

June 28, 2013

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503

**RE: Docket ID OMB–2013 -11984–Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on States, Local, and Tribal Entities**

Thank you for the opportunity to comment on this year’s Draft 2013 Report to Congress (Report). We would like to highlight four findings from our independent analysis of the data for final rules published in FY 2012:

- Analyzing 471 final rules, annualized and adjusted to 2001 dollars, we found total costs of \$29.5 billion and total benefits of \$105.7 billion.
- Transfer rules, routinely omitted from quantified benefit and cost calculations, often impose significant costs and paperwork burden hours. During FY 2012, six major transfer rules imposed \$1.4 billion in costs, with 25.7 million associated burden hours.
- Paperwork hours, rarely discussed in the broader context of costs, also contain significant burdens. Of the 14 rules OIRA examined, paperwork consumed \$330 million in annual costs (2001 dollars).
- We found two final rules labeled as significant under Executive Order 12,866 in the regulatory text but excluded from this report. For example, the text of “Energy Standards for Dishwashers” designated the rule as “economically significant,” but it was later declared “non-major” and does not appear in the Report.

Forum’s Benefit-Cost Findings

Every week, the American Action Forum (Forum) analyzes proposed and final rules for monetized costs and paperwork burden hours. For FY 2012, we recorded 471 final rules. Our typical methodology does not deflate costs, so for this comment we tried to replicate OIRA’s methodology.

We analyzed costs and benefits at a 7 percent discount rate (when possible) and deflated the monetized figures to 2001 dollars. Including independent agency actions and non-major rules, the Forum found \$29.5 billion in costs and \$105.7 billion in benefits. The benefits figure corresponds directly to OIRA’s findings but the costs do not, with OIRA’s high-end figure constituting only 66 percent of our findings.

The breadth of OIRA’s data on costs and benefits has been a topic for discussion in the past. “OMB believes, however, that the benefits and costs of major rules, which have the largest economic effects, account for the majority of the total benefits and costs of all rules subject to OMB review.” Footnote 30 in the Report claims that it captures a “vast majority” of costs and benefits. According to the Forum’s analysis, this is true for the benefits, but not for the costs of all rules published.

### Costs and Benefits of 471 Federal Rules

Forum Analyzed Rules from FY 2012	Billions of 2001 dollars	OIRA Benefits/Costs as Percentage of Forum Total
Total Costs	29.5	66%
Total Benefits	105.7	108%

For omitted benefits, the Forum found “Locomotive Safety Standards” (2130-AC16), which could generate \$308 million in benefits, and \$22 million in costs (2001 dollars). In addition, “NESHAP from Lead Smelting” (2060-AQ68) listed \$11.2 million in high-end benefits, but also conceded that costs would exceed benefits by approximately \$2 million per year. Finally, as FAA is the most prolific regulator by volume, a few of its rules listed monetized benefits but that data does not drastically alter topline figures.

On omitted costs, however, there were dozens of rules that push FY 2012’s high-end costs far beyond \$19.5 billion. When the Forum added the costs of the 14 rules OIRA included, we found \$19.4 billion in costs and \$104.5 in benefits, verifying that the methodology and data used are consistent with OIRA’s. By extending this same methodology to all 471 rules in the Forum’s database, we found a total of \$29.5 billion in costs. Thus, a complete analysis of FY 2012 would yield an additional \$10 billion in costs, or 52 percent of OIRA’s high-end cost projection.

We understand the limitations that statutes and Executive Orders place on OIRA review but based on our initial findings, it appears that 14 major rules do not account for the “vast majority” of total costs. Our benefit findings correspond with the Report but the cumulative effect of more than 400 non-major rules does increase the cost figure significantly.

#### Significant Transfer Costs

The Report listed several “Major Rules Implementing or Adjusting Federal Budgetary Programs” and the “transfer” amounts associated with those regulations. The Report noted, “It is important to emphasize that many major rules are budgetary transfer rules, and may not impose significant regulatory costs on the private sector.”

However, after examining six major transfer rules, the Forum found \$1.4 billion in costs and more than 25.7 million paperwork burden hours. Thus, 27 percent of transfer rules do impose monetized costs and paperwork burdens on states or the private sector. Yet, the Report omitted these costs and paperwork burdens in “Major Rules Reviewed with Partial Estimates of Annual Benefits or Costs.”

#### **Transfer Rules Imposing Costs and Burden Hours**

<b>Regulation</b>	<b>RIN</b>	<b>Costs (in millions \$)</b>	<b>Burden Hours</b>
Community First Choice Option	0938-AQ35	896	
Electronic Health Record Program	0938-AQ84	299.5	2,034,740
Eligibility Changes under ACA	0938-AQ62	256.4	<b>21,279,202</b>
Changes in Provider Enrollment	0938-AQ01	23.8	2,089,618
Certification of Compliance	0584-AE15	2	156,608
Medicare Payment Policies	0938-AQ25	0.15	200,000
		<b>Total: 1,478</b>	<b>Total: 25,760,168</b>

One omission was “Eligibility Changes under ACA” (0938-AQ62). The Report only listed the transfers and claimed no estimated benefits or costs. However, 77 FR 17,198 lists the “Annual Recordkeeping and Reporting Requirements,” conceding 21.2 million paperwork burden hours and costs of \$256 million. The table in the rule labels all paperwork collections as new. It is difficult to believe that 21.2 million hours will not create a significant cost for states and private entities.

For perspective, “Eligibility Changes under ACA” is now the [fourth largest](#) collection for Health and Human Services. In addition, OIRA’s [approved](#) paperwork collection for the rule curiously omits any monetized costs, even though the text of the rule listed possible burdens. We find it difficult to believe a new paperwork burden of more than 21.2 million hours won’t impose substantial compliance costs.

The paperwork total of the transfer rules above, 25.7 million hours, is significant as well. It represents 7.2 percent of the 355 million-hour increase reported in the [latest](#) “Information Collection Budget of the United States Government.” According to the text of the rules, all of the collections are new.

OIRA has addressed transfer costs in the past: “The Regulatory Right-to-Know Act requires OMB to report the social costs and benefits of these rules, and OMB encourages agencies to report these costs and benefits for transfer rules; OMB will consider incorporating any such estimates into future Reports.” For the final Report, and future reports to Congress, the Forum recommends including the above rules and other major transfer rules with costs in the table for “Major Rules Reviewed with Partial Estimates of Annual Benefits or Costs,” or a separate table that reviews transfer rules with new costs.

### Paperwork Burden Hours

This Report and previous iterations have mentioned “Simplifying Paperwork Requirements,” in an effort to fulfill the goals of Executive Order 13,563. However, the Report provides a limited discussion of the burdens imposed by millions of new paperwork hours.

As previously mentioned, the most recent “Information Collection Budget” (ICB) reported a net increase of more than 355 million hours. The ICB focuses on new collections and paperwork violations, but not the economic and regulatory implications of increased hours. However, OIRA’s Report rarely mentions the regulatory impact of large paperwork collections, and some agencies fail to monetize new hours.

Obviously, the cost of one hour depends on the employee and the task, but a central figure for monetizing paperwork could be the mean wage (\$31.23) for “Compliance Officer.” According to the Bureau of Labor Statistics (BLS), these officers “examine, evaluate, and investigate eligibility for or conformity with laws and regulations.” If this wage rate were applied to the new paperwork from the last ICB, the monetized amount would exceed \$11 billion, but there is no discussion of these impacts in either the ICB or OIRA reports to Congress.

Paperwork obviously imposes costs on individuals and businesses. For example, the Forum analyzed the paperwork requirements of the 14 major rules that reported costs and benefits. Of those, 11 monetized these reporting and recordkeeping requirements, and the totals were somewhat surprising: \$330 million (in 2001 dollars) in paperwork costs. Our figures for the paperwork costs of FY 2012 major rules are below:

<u>Rule</u>	<u>RIN</u>	<u>Paperwork Costs</u> <u>(Millions of 2001 \$)</u>
Mercury and Air Toxics Standards (MATS)	2060-AP52	166.1
Positive Train Control Amendments	2130-AC27	<u>90.1*</u>
Hazard Communication	1218-AC20	27.7
Oil/Natural Gas Sector Emission Standards	2060-AP76	16
National Registry of Medical Examiners	2126-AA97	<u>10.6*</u>
Standards for Electronic Funds Transfer	0938-AQ11	7.9
Operating Rules for Electronic Funds Transfer	0938-AR01	5.8
Petroleum Refinery Standards	2060-AN72	3.9
Standard Unique ID for Health Plans	0938-AQ13	1.2
CAFE for 2017 and Later	2060-AQ54	1.1
Standards for Living Organisms	1625-AA32	0.08
		<b>Total: 330.4</b>

*\*Denotes Forum used BLS mean wage for non-monetized hours.*

The Food and Drug Administration and the Commodity Futures Trading Commission have used BLS's mean wage. We recommend a standard methodology across cabinet agencies to monetize paperwork burden hours. If the paperwork is quantifiable, there is no reason to avoid monetization, even using a conservative figure. The level of non-monetized paperwork is so great that [OIRA currently reports](#) the average hourly cost to comply with federal paperwork is \$7.03, below the federal minimum wage. Finally, a discussion of the regulatory impacts of paperwork in this final Report could fill the analytical gap between the ICB's figure on the total paperwork budget.

#### Miscellaneous Matter

On page 28, the Report lists RIN 1904-AB50 for "Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs." This RIN refers to "Energy Efficiency Standards for Fluorescent Lamp Ballasts." The correct RIN for the Medicare Advantage rule is 0938-AQ86.

#### Clarifying OIRA's Methodology

In our review of this Report, we found two rules designated as significant that were excluded, including a rule labeled "economically significant."

Previous reports have noted that the Regulatory-Right-to-Know Act does not define "major rule." OIRA has previously defined it as any rule: 1) designated major under the Congressional

Review Act, 2) designated as meeting the threshold under UMRA, or 3) designated as “economically significant.”

This methodology does not appear in the final 2012 Report or this draft Report. Assuming the previous methodology is still in effect, we are curious whether the omission of “Energy Conservation Standards for Residential Dishwashers” (1904-AC64) is purposeful. The text of the rule notes that the “regulatory action is an ‘economically significant regulatory action’ under section 3(f)(1) of Executive Order 12866” (77 FR 31,959). In addition, the [Unified Agenda](#) entry states the rule is both major and economically significant. However, OIRA’s [review of the rule](#) stated that it was neither economically significant nor major.

This might indicate merely a minor error in the database but the text of the rule noted “that the rule is not a ‘major rule’” (77 FR 31,962). In addition, the Government Accountability Office also listed the rule as non-major, even though costs range from \$522 to \$881 million and benefits range from \$683 million to \$1.4 billion (in 2010 dollars). We believe RIN 1904-AC64 should be included in Table 1-5 (a) for major rules that estimate costs and benefits. If not, OIRA should further clarify its methodology for its Report.

A second rule published in FY 2012 listed burdens in excess of \$100 million and was determined to be significant under 12,866, but was not deemed “economically significant” or “major.” “Adjacent-Track On-Track Safety” (2130-AB96) was “determined to be significant under both Executive Order 12866 and DOT policies and procedures” (76 FR 74,609). The rule lists costs of \$285.7 million and benefits of \$286.2 million.

However, OIRA [concluded](#) the rule was neither economically significant nor major, and GAO lists no record of the rule. RIN 2130-AB96, like many other rules on the table below, is listed as significant under 12,866 but there is no discussion of whether the rule is “economically significant.” In addition, the regulatory text excludes any mention of the Congressional Review Act, even though most regulations designate whether a rule is major or non-major. We suggest some mention of these two rules in the Report.

#### **Significant Regulations Omitted from Recent Reports**

<b>Regulation</b>	<b>RIN</b>	<b>Costs (in millions \$)</b>	<b>Burden Hours</b>
Energy Standards for Dishwashers	1904-AC64	881	380
Railroad Track On-Track Safety	2130-AB96	285	22,946
TSCA Inventory Update	2070-AJ43	111	1,640,000
Nutrition Labeling	0583-AC60	156	
Prohibiting Genetic Discrimination	0938-AP37	356	
School Food Safety Analysis	0584-AD65	116	
Airline Passenger Protections	2105-AD72	100	107,885
Rules of Practice for Patent Trial	0651-AC70	94	528,946

In addition, the Forum also noticed that the “Conflict Minerals” rule (3235-AK84) was excluded from the Report. This was a major rule according to [GAO](#), with initial costs of “\$3 billion to \$4 billion” and annual costs from “\$207 million and \$609 million.” It was also published on the

same day as the “Disclosure of Payments by Resource Extraction Issuers,” which was included in the Report. We recommend including the Conflict Minerals rule in Table 1-8.

In the future, we suggest OIRA clarify its methodology, as it did on page 8 of the 2011 report and page 6 of the 2010 report. In addition, previous commenters (*see* Aldy et al.) have noted that independent agencies have issued major rules without identifying which rules are major. We have found instances where even cabinet agencies have issued rules without a discussion of the Congressional Review Act (*see* RIN 2130-AB96). We recommend OIRA “consider additional steps to promote consistency and transparency” among cabinet agencies to determine major rule status in the text of regulations.

Finally, we have noticed that there is no consistent dollar year used when agencies monetize costs and benefits. For example, CAFE was in 2010 dollars; the MATS rule was in 2007 dollars, and some HHS rules were in 2012 dollars. Thus, rules’ nominal figure range from 2007 dollars to 2012 dollars, only to have OIRA deflate all of them to 2001 dollars. If feasible, we recommend a consistent dollar year among cabinet agencies.

We appreciate the opportunity to comment on this draft report. Should OIRA require additional information, please contact us at 202-706-7053 or [sbatkins@americanactionforum.org](mailto:sbatkins@americanactionforum.org).

Sincerely,

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