

*From the Desk of Richard A. Williams, Ph.D.*

July 29, 2013

Dr. Howard Shelanski  
Office of Information and Regulatory Affairs,  
Office of Management and Budget, Attn: Mabel Echols,  
NEOB, Room 10202,  
725 17th Street NW., Washington, DC 20503.

Dear Dr. Shelanski

The Regulatory Studies Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, the Regulatory Studies Program conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals and reports from the perspective of the public interest. We appreciate the invitation to comment on the Draft 2013 Report to Congress on the Cost and Benefits of Federal Regulations and hope that our comments will be useful to the Office of Management and Budget.

Sincerely,

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Congress has asked for the president, through the Office of Information and Regulatory Affairs (OIRA) in OMB, to report on the state of the federal regulatory system for the last 15 years in annual Reports to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (hereafter referred to as “the Reports”).<sup>1</sup> While some of the elements Congress requested are present in some of the Reports, none of the Reports gives a complete picture of the state of the federal regulatory system. While the initial Reports were fairly technical summaries about the benefits and costs of the regulations for which OIRA had information, more recently the Reports seem more to be comparing the relative political accomplishments of presidents. None of the Reports in fact describes the state of the federal regulatory system as Congress requested and, instead, they seem to be increasingly politicized.

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess particular rulemaking proposals as well as the overall impact of regulations from the perspective of the public interest.<sup>2</sup>

### Introduction

OMB has been required to report to Congress on the benefits and costs of federal regulations since 1997. The Reports typically project an unwarrantedly optimistic picture of an effective regulatory system protecting us from a variety of risks. As the Regulatory Report Cards prepared

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<sup>1</sup> All the Reports can be found here: [http://www.whitehouse.gov/omb/inforeg\\_regpol\\_reports\\_congress](http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress).

<sup>2</sup> This comment was prepared by Richard A. Williams, Director for Policy Research at the Mercatus Center at George Mason University. This comment is solely the view of the author and is not an official position of George Mason University.

by the Mercatus Center show, agencies have consistently done a poor job when evaluating the economic impact of economically significant regulations, including failing to define the market failure being addressed. Unfortunately, this is an institutional problem transcending administrations and political parties. The agencies' estimates of benefits and costs are suspect as well. Furthermore, the increasing number of regulations and the growing pace of enactment may have the effect of decreasing safety.

What Senator Fred Thompson once called “a more complete picture of the regulatory system” is essential for the Report to be useful to Congress, and should include, at the minimum, better assessment of the quality of regulatory impact analyses; better assessment of the benefits of rules likely to be suspect; unintended consequences of excessive rules; laws whose implementation will likely not result in regulations with benefits exceeding cost; and recommendations for reforming the Administrative Procedure Act.

The first section of these comments overviews the history and requirements of the Reports on the Costs and Benefits of Federal Regulations (“Reports”). The second section examines the shortcomings of the Reports. The third section considers the recent overstatement of the benefits of rules, including misrepresenting costs to consumers as benefits. The fourth section analyzes how excessive regulation can make us less safe. The final section presents ways to make the Reports more useful to Congress and to improve the regulatory process.

## I. Requirements for the Reports

Following the Stevens Amendment in 1997, which required OMB to report to Congress on the benefits and costs of federal regulations (an amendment to the Omnibus Consolidated Appropriations Act of 1997<sup>3</sup>), Congress passed the Regulatory Right-to-Know Act in 2000.<sup>4</sup>

The Right-to-Know Act asks OMB to identify areas for reform, including

“(1) an estimate of the total annual costs and benefits (including quantifiable and nonquantifiable effects) of Federal rules and paperwork, to the extent feasible--

(A) in the aggregate;

(B) by agency and agency program; and

(C) by major rule;

(2) an analysis of impacts of Federal regulation on State, local, and tribal government, small business, wages, and economic growth; and

(3) recommendations for reform.”

In announcing these requirements, Senator Thompson expressed his hope that this would “require OMB to provide a more complete picture of the regulatory system, including the incremental costs and benefits of particular programs and regulations, as well as an analysis of regulatory impacts on small business, governments, the private sector, wages and economic growth.”<sup>5</sup>

More recently, Congress has asked OMB to report information on:

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<sup>3</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, sec. 645, 110 Stat. 3009 (1996), pp. 1088–89.

<sup>4</sup> Regulatory Right-to-Know Act 31 U.S.C. § 1105 (2000).

<sup>5</sup> Fred Thompson, “Regulatory Right to Know Act of 1999,” *Congressional Record* 145, no. 8 (1999).

- (a) increasing public participation in the rulemaking process and reducing uncertainty;
- (b) improving coordination across Federal agencies to eliminate redundant, inconsistent, and overlapping regulations; and
- (c) identifying existing regulations that have been reviewed and determined to be outmoded, ineffective, or excessively burdensome.<sup>6</sup>

The intent of Congress seems to be to ask the president's key arm that oversees all federal regulations, at least for the executive-branch agencies, for a "more complete picture" of the regulatory state, how it is affecting the United States, where things are going wrong, and what should be done about it.

While the Reports to date contain interesting information, they do not fully inform Congress and the American public about the overall effect of federal regulations. All of the Reports produce a vision of an efficient and effective system of regulations that are protecting us from a myriad of risks we face in daily life, from financial security to food safety to workplace safety. There are several reasons why the somewhat-rosy picture in the OMB documents is not justified:

1. The extent and quality of regulatory impact analysis is insufficient to justify claims that the total benefits of regulations exceed their costs.
2. Some of the underlying assumptions that produce benefit estimates make those estimates suspect.
3. There are so many regulations on the books, and they are coming at such a rapid rate, that the cumulative effect of excessive rules is making us less safe. Because the Report

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<sup>6</sup> The Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, requires OMB to "submit to the Committees on Appropriations of the House and the Senate a report on the implementation of Executive Order 13563."

merely tallies up the benefits and costs of individual regulations, it does not address this type of effect.

## II. Inadequate regulatory impact analysis

The estimates used in OMB's Reports are prepared by the agencies themselves, which means that the agencies are analyzing their own decisions. The cost and benefit estimates are produced at the time agencies issue final regulations; they are thus predictions, not estimates of the actual effects of the regulations after they have been implemented. Research shows that agencies often make decisions early in the regulatory process and agency economists are pressured to make their analyses support those decisions.<sup>7</sup> In fact, agencies do an poor job overall of preparing economic analysis for new rules.

For more than three decades, executive orders have required executive branch agencies to conduct economic analyses (Regulatory Impact Analyses, or RIAs) of major regulations. Since 2008, the Mercatus Center at George Mason University has conducted a project known as the Mercatus Regulatory Report Card (the "Report Card") that evaluates federal agencies' economic analyses for proposed, economically significant regulations.<sup>8</sup> The project also assesses the extent to which agencies claim to have used the analysis to make decisions about regulations.<sup>9</sup> Between 2008 and 2012, 148 proposed rules have been evaluated.

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<sup>7</sup> Richard Williams, "The Influence of Regulatory Economists in Federal Health and Safety Agencies" (Working Paper No. 08-15, Mercatus Center at George Mason University, Arlington, VA, July 2008), [http://mercatus.org/sites/default/files/publication/WP0815\\_Regulatory%20Economists.pdf](http://mercatus.org/sites/default/files/publication/WP0815_Regulatory%20Economists.pdf).

<sup>8</sup> "Regulatory Report Card," Mercatus Center, <http://mercatus.org/reportcard>.

<sup>9</sup> Jerry Ellig and James Broughel, "How Well Do Agencies Use Economic Analysis?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA: 2013), [http://mercatus.org/sites/default/files/Ellig\\_FedAgenciesRIA\\_MOP\\_071513.pdf](http://mercatus.org/sites/default/files/Ellig_FedAgenciesRIA_MOP_071513.pdf).

The economic analyses in the rulemakings evaluated by the Report Card each receive a score ranging from 0 (no useful content) to 5 (comprehensive analysis with potential best practices) on each of 12 criteria based on requirements imposed under Executive Order 12866, as well as RIA guidelines laid out in OMB's Circular A-4.

Unfortunately, the Report Card findings have not been reassuring. Agencies consistently do a poor job on economic analysis. For the period from 2008 to 2012, the average Report Card score for prescriptive regulations was 31 out of a total of 60 points.<sup>10</sup> That is the equivalent to a grade of "F." In 2012, the average score was a disappointing 29.<sup>11</sup> Analysis by other researchers in the past confirms the poor quality of federal regulatory-impact analyses.<sup>12</sup> This research indicates there are no significant differences in the quality of economic analysis across administrations, suggesting the problem is institutional, rather than just a case of poor management by one administration or political party.<sup>13</sup>

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<sup>10</sup> Author's calculations based on data available at "Regulatory Report Card," [www.mercatus.org/reportcard](http://www.mercatus.org/reportcard).

<sup>11</sup> Author's calculations based on data available at "Regulatory Report Card," [www.mercatus.org/reportcard](http://www.mercatus.org/reportcard).

<sup>12</sup> See, for example, Winston Harrington, "Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews," (discussion paper 06-39, Washington, DC: Resources for the Future, 2006); and Robert W. Hahn and Paul C. Tetlock, "Has Economic Analysis Improved Regulatory Decisions?," *Journal of Economic Perspectives* 22, no. 1 (2008): 67–84. See Art Fraas and Randall Lutter, "The Challenges of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4," *Annual Review of Resource Economics* 3 no. 1 (2011): 71-85; Jamie Belcore and Jerry Ellig, "Homeland Security and Regulatory Analysis: Are We Safe Yet?," *Rutgers Law Journal* 40, no. 1 (2008): 1–96; Robert W. Hahn, Jason Burnett, Yee-Ho I. Chan, Elizabeth Mader, and Petrea Moyle, "Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866." *Harvard Journal of Law and Public Policy* 23, no. 3 (2001): 859–71; Robert W. Hahn, and Patrick Dudley, "How Well Does the Government Do Cost–Benefit Analysis?" *Review of Environmental Economics and Policy* 1, no. 2 (2007): 192–211; Robert W. Hahn, and Robert Litan, "Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe," *Journal of International Economic Law* 8, no. 2 (2005): 473–508; Robert W. Hahn, Randall W. Lutter, and W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* (Washington, DC: AEI-Brookings Joint Center for Regulatory Studies, 2000); Government Accountability Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, Report GAO/RCED-98-142 (May 1998); Government Accountability Office, *Air Pollution: Information Contained in EPA's Regulatory Impact Analyses Can Be Made Clearer*, Report GAO/RCED 97-38 (April 1997).

<sup>13</sup> Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III. "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across U.S. Administrations," *Regulation & Governance* 7 (2013): 153–73.

Some of the most problematic areas the Report Card identifies are a failure to define the systemic problem or market failure the agency sought to solve through the regulation, a lack of consideration of serious alternatives to the regulation being proposed, and a failure to set forth procedures to track the results of the regulation once it has been implemented.<sup>14</sup> If an agency cannot define and demonstrate the existence of the problem it seeks to solve, the claimed benefits of the regulation are suspect. In fact, as will be discussed later on, there are other reasons why the claimed benefits are suspect. In addition, if an agency did not seriously consider a sufficient number of broad alternative ways to solve problems, there is no way to determine whether the agency adopted the most effective or efficient approach.<sup>15</sup> And if the agency makes no effort at retrospective analysis, there is no way to tell whether the predicted benefits and costs actually occurred.

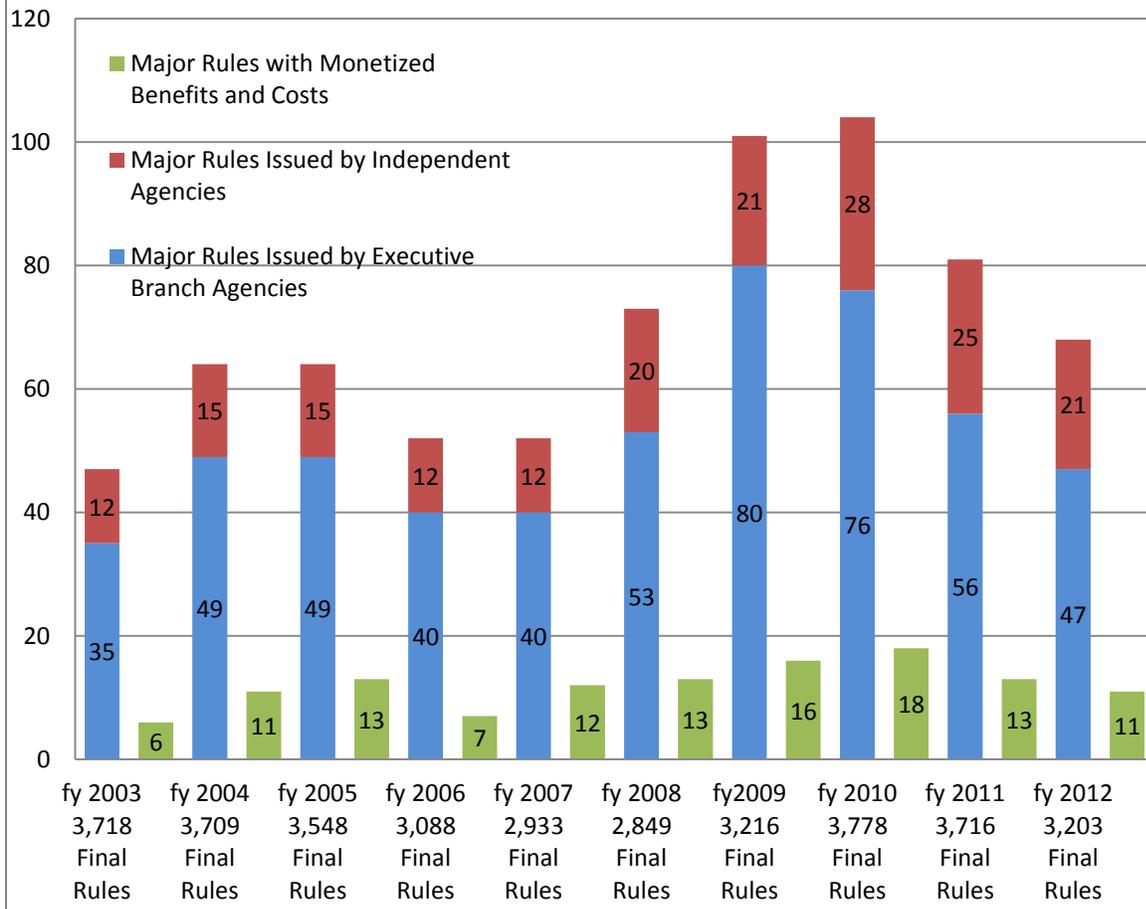
Finally, as we reported last year, there are far too few analyses of even significant rules, much less all rules, to draw conclusions about the total benefits and costs. Figure 1, below, shows that only 23% of major executive-branch rules and only 0.3% of all rules monetized benefits and costs.

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<sup>14</sup> See, for example, Jerry Ellig and James Broughel, "Regulation: What's the Problem?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA: 2011), [http://mercatus.org/sites/default/files/Ellig\\_broughel\\_Regulationwhatstheproblem.pdf](http://mercatus.org/sites/default/files/Ellig_broughel_Regulationwhatstheproblem.pdf); James Broughel and Jerry Ellig, "Regulatory Alternatives: Best and Worst Practices," (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA: 2012), <http://mercatus.org/sites/default/files/RegulatoryAlternativesElligBroughel2-21-12.pdf>; Hahn and Tetlock, "Has Economic Analysis Improved Regulatory Decisions?;" and Jerry Ellig and Patrick McLaughlin, "The Quality and Use of Regulatory Analysis in 2008," *Risk Analysis* 32, no. 5 (2012): 855–80; Ellig & Morrall working paper.

<sup>15</sup> "Efficient" has a specific economic meaning; it means selection of a regulatory option that generates the largest difference between the benefits and the costs amongst all of the options.

**Figure 1: Comparison of Final Rules With Monetized Benefits and Costs**  
(from OMB Reports)



### III. Miscounting benefits

The last two Reports have a relatively new item where the current administration has pronounced that they have produced much larger net benefits than previous presidents.<sup>16</sup> The Reports claim that the current administration increased net benefits by nearly 400% over what President Bush

<sup>16</sup> Cass Sunstein, "Making Regulation Smarter to Save Lives and Money," *White House Blog*, May 10, 2012, <http://www.whitehouse.gov/blog/2012/05/10/making-regulation-smarter-save-lives-and-money>.

achieved and over 560% over what President Clinton was able to achieve over a two-year period.<sup>17</sup>

The two most recent Reports claim to have somehow achieved \$260 billion in net benefits for the last two years. Despite representing these claims in large colored graphs for two years running and verbally exhorting this performance,<sup>18</sup> OMB quietly assures us that these tables are “designed to be illustrative rather than definitive, and continuing work must be done to ensure that estimates of this kind are complete and not misleading.”<sup>19</sup> One recommendation is that if OMB does not wish to be misleading, these comparisons should stop.

Most of the benefits reported this year come from two rules, the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Coal- and Oil-Fired Electric Utility Steam Generating Units<sup>20</sup> and Corporate Average Fuel Economy (CAFE) standards.<sup>21</sup> With the former, most of the benefits are due to reductions in particulate matter.<sup>22</sup> EPA notes some uncertainty about these benefits, because of the assumption that all fine particles are equally potent in causing premature mortality and the fact that the reported levels are at the low end of the concentration distributions

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<sup>17</sup> In 2012 and 2013, President Clinton had net benefits of \$14 and \$30 billion; President Bush had net benefits of \$3.4 and \$60 billion, while President Obama claimed net benefits of \$91.3 and \$159 billion.

<sup>18</sup> Sunstein, “Making Regulation Smarter.”

<sup>19</sup> 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, page 29.

<sup>20</sup> Federal Register, “National Emission Standards for Hazardous Air Pollutants (NESHAP) for Coal- and Oil-fired Electric Utility Steam Generating Units; Notice of Proposed Rulemaking,” proposed rule, Fed. Reg (2013): 2013-15146

<sup>21</sup> Federal Register, “Corporate Average Fuel Economy standards, ‘2017 and Later Model year Light-duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Final Rule” 77 Fed. Reg. (2012), 63149–63187.

<sup>22</sup> Office of Management and Budget, *Draft 2013 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2012), pp. 14–15, [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013\\_cb/draft\\_2013\\_cost\\_benefit\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf).

— but fails to note that there may be no mortality response at these levels.<sup>23</sup> This uncertainty about the effects of reducing particulate matter ought to be sufficient reason to refrain from making any point-estimate claims about benefits for these regulations.<sup>24</sup>

The underlying assumption resulting in estimating benefits (in the CAFÉ and other energy rules) associated with government perceptions of irrational choices by consumers and firm managers are also questionable.<sup>25</sup> In Latin, the concern is that *beneficium invite non datur* (A benefit cannot be bestowed on an unwilling person). This year, the agency reports \$1.05 billion in benefits from energy efficiency standards for fluorescent lamps, \$1.13 billion from energy standards for residential clothes washers, \$9.2 billion from fuel standards for cars and trucks and \$28.8 billion from greenhouse gas and CAFE Standards for light-duty vehicles.<sup>26</sup> A very small proportion of the benefits of these rules are from improvements in environmental quality. Most of the benefits accrue from the government’s view of how consumers and firms should *rationaly* choose products based on their energy efficiency relative to other product characteristics. However, the agencies did not present evidence demonstrating that consumers were actually behaving irrationally.<sup>27</sup> Given that energy efficiency is only one attribute of products that consumers put into the equation when deciding on a purchase, this evidence should be fairly difficult to provide. In fact, the assumption that consumers are “better equipped than analysts or

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<sup>23</sup> Federal Register, “National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units,” 78 Fed. Reg. (2013): 24073–24094.

<sup>24</sup> Louis Anthony Cox, “Miscommunicating Risk, Uncertainty and Causation: Fine Particulate Air Pollution and Mortality Risk as an Example,” *Risk Analysis* 32, no. 5 (2012): 765–67.

<sup>25</sup> See, for example, Ted Gayer and W. Kip Viscusi, “Overriding Consumer Preferences with Energy Regulations” (Working Paper No. 12-21, Mercatus Center at George Mason University, Arlington, VA, July 2012), [http://mercatus.org/sites/default/files/Energy\\_regulations\\_GayerViscusi\\_WP1221\\_1.pdf](http://mercatus.org/sites/default/files/Energy_regulations_GayerViscusi_WP1221_1.pdf).

<sup>26</sup> Appendix A, 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, pp. 77-82.

<sup>27</sup> Gayer and Viscusi, “Overriding Consumer Preferences.”

policymakers to make market decisions that affect themselves” is supported by “much empirical evidence.”<sup>28</sup> Overriding consumer preferences is a cost, not a benefit, and should be treated as such.

#### IV. Danger of Excessive Regulation

The first OMB Report to Congress on the Benefits and Costs of Federal Regulations was produced in 1997. In that Report, OIRA discussed the creation of many of the regulatory agencies and noted that

The consequence of the long history of regulatory activities is that Federal regulations now affect virtually all individuals, businesses, State, local, and tribal governments, and other organizations in virtually every aspect of their lives or operations.<sup>29</sup>

OIRA noted that “regulations (like other instruments of government policy) have enormous potential for both good and harm ... [but].... Excessive or poorly designed regulations ... can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity and accidentally distort private incentives.”<sup>30</sup>

OMB has reported on some of these issues in previous Reports, but not so much on the problem of excessive regulations. Concern about excessive numbers of regulations appears to have been ignored. In fact, rather than reducing the rates at which regulations are issued, the opposite has

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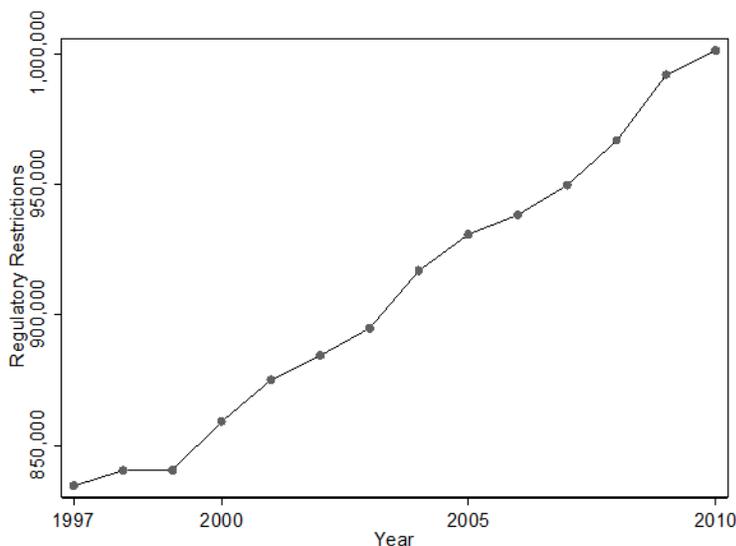
<sup>28</sup> Ibid., pp. 6-7

<sup>29</sup> Office of Management and Budget, *1997 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 1997), [http://www.whitehouse.gov/omb/inforeg\\_chap1](http://www.whitehouse.gov/omb/inforeg_chap1).

<sup>30</sup> Ibid.

occurred. In the 15 years prior to 1997, when OIRA expressed its concern about excessive (and poorly designed) regulations, the federal government produced 370,135 final rules.<sup>31</sup> In the 15 years since 1997, the federal government has produced 546,414 regulations, a 155% increase. Counting “regulations” in terms of the actual requirements within each rule, such as instructions that someone “must” or “shall” do or refrain from doing something, the recent growth in these requirements, as depicted in Figure 2, is alarming.

**Figure 2: The trend of federal regulation, 1997–2010<sup>32</sup>**



The analytical requirement for prospective individual regulations began with the Army Corps of Engineers in 1936, and was formalized for all agencies with President Nixon’s Quality of Life Review in October 1971.<sup>33</sup> Although comprehensive reviews of individual regulations were being conducted, there was not much concern about existing regulations. That may have been

<sup>31</sup> Federal Register Rules Published (1936-2002).

<sup>32</sup> Omar Al-Ubaydli and Patrick A. McLaughlin, “The Industry-Specific Regulatory Constraint Database (IRCD): A Numerical Database on Industry-Specific Regulations for All U.S. Industries and Federal Regulations, 1997–2010” (Working Paper No. 12-20, Mercatus Center at George Mason University, Arlington, VA, July 2012), [http://mercatus.org/sites/default/files/IRCD\\_McLaughlinUbaydli\\_v1-0\\_0.pdf](http://mercatus.org/sites/default/files/IRCD_McLaughlinUbaydli_v1-0_0.pdf).

<sup>33</sup> Jim Tozzi, “OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding,” *Administrative Law Review* 63, no. 37 (2011): 44.

because regulatory activity was not as great in 1971 as it has been since then. In the 35 years of Federal Register (FR) activity preceding 1971, the FR published an average of 12,281 pages per year (total 429,844).<sup>34</sup> In the 40 following 1972, the FR has published an average of 67,329 pages per year (total 2,692, 832), an increase of about 550%. In 2012, there were 78,961 pages in that year's FR, which would have been about 6 ½ years of pre-1971 activity.

There are a number of costs associated with the presence of excessive rules. For example, as identified by Nichols and Wildavsky 25 years ago, the idea that more rules equals more safety, a so-called "linear notion," has not always proven to be the case.<sup>35</sup> For example, additional rules were a major contributor to the Chernobyl nuclear power accident, and excessive rules put similar safety strains on the Three Mile Island nuclear facility. A more recent paper by two industrial psychologists and an economist finds that an excessive number of detailed, prescriptive rules can cause firm managers and workers to become robotic rule followers who no longer attempt to solve new problems.<sup>36</sup> Third, as OIRA itself noted in the first of these annual documents, back in 1997, "Some regulations are critically important (such as safety criteria for airlines or nuclear power plants); some are relatively trivial<sup>37</sup> (such as setting the times that a draw bridge may be raised or lowered). But each has the force and effect of law and each must be taken seriously."<sup>38</sup> This means that neither firms nor government inspectors can prioritize rules according to their importance or efficacy.

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<sup>34</sup> "Federal Register Pages Published," Office of the Federal Register, <https://www.federalregister.gov/uploads/2013/05/FR-Pages-published.pdf>

<sup>35</sup> Elizabeth Nichols and Aaron Wildavsky, "Does Adding Safety Devices Increase Safety in Nuclear Power Plants," in *Searching for Safety*, ed. Aaron Wildavsky, (Piscataway, NJ: Transaction Publishers, 1988), 128.

<sup>36</sup> Andrew Hale, David Borys and Mark Adams, "Regulatory Overload" Mercatus Working Paper, Nov. 28, 2011.

<sup>37</sup> For an example of one that is trivial, see the Food and Drug Administration's "Requirements for Specific Standardized Canned Vegetables" at 21 CFR, part 155, sect. 120.

<sup>38</sup> OMB, *1997 Report to Congress*, p. 2.

Health and safety may also be affected both with individual rules and by the accumulation of rules when unintended consequences fail to be analyzed. Despite OMB's discussion of "ancillary benefits and countervailing risks" in Circular A-4, there does not always seem to be a general acceptance by the agencies that they should pay careful attention to risk/risk trade-offs.<sup>39</sup> This means that we do not know not only when health and safety benefits may be smaller than estimated, but that perhaps different populations are placed at risk and those countervailing risks may actually lead to more societal risk overall.

## V. Recommendations

If this Report is to be truly helpful at giving "a more complete picture of the regulatory system," there are some additions that would be helpful, specifically

- (1) The effect of regulations on particular industries and, where applicable, regions (states and localities), in the present and in past years;
- (2) A better assessment of the extent, the quality, and the extent of use of regulatory impact analyses;
- (3) A better assessment of the benefits of rules that are likely to be suspect;
- (4) The unintended consequences of excessive rules and the progress made at eliminating rules, particularly in areas identified in (1);
- (5) Laws whose implementation has resulted, or is likely to result, in regulations that are unlikely to have benefits exceeding costs; and,

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<sup>39</sup> Office of Management and Budget, "Circular A-4," (2003), [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4](http://www.whitehouse.gov/omb/circulars_a004_a-4).

- (6) Recommendations for reform of the 65-year-old Administrative Procedure Act that will help make more efficient regulations and achieve some of the goals of the Consolidated Appropriations Act.

These ideas are discussed in detail below:

- (1) The effect of regulations on particular industries and, where applicable, regions (states and localities), in the present and in past years

As mentioned above, agencies are required by Executive Order 12866 to supply OIRA with costs on states and localities as well as individual industries. OIRA could report on regions and industries that have had particularly high combined regulatory costs from all agencies. Keeping data this way may make it possible for OIRA to work with agencies to stagger compliance dates to prevent overwhelming regions or industries in any single time period.

RegData (mentioned earlier) can give a picture of industries that are subject to the largest number of regulatory requirements in recent years.<sup>40</sup> In addition, there are some studies now available that can help give a more complete picture of the how regulations impact individual industries and regions. This would be more specific than, for example, the chapter on regulations and manufacturing in the 2004 Report.<sup>41</sup> Two recent papers that

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<sup>40</sup> RegData is a tool produced by the Mercatus Center that quantifies regulatory restrictions on industries and can be found here: <http://regdata.mercatus.org/>

<sup>41</sup> Office of Management and Budget, *Informing Regulatory Decisions: 2004 Draft Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2004), pp. 52–57, [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/draft\\_2004\\_cbreport.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/draft_2004_cbreport.pdf).

could serve as models detail the impacts on airlines and the pulp and paper industry.<sup>42</sup> If OMB were to signal that it will begin including these types of papers in its annual Report, it is likely that they would generate the incentive for those most affected to produce this type of research. This could lead to special efforts to reduce the burden on those industries and regions most severely impacted.

(2) A better assessment of the extent, the quality, and the extent of use of regulatory impact analyses

For the last five years, the Mercatus Center has had an ongoing project, the Regulatory Report Card, which examines the quality and the extent of use of RIAs. It is freely available on the web at <http://mercatus.org/reportcard>. OMB could reproduce a chart each year similar to that shown above, showing the number of rules with monetized benefits and costs relative to all rules that year. Reporting these problems in one section is one way to show that our current system is not generating a sufficient amount of high quality analysis in order to make good regulatory decisions. Properly armed with this information, Congress can act to improve this outcome.

(3) A better assessment of the benefits of rules that are likely to be suspect

OMB has highly trained economists who sometimes spend months reviewing individual rules and are well aware of major rules whose benefits are not likely to be as the agencies portray them. Obviously, for political reasons OMB cannot always return these rules to the agencies. Nevertheless, there are many independent sources which may have reached

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<sup>42</sup> Button, Kenneth, "Ongoing Government Failures in Air Transportation," (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, May 17, 2012), <http://mercatus.org/sites/default/files/Ongoing-Government-Failures-In-Air-Transportation.pdf>; Colleen Haight and Derek Thieme, "Regulation in the Pulp and Paper Industry: Costs and Consequences," (Working Paper No. 12-16, Mercatus Center at George Mason University, Arlington, VA, May 2012), <http://mercatus.org/sites/default/files/Regulations-Pulp-Paper-Industry.pdf>; and Peter Van Doren, "A Brief History of Energy Regulations," (Cato Institute, Washington, DC, February 2009), <http://www.downsizinggovernment.org/energy/regulations>.

different conclusions. The OMB can include these independent studies in the Reports, because they are already in the public sphere. For example, *Risk Analysis* has recently published studies suggesting that the benefits of National Ambient Air Quality Standards may be negligible.<sup>43</sup> Similarly, Gayer and Viscusi have a paper that highlights the problems with the benefits of energy regulations.<sup>44</sup> OMB should include these studies along with the agency reports of benefits to give a more complete picture.

There are also papers that demonstrate that the benefits of entire programs might indicate that we should go in different directions. For example, a recent working paper examined how successful OSHA has been in reducing workplace injuries over the course of its entire history.<sup>45</sup> The conclusion of the paper was that, “Workplace fatalities and nonfatal injuries have fallen since 1970, but the downward trend in fatalities began in the 1930s and the drop in nonfatal injuries started in the 1990s, unrelated to any change in OSHA activities. The decline has been driven less by OSHA and more by changes in the industrial structure of the American workforce, technological improvements, and expanded financial incentives facing firms to eliminate hazards.”<sup>46</sup>

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<sup>43</sup> Cox, “Miscommunicating Risk,” pp. 765–767. For another example of a critique of benefit estimates, see Anne Smith, “Summary and Critique of the Benefits Estimates in the RIA for the Ozone NAAQS Reconsideration,” (private report, NERA Economic Consulting, Washington, DC, July 22, 2011).

<sup>44</sup> Ted Gayer and W. Kip Viscusi, “Environmental Benefits of Energy Regulations are Negligible,” Mercatus Center, August 2, 2012, <http://mercatus.org/publication/environmental-benefits-energy-regulations-are-negligible>; Ted Gayer and W. Kip Viscusi, “Overriding Consumer Preferences with Energy Regulations,” *Journal of Regulatory Economics* 43, no. 3 (2013).

<sup>45</sup> John D. Leeth, “OSHA’s Role In Promoting Occupational Safety and Health” (Working Paper No. 12-34, Mercatus Center at George Mason University, Arlington, VA, November 2012), [http://mercatus.org/sites/default/files/OSHA\\_Leeth\\_v1-0.pdf](http://mercatus.org/sites/default/files/OSHA_Leeth_v1-0.pdf).

<sup>46</sup> *Ibid.*, p. 69.

Similarly, my recent paper examining the FDA's role in making food safe in the United States finds that "The FDA has continued to use the same tools as it did over 100 years ago to try and make food safer but, eventually, it will become obvious to even the most dedicated supporters of food-safety regulation that we cannot make food safer by continuing centuries-old practices."<sup>47</sup> This paper essentially suggested that trying to make further improvements by government regulation were not likely to be successful, and that using enhanced trace backs were much more likely to create incentives to keep food safe. A similar paper is forthcoming from the Mercatus Center on the Department of Transportation.

(4) The unintended consequences of excessive rules and the relative progress made at eliminating rules, particularly in areas identified in (1)

OMB should not just report those rules that have been eliminated, but report them relative to the baseline of how many rules have been added and how many rules are in existence. They should be able to point out rules that, subsequent to their promulgation, have been shown to have unintended consequences and should be considered for termination.<sup>48</sup>

(5) Laws whose implementation has resulted, or is likely to result, in regulations that are unlikely to have benefits exceeding costs.

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<sup>47</sup> Richard Williams, "A New Role for the FDA in Food Safety," (Working Paper No. 12-69, Mercatus Center at George Mason University, Arlington, VA, November 2010), p. 1,

<http://mercatus.org/sites/default/files/publication/wp1069-a-new-role-for-the-fda.pdf>.

<sup>48</sup> See, for example, Sherzod Abdulkadirov, "The Unintended Consequences of Safety Regulation," (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, June 3, 2013), [http://mercatus.org/sites/default/files/Abdulkadirov\\_UnintendedConsequences\\_v1.pdf](http://mercatus.org/sites/default/files/Abdulkadirov_UnintendedConsequences_v1.pdf).

The European Union and Congress have generally different requirements for laws and regulations. As Cavan O'Connor Close and Dominic Mancini have written “Whereas in the US an IA [Impact Assessment] is produced in order to find the most efficient way of implementing laws passed by Congress in the form of a rule or a regulation, a [European] Commission IA serves mainly to inform policy makers when deciding on what sort of legislative or non-legislative proposal to make.”<sup>49</sup> That is, in the U.S. we do economic impact assessments on regulations; in Europe, they are done on laws.

However, OMB has always insisted that agencies should identify and analyze regulatory options that might suggest changes in current laws to provide for more efficient solutions.<sup>50</sup> In the absence of impact analysis done prior to legislating, the only impact analysis for solving social problems is now done at the agencies. Therefore, OMB should stress even more strongly that agencies must consider all regulatory options, including ones that would require statutory changes, to find the most efficient one. Circular A-4 notes that, “You should also discuss the statutory requirements that affect the selection of regulatory approaches. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, you should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.”<sup>51</sup>

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<sup>49</sup> Cavan O'Connor Close and Dominic J. Mancini, “Comparison of US and European Commission Guidelines on Regulatory Impact Assessment/Analysis” (Industrial Policy and Economic Reforms Paper No. 3, Enterprise and Industry Directorate — General European Commission), [http://ec.europa.eu/enterprise/newsroom/cf/\\_getdocument.cfm?doc\\_id=4188](http://ec.europa.eu/enterprise/newsroom/cf/_getdocument.cfm?doc_id=4188).

<sup>50</sup> See OMB, “Circular A-4”: “When a statute establishes a specific regulatory requirement and the agency is considering a more stringent standard, you should examine the benefits and costs of reasonable alternatives that reflect the range of the agency’s statutory discretion, including the specific statutory requirement.”

<sup>51</sup> OMB, “Circular A-4.”

OMB, representing the president, has the obligation to present to Congress those statutes that do not address real systemic problems or whose regulations may only be done in ways where costs exceed their benefits.

(6) Recommendations for reform of the 65 year old Administrative Procedures Act that will help make more efficient regulations and achieve some of the goals of the Consolidated Appropriations Act.

In the original Right-to-Know Act, as mentioned earlier, OMB was charged with making recommendations for reform. In some years, particularly recently, OMB has made extensive recommendations. These recommendations generally focus on improving the review process, using better analytics, or improving specific programs. With respect to the review process, OMB wrote a response to the following comment: “*Congress should pass a law requiring that all regulatory agencies comply with OIRA guidelines when analyzing the impact of economically significant regulations.*” OMB responded, “If such analyses were conducted in accordance with OIRA guidance and related agency guidance, these analyses could be made more comparable and useful. We agree that this is a promising idea, subject to the qualification that we are able periodically to revise the guidelines to reflect advances in the state of the art. In addition, the resource implications for agencies need to be considered.”<sup>52</sup> Other process recommendations include methods for more effective communication on rules with stakeholders,<sup>53</sup> use of external peer

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<sup>52</sup> Office of Management and Budget, *Making Sense of Regulation: 2001 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2001), p. 57, <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/costbenefitreport.pdf>.

<sup>53</sup> *Ibid.*, pp. 43–44; Office of Management and Budget, *2010 Report to Congress on Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2010), p. 50, [http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010\\_Benefit\\_Cost\\_Report.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf).

review,<sup>54</sup> OMB review of guidance documents,<sup>55</sup> advance consultation with OMB on rule development,<sup>56</sup> and use of simpler, clearer language in regulations and analysis.<sup>57</sup>

With respect to improving the analytics used, OMB wrote in 2002 of “the need for use of methods of risk assessment that supply central estimates of risk as well as upper and lower bounds on the true yet unknown risks,” adding that “agency analyses should be transparent about data, methods, and assumptions so that analytic results are substantially reproducible.”<sup>58</sup> Yet OMB also suggests that “if we must conclude review of new rules with substandard analyses (e.g., due to judicial or statutory deadlines), we will, when appropriate and constructive, publish a technical critique of such analyses.”<sup>59</sup> OMB also has general recommendations for use of sound science based on the evidence, including risk assessment, benefit-cost analysis, and validating benefit-cost analysis with ex post analysis.<sup>60</sup>

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<sup>54</sup> OMB, *2001 Report to Congress*, pp. 45–46; Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2002), p. 20, [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002\\_report\\_to\\_congress.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf); Office of Management and Budget, *Informing Regulatory Decisions: 2004 Draft Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2004), 52–57; OMB, *2010 Report to Congress*, p. 60; Office of Management and Budget, *2011 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2011), pp. 76–77, [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011\\_cb/2011\\_cba\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf); Office of Management and Budget, *2012 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2012), pp. 85–86, [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012\\_cb/2012\\_cost\\_benefit\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf).

<sup>55</sup> OMB, *2001 Report to Congress*, pp. 39–43, 44–45; OMB, *2002 Report to Congress*, pp. 72–74.

<sup>56</sup> OMB, *2001 Report to Congress*, pp. 43–44.

<sup>57</sup> OMB, *2012 Report to Congress*, pp. 74–75; OMB, *2010 Report to Congress*, p. 51; and OMB, *2013 Draft Report to Congress*, pp. 57–58.

<sup>58</sup> OMB, *2001 Report to Congress*, p. 50.

<sup>59</sup> *Ibid.*, p. 56.

<sup>60</sup> OMB, *2001 Report to Congress*, pp. 49–51; Office of Management and Budget, *Validating Regulatory Analysis: 2005 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2005), 41–49, [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005\\_cb/final\\_2005\\_cb\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2005_cb/final_2005_cb_report.pdf);

As to specific programs, in 1998 OMB concluded, “At this stage we do not believe we have enough information to make definitive recommendations on specific regulatory programs based on the incomplete and uneven data that we discuss at length above. However, agencies are continuing to reform and improve their regulatory programs.”<sup>61</sup> OMB should have information by now that will allow them to recommend programs that are not now, and are not likely in the future, to produce regulations whose benefits exceed their costs.

### Conclusion

Congress has asked for a complete picture of the regulatory system in these annual Reports. Instead of making claims about the how well each administration is doing with respect to the benefits and costs of their rules each year (which claims are not justified given the current state of analysis), OMB could emphasize the particularly difficult effects on regions and industries, where the analysis is falling short, which programs should be modified or eliminated, and how Congress can act to improve the regulatory system. They should also identify, not just current burdens, but also cumulative burdens of rules that might suggest either regions or industries where particular attention should be paid to reducing the regulatory burdens.

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Office of Management and Budget, *2009 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 2009), p. 55, [http://www.whitehouse.gov/sites/default/files/omb/assets/legislative\\_reports/2009\\_final\\_BC\\_Report\\_01272010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/2009_final_BC_Report_01272010.pdf); OMB, *2010 Report to Congress*, p. 55; OMB, *2011 Report to Congress*, p. 58; OMB, *2012 Report to Congress*, p. 76; Exec. Order No. 13,563, 3 C.F.R., 2011.

<sup>61</sup> Office of Management and Budget, *Informing Regulatory Decisions: 1998 Report to Congress on Benefits and Costs of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: OMB, 1998), chapter 4, <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/costbenefitreport1998.pdf>.