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# HOW CHANGES IN THE *FEDERAL REGISTER* CAN HELP IMPROVE REGULATORY ACCOUNTABILITY

ROBERT W. HAHN\*

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## INTRODUCTION

Expenditures on federal environmental, health and safety regulation have grown dramatically in recent decades and now total several hundred

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billion dollars annually.<sup>1</sup> Over the next decade, regulations and regulatory expenditures are likely to increase significantly. As regulatory activities grow, so does the need to consider their implications more carefully. Yet, the economic impacts of regulation receive much less scrutiny than direct, budgeted government spending.

The potential gains of regulatory reform are substantial. Research suggests that a substantial number of the federal government's regulations would fail a strict benefit-cost test using the government's own numbers.<sup>2</sup> Moreover, there is ample research suggesting that regulation could be significantly improved, so that we could save more lives with fewer resources.<sup>3</sup> One study found that a reallocation of mandated expenditures toward those regulations with the highest payoff to society could save as many as 60,000 more lives a year at no additional cost.<sup>4</sup>

Congress has recently become more receptive to using economic analysis in regulatory decisionmaking. For example, the Unfunded Mandates Reform Act of 1995<sup>5</sup> calls for economic assessments of government mandates affecting state governments, local governments and the private sector. Another example is an amendment that requires the Office of Management and Budget (OMB) to produce a report on the benefits and costs of federal regulation.<sup>6</sup> While these assessments are important, more needs to be done

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1. See KENNETH J. ARROW ET AL., *BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES* (1996); see also OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, *REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS* (1997) (visited June 29, 2000) <<http://www.whitehouse.gov/OMB/infoereg/rcongress.html>> [hereinafter OFFICE OF INFORMATION AND REGULATORY AFFAIRS 1997].

2. In the most likely scenario, Hahn found that 60 out of 106 regulations, or 57%, would not pass a strict benefit-cost test. See ROBERT W. HAHN, *REGULATORY REFORM: ASSESSING THE GOVERNMENT'S NUMBERS* 14 (AEI-Brookings Joint Ctr. for Regulatory Studies Working Paper No. 99-6, 1999).

3. See John F. Morrall III, *A Review of the Record*, 10 REG. 25, 29-34 (1986) (discussing cost effectiveness of rules); see also W. Kip Viscusi, *The Dangers of Unbounded Commitments to Regulate Risk*, in RISKS, COSTS, AND LIVES SAVED 135, 162 (Robert W. Hahn ed., 1996) (concluding that reallocation of regulatory resources would save more lives for less money).

4. See Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, in RISKS, COSTS, AND LIVES SAVED 167, 172 (Robert W. Hahn ed., 1996) (finding that changes in investment strategy could save twice as many lives as under current legislation).

5. Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.).

6. See OFFICE OF INFORMATION AND REGULATORY AFFAIRS 1997, *supra* note 1 (explaining that obligation of OMB to submit detailed reports to Congress is indicative of agreement that gathering such information would improve regulatory reform); see also Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 645, 110 Stat.

to hold legislators accountable for the regulations that are implemented.<sup>7</sup>

To improve regulation, an important first step is to provide useful information that is accessible to the public and other interested parties. The government is an essential source of that information for many federal regulations. Within the government, a central repository of information on regulation is the *Federal Register*.

This paper examines how the *Federal Register* can be used to improve the regulatory process by providing information to interested parties in a "user-friendly" format. The *Federal Register* is the focus of this analysis because it provides the text of all federal regulations and sometimes provides summaries of government analyses of significant regulations. In addition, the *Federal Register* can be found in libraries and on the Internet.<sup>8</sup>

This paper has two objectives: first, to identify the kind of information contained in economic assessments of regulations that are presented in the *Federal Register*, and second, to suggest how information in the *Federal Register* could be modified to make the regulatory process more transparent, thus enhancing regulatory accountability.<sup>9</sup> While this analysis focuses on federal regulation in the United States, the findings and policy recommendations are readily applicable to other jurisdictions dealing with regulatory reform both inside and outside of the United States.<sup>10</sup>

Part I develops the basic research methodology for evaluating *Federal Register* notices and summarizes the main analytical results.<sup>11</sup> Part II ex-

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3009-366 (1996) (establishing requirement for OMB reports). See, e.g., ROBERT W. CRANDALL ET AL., AN AGENDA FOR FEDERAL REGULATORY REFORM 4 (1997) (advocating that regulations should be judged by their unique costs and benefits); ARROW ET AL., *supra* note 1, at 11.

7. See ROBERT W. HAHN & ROBERT E. LITAN, IMPROVING REGULATORY ACCOUNTABILITY 3-5 (1997) (emphasizing that one-time report required by Omnibus Consolidated Appropriations Act is significant but must be made a permanent requirement in order to have lasting impact on regulatory reform).

8. The Government Printing Office publishes the *Federal Register*. See, e.g., *National Archives and Records Administration Database for the 1995, 1996, 1997, 1998, 1999 and 2000 Federal Register* (visited June 29, 2000) <[http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html)> (representing official web site of Government Printing Office); Private Academic Library Network of Indiana, *GPO Access at PALNI* (visited June 29, 2000) <<http://www.palni.edu/gpo>> (providing daily *Federal Register* entries).

9. The focus of the paper is not the validity of the information contained in the *Federal Register* notices, but rather what is and is not contained in the notices.

10. See generally J. Luis Guasch & Robert W. Hahn, *The Costs and Benefits of Regulation: Implications for Developing Countries*, 14 WORLD BANK RES. OBSERVER 137, 149-51 (1999) (discussing deregulation in Latin America and Mexico, among other developing countries); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGULATORY IMPACT ANALYSIS: BEST PRACTICES IN OECD COUNTRIES 7 (1997).

11. Unless otherwise specified, the term "*Federal Register* notices" will be used in this paper to denote the documents that agencies publish in the *Federal Register* for their regu-

plains how to change those notices to include relevant economic information on the impacts of regulation in a user-friendly format. It also addresses issues of enforcing the proposed changes and providing useful aggregate information.

### I. BACKGROUND, METHODOLOGY AND RESULTS

The last six presidents have introduced different regulatory oversight mechanisms with varying degrees of success. In 1981, President Reagan was the first president to formally require estimation of the costs and benefits of major regulations in Executive Order 12,291.<sup>12</sup> The results of those analyses were frequently summarized in the *Federal Register*. President Bush also used Executive Order 12,291. In 1993, President Clinton replaced the Reagan Executive Order 12,291 with Executive Order 12,866, which requires similar regulatory analyses.<sup>13</sup>

The Clinton Executive Order aimed to make the regulatory process more efficient and transparent. It established twelve principles for writing regulations that agencies should follow "to the extent permitted by law and where applicable."<sup>14</sup> Four of these principles are particularly relevant for this analysis. First, each agency must assess the costs and benefits of a rule and only adopt it "upon a reasoned determination that the benefits of the intended regulation justify its costs."<sup>15</sup> Second, each agency should assess alternatives to the regulation.<sup>16</sup> Third, all agencies should assess the effects of federal regulations on state, local and tribal governments.<sup>17</sup> Last, and

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lations. These notices may or may not contain economic analyses.

12. See Exec. Order No. 12,291, 3 C.F.R. 127 (1981). President Reagan's Executive Order defined a "major" rule as any rule:

that is likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Exec. Order No. 12,291 § 1(3)(b), 3 C.F.R. at 127-28.

13. See Exec. Order No. 12,866, 3 C.F.R. 638 (1993). President Reagan's Executive Order uses the term "major," while President Clinton's Executive Order 12,866 uses the term "significant." Exec. Order No. 12,866 § 2(f), 3 C.F.R. at 641. This paper will use the term significant as was used in the more recent order by President Clinton.

14. Exec. Order No. 12,866 § 1(b), 3 C.F.R. at 639.

15. Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. at 639.

16. See Exec. Order No. 12,866 § 1(b)(8), 3 C.F.R. at 639 (stating that alternatives include economic incentives and interest of providing information to the public).

17. See Exec. Order No. 12,866 § 1(b)(9), 3 C.F.R. at 640 (commenting "as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other government functions").

most importantly, all regulations should "be simple and easy to understand

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 Federal Focus, a consulting firm, examined the Environmental Protection Agency's compliance with Executive Order 12,866.<sup>19</sup> More recently researchers have looked at the compliance of all regulatory agencies.<sup>20</sup> Federal Focus created a report card for final and proposed regulations promulgated between April and September of 1994. Their analysis examined 222 "substantive"<sup>21</sup> rules by the Environmental Protection Agency using *Federal Register* notices. The Office of Information and Regulatory Affairs (OIRA) within OMB classified forty-five of those rules as "significant."<sup>22</sup> The report used a number of evaluation criteria, which were based on Executive Order 12,866.<sup>23</sup> For example, OIRA examined whether the regulatory action was undertaken because of public need or law; whether costs and benefits were assessed; if the agency made a determination that benefits justified costs; if the agency considered alternatives and selected

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18. Exec. Order No. 12,866 § 1(b)(12), 3 C.F.R. at 640.

19. See THE INSTITUTE FOR REGULATORY POLICY, FEDERAL FOCUS, INC., ENSURING ACCOUNTABILITY FOR DEVELOPING WELL-FOUNDED FEDERAL REGULATIONS: AN INITIAL "REPORT CARD" ON COMPLIANCE WITH KEY DIRECTIVES OF THE REGULATORY EXECUTIVE ORDER (E.O. 12,866) (1995) [hereinafter THE INSTITUTE FOR REGULATORY POLICY].

20. See ROBERT W. HAHN ET AL., ASSESSING REGULATORY IMPACT ANALYSES: THE FAILURE OF AGENCIES TO COMPLY WITH EXECUTIVE ORDER 12,866, 23 HARV. J.L. & PUB. POL'Y 859 (2000).

21. Federal Focus defined "substantive rules" as rules that:

[W]ere not technical or administrative types of actions such as Clean Air Act State Implementation Plan ("SIP") approvals, minor amendments to previous rulemaking notices, solicitation of public comments, technical corrections, denials of petitions for stays, comment period extensions, reopening of comment periods, designations of air quality planning areas, and changes of address.

THE INSTITUTE FOR REGULATORY POLICY, *supra* note 19, at 4.

22. OMB classifies rules as "significant" if they fall within the categories established by Clinton's Executive Order. See Exec. Order No. 12,866 § 2(f), 3 C.F.R. 638, 641-42 (1993). A "significant" regulatory action is one that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

*Id.*

23. See THE INSTITUTE FOR REGULATORY POLICY, *supra* note 19, at 4-7.

the least burdensome option; if OIRA rejected or returned the rule to the agency for modification; and if the agency withdrew the rule.

The report found that the Environmental Protection Agency (EPA) was not complying with Executive Order 12,866 for most regulations that were examined. It is important to note, however, that the report only reviewed EPA regulations over a short period of time. Moreover, the authors did not report their methodology in enough detail to allow for replication of the results. For example, they state that the benefits justified the costs for six rules.<sup>24</sup> The authors of the report do not indicate if the agency was required to state specifically whether the benefits justified the costs, or if the authors simply drew their own conclusions.

In this paper, I have created a regulatory scorecard for ninety-two significant final and proposed rules promulgated by five agencies over the period 1990 to mid-1995.<sup>25</sup> To score those rules, I used both *Federal Register* notices and regulatory impact analyses (RIAs).<sup>26</sup> I based the analysis on four factors: if costs were assessed; if benefits were quantified; if benefits were monetized, and if the agency stated that it determined that benefits exceeded the costs. I found that a large number (99%) of analyses reported cost information; most (87%) reported a quantification of benefits; only a few (25%) actually monetized those benefits; and even fewer (18%) reported that they found that monetized benefits exceeded costs.

The methodology used in this paper borrows from the studies by Federal Focus and a book that I edited in 1996.<sup>27</sup> I was also interested in identifying variables that were objective in the sense that the methodology could be replicated. The agency only received credit on my regulatory scorecard for what it explicitly stated in the relevant *Federal Register* notice.<sup>28</sup>

The subsequent analysis takes the information provided in the *Federal*

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24. See *id.* at 8.

25. See Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in RISKS, COSTS, AND LIVES SAVED 208, 212 (Robert W. Hahn ed., 1996) (explaining methodology for study).

26. An RIA typically provides an agency's estimate of the economic and social impacts of a proposed significant regulation.

27. See THE INSTITUTE FOR REGULATORY POLICY, *supra* note 19; see also Hahn, *supra* note 25, at 208.

28. Another official publication, called the *Code of Federal Regulations* (CFR), provides a codification of general and permanent rules. See generally The National Archives & Records Admin., *About the Code of Federal Regulations* (visited June 29, 2000) <<http://www.access.gov/nara/about-ctr.html>> ("The *Code of Federal Regulations* (CFR) is a codification of the general and permanent rules published in the *Federal Register* by the Executive departments and agencies of the Federal Government."). However, these rules are only codified in the CFR after they are published in the *Federal Register*.



*Register* as given. Many scholars have questioned the validity of that information, but that is not my intent here. Rather, I will assess the extent to which *Federal Register* notices adequately summarize potentially useful information on the impacts of regulation.<sup>29</sup> Presenting such information in a transparent format and making it easily accessible is important because doing so can help oversight agencies and other interested parties check on its validity. It would also permit an assessment of whether the government's own regulatory analyses support its decisions.

My sample included final rules promulgated by regulatory agencies from 1996 through February 10, 1998 that were subject to review by the OMB. The first step in the analysis was to create a list of final regulations using the OMB's list of "Executive Order Reviews Completed for Economically Significant Regulations."<sup>30</sup> I chose to review "economically significant" rules (as defined by Executive Order 12,866) because they are likely to have the largest economic and social impacts.<sup>31</sup> Thus, it is important for the public to have adequate information about them. I examined both transfer and non-transfer rules. Transfer rules typically involve large budgetary transfers<sup>32</sup> while non-transfer rules typically involve regulations

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29. A related issue is whether the information *not* reported is available somewhere in the government (e.g., in an RIA). While this issue is not investigated here, I believe it is worth exploring further. Doing so could help shed light on the question of whether the *Federal Register* notices fail to report key information, or whether that information is simply not available.

Recent research suggests that in many cases the information is simply not available. See, e.g., STAFF OF HOUSE COMM. ON COMMERCE, 105th CONG., SURVEY OF FEDERAL AGENCIES ON COSTS OF FEDERAL REGULATIONS 1-17 (Comm. Print 1997); HAHN, *supra* note 25, at 210-11 (discussing data available in an RIA); HAHN ET AL., *supra* note 20.

30. See Report on Executive Order Reviews Completed for Economically Significant Regulations, Regulatory Information Service Center, Washington, D.C. (July 30, 1999) (search of regulations from Feb. 1, 1999 through July 31, 1999) (on file with author).

31. The General Accounting Office (GAO) also reviews rules promulgated by agencies. There were a number of instances where the information reported in the *Federal Register* notice conflicted with the information provided by GAO. For example, the Department of Housing and Urban Development's *Federal Register* notice for their rule on Single Family Mortgage Insurance does not mention an economic analysis. However, the GAO report says that one was completed and it reports cost estimates. See Department of Housing and Urban Development, *Single Family Mortgage Insurance; Loss Mitigation Procedures*, OGC-96-33 (visited June 29, 2000) <<http://www.gao.gov/decisions/majrule/og96033.htm>>.

During GAO's review process, the agency also examines the accompanying RIAs. This element may account for the difference between the information found in the *Federal Register* and the information provided by GAO.

32. Transfer rules dictate how federal government receipts are spent in particular cases. Examples of transfer rules include the Medicare and social security regulations that involve

aimed at modifying the behavior of firms, individuals, and government agencies.<sup>33</sup>

I created a database with seventy-two final rules.<sup>34</sup> Each rule was scored on pertinent information related to alternatives considered, costs, benefits, and other essential economic information.<sup>35</sup> Table 1 provides a summary of this analysis. The table consists of six sections: the first section reviews alternatives; the second section reviews costs; the third section reviews cost savings; the fourth section reviews benefits; the fifth section reviews benefit-cost information; and the sixth section reviews other key economic assumptions.

Five categories of rules are considered in the table: all rules, those designated as transfer rules, non-transfer rules, rules for which a RIA was completed, and rules for which there was no RIA. The reason for categorizing the rules this way is because I expected that transfer and non-transfer rules would present different information because the former typically involve on-budget expenditures and the latter involve off-budget expendi-

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transfers from general taxpayers to recipients. According to OMB "transfers are payments from one group in society to another and therefore are not real costs to society as a whole." OFFICE OF INFORMATION AND REGULATORY AFFAIRS, *supra* note 1, at ch. 1.

33. Non-transfer rules examined by OMB frequently aim to help protect the environment, health, and safety. Non-transfer rules, such as environmental regulations, often impose large costs on society, but do not have a large on-budget component. They frequently affect private industry directly through increases in compliance costs and consumers indirectly through their impact on the prices of goods and services. They also can have important benefits, such as reductions in human health risk.

34. The list of rules was constructed from the OMB's list of economically significant rules for 1996 through February 10, 1998. Only final rules were reviewed, of which there were 88. One of the rules, EPA's National Ambient Air Quality Standards for Sulfur Oxides was set previously and the agency was required by the Clean Air Act to review its standards. After reanalyzing the standards, the agency decided not to change them. This rule was not considered in the sample because the original rule came up prior to our sample start date. There were fifteen other rules that could not be located using the *Federal Register* database. Hence, the database contained seventy-two rules. The breakdown of the rules by agency was the following: the Department of Agriculture had seventeen rules; the Department of Commerce had four rules; the Department of Energy had two rules; the Department of Health and Human Services had fourteen rules; the Department of Housing and Urban Development had two rules; the Department of the Interior had three rules; the Department of Justice had one rule; the Department of Labor had three rules; the Department of Transportation had six rules; the Department of Veterans Affairs had one rule; the Environmental Protection Agency had thirteen rules; the General Services Administration had one rule; the Social Security Administration had three rules; and there were two rules that were released jointly by the Treasury Department, the Department of Commerce and the Department of Health and Human Services.

35. Once each *Federal Register* notice was reviewed, the data were entered into a database. Each notice was then reviewed a second time to check for accuracy. See Table 1, *infra* p. 949, for more details on category definition, scoring, and additional data.

tures. I also expected the nature of analysis to differ for rules that had an RIA and rules that did not. Specifically, rules with an RIA were expected to have more useful economic information contained in the *Federal Register*, since the notice could rely on the economic analysis done for the RIA.<sup>36</sup>

#### A. Alternatives

Agencies have many alternative approaches to achieving regulatory goals. Often they can choose the specific mechanism and the stringency of a regulation. While these options sometimes are restricted by legislative mandates, agencies usually have to make choices along several dimensions. The choice of a regulatory approach from a set of alternatives is one of the most important functions an agency is asked to perform. President Clinton's Executive Order 12,866 states that "agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." The following discussion reports on the extent to which agencies presented information on their assessment of alternatives in the *Federal Register*.

The first section of the table evaluates the review of alternatives to the proposed regulation. It consists of three measures: whether a notice said alternatives were considered in the regulatory analysis, whether alternatives were actually discussed, and whether there was some attempt to present a quantitative analysis of alternatives.

In general, there was little consideration of alternatives.<sup>37</sup> For all seventy-two rules, thirty-one (43%) considered alternatives; only nineteen (26%) discussed specific alternatives; and eight (11%) quantified them. Comparing transfer rules with non-transfer rules reveals that alternatives were considered, discussed, and quantified less frequently for transfer rules. For example, seven (21%) of the transfer rules considered alternatives while twenty-four (63%) of the non-transfer rules did so. Comparing notices that had no RIAs with notices that had RIAs reveals a similar pattern. In the case of notices with no RIAs, a review of the *Federal Register* did not reveal that alternatives were considered, discussed, or quantified. For notices with RIAs, thirty-one (54%), or slightly over half, of the *Fed-*

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36. Most non-transfer rules (89%) had RIAs (34 of 38). A lower proportion (68%) of transfer rules had RIAs (23 of 34). See Appendix, *infra* p. 953, § I-A. The quality of RIAs, however, can vary dramatically across rules. Frequently, transfer rules do not receive the same level of scrutiny in the RIA analysis.

37. There were four rules that identified statutory restrictions on considering alternatives, including EPA's rules for particulate matter and ozone.

eral Register notices said that alternatives were considered.

### B. Costs

Regulations can impose costs on individuals in several ways including higher prices, lower wages and lower returns on equity. Comprehensive estimates of regulatory costs allow decisionmakers to compare regulatory alternatives. They can also allow decisionmakers to consider distributional concerns by assessing the economic impact of a regulation on different groups.

The second section of the table reviews information on costs. It consists of three measures: whether a notice said costs were assessed, whether costs were reported, and whether costs were monetized.<sup>38</sup> The pattern is similar to the pattern observed with alternatives, except the notices say costs were assessed in more cases.<sup>39</sup> Of all the rules, forty-nine (68%) stated that costs were assessed; forty-one (57%) reported the costs, and thirty-nine (54%) monetized them. The number of non-transfer rules that said they assessed costs was slightly higher than for transfer rules, but notices with RIAs stated that costs were assessed much more often. For notices with RIAs, forty-six (81%) said that costs were assessed compared with only three (20%) for those notices that had no RIA.

Notices said that cost savings were assessed in only about one-fifth of all cases. In some cases, rules simply may have not had cost savings, so it is difficult to know whether this number is a good estimate of the number of rules that actually would yield cost savings. Interestingly, of the sixteen notices stating that cost savings were assessed, fourteen actually provided estimates of those savings—a fairly high proportion when compared with the overall cost or benefit category.

### C. Benefits

There are many different kinds of benefits to regulations, depending on their focus. Some of the more significant benefits include reductions in the risk of dying, getting sick, or being in an accident. Benefit estimates allow decision makers to determine whether a proposed regulation is likely to

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38. For costs to be assessed, the agency had to state in the *Federal Register* notice that costs had been assessed. For costs to be identified, the agency had to give a description and some quantification of the costs in the *Federal Register* notice. For costs to be monetized, the agency had to provide dollar estimates for the costs of the rule. See Appendix for more details.

39. Relatively few notices identified information pertaining to administrative costs, local and state government costs, and other costs. See Appendix, *infra* p. 958, § I-B.

yield substantial benefits and therefore may be worth implementing, and which groups are likely to benefit most as a result of a regulation.

Notices stated agencies assessed the benefits in about half of the cases, half of the cases, but rarely reported and almost never monetized them. Of all the rules, thirty-eight (53%) stated that benefits were assessed; twenty-seven (38%) reported benefits in the *Federal Register* notice and fifteen rules (21%) monetized those benefits. Notices for non-transfer rules noted, reported and provided monetary estimates of benefits more frequently than transfer rules. The same pattern was observed in comparing notices that had RIAs with notices that did not.

#### D. Net Benefits

A comparison of costs and benefits of a regulation helps decision makers and stakeholders assess whether that regulation would improve upon the status quo. Without such a comparison, decision makers cannot know whether a regulation is likely to result in a more efficient allocation of available resources. Somewhat surprisingly, I found that agencies routinely failed to state whether benefits exceeded costs. This suggests that either the underlying regulatory impact analysis did not calculate this key piece of information or the *Federal Register* notice failed to report it.

Only fifteen of the notices (21%) stated that the benefits of the rules exceeded the costs. This was somewhat surprising because Executive Order 12,866 calls for an adoption of the regulation "only upon a reasoned determination that the benefits of the intended regulation justify its costs."<sup>40</sup>

Relatively few notices (24%) reported key economic information on the present value of costs and/or benefits; annual estimates were reported more frequently (40%), perhaps reflecting the fact that such estimates were more prevalent in RIAs. In general, notices for transfer rules presented benefit-cost information more frequently than notices for non-transfer rules. The same patterns were observed for notices with RIAs when compared with notices without RIAs.

The final section provides information on two key economic assumption – the discount rate and the dollar year of the estimates. The discount rate is used to compare benefits and costs at different points in time. The dollar year is necessary to describe the value of the dollars being discussed. Of the seventy-two rules, forty-one applied to more than one year.<sup>41</sup> The discount rate was reported only about one-third of the time for those rules in-

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40. Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 639 (1993).

41. The remaining rules were either applied to one year or were unclear based on the *Federal Register* notice.

volving multiple years. The dollar year was reported in only six percent of all cases and ten percent of rules involving multiple years. In the case of transfer rules, the dollar year was never reported, perhaps reflecting that the dollar year is clearer for budgetary transfers. Yet the dollar year was only reported in fifteen percent of non-transfer rules involving multiple years. Notices for non-transfer rules and rules with RIAs did better at reporting these details than notices with transfer rules and notices without RIAs, respectively.

The database provides examples of specific rules that scored well and poorly.<sup>42</sup> Examples of non-transfer rules that scored well and poorly are the 1997 Quality Mammography Standards rule and the 1996 Revisions to the Export Administration Regulations, respectively. The 1997 Child and Adult Care Food Program and the 1997 Disaster Reserve Assistance Program rules are examples of transfer rules that scored well and poorly, respectively.<sup>43</sup> The Mammography rule scored the best of the non-transfer rules, reporting information on costs, cost savings, and benefits. The only categories it did not score well on were the discussion or quantification of alternatives, the itemization of cost savings and reporting the dollar year. The Food Program rule scored the best of the transfer rules. It also reported information on costs, cost savings and benefits. The only categories it did not assess were the consideration of alternatives, a statement that the benefits of the rule exceeded the costs, a report of the discount rate, the dollar year of the estimates or whether the totals were in the present value. The Export Regulations, a non-transfer rule, and the Disaster Reserve rule, a transfer rule, both failed in almost all ways that I measured.<sup>44</sup> The only category the *Federal Register* notices reported assessing for these rules was the paperwork impact. On average these rules did quite poorly, with the

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42. The maximum score a rule could receive was 31 if it was applicable to more than one year and 28 if it only applied to one year. The rules that scored well both applied to more than one year. The rules that had low scores did not apply to more than one year.

43. The 1997 Quality Mammography Standards was a Food and Drug Administration rule that established standards for mammography facilities and facility evaluation. The 1997 Child and Adult Care Food Program was a Department of Agriculture rule that amended the regulations governing the reimbursement for meals served in day care homes. The 1997 Disaster Reserve Assistance Program was a Department of Agriculture rule that provided assistance to farmers whose production of livestock feed was adversely affected by severe winter conditions. The 1996 Revisions to the Export Administration Regulations was a Department of Commerce rule that implemented the President's reform of computer export controls.

44. There were six rules that failed in almost all respects, and one rule that failed completely. The two rules discussed here were chosen because they were not prevented by statute from assessing costs and benefits.

notices only reporting relevant information for a third of the categories. The non transfer rules did slightly better than the transfer rules.

There are several conclusions to be drawn from this analysis of the economic information contained in *Federal Register* notices. First, few notices do a good job of reporting key economic information concerning costs, benefits, regulatory alternatives, and key economic assumptions. The question remains whether such information is readily available. While I cannot provide a quantitative answer to this question, it is likely that much more information is available than reported. For example, in only about sixty percent of the cases did notices report monetized costs for rules with RIAs; yet I found that cost or cost savings were estimated in virtually all of the cases I examined in an earlier study of RIAs.<sup>45</sup> Thus, it is quite likely that the *Federal Register* notices are not taking advantage of important information contained in RIAs.<sup>46</sup> Moreover, such information should be available if President Clinton's Executive Order 12,866 has been implemented effectively.<sup>47</sup>

A second important conclusion is that notices for transfer rules tend to report less information on their economic impacts than notices for non-transfer rules. This is due, in part, to the difference in nature of these rules and the level of scrutiny each receives. The regulatory review process appropriately focuses more efforts on non-transfer rules because regulators have more discretion in devising those rules. A related point is that notices that rely on RIAs generally report more information than notices without RIAs. This is because RIAs provide economic information that can be easily reported in the *Federal Register*.

Third, few rules report that monetized benefits actually exceed monetized costs. This pattern is consistent with my findings in an earlier study.<sup>48</sup> It suggests that Executive Orders 12,291 and 12,866 have been ineffective in stopping many rules that would fail a benefit-cost test.

Finally, information on benefits and costs is in relatively short supply in the *Federal Register* notices. Thus, it is frequently difficult to ascertain the

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45. See Hahn, *supra* note 25, at 212 (finding 99% of agencies reported information on costs and cost savings).

46. Recent research suggests that much information is also unavailable in the RIAs. See generally HAHN, *supra* note 20.

47. For a useful discussion of some of the strengths and weaknesses of RIAs under Executive Order 12,866, see HAHN, *supra* note 20. See also GENERAL ACCOUNTING OFFICE, REGULATORY REFORM: AGENCIES COULD IMPROVE DEVELOPMENT, DOCUMENTATION, AND CLARITY OF REGULATORY ECONOMIC ANALYSIS 1-3, GAO-RCED-98-142 (1998) [hereinafter REGULATORY REFORM].

48. See Hahn, *supra* note 25, at 212 (concluding only a fraction of regulations would pass cost-benefit test).

likely economic impacts of a rule on consumers from reading such notices.<sup>49</sup> The next section discusses an approach for addressing this deficiency.

## II. SUGGESTIONS FOR REFORM

This section examines how economic information can be presented in the *Federal Register* in a way that holds regulators and lawmakers more accountable, thus making the regulatory process more transparent. The focus is on presenting a summary of the economic impacts of a regulation in a "Regulatory Impact Summary" (RIS), which would be part of the *Federal Register* notice for all significant regulations.

As noted previously, the *Federal Register* has the potential to provide a vital information link for the public, interested parties, and government officials. Yet, the preceding analysis reveals that a large number of *Federal Register* notices do not contain essential information. This observation does not necessarily imply that an agency failed to complete an analysis or did not discuss that analysis in another document, but it does show that agencies are not reporting potentially useful information in a visible and accessible place.<sup>50</sup>

Providing sufficient information, however, is not enough. It needs to be provided in a standard format to help encourage wider readership and greater transparency. Currently, each agency and often each department

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49. These conclusions are similar to GAO's report on the incorporation by agencies of the OMB's "Best Practices." See Office of Management and Budget, *Economic Analysis of Federal Regulations Under Executive Order 12,866* (visited June 29, 2000) <<http://www.whitehouse.gov/OMB/inforeg/riaguide.htm>> [hereinafter OMB 1996] (representing results of two-year effort by group to describe "best practices" for preparing economic analysis of significant regulatory action called for by Executive Order).

GAO reviewed twenty RIAs of economically significant rules that were released between July 1996 and March 1997. See REGULATORY REFORM, *supra* note 47, at 14-16. They examined whether agencies followed OMB's guidelines requiring consideration of alternatives and calculation of costs and benefits when making regulatory decisions. *Id.* at 16. GAO found upon reviewing the RIAs, which generally provide more detail than *Federal Register* notices but are not typically published in the *Federal Register*, that some did not follow OMB's guidance. *Id.* at 17. But they found a higher percentage included consideration of alternatives and reporting of costs and benefits than the *Federal Register* notices reviewed for this paper. *Id.* at 18-19.

50. Most of the government's information on regulations is primarily available at the agency or in the OMB's Docket Office, access to which is difficult and costly for most citizens and interested parties. Therefore, I would suggest that each department keep a copy of each of its *Federal Register* notices on its web site. In addition, agencies should publish their regulatory impact analyses online.



has a particular style for presenting information in the *Federal Register*.<sup>51</sup> While the details of regulations and their impacts vary, there are enough common elements in an economic evaluation to justify a standard format.

It is particularly important to achieve some degree of uniformity in presenting an RIS. Presently, agencies are not legally required to present any particular information in the *Federal Register* notice. They are only required to make a regulation's text available in a place accessible to the public.<sup>52</sup>

The purpose of the RIS is to provide a clear and concise summary of a rule's impact.<sup>53</sup> A prototype for an RIS is shown in Table 2. The RIS is divided into four parts: background on the rule, the overall impact of the rule, a description of costs and benefits, and an examination of regulatory alternatives.<sup>54</sup>

#### A. Descriptive Information

The purpose of the first section of the form is to identify and provide a brief description of the type and scope of the rule. The entries for "Agency and Department/Office Name," "Contact Person," "Telephone Number," "Title of the Rule," "RIN Number," and "Docket Number" are self-evident. For the "Type of Rulemaking" the agency should indicate whether the rule is final, interim, proposed, or a notice. "Type of Rule" establishes if the regulation primarily affects the budget or primarily involves regulation of the private sector, individuals, or government entities.

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51. For example, the Food and Drug Administration, in implementing the National Environmental Policy Act under its jurisdiction, presents a summary of the rule, then comments on the proposed rule and near the end of the rule presents its economic analysis. In contrast, the Department of Energy, in its rule on the Energy Conservation program for refrigerators and freezers, presents an introduction, some background on the rule, then discusses the technological feasibility of the rule and provides an economic justification for the rule. The comments on the proposed rule were addressed within the text of the rule as opposed to being in a separate section of the notice.

52. See 5 U.S.C. § 604(b) (1994 & Supp. IV 1998).

53. I recommend that both the *Federal Register* notice and the RIA contain an RIS. Much of the same information should also be included in the executive summary of the rule. See HAHN, *supra* note 20, for more information. See also Robert W. Hahn & Robert E. Litan, *Improving Regulations: Start with the Analysis and Work from There*, Prepared Testimony before the Subcom. on Regulatory Reform and Paperwork Reduction of the House Comm. on Small Business (June 2000) (on file with author) [hereinafter *Improving Regulations*].

54. See REGULATORY REFORM, *supra* note 47, at 5-6 (suggesting each RIA contain an executive summary including all costs and benefits, describing uncertainties of costs and benefits, and comparing alternatives considered by agency).

For "Statutory Authority for the Rule" the agency should state what statute or law gives it the authority to implement the rule.<sup>55</sup> For "Rulemaking Impetus" the agency should indicate what events or law led them to draft the rule.<sup>56</sup> The "Description" should be brief and explain what area the rule regulates and the manner in which it regulates that area.

### B. Overall Impact

Executive Order 12,866 classifies a rule as "significant" if it has an impact on the economy of \$100 million or more in one year. The Unfunded Mandates Reform Act classifies a rule as "significant" if the regulation has an impact on the private sector and/or state or local governments of more than \$100 million in one year.<sup>57</sup> Therefore, the first question in this section identifies whether the rule is significant and if it will have a large impact on the economy. Executive Order No. 12,866 also requires that agencies "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs," to the extent permitted by law.<sup>58</sup> This section asks for a best estimate of the benefits and costs, a determination of whether benefits exceed costs and a discussion of the level of confidence in the benefit-cost estimates.

The next few entries in the form involve the mechanics of discounting. Discounting is fundamental to converting costs and benefits that occur at different points in time into a present value. Therefore, an agency has to identify the specific years in which the benefits and costs would occur, determine what year the rule becomes effective and select a discount rate. In general, the agency should use the discount rate suggested by an oversight agency, such as OMB, to help standardize estimates.<sup>59</sup> The benefits and costs should then be discounted back to the year in which the rule becomes effective. If the rule only applies to one year, then discounting the estimate is unnecessary. The years in which the benefits and costs are incurred should be entered into "Identify the years in which the costs are imposed."

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55. See 5 U.S.C. § 603(b)(2) (1994 & Supp. IV 1998) (requiring succinct statement of "Statutory Authority for the Rule").

56. See *id.* § 603(b)(1) (requiring description of reasons for actions taken by agency).

57. See 2 U.S.C. § 1532(a) (1994 & Supp. IV 1998); see also Exec. Order No. 12,866 § 3(f), 3 C.F.R. 638, 641-42 (1993) (mandating other criteria which will classify regulatory action as "significant regulatory action").

58. Exec. Order No. 12,866 § 1(b), 3 C.F.R. at 639.

59. Different discount rates may be warranted for different problems, such as those with particularly long time horizons. However, here the first-order problem is developing some economic standards that facilitate comparison across *most* proposed and final rules. See, e.g., ARROW ET AL., *supra* note 1; OMB 1996, *supra* note 49.

The "Dollar Year of the Benefits and Costs Estimates" should be the year in which the rule becomes effective and the agency must then state what discount rate they used in their calculations.

### C. Benefits and Costs

This section is divided into a subsection on benefits and a subsection on costs.<sup>60</sup> The section on costs is motivated by the Unfunded Mandates Reform Act of 1995 and Executive Order 12,866, which both require that agencies assess the cost of rules.<sup>61</sup> The first question asks for information on both the annual and present value of costs of a rule.<sup>62</sup> Annual information on cost is useful to determine expenditure patterns over time. The present value calculation gives an estimate of the real value of resources that would be spent in implementing the regulation. The first entry "Total Costs" requires that the agency give a best estimate of the total costs. The entries below breakdown costs into smaller categories that are of interest.<sup>63</sup> "Compliance Costs" refers to the direct costs that the private sector will incur in implementing the rule.<sup>64</sup> If the rule is regulatory then the expectation is that most of the costs would fall into this category. "Administrative Costs" refers to those costs that are incurred in administering the rule at different levels of government. "Federal Budget Costs" refers to impacts on the federal budget from implementing the rule.<sup>65</sup> If the rule is a transfer rule, then the expectation is that most of the costs would fall into this category. "Local/State Budget Costs" under the Unfunded Mandates Reform Act refers to the budgetary impacts of the rule on state and local governments.<sup>66</sup> If the costs imposed by the rule do not fall into any of the catego-

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60. Costs are defined as costs minus cost savings.

61. See 2 U.S.C. § 1532(a) (requiring, under Unfunded Mandates Reform Act, a written statement including an assessment of costs for a rule imposing costs of \$100 million or more on State, local and tribal governments or the private sector); see also Exec. Order No. 12,866 § 6(3)(B)-(C), 3 C.F.R. at 645-46 (requiring that costs be assessed for significant rules and economically significant rules).

62. The form asks for a single annual estimate of costs and benefits. More information could usefully be included in other parts of the *Federal Register* notice.

63. The categories are not mutually exclusive. Thus, the numbers in the different categories will not necessarily add to the total.

64. See 2 U.S.C. § 1532(a) (requiring private sector costs be assessed by an agency when considering rule). This estimate should include additional paperwork burdens. See *id.* § 1532(a)(3)(A).

65. For example, a rule to clean up federal toxic waste sites could result in increased expenditures at the Department of Defense.

66. See 2 U.S.C. § 1532(a)(3)(B) (requiring estimates by an agency of disproportionate budgetary impact on state and local governments when considering a rule).

ries, then the agency should enter them into "Other Costs." Agencies can briefly explain their rationale for the cost estimates and expound on their approach in the body of the notice.

The second question under this subsection identifies key segments that are affected directly. The Regulatory Flexibility Act requires that agencies assess the impact on small business.<sup>67</sup> The Unfunded Mandates Reform Act requires that the impact on the private sector and local, state and tribal governments be assessed.<sup>68</sup> Those impacts should then be described and the dollar amounts should be estimated.

In addition to assessing costs, Executive Order No. 12,866 and the Unfunded Mandates Reform Act both require that agencies assess the benefits of a rule. The analysis is similar to that required of costs.<sup>69</sup> Annual and present value benefit estimates should be reported. It is preferred that agencies enter dollar values, but that is not required. If dollar estimates cannot be obtained, then some other estimates of benefits should be provided where appropriate, such as tons of pollution reduced. "Total Benefits" requires that the agency give a best estimate of the total benefits. The entries separate benefits into different categories. "Health Benefits" refers to the benefits that accrue from reduced human health risks or reductions in mortality and morbidity resulting from a rule. "Pollution Benefits" refer to benefits from a reduction in pollution, for example 100 tons of carbon dioxide.<sup>70</sup> If the benefits do not fall into any of these categories then they

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67. See 5 U.S.C. § 603(a) (1994 & Supp. IV 1998). I am opposed to singling out the impact on small business of regulations, while not considering the more general impact on consumers and larger businesses as well. Nonetheless, small business is inserted here because of statutory requirements that reflect its political strength.

68. See 2 U.S.C. § 1532(a) (1994 & Supp. IV 1998).

69. See *id.* (stating requirements of Unfunded Mandates Reform Act). The regulatory principles of Executive Order No. 12,866 require, under section 1(b)(6), that benefits be assessed. See Exec. Order No. 12,866 § 1(b)(6), 3 C.F.R. 638, 639 (1993). The assessment of benefits is again required by the executive order for significant rules in section 6(3)(B) and for economically significant rules in section 6(3)(C). See Exec. Order No. 12,866 § 6(3)(B)-(C), 3 C.F.R. at 645. Again, it is inappropriate to simply sum estimates of future benefits as this does not account for the time value of money. If the rule only applies to one year, then discounting the estimates is unnecessary.

70. To the extent such benefits result in reductions in health risks, the numbers in the different categories may not add up to the estimate of total benefits. When health and pollution benefits are expressed in physical or human terms, such as lives saved or tons of pollution reduced, agencies should apply standard values to convert those numbers into dollar estimates. It would be desirable for an agency, such as OMB, to specify a baseline set of benefit values for purposes of that estimation. If those values are not specified, then the agency should specify such values in the RIS. In either case, the agency should explain the basis for its benefit estimates in the notice itself.

should be entered into the "Other Benefits" category. Agencies are then asked to explain briefly their rationale for the benefit estimates. The next few entries in the form again relate to discounting and the beneficiaries of the benefits.<sup>71</sup> The process for completing this section is analogous to the section on costs.

#### *D. Alternatives to the Regulation*

The final section of the form addresses the alternatives that agencies should consider when regulating. Executive Order 12,866, the Unfunded Mandates Reform Act and the Regulatory Flexibility Act all require that when an agency regulates, it considers alternatives to the extent permitted by law.<sup>72</sup> In particular, Executive Order 12,866 identifies principles of regulation that require agencies to assess the costs and benefits of all alternatives, including the option of not regulating, and select the approach that maximizes net benefits.<sup>73</sup> The Regulatory Flexibility Act requires that agencies give a description of the alternatives considered by agencies and a statement as to why each alternative was rejected.<sup>74</sup> For these reasons, the form includes a section asking the agency to list and briefly describe the alternatives it considered and why those alternatives were rejected. If alternatives were not considered then the agency must also give an explanation. The RIS then asks for dollar estimates of the costs and benefits of each alternative.

For any particular rule that is deemed "significant," I am suggesting that the appropriate regulatory agency complete every entry in the RIS. If an answer is not provided for a section, the agency should give a detailed explanation of why it did not complete that section. Whenever possible, an

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71. Typically, the same discount rate should be applied to costs and benefits, so the entries concerning discounting permit a simple check to determine whether the agency actually used the same discount rate.

72. Executive Order No. 12,866 requires the consideration of alternatives as part of its regulatory principles that agencies should follow unless legally prohibited or inappropriate. See Exec. Order No. 12,866 § 1(b), 3 C.F.R. at 639. Consideration of alternatives is also required of agencies promulgating economically significant rules that they submit to OIRA unless prohibited by law. See Exec. Order No. 12,866 § 6(a)(3)(C)(iii), 3 C.F.R. at 646. The Regulatory Flexibility Act requires the consideration of alternatives as part of the initial flexibility analysis that agencies must complete. See 5 U.S.C. § 603(c) (1994 & Supp. IV 1998). The Unfunded Mandates Reform Act requires consideration of alternatives for any rule that results in the expenditure of \$100 million or more by State, local and tribal governments or by the private sector. See 2 U.S.C. § 1535(a) (1994 & Supp. IV 1998).

73. See Exec. Order No. 12,866 § 1(a), 3 C.F.R. at 639 (noting exception to requirement if statute requires another approach).

74. See 5 U.S.C. § 604(a)(3) (1994 & Supp. IV 1998).

agency should always give dollar estimates and if not, explain why.<sup>75</sup> Agencies should be clear and precise in answering each question. If a question is not applicable to the rule, then the agency should state this and provide a detailed explanation.<sup>76</sup>

There is a precedent for providing summary information on regulations. Presently, some states, like California, Pennsylvania and Michigan, have a regulation summary form that each agency must complete when submitting a regulation. California provides a particularly good example. They have a four-page form that serves as a summary and must be in each rule's rule-making record.<sup>77</sup> The form became a requirement in March 1998, so it is too early to evaluate the results.

If states are undertaking such measures, there is no reason why federal agencies can not do the same. Moreover, an RIS and the accompanying economic analysis in the *Federal Register* should apply not only to significant regulations overseen by the OMB, but also to all federal regulations whose annual impact is likely to exceed \$100 million. In particular, there is no reason to exempt independent agencies, such as the Federal Communications Commission and the Federal Energy Regulatory Commission.<sup>78</sup>

It should not be assumed that this form will be completed faithfully, even if Congress passes a law requiring it. Agencies will not reform unless they have an incentive to do so. I suggest therefore, that the OMB be given powers to require that agencies implement the necessary changes. For example, OMB could be given the power to reject a regulatory analysis unless it meets certain guidelines, including the presentation of a clear executive summary along with a regulatory impact summary.<sup>79</sup> This information could then be used in the *Federal Register* notices.<sup>80</sup>

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75. Executive Order 12,866 allows a quantification of costs and benefits or a qualitative description of them. See Exec. Order No. 12,866 § 1(a), 3 C.F.R. at 639 (1993). Here, however, quantification is preferred, particularly for the summary.

76. The agency should not be required to do so if law prohibits it.

77. See Exec. Order No. W-144-97 § 3 (Cal. 1997) (visited on June 22, 2000) <<http://commerce.ca.gov/business/corporate/regulation/xo14497.html>>; see also State of California, Economic and Fiscal Impact Statement: Regulations and Orders, STD. 399 (Rev. 2-98) (visited on June 20, 2000) <<http://commerce.ca.gov/business/corporate/regulation/efi.pdf>>.

78. Some exemptions may be required, such as those related to actions affecting the money supply. Regulations that are in response to emergency situations could be exempted, but the scope for such exemptions should be narrow.

79. See, e.g., *Improving Regulations*, *supra* note 53.

80. A weaker enforcement mechanism would be for OMB to produce a scorecard that showed how well agencies provided information on proposed and final rules in the *Federal Register*. A scorecard is desirable because it would allow an assessment of whether agencies are providing more information more consistently over time and if it is easy to under-

Mere compliance is not enough, however. The oversight agency also needs to provide an assessment of the quality of the analysis. This assessment could also be included in the *Federal Register* at an appropriate time.

#### CONCLUSION

Two important conclusions emerge from this analysis. First, *Federal Register* notices that present regulatory analysis currently exhibit a great deal of variation in the kind of information that is presented. Second, with some key changes in the requirements for including and presenting information, the content of these notices could be improved dramatically.<sup>81</sup> In addition, such information can be aggregated in a way that provides insight into how well or how poorly agencies are complying with guidelines to make their analyses more transparent.

I have suggested that each agency be required to fill out a Regulatory Impact Summary for each significant regulation. This standardization will make it easier for the public, interest groups, and academics to obtain information on the government's views of the benefits and costs of regulation. In addition, it will enable interested parties and government agencies to assess the impact of government regulation and the quality of agency analyses. For example, based on the information contained in an RIS, the OMB could present a scorecard in its annual report on the benefits and costs of regulation that would give legislators and the public a quick way to evaluate the performance of agencies in doing regulatory analyses.

The information identified in the Regulatory Impact Summary is similar to that required by Executive Order No. 12,866, the Unfunded Mandates Reform Act and the Regulatory Flexibility Act. Congress should simply consider passing an amendment requiring that the information be summarized and produced in the form suggested here. The cost would be trivial, and the benefits could be potentially quite large.

Critics could argue that my recommendations for improving the process are hardly worth doing because of the large impact that politics has on regulation. They would be wrong not because politics does not have a large impact, but because analysis can help to make the decisionmaking process more transparent, thus changing the nature of the politics and hopefully leading to more informed policy judgements.

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stand. In providing this information, the scorecard would also make the regulatory process more transparent.

81. The findings of this paper are consistent with some of my earlier work, which examines both *Federal Register* notices and regulatory impact analyses. See Hahn, *supra* note 25, at 208; HAHN, *supra* note 2.

Simply requiring agencies to complete a form will not necessarily improve the quality of the information provided. However, if the basic information is at least available in one place, it becomes easier to check that all the requisite information is provided. In addition, the oversight agencies and other interested parties can more easily assess its quality.

Critics of my policy recommendations might also say that making the government's analysis available is not particularly useful because of potential bias in the analysis. If such bias exists, and I believe it does, it will be easier for skeptics to show how the analysis can be improved if the findings from the analysis are readily available.

Clearly, more needs to be done to improve the government's analysis of regulations. I believe the key to improving such analysis is to increase the amount of competition and attention such analyses receive inside and outside of government. One proposal worthy of consideration is a bill to establish a congressional oversight agency charged with assessing regulations.<sup>82</sup> This agency could compete with the existing oversight office within OMB.<sup>83</sup> Such competition could yield better regulatory analysis and greater transparency at a reasonable cost.

Regulatory reform will not happen overnight. Nor will it happen as the result of a single reform. This paper has argued that one important avenue for reform is to enhance regulatory accountability by providing better access to regulatory information. The *Federal Register* can and should be used to enhance access to such information.

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82. See H.R. 3669, 106th Cong. (2000) (recent proposed legislation that would create an office within GAO to report on benefits and costs of major regulations).

83. See HAHN & LIJAN, *supra* note 7, at 1.



**Table 1**  
**Summary of Information in *Federal Register* Notices**

	<i>All Rules</i>	<i>Non- Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<b>Number of Rules in the Database</b>	<b>72</b>	<b>38</b>	<b>34</b>	<b>57</b>	<b>15</b>
<b>Alternatives</b>					
<b>Notice said alternatives were considered</b>	<b>31 43%</b>	<b>24 63%</b>	<b>7 21%</b>	<b>31 54%</b>	<b>0 0%</b>
<b>Alternatives discussed</b>	<b>19 26%</b>	<b>13 34%</b>	<b>6 18%</b>	<b>19 33%</b>	<b>0 0%</b>
<b>Alternatives quantified</b>	<b>8 11%</b>	<b>6 16%</b>	<b>2 6%</b>	<b>8 14%</b>	<b>0 0%</b>
<b>Costs</b>					
<b>Notice said costs were assessed</b>	<b>49 68%</b>	<b>28 74%</b>	<b>21 62%</b>	<b>46 81%</b>	<b>3 20%</b>
<b>Costs reported</b>	<b>41 57%</b>	<b>25 66%</b>	<b>16 47%</b>	<b>38 67%</b>	<b>3 20%</b>
<b>Monetized costs reported</b>	<b>39 54%</b>	<b>23 61%</b>	<b>16 47%</b>	<b>36 63%</b>	<b>3 20%</b>
<b>Cost Savings</b>					
<b>Notice said that cost savings were assessed</b>	<b>16 22%</b>	<b>10 26%</b>	<b>6 18%</b>	<b>15 26%</b>	<b>1 7%</b>
<b>Cost savings were reported</b>	<b>15 21%</b>	<b>10 26%</b>	<b>5 15%</b>	<b>14 25%</b>	<b>1 7%</b>
<b>Monetized cost savings reported</b>	<b>14 19%</b>	<b>9 24%</b>	<b>5 15%</b>	<b>13 23%</b>	<b>1 7%</b>

	<i>All Rules</i>	<i>Non- Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<b><u>Benefits</u></b>					
Notice said that benefits were assessed	38	26	12	37	1
Benefits reported	27	22	5	26	1
	38%	58%	15%	46%	7%
Monetized benefits reported	15	11	4	15	0
	21%	29%	12%	26%	0%
<b><u>Benefits and Costs</u></b>					
Notice states that benefits exceed costs	15	10	5	14	1
	21%	26%	15%	25%	7%
Monetized benefits and costs	14	10	4	14	0
	19%	26%	12%	25%	0%
Present Value of costs and/or benefits reported <sup>84</sup>	10	9	1	10	0
	24%	33%	7%	26%	0%
Annual estimate of benefits and/or costs reported	29	20	9	28	1
	40%	53%	26%	49%	7%
<b><u>Key Economic Assumptions</u></b>					
Discount rate reported <sup>*</sup>	13	11	2	13	0
	32%	41%	14%	34%	0%
Dollar year reported	4	4	0	4	0
	6%	11%	0%	7%	0%

84. The present value and the discount rate categories' percentages are computed based on the forty-one rules whose *Federal Register* notices said applied to more than one year. The "All Rules" column was based on all forty-one rules. There were twenty-seven non-transfer, fourteen transfer, thirty-eight RIA, and three non-RIA rules that appeared to apply to more than one year and these were the amounts used to calculate the percentages.

**Table 2  
Regulatory Impact Summary**

<b>I BACKGROUND ON RULE AND AGENCY</b>	
<b>CONTACT PERSON</b>	<b>TELEPHONE NUMBER</b>
<b>TITLE OF THE RULE</b>	
<b>RIN NUMBER</b>	<b>DOCKET NUMBER</b>
<b>TYPE OF RULEMAKING</b>	<b>TYPE OF RULE</b>
<b>STATUTORY AUTHORITY FOR RULE</b>	<b>RULEMAKING IMPETUS</b>
<b>BRIEF DESCRIPTION OF THE RULE</b>	
<b>II OVERALL IMPACT</b>	
Will the rule have an impact on the economy of \$100 million or more? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Best estimate of the present value of quantifiable benefits of the rule.    \$ _____	
Best estimate of the present value of quantifiable costs of the rule. <sup>85</sup> \$ _____	
Do the quantifiable benefits outweigh the quantifiable costs? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Report the dollar year of benefits and costs. _____	
Report the discount rate used to calculate the best estimate of benefits and costs. _____	
If more than one discount rate was used in calculations, please explain why. _____	
Discuss level of confidence in the benefit-cost estimates and key uncertainties. Include a range for benefits and costs. _____	
Identify benefits or costs that were not quantified and state why they were not quantified. _____	
_____	
_____	
_____	
_____	

85. "Costs" are defined as costs minus cost savings.

<b>III. BENEFITS AND COSTS</b>			
<b>Estimated Incremental Benefits</b>			
<b>1. Benefits and breakdown of quantifiable benefits by type.</b>			
	<b>Annual</b>	<b>Years in Which Costs Occur</b>	<b>Present Value</b>
<b>Total Benefits</b>	_____	_____	_____
<b>Health Benefits</b>	_____	_____	_____
<b>Pollution Benefits</b>	_____	_____	_____
<b>Safety Benefits</b>	_____	_____	_____
<b>Other Benefits</b>	_____	_____	_____
Notes: _____			
<b>2. Give a brief description of who will benefit:</b> _____			
<hr/>			
<b>Estimated Incremental Costs</b>			
<b>1. Costs and breakdown of quantifiable costs by type.</b>			
	<b>Annual</b>	<b>Years in Which Costs Occur</b>	<b>Present Value</b>
<b>Total Costs</b>	_____	_____	_____
<b>Compliance Costs</b>	_____	_____	_____
<b>Administrative Costs</b>	_____	_____	_____
<b>Federal Budget Costs</b>	_____	_____	_____
<b>Local/State Budget Costs</b>	_____	_____	_____
<b>Other Costs</b>	_____	_____	_____
Notes: _____			
<b>2. Give a brief description of who will bear the costs:</b> _____			
<hr/>			
<b>IV. ALTERNATIVES TO THE REGULATION</b>			
<b>1. List and briefly describe the alternatives to the rule that were considered and why they were rejected, including a summary of costs and benefits of those alternatives. If no alternatives were considered, explain why not.</b>			
_____			
_____			
_____			
_____			
_____			

## APPENDIX

This Appendix is divided into two parts. The first part provides definitions for the categories used in reviewing *Federal Register* notices so that scoring can be replicated if desired. The second part provides a discussion of information on other categories that were examined.

## I. GLOSSARY OF CATEGORIES

The glossary is divided into the following sections: Alternatives; Costs, Cost Savings, and Benefits; Cost-Only Categories; Cost Savings-Only Categories; Benefit-Only Categories; Costs and Benefits; Quantitative Details, Other Impacts, and; Other Details.

## A. Alternatives

*Notice said alternatives were discussed:* An agency only had to state in the *Federal Register* notice that alternatives were considered. It did not have to specify those alternatives or discuss them.

*Alternatives discussed:* The agency had to describe briefly the alternative(s).

*Alternatives quantified:* The agency had to report cost and/or benefit numbers for the alternative(s).

## B. Costs, Cost Savings, and Benefits

In this section, the phrase "cost/cost savings/benefits" refers to three distinct categories of cost, cost savings, and benefits. Each of these categories is scored separately on the variables discussed below.

*Costs:* Anything that the agency stated was a cost was considered to be a cost.

*Cost Savings:* If the agency stated that the estimate was a cost saving or a saving, then it was considered to be a cost saving.

*Benefits:* Anything the agency stated was a benefit was considered to be a benefit.

*Notice said costs/cost savings/benefits were assessed:* The agency had to state in the *Federal Register* notice that costs/cost savings/benefits were assessed. However, it did not have to state the actual costs/cost savings/benefits or discuss them.

*Reported costs/cost savings/benefits:* The agency had to provide some assessment of the costs/cost savings/benefits of the rule in the *Federal Register* notice. The estimates did not have to be monetized.

*Monetized costs/cost savings/benefits reported:* Monetized costs/cost savings/benefits were reported when the agency published dollar estimates

of the costs/cost savings/benefits, in the *Federal Register* notice.

*Costs/cost savings/benefits monetized and itemized:* The agency had to provide dollar estimates for costs/cost savings/benefits and publish a breakdown of those monetized estimates.

### C. Cost-Only Categories

This paper divides costs into a number of categories: private sector compliance, budgetary, administrative, local or state government and other costs. These categories are not mutually exclusive. Agencies rarely designated a category explicitly. The following definitions were used in scoring costs:

*Private sector compliance costs:* Costs incurred by the private sector in complying with the rule.

*Budgetary costs:* Costs incurred by the federal government in enacting the rule.

*Administrative costs:* Costs, like paperwork, that were incurred in administering the requirements of the rule.

*Local or state government costs:* Costs incurred by local and state governments in complying or enforcing the rule.

*Other costs:* Any other costs the rule imposed.

### D. Cost Savings-Only Categories

Like the categories for costs, the categories for cost savings are not mutually exclusive. Agencies rarely designated a category explicitly. The following definitions were used in scoring cost savings:

*Compliance cost savings:* Cost savings from reducing private sector compliance costs.

*Budget cost savings:* Cost savings obtained from a reduction in budget outlays.

*Savings from fuel or energy efficiency:* Cost savings that arose from the rule increasing fuel or energy efficiency.

### E. Benefit-Only Categories

Benefits are divided into a number of categories: pollution, health, other environmental and other benefits. These categories are not mutually exclusive. Agencies rarely designated a category explicitly. The following definitions were used in scoring benefits:

*Pollution benefits:* Classified as benefits from reducing any kind of pollution.

*Health benefits:* Benefits from reducing morbidity and mortality.

*"Other" benefits for the environment:* Any other environmental benefits

resulting from the rule and included any benefits to the environment other than pollution benefits. An example would be wetlands preservation.

*Other benefits:* Any other benefits resulting from the rule.

*Source of benefits unclear:* The source was unclear because the *Federal Register* notice was unclear.

#### F. Costs and Benefits

*Notice states that benefits exceed costs:* The agency had to state in the notice that the benefits exceeded the costs. An independent assessment was not conducted of whether the agency's reported benefits outweighed the costs.

*Monetized cost and benefit estimates reported:* The agency had to provide dollar estimates for both benefits and costs.

*Monetized costs and benefits, cost savings and benefits, or costs and cost savings:* The agency had to provide dollar estimates for one of these combinations of costs, cost savings and benefits.

*Monetized and itemized costs and benefits, cost savings and benefits, or costs and cost savings:* The agency had to provide dollar estimates and breakdowns of those estimates for one of these combinations of costs, cost savings and benefits.

*Prohibited from considering costs and benefits:* Sometimes agencies were legally prohibited from considering or calculating cost and benefit estimates during the regulatory process. An agency needed to state in the *Federal Register* notice that a statute or law prohibited a cost-benefit analysis.

#### G. Quantitative Details

*Notice revealed that rule applies to more than one year:* This category was satisfied if the agency stated that the rule applied to more than one year or if the estimates were broken down over multiple years.

*Discount rate reported:* Self-evident.

*Present value of costs and or benefits reported:* The agency had to state specifically that the estimate was in present value terms.

*Dollar year reported:* The agency had to report the year the cost and/or benefit estimates were in.

*Annual estimates of costs and/or benefits:* The cost and/or benefit estimates were reported in annual numbers.

### H. Other Impacts

*Assessed paperwork impacts:* The agency had to say that paperwork impacts were assessed according to the Paperwork Reduction Act. The agency could state that there was or was not an impact. It could also state that the nature of the rule meant it did not have to assess those impacts because it did not apply.

*Assessed local and state government impacts:* The agency had to say it assessed the impact on local and state governments according to the Unfunded Mandates Reform Act. The agency could state that there was or was not an impact. It could also state that the nature of the rule meant it did not have to assess those impacts because it did not apply.

*Assessed small business impact:* The agency had to say it conducted a Regulatory Flexibility Analysis to assess the impact on small businesses. The agency could state that there was or was not an impact. It could also state that the nature of the rule meant it did not have to assess those impacts because it did not apply.

### I. Other Details

*Transfer Rule:* A rule was judged a transfer if its primary impact was on federal budget payments. Examples of transfer rules are the Medicare and social security regulations that change levels of payment from taxpayers to recipients. They differ systematically from non-transfer rules in that they do not impose direct social costs upon society.

*RIA Developed:* An RIA is a regulatory impact analysis. The agency obtained credit for the category if it stated in the *Federal Register* notice that an RIA was produced.

## II. OTHER DATA

This section is divided into a discussion of data related to regulatory impact analysis, costs, cost savings, benefits, benefits and costs, application of rules to more than one year, and assessment of other impacts.

### A. RIAs

The expectation was that transfer rules would have a lower percentage of RIAs than non-transfer rules because closer scrutiny would be given to non-transfer rules. The data support this view. Sixty-eight percent of transfer rules and eighty-nine percent of non-transfer rules have RIAs. Ten of the rules included the RIA with the *Federal Register* notice.



	<i>All Rules</i>	<i>Non- Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<i>Number of Final Rules in Database</i>	72	38	34	57	15
<i>Agency Developed an RIA</i>	57 79%	34 89%	23 68%	57 100%	0 0%

### B. Cost Categories

As expected, the percentage of rules for which the agency reported cost estimates for private sector compliance costs was much lower for transfer than non-transfer rules and the budgetary costs were higher for transfer than non-transfer rules. This is because transfer rules tend to affect the budget and non-transfer rules typically have a direct impact on the private sector. Relatively few notices reported information pertaining to administrative costs, local and state government cost and other costs.

	<i>All Rules</i>	<i>Non- Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<i>Number of Final Rules in the Database</i>	72	38	34	57	15
<b><u>Cost Categories Reported</u></b>					
<b>Private Sector Compliance Costs</b>	27 38%	24 63%	3 9%	27 47%	0 0%
<b>Budgetary Costs</b>	21 29%	6 16%	15 44%	18 32%	3 20%
<b>Administrative Costs</b>	13 18%	7 18%	6 18%	11 19%	2 13%
<b>Local / State Government Costs</b>	7 10%	4 11%	3 9%	7 12%	0 0%
<b>Other Costs</b>	2 3%	1 3%	1 3%	2 4%	0 0%

### C. Cost Savings Categories

Notices indicated that only non-transfer rules had compliance cost savings or savings from fuel or energy efficiency. In addition, more transfer rules had budget cost savings than non-transfer rules.

	<i>All Rules</i>	<i>Non-Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<i>Number of Final Rules in Database</i>	72	38	34	57	15
<b><u>Cost Savings Categories Reported</u></b>					
<b>Compliance Cost Savings</b>	6 8%	6 16%	0 0%	6 11%	0 0%
<b>Budget Cost Savings</b>	8 11%	3 8%	5 15%	7 12%	1 7%
<b>Savings From Fuel or Energy Efficiency</b>	3 4%	3 8%	0 0%	3 5%	0 0%

#### D. Benefits

All but one of the rules without an RIA did not report benefits whereas twenty-six of the rules with RIAs reported at least some kind of benefit. This result was expected because rules with RIAs are more likely to attempt to assess benefits. All of the pollution and health benefits were reported by the non-transfer rules: nine (24%) and eleven (29%) respectively. "Other" Benefits for the environment included environmental benefits other than pollution reductions (e.g., rebuilding of the fish stock).

	<i>All Rules</i>	<i>Non-Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<i>Number of Final Rules in Database</i>	72	38	34	57	15
<b><u>Benefit Categories Reported</u></b>					
<b>Pollution Benefits</b>	9 13%	9 24%	0 0%	9 16%	0 0%
<b>Health Benefits</b>	11 15%	11 29%	0 0%	11 19%	0 0%
<b>"Other" Benefits for the Environment</b>	3 4%	2 5%	1 3%	3 5%	0 0%
<b>Other Benefits</b>	7 10%	2 5%	5 15%	6 11%	1 7%
<b>Source of Benefits Unclear</b>	1 1%	0 0%	1 3%	1 2%	0 0%

*E. Benefits and Costs*

Only four of the rules were prevented by statute from considering costs and benefits when making regulatory decisions. Those four rules explicitly stated that they were prohibited from considering costs and benefits and anything beyond what was established by the authorizing statute. However, there were many other rules that did not assess costs and benefits, but whether or not they were prohibited by statute could not be determined from the *Federal Register*.

	<i>All Rules</i>	<i>Non-Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<b>Number of Final Rules in Database</b>	72	38	34	57	15
<b>Prohibited from Considering Benefits and Costs</b>	4 6%	4 11%	0 0%	3 5%	1 7%

*F. Monetization and Itemization of Costs, Cost Savings and Benefits*

For costs, cost savings and benefits there were a significantly lower number of rules that provided an itemized estimate. An even lower number of rules provided monetized and itemized estimates for costs and benefits, cost savings and benefits or cost and cost savings.

	<i>All Rules</i>	<i>Non-Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<b>Number of Final Rules in the Database</b>	72	38	34	57	15
<b>Costs</b>					
<b>Costs Monetized</b>	39 54%	23 61%	16 47%	36 63%	3 20%
<b>Costs Monetized and Itemized</b>	20 28%	15 39%	5 15%	19 33%	1 7%
<b>Cost Savings</b>					
<b>Cost Savings Monetized</b>	14 19%	9 24%	5 15%	13 23%	1 7%
<b>Cost Savings Monetized and Itemized</b>	5 7%	2 5%	3 9%	5 9%	0 0%

	<i>All Rules</i>	<i>Non- Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<b><u>Benefits</u></b>					
<b>Benefits Monetized</b>	15 21%	11 29%	4 12%	15 26%	0 0%
<b>Benefits Monetized and Itemized</b>	8 11%	6 16%	2 6%	8 14%	0 0%
<b><u>Costs, Cost Savings and Benefits</u></b>					
<b>Monetized Costs and Bene- fits, Cost Savings and Bene- fits or Costs and Cost Savings</b>	11 15%	7 18%	4 12%	11 19%	0 0%
<b>Monetized and Itemized Costs and Benefits, Cost Savings and Benefits or Costs and Cost Savings</b>	6 8%	5 13%	1 3%	6 11%	0 0%

*G. Application to more than one year*

For some of the rules, it was clear from the notices that they applied to more than one year. There were more non-transfer rules that applied to more than one year – twenty-seven (79%) than transfer rules. This can be explained by the fact that regulatory rules (e.g., those involving non-transfers) typically apply to several years whereas budgetary rules may apply to a single year. Many more rules with RIAs than rules without RIAs were relevant for more than a year. Most rules without RIAs were unclear as to when the rule was applicable.

	<i>All Rules</i>	<i>Non-Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<i>Number of Rules in the Database</i>	72	38	34	57	15
FR notice revealed that rule applies to more than one year	41 57%	27 71%	14 41%	38 67%	3 20%
Unclear if the rule applies to more than one year	22 31%	8 21%	14 41%	11 19%	11 73%

#### H. Assessment of Other Impacts

A large fraction of the notices said that the rule assessed impacts for paperwork, local and state governments and small businesses. The biggest difference between categories was those with RIAs and those without. As expected those without RIAs assessed other impacts less frequently than those with RIAs did. There were not large differences between transfer and non-transfer rules.

	<i>All Rules</i>	<i>Non-Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<i>Number of Rules in the Database</i>	72	38	34	57	15
<u>Rules that assessed paperwork impacts</u>	66 94%	35 97%	31 91%	53 95%	13 93%
Agency found an impact	53 80%	30 86%	23 74%	44 83%	9 69%
Agency found no impact	13 20%	5 14%	8 26%	9 17%	4 31%
Rule not applicable to act	2	2	0	1	1
Did not assess impact	4	1	3	3	1

	<i>All Rules</i>	<i>Non- Transfer</i>	<i>Transfer</i>	<i>RIA</i>	<i>No-RIA</i>
<b><u>Rules that assessed state and local government impacts</u></b>	<b>52</b> <b>83%</b>	<b>27</b> <b>79%</b>	<b>25</b> <b>86%</b>	<b>44</b> <b>85%</b>	<b>8</b> <b>73%</b>
Agency found an impact	19 37%	12 44%	7 28%	19 43%	0 0%
Agency found no impact	33 63%	15 56%	18 72%	25 57%	8 100%
Rule not applicable to act	9	4	5	5	4
Did not assess impact	11	7	4	8	4
<b><u>Rules that assessed small business impact</u></b>	<b>55</b> <b>93%</b>	<b>31</b> <b>94%</b>	<b>24</b> <b>92%</b>	<b>48</b> <b>96%</b>	<b>7</b> <b>78%</b>
Agency found an impact	31 56%	18 58%	13 54%	31 65%	0 0%
Agency found no impact	24 44%	13 42%	11 46%	17 35%	7 100%
Rule not applicable to act	13	5	8	7	6
Did not assess impact	4	2	2	2	2