

# THE PRICE OF REGULATION: RETHINKING EXECUTIVE REVIEW OF AGENCY RULEMAKING

*David R. Sheaffer*\*

2016 MICH. ST. L. REV. 1091

## ABSTRACT

*“No regulation is ‘appropriate’ if it does significantly more harm than good.” Michigan v. EPA, 135 S. Ct. 2699, 2707 (2015).*

*Most federal regulations are well intended, but many also create substantial economic hardships. Charged with balancing the costs and benefits of potential regulatory actions is the Office of Information and Regulatory Affairs (OIRA). Since its creation through an executive order, OIRA diligently subjected the most significant proposed regulations to rigorous cost–benefit analysis. However, cost assessment rarely begins until substantial resources have been expended and the regulations are near completion. If the right balance is not found, the courts may strike the regulation down. To mitigate the potential waste of millions of dollars in promulgating rules that will never survive judicial review, economic and technological feasibility should be formally scrutinized at the pre-rule stage of deciding if regulation is appropriate. This Note proposes that such a goal can be accomplished by augmenting the executive review process through the issuance of a new executive order that (1) requires agencies and OIRA to analyze the feasibility of all economically significant pre-rule decisions of whether to regulate; and (2) lifts the shroud of secrecy surrounding OIRA by adding enforceable transparency requirements to the pre-rule review process.*

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\* Articles Editor, *Michigan State Law Review*; J.D. 2017, Michigan State University College of Law, B.S. 2011, Washington State University. The author would like to thank Professor Michael Sant’Ambrogio for his invaluable insight, wisdom, and advice throughout the research and publication process. The author would also like to thank the *Michigan State Law Review* editorial staff for their diligent efforts in reviewing this Note.

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## INTRODUCTION

Preceding nearly every federal action a simple question must be asked—how much will this decision cost? In the United States, federal adjudication and lawmaking predominantly occurs within administrative agencies.<sup>1</sup> The volume of legally binding decisions issued, cases heard, and people employed by administrative agencies dwarf all other branches of government.<sup>2</sup> The rules promulgated by these agencies significantly impact the daily lives of the nation’s citizens, businesses, and economy alike.<sup>3</sup> As such, it is hardly surprising that the process of administrative rulemaking has been a subject of continuous debate.<sup>4</sup> A frequent question that has arisen is when and how should agencies assess the cost of their regulatory actions?<sup>5</sup>

The regulatory actions of risk managers, like the United States Environmental Protection Agency (EPA), are often subjected to more frequent and rigorous scrutiny than other agencies.<sup>6</sup> The EPA’s mission is “to protect human health and the environment”;<sup>7</sup> however, compliance with EPA regulations imposes high economic and social

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1. See WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 131 (2014).

2. See *id.*

3. See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 9 (2008).

4. See *id.*

5. See *id.* (discussing the impacts of the debate surrounding cost assessment on regulatory policy).

6. See *id.* at 9-12.

7. *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do> [<https://perma.cc/E2XA-NECT>] (last visited Nov. 1, 2016).

costs.<sup>8</sup> While the EPA's rules and regulations have the greatest potential for economic and social benefit, its rules also carry the highest compliance costs.<sup>9</sup>

It seems obvious that the proper function of the regulatory state requires the cost of implementation and compliance with federal regulations to be considered at some point.<sup>10</sup> Statutory language may instruct agencies to weigh the costs against the benefits,<sup>11</sup> but in other instances, statutes are silent or ambiguous.<sup>12</sup> However, even where the statute is silent, Executive Order 12,866 often requires an agency to submit an assessment of the costs and benefits of a proposed rule for executive review prior to promulgation.<sup>13</sup> And, the recent decision in *Michigan v. EPA* demonstrates a lack of consensus regarding just how early agencies must weigh costs in the face of ambiguity.<sup>14</sup>

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8. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 13-14 (2014).

9. See *id.* An Office of Management and Budget (OMB) review of major federal rules from 2003 to 2013 estimated that these rules cost the nation between \$68.5 and \$101.8 billion. *Id.* at 9-11 (depicting the estimated costs and benefits of major federal rules in Table 1-1). Of those costs, 46% to 56% were associated with rules issued by the EPA. *Id.* at 11.

10. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate.”).

11. See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1216-17 (5th Cir. 1991) (stating § 6 of the Toxic Substance Control Act required the EPA to evaluate the costs and benefits of all permissible regulatory regimes for asbestos and choose the least burdensome option that would accomplish the desired result).

12. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 220-23 (2009) (holding that the requirement that standards for water cooling intake structures be achieved by “the best technology available for minimizing adverse environmental impact” could reasonably allow an evaluation of costs and benefits despite ambiguity) (citations omitted).

13. Exec. Order No. 12,866 § 6, 3 C.F.R. 638, 644-46 (1994), reprinted in 5 U.S.C. § 601 at 804-06 (2012) (providing the guidelines for centralized review of regulatory actions). The OMB is tasked with the review of costs analysis completed by agencies, but there appears to be a lack of consensus concerning the court's role when evaluating those cost-benefit analysis (CBA) during judicial review. Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 MICH. L. REV. 1708, 1728-29 (2002) (reviewing CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002) (critiquing the arguments regarding how courts should evaluate CBA during judicial review presented by Cass R. Sunstein in his article “*On the Costs and Benefits of Aggressive Judicial Review of Agency Action*,” 1989 DUKE L.J. 522)).

14. Compare *Michigan*, 135 S. Ct. at 2710-12 (holding the EPA acted unreasonably by interpreting the statute not to require consideration of costs when determining that further regulation was “appropriate and necessary”), with *id.* at

EPA regulations are frequently challenged on the grounds of whether the agency properly, or improperly, considered costs during the regulatory process.<sup>15</sup> In *Whitman v. American Trucking Ass'ns*, the Supreme Court held that the EPA is precluded from considering costs when emission standards are clearly set on the basis of an initial health-based risk assessment.<sup>16</sup> However, when a statute is silent, an agency may be required to weigh costs during its initial decision of whether regulations are needed.<sup>17</sup> In *Michigan v. EPA*, the Court affirmed the latter principle but stopped short of mandating a full cost-benefit analysis (CBA) or articulating specific guidelines for future analysis.<sup>18</sup> The Supreme Court's decision on February 10, 2016, to stay implementation of the EPA's Clean Power Plan suggests that the Court is hesitant to allow another economically significant rule to be implemented until its legality and fiscal merits are settled.<sup>19</sup>

Executive review—including review of an agency's CBA—usually occurs as a proposed rule approaches publication.<sup>20</sup> The legal community has long debated the merits of applying CBA to

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2725-26 (Kagan, J., dissenting) (arguing it was reasonable to defer consideration of costs to later stages of the rulemaking process).

15. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 462-64 (2001) (summarizing respondent's argument that the EPA should have considered the cost of compliance when setting NAAQS standards).

16. See *id.* at 469, 486 (holding the text of the statute precluded the agency from considering costs in the NAAQS setting process). Costs are “both so indirectly related to public health and so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ 108 and 109 had Congress meant it to be considered.” *Id.* at 469. The Supreme Court affirmed a more modest reading of *American Trucking* several years later. See *Entergy Corp.*, 556 U.S. at 223 (“American Trucking thus stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.”).

17. See *Michigan*, 135 S. Ct. at 2709-12.

18. *Id.* at 2711.

19. See Susan E. Dudley, *Supreme Court to EPA: Fool Me Once*, FORBES (Feb. 10, 2016, 8:37 AM), <http://www.forbes.com/sites/susandudley/2016/02/10/supreme-court-to-epa-fool-me-once/#21d3e0825901> [<https://perma.cc/4P4J-K536>] (suggesting that the Supreme Court wishes to avoid seeing another major rule essentially implemented and then struck down years later).

20. See Exec. Order No. 12,866 § 1(a), 3 C.F.R. 638, 638-39 (1994), reprinted in 5 U.S.C. § 601 at 802 (2012) (essentially meaning regulatory actions with an expected annual economic effect of at least \$100 million are subjected to rigorous CBA by the enacting agency, which is then reviewed by OMB).

regulatory actions generally.<sup>21</sup> Professor Eric Posner and others have extensively discussed the best methodology to apply during the review process,<sup>22</sup> while others, like Professor Jennifer Nou, have evaluated different models of statutorily mandated CBAs.<sup>23</sup> In light of *Michigan v. EPA*, the role and timing of a CBA should once again be analyzed.

This Note will not discuss whether CBA is a wise or beneficial regulatory tool. Rather, it assumes the need for some cost evaluation and focuses on the early stages of the regulatory process.<sup>24</sup> The forthcoming discussion asserts that cost assessment remains desirable in furthering the pre-rule phases of the rulemaking, and it puts forward the novel proposition that a feasibility standard should be uniformly applied to pre-rule decisions.<sup>25</sup> When a pre-rule regulatory decision is of potentially major proportion, the Office of Management and Budget (OMB) should assess the decision in accordance with the existing framework of Executive Order 12,866, but with a focus on whether sufficient regulation can feasibly be achieved.<sup>26</sup> By shifting the focus of this pre-rule analysis to the question of feasibility, the later development and cost assessment of final rules will become more efficient and reliable. However, for such a requirement to be effective, a new executive order should

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21. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

22. See generally Matthew D. Alder & Eric A. Posner, *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives: A Conference Sponsored by the John M. Olin Foundation and the University of Chicago Law School: Introduction*, 29 J. LEGAL STUD. 837, 838-42 (2000) (providing a brief summary of how academic discourse surrounding CBA is shifting toward empirical and pragmatic assessment of the application of CBA); REVESZ & LIVERMORE, *supra* note 3, at 9-12 (discussing perceived problems with the current application of CBA to federal rulemaking and proposing a new approach).

23. See, e.g., Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013). Indeed, there may be a variety of strategic reasons why an agency would choose to perform a formal CBA over less rigorous cost assessment, or what level of detail and quality the review will entail. See, e.g., Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1352 (2002).

24. See *infra* Part III (discussing the changes to executive review advocated by this Note).

25. See *infra* Subsection III.B.1 (discussing application of a feasibility standard to pre-rule agency actions).

26. See *infra* Section III.A (arguing the requirements of Executive Order 12,866 should already apply to significant pre-rule actions).

modify that structure to increase transparency and clarify its applicability to pre-rule decisions.<sup>27</sup>

Part I examines the complex academic discourse regarding CBAs, alternative methods of cost assessment, and the approaches courts have taken when reviewing agency cost assessment.<sup>28</sup> Part II discusses the use of executive orders to mandate cost assessment in rulemaking, as well as the application of that framework to the EPA.<sup>29</sup> Part III analyzes the applicability of Executive Order 12,866 to pre-rule agency actions, and it advocates for a new order that clearly requires cost assessment of significant pre-rule decisions and greater transparency.<sup>30</sup>

### I. COST-BENEFIT ANALYSIS, THE DEFAULT CORNERSTONE OF THE REGULATORY PROCESS

Much ink has been spilled in the last fifty years debating the use of policies grounded in neo-classical economics to guide the regulation of risks to health, safety, welfare, and even our environment.<sup>31</sup> Another significant portion of legal scholarship has focused on normative questioning of the propriety of CBA in the regulatory process.<sup>32</sup> However, as presidential acquiescence through executive orders and the forthcoming discussion of scholarly work

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27. See *infra* Subsection III.B.3 (advocating for increased disclosure and transparency requirements for OIRA). An essential element of increased transparency is a requirement that all communications between the Office of Information and Regulatory Affairs (OIRA), executive agencies, and interested outside parties concerning significant regulatory actions to be disclosed as they occur.

28. *Infra* Part I (examining existing academic commentary regarding cost analysis and prior cases).

29. *Infra* Part II (discussing the current executive review structure and process).

30. *Infra* Part III (applying a feasibility standard to review of pre-rule agency actions).

31. See *infra* Sections I.A, I.B (discussing work by various prominent scholars regarding the ongoing debate surrounding cost analysis of regulatory actions).

32. See, e.g., Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913 (2000) (taking a position in support of CBA against philosophical criticisms); Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Retaking Regulatory Review*, 65 U. MIAMI L. REV. 335 (2011) (engaging normative questions of the propriety of utilizing CBA to decide inherently moral questions, such as the valuation of human life).

and judicial decisions demonstrate, the contemporary discourse has progressed.<sup>33</sup>

### A. The Institutional Role of Cost Assessment

Despite its controversial roots, CBA is an increasingly accepted, and even essential, component of the regulatory scheme.<sup>34</sup> Academic discourse is now putting greater focus on the institutional role of CBA as a regulatory tool.<sup>35</sup> However, some argue that the federal government's embrace of CBA has been overly enthusiastic, causing it to disregard other tools of cost assessment like feasibility standards.<sup>36</sup> Coincidentally, as that argument has risen, courts have become less deferential to the substance and conclusions of agency CBA.<sup>37</sup>

#### 1. *A Nation Embracing the Cost-Benefit Approach*

The actions of nearly every president since Ronald Reagan, the day-to-day practice of regulatory agencies and the courts, and the growing literature of legal commentators, resoundingly demonstrate that the use of CBA is the gold standard of modern regulation.<sup>38</sup> Cost-benefit analysis requires, to the extent possible, quantification and comparison of the expected effects of regulatory action.<sup>39</sup> In theory, the regulations resulting from CBA applied as a procedure

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33. See *infra* Section I.A.

34. See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 19-20 (2002); Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 323-24 (2001).

35. See Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1140-42 (2001) (laying the foundation for a theory of CBA as a means for the executive to control the actions of regulatory agencies).

36. See, e.g., David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 6-8 (2005) (presenting the argument that the focus on CBA has erroneously overshadowed other viable cost assessment approaches such as technology-based feasibility standards).

37. See Posner, *supra* note 35, at 1137-38.

38. Compare SUNSTEIN, *supra* note 34, at 19-20 (making the case for widespread use of CBA but noting that as of 2002, it did not yet command complete social consensus as proper), with REVESZ & LIVERMORE, *supra* note 3, at 12-13 (accepting CBA as an "inevitable, but also . . . desirable" part of the regulatory process while laying the foundation for reforms in procedure and substance).

39. SUNSTEIN, *supra* note 34, at 20. These effects are broadly grouped into the categories of costs and benefits. *Id.*



and followed in substance—that benefits must outweigh costs—will be economically and socially efficient.<sup>40</sup> The CBA method is attractive to politicians and regulators alike because it provides transparency, logic, and a measure of accountability to regulatory decisions.<sup>41</sup> These principles do not, however, dictate when cost assessment should begin or its institutional role in the modern regulatory state.<sup>42</sup>

## 2. *Cost-Benefit Analysis and Executive Review as a Means of Control*

The use of CBA is most often praised as a means of ensuring efficiency of regulatory action; however, some argue the true purpose is to exert power over executive agencies.<sup>43</sup> A control theory is particularly relevant because the delegation of lawmaking authority to federal agencies represents a willing discharge of control over the regulatory agenda.<sup>44</sup> Control is created by giving the executive a means of blocking projects that are not in line with its own policy objectives, and it helps to decrease asymmetry in information and increase control of the agenda.<sup>45</sup> Therefore, CBA is likely to improve the efficiency of the final policy and regulatory results along a range of possible outcomes, even if the agency and president do not share common objectives.<sup>46</sup> Professor Posner, a key

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40. *Id.* at 20-21. “For most government action . . . the benefits do seem to exceed the costs. . . . But . . . a closer look at federal regulatory policy shows a wide range of problems[,] . . . [the] foremost is exceptionally poor priority setting, with substantial resources sometimes going to small problems, and with little attention to some serious problems.” Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1658 (2001).

41. SUNSTEIN, *supra* note 34, at 27-28.

42. *See id.*

43. *See, e.g.,* Nou, *supra* note 23, at 1758 (arguing executive review through OIRA provides a means by which the president can influence agency rulemaking, but may lead to agencies defensively insulating their reports); Posner, *supra* note 35, at 1140-41 (arguing the CBA’s are more accurately described as a means by which the president and Congress can control executive agencies).

44. *See* Posner, *supra* note 35, at 1142-43.

45. *Id.* at 1143.

46. *See id.* at 1162. This author utilized an equation of positive political theory to test a variety of possible policy outcomes regarding whether an agency would choose to utilize a CBA and how likely that analysis was to encourage acceptance by the executive. *See id.* at 1147-62. Factors such as the executive’s desire for an efficient outcome, the accuracy of CBA, and the costs of performing CBA were considered. *Id.* at 1162. The author concluded that the final outcome utilizing a CBA was always more efficient than without, unless (1) CBA was

proponent of the control theory, accepts and supports CBA but acknowledges that it may not always lead to the most efficient regulations.<sup>47</sup>

Professor Posner suggests that a preferable role for generalist courts would be to enhance the value of CBA by focusing on performance as a procedural matter, rather than scrutinizing the substance.<sup>48</sup> He offers several justifications, most of which tend to resonate with those explanations used to support deference to an agency's reasonable interpretation of statutory ambiguity.<sup>49</sup> A more hands-off approach for the courts maintains the prevalence of CBA as the gold standard for regulatory review, but restricts the judiciary to a gatekeeper abstaining from scrutinizing the substance of a rule.<sup>50</sup>

However, giving the executive primary authority over agency cost assessments also carries risks, which are heightened when agency staff and the executive do not share policy objectives.<sup>51</sup> Executive review by the Office of Information and Regulatory Affairs (OIRA)—a subdivision of the OMB—may not carry the same finality as a judicial decision, but rejection can still be very

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assumed inaccurate and expensive; or (2) CBA is highly accurate, but the president is more interventionist than is efficient. *Id.* The value of CBA is at its highest when the goals of the executive and Congress are in sync, while judicial enforcement is most valuable when the executive's policy objectives are also efficient. *See id.* at 1188-89. The author provided the following guiding principles stating that CBA becomes more desirable as:

- (1) The agency goals diverge from the principal's;
- (2) The principal's goal approximates efficiency; or it is less interventionist, or not too much more interventionist, than efficiency (if cost-benefit analysis is judicially enforced or if it serves as a precise signal);
- (3) The goals of components of the principal—the President, members of Congress—converge;
- (4) The regulated activity can be reliably monetized;
- (5) The difficulty of monitoring the agency increases;
- (6) The difficulty of sanctioning the agency or agency head declines.

*Id.* at 1189.

47. *Id.* at 1143.

48. *See id.* at 1192.

49. *See id.* at 1193. The primary justifications for the preference the court take a procedural rather than substantive stance on review can be summarized as follows: (1) Courts lack specialized expertise needed to independently determine valuation and discount rates; (2) demanding that agencies monetize unquantifiable costs or benefits is not desirable; (3) the ideal policy outcome of the agency and the principle help determine the level of scrutiny; and (4) the greater the political branch's ability to sanction the agency the less eager courts should be to punish or reverse agency decisions. *See id.*

50. *See id.*

51. *See generally* Nou, *supra* note 23.

costly and time consuming.<sup>52</sup> That agencies may intentionally insulate their regulatory actions from reversal by the judiciary is hardly surprising; however, evidence suggests agencies engage in similar insular actions in preparation for executive review.<sup>53</sup> Decisions made to insulate regulatory action can drastically alter the detail, substance, and value of a CBA.<sup>54</sup>

Because OIRA can effectively reverse or postpone a proposed rule by returning it to agencies for further consideration, executive review is taken very seriously.<sup>55</sup> Self-insulation, if misused, has the potential to undermine the value of any form of cost assessment.<sup>56</sup> In fact, an agency can utilize a number of strategies to “pad” its findings and regulatory decisions in order to survive review, some of which may avoid or influence agency cost assessment.<sup>57</sup> Self-insulation can force the resource-limited executive office to pick and

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52. *See id.* at 1758-59. The routine nature of executive review in rule promulgation also allows for it to be planned for, and agency reports and documentation to be catered to that review process. *Id.* at 1759.

53. *See id.* at 1757-58 (proposing that because agencies often face review by the executive before judicial review is even contemplated, those agencies consciously plan for survival of such review).

54. *See id.* at 1770 (“Administrative agencies are bureaucracies as traditionally conceived, and such bureaucracies have long been known to create routines and strategies for dealing with new requirements imposed upon them.”).

55. *See id.* at 1778. If the agency’s policy objectives are contrary to those of the current administration, it may decide to avoid intensive cost review all together by issuing policy statements or guidance documents that do not carry the binding force of a formal rule. *See id.* at 1777. Guidance documents and policy statements that are not expected to lead to the promulgation of a formal rule are not subject to Executive Order (EO) 12,866. *See id.* at 1785-86, 1789. Such action may carry the risk of pushing a significant amount of agency policy work behind closed doors.

56. *See id.* at 1771.

57. *See id.* at 1782. Methods to bypass review under EO 12,866 include (1) regulatory inaction; (2) adjudication and guidance documents; and (3) promulgation of numerous nonsignificant rules. *See id.* at 1783-86. An agency can calibrate the scrutiny of review by attempting to avoid designation as economically significant rules. *Id.* at 1792. However, recognizing what a CBA consists of is open to multiple interpretations, the agency can also decide to vary the quality and technical nature of its analysis and presentation, thereby making review by a non-expert more difficult. *See id.* at 1792-93. Since some courts have held that the executive review process cannot delay promulgation, agencies can use the timelines imposed by EO 12,866 and the organic statute to force speedy and less thorough review. *See id.* at 1797-98, nn. 232-36. However, guidance documents are now subject to the same requirements as other regulatory actions, including the requirements for significant actions. *See generally* Exec. Order. No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (amending EO 12,866 to include guidance documents to existing executive review requirements).

choose which regulatory actions to invest time and money into reviewing.<sup>58</sup> Whatever form regulatory action takes, the proper role of courts in reviewing the final product may depend on the judge's opinion regarding the legitimacy of executive oversight.<sup>59</sup> But most generally agree that some form of judicial scrutiny is necessary.<sup>60</sup> That being said, the traditional CBA is just one of several possible balancing and feasibility based approaches for assessing costs.<sup>61</sup>

### 3. *Alternatives to the Traditional Cost–Benefit Approach*

A potentially undesirable result of governmental endorsement of the CBA approach is that some believe such analysis is inherently anti-regulatory.<sup>62</sup> While it seems unlikely that the prevalence of CBA will disappear in the foreseeable future, the approach may be improved or supplemented.<sup>63</sup> One alternative theory is highly critical of the current structure and application of CBA, but does not attempt to disperse with the method altogether.<sup>64</sup>

Professors Richard Revesz and Michael Livermore argue that CBA, as currently structured and applied to environmental law, is biased toward conservative anti-regulatory interests.<sup>65</sup> The book *Retaking Rationality* presents many perceived problems with CBA and OIRA, largely focusing on the assumptions and metrics

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58. See Nou, *supra* note 23, at 1772.

59. See *id.* at 1822-23. The author notes that while there is a range of possibilities between those who are always for or always against critical judicial review of agency decisions, and the appropriate level of scrutiny should be made on a case-by-case basis after considering the degree of agency self-insulation and presidential involvement. *Id.* at 1823.

60. See, e.g., *id.* at 1822-23.

61. See *infra* Subsection I.A.3 (discussing modified CBA and feasibility standards).

62. REVESZ & LIVERMORE, *supra* note 3, at 13-15 (summarizing several criticisms of CBA).

63. *Id.* at 171 (proposing changes to executive review that will help to cure perceived deficiencies in the current process).

64. See *generally id.* (advocating for fundamental alteration to the role of CBA in the regulatory scheme). The author argues that CBA is likely a permanent mechanism in the regulatory process, but it does not have to be a negative for pro-regulatory interests or the environment. See *id.* at 9-16. The author presents eight chapters dedicated to critiques or fallacies institutionalized within the current use of CBA, see *id.* at 51, 55-147, as well as institutionalized hurdles to its effective application as a regulatory tool, see *id.* at 151-61.

65. See *id.* at 47.

applied.<sup>66</sup> Accordingly, the proponents suggest a new executive order to shift OIRA away from critical review of cost assessment “toward agenda-setting and . . . calibrat[ing] . . . regulatory stringency.”<sup>67</sup> Two suggestions presented are of particular interest: the formal adoption of open meeting requirements and the inclusion of public disclosure requirements for OIRA’s internal rules.<sup>68</sup> While a paradigm shift of the kind suggested is unlikely to occur within the foreseeable future, some suggestions may prove useful for improving the current system.<sup>69</sup>

CBA is not the only legitimate mechanism for regulatory cost assessment, and other methods, such as feasibility base standards, should be utilized more.<sup>70</sup> The feasibility principle is most often associated with technology-based environmental or occupational safety standards and requires highly stringent regulations to the extent “feasible.”<sup>71</sup> A feasibility analysis requires an initial assessment of the cost of implementing a proposed regulatory action based on the technology available to comply.<sup>72</sup> Next, those costs are compared to the past and expected profits of the industry subject to

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66. See *id.* at 55. Some of the perceived problems with the current system are broadly labeled as a false assumption that unintended consequences are always bad, *id.*, critiques regarding the propriety of wealth preservation, *id.* at 67, and metrics of valuing human life, *id.* at 77, 107, and false assumptions regarding the adaptability of people and industry, *id.* at 85, 131.

67. *Id.* at 171. Shortly after its publication, *Rethinking Rationality* received critical review from legal scholars on the opposing side of the debate. See, e.g., Christopher C. DeMuth & Douglas H. Ginsburg, *Revesz & Livermore*, 108 MICH. L. REV. 877 (2010) (reviewing RICHARD R. REVESZ & MICHAEL A. LIVERMORE, *RETAKE RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008)). This review largely criticized the book for over simplifying complex issues and promoting individual political agendas at the sacrifice of academic objectivity. See *id.* at 911-12.

68. See REVESZ & LIVERMORE, *supra* note 3, at 172-73.

69. See *id.* Whether or not the all of the changes proposed by Revesz are needed, the author’s theory provides much needed critical analysis of the current executive review process.

70. See generally Driesen, *supra* note 36 (presenting a normative comparison of a feasibility principle and CBA and arguing that feasibility provides a reasonable alternative for CBA in many regulatory contexts).

71. See DAVID M. DRIESEN, ROBERT W. ALDER & KIRSTEN H. ENGEL, *ENVIRONMENTAL LAW: A CONCEPTUAL AND PRAGMATIC APPROACH* 185 (Vicki Been et al. eds., 2d ed. 2011).

72. See Driesen, *supra* note 36, at 10-11. The feasibility principle as applied to environmental regulations is constrained by the following principles: “First, the principle authorizes government agencies to forego physically impossible environmental improvements. Second, the principle authorizes government agencies to forego constraints so costly that they cause widespread plant shutdowns.” *Id.* at 9.

regulation.<sup>73</sup> If the costs of the proposed regulation will lead to mass unprofitability in the industry or widespread shutdowns and job loss, then the regulatory action is deemed unfeasible.<sup>74</sup> If the proposed regulatory action is unfeasible, then it should be abandoned or materially altered.<sup>75</sup>

Many statutes expressly require a feasibility approach for promulgating regulations,<sup>76</sup> but the principles of a feasibility analysis could be applied as a supplemental tool for executive review. For example, the feasibility standard would give agencies greater guidance during early pre-rule decisions when the data needed to fully quantify benefits is limited or not yet available.<sup>77</sup> Moreover, historic application of feasibility nearly always results in proposed regulation that will result in zero facility closures,<sup>78</sup> which may make this approach politically attractive. Even if a full CBA is still required at later stages of rule promulgation, a feasibility standard provides a reasonable means of gauging the costs of possible regulatory solutions during pre-rule stages because it does not require monetization of benefits.<sup>79</sup> While the feasibility approach has received far less support from Congress recently, with the increasing

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73. *See id.* at 12 (“This implies that regulators must compare cost, not to benefits, but to net earnings prior to regulation and the value of corporate assets. Costs significant enough to render plants *unprofitable* could lead their owners to shut them down.”).

74. *See id.* at 16 (“This principle requires maximum reductions at least up to the point where plant closures begin to occur.”).

75. *Id.* at 18.

76. *See id.* at 20-21 (describing provisions of the Clean Air Act and Clean Water Act that call for standards to be set using technology based feasibility principles).

77. *Id.* at 41-42.

78. *See id.* at 45-46 (“[The] EPA has regularly refrained from regulating at all and engaged in quite indefensible statutory interpretation to avoid shutdowns under health-based statutory provisions that seemed to require shutdowns . . . to fully protect public health.”). The feasibility principle operates on a presumption that regulations that are so burdensome as to result in widespread closures will not be deemed feasible. *See id.* at 46 (“Any time an agency predicts that its regulation will cause widespread closure of facilities, it will face enormous pressure to soften that regulation.”).

79. *See id.* at 51. Analyzing benefits is commonly understood to require quantification of “the value of the averted harm from the decrease in [the risks] the particular regulation will bring.” *Id.*

hostility of courts toward agency CBAs, a change in opinion may be approaching.<sup>80</sup>

## B. Increased Scrutiny in the Courts

Many statutes do not formally require CBA;<sup>81</sup> however, as most agencies engage in cost analysis for one reason or another, courts consistently look at those findings.<sup>82</sup> Executive Order 12,866 essentially forces agencies to assess costs and benefits in order to gain OIRA approval in situations where they might not otherwise.<sup>83</sup> The CBA submitted to OIRA is not independently enforceable<sup>84</sup> but is usually incorporated into the agency's reasoning and published with the final rule. In the past, federal courts were fairly deferential to an agency's conclusion in reviewing its CBA,<sup>85</sup> but more recently agencies have been subjected to increasingly rigorous review.<sup>86</sup> The following cases provide insight regarding the treatment of CBA by courts and how pre-rule assessment may help a rule survive review.<sup>87</sup>

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80. *See id.* at 94-95 (concluding that current proponents of the CBA approach have failed to articulate a sound reason why it should be preferred over feasibility as the primary method for cost assessment).

81. *See, e.g.*, 42 U.S.C. § 7412(d) (2012) (requiring standards for new or existing sources to meet the maximum degree of emissions reduction if achievable by that categorical source of emissions after considering the cost of compliance, but without requiring a comparison to benefits).

82. *See infra* Subsections I.B.1-3 (analyzing three different ways in which courts have evaluated agency cost analysis).

83. *See* Exec. Order No. 12,866 § 6, 3 C.F.R. 638, 644-46 (1994), *reprinted in* 5 U.S.C. § 601 at 804-06 (2012).

84. *See id.* § 10, 3 C.F.R. at 649 (clarifying that the executive order does not create an independent private right of action).

85. *See* Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 340, 340 n.309 (1983) (noting the deferential nature of many courts' review of agency cost-benefit analysis); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1288-89 (2009) ("In other contexts involving economic regulations, courts rarely interfere to second-guess those cost-benefit determinations.").

86. *See* *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49, 1156 (D.C. Cir. 2011) (subjecting the CBA performed by the SEC to highly critical review and ultimately vacating the finalized rule).

87. *See infra* Subsections I.B.1-3 (analyzing three different ways in which courts have evaluated agency cost analysis).

### 1. Statutory Preclusion of Analyzing Costs

Statutes delegating lawmaking power to an agency may prohibit weighing costs, and in such cases, Executive Order 12,866 cannot legally impose such a requirement.<sup>88</sup> Section 109 of the Clean Air Act (CAA) contains such a restriction.<sup>89</sup> In *Whitman v. American Trucking*, the Court held that the CAA precluded consideration of costs during promulgation of rules under a health-based risk assessment.<sup>90</sup> One of several issues in that case was whether § 109 of the CAA precluded the EPA from weighing the costs of implementation in setting or revising the National Ambient Air Quality Standards (NAAQS).<sup>91</sup> Noting that in many parallel provisions of the CAA Congress explicitly addressed whether the EPA was to consider costs when promulgating standards, the Court refused to read into § 109 an implicit authorization to weigh costs.<sup>92</sup> Key to the Court's reasoning was the focus of § 109 on setting NAAQS based on the EPA's findings regarding public health risks.<sup>93</sup> Supporting the textual analysis was the Court's conclusion that Congress was aware of high compliance costs when it enacted the CAA and specifically omitted cost consideration from § 109.<sup>94</sup>

*American Trucking* affirmed the D.C. Circuit's prior judgment that the EPA was not permitted to weigh costs of implementation when setting NAAQS, even if such economic considerations will

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88. Exec. Order No. 12,866 § 1(b), 3 C.F.R. 638, 639 (1994), *reprinted in* 5 U.S.C. § 601 at 802 (2012) (“[A]gencies should adhere to the following principles, to the extent permitted by law. . . .”); *Id.* § 2(b), 3 C.F.R. at 640 (“To the extent permitted by law, OMB shall provide guidance to agencies and . . . shall be the entity that reviews individual regulations, as provided by this Executive order.”).

89. *See* 42 U.S.C. § 7409(b)(1)-(2) (2012).

90. *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 462, 465 (2001).

91. *Id.* at 464-65. EPA's standing interpretation of section 109 was that cost considerations were precluded in setting NAAQS or revising those standards. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,887 (July 18, 1997). The action was identified as economically significant under Executive Order 12,866. *Id.* Therefore, the EPA completed a regulatory impact analysis, including a CBA, for potential state implementation plans under the NAAQS, but those considerations did not play a role in setting the standards. *Id.*

92. *Am. Trucking*, 531 U.S. at 468-69. Justice Scalia, writing the opinion for the court, famously noted Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes.” *Id.* at 468.

93. *See id.* at 471.

94. *See id.* at 466-67.



become relevant during state implementation.<sup>95</sup> Thus, when a statute expressly requires an agency to establish standards under a method incompatible with cost assessment, the existing executive order cannot legally impose one.<sup>96</sup> However, as later cases demonstrated, the Court does not always treat silence regarding costs the same.<sup>97</sup>

## 2. *Hard-Look Review of Cost Analysis*

When agencies are required to consider costs, courts—most often the D.C. Circuit—have become increasingly rigorous in reviewing agencies' CBA under the Administrative Procedure Act (APA).<sup>98</sup> One example of hard-look review comes from a case where the Securities and Exchange Commission—exempt from CBA under Executive Order 12,866 at the time—was statutorily required to weigh the costs and benefits of new proxy rules.<sup>99</sup> In *Business Roundtable v. SEC*, petitioners challenged the SEC's promulgation of Rule 14a-11,<sup>100</sup> which revised the requirements public companies must meet when informing shareholders about and their ability to vote for shareholder-nominated candidates for a board of directors.<sup>101</sup> Before this rule, incumbent board members would nominate candidates for vacant seats, and those nominations would be sent in a proxy statement to the shareholders.<sup>102</sup> Under the new rule, it was

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95. *See id.*

96. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,882. Executive Order 12,866 only requires assessment of costs “to the extent permitted by law.” Exec. Order No. 12,866 § 1(b), 3 C.F.R. 638, 639 (1994), reprinted in 5 U.S.C. § 601 at 801 (2012).

97. *See infra* Subsection I.B.3 (discussing the recent Supreme Court decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015)).

98. *See generally* *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (providing a critical analysis of the SEC's CBA of a new rule changing the requirements for proxy-contest board elections and ultimately holding the analysis inadequate, arbitrary, and capricious).

99. *Id.* At the time of the *Business Roundtable* case, Executive Order 12,866 did not apply to independent regulatory agencies such as the SEC. *See* Exec. Order No. 12,866 § 3(d), 3 C.F.R. at 641.

100. *Bus. Roundtable*, 647 F.3d at 1146.

101. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,670 (Sept. 16, 2010).

102. *Bus. Roundtable*, 647 F.3d at 1147.

significantly more difficult for shareholders to nominate candidates.<sup>103</sup>

The challengers primarily argued, and the court noted, that the rule was flawed because the SEC inadequately carried out its duty to evaluate the effect of a new rule “upon ‘efficiency, competition, and capital formation’ and . . . ‘to apprise itself . . . of the economic consequences of [the] proposed regulation.’” under Title XV.<sup>104</sup> While not binding, courts have generally been deferential to the factual findings of agencies and OIRA during CBA review.<sup>105</sup> However, the D.C. Circuit was highly critical, and it found the agency’s CBA arbitrary and inadequate.<sup>106</sup>

The opinion amounted to a scathing review of the SEC Commissioner’s factual determinations and ultimately vacated the rule.<sup>107</sup> Giving the SEC scant deference, the court dissected everything from the assumptions and discounting methods applied to what studies were and were not relied upon by the agency.<sup>108</sup> The

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103. *See id.* To nominate a candidate shareholders were required to separately file a proxy statement and ensure its distribution to the board and all other shareholders. *Id.*

104. *Id.* at 1148 (quoting 15 U.S.C. § 78c(f) (2012)) (internal citation omitted).

105. *See, e.g.,* Fla. Manufactured Hous. Ass’n v. Cisneros, 53 F.3d 1565, 1577 (11th Cir. 1995) (deferring to the agency’s methodological choices with regard to cost assessment under and ambiguous statute); Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1342 (D.C. Cir. 1985) (stating that agency decisions about CBA are of a nature where the court should prefer to defer to agency expertise).

106. *Bus. Roundtable*, 647 F.3d at 1148-55. On petition, the D.C. Circuit analyzed the final rule under the arbitrary and capricious standard of APA § 706. *Id.* at 1148.

107. *See id.* at 1156.

108. *See id.* at 1150-51. First, the proposition that directors may not choose to oppose shareholder nominees was based on mere speculation and contrary to evidence of record with regard to the fiduciary obligations of the board. *Id.* at 1149-50. Second, the Commissioner neglected its statutory duty when it failed to use available data about the costs of traditional proxy contests to make predictions concerning how much a company may spend to oppose shareholder nominees. *Id.* at 1150. Third, the court doubted the studies relied upon to support the assertion that boards with dissident directors would actually increase performance for the company, and it scolded SEC for failing to adequately address studies predicting the opposite result submitted by commentators. *Id.* at 1151. Finally, the decision to discount costs over time, but not benefits, was deemed arbitrary and unsupported by the record. *Id.* The court was also critical of the Commissioner’s failure to adequately address the possible effects and costs of shareholders being represented by special interest groups that might funnel money into proxy contests. *Id.* at 1151-52. Additionally, dismissing the possible effects of increased volume or frequency

opinion in *Business Roundtable* illustrates what some deem to be an undesirable consequence of judges second-guessing the well-articulated findings of agency experts.<sup>109</sup> However, if the SEC's cost analysis had first been subjected to the scrutiny of OIRA prior to promulgation, then perhaps the rule, and the outcome of the case, would have been different.<sup>110</sup> Often, even if a statute is silent with regard to cost consideration, a court may interpret the statute to require agencies to engage in some form of cost assessment.<sup>111</sup>

### 3. Statutory Silence as Requiring Cost Consideration

In 2015, the Supreme Court reprimanded the EPA for refusing to consider costs when deciding whether further regulation of certain power plants was "appropriate and necessary" under § 112 of the CAA.<sup>112</sup> The EPA extensively evaluated the costs and benefits of the proposed and final rule in a "Regulatory Impact Analysis" (RIA) in accordance with Executive Order 12,866.<sup>113</sup> However, the majority took issue with the agency's failure to consider costs at all when making its pre-rule decision in 2000 that regulations were appropriate and necessary.<sup>114</sup>

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of proxy contests on company performance without reasonable explanation was arbitrary. *Id.* at 1153-55.

109. See, e.g., Garrett F. Bishop & Michael A. Coffee, *A Tale of Two Commissions: A Compendium of the Cost-Benefit Analysis Requirements Faced by the SEC & CFTC*, 32 REV. OF BANKING & FIN. L. 565, 595-98 (2013) (summarizing the highly critical nature of the D.C. Circuit's review in *Business Roundtable v. SEC*).

110. See, e.g., Fla. Manufactured Hous. Ass'n v. Cisneros, 53 F.3d 1565, 1578-81 (11th Cir. 1995) (holding in favor of the agency and deferring to its assumptions and findings in the CBA conducted as a part of executive review).

111. See *infra* Subsection I.B.3.

112. Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015) (holding that EPA acted unreasonably when it refused to consider costs of compliance when deciding further regulation of power plants was appropriate and necessary after conducting congressionally mandated studies). The specific provision the agency acted under was 42 U.S.C. § 7412(n)(1)(A). *Id.*

113. National Emission Standards for Hazardous Air Pollutants, 76 Fed. Reg. 24,976, 25,078-79 (proposed May 3, 2011) (to be codified at 40 C.F.R. pts. 60 & 63); National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. 9304, 9432-33 (2012).

114. Michigan, 135 S. Ct. at 2708-09. See also 76 Fed. Reg. at 24,988 ("We further interpret the term 'appropriate' to not allow for the consideration of costs."); 77 Fed. Reg. at 9,327 ("Cost does not have to be read into the definition of 'appropriate' . . .").

The CAA contains a unique provision for determining if NAAQS apply to fossil-fuel-fired power plants, and it was the EPA's interpretation of this provision that gave rise to litigation.<sup>115</sup> First, Congress required the EPA to study the hazards to public health reasonably anticipated to occur after the implementation of other regulations under the 1990 CAA amendments.<sup>116</sup> After consideration of those studies, the EPA determined that regulation was "appropriate and necessary," thus requiring the agency to regulate the power plants.<sup>117</sup> The agency reaffirmed this finding in 2012 and began rule promulgation.<sup>118</sup> The EPA sent a RIA to OIRA along with the published notice of the agency's 2012 determination.<sup>119</sup> As the

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115. See *Michigan*, 135 S. Ct. at 2705-06.

116. *Id.* The statute required the EPA to perform three separate studies of coal and oil fired power plants. *Id.* at 2708. One required a study of "the health and environmental effects of [mercury] emissions, technologies which are available to control such emissions, and the costs of such technologies." *Id.* (quoting 42 U.S.C. § 7412(n)(1)(B) (2012)).

117. See *id.* at 2705. The agency's 2000 findings regarding the appropriate and necessary determination were published in 65 Fed. Reg. 79,825, 79,826-30 (Dec. 20, 2000). This initial finding was reviewed by OIRA in accordance with Executive Order 12,866. *Id.* at 79,831. However, the EPA's findings were not deemed economically significant nor did OIRA publish its findings in the Unified Agenda for that term. See *OIRA Conclusion of EO 12,866 Regulatory Review*, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eoDetails?rrid=107185> [<https://perma.cc/4W3P-VJ52>] (last visited Nov. 1, 2016) (presenting the regulatory review for EPA's 2000 "Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units").

118. See *Michigan*, 135 S. Ct. at 2705. "The Agency found regulation 'appropriate' because (1) power plants' emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions." *Id.* Further, regulations were deemed "'necessary' because the imposition of the Act's other requirements did not eliminate these risks." *Id.*

119. See *id.* at 2705-06. The dissent notes that this review was a formal CBA. *Id.* at 2714 (Kagan, J., dissenting). The initial findings by the EPA with regard to the appropriate and necessary decision in 2000 were not reviewed as an "Economically Significant" rule or action, and thus OIRA would not have reviewed the findings and any associated CBA with the same degree of scrutiny as it would have otherwise. OIRA has minimal records of the first review. See, e.g., *OIRA Conclusion of EO 12,866 Regulatory Review*, *supra* note 117. The formal CBA was not completed and reviewed until 2011, and the final rule was published in 2012. See *View Rule*, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2060-AP52> [<https://perma.cc/L836-A8ZZ>] (last visited Nov. 1, 2016) (summary of executive review findings for EPA's "National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for

EPA noted in the Federal Register, and presumably its report to OIRA, the quantifiable impacts of the rules were expected to be \$9.6 billion in annual costs and \$4 to \$6 million in direct benefits.<sup>120</sup> However, ancillary benefits<sup>121</sup> were expected to raise the benefit threshold to \$37 to \$90 billion.<sup>122</sup> Despite the extensive data available regarding costs, the EPA determined cost consideration was not necessary to its appropriate and necessary finding, and it did not base that decision on the cost factors discussed in the RIA.<sup>123</sup>

Even under the deferential standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>124</sup> the Court held the EPA's refusal to consider costs when making the preliminary appropriate and necessary finding was unreasonable.<sup>125</sup> Justice Scalia, writing for

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Electric Utility Steam Generating Units"). It is curious that the original agency finding that regulations were "appropriate and necessary" was not itself subject to a formal CBA review under EO 12,866. The mere speculation of a lay person could likely surmise that nearly all emission regulations imposed on the energy sector would be likely to have an economic impact of at least \$100 million per year, and the executive order is not limited to actual rules, but rather includes a much wider array of agency actions that are expected to result in the promulgation of a rule.

120. See *Michigan*, 135 S. Ct. at 2705-06. Despite the disclosure requirements of EO 12,866, the regulatory impact analysis was unavailable in a downloadable pdf or html format from either the EPA's or OIRA's online databases.

121. Direct benefits are those benefits that are intended results of a program and closely related to the regulatory measure being taken. *Vocabulary Catalog: Program Evaluation Glossary*, U.S. ENVTL. PROT. AGENCY, [https://ofmpub.epa.gov/sor\\_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=Program%20Evaluation%20Glossary&filterTerm=direct%20benefit&checkedAcronym=false&checkedTerm=false&hasDefinitions=false&filterTerm=direct%20benefit&filterMatchCriteria=Contains](https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=Program%20Evaluation%20Glossary&filterTerm=direct%20benefit&checkedAcronym=false&checkedTerm=false&hasDefinitions=false&filterTerm=direct%20benefit&filterMatchCriteria=Contains) [https://perma.cc/NH3U-N3VU] (follow "Search" hyperlink; then search "direct benefit"). Alternatively, indirect, or ancillary, benefits are those that arise from and are related to the regulatory program, but are not an intended objective or goal of the program. *Id.* (follow "Search" hyperlink; then search "indirect benefit").

122. *Michigan*, 135 S. Ct. at 2705-06.

123. *Id.*

124. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under *Chevron* once it is determined that Congress has not spoken to the precise issue that the agency is addressing in its interpretation of the law, the Court will defer to the agency's reasonable interpretation so long as it is not arbitrary or capricious. *Id.* at 842-44.

125. See *Michigan*, 135 S. Ct. at 2711. The EPA attempted to support its interpretation by invoking *American Trucking*. *Id.* at 2709. Under the EPA's interpretation, the agency was precluded from inferring mandatory cost consideration from a provision of the CAA silent in that regard. See *id.* This is an interesting point for the Court to make as Justice Scalia—writing for the majority in *American Trucking*—used the exact same argument to buttress his conclusion that the EPA was precluded from considering economic costs when setting NAAQS.

the majority, stated that the term “appropriate” naturally “include[d] consideration of all the relevant factors” and that agencies have long considered weighing of advantages and disadvantages of proposed actions as a central part of the rulemaking.<sup>126</sup> Particularly damaging to the EPA’s interpretation was that one preliminary study required by Congress expressly included consideration of the cost of available control technologies.<sup>127</sup> The agency’s extensive cost consideration at later stages of promulgation did not forgive or repair the unreasonable neglect in failing to weigh those factors initially.<sup>128</sup> While the Court stopped short of mandating a formal CBA for the preliminary determination of whether to regulate,<sup>129</sup> some level of quantified cost consideration is necessary to survive future review.<sup>130</sup>

Alternatively, a robust dissenting opinion argued that it was reasonable and appropriate to defer consideration of costs to later stages of rulemaking.<sup>131</sup> The dissent found it unlikely that the EPA could estimate costs with any degree of accuracy at the preliminary stage, and the later processes of rulemaking were expected to ensure

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Justice Scalia distinguished *American Trucking* by concluding that the provision in question there expressly encompassed health and safety concerns. If the CAA expressly “directs [the] EPA to regulate on the basis of a factor that on its face does not include cost,” then an implicit requirement should usually not be read into it. *Id.* This provision of the CAA did not direct the EPA to regulate on the basis of factors that clearly precluded cost consideration. *Id.*

126. See *id.* at 2707-08 (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 122, 1266 (D.C. Cir. 2014)). “[C]ost includes more than the expense of complying with regulations; any disadvantage could be termed a cost.” *Id.* at 2707. EPA conceded that even if it had determined that the technologies needed to eliminate harms from emissions “do even more harm to human health, it would *still* deem regulation appropriate.” *Id.*

127. See *id.* at 2708.

128. See *id.* at 2709. Even if costs would again become relevant and be considered when determining at what level to set regulations, they do not affect the need to consider costs during the preliminary phase of deciding whether to regulate. *Id.*

129. See *id.* at 2711 (holding that the agency may not ignore costs altogether, but that the agency must monetize each potential advantage and disadvantage when making the preliminary determination of whether additional regulation is appropriate and necessary).

130. See *id.* While both costs and benefits, including ancillary benefits, were monetized to a significant degree in the regulatory impact analysis, the EPA itself conceded that it did not rely on those estimates in making its preliminary determination. *Id.* Accordingly, even if permissible, those considerations do not make up for the agency’s neglect because the Court reviews what the agency actually “did, not by what it might have done.” *Id.* (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

131. See *id.* at 2714-15 (Kagan, J., dissenting).

costs were given ample consideration.<sup>132</sup> In 2000, the agency expressly noted that a thorough evaluation of alternative regulatory schemes would be explored to find a lowest cost solution during the writing of the rule.<sup>133</sup> Thus, the dissent asserted that it was adequate that the initial determination to regulate be based on health risks and technological feasibility.<sup>134</sup> Moreover, the dissent suggested that because the agency knew any proposed rule would need to pass critical economic review by OIRA, the lack of cost consideration in the initial decision was irrelevant to the overall validity and efficiency of the final rule.<sup>135</sup>

As pre-promulgation executive review continues to move toward acceptance as a bedrock aspect of the regulatory process, the closer scrutiny of the review process' inner workings is necessary.<sup>136</sup> Executive review proves to be an important means by which the work of agencies can be monitored and guided.<sup>137</sup> Moreover, it helps

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132. *Id.* Justice Kagan argued the determination of whether to regulate is similar to the health-based trigger used for setting NAAQS; under this theory, deciding to regulate is based solely on the quantity of pollutants and their health effects, and costs consideration is reserved for later. *See id.* at 2715.

133. *Id.* at 2717.

134. *See id.* Note, however, technological feasibility still requires consideration of whether the costs of implementation and compliance would bankrupt the industry. *See Driesen, supra* note 36, at 11-12. EPA did not phrase its findings in terms of feasibility, rather it stated that consideration of costs carried no relevance to its "appropriate and necessary" finding. *Michigan*, 135 S. Ct. at 2707. *See also* National Emission Standards for Hazardous Air Pollutants, 76 Fed. Reg. 24,976, 24,988 (proposed May 3, 2011) (to be codified at 40 C.F.R. pts. 60 & 63) ("We further interpret the term 'appropriate' to not allow for the consideration of costs."); National Emission Standards for Hazardous Air Pollutants, 77 Fed. Reg. 9304, 9327 (proposed Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63) ("Cost does not have to be read into the definition of 'appropriate.'").

135. *See Michigan*, 135 S. Ct. at 2721 (Kagan, J., dissenting). To summarize the dissent's analysis, as a whole the agency's interpretation was reasonable because it did consider costs in several ways: (1) it divided power plants into subcategories based on factors such as fuel type, size, geographic location, and technology; and (2) the floor standards were designed to reflect what the top 12% in each category were already achieving, thus, being technology forcing while still feasible and economically sound. *Id.* at 2718-20.

136. *See supra* Section I.A.; *see also* REVESZ & LIVERMORE, *supra* note 3, at 9 (advocating for fundamental alteration to the role of OIRA and the use of CBA in the regulatory scheme).

137. *See supra* Subsection I.A.2; *see also* Nou, *supra* note 23, at 1814 (arguing executive review through OIRA provides a means by which the president can influence agency rulemaking, but may lead to agencies defensively insulating their reports); Posner, *supra* note 35, at 1140-41 (arguing the CBA's are more

to establish a more substantial record to be relied upon when litigation arises, which can be useful in light of increasing judicial scrutiny.<sup>138</sup> However, perhaps surprisingly, the framework that mandates and guides agencies and OIRA through the review process has remained largely unchanged over the last several decades.<sup>139</sup>

## II. THE RISE OF COST ANALYSIS IN FEDERAL RULEMAKING

Weighing the costs and benefits of federal regulations before they become law is not a recent development and examples date back at least to the 1936 Flood Control Act of the New Deal Era.<sup>140</sup> In the past, risk managers, such as the EPA and the Occupational Health and Safety Administration, were the primary targets of such mandates.<sup>141</sup> However, today, even the actions of financial regulatory institutions are subject to a rigorous evaluation of projected costs and benefits.<sup>142</sup> While formal CBA is not the only means by which an agency can evaluate the value and efficiency of proposed rules, CBA has become the default method.<sup>143</sup>

### A. Cost–Benefit Analysis and the Regulatory Process

Since its enactment in 1946, the APA has required that agencies publish a description of the basis and purpose of all proposed regulations to facilitate review by the judiciary and political superiors.<sup>144</sup> However, with its lack of quantifiable metrics, the APA provides an unsatisfactory means for those entities to measure the social value of proposed regulations or the best time to

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accurately described as a means by which the president and Congress can control executive agencies).

138. See *supra* Section I.B (discussing various cases demonstrating the evolving level of deference courts have given agencies' review of costs and other factors when promulgating regulations).

139. See *infra* Section II.A (discussing the history and framework of executive review).

140. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 169 (1999); Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 1994 (2013).

141. See Ahdieh, *supra* note 140, at 1994.

142. See Bishop & Coffee, *supra* note 109, at 586.

143. See *supra* Subsection I.A.3.

144. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (2012)).



begin review.<sup>145</sup> The inability of the APA process to measure social and economic value is likely one reason the executive began requiring CBA in the regulatory process.

While the APA does not require CBA, it does provide the general framework for notice-and-comment rulemaking, which is the most common procedure for promulgating rules and regulations.<sup>146</sup> Federal statutes delegate lawmaking authority to agencies; and through that authority, an agency will generally decide when it is permitted—or required—to create new rules and regulations.<sup>147</sup> Current executive orders generally require CBA to occur concurrently with the publication of a proposed rule and again with the final rule.<sup>148</sup>

### 1. *Executive Orders*

In light of a desire for greater agency accountability, several presidents have issued executive orders requiring that the agency weigh the costs and benefits of significant regulatory actions.<sup>149</sup> President Reagan issued the first order mandating formal CBA in an

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145. See Posner, *supra* note 35, at 1144. This is largely because a mere description of the purpose and effect of a regulation does not provide any form of quantifiable measure by which the projected benefits can be compared to the expected costs. See *id.* at 1144-45.

146. See generally JACOB A. STEIN & GLENN A. MITCHELL, *ADMINISTRATIVE LAW* (2016) (providing a comprehensive overview of administrative law, including the formal and informal rulemaking process).

147. See *id.* at § 13.01. Preparing new regulations includes extensive pre-rule research and evaluation before a proposed rule is ever drafted. See *id.* Once a proposed rule is drafted, the agency must publish notice and the text of the proposed rule, or rules, in the Federal Register for public comment. *Id.* at § 15.01. After the comment period closes, the final rule is published along with a statement of basis in the Federal Register prior to the effective date. *Id.*

148. See Exec. Order No. 12,866 § 6(a), 3 C.F.R. 638, 644 (1994), *reprinted in* 5 U.S.C. § 601 at 804-05 (2012) (requiring agencies to submit proposed rules for review “before issuing a notice of proposed rulemaking”).

149. See Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation?: Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489-90 (2002).

For over twenty years, the executive branch . . . has required regulatory agencies to assess the costs and benefits of regulation, and to attempt to ensure that the benefits outweigh, or justify, the costs. At least in a formal sense, cost-benefit balancing is now the official creed of the executive branch . . . .  
*Id.* at 1489.

RIA for all proposed major federal rules and regulations.<sup>150</sup> Under this order, regulatory actions were not to be taken if projected costs outweighed the quantifiable benefits.<sup>151</sup> Twelve years later, the Clinton administration embraced those early principles first while softening the CBA requirements.<sup>152</sup>

President Clinton created a more flexible requirement and expanded upon the regulatory philosophy first adopted by Reagan.<sup>153</sup> While the fundamental commitment to CBA remained, the new order required only that the *benefits justified costs* and that agencies craft regulations in the most cost-effective manner possible.<sup>154</sup> The order's statement of "Regulatory Philosophy and Principles" implies that review was intended to apply to official actions beyond just proposed and final rules.<sup>155</sup> Specifically, § 1(a) states, "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall . . . include both quantifiable measures . . . and qualitative measures . . ." <sup>156</sup> The broad definition of "regulatory actions" bolsters this interpretation.<sup>157</sup> Section 3(e) defines a "regulatory action" as "any substantive action by an agency . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking."<sup>158</sup> Finally, in 2011, President Obama issued Executive Order No. 13,579, which reaffirmed and reenacted the flexible approach to CBA analysis laid out in Executive Order 12,866.<sup>159</sup>

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150. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981), *revoked* by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 at 802 (2012). Under this order, a "major rule" was defined as one which would have "[a]n annual effect on the economy of \$100 million or more." 46 Fed. Reg. at 13,193. The reports described potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs, in sufficient detail to allow for review by the OMB. *Id.* at 13,194.

151. *Id.* at 13,193.

152. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 at 802 (2012) (revoking and replacing Exec. Order 12,291).

153. See Hahn & Sunstein, *supra* note 149, at 1490.

154. See Exec. Order 12,866, 3 C.F.R. 638; see also Bishop & Coffee, *supra* note 109, at 572.

155. See Exec. Order No. 12,866 § 1, 3 C.F.R. at 638-39.

156. *Id.* § 1(a), 3 C.F.R. at 639.

157. *Id.* § 3(e), 3 C.F.R. at 641.

158. *Id.*

159. Exec. Order No. 13,563, 3 C.F.R. 215 (2012), *reprinted in* 5 U.S.C. § 601 (2012).

Under Executive Order 12,866, there are two stages of review.<sup>160</sup> The review process relevant to this discussion is one of centralized review of regulatory actions by OIRA.<sup>161</sup> During that review process, both agencies and OIRA have unique responsibilities.<sup>162</sup>

a. Agency Obligations and OIRA's Duties

One of the responsibilities placed upon agencies is to make an initial identification of significant regulatory actions; once identified, detailed CBA requirements are triggered.<sup>163</sup> Accordingly, unless legally prohibited, an agency must submit to OIRA an analysis that, to the extent possible, quantifies the underlying costs and benefits of the proposed regulatory action, as well as a similar analysis of possible alternative actions.<sup>164</sup> The findings are then integrated into the agency's decision-making process to the extent such consideration is legally permitted.<sup>165</sup> Once a final regulation is published, all of the underlying information from the CBA process is to be made available to the public.<sup>166</sup> Additionally, either OIRA or the agency must publish a description of any substantive changes between the original proposal and the published action.<sup>167</sup>

The order also articulates OIRA's responsibilities and several limitations regarding the scope of its authority.<sup>168</sup> One important restriction is that substantive economic review is limited to matters

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160. See Exec. Order No. 12,866 §§ 4 & 6, 3 C.F.R. at 642-48. First, the order requires each executive agency to annually submit to OMB a "Regulatory Plan" for those significant regulatory actions that the agency reasonable expects to propose or finalize during the "fiscal year or thereafter." *Id.*

161. *Id.* § 6, 3 C.F.R. at 644-48.

162. *Id.* § 6(a)-(b), 3 C.F.R. at 644-48.

163. *Id.* § 6(a)(3)(C), 3 C.F.R. at 645. For "significant regulatory action[s]," agencies must provide OIRA with (1) the text of the drafted regulatory action; (2) a description of the need for the action; (3) an explanation of how the action will meet that need; (4) the anticipated costs and benefits of the action; (5) an explanation of how the action is consistent with the authorizing statute; and (6) a description of how the action coincides with the president's regulatory priorities. *Id.* § 6(a)(3)(B)(i)-(ii); 3 C.F.R. at 645.

164. *Id.* § 6(a)(3)(C)(i)-(ii), 3 C.F.R. at 645-46.

165. *Id.*

166. See *id.* § 6(a)(3)(E)(i)-(iii), 3 C.F.R. at 646.

167. *Id.* The publications requirement of the executive order also requires disclosure of whether changes were proposed by OIRA.

168. *Id.* § 6(b), 3 C.F.R. at 646-48.

identified as *significant regulatory actions*.<sup>169</sup> After review, a proposed action can be approved or returned to the agency for further consideration with an explanation of the specific reasons for the return.<sup>170</sup> In an effort to improve accountability and public confidence, Executive Order 12,866 included significant disclosure requirements regarding communications concerning actions under formal review.<sup>171</sup> As executive review is not directly challengeable in court, specific procedures also exist to handle disputes.<sup>172</sup>

### b. Disputes Regarding Review and Final Publication

While not independently enforceable, Executive Order 12,866 gives OIRA substantial ability to influence or block the publication of regulatory actions.<sup>173</sup> Unless required by law, an agency is

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169. *Id.* The key criteria defining a “significant regulatory action” is the expectation that the action will have \$100 million or more in annual economic effect. *Id.* § 3(f), 3 C.F.R. at 641. Also fairly strict time limits are placed on the review process. *Id.* § 6(b)(2)(A)-(C), 3 C.F.R. at 646-47. All actions prior to the Notice of Proposed Rulemaking are limited to a ten day review and proposed and final rules must be reviewed within ninety days of submission, unless an extension is granted. *Id.* These deadlines were likely to prevent OIRA review from becoming a death sentence for controversial regulations.

170. *Id.* § 6(b)(3), 3 C.F.R. at 647.

171. *Id.* § 6(b)(4), 3 C.F.R. at 647-48; *see also* REVESZ & LIVERMORE, *supra* note 3, at 36-38 (noting one of the major improvements to executive review provided by the Clinton administration was an expansion of disclosure requirements). First, notice of all oral ex parte communication with individuals not employed by an executive agency concerning an action under review must be sent to an OIRA designee. Exec. Order No 12,866 § 6(b)(4)(A), 3 C.F.R. at 647. Second, a representative of the issuing agency must be invited to all meetings between OIRA personnel and outside parties. *Id.* § 6(b)(4)(B)(ii), 3 C.F.R. at 647. Third, any written communications received by OIRA from non-executive parties regarding an action under review must be forwarded to the issuing agency within ten days of receipt. *Id.* Finally, OIRA must make publically available a log containing, at a minimum, (1) the status of regulatory actions; (2) a notation of all communications forwarded to the issuing agency; (3) and the subject matter, dates, times, and names of participant for all substantive oral communications between OIRA personnel and non-executive parties concerning an action under review. *Id.* § 6(b)(4)(B)(iii), 3 C.F.R. at 647-48.

172. *See* REVESZ & LIVERMORE, *supra* note 3, at 26-27; *see also* Exec. Order. No. 13,563, 76 Fed. Reg. 3821 (Jan 18, 2011).

173. *See* REVESZ & LIVERMORE, *supra* note 3, at 26-27 (explaining how, in the early days of OIRA review, many controversial regulations were subjected to costly delays or were ultimately abandoned). A 2011 executive order expanded the Regulatory Impact Analysis, essentially the same as a cost benefit analysis, to independent regulatory agencies to the extent permitted by law. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821.

precluded from publishing a significant regulatory action without approval or waiver from OIRA.<sup>174</sup> Alternatively, if OIRA fails to return the rule or otherwise notify the agency within the applicable time period, then publication proceeds.<sup>175</sup> Disputes between agencies and OIRA must be resolved by the President or Vice President at the request of the issuing agency or another agency with a significant interest.<sup>176</sup> In practice, however, the Order provides little more than a mechanism of internal management as outside parties cannot bring suit for non-compliance.<sup>177</sup>

## 2. *Advantages and Weaknesses of Executive Orders*

The debate surrounding how best to evaluate the costs of federal regulations is extensive.<sup>178</sup> From the debate, an obvious question arises: Why has such influential policy been carried out through non-binding executive orders? Congress has, with varying degrees of success, attempted to require all federal regulations to undergo some form of CBA.<sup>179</sup> Additionally, Congress can impose CBA or feasibility cost assessment by including express terms in the organic statute delegating authority to the agency.<sup>180</sup> Even ambiguous provisions, such as a requirement that regulation be “appropriate and necessary,” can implicitly require an evaluation of costs.<sup>181</sup> However, attempts to codify a uniform system of cost assessment in the APA have largely been unsuccessful.<sup>182</sup> Perhaps it is because of Congress’

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174. Exec. Order No. 12, 866 § 8, 3 C.F.R. at 648-49.

175. *Id.* Sometimes significant regulatory actions are required to be published within a certain timeframe, thus making the prohibition under the executive order an empty threat. *See, e.g.*, 42 U.S.C. § 7412(c)(1) (2012) (requiring the EPA to publish a list of all “major sources and area sources” of pollutants listed in other relevant provisions of that code section within twelve months of November 15, 1990).

176. *See* Exec. Order No. 12,866 § 7, 3 C.F.R. at 648.

177. *Id.* § 10, 3 C.F.R. at 649.

178. *See supra* Section I.A (discussing some of the contemporary academic discourse surrounding regulatory cost analysis).

179. *See* Johnston, *supra* note 23, at 1344-45 (discussing the failed attempt of the 104th Congress to carry through on major Republican campaigning issues).

180. *See, e.g.*, Bishop & Coffee, *supra* note 109, at 579-81, 602-04 (discussing the CBA provisions of the National Securities Market Improvement Act of 1996 and the Commodity Exchange Act and how those provisions impacted independent financial regulatory agencies).

181. *See* Michigan v. EPA, 135 S. Ct. 2699, 2709-12 (2015).

182. *See* Jennifer Nou, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL’Y REV. 601, 607 (2008)

inability to pass a uniform policy of regulatory cost assessment that inspired such important matters to be handled through non-binding executive orders.<sup>183</sup>

Taking action by executive order, rather than waiting for legislation, offers a number of advantages.<sup>184</sup> Executive orders allow the President to make a decisive first move—to set the agenda and tone of the conversation quickly and without the delays of the legislative process.<sup>185</sup> While some orders may be controversial, they also reinforce the public's perception of the President as a leader.<sup>186</sup> To paraphrase another scholar, through executive order, the President can articulate and solve a public policy problem in one decisive action.<sup>187</sup>

Despite these advantages, there are undeniable weaknesses to creating policy through an executive order.<sup>188</sup> The most obvious of these is the sheer possibility of instability due to the ability of any subsequent executive to set aside or replace any given order.<sup>189</sup> Moreover, the legal authority of executive orders can sometimes be questionable, as presidents do not make law in the same manner as Congress.<sup>190</sup> Accordingly, executive actions must fit a narrow field of qualification between being an effective administrative tool while avoiding misuse of Article II powers.<sup>191</sup> In the realm of cost

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(“While attempts to formally codify cost-benefit requirements in the APA have failed, a mix of executive orders, guidance documents, and best-practice manuals nonetheless mandate the procedure as a matter of practice.”).

183. See William H. Rodgers, Jr., *Executive Orders and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 13, 15-16 (2001) (summarizing perceived advantages and disadvantages of executive orders).

184. See *id.* at 15.

185. See *id.* at 15-16. For example, Theodore Roosevelt set aside millions of acres of forest land for federal management in a single afternoon during his presidency. *Id.* at 15.

186. See *id.*

187. See *id.* Executive orders allow the president to “depict the crisis and to solve it in a single utterance.” *Id.*

188. See *id.* at 16.

189. See *id.* (discussing when an order passed by President Carter was overturned in a matter of days with the arrival of the Reagan administration).

190. See *id.* The leading authority on the scope of presidential power is still *Youngstown Sheet & Tube Co. v. Sawyer*. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (providing a three-prong test against which the strength and scope of presidential authority is to be evaluated).

191. See Rodgers, *supra* note 183, at 16-17. In dictum, the D.C. District Court provided warning against possible misuse of EO 12,291—issued by President Reagan—which served as the principle basis for the currently enforced EO 12,866:

consideration, Executive Order 12,866 has largely avoided those problems.<sup>192</sup> The executive order has, however, led to some tensions.<sup>193</sup>

## B. The Relationship of Risk Managers and OIRA in Practice

The early use of CBA by OIRA chilled the promulgation of federal regulations and led to tension between that office and federal risk managers.<sup>194</sup> In the years prior to the Clinton Administration, OIRA's activities and interactions with agencies were largely secretive and often resulted in lengthy and expensive delays in the promulgation.<sup>195</sup> The chill of regulations that followed was unsurprising: James Miller, the head of OMB during the Reagan Administration, openly advocated against expansive government regulation in his prior scholarly work.<sup>196</sup> Whether or not OIRA's

Yet, the use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. . . . [I]f used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. . . . This is incompatible with the will of Congress and [is not] a valid exercise of . . . Article II powers.

*Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986).

192. See Exec. Order No. 12,866 § 10, 3 C.F.R. 638, 649 (1993), *reprinted in* 5 U.S.C. § 601 at 806 (2012). The Order does not affect the availability of judicial review under the APA, and it creates no private right of action for noncompliance with the order. *Id.* While the APA does not require compliance with Executive Order 12,866, a final rule can be vacated as arbitrary and capricious if relevant cost-associated factors are not addressed during promulgation. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44, 55 (1983) (holding the NHTSA failed to consider all relevant factors when it created its safety standard). It should be noted, however, in that case the agency put too much emphasis on monetary costs, and not enough emphasis on factors associated with safety. *Id.* at 56-57.

193. See *infra* Section II.B (discussing tensions caused by executive review and the somewhat inconsistent application of review to significant regulatory actions).

194. See REVESZ & LIVERMORE, *supra* note 3, at 27-29.

195. *Id.* at 26-27.

196. *Id.* at 23-25. Several other key appointees in the Reagan administration were prominent academics and proponents of the anti-regulatory school of economics, and that theory was at the center of original CBA review process. *Id.* Some have gone so far as to argue OIRA acts as a zealot for the anti-regulatory movement using CBA to create inefficiently lax regulations that do not maximize net benefits. See *e.g.*, REVESZ, *supra* note 3, at 15-51 (noting OIRA rarely seems to subject proposed deregulatory decisions to the same scrutiny as those tightening regulation); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L.

leadership is biased, the power of OIRA to influence federal regulation is considerable.

While Executive Order 12,866 requires OIRA's formal review of all significant regulatory actions before they are published, OIRA begins informal review much earlier.<sup>197</sup> Informal review is not subject to the time or transparency requirements of the order.<sup>198</sup> In fact, "[i]nformal review can be much more important in the rule-development process than formal reviews, and can last much longer."<sup>199</sup> The modern relationship appears to have changed, as agencies are contacting OIRA staff earlier in the rulemaking process and informal review has become more prevalent.<sup>200</sup>

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REV. 335, 383, 395-97, 402 (2006) (concluding that CBA has predominantly driven regulations to be less stringent); Jeffrey Rudd, *The Evolution of the Legal Process School's "Institutional Competence" Theme: Unintended Consequences for Environmental Law*, 33 *ECOLOGY L.Q.* 1045, 1079-82 (2006) (arguing that CBA is fundamentally flawed and its application to environmental law has perverted the law).

197. See Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 *ENVTL. L.* 767, 787 (2008). Between 1994 and 2005, OIRA reviewed an average of 620 rules annually. See Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 *FORDHAM URB. L.J.* 1257, 1275 (Table 1) (2006). The office only employs about 55 people, of which, about 30 are desk officers who review the 600 to 700 significant rules and 3,000 agency information requests each year. *Id.* at 1307; *Frequently Asked Questions*, OFF. OF INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> [<https://perma.cc/D36Q-LJ8P>] (last visited Nov. 1, 2016).

198. See Johnson, *supra* 197, at 787.

199. See Copeland, *supra* note 197, at 1279 (discussing one instance where the informal review lasted four times as long as the formal review).

200. *Id.* at 1280 (noting agencies are contacting OIRA to discuss significant rules earlier in the regulatory process, often before formal review begins).



Table 1

Year	Significant Pre-Rule	Significant Notice of Proposed Rulemaking	Significant Proposed Rule	Significant Final Rules and Interim Final Rules	Total Significant Regulatory Actions Reviewed	Total Regulatory Actions Reviewed
2000	1	2	32	57	92	582
2001	0	8	41	63	112	700
2002	5	11	44	51	111	669
2003	3	7	43	49	102	715
2004	1	8	27	57	93	626
2005	0	8	29	45	82	611
2006	0	9	32	34	75	600
2007	2	2	37	44	85	589
2008	2	6	56	69	133	673
2009	1	8	50	69	128	595
2010	0	16	49	79	144	690
2011	1	5	52	61	119	740
2012	0	5	30	51	86	424
2013	0	1	48	56	105	418
2014	1	5	50	58	114	452
Sum	17	101	620	843		
Avg	1.13	6.73	41.33	56.20	105.40	605.60

*This table was compiled using the raw historic data compiling the reviews of economically significant regulatory actions completed by OIRA from 2000 to 2014. The data is available at: <http://www.reginfo.gov/public/do/eoHistoricReport>.*

Furthermore, despite several hundred regulatory actions being identified as economically significant each year, as Table 1 shows, only a small fraction of those are actually formally reviewed.<sup>201</sup> Executive Order 12,866 gives OIRA the authority to waive review of a regulatory action, and historic reporting data indicates waiver has likely become the rule rather than an exception.<sup>202</sup> What little data OIRA does disclose shows an observable gap between the number of significant pre-rule decisions reviewed and proposed rules reviewed in subsequent years.<sup>203</sup> Accordingly, it is likely that many pre-rule actions, which are reasonably likely to lead to a proposed or final rule, are never formally reviewed.<sup>204</sup>

Despite the disclosure requirements of Executive Order 12,866, significant concerns remain regarding how much transparency exists

201. See Table 1, *supra* Section II.B.

202. See Table 1, *supra* Section II.B. When the number of significant pre-rule decisions reviewed is compared with proposed and final rules reviewed in subsequent years, the lack of correlation suggests that OIRA is choosing not to formally review many significant regulatory programs until a rule is formally proposed.

203. See Table 1, *supra* Section II.B.

204. See Table 1, *supra* Section II.B.

in practice.<sup>205</sup> In 2001, OIRA distributed an internal memorandum that expanded its disclosure requirements for ex parte communications regarding regulatory actions during informal review.<sup>206</sup> However, whether a rule or regulatory action is under review—starting when informal review begins—or whether consultations have become substantive is a discretionary judgment made by OIRA.<sup>207</sup> To make matters worse, only minimal information concerning what transpires during meetings between OIRA employees, agencies, and private parties is actually made publicly available.<sup>208</sup>

Of the information that is published on OIRA's website regarding meetings and ex parte communications, much is largely uninformative and extremely vague.<sup>209</sup> Contrary to its own policy, OIRA does not appear to regularly publish the substance of the communications made during informal review.<sup>210</sup> Therefore, changes to a proposed rule or regulatory action made during informal review may not be disclosed to the public, and if no further changes are made in formal review, OIRA approves the regulation as "consistent with no change."<sup>211</sup> As OIRA acknowledges that its influence often has the most profound effect during the informal stages, not publishing those effects makes little sense.<sup>212</sup> Without full disclosure, much of the communication between agencies, private parties, and OIRA—specifically that concerning cost analysis—is still shrouded in secrecy.<sup>213</sup>

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205. See Copeland, *supra* note 197, at 1309-10 (discussing that even the Government Accounting Office's review of OIRA and OMB suggests that considerable work may be needed to increase transparency).

206. U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 53 (2003).

207. See, e.g., *id.* at 55.

208. See *id.* at 54-55.

209. See *id.*

210. See *id.* at 55 (OIRA does not consider the disclosure requirements of EO 12,866 applicable during informal review).

211. See *id.* at 57. One justification offered is that such communication is part of the deliberative process and does not represent the agencies official position. *Id.*

212. See *id.*

213. See Copeland, *supra* note 197, at 1311-12 (explaining OIRA actually discourages agencies from disclosing changes made as a result of informal review, despite acknowledging that it is during that stage executive review is most influential).

Scholars may not agree about the best method of judging regulatory costs,<sup>214</sup> but there is little doubt that cost analysis and executive review will continue as important aspects of the regulatory process.<sup>215</sup> The existing structure of executive review has survived the test of time and while not perfect, provides clear and plainly worded instructions.<sup>216</sup> However, the existing structure lacks both adequate transparency and clear instructions for its application to pre-rule decisions.<sup>217</sup>

### III. A HYBRID FORM OF EARLIER COST ASSESSMENT AND FURTHER SUBSTANTIVE GUIDANCE FROM THE EXECUTIVE

The 2015 *Michigan v. EPA* opinion suggests that a majority of the Court expects agencies to weigh the costs of all major regulatory decisions, even if those decisions precede the actual drafting of rules.<sup>218</sup> As all regulatory actions having an annual impact of at least \$100 million are required to undergo a detailed cost assessment by OIRA, that review process is a reasonable mechanism through which to evaluate pre-rule decisions as well.<sup>219</sup> A narrow reading of Executive Order 12,866 would require significant pre-rule decisions to be reviewed as economically significant regulatory actions more often than currently occurs.<sup>220</sup> However, due to possible uncertainty and minimal data available to early agency findings and decisions, a review process less demanding than formal CBA is required.<sup>221</sup> Accordingly, a new executive order should augment the current

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214. Compare Driesen, *supra* note 36, at 94-95 (concluding that proponents of CBA have yet to establish its absolute superiority over the use of all other methods), with SUNSTEIN, *supra* note 34, at 139 (finding the greatest value in CBA lays in its use to prevent the problems of erroneous over or under regulation).

215. See Nou, *supra* note 23, at 1836 (concluding scholarly work has not given enough attention to the power and effect of executive review on the regulatory process).

216. See generally Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601, at 802 (2012). See also *supra* Section II.A (examining the history and structure of Exec. Order No. 12,866).

217. See discussion and accompanying footnotes *supra* Section II.B.

218. See *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015).

219. See Exec. Order No. 12,866, 3 C.F.R. 638.

220. *Id.* §§ 3(f), 6(a)(3)(B), 3 C.F.R. at 641, 645 (defining significant regulatory actions and requiring the more detailed review and CBA of actions identified as such).

221. See Driesen, *supra* note 36, at 49-50 (noting the primary difference between a feasibility standard and CBA is the need, or lack thereof, to quantify and monetize the expected benefits of a regulatory solution).

process by establishing an intermediate feasibility assessment for economically significant pre-rule actions.<sup>222</sup> The expanded assessment of pre-rule actions should be accompanied by a provision that also expands disclosure requirements, thus ensuring the review process remains as transparent as possible.<sup>223</sup>

#### A. Pre-rule Actions Are Economically Significant When Reasonably Expected to Lead to Promulgation of an Economically Significant Rule

Many pre-rule actions are rarely classified as economically significant regulatory actions because they do not directly impose costs.<sup>224</sup> However, actions like a “significant regulatory action” and “notices of proposed rulemaking” easily fit the definition of “regulatory action” in Executive Order 12,866.<sup>225</sup> Section 3(e) defines a regulatory action as “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, *including notice of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.*”<sup>226</sup> Congressionally mandated findings, such as whether further regulation is “appropriate and necessary” under the CAA, logically fall within this definition when the finding is both expected to lead to the promulgation of a final rule and published in the Federal Register.<sup>227</sup> If a regulatory action is

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222. See discussion and accompanying footnotes *infra* Section III.A (advocating for the establishment of an intermediate feasibility assessment). While an extensive change in internal policy could accomplish the same goal, this Note advocates for a new Executive Order because the order would be binding on OIRA.

223. See *infra* Section III.A (advocating for more expansive disclosure requirements for the substance of executive review).

224. See, e.g., Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,830-31 (Dec. 20, 2000) (finding that regulation of coal and oil fired power plants are appropriate and necessary, thus adding those units to the category sources required to be regulated under the CAA and triggering the need to promulgate regulations).

225. See Exec. Order No. 12,866 § 3(e)-(f), 3 C.F.R. at 641.

226. *Id.* § 3(e), 3 C.F.R. at 641 (emphasis added).

227. See 42 U.S.C. § 7412(d) (2012). If misused, a mandate to assess the costs of early regulatory decisions could potentially violate the statutory requirements that are less permissive of cost considerations, such as the initial risk assessment for establishing NAAQS or whether regulation is permissible under the OSH Act. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (holding the EPA was precluded from “implementation costs in setting primary and

significant, then it is subject to review by OIRA.<sup>228</sup> However, only significant regulatory actions are subjected to the CBA requirements of the current order: those actions with an expected net annual economic impact of \$100 million or more.<sup>229</sup> Pre-rule decisions of *whether to regulate*, which are reasonably expected to lead to an economically significant rule, are materially similar to significant “notices of inquiry” or “advance notices of proposed rulemaking” and should be reviewed under the same, or a similar, standard.<sup>230</sup>

Consider, again, the decision at issue in *Michigan v. EPA*.<sup>231</sup> The initial appropriate and necessary finding triggered the need to promulgate federal rules that were expected to cost at least \$100 million a year.<sup>232</sup> That decision was, in fact, a significant regulatory action and should have been subject to OIRA review.<sup>233</sup> However, neither the EPA nor OIRA identified that initial finding as significant because it did not directly impose costs; thus, no formal CBA was conducted until a proposed rule was issued.<sup>234</sup> Had some form of cost assessment been integrated into the initial pre-rule determination, there would have been no basis for the majority’s holding.<sup>235</sup>

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secondary NAAQS under § 109(b) of the CAA”). Thus, as under the current CBA requirements of Executive Order 12,866, an agency would likely need to consider cost related factors, or at the very least ensure such consideration does not serve as a basis for the final decision.

228. See Exec. Order No. 12,866 §§ 3(f), 6(a)(3)(B), 3 C.F.R. at 641, 645. Even deregulatory decisions are to be evaluated under the “economically significant regulatory actions” standard. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS (Sept. 17, 2003).

229. See Exec. Order. No. 12,866 §§ 3(f)(1), 6(a)(C)(i)-(ii), 3 C.F.R. at 641, 645-46.

230. *Id.* §§ 3(e)-(f), (6)(a)(C)(i)-(ii), 3 C.F.R. at 641, 645-46.

231. 135 S. Ct. 2699, 2711 (2015).

232. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000) (finding that regulation of coal and oil fired power plants are appropriate and necessary; thus, adding those units to the category sources required to be regulated under the CAA and triggering the need to promulgate regulations).

233. See *Michigan*, 135 S. Ct. at 2705-06, 2712 (discussing the EPA’s “appropriate and necessary” finding published in 2000).

234. See 65 Fed. Reg. at 79,831. However, the EPA’s conclusion regarding EO 12,866’s applicability is contrary to the text of the Order. A significant regulatory action can be an action that imposes costs itself, or is reasonably likely to lead to the promulgation of a rule that will impose costs. See Exec. Order No. 12,866 § 3(e), 3 C.F.R. at 641.

235. See *Michigan*, 135 S. Ct. at 2706 (noting that the EPA itself stated that the cost assessment performed was in no way a basis for the decision that further regulations were appropriate and necessary).

Since much of the information required for monetizing benefits would be difficult, if not impossible, to accurately assess until the specific regulatory solution is developed, requiring agencies to complete a formal CBA for preliminary findings is unreasonable.<sup>236</sup> However, agencies do not decide regulation is necessary off-the-cuff, and quite frequently these decisions follow congressionally mandated research.<sup>237</sup> That Congress required the findings reviewed in *Michigan v. EPA* to be based on years of previously conducted research was not unique. Alongside any research required by Congress,<sup>238</sup> the enacting agency should assess the costs of possible solutions before continuing to rule promulgation so long as the statute does not forbid such consideration.<sup>239</sup>

## B. Early Feasibility Analysis and Transparency

Two areas most in need of further clarification are: (1) the time at which an agency assesses regulatory costs and (2) the level of transparency for such review. Typically, OIRA does not formally review an agency's cost assessment until a proposed rule is nearing

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236. See Driesen, *supra* 36, at 51-52 (explaining that both CBA and feasibility standards require an assessment of technological factors compared with economic factors, such as profits, but CBA requires the additional, and highly difficult, step of quantifying and monetizing averted risks). Driesen proposes that since we often lack the scientific knowledge to quantify risks in a completely objective manner, such assessments usually represent a policy judgment made on the basis of many assumptions. *Id.* at 52-53.

237. See, e.g., 42 U.S.C. § 7412(n)(1) (2012) (requiring the EPA to study the health risks associated with power plant emissions following the 1990 amendments to the CAA and requiring the agency to determine if additional regulations were needed on the basis of those studies); *id.* § 7412(n)(2) (requiring the Department of Energy to engage in a six year study of emission control technology for pet coke overproduction, and requiring the agency to recommend potential regulatory solutions on the basis of that study); 29 U.S.C. §§ 671(a), (c)(1), (d) (2012) (requiring the National Institute for Occupational Safety and Health, along with other agencies, to study the risk of contamination of workers homes with hazardous substances, and recommend regulation on the basis of the findings of such studies).

238. It was the 1990 amendments to the CAA that required the EPA to study power plant emissions and determine if additional regulation was needed, see Clean Air Act Amendments, Pub. L. No. 101-549, tit. III, § 301, 104 Stat. 2531 (1990) (codified at 42 U.S.C. § 7412(n)(1)), but the finding that further regulation was appropriate and necessary was not published until ten years later, see Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000).

239. See *infra* Section III.B (proposing integration of a feasibility standard into executive review of significant pre-rule agency actions).

publication.<sup>240</sup> However, substantial expenses are incurred prior to that date, especially if the research leading to rule promulgation is extensive.<sup>241</sup> As a procedural matter, the weighing of costs should start with pre-rule decisions even before informal review of completed drafted rules begins.<sup>242</sup> Moreover, much of the information exchanged and changes made during informal review is not disclosed.<sup>243</sup> To create a more complete record and to encourage public accountability, all communications between OIRA and agencies concerning regulatory actions under review should be fully documented and made public.<sup>244</sup>

### 1. *Deciding Whether to Regulate Should Include Cost Consideration*

Uncertainty at the early stages of the regulatory process is not an excuse to ignore costs if there are methods of cost assessment less demanding than a formal CBA available.<sup>245</sup> An alternative sometimes used later to set standards is an economic or technological feasibility principle.<sup>246</sup> A feasibility-based analysis for pre-rule decisions would provide a reasonable basis on which to decide whether the agency should invest further resources to draft specific standards.<sup>247</sup>

A feasibility-based assessment during executive review should not replace CBA outright.<sup>248</sup> The CBA method has proven to be an effective administrative tool that allows the executive some degree of

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240. See Copeland, *supra* note 197, at 1273 (noting that formal OIRA review is often restricted to proposed and final rules).

241. See *id.*

242. See *id.* at 1279-80 (discussing the increase in the use of informal review by OIRA, which occurs earlier than formal review and often lasts much longer); see also Posner, *supra* note 35, at 1192 (discussing CBA as a procedural mechanism).

243. See Copeland, *supra* note 197, at 1279-80.

244. See *supra* Section II.B (discussing minuscule amount of communication actually disclosed in practice).

245. See Driesen, *supra* note 36, at 63 (concluding that proponents of the CBA approach have not articulated why that method is superior to feasibility analysis in light of significant valuation and quantification problems).

246. See *id.*

247. See *id.* at 51-52 (explaining that a feasibility assessment includes a majority of the information needed for the first step of a CBA, but does not require the additional complexities of quantifying expected benefits).

248. Cf. *id.* at 47, 94 (summarizing the authors argument that feasibility is an overall superior standard, at least in most areas of environmental law).

control over federal agencies.<sup>249</sup> But formal quantification and monetization of benefits for pre-rule decisions, such as whether to regulate, is unnecessary. Rather, when deciding whether to regulate agencies should first assess the *feasibility* of various regulatory approaches.

As a threshold matter, the agency must determine a need for additional regulation, or put differently, that additional regulations would have some benefit.<sup>250</sup> Some kind of risk assessment is typically mandated by the organic statute, and it bestows upon the agency the authority to promulgate regulations.<sup>251</sup> The actual quantification and monetization of such benefits should, however, be left for later stages of the regulatory process, such as when drafting alternative regulatory proposals. The beauty of a feasibility approach is that most, if not all, of the information needed to make such an assessment can be gathered from market data and assessments of available technology.<sup>252</sup>

Determining the economic feasibility of whether additional regulation should be pursued would function similar to existing technological feasibility standards scattered throughout the U.S. Code.<sup>253</sup> One of the most familiar variations of a feasibility approach is the “best available technology” standards used in the Clean Drinking Water Act.<sup>254</sup> However, unique to a pre-rule assessment, an agency need not consider the feasibility of a specific regulation

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249. See, e.g., SUNSTEIN, *supra* note 34, at 55-60 (discussing the foundational principles of CBA and how they have been a significant and major part of the federal regulatory system); Posner, *supra* note 35, at 1198-99 (concluding that despite not always producing the most efficient result, CBA lessens the control of interest groups and provides a tool for the executive to influence agencies).

250. See Driesen, *supra* note 36, at 12 (noting that feasibility begins with an assessment of pollution control technologies and forms of pollution possible technology may reduce).

251. See, e.g., Occupational Health and Safety Act of 1970, 29 U.S.C. § 655(b)(5) (2012). The Occupational Health and Safety Act has been interpreted to require an initial finding that the workplace is currently unsafe to justify the promulgation of regulations. See *Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980). But, even in the absence of such a mandate, an agency would risk reversal for acting arbitrarily if further regulation would provide no benefit.

252. See Driesen, *supra* note 36, at 11-12.

253. See *id.* at 12-13 (summarizing how technology standards under the CWA have been applied and evaluated by the Supreme Court).

254. See, e.g., Clean Drinking Water Act, 33 U.S.C. § 1311 (2012) (requiring the effluent reductions for certain point sources be achieved by “application of the best available technology economically achievable for such category or class” that will meet the requirements of promulgated regulations).



because it has not been drafted yet.<sup>255</sup> To determine whether to regulate, an agency need merely consider what range of possible regulatory approaches could be utilized to address the identified risk.<sup>256</sup> Next, the estimated costs of various possible regulatory solutions would be determined and compared against various market factors, such as operating costs, net profits, and the potential for closure.<sup>257</sup> If analysis shows that regulations generally would cause widespread closures or financially destroy an industry, then rulemaking should be abandoned as unfeasible.<sup>258</sup> More likely, however, the agency will determine that some range of options are unfeasible, and the agency will not waste resources developing standards utilizing those methods.<sup>259</sup>

Assessment of feasibility at this preliminary stage would not interfere with later CBA of the actual proposed rules. A feasibility standard—only pursuing options the industry can reasonably bear—allows for a much broader range of regulatory possibilities than those for which the benefits outweigh or justify the costs.<sup>260</sup> Earlier assessment of costs would, however, ensure that agencies do not waste resources researching and drafting regulations the target entity cannot tolerate. Conversely, the later CBA for proposed and final rules seeks to ensure that only efficient and justified rules will actually be become law.<sup>261</sup>

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255. Cf. Exec. Order No. 12,866 § 1, 3 C.F.R. 638, 638-39, *reprinted in* 5 U.S.C. § 601, at 802 (2012).

256. See Driesen, *supra* note 36, at 11-12 (describing that feasibility, in the environmental context, requires the assessment of a range of technological pollution control mechanisms and a comparison of the costs of those options with other economic factors). As with a traditional feasibility approach, here you would assess a range of possible options and the costs associated with those options, the primary difference is the timing with which this application takes place.

257. See *id.* at 12-16. While most often agencies are considering whether or not to impose additional regulations, questions of whether deregulation or loosening of regulations are appropriate should undergo the same analysis. It is less likely that a decision to loosen regulation would lead to unfeasible costs on the industry in most cases.

258. See *id.*

259. See *id.* at 16-19 (“This principle requires maximum reductions at least up to the point where plant closures begin to occur[.]” or put differently, when further reduction is unfeasible). Utilizing the principle for pre-rule decisions does not obligate the agency to promulgate rules up to the maximum feasible level, but rather helps to set an initial ceiling on the level of stringency that should be considered.

260. See *id.*

261. See Exec. Order No. 12,866 § 1, 3 C.F.R. at 638-39.

A feasibility standard also operates well under a number of statutory mandates that may or may not address costs. The feasibility principle appears to fit very well with ambiguous provisions like the appropriate and necessary finding subject to debt in *Michigan v. EPA*.<sup>262</sup> Intuitively, if tightening regulations would be unfeasible because the industry would cease to exist, then it cannot be considered appropriate.<sup>263</sup> However, pre-rule feasibility analysis fits under other regulatory schemes as well.

Many statutes require an initial determination of risk to justify rulemaking.<sup>264</sup> Until just recently, the Toxic Substance Control Act (TSCA) required the EPA to make an initial finding of unreasonable risk and then impose the least burdensome combination of several enumerated regulatory solutions.<sup>265</sup> Under the proposed feasibility standard, after determining an unreasonable risk exists, the agency would next determine which of the enumerated regulatory actions are feasible given the specific entity or system to be regulated.<sup>266</sup> Since any option that is unfeasible cannot possibly be the least burdensome solution, there would be no need to consider those options when promulgating specific standards.<sup>267</sup> The feasible proposals would

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262. See *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) (holding it was unreasonable for the EPA to decide regulating power plants was “appropriate and necessary” without giving any consideration to costs).

263. See *id.* at 2709-10 (noting that requiring a floor of regulations no matter what the cost is unreasonable). After all, the agency cannot regulate an industry that does not exist, and the statute contains no language to suggest that eliminating the industry was an option.

264. See *e.g.*, Toxic Substance Control Act (TSCA), 15 U.S.C. § 2605(a) (2012) (requiring the agency to impose the least burdensome of one or more enumerated regulatory options after it determines the manufacture or use of a substance “presents . . . an unreasonable risk of injury to health or the environment”). The least burdensome requirement has been interpreted by the court as to require a form of CBA regarding all possible alternative regulatory solutions, not just the options proposed by the agency in rulemaking. See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1216-17 (5th Cir. 1991) (striking down the EPA’s asbestos ban).

265. See *Corrosion Proof*, 947 F.2d at 1217.

266. See *id.* at 1222-23. On June 22, 2016, President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act, 114 Pub. L. No. 182, 130 Stat. 448 (2016) (to be codified at 15 U.S.C. §§ 2601-97 (2018)), which amended TSCA and removed the least burdensome requirement.

267. See *id.* An initial feasibility assessment would be more cost effective than formally weighing the costs and benefits of each possible alternative. Thus, this would be an effective means by which the agency could eliminate the need to perform a full CBA on some of the enumerated options. So long as such analysis is documented and supported by the facts, it would provide a sufficient record to

then be reviewed by OIRA before the agency moves forward with promulgation, thus giving the Executive additional tools and a level of control at the pre-rule phase.<sup>268</sup>

Some statutes may still forbid integrating the proposed feasibility assessment as part of the substantive basis for a proposed rule because the statute and precedent forbid such considerations.<sup>269</sup> However, under similar conditions, the EPA has primarily performed a RIA and CBA for economically significant actions in accordance with Executive Order 12,866.<sup>270</sup> Those findings are not, however, considered in the issuing of the final rule because the organic statute precludes cost consideration, and the executive order cannot require cost consideration that would violate the law.<sup>271</sup> Because the proposed feasibility standard is a mere augmentation of the existing process under Executive Order 12,866, it too would function as an administrative tool, similar to the actions at issue in *American Trucking*.<sup>272</sup> But even if a feasibility assessment cannot serve as a basis for the rule, the documentation of analyzing economic factors at the pre-rule phase will prove useful in supporting a final rule.<sup>273</sup>

## 2. Pre-Rule Feasibility in Action

The following hypothetical scenarios will demonstrate how a feasibility standard would function with three different results. First, when a wide range of regulatory options appear feasible, the agency

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survive the substantial evidence test imposed by the TSCA on review. *See id.* at 1223.

268. *See* Posner, *supra* note 35, at 1174-79 (discussing the various tools through which the Executive can “punish” agencies who under or over regulate).

269. *See, e.g.*, 42 U.S.C. § 7409(b)(1) (2012); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 470-73 (2001) (holding § 109(b) of the Clean Air Act bars consideration of costs and economic factors from the process of setting NAAQS).

270. *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,701-02 (July 18, 1997).

271. *See* 42 U.S.C. § 7409(b)(1); Exec. Order No. 12,866 § 6, 3 C.F.R. 638, 644-48, *reprinted in* 5 U.S.C. § 601 at 805-06 (2012).

272. *See Am. Trucking*, 531 U.S. at 463; National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. at 38701-02. However, even if the proposed requirement was implemented as an amendment to the APA requiring a uniform feasibility assessment, it would still be precluded if cost consideration was contrary to the organic statute. *See* Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (2012).

273. *See* Driesen, *supra* note 36, at 51-52 (explaining the requirements for application of the feasibility principle represent the first half of information needed to perform a full CBA).

will proceed to rule development.<sup>274</sup> Second, when any additional regulation is likely to bankrupt the industry or lead to elimination of many market participants, regulation should not be pursued.<sup>275</sup> Finally, when some degree of regulation may be feasible and should at least be considered under a formal CBA, but regulation beyond a certain point would be unfeasible; the agency should waste no further resources considering regulations at or beyond that point of stringency.<sup>276</sup>

For the purpose of this hypothetical, assume the following facts. Under the CAA, the EPA is required to monitor and assess the extent and effect of atmospheric deposition<sup>277</sup> of hazardous air pollutants in the Great Lakes and coastal waters.<sup>278</sup> The EPA is required to promulgate additional emission regulations if it determines (1) that other provisions of the CAA are not adequate to prevent “serious adverse effects to public health and serious or widespread environmental effects” and (2) that such regulations are “necessary and appropriate” to prevent known adverse effects.<sup>279</sup> Assume a new substance, compound XX, has been identified as hazardous and is emitted as a byproduct of jet fuel combustion. The EPA identifies serious environmental risks associated with XX and determines that existing regulations under the CAA will not prevent widespread degradation of the Great Lakes and coastal waters. Now, much like the dilemma regarding power plants, the EPA must determine whether to promulgate additional regulations.<sup>280</sup>

#### a. Clear Feasibility of Several Options

Under some conditions, further regulation will be so clearly feasible that analysis will appear as no more than a formality.

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274. See discussion *infra* Subsection III.B.2.a.

275. See discussion *infra* Subsection III.B.2.b.

276. See discussion *infra* Subsection III.B.2.c.

277. Definitions of “Atmospheric Deposition,” U.S. ENVTL. PROTECTION AGENCY, [http://ofmpub.epa.gov/sor\\_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do](http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do) [<https://perma.cc/QYZ8-HUGY>] (last visited Nov. 1, 2016) (type “atmospheric deposition” into the search bar; then select “exact match;” then click search and look to the third result). Atmospheric deposition is generally defined as the settling of airborne pollutants or particles onto land or water. *Id.* Settling may occur through precipitation or in the absence of precipitation. *Id.*

278. See Clean Air Act, 42 U.S.C. § 7412(m)(1) (2012).

279. *Id.* § 7412(m)(6).

280. See *supra* Subsection I.B.3 (discussing the 2015 *Michigan v. EPA* decision).

Assume, for example, annual net profits for the domestic airline industry of \$100 billion for the past ten years. The EPA has identified a range of possible regulatory solutions to the atmospheric deposition problem identified. The implementation of any one of these mechanisms would cost the industry between \$5 billion and \$30 billion annually. Further, even at the upper end of the EPA's estimate, it is highly unlikely that any carrier in the United States would cut flights or lay off employees.

Under the facts as presented, the EPA would be justified in continuing onto rule promulgation with any number of regulatory approaches. Regulation is necessary because of the identified risk that is not currently being addressed. Moreover, at most, the industry would face a thirty-percent decrease in net profit; but even so, the industry as a whole would remain highly profitable. Further regulation is thus logically appropriate under a feasibility analysis because despite costs, even the most stringent regulations are bearable by the industry.

At later stages, the EPA may decide that the most stringent regulations are unjustified. For example, the monetized benefits of the greatest level of regulation may be greatly outweighed by the marginal costs of that regulatory scheme.<sup>281</sup> However, at this initial phase the EPA need not monetize benefits. It merely needs to determine that some range of possible regulatory mechanisms are feasible after comparing the cost to the industry against profits and other economic factors.<sup>282</sup> Alternatively, the only possible solutions may sometimes be so costly as to make them unfeasible.

#### b. No Further Regulation Is Feasible

If an agency cannot identify any possible regulatory solution, the costs of which are bearable by the industry as a whole, then the agency should not waste resources drafting a proposed rule. Assume annual industry profits are the same. However, under this scenario, emissions of XX are known to result from the use of an essential additive in the manufacture of jet fuel. Currently, the only plausible substitute is still in development, and even if available, widespread use would exponentially increase fuel prices. Also assume that to

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281. See DRIESEN, ALDER & ENGEL, *supra* note 71, at 245-46 (discussing whether Executive Order 12,866 requires a comparison of overall costs and benefits or marginal costs and benefits).

282. See Driesen, *supra* note 36, at 11-12.

retrofit airline fleets with an adequate emission control system would cost the industry \$100 billion annually for five years.

Under these facts, the EPA would likely conclude that even if further regulation is deemed necessary, no additional regulations are feasible. Banning the proposed fuel additive is not a feasible solution because no known substitute is available, and even when ready, the substitute is cost prohibitive. Requiring the fleet to be retrofitted would solve the problem, but it is not feasible to force an industry to endure net zero profits for five years. In light of these considerations, the agency would be hard pressed to justify spending resources promulgating proposed rules because all available regulatory mechanisms will cripple the industry and likely fail the later CBA.

However, even if regulations are not feasible now, that finding does not preclude promulgation of different rules at a later date. The findings of the feasibility analysis show that currently it is not reasonable to dedicate additional resources to developing a rule. Regulatory dilemmas are rarely so black and white. The feasibility principle is most useful when applied to eliminate a range of possible mechanisms, thus narrowing the field to those which should be given further consideration.<sup>283</sup>

### c. Thinning the Field

Using a feasibility analysis for decisions of whether to regulate will be most effective when applied to situations where it can guide the scope of later rulemaking. Lack of feasibility can eliminate some regulatory mechanisms initially, thereby focusing the bulk of later resources on options that are more likely to survive review. While some agencies may already assess feasibility informally when deciding whether to regulate, requiring agencies to make known the options being considered prior to rule drafting allows for more robust public participation during later stages.

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283. An exception to the general rule that unfeasible regulations should not be pursued may exist where the intent of Congress was to force technological development or eliminate a source of risk. *See generally* Thomas O. McGarity, *Radical Technology-Forcing in Environmental Regulation*, 27 LOY. L.A. L. REV. 943 (1994) (discussing various efforts by Congress to force the development of new technology by imposing requirements that cannot be met by current technology). However, only when congressional intent is unambiguous and precise should an agency proceed to develop clearly unfeasible regulations; because, as Professor McGarity's essay shows, even when statutory language requires the development of currently unfeasible regulations, such laws often fail in the courts. *Id.* at 955-58.

For this scenario, assume the facts are the same as scenario (b) with the following changes.<sup>284</sup> The alternative substitute, while slightly more expensive, has already been developed and is available on the market. An emission control device is also available, but it would cost \$80 billion annually, over five years, to retrofit the entire fleet. However, it is predicted that requiring the emissions device may result in some smaller airlines closing and may cause large-scale layoffs for several larger carriers.

Scenario (c) provides a more challenging dilemma for the EPA, and one that is likely more accurate of reality. Even without quantifying benefits, the agency may conclude that an eighty-percent reduction in profits along with likely closures and job losses is unfeasible, despite the industry as a whole surviving. A finding of infeasibility is reasonable in light of a core principle of feasibility—avoiding disproportionately concentrated negative externalities.<sup>285</sup> Additionally, unless the agency expected monetized benefits to be very large, it would be hard to justify imposing a substantial financial burden on an industry.<sup>286</sup> However, the EPA may go forward with various options for phasing out the old fuel additive for a substitute. The projected increase in cost caused by the substitute would be weighed against industry profits, job stability, and overall market function. If the initial cost would be high or borderline unfeasible, then the agency may also need to project the effect of increase in demand from phasing out chemical XX on costs associated with the substitute. If the decline in prices is likely to offset decreased profits over time, then the EPA is more likely to determine further regulation is feasible and begin drafting a rule. If feasibility is a close call, then an agency would likely be justified in moving forward with rule promulgation whatever its conclusion.

### 3. *Public Disclosure*

Despite significant improvements to transparency, much of OIRA's work—and its interactions with agencies—is still shrouded

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284. See *supra* Subsection III.B.2.b.

285. See Driesen, *supra* note 36, at 21 (noting the feasibility principle as applied to setting emissions standards allows for standards to be set up to the point where widespread industry closures will occur).

286. See *Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015) (analogizing the EPA's decision to regulate no matter what the cost as similar to “buy[ing] a Ferrari without thinking about cost, because [the buyer] plans to think about cost later”).

in secrecy.<sup>287</sup> A large amount of communication between OIRA, agencies, and outside parties occurs before actions are officially under review, and those communications, even if substantive, are not subject to the disclosure requirements of Executive Order 12,866.<sup>288</sup> Moreover, courts and the public generally have limited access to those proceedings or a record of their substance.<sup>289</sup> Over 600 rules are reviewed by OIRA each year, and on average, 105 of those are designated as economically significant.<sup>290</sup> It would be reasonable to assume that many significant rules were a topic of discussion within the agency for some time before formal review began.<sup>291</sup> Yet the public disclosure requirements of the current executive order do not apply to the conversations and bargains made about the nation's most important regulations during informal review and surrounding pre-rule decisions.<sup>292</sup>

Agencies are now contacting OIRA staff earlier in the rulemaking process, which likely makes informal review and pre-rule discussions more important than at any other point in history.<sup>293</sup> OIRA continues to transform itself from being merely a gatekeeper for promulgation to being a counselor and advisor for agency heads.<sup>294</sup> Other agencies, the courts, and the public have a right to know what occurs behind closed doors.<sup>295</sup> Short of congressional

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287. See Copeland, *supra* note 197, at 1309-10 (discussing ongoing concerns about a lack of transparency in OIRA review, despite the requirements of executive orders).

288. See Johnson, *supra* note 197, at 787.

289. See Copeland, *supra* note 197, at 1279 (discussing one instance where the informal review lasted four times as long as the formal review). "Informal review can be much more important in the rule-development process than formal reviews, and can last much longer." *Id.*

290. See Table 1, *supra* Section II.B.

291. See Copeland, *supra* note 197, at 1278-79 (quoting OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COST AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 43 (2001)) ("A common yet informal practice is for agencies to share preliminary drafts of rules and/or analyses with OIRA desk officers prior to formal decision making at the agency.").

292. The pessimist might conclude that these very rules are being perverse while still in their infancy.

293. See Copeland, *supra* note 197, at 1280.

294. See Posner, *supra* note 35, at 1193.

295. Cf. U.S. GEN. ACCOUNTING OFFICE, *supra* 206, at 214 (offering the opinion that changes made during informal review should not be disclosed). See Copeland, *supra* 197, at 1309-10 (discussing ongoing concerns regarding a lack of transparency with OIRA review).



action, the best way to address this concern is further expansion of the existing disclosure requirements in a new executive order.

Coupling a feasibility assessment for pre-rule review with expanded disclosure requirements promotes effective regulation and democratic governance.<sup>296</sup> Therefore, the disclosure requirements already applied to RIA and CBA should be extended to apply to a feasibility standard to pre-rule decisions and informal review.<sup>297</sup> However, a new order must go further. First, the new order should explicitly require OIRA to publish a summary of the substance of—and participants to—meetings and communications concerning significant regulatory actions to be published as these actions occur.<sup>298</sup> Second, the provision giving OIRA the ability to waive the review process for significant regulatory actions should be eliminated. Finally, some principle of accountability must be established to ensure the information is easily accessible to the general public and that online databases are maintained. Moreover, while there are certainly downsides to an executive mandate, it is preferable to amending the APA.<sup>299</sup>

### C. Reasons to Avoid Amending the Administrative Procedure Act

Requiring cost consideration for pre-rule decisions will help agency rules survive judicial review of the final product, even if that requirement is not independently reviewable. Executive Order 12,866 and its predecessors have never included an independent legal right of review, even for final rules.<sup>300</sup> When executive orders are utilized as tools to increase administrative efficiency, creation of independent legal rights is not the objective. Likewise, this proposal is intended as a mechanism to create a more comprehensive

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296. See Driesen, *supra* note 36, at 77-80 (suggesting that evaluating health, safety, and environmental regulations on the basis of feasibility comports more closely with the public's expectations for both accountability and transparency).

297. See Exec. Order No. 12,866 §§ 6(a)(E), (b)(4)(D), 3 C.F.R. 638, 644-48 (1994), *reprinted in* 5 U.S.C. § 601 at 804-06 (2012) (containing disclosure requirements).

298. See Copeland, *supra* note 197, at 1291-93, 1309-10 (discussing that even under the current disclosure requirements the material published by OIRA does not make clear the participants or substance of meetings); Nou, *supra* note 23, at 1823-24 (describing how disclosure requirements under the current executive order are often not met in practice).

299. See *infra* Section III.C (describing the reasons to avoid a direct amendment of the APA).

300. Exec. Order No. 12,866 § 10, 3 C.F.R. at 649.

administrative record regarding decisions made early in the rulemaking process, and to make those decisions more transparent.<sup>301</sup> These goals can be achieved through the use of executive action, thereby avoiding the headache and debate that would inevitably accompany a congressional action.

Adding a uniform cost consideration requirement to the APA has been challenging.<sup>302</sup> At its core, the APA relies on the participation of private parties for rulemaking to function.<sup>303</sup> The additional pre-rule requirements proposed do not, however, need to be codified in the APA. The requirements of the APA will ensure any substance of the feasibility assessment relied upon in proposed and final rules will be published as part of the substance and basis.<sup>304</sup> Congress has, for the most part, left supervision of agencies to the executive.<sup>305</sup>

As a functional matter, an executive order is a better mechanism through which to require assessment of agency policy decisions at the pre-rule phase. One reason is that pre-rule determinations of whether regulation is necessary does not fit under the APA's current definition of a "rule."<sup>306</sup> Pre-rule determinations do, however, fit within the time-tested definition of "regulatory action" in Executive Order 12,866.<sup>307</sup> While formal amendment to

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301. See *supra* Section III.B (discussing the need for greater transparency).

302. See, e.g., Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96-98 (2003) (summarizing some perceived flaws of the APA and various criticisms the statute has received since its promulgation).

303. See *id.* at 102-03.

304. See Administrative Procedure Act, 5 U.S.C. § 553(b) (2012) (requiring notice of proposed rulemaking to include "reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule or a description of the subjects and issues involved"). Additionally, any findings relied upon for the final rule will usually be included in the statement of basis and purpose. *Id.* § 553(c) ("[T]he agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

305. See Rubin, *supra* note 302, at 134-36 (summarizing the minimal actions Congress has taken to guide executive review of administrative decisions).

306. See 5 U.S.C. § 551(4) (defining a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").

307. Exec. Order No. 12,866 § 3(e), 3 C.F.R. at 641 (defining regulatory action as "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking").

the APA could theoretically provide a more permanent solution, Congress's reluctance to change the APA has deep roots and seems unlikely to change.<sup>308</sup>

The acquiescence of Congress to executive review over the last several decades indicates a lack of ability or desire to formally guide these efforts.<sup>309</sup> The simplicity of a feasibility assessment also makes it superior to CBA for pre-rule decisions.<sup>310</sup> Moreover, an early feasibility requirement would help to ensure agencies are acting in an economically rational manner when deciding whether additional regulations are required, which is an ideal the APA itself does not always accomplish.<sup>311</sup> Additional executive oversight is likely to meet some resistance from those who already believe the federal regulatory process is already too slow and cumbersome.

#### D. Potential Opposition to More Extensive Executive Review

The proposal discussed thus far may face criticism as it imposes additional burdens on the regulatory process, thereby slowing down regulation.<sup>312</sup> Some may also believe additional requirements will actually push the regulatory process further out of public view<sup>313</sup> and result in an unreasonable blanket patch for unique agency problems.<sup>314</sup> These criticisms are not unique to this proposal; in fact, they are the kind of concerns that face any proposal to

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308. See Rubin, *supra* note 302, at 136-37. Congress has added some incremental requirement to federal rule making and executive review, but nothing comprehensive. See Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-12 (2012)); Paperwork Reduction Act, Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as reenacted at 44 U.S.C. §§ 3501-02 (2012)); Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995) (imposing requirements similar to Executive Order 12,866 on federal mandates that impact states) (codified in scattered sections of 2 U.S.C.).

309. See Rubin, *supra* note 302, 136-37.

310. Cf. *supra* Subsection II.A.1. See Rubin *supra* note 302, at 136-37 (arguing the process of executive review is exactly the kind of process that should be addressed by the APA).

311. See Rubin, *supra* note 302, at 162-63 (advocating for a new APA that would codify the principle of instrumental rationality into agency rulemaking, which would ensure that agencies implement legislative and presidential goals in the most effective manner possible).

312. See *infra* Subsection III.D.1.

313. See *infra* Subsection III.D.2.

314. See *infra* Subsection III.D.3.

augment the regulatory process.<sup>315</sup> However, the force and magnitude of opposition is not sufficient to impede the value of a feasibility mandate.<sup>316</sup>

### 1. *Excessively Burdensome*

To counter the criticisms that a pre-rule feasibility standard is unduly burdensome requires consideration of two factors. First, the utilization of a feasibility standard for pre-rule actions would remove the need to quantify and monetize benefits while a regulation is still in the womb.<sup>317</sup> Assessing the economic feasibility of additional regulation consists of two primary steps. Initially, a range of possible regulatory solutions must be identified prior to crafting the details of a specific proposal.<sup>318</sup> Next, the estimated economic costs of those options are compared with the economic characteristics of the target industry.<sup>319</sup> Accordingly, while not without burden, feasibility is much simpler and cheaper than monetizing anticipated benefits for a formal CBA.<sup>320</sup>

Moreover, for many decisions, agencies will compile significant scientific and economic data prior to deciding if further regulation is necessary.<sup>321</sup> While this is not true for all regulatory actions, those that are of such a magnitude as to lead to a significant rule will almost always be accompanied by substantial research.<sup>322</sup> Accordingly, feasibility analysis and OIRA review will not excessively delay the regulatory process because much of the

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315. See Rubin, *supra* note 302, at 97-99 (describing a number of criticisms of the APA).

316. See *infra* Subsections III.D (summarizing why the proposed feasibility standards survives likely critiques).

317. See *supra* Subsection III.B.1; Driesen, *supra* note 36, at 12.

318. See *supra* Subsections III.B.1-2; see also Driesen, *supra* note 36, at 8-12.

319. See Driesen, *supra* note 36, at 8-12.

320. *Id.* at 49-50, 89-90. Recall that a formal CBA requires detailed quantification even noneconomic benefits.

321. See *supra* Section III.A.

322. See, e.g., Clean Air Act, 42 U.S.C. § 7412(1)(m)(5) (1990) (requiring studies of emissions from power plants to be completed within three years of enactment followed by regulations if determined appropriate and necessary). The required studies and appropriate and necessary finding did not, however, come until almost ten years later. See Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000).

research needed is synonymous with what the agency already performs to prepare for later review.<sup>323</sup>

## 2. *Pushing the Administrative Process Out of the Public Eye*

Expanding the disclosure requirements already present in Executive Order 12,866 enhances accountability at both an administrative and political level.<sup>324</sup> Meaningful participation by the public in rulemaking is maintained because the communications regarding all regulatory actions under OIRA review are published more quickly and with greater detail.<sup>325</sup> Increased disclosure requirements are burdensome, but OIRA is already in the business of keeping and managing documents and data.<sup>326</sup> The recommended expansions would increase the likelihood that what is disclosed will be practically useful and informative. Further, the General Accounting Office has already recommended similar expansions, but they have not been fully implemented in practice.<sup>327</sup> The public should be able to review the full scope of decisions made by the government throughout the rulemaking process, including what parties have lobbied to influence those decisions.<sup>328</sup>

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323. See Driesen, *supra* note 36, at 49-50 (an assessment of feasibility presupposes cost assessment, which is the first step in performing a CBA).

324. See *id.* at 80-85 (arguing the feasibility principle better serves democratic accountability, as well as offering fewer opportunities for special interest groups to influence rulemaking).

325. See *supra* Subsection III.B.3.

326. See Exec. Order. No. 12,866 § 6(a)(3)(E), (b)(4)(D), 3 C.F.R. 638, 644-48 (1994), *reprinted in* 5 U.S.C. § 601 at 804-06 (2012) (containing disclosure requirements); see also Copeland, *supra* note 197, at 1273-75 (describing OIRA's recordkeeping).

327. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 206, at 14-15 (recommending several changes to improve OIRA's compliance with the public disclosure requirements of EO 12,866). Three years after the General Accounting Office made these recommendations, scholars still continue to note less than desirable compliance. See Copeland, *supra* note 197, at 1309. Some have suggested OIRA should be subjected to the same disclosure requirement as provided under the APA. See, e.g., REVESZ & LIVERMORE, *supra* note 3, at 171-72.

328. See REVESZ & LIVERMORE, *supra* note 3, at 171-72 (arguing OIRA should be subject to the same transparency requirements as under the APA for "rulemaking like" activities).

### 3. A Uniform Executive Requirement Is the Best Option

With one exception, Congress has been largely unsuccessful in mandating any form of uniform cost assessment for federal rules.<sup>329</sup> Efforts to codify specific CBA requirements continue to rise,<sup>330</sup> but the current piecemeal approach to regulation is inefficient and undesirable. As the congressional unanimity needed to amend the APA is lacking, the most effective solution remaining is a new executive order to improve on the existing process of review by OIRA.<sup>331</sup> A new order would allow the president to set the tone for how to review regulatory costs while leaving Congress free to discard the requirements as needed.<sup>332</sup> Moreover, while the reasons agencies regulate vary according to the jurisdiction and scope of authority delegated by Congress, the feasibility standard proposed fits exceptionally well in a uniform order.

Executive Order 12,866 is not aimed at regulation of a specific type but rather broadly at those regulations expected to impose significant economic costs.<sup>333</sup> Because the proposed feasibility standard maintains the structural requirements of the order, it will only impose additional burdens on regulatory decisions of substantial economic magnitude. Moreover, this proposal also retains the preclusion against superseding contrary requirements imposed by federal law.<sup>334</sup> Congress remains free to exempt specific regulatory decisions from the requirement or to impose more stringent

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329. See Rubin, *supra* note 302, at 136 (noting the Unfunded Mandate Reform Act of 1915 requires CBA of regulations that have significant “economic impact on state and local governments”).

330. See, e.g., H.R. Res. 2410, § 22601(c)(3) (114th Cong., 2015) (introduced in the House May 19, 2015) (requiring the National Rail Development Plan to include an analysis of costs and benefits of potential investments weighing a number of enumerated factors).

331. See REVESZ & LIVERMORE, *supra* note 3, at 171 (suggesting a new executive order to redefine the role of OIRA). The order proposed by Revesz and Livermore would move OIRA into a more agenda setting role and away from CBA altogether. *Id.*

332. See Rodgers, *supra* note 183, at 15-16 (describing executive action as an aggressive first move that can be utilized strategically).

333. See Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641 (requiring CBA of regulatory actions identified as significant, usually those that impose \$100 million or more in annual economic costs). The proposed order would maintain the significant regulatory action criteria, and thus only apply to decisions concerning regulation of great economic magnitude.

334. See *id.* § 1(b)(10), 3 C.F.R. at 639.

requirements as it deems necessary.<sup>335</sup> Also, agencies will be better able to implement new requirements if imposed only on a limited number of significant rules rather than generally under the APA.<sup>336</sup> Under this proposal, the feasibility of a pre-rule decision will serve as a default question for agencies unless Congress expresses contrary intent.

Uncertainty at the point of deciding whether to regulate may preclude application of a detailed CBA, but this does not nullify the need for cost assessment.<sup>337</sup> Requiring a feasibility analysis for pre-rule regulatory actions will promote efficiency and effectiveness of final rules, with minimal added burden.<sup>338</sup> Pre-rule accountability will increase efficiency by encouraging agencies to invest significant time and resources only in those rules that are economically achievable.<sup>339</sup>

## CONCLUSION

Cost assessment is an essential part the regulatory process.<sup>340</sup> Regulatory decisions that are not based on a thorough consideration of all relevant factors can hardly expect to survive judicial review.<sup>341</sup> Generally, unless Congress has stated otherwise, agencies are free to and should consider a variety of costs associated with potential regulatory actions.<sup>342</sup> As written, Executive Order 12,866 provides the framework for review of significant actions once rulemaking is

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335. See *id.* § 6(a)(3)(C), 3 C.F.R. at 644 (stating that the analysis required by the order must only be complied with as legally permitted).

336. See discussion *supra* Subsection II.A.1, Section III.A (noting the review under discussion only applies to economically significant rules).

337. See *Michigan v. EPA*, 135 S. Ct. 2699, 2710-11 (2015) (dismissing the dissent's concerns regarding uncertainty and holding that even if cost was considered at later stages, it did not cure the initial and reversible defect committed by the EPA).

338. See discussion of hypotheticals *supra* Subsection III.B.2.

339. See *supra* Subsection III.B.1 (discussing the application of feasibility to pre-rule evaluation).

340. See SUNSTEIN, *supra* note 34, at 19-20 (noting the acceptance and integration of CBA into the agenda of presidents and agencies since Reagan and predicting such embrace will continue).

341. See *Michigan*, 135 S. Ct. at 2706 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) ("It follows that agency action is lawful only if it rests 'on a consideration of the relevant factors.'").

342. See SUNSTEIN, *supra* note 34, at 31 (presenting perceived default rules of CBA).

underway;<sup>343</sup> however, holes in the effectiveness and transparency of the process remain.

While Executive Order 12,866 appears to require formal review of preliminary decisions,<sup>344</sup> clarification on that issue is needed. Weighing costs and benefits is a valuable tool in rulemaking, but formal CBA is not the best mechanism for evaluating all regulatory decisions.<sup>345</sup> Utilizing a feasibility standard is a reasonable way to assess the expected costs of early regulatory decisions before unrecoverable resources are expended drafting specifically tailored rules.<sup>346</sup> Coupled with greater accountability, this standard will result in efficient and stable regulations and promote public confidence by bringing the administrative process out of the shadows.<sup>347</sup>

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343. See discussion *supra* Subsection II.A.1 (discussing the pertinent text of Executive Order 12,866).

344. See discussion *supra* Section III.A. The executive order that has been the primary focus of discussion provides separate definitions for a “rule” and “regulatory action,” Exec. Order No. 12,866 § 3(d)-(e), 3 C.F.R. 638, 641 (1994), reprinted in 5 U.S.C. § 601 at 803 (2012), but only provides for the most critical review and CBA requirements for significant regulatory actions that will, or are likely to, lead to rules. *Id.* § 6(a)(3)(B), 3 C.F.R. at 644-45.

345. See Driesen, *supra* note 36, at 94 (concluding feasibility is at least as viable as CBA for many regulatory structures).

346. See *supra* Sections III.A-B.

347. See *supra* Sections III.C-D.