drawn from the concepts of economic man, the scientific method, and the ideal model of bureaucracy postulated by Max Weber. See Pfiffner, Administrative Rationality, 20 PUB. AD. REV. 125 (1960).
82 See text accompanying note 36 supra.
both the intellectual limitations of the decision-maker and the political context within which the agency functions. Decision-makers do not attempt a comprehensive survey of all the possible alternatives. The cost of obtaining all of the relevant information and the requisite analysis is too great. Moreover, the decision-maker has only a limited amount of time to assimilate and to evaluate information before coming to a decision.

The assumption that an agency as a decision-maker has a clearly defined set of values has also been disputed. Within any organization there will be no shared set of clearly defined values or agreement as to the means to effect any given value. The values upon which there is widespread agreement are likely to be too vague to serve as a guide for decision-making. Any attempt to establish a guideline set of values ignores the fluidity of values and their constant revision as societal value preferences change.

Since the decision-maker cannot assemble and evaluate detailed information on alternatives and there is no common set of values to provide a basis for ranking those alternatives, the rational model cannot precisely describe the decision-making process of a large organization such as a government agency. One commentator on public administration has concluded, "A decision-maker, attempting to adhere to the tenets of a rationalistic model, will become frustrated, exhaust his resources without coming to a decision, and remain without an effective decision-making model to guide him. Rationalistic models are thus rejected as being at once unrealistic and undesirable."  

**B. The Incremental Model**

The theoretical shortcomings of the rational model are well known and various alternate theories have been advanced to reconcile the limitations of the decision-maker with the desire for a basically rational decision-making process. An alternate approach, known as the incremental model of decision-making, has been advanced and refined by Professor Charles Lindblom. Re-
jecting the unrealistic assumptions of the rational model, he posits a process which is far from rational, but which more accurately describes the actual decision-making process.90

Under the incrementalist approach, decision-makers do not attempt to reach the optimal response to a problem; rather, they settle for those solutions which provide a relatively satisfactory realization of their values.91 The model posits the following process.92

1. The decision-maker does not attempt a comprehensive survey and evaluation of alternatives, but rather limits his attention to policies which differ incrementally from existing policies.
2. Out of a concern for political feasibility, the decision-maker considers only a restricted number of those incremental alternatives.
3. For each alternative only a few of the important consequences are considered; other important consequences are disregarded.
4. The problem facing the decision-maker is continually redefined as the ends and means are adjusted to make the problems more manageable.
5. Thus, no "correct" solution is found because a never-ending series of attacks is made on a constantly redefined problem.
6. The decision-making process is remedial, designed to alleviate existing social problems rather than to achieve future goals.

The incremental model describes a process of decision-making far less demanding and far more shortsighted than the rational model. Since only incremental policy changes are considered, the decision-maker requires far less information to make his decision. Furthermore, since the objective of the decision-maker is neither to solve a problem nor to find the "correct" solution, the decision-maker can ignore some consequences and refrain from defining values since there will always be an opportunity for later evaluation. The policy decision can be altered as unforeseen consequences become apparent, the value preferences of society or the decision-maker change, or political shifts make an attractive alternative feasible.93

90 Frederickson. Public Administration in the 1970s: Developments and Directions, 36 Pub. Ad. Rev. 564, 569 (1976). While not fully accepting the incremental model, Frederickson states, "Quite clearly, the incremental ... view is the most empirically accurate of the approaches to rationality." Id. at 569.
91 H. Simon, supra note 88, at xxv.
92 The following summary is that of the author of this note. It is drawn from C. Lindblom, The Intelligence of Democracy 144-48 (1965).
The incremental model has also been criticized from both a normative and descriptive standpoint. Viewed in the context of a pluralistic society, the model underrepresents the poor and politically unorganized whose value preferences are not fully represented by decision-makers. The model also ignores the process of achieving basic societal innovations since it focuses on short-term changes with only limited variations from existing policies.

An economic impact statement has a much less important role when viewed from the perspective of the incremental model of decision-making. Rather than being limited to incremental policy alternatives, the EcIS is designed to force detailed consideration of all possible alternatives. An EcIS is designed to illustrate the single best solution to the problem, but the model suggests that decision-makers do not solve problems but merely adopt short-term, remedial steps that will be satisfactory to the agency and other interested actors. In addition, an economic impact statement does not allow room for different alternatives to become acceptable as values change and political forces shift.

C. The Role of an Economic Impact Statement in the Decision-Making Process

Apart from the definitional problems in Florida H.B. 874 and Michigan H.B. 6423, and the potential for agency manipulation in statement preparation, reliance on the EcIS to improve the agency decision-making process appears misguided. Administrative agencies are not rational actors devising policies designed to achieve social goals. Their decisions must be acceptable within the agency’s political environment. They will be responsive to those groups who can influence their organizational well-being. A government agency seeks to maintain positive relationships with those groups—the executive, legislators, other administrators, and interest groups—that form its constituency. The agency will develop
policies that are acceptable to those groups regardless of economic predictions that indicate an alternate policy may be more desirable.

This analysis does not suggest that economic analysis is not valuable or that agency decision-makers should not try to reach rational solutions to the problems they face. But the type of economic analysis required by the Economic Impact Disclosure Act is not an effective method of furthering these goals. The cost of statement preparation will be considerable and the potential for delay is significant. The benefit to the decision-making process is outweighed by these costs. Agency decisions will continue to be responsive to the demands of the agency's constituency. Those decisions will be framed by the values advanced by members of the constituency and the agency and the need to find a solution acceptable to both. Consequently, the EcIS will probably function as a tool to justify the agency's decision rather than as an integral part of the planning process.

The concepts of economic analysis suggest that procedural changes in the agency decision-making process cannot be justified if the costs of the change outweigh the resulting benefits. The EcIS required by the Economic Impact Disclosure Act cannot meet this

99 The environmental impact statement requirement of NEPA can be justified as providing a basis for exerting political pressures on federal agencies.

If one evaluates EIS's in terms of the quality or even potential quality of the science which is brought to bear on environmental policy issues, the evaluation is discouraging. However, if one takes a more political perspective, NEPA seems to have created a new complex political process which can be and has been used very effectively to improve the social and environmental sensitivity of government decision-makers.


NEPA created an avenue for environmental groups, previously unrepresented in many agencies, to exert effective political pressure on decision-makers. The same justification is not available for the Economic Impact Disclosure Act. The economic effects of agency action, unlike the environmental ones, are examined prior to the decision. See note 28 and accompanying text supra. In addition, it is not clear that the Act would provide a method for previously ignored parties to exert effective political pressure on the agency. The business community has been the most forceful advocate of the Economic Impact Disclosure Act, yet these businesses are already able to communicate their opinions on proposed actions to the agencies. There is no indication that the Act would change the relative distribution of political power as NEPA has done. Professor Andrews has commented that:

The enactment of NEPA was an attempt to bring about administrative change by changes in procedures, and it may yet prove to have achieved some enduring success. However, such success should probably be attributed to the maintenance of political forces that have been engendered by the Act and the prevalent climate of environmental and related values, not to the direct effect of NEPA procedures on agency activities.

Andrews, supra note 19, at 322. Thus any attempt to force the agency to be more responsive to the economic impact of its activities through procedures altering the decision-making process will not be effective unless there is a political climate to reinforce the procedural change.

100 Holden, supra note 97, at 944.

101 This is basically the same criticism that has been leveled at environmental impact statements. See sources listed in notes 19-20 supra.
test. It will not effectively limit the discretionary powers of state agencies because economic analysis of this type reflects the ideology of the policy analyst. It will not increase the responsiveness of state agencies to the public interest and legislative intent, but will instead be manipulated to justify decisions which are based on undisclosed factors.

V. An Alternative Approach

Economic analysis can play a useful role in the decision-making context and should be encouraged if its limitations are appreciated. Proposed legislation and administrative rules should be examined prior to implementation to the extent reasonably possible. There is, however, no need for a formal mechanism of the type required by the Economic Impact Disclosure Act. The EcIS has limited potential for alleviating problems caused by the vast discretionary powers of administrative agencies.

However, more modest goals could be furthered by a statement from the agency outlining the expected effects of a proposed rule. Such a statement could serve as a method of disclosure establishing that the agency considered economic factors in reaching its decision. In addition, it would give the legislature and public an opportunity to ascertain agency bias in the measurement and weighing of values. These disclosures can be made by a much less elaborate and less costly procedure than the one required by the Economic Impact Disclosure Act.

An example of a procedure providing for disclosure of anticipated economic impact is found in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.102 When promulgating a rule defining unfair or deceptive acts or practices, the FTC must issue a statement of basis and purpose.103

The Commission's statement of basis and purpose to accompany a rule promulgated . . . shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.104

Congress was aware of the limitations of economic analysis and the costs borne by interested parties when agency rulemaking is delayed. The House Report states:

The Committee wishes to emphasize that the requirements for the FTC’s statement which accompanies the adoption of a rule are incorporated for the purpose of permitting a better understanding of the terms of the rule and the reasons for the rule on the part of the public . . . . In particular, the requirement that the statement include statements as to the economic impact of the rule does not require the Commission to undertake a full scale economic investigation prior to promulgation of the rule. To do this would inordinately delay FTC proceedings and deny relief to the consuming public while indefinite questions of economic prediction were resolved by the Commission. This provision should be read to require that the Commission consider the economic impacts of the rule to issues and summarize its best estimate of that impact in the statement. Obviously, a full evaluation of the economic impact of the rule would have to await its promulgation.105

The prospect of delay caused by the requirement of a statement of economic effect is further reduced by the provisions for judicial review. The statement of basis and purpose is part of the “rulemaking record”106 which the courts review in deciding whether there is substantial evidence to support the FTC action. However, the “contents and adequacy” of the statement are not “subject to judicial review in any respect.”107 Thus, the statement can aid in justifying the FTC’s decision, but it presumably cannot undermine that decision.

The economic analysis required by the Magnuson-Moss Warranty Act and the statement of economic effect which must accom-
pany a rule promulgated pursuant to that Act are not similar to those involved in the environmental impact statement process. There is no public comment on the statement as it is being prepared and there is no judicial review of the adequacy of the completed statement. To prevent confusion between the different procedures, the economic analysis required by the Magnuson-Moss Warranty Act should be labeled as an economic assessment rather than as an economic impact statement.

This method of economic assessment, disclosing the anticipated economic impact of the agency action, is superior to the statement required by the Economic Impact Disclosure Act in several respects. The agency actions which trigger formal economic analysis are appropriately quite limited. Rather than requiring all state agencies to prepare a statement for a broad spectrum of their activities, the Magnuson-Moss Warranty Act applies only to a single agency and requires the statement for rulemaking in one specific area. This approach offers several advantages. A limited number of statements will be produced, rather than the flood of EcIS's resulting from the broader proposal, and the legislature can designate the particular types of agency activity in which economic considerations deserve particular attention. Moreover, fewer agency resources will be required for preparation of an assessment. In addition, hopefully, the assessments will receive closer scrutiny than would be the case with a broader requirement.

Denying judicial review of the content and adequacy of an economic assessment is another advantage. The potential for delay is too great to justify judicial review in light of the limited effect of either economic assessment or impact statements upon the decision-making process. The courts, even more than the FTC, are not well equipped to handle "indefinite questions of economic prediction." 108 The resources of the agencies and interested parties can be more efficiently allocated to examination of the substantive decisions and the justifications for the decisions and biases of the decision-maker, rather than to preparation of a statement which does not significantly affect the choice of an alternative and which obscures some of the important factors influencing that choice.

VI. Conclusion

The Economic Impact Disclosure Act is a response to the perceived failure of state agencies to consider adequately the

108 See text accompanying note 105 supra.
economic effects of their activities upon consumers and the business community. The Act would force agencies to present an economic analysis of the impact of their actions and would allow aggrieved parties to seek judicial review of the EcIS to protect the integrity of the process. Thus, the Act is designed to reduce the problems arising from the discretion of state agencies and to make the decision-making process more responsive to the public interest.

However, the Economic Impact Disclosure Act is a poor way to achieve those goals. The statute includes far too many agency activities within its scope and could substantially delay agency response to pressing problems. But beyond the definitional problems, economic impact statements would not be an effective method of controlling agency discretion. Rather than providing an objective determination of the desirability of agency activity, the EcIS will reflect the ideology and bias of the agency. In addition, as a procedural method of controlling the agency, the Act ignores the realities of the decision-making process. In the hope of increasing the rationality of the agency decisions, the Act requires a process peripheral to the political forces and organizational values which form a substantial part of the basis for agency decisions. The cost of EcIS preparation, in terms of agency resources and time, clearly outweighs any benefit the statement might produce in the decision-making process.

Economic analysis can be useful as a check on agency discretion, but it should take the form of an assessment of predicted impacts. The purpose should be seen as disclosure to the legislature and to the public of the factors influencing agency decision-making. Economic assessment can allow interested parties to understand the basis for a decision, but the economic effects alone will rarely explain why an agency prefers a particular alternative. Since economic assessment can adequately serve the more modest goal of disclosure, the procedural protections designed to ensure the integrity of the process should be correspondingly limited.

—William F. Flynn