



August 27, 2014

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

**RE: Docket ID OMB–2014–0002–Draft 2014 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 2014 Report to Congress (2014 Report). We would like to highlight our findings from an independent analysis of the data for final rules published in FY 2013:

- Based on the American Action Forum’s (AAF) analysis of all final rules issued in FY 2013 that quantified costs (310) and benefits (18), annualized costs were \$7.2 billion and annualized benefits were \$33.5 billion (in 2001 dollars).
- The 2014 Report appears to have omitted two “major” rules (0938-AR16 and 0938-AR14) issued on November 21, 2012. In addition, “Definition of Form I-94” (1651-AA96) has benefits exceeding \$100 million, should be deemed major, and therefore listed in the 2014 Report.
- Retrospective Review: Previously, OIRA has sought to “facilitate the continuing institutionalization of regulatory lookback.” However, the Government Accountability Office (GAO) has noted, “the ease of finding review plans ... varied across agencies.” OMB could consider placing all retrospective review updates in a central location or ensure that all agencies place reviews on their Open Government websites.
- Consistent with the Regulatory-Right-to-Know Act’s call for the study of small business impacts, future reports could list the regulations that will impose a “significant economic impact on a substantial number of small entities.” Currently, there is no database with regulations triggering the Regulatory Flexibility Act (RFA), and as OIRA admits, the evidence “remains less than clear.”

*FY 2013 Audit*

According to OIRA estimates, seven rules monetizing costs and benefits generated \$25 billion to \$67 billion in benefits and \$2 billion to \$2.5 billion in costs (in 2001 dollars). Based on a review of 310 final rules issued during FY 2013, AAF found



\$7.2 billion in annualized costs and \$33 billion in benefits. Although the benefit range is within OIRA’s estimates, costs are roughly three times higher.

**Costs and Benefits of 310 Federal Rules**

<b>AAF Analyzed Rules from FY 2013</b>	<b>Billions of 2001 dollars</b>	<b>OIRA Benefit-Cost Range as Percentage of AAF Total</b>
Total Costs	\$7.2	31%
Total Benefits	\$33	100%

As discussed in earlier reports, this discrepancy results from the methodology that compares rules with an economic threshold greater than \$100 million that monetize both costs and benefits. AAF found that the seven rules that OIRA highlighted produced \$2.3 billion in costs and \$30 billion in benefits, well within the ranges provided in Table 1-5. However, including all final rules that monetized costs and benefits, including measures that cut costs, 310 rules included costs and 18 rules monetized benefits. Thus, the benefit figure does not diverge from OIRA’s data, but the cost figure is only 31 percent of the total.

The FY 2013 report states, “[T]he 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.” However, examining only agencies subject to OIRA review yields \$5.9 billion in costs and \$33 billion in benefits. Thus, the cost of major rules is not the majority “of all rules subject to OMB review.” In fact, it is roughly 38 percent of all cabinet agency rules and this figure drops further if independent agencies are included.

If we eliminate the \$100 million economic threshold and compare the 18 rules that monetize both costs and benefits, costs total \$2.6 billion, compared to \$33.5 billion in benefits (in 2001 dollars). Again, costs are slightly higher than OIRA reports, whereas benefits are within the range provided in Table 1-5.

Whether the universe is seven rules or 18, it is clear that there are significant costs that are often underreported. There are seven other regulations with monetized costs above \$100 million annually, though not all are subject to OIRA review. Combined, they could impose more than \$3 billion in costs. Although these rules do not monetize benefits, their costs exceed the seven that received heightened scrutiny in the 2014 Report.

In FY 2012, major rules that monetized both costs and benefits accounted for roughly two-thirds of overall costs, compared to less than one-third in FY 2013. In the future, it might prove useful to examine whether major rules that omit benefit figures actually impose higher costs than the major rules that monetize both. This



is less of a concern in years with several notable rules with high costs and benefits because these measures will likely comprise the majority.

### *November 21, 2012 Rules*

According to GAO's Major Rule Database, there were two rules published on November 21, 2012 that do not appear in OIRA's Report. One rule for Monthly Actuarial Rates ([0938-AR16](#)) was listed as non-major by [OIRA records](#), but GAO records the rulemaking as [major](#). In addition, the most recent [Unified Agenda listing](#) notes the rule is both major and economically significant.

Inpatient Hospital Deductibles (0938-AR14) was the second rule published on November 21, 2012 that GAO listed as [major](#). The [Unified Agenda](#) entry also declared the rule as both major and economically significant, but OIRA did not list it in the 2014 Report.

Is it possible that OIRA excluded both major rules because they were notices? There does not appear to be a discussion in the draft 2014 Report or the final 2013 Report about omitting notices that are also major rules. OIRA states that the methodology adopted in its draft Report will include rules "that meet any one of the following three conditions: Rules designated as major ... Rules designated as meeting the analysis threshold under the Unfunded Mandates Reform Act ... Rules designated as 'economically significant' under section 3(f)(1) of Executive Order 12866." Since both measures were designated as major to GAO, it would appear that 0938-AR14 and 0938-AR16 satisfy at least one of the three conditions and should be included in the 2014 Report.

### *Definition of Form I-94 (1651-AA96)*

According to [OIRA](#) and [GAO](#) records, "Definition of Form I-94" is non-major, but there is no discussion of major rule status and the text only states that the measure is a "significant regulatory action" under section 3(f) of Executive Order 12866," omitting any mention of section 3(f)1. However, the rule imposes substantial costs and its economic significance eclipses \$100 million annually.

According to the text of the rule, "[B]enefits for this rule for 2013 would range from \$110.7 million to \$155.6 million. In our primary estimate, the benefits of this rule would be \$129.5 million in 2013." (78 FR 18,467) The central I-94 "time savings" calculation is also consistently above \$100 million annually from 2013 to 2016. It appears that the benefits of the rule do rise to economically significant and major rule status. AAF recommends including this rule in the 2014 Report or



clarifying its status under Executive Order 12,866 and the Congressional Review Act.

### *Retrospective Review*

The 2014 Report specifically asks for comment on the administration's retrospective review efforts. As OIRA does with other major rulemakings, listing major efforts under Executive Orders 13,563 and 13,610 in table format might better communicate these efforts to the public. For example, the Department of Education recently reduced annual paperwork burdens by "approximately \$109 million," with a corresponding four million hour reduction (78 FR 65,783).

Other measures that reduced costs and burden hours on private entities or local governments could also be included in a transparent format. For FY 2013, AAF found 13 rules that reduced costs and 12 that cut paperwork.

When the Government Accountability Office (GAO) studied the administration's retrospective review efforts, it noted difficulties finding all of the plans. Although AAF recognizes this is an agency-driven initiative now, even GAO found it difficult to find the EO 13,610 plans. They noted, "[T]he ease of finding review plans and the comprehensiveness of the plans varied across agencies...The White House web page, which posts a compiled list of agency plans, did not always include agencies semiannual progress reports showing the outcomes and progress of analyses."

In the future, it would be helpful if agencies coordinated a central place to post their semiannual progress reports. Agencies should at least be able to post plans on their Open Government sites, rather than placing them in their websites or somewhere on regulations.gov.

Finally, former OIRA Administrator Cass Sunstein [issued a memo](#) on paperwork in 2012 with the goal of eliminating two million hours or more for agencies that "now impose high paperwork burdens" and at least 50,000 hours for all other agencies. The goal of the memo was to fulfill the mission of EO 13,610 by achieving "significant quantifiable reductions in paperwork burdens." However, after more than two years of implementation, it does not appear that all agencies have succeeded. The chart below tracks the daily paperwork fluctuations in 2013.



## Cumulative Paperwork Hours in 2013



Rather than cutting burden hours, agencies added more than 157 million hours. Part of this increase could have come from independent agencies, but even burdens from administrative agencies grew. In its effort to achieve the goals of EO 13,610, does the administration plan to ensure every agency reduces paperwork by 50,000 hours? If every cabinet-level agency met this goal, it would save roughly 800,000 burden hours, or 0.007 percent of the nation’s 10.3 billion hour total. The more ambitious goal of two million hours saved would generate approximately 32 million hours in savings, or 0.3 percent of the aggregate total.

Full implementation of former Administrator Sunstein’s 2012 memo could save millions of hours of paperwork and produce substantial monetary savings for individuals, businesses, and local governments. Although there have already been major strides to reduce paperwork by some agencies, it appears that government-wide efforts have not reduced aggregate burdens.

### *Small Business Impacts*

The 2014 Report takes special care to acknowledge the impacts of regulation on small businesses. However, it concedes, “The empirical evidence of the effects of regulation on small businesses remains less than clear.” Under the Regulatory Flexibility Act, agencies must merely certify whether a rule would impose a “significant economic impact on a substantial number of small entities” (SISNOSE) and conduct an analysis. Yet, there is no dataset available to analyze all rules that impose a SISNOSE. OIRA does provide a search function to determine if a RFA analysis is required or if small entities would be affected.



For FY 2013, AAF found at least five rules that will impose a SISNOSE, compared to 38 rules where a RFA analysis was required. Below are the five rules with their corresponding Regulation Identifier Numbers (RINs).

<u>Regulation</u>	<u>RIN</u>
Unique Device Identification	0910-AG31
Changes to Prospective Payment System for FY 2014	0938-AR53
Gluten-Free Labeling of Foods	0910-AG84
Reimbursement of Sole Community Hospitals	0720-AB41
Hospital Outpatient Prospective Payment System	0938-AR10

In the future, it might be helpful to display the major rules that impose a SISNOSE for the purpose of transparency. There are hundreds of analyses under the RFA annually, but no central dataset of rules that actually trigger a SISNOSE.

In conclusion, we appreciate the opportunity to comment on this draft report. Should OIRA require additional information, please contact us at 202-559-6420.

Sincerely,

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