
THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

Public Interest Comment¹ on
The Office of Management and Budget's
Draft 2013 Report to Congress on the Benefits and Costs of Federal Regulations
Docket ID No. OMB-FRDOC-0001

July 31, 2013
Don King, MD, JD²

The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. As part of its mission, the GW Regulatory Studies Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Office of Management and Budget's Draft 2013 Report to Congress offers suggestions for improving the information value of the Report, particularly with respect to regulations issued by the Department of Health and Human Services (HHS), and does not represent the views of any particular affected party or special interest.

Introduction

For the past 16 years, the Office of Management and Budget (OMB) has reported annually to Congress on the benefits and costs of federal regulations. OMB recently released its draft 2013 report (report) for public comment. Among other things, the report provides a summary of agency-estimated benefits and costs of the major regulations OMB reviewed during the preceding 10 fiscal years and more detailed information concerning agency-estimated benefits and costs of major rules reviewed during the 2012 fiscal year (FY 2012).

The HHS issued 21 of the 47 major rules OMB reviewed in FY 2012, more than any other agency.³ Of the 25 "non-transfer rules," HHS issued seven. Of the 22 "transfer rules," HHS

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

² Don W. King, is a Professor Emeritus of Neurology at the Medical College of Georgia and a visiting scholar with the GW Regulatory Studies Center.

³ Office of Management and Budget (OMB), 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations, 21-23 (2013).

issued 14. This comment evaluates the portion of the draft report related to the benefits and costs of HHS rules, and discusses aspects of their supporting analyses. It concludes with suggestions for improving the clarity and usefulness of the report for both Congress and the policy community.

Benefits and Costs of Major Rules (FY 2003 – FY 2012)⁴

In Chapter 1, Section A, OMB provides estimates of the “total” benefits and costs of major rules aggregated over the past 10 fiscal years (Tables 1-1).⁵ In Chapter 1, Section B, OMB provides estimates of the benefits and costs of these rules by fiscal year (Table 1-3).⁶ In Chapter 1, Section C, OMB provides more detailed estimates of benefits and costs of the major FY 2012-reviewed rules included in the aggregate estimates (Table 1-4).⁷

In the titles of Tables 1-1, 1-3, and 1-4, and occasionally in the text of the sections, OMB uses the term, “Total Annual Benefits and Costs.” However, for the 2003-2012 fiscal years covered, the report includes estimates for only 115 of the 536 major rules OMB reviewed.⁸ For FY 2012, OMB includes only 14 of the 47 OMB-reviewed major rules and only 3 of the 21 major HHS rules.⁹ These tables exclude four FY 2012 HHS rules for which the Department provided monetized cost estimates in its accounting statement,¹⁰ and at least five other rules¹¹ for which HHS estimated the cost of “information collection requirements” (ICRs).

Benefits and Costs for FY 2012¹²

In Chapter 1, Section C, OMB provides more detailed information concerning the benefits and costs of major rules reviewed during FY 2012.¹³ For this section, OMB divides rules into the following mutually exclusive categories: (1) non-transfer rules for which an agency estimated both benefits and costs, (2) non-transfer rules for which an agency provided a partial estimate of benefits and costs, (3) transfer rules implementing or adjusting federal budgetary programs, and (4) non-budget transfer rules.

⁴ Table A-1 in Appendix A provides agency estimates of the benefits, costs, and wealth transfers of the 47 major rules reviewed during 2012. OMB, 76-83 (2013), *supra note 3*. For HHS rules, the estimates were those included in the HHS-prepared accounting statements that accompanied publication of the rule in the Federal Register. Table A-2 in Appendix A provides agency estimates of the benefits and costs, but not transfers, of the 68 major rules reviewed between FY 2003 and 2011. OMB, 84-92 (2013), *supra note 3*.

⁵ OMB, 10-18 (2013), *supra note 3*.

⁶ OMB, 18-21 (2013), *supra note 3*.

⁷ OMB, 21-24 (2013), *supra note 3*.

⁸ OMB, 10 (2013), *supra note 3*.

⁹ OMB, 21-24 (2013), *supra note 3*.

¹⁰ These include RINs 0938-AQ22, 0938-AQ27, 0938-AQ 67, and 0938-AQ84. See Appendix A-1, OMB, 76-83 (2013), *supra note 3*.

¹¹ These include RINs 0938-AO53, 0938-AQ01, 0938-AQ25, 0938-AQ26, and 0938-AQ62. These data are based on the author’s review of the analysis that HHS conducted at the time the rule was published.

¹² Table A-1 in Appendix A provides agency estimates of the benefits, costs, and wealth transfers of the 47 major rules reviewed during 2012. OMB, 76-83 (2013), *supra note 3*.

¹³ OMB, 21-23 (2013), *supra note 3*.

Non-Transfer Rules for which HHS Estimated Benefits and Costs

Of the 21 major HHS rules, OMB classifies three as non-transfer rules for which HHS had estimated both benefits and costs (Table 1-5(a)).¹⁴ Each of these rules governs private parties that contract with other private parties, and each adopts a standard or a set of operating rules that all participants in the affected markets must adopt.

Table 1-5(a) contains the HHS-estimated benefits and costs for these rules. HHS did not estimate wealth transfers for any of these rules, and no transfers were included in Table 1-5(a). The HHS benefit-cost analyses of these three rules did not include the government cost to monitor and enforce the rules or the cost of lost consumer and producer surplus that may result because of a decrease in the quantity of goods or services provided.

Non-Transfer Rules for which HHS Made Partial Estimates

OMB considers four of the 21 HHS rules to be non-transfer rules for which HHS provided a partial estimate of benefits and costs (Table 1-5(b)).¹⁵ Unlike the three HHS rules discussed in the preceding section, these four rules govern federal spending programs.¹⁶ Two of the four rules impose new requirements on federal fund recipients, and two are a result of an initiative begun with Executive Order 13563 to decrease requirements that regulated entities must follow.

Table 1-5(b) contains the HHS-estimated benefits and costs of these rules, but not the HHS-estimated wealth transfers, even though one of these rules (RIN 0938-AQ22) would result in a significant transfer of funds. As with the first set of non-transfer rules, the benefit-cost analyses of these four rules did not include the agency cost to monitor and enforce the rules or the cost of lost consumer and producer surplus that may occur as a result of the rule.

Transfer Rules Implementing Federal Budgetary Programs

OMB considers twelve of the 21 rules to be transfer rules implementing or adjusting federal budgetary programs (Table 1-6(a)).¹⁷ Most of these rules govern the payment of funds to professionals or facilities that provide medical care for beneficiaries of government programs. Two of the rules (RIN 0938-AQ27 and RIN 0938-AQ84) provided funds to reward providers for meeting certain specified requirements, quality requirements for the former rule and requirements to use electronic health record technology for the latter. Similar to RIN 0938-AQ22 described above, these rules contain requirements that must be met for a recipient to gain additional federal payment.

¹⁴ OMB, 23-24 (2013), *supra note 3*.

¹⁵ OMB, 25-26 (2013), *supra note 3*.

¹⁶ Even though these rules are limited to federal spending programs, because the federal government is the largest health care payer in the United States, and because most professionals and hospitals provide care for federal or state beneficiaries, these rules effectively apply to most U.S professionals and hospitals.

¹⁷ OMB, 26-27 (2013), *supra note 3*.

Table 1-6(a)) contains the HHS-estimated wealth transfers for these rules, but not the HHS-estimated benefits or costs. Neither HHS nor OMB included the cost of agency implementation of these rules or the cost of resource misallocation that federal spending may produce.

Non-Budget Transfer Rules

OMB considers two of the 21 HHS rules to be non-budget transfer rules (Table 1-6(b)).¹⁸ One of these rules would result in wealth transfers between affected health insurance issuers, and the other makes technical changes to the Medicare Advantage and Prescription Drug Benefit programs. Similar to the rules described in the preceding section, OMB does not include benefits or costs in Table 1-6(b).

Discussion

OMB's Presentation of Benefits and Costs from FY 2003 – FY 2012

In Chapter 1, OMB presents estimates of the aggregated benefits and costs of major rules it reviewed from FY 2003 through FY 2012. However, OMB includes in these estimates only 115 of the 536 major rules it reviewed from FY 2003 through and FY 2012 and only 14 of the 47 major rules it reviewed during FY 2012.

OMB uses two criteria for including a rule's benefits and costs in these aggregate estimates: (1) "each rule was estimated to generate benefits and costs of approximately 100 million or more, in any one year," and (2) "a substantial portion of its benefits and costs were quantified and monetized by the agency or, in some cases, monetized by OMB."¹⁹ Undoubtedly, the second criterion is the primary reason such a small proportion of major rules is included in these totals.

While OMB explains in the text that the totals include only those rules for which agencies had estimated a substantial portion of both benefits and costs, the titles of Tables 1-1, 1-3, and 1-4 contain the words "Total Annual Benefits and Costs." Unless one reads the text closely or is familiar with OMB's inclusion criteria for these tables, the reader may mistakenly assume that these tables contain the benefits and costs of all major OMB-reviewed rules.

OMB should state more clearly that the benefits and costs presented in Tables 1-1, 1-3, and 1-4 are derived from a relatively small proportion of the major rules issued during the time period involved, and OMB should rename the titles of these tables to more accurately reflect their content.

OMB's Classification System for Rules Reviewed in 2012

OMB classifies the FY 2012 rules into one of four mutually exclusive categories: (1) non-transfer rules for which an agency estimated both benefits and costs, (2) non-transfer rules for

¹⁸ OMB, 28 (2013), *supra note 3*.

¹⁹ OMB, 10 (2013), *supra note 3*.

which an agency provided a partial estimate of benefits and costs, (3) transfer rules implementing or adjusting federal budgetary programs, and (4) non-budget transfer rules.

However, for at least two reasons, OMB's classification system may not be the best way to classify these rules. First, using the OMB system, some rules may not be easily classified into one of the mutually exclusive groups. For example, rules that OMB placed in category 2 and category 3 both govern the payment of funds from the federal government to private parties or to states. Most of these rules change the amount of funds that the federal government will dispense, and these changes are then reflected as transfers to the appropriate party in the agency-prepared accounting statement. With the exception of the rule RIN 0936-AQ22, OMB considers rules that would change the amount of funds to be dispensed to be transfer rules and places these rules in category 3. However, OMB considers RIN 0938-AQ22 to be a non-transfer rule and places this rule in category 2, even though the rule would result in a significant transfer of funds. Since many spending rules result in both transfers and social costs, there does not appear to be a clear distinction between non-transfer rules OMB places in category 2 and transfer rules OMB places in category 3.

In addition, OMB's classification system may provide a misleading picture of the benefits, costs, and transfers of federal spending rules. For "non-transfer" rules placed in category 2, OMB reports in Table 1-5(b) the HHS-determined benefits and costs, as reflected in the accounting statements.²⁰ However, it does not report the HHS-determined transfers, even though one of these four rules (RIN 0938-AQ22) resulted in a significant transfer of funds.²¹ For "transfer" rules placed in category 3, OMB reports in Table 1-6(a) the HHS-determined transfers, but not the HHS-determined benefits or costs,²² even though HHS had made cost estimates in the accounting statements for two of these rules, and HHS had made estimates of ICR costs for at least 5 others. Considering rules to be transfer rules may lead one to ignore very important regulatory costs (or benefits).

Instead of dividing the 2012-reviewed rules into non-transfer and transfer rules, OMB should consider dividing these rules into rules governing private conduct and rules governing federal spending. Rules governing private conduct may result in social benefits, social costs, or wealth transfers or any combination of these three effects. Similarly, rules governing federal spending may result in any combination of these three effects. Rules governing federal spending could then be divided into rules that place new requirements on recipients and rules that do not. Many federal spending rules that transfer funds from the federal government to private parties place new requirements on recipients.²³ If a rule changes the criteria for receiving federal funds, it

²⁰ OMB, 25-26 (2013), *supra note 3*.

²¹ These transfers were listed in Table A-1 of the Appendix. OMB, 76-83 (2013) *supra note 4*. However, the text and tables in Chapter 1 give the impression that transfer rules result in no or minimal costs.

²² OMB, 26-27 (2013), *supra note 3*.

²³ As noted above, HHS reported monetized cost estimates in the accounting statements of at least four of the spending rules, and in at least five others, HHS made monetized estimates of the costs of ICRs that were not included in the accounting statements.

likely will increase (or sometimes decrease) the costs it imposes on recipients. Changing the classification system should facilitate the inclusion of these costs (and benefits) in the section and tables devoted to FY 2012 rules.

Review of HHS Analysis of Benefits, Costs, and Transfers

Executive Order 12866 requires agencies to conduct a regulatory impact analysis for all economically significant rules.²⁴ OMB Circular A-4 provides guidance to assist agencies in conducting these analyses.²⁵ It specifically instructs agencies to include the following types of costs in their analyses: (1) “private-sector compliance costs and savings,” (2) “government administrative costs and savings,” and (3) “gains or losses in consumers’ or producers’ surpluses.”²⁶ It also instructs agencies to provide a summary accounting statement that includes all significant benefits, costs, and wealth transfers that are likely to occur as a result of the rule.²⁷

A brief review of the HHS analyses on which OMB relied for the draft report suggests that HHS may not be conducting a complete cost analysis as required by Executive Order 12866 and instructed by Circular A-4. For the 21 HHS rules reviewed by OMB, HHS only occasionally included the cost of ICRs in the RIA’s accounting statement,²⁸ and ICRs often represent a significant portion of the compliance costs of these rules. Also, HHS did not include in the accounting statements the agency cost to monitor and enforce the rule, and these costs are a significant type of government administrative cost. Finally, HHS did not include the cost of lost consumer and producer surplus that may occur because of a rule’s effect on the quantity of goods or services provided. Since HHS did not calculate these costs, OMB does not include these costs in the draft report.

OMB should require agencies to conduct a more complete analysis of the costs of their rules and should consider reporting agency compliance with Circular A-4 in its annual reports to Congress.

Summary of Recommendations

1. OMB should more clearly state that the benefits and costs presented in Tables 1-1, 1-3, and 1-4 are derived from a relatively small proportion of the major rules issued during the time period involved, and rename the titles of these tables to more accurately reflect their content.
2. OMB should consider changing its classification system for 2012 rules from one that divides rules into non-transfer rules and transfer rules to one that divides rules into rules governing

²⁴ The President, Executive Order 12866, Regulatory Planning and Review, Section 6(a)(3)(C), 58 Fed. Register 51742 (Oct. 4, 1993).

²⁵ OMB, Circular A-4, 1-48 (2003); *see also* OMB, Regulatory Impact Analysis: A Primer 1, 10 (2011).

²⁶ OMB, 37 (2003), *supra note 26*

²⁷ OMB, 44-46 (2003), *supra note 26*.

²⁸ As noted earlier, HHS reported costs in the accounting statements of only four HHS spending rules and of only two of the rules OMB considered to be transfer rules. In at least five others, HHS provided monetized estimates of ICRs, but did not include these costs in the accounting statement of the individual rule.

private conduct and rules governing federal spending. Rules governing federal spending could then be divided into rules that place new requirements on recipients and those that do not. Such a division should facilitate ease of classification and also provide a better understanding of the benefits, costs, and transfers that occur, whether the rule governs private conduct or federal spending.

3. OMB should require agencies to conduct a more complete analysis of the costs of their rules, including each of the types of costs specified Circular A-4. Also, OMB should consider reporting agency compliance with Circular A-4 in its annual report to Congress.