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January 31, 2020

Ms. Cynthia T. Brown
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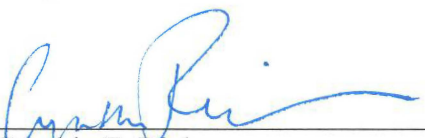
Re: EP 752, Association of American Railroads' Petition for Reconsideration

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are the Association of American Railroads' ("AAR's") comments in response to the Board's November 4, 2019 Solicitation of Information.

Thank you for your assistance in this matter.

Respectfully,



Cynthia E. Richman

Counsel for the Association of American Railroads

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 752

**RESPONSE OF THE ASSOCIATION OF AMERICAN RAILROADS TO
SOLICITATION OF INFORMATION**

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January 31, 2020

INTRODUCTION

The Surface Transportation Board should join other agencies throughout the federal government and incorporate robust cost-benefit analysis into its rulemakings. As AAR has explained, cost-benefit analysis is a widely accepted feature of modern administrative law, and would help ensure the Board's compliance with its statutory obligations. AAR's Petition for Rulemaking, EP 752 (STB served Mar. 14, 2019) ("AAR Petition").

In response to AAR's petition, the Board recently solicited "information on whether and how particular cost-benefit analysis might be more formally integrated into its rulemaking process." Solicitation of Information, *Association of American Railroads—Petition for Rulemaking*, EP 752, at 1 (STB served Nov. 4, 2019) ("Solicitation"). The Board seeks information on the following four topics: (1) specific methods of cost-benefit analysis, including information on how those methods apply "to the economic regulation of railroads"; (2) "specific data that the Board collects or could collect to assist with cost-benefit analysis"; (3) "a detailed description of how cost-benefit analysis would apply to a hypothetical rulemaking"; and (4) whether the Board should adopt a "threshold for determining the rulemaking proceedings to which any cost-benefit procedures should apply." *Id.* at 2–3.

AAR addresses each of these topics in detail below. In addition, AAR's comments are supported by the expert advice of David Zorn, PhD (attached as Exhibit A). Dr. Zorn has decades of experience in cost-benefit analysis. As explained below and in Dr. Zorn's verified statement, the Board can apply the basic framework of cost-benefit analysis that applies throughout the federal government in its own rulemakings. In doing so, the Board can rely on the experience of other agencies, including independent agencies like the SEC, in addition to the extensive experience of the Office of Management and Budget ("OMB"). The Board already has a wide variety of data resources available to it when it analyzes the costs and benefits of its rules,

and can always identify and solicit additional data as necessary in individual rulemakings. And even though the Board's hypothetical is difficult to analyze, given it omits any description of the problem it seeks to address, applying the basic framework of cost-benefit analysis is fairly straightforward. Finally, AAR suggests that, if the Board adopts a threshold for cost-benefit analysis, then it should follow the practice of other agencies and prepare a comprehensive economic analysis of proposed rules that are particularly consequential. Specifically, the Board could require cost-benefit analysis for rules that, at minimum, have a material adverse effect on the economy or competition, raise novel legal or policy issues, have a potential economic impact of \$100 million or greater, or are otherwise important enough to require a full analysis.

In short, the Board should join the extensive (and growing) list of federal agencies, including independent agencies, that have committed themselves to analyzing the economic costs and benefits of their proposed rules. The Board should grant AAR's petition.

RESPONSE

For the reasons AAR has already explained, the Board should formally incorporate cost-benefit analysis into its rulemaking proceedings. The Board would break no new ground in doing so, and could draw on the extensive experience and guidance of fellow agencies and OMB. In its solicitation, the Board has specifically asked for information regarding four topics: (1) the methods it should use to analyze its rules; (2) the data resources that its analysts could draw on; (3) how cost-benefit analysis would apply to a hypothetical rule lowering the statutory revenue-variable cost ("R/VC") threshold for market dominance; and (4) the threshold for determining which rulemakings require a comprehensive cost-benefit analysis. AAR will briefly explain the importance of cost-benefit analysis below, and then discuss each of these topics in detail.

A. Cost-Benefit Analysis Is An Essential Component Of Effective Rulemaking

As AAR explained in its opening petition, cost-benefit analysis has long been recognized as an indispensable part of sound policymaking. *See* AAR Petition at 6–8. In recent years executive and independent agencies alike have recognized the importance of making a formal commitment to incorporate meaningful cost-benefit analyses into their rulemakings. For example, in December 2018 the Department of Transportation (“DOT”) outlined new policies governing its rulemakings, including a renewed commitment to cost-benefit analysis and an emphasis on using the best data that is reasonably available. *Policies and Procedures for Rulemakings*, DOT Order 2100.6, at 3, 14 (Dec. 20, 2018) (“DOT Order”). Similarly, the FCC adopted a formal rule requiring its economists to prepare “a rigorous, economically-grounded cost-benefit analysis for” major rulemakings. 47 C.F.R. § 0.21(c).

Here, too, the Board should formally incorporate cost-benefit analysis into its rulemaking procedures to ensure that the Board’s rulemakings comply with the best practices for expert agencies making rules that can have a dramatic impact on the industry and economy. In fact, 52 members of Congress recently wrote the Board encouraging it to “incorporate a thorough cost-benefit analysis into its regulatory framework” to “improve the transparency and clarity of the Board’s decisions and help ensure that any new regulatory action promotes the long-term health of the freight transportation sector for shippers, railroads, and consumers alike.” Letter from the Honorable Sam Graves et al. at 1 (Dec. 9, 2019) (attached as Exhibit B). And another member of Congress recently wrote the Board separately to “urge [the Board] to incorporate a thorough cost-benefit analysis into its regulatory framework towards future significant rulemakings.” Letter from the Honorable Ken Calvert, EP 752, at 1 (STB served Jan. 15, 2020). Even the American Chemistry Council—one of the Joint Shippers that has argued that the Board should deny AAR’s request for a formal cost-benefit rule—recognizes that “[i]t is now a well-

established principle with academics, policymakers, and the public that agencies should regulate only when the benefits of regulation outweigh the cost.” American Chemistry Council Comment Letter, EPA-HQ-OA-2018-0107, at 1 (Aug. 13, 2018) (“ACC EPA Comment Letter”), <https://tinyurl.com/yx8bqny8>.

Among other advantages, a formal cost-benefit analysis requirement would help ensure that the Board’s rulemakings fulfill its statutory objectives, including the consideration of the economic consequences of its rules. For example, Section 10101 provides that “[i]n regulating the railroad industry, it is the policy of the United States Government . . . to ensure the development and continuation of a sound rail transportation system,” to “allow[] rail carriers to earn adequate revenues,” and “to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes.” 49 U.S.C. § 10101(3)–(5). As the D.C. Circuit has put it, an agency should strive to “apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation.” *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quotation marks omitted). And the Supreme Court has held that an agency’s failure to consider whether a regulation “does significantly more harm than good” is inconsistent with its obligation to adopt “appropriate and necessary” regulations. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015); *see also id.* at 2717 (Kagan, J., dissenting) (“[A]n agency must take costs into account in some manner before imposing significant regulatory burdens.”).¹

¹ The American Chemistry Council has acknowledged the import of *Michigan v. EPA*, quoting that case for “the principle that unless a statute otherwise prohibits it, ‘an agency must take costs into account in some manner before imposing significant regulatory burdens.’” *See* ACC EPA Comment Letter, at 2 (emphasis in original); *see also id.* at 2 n.9 (citing *Business Roundtable* for the proposition that “an agency statutorily authorized to conduct a cost-benefit analysis must quantify costs and benefits”) (emphasis in original).

Thus, incorporating cost-benefit analyses into the Board’s rulemaking procedures will help the Board ensure that its rules are legally defensible and honor its statutory obligations. “[P]art of [cost-benefit analysis]’s appeal for regulators is that it provides a clear methodology for achieving various statutory directives in light of difficult tradeoffs, especially when the underlying statutes require agencies to consider these tradeoffs in some way.” Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 Duke L.J. 1593, 1606 (2019) (“Cecot, *Regulatory Stability*”). An agency’s “alternative to [cost-benefit analysis] is making these policy-laden decisions while largely uninformed about costs and benefits, usually by pointing vaguely to some statutory directive or by citing agency expertise.” *Id.* at 1613. That haphazard approach is “more likely to result in decisions that are profoundly misguided.” *Id.*

Cost-benefit analysis reduces the risks of that approach and, in turn, generally increases a rule’s odds of surviving judicial review. *See* Christopher Carrigan et al., Geo. Wash. Univ., *Regulatory Impact Analysis and Litigation Risk* 12 (2019) (“[E]mpirical analysis suggests that the quality of the regulatory agency’s [cost-benefit analysis] can affect the outcome of judicial review when the rule is challenged by a potentially aggrieved party.”); *see also* Jerry Ellig, Brookings Inst., *Better Economic Analysis Can Reduce Regulators’ Litigation Risks* 11 (2019) (“An analysis with above average quality is more likely to help uphold the regulation in court than to undermine it.”). In fact, the success rate of the Board’s rulemakings under its existing procedures (57%) “is markedly lower than it is in other proceedings.” Matthew J. Warren, *Judicial Review of Surface Transportation Board Decisions: An Empirical Analysis*, 45 Transp. L.J. 1, 22–23 (2018). Adding cost-benefit analysis into the Board’s rulemakings will increase efficiency and conserve public and private resources by reducing the likelihood of judicial challenge.

The Congressional Review Act also requires the Board to consider the economic consequences of its rules, as OMB recently emphasized. After AAR filed its petition, OMB issued guidance directing the Board and other agencies to submit to OMB evaluations of whether or not proposed rules are “major” and meet certain thresholds of economic impact under the Act. *See* OMB, Guidance on Compliance with the Congressional Review Act (2019) (“CRA Guidance”) (attached as Exhibit C). The new guidance also establishes that these evaluations must include cost-benefit analyses based on “the analytical approach in OMB Circular A-4.” *Id.* at 6. OMB’s guidance confirms that the issue is not *whether* the Board should consider the costs and benefits of its rules, but simply *how* best to do so in light of existing statutory requirements.

Of course, the Board, like other agencies, has finite resources. But, as evidenced by other agencies, adoption of cost-benefit analysis does not impose prohibitive costs. The Board can join the numerous other agencies that apply cost-benefit analysis to significant rulemakings with only modest adjustments to its day-to-day operations. The Board already has an Office of Economics with economists who can prepare cost-benefit analyses. And the Board already requires railroads to submit on an ongoing basis many types of data that would likely prove useful in analyzing the costs and benefits of proposed rules. As a result, the Board is in a better position than many other agencies to include cost-benefit analysis in its significant rulemakings and can do so without any major investment. *See* Ex. A at 3, 5–7, 20–21.

Most important, a formal commitment to cost-benefit analysis will help the Board do its job more effectively and efficiently. Cost-benefit analysis ensures that agency decisionmakers clearly define and consider the pros and cons of proposed rules and alternative proposals. *See, e.g., Administrative Conference Recommendation 2013-2*, 78 Fed. Reg. 41,352, 41,355 (July 10, 2013); Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact*

Analysis, 28 Cornell J.L. & Pub. Pol’y 1, 10 (2018) (“Ellig, *Regulatory Impact Analysis*”).

Applying cost-benefit analysis to each of the Board’s proposed rules could also make rulemakings more efficient and methodical by organizing the Board’s consideration of the consequences of its proposals into a consistent framework. “When carefully conducted, [cost-benefit analysis] promotes transparency and accountability, efficient and predictable policies, and targeted retrospective review.” Cecot, *Regulatory Stability*, at 1601. Cost-benefit analysis also promotes regulatory stability, since it “ensures that changes to policy are based on some evenhanded analysis of costs and benefits” set against the backdrop of “a regulation’s original [cost-benefit analysis].” *Id.* at 1618.

B. Responses To The Board’s Specific Requests For Information

In November 2019, the Board issued a solicitation of information stating that it “continues to consider the practices at other agencies” relating to cost-benefit analysis. Solicitation at 2. The Board explained “that it would be helpful to solicit additional information” that would assist its “evaluation of whether and how particular cost-benefit analysis approaches might be more formally integrated into its rulemaking process.” *Id.* The Board subdivided that information into four categories: (1) Methods, (2) Data, (3) Application, and (4) Threshold. *Id.* at 2–3. AAR will address each category in turn.

To assist the Board’s evaluation of the first three issues, AAR has also solicited the expert advice of David Zorn, PhD. For more than two decades, Dr. Zorn was an economist at the Food and Drug Administration, where he supervised and trained regulatory analysts and conducted and supervised cost-benefit analyses. In the attached verified statement, Dr. Zorn explains both how economists at federal agencies approach cost-benefit analysis generally and how the Board could apply those practices in its proceedings. *See* Ex. A.

1. Methods Of Cost-Benefit Analysis

The Board first seeks “information on specific methods . . . that would assist in the qualitative or quantitative analysis of a final rule by the Board.” Solicitation at 2. Meaningful cost-benefit analysis (also referred to as “economic analysis,” “regulatory impact analysis,” or “benefit-cost analysis”) facilitates reasoned agency decision-making by evaluating the necessity, benefits, and costs of additional agency action. The basic framework of cost-benefit analysis requires an agency to: (1) identify the nature and demonstrate the significance of the problem that the agency is trying to solve; (2) identify a variety of alternative solutions; (3) identify the potential benefits of each alternative and the proposed agency action; and (4) identify the potential costs of each alternative and the proposed agency action, including the cumulative impact of regulation. *See, e.g.*, OMB Circular A-4 at 2–3 (Sept. 17, 2003), <https://tinyurl.com/yaork9v2>; Ex. A at 8–9; Jerry Ellig, Public Interest Comment, *Association of American Railroads—Petition for Rulemaking*, EP 752, at 4 (STB served Nov. 6, 2019) (“Ellig, Public Interest Comment”).

Guidance From Other Agencies: This basic framework has been applied by agencies across the federal government for decades. Thus, the Board would not be starting from a blank slate in applying the framework in its own rulemakings. Existing regulatory guidance can serve as a template for the Board, particularly because OMB and several agencies, including independent agencies, have already developed concepts and methods that are largely transferable across different kinds of rulemakings. For example, OMB has published extensive guidance on the methods agencies should use to conduct cost-benefit analyses. *See generally* Circular A-4; *see also, e.g.*, OMB, *Regulatory Impact Analysis: A Primer* (Aug. 15, 2011), <https://tinyurl.com/y9kxe9y6>; OMB, *Agency Checklist: Regulatory Impact Analysis* (Oct. 28, 2010) (“OMB Checklist”), <https://tinyurl.com/ybr2v32f>. And the SEC has published detailed

guidance on how its staff should prepare cost-benefit analyses. *See SEC, Memo: Current Guidance on Economic Analysis in SEC Rulemakings* (Mar. 16, 2012), <https://tinyurl.com/y74qfq76>.

The Board should also consider working closely with OMB in light of its experience conducting and evaluating cost-benefit analyses for agencies throughout the federal government, including independent agencies. In fact, the Commodity Futures Trading Commission (“CFTC”) entered into a formal memorandum of understanding under which OMB agreed to provide the CFTC “technical assistance” in considering “the costs and benefits of proposed and final rules.” *Memorandum of Understanding Between OIRA and the CFTC* (May 9, 2012), <https://tinyurl.com/ydhqegw5>. That is a sound arrangement. As Dr. Ellig has noted, “[a]gencies produce higher-quality analysis when [OMB] reviews the regulation for a longer time.” Ellig, *Regulatory Impact Analysis*, at 31–32. The Board should consider a similar arrangement with OMB as it develops its own best practices for cost-benefit analysis.

Cost-Benefit Analysis At The SEC: As an illustration of how cost-benefit analysis is applied by independent agencies, consider the SEC’s detailed cost-benefit analysis of its recent proposal to amend its rules related to investment-adviser advertisements. *See Investment Adviser Advertisements; Compensation for Solicitations*, 84 Fed. Reg. 67,518, 67,600–21 (Dec. 10, 2019). The SEC starts by describing the problem it is trying to solve and the baseline for its analysis, including its existing rules. *Id.* at 67,600–02. The SEC identifies the potential reach of its proposed rule in terms of the number of regulated investment advisers and the amount of assets that they manage, and then estimates the numbers of specific types of the advisers’ potential clients who could benefit from the proposed rule. *Id.* at 67,603–06. The SEC then walks through a detailed analysis of the costs and benefits of its proposal. *Id.* at 67,606–18.

Although the SEC had difficulty quantifying some of the potential costs and benefits, it still identifies each and explains why it could not be quantified based on the information currently available to the agency. *Id.* Importantly, the proposal specifically solicits information from commenters that would allow the SEC to further consider and quantify these and other costs and benefits. *Id.* at 67,600. And the SEC quantifies specific costs and benefits where feasible, including by estimating the costs of additional disclosures for individual investment advisers and the aggregate cost of the proposed rule. *Id.* at 67,612–21. The SEC then considers in its analysis all of the economic considerations it is obligated to consider by statute—e.g., the potential effect of its proposed rule on capital formation, efficiency, and competition. *Id.* at 67,618–19. And the SEC describes the reasonable alternatives to its proposal and explains why it chose the proposed rule instead. *Id.* at 67,619–21.

Another illustration of how cost-benefit analysis is applied can be found in another recent SEC rule that gives management companies the option to provide investors with shareholder reports by internet instead of by mail. *See Optional Internet Availability of Investment Company Shareholder Reports*, 83 Fed. Reg. 29,158 (June 22, 2018). Once again, the SEC begins by describing both the problem that the rule was designed to solve and the analytical baseline. *Id.* at 29,183–85. The SEC then explains the rule’s potential reach in quantitative and qualitative terms, and notes that it took care to revise its initial estimates in light of more accurate ones provided by commenters. *Id.* at 29,184. The SEC then quantifies specific costs and benefits to the extent possible and discusses each of the economic considerations that Congress required it

to take into account. *Id.* at 29,185–94. The SEC concludes by describing alternatives and explaining why it opted for its rule instead. *Id.* at 29,194–95.²

Cost-Benefit Analysis At The Board: A cost-benefit analysis of the Board’s proposals could follow the same basic approach. The Board has asked how cost-benefit analysis would apply in the specific context of the economic regulation of railroads. As Dr. Zorn emphasizes, the subject matter of the Board’s regulations differ from those of other agencies, but the methods of analyzing the regulations that it proposes and adopts should not. Ex. A at 7. In short, the Board could implement the same basic framework that other agencies use to analyze regulations. To do so, the Board would first identify the scope of the problem that it is trying to solve and explain the necessity of the proposal. The Board would then identify and describe regulatory alternatives. Next, the Board would analyze and compare the potential costs and benefits of its proposal.

The Board’s analysis should quantify costs and benefits to the extent practicable. In doing so, the Board could draw on the resources identified above, and could also draw on the specific methods it already uses to comply with the Paperwork Reduction Act. The Act requires agencies to provide OMB with an estimate of the burden that each of the agencies’ information-collection requests will impose. *See* 44 U.S.C. § 3507(a); *see also* GAO, *Paperwork Reduction Act: Agencies Could Better Leverage Review Processes and Public Outreach to Improve Burden*

² Other examples of independent agencies engaging in thorough cost-benefit analyses are legion. *See, e.g., Transaction Fee Pilot for NMS Stocks*, 84 Fed. Reg. 5202 (Feb. 20, 2019) (SEC); *Regulation of NMS Stock Alternative Trading Systems*, 83 Fed. Reg. 38,768 (Aug. 7, 2018) (SEC); *Recordkeeping for Timely Deposit Insurance Determination*, 81 Fed. Reg. 87,734 (Dec. 5, 2016) (FDIC); *Investment Company Liquidity Risk Management Programs*, 81 Fed. Reg. 82,142 (Nov. 18, 2016) (SEC). The Board may wish to look to these and similar examples as it considers how to apply cost-benefit analysis in its own rulemakings.

Estimates 7 (2018).³ Not all costs and benefits are easily quantifiable. The Board should, where appropriate, describe numbers in ranges of potential costs and benefits, or, as a last resort, consider costs and benefits qualitatively and explain why they cannot be quantified. And if the Board lacks sufficient information to quantify the economic impact of a proposed rule, then it should solicit that information by specifically asking stakeholders to provide verifiable and quantified estimates of costs and benefits.

Dr. Zorn describes how the Board would implement this approach, using one of the Board's recent demurrage proposals as an example. *See Notice of Proposed Rulemaking: Demurrage Billing Requirements*, EP 759 (STB served Oct. 7, 2019).⁴ The Board could identify the problem that it is trying to solve as shippers' and warehousemen's alleged lack of "sufficient information to readily assess the validity of [demurrage] charges without having to undertake an unreasonable effort to gather information that can be provided by the railroad in the first instance, to properly allocate demurrage responsibility, and to modify their behavior if their own actions led to the demurrage charges." *Id.* at 10. The Board would then identify and describe a variety of alternative solutions to the perceived problem. *Ex. A* at 10. For example, it would be

³ The Board may also find relevant general methods that both executive and independent agencies routinely employ to calculate the total cost of an information-collection request under the Paperwork Reduction Act. First, agencies solicit public input on their proposed calculations. GAO, *Paperwork Reduction Act*, at 9. Second, agencies use existing data and, in some cases, also collect original data. *Id.* at 12–13. The existing data can come from the agency itself or from other agencies. *Id.* at 13. And third, if agencies cannot find (or wish to supplement) relevant data, they exercise "their professional judgment to develop estimates, informed in some instances by internal consultation or public input." *Id.* at 14.

⁴ Dr. Zorn emphasizes that his discussion of the demurrage proposal and the Board's hypothetical rule are for illustration purposes only and are not intended to reflect his or AAR's opinions on the merits of either proposal, or as an exhaustive description of the factors that the Board would consider in a real rulemaking. *Ex. A* at 9 n.12, 23 n.25. Likewise, AAR's discussion of these proposals in these comments is solely to assist the Board's consideration of how to incorporate cost-benefit analysis into its rulemakings, and is not intended to reflect AAR's position on the proposals themselves or any other matter.

“essential” for the Board to consider “taking no new regulatory action” to provide “a baseline against which to measure the costs and benefits of new regulation.” *Id.* The Board could also consider “alternative minimum requirements for invoices that provide less detail than the proposed rule, and alternative minimum requirements that contain even more detail.” *Id.*

Next, the Board would identify the proposal’s potential costs and benefits. Ex. A at 10, 15. Dr. Zorn notes that although specific costs and benefits will likely be unique to each rule, there are categories of costs and benefits that are frequently implicated by the Board’s rulemakings. *Id.* at 10–11. For example, the cost of administrative proceedings at the Board, the effects of the Board’s rules on railroad investment and service, and the effects on output by shippers, could all be implicated by the Board’s regulation of freight-rail transportation. *Id.* In considering costs like these, the Board should take care to distinguish transfer payments (e.g., lower prices to shippers, which transfer money from railroads to shippers) from the social costs and benefits of those transfer payments (e.g., decreased investment in railroad infrastructure and reduced capacity). *Id.* at 11.

In the demurrage example, the Board could measure the potential costs of including additional information on demurrage invoices by estimating the number of labor hours that railroads and shippers would incur, multiplied by an estimate of the per-hour labor cost, to calculate a total one-time cost of implementing the proposed rule. Ex. A at 11–14. The Board would also consider potential costs identified by commenters, including the “potential impact of its proposal on railroad revenue sufficiency and the efficient operation of the rail system, and update its analysis based on that additional information.” *Id.* at 14. As for benefits, the Board would estimate the savings for carriers and shippers from a potential reduction in the amount of disputed invoices. *Id.* at 16. The Board would estimate the average cost of each disputed

invoice and then multiply that average cost by an estimated reduction in the amount of disputes to come up with an estimate (or an estimated range) of total savings. *Id.* at 16–18.⁵

Dr. Ellig’s comments with respect to the cost-benefit analysis of the Board’s recent “Market Dominance Streamlined Approach” and “Final Offer Rate Review” proposals are also instructive. Ellig, Public Interest Comment, at 1. In his November 2019 comment letter, Dr. Ellig notes that the proposals give the Board “an excellent opportunity . . . to ‘test drive’ the framework for benefit-cost analysis that is most commonly employed by federal agencies.” *Id.* at 3. Dr. Ellig then uses those proposals to “explain[] the [regulatory impact analysis] framework and demonstrate[] how it could be used to answer key factual questions the STB must answer in order to accomplish its statutory goals.” *Id.*

The Board has also asked for an account of how cost-benefit analyses might be different for “rules that establish the processes under which administrative litigation takes place,” as opposed to “other types of rules that prescribe a particular action or technology.” Solicitation at 2. At bottom, the basic framework that would govern the Board’s analysis of administrative process rules on the one hand and substantive rules on the other is the same. Ex. A at 6–7. Nevertheless, in individual rulemakings that framework could produce several differences in costs, benefits, and transfers.

⁵ The demurrage proposal may not satisfy the \$100 million threshold for “major rule[s]” in the Congressional Review Act, but nonetheless, Dr. Zorn’s cost-benefit analysis illustrates how cost-benefit analyses do not necessarily require significant investment and can provide the Board with important information to guide its regulatory decisions. *See* Ex. A at 10–19. In any event, the proposal may otherwise constitute a “major rule” meriting a full analysis because it could have a significant adverse impact on productivity. *See, e.g.,* Verified Statement of Bradley Stock, *in* Union Pacific Railroad Comment Letter, EP 759, at 3 (STB served Nov. 6, 2019) (explaining that as a result of the demurrage proposal, “Union Pacific would need to commit employees and informational technology resources to implement the propos[al],” which would “result in invoices twice as long as current invoices” and “additional time [spent by customers] each month reviewing the more cluttered invoice”).

As for administrative process rules, the Board could find that the majority of direct, easily quantifiable costs and benefits would be litigation and administrative costs incurred (or saved) by parties and the Board in administrative proceedings. *See* Ex. A at 10–11, 15–16. But the Board would also need to consider how changes to its procedural rules would change the behavior and incentives of railroads and shippers, including railroads’ and shippers’ expectations about the outcome and cost of administrative proceedings and how those expectations might impact rates and negotiations. *Id.* at 10–11.

As for new substantive rules, the Board would obviously want to determine the costs and benefits that directly result from compliance or, for deregulatory rules, the costs and benefits of relief from the need to comply. *See* Ex. A at 11, 15. But the Board would also need to identify indirect costs—e.g., the costs of any increase or decrease in administrative litigation caused by the new substantive rule. *See id.* at 11. Consider an indirect, but major, cost of the Board’s pending mandatory-switching proposal. If adopted, the proposal could lead to increased switching. As AAR has explained in that proceeding, increased switching could have significant ramifications for existing routing patterns that could, in turn, drive up costs associated with shipments, even for those shipments not subject to mandatory-switching orders. *See* Opening Comments of AAR, EP 711, at 4–6 (STB served Oct. 26, 2016). In a complete cost-benefit analysis, the Board would identify and consider these costs too.

For all of its rules, the Board should also consider their potential cumulative impact in light of the overall burden that the Board’s and other agencies’ regulations impose on the railroad industry. *See* AAR Petition 10–12. This is particularly important for the Board, since the pre-Staggers Act stagnation in the railroad industry proves that cumulative economic regulation can strangle the industry to the detriment of railroads, shippers, and the broader

economy. Among other things, the Board would consider how a proposed rule would interact with the Board’s other regulatory requirements, whether the proposed rule would conflict with or create inconsistencies with other regulations, and whether the additional costs of the new rule could be offset or lowered with corresponding deregulatory changes. Ex. A at 19–20.

2. Data Sources

Next, the Board requests “suggestions regarding specific data that [it] collects or could collect to assist with cost-benefit analysis.” Solicitation at 2. As Dr. Zorn explains, the Board already has access to extensive data collections that would likely prove essential in the Board’s cost-benefit analyses. Ex. A at 20. The following is a non-exhaustive list:

- Carload waybill data
- Uniform rail costing system data
- Annual R-1 reports and submitted financial data
- Rail service data
- Freight Analysis Framework data

Id.

The Board’s solicitation also mentions the possibility of increasing its data collection for the purpose of cost-benefit analysis in future rulemakings. The costs of doing so, however, would likely outweigh its benefits, as Dr. Zorn explains. Ex. A at 21–22. The data relevant to a cost-benefit analysis of one proposal is often irrelevant to analyses of others. *Id.* And agency economists are generally capable of identifying the types of data they need only after the agency identifies a problem and comes up with a proposed solution. *See id.* For those reasons, increasing general, ongoing data collection for the purpose of future cost-benefit analysis could result in wasted public and private resources. *See id.* AAR is unaware of any agency that collects information from regulated parties as a matter of course solely for the purpose of cost-benefit analysis.

Of course, the Board can and should always request additional information from shippers and carriers as necessary for its consideration of a particular proposal, as it has done here. Shippers and carriers are the entities most directly impacted by the Board's rulings, and they carefully monitor the Board's rulemaking proceedings. There is every reason to expect that they would be responsive to reasonable requests from the Board for information that would assist it in a particular rulemaking, including verifiable data that would help the Board quantify and analyze the economic impacts of its rules.

3. Application Of Cost-Benefit Analysis To The Board's Hypothetical Rule

The Board also asked for "a detailed description of how cost-benefit analysis would apply to a hypothetical rulemaking." Solicitation at 3. The hypothetical rulemaking is "a hypothetical proposed rule to modify the [R/VC] percentage used for purposes of market dominance from 180% to 165%." *Id.*

As an initial matter, the Board's hypothetical proposal suffers from a threshold problem that makes it difficult to respond to the Board's request. Specifically, the Board has not identified the hypothetical problem that the proposal is intended to solve. As Dr. Zorn explains, "[r]egulatory impact analysis should never be performed on a vaguely conceptualized regulation that is unmoored from any identifiable problem." Ex. A at 23. Effective cost-benefit analysis requires an agency to identify a problem first, rather than asking regulatory analysts to hypothesize a problem that would justify a new regulation. *See, e.g.,* Ellig, Public Interest Comment, at 4; Circular A-4 at 2–3. Identifying a perceived problem allows regulatory analysts to "[a]ssess the nature and significance of the problem," "so the agency knows whether there is a problem that could be solved through regulation, and so the agency can tailor a solution that will effectively solve the problem." Ellig, *Regulatory Impact Analysis*, at 7. Identifying the scope of

a perceived problem also informs analysis of the potential costs and benefits of a proposed rule, in part by identifying the intended beneficiaries and the businesses and individuals who are likely to bear the cost. Proposals like the hypothetical rule would leave commenters (and regulatory analysts) guessing at what the Board seeks to accomplish. They would also leave commenters and analysts guessing at which companies and individuals a proposed rule is intended to benefit, and who will bear the cost.

For purposes of walking through the analysis, AAR assumes that in the hypothetical the Board has perceived a market failure for traffic that has an R/VC ratio above 165 but below 180, and that the Board seeks to solve that problem by allowing shippers to challenge rates below the current threshold. Having identified a perceived problem, the Board would then marshal evidence showing that the status quo has failed to protect against the negative effects of market dominance. More specifically, the Board would need to point to a “demonstrable” market failure. Ex. A at 25. As Dr. Zorn explains, the Board could look to the Board’s experience with rate proceedings under the current threshold, and the Board’s economists could research the rates for traffic moving below R/VC 180 using information in the Board’s Carload Waybill database. *Id.* at 28, 34.

Assuming that the Board still perceives a problem, the Board would then identify reasonable alternatives to lowering the percentage to 165. One alternative would be a baseline of no regulatory action, which would leave the current R/VC threshold of 180 in place. The alternative of no regulatory action “usually serves as the most easily identified baseline for analysis and a basis for comparison of other alternatives.” Ex. A at 29. The Board would also consider alternative changes, including higher and lower thresholds or eliminating the threshold completely. *Id.* at 30.

Next, the Board would evaluate the potential costs of the hypothetical proposal. The Board would “estimate how carriers and shippers would respond to the Board’s new authority,” and assess the likelihood and consequences of various potential responses. Ex. A at 30. The potential consequences would include increased litigation at the Board, reductions in prices for some shippers to forestall potential litigation, and offsetting increases in prices for other shippers. *Id.* at 33. Although rate reductions would be transfer payments, not *direct* social costs, the Board would need to recognize the potential *indirect* social costs from a reduction in railroad revenue, including reduced investment by railroads, reductions in the quality of service, and decreased output by shippers whose prices go up to offset lower rates for other shippers. *Id.* The Board could use information in its confidential waybill data to estimate the impact of its proposal on rates and the annual projected increase in rate challenges at the Board. *Id.* at 34–35. Using the average cost of individual rate cases, the Board could quantify a range of potential increased litigation costs. *Id.* at 35.

The Board would then evaluate the hypothetical rule’s potential benefits and compare them to the rule’s potential costs. The potential benefits could include reduced prices to consumers that might result from reduced rates for affected shipments, or increased output by shippers who pay reduced rates. Ex. A at 36. If the potential costs of the rule would likely outweigh the potential benefits, then the Board would decline to adopt the rule or adopt a less costly alternative proposal.

Finally, even if in isolation the hypothetical rule appeared likely to create net benefits, the Board would still need to consider the rule’s cumulative impact. Among other things, the Board would consider whether tinkering with the market-dominance threshold would impact or create inconsistencies with the Board’s other policies that rely on R/VC ratios. Ex. A at 38–40. For

example, the Board has proposed incorporating the current threshold into the anti-competitive prong of the test for mandatory-switching orders, Decision, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711, at 22 (STB served July 27, 2016), and has used the current threshold to identify “potentially captive” traffic as a rationale for revoking exemptions for certain commodities, Decision, *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1), at 4–5, 8–10 (STB served Mar. 23, 2016).⁶ And the Board would want to consider information from railroads and other stakeholders about how the hypothetical rule would contribute to the overall and marginal burdens of existing regulations in a way that has *additional* harmful effects on the industry’s ability to thrive and contribute to the economy. To address this potential problem, the Board could consider offsetting the new costs imposed by the hypothetical rule with corresponding deregulatory action—for example, additional exemptions for certain types of shipments. Ex. A at 40. The Board would be well prepared to do so, particularly because it already “has taken a number of actions to streamline its regulations” based on the recommendations of its Regulatory Reform Task Force. STB, *Agency Task Forces*, <https://tinyurl.com/u38czjk>.

4. Threshold For Cost-Benefit Analysis

The Board’s final request was for “information on the threshold for determining the rulemaking proceedings to which any cost-benefit analysis procedures should apply.” Solicitation at 3. AAR suggests that all of the Board’s rulemakings could benefit from incorporation of cost-benefit analysis. Relatively simple rules should require only relatively simple analyses, requiring fewer resources. More complex or far-reaching proposed regulations

⁶ As described in its prior submissions, for a variety of reasons AAR believes that the current R/VC threshold should not serve as a proxy for identifying qualitative market dominance. See Opening Comments of AAR, EP 704 (Sub-No 1), at 22–28 (STB served July 26, 2016).

will likely call for a commensurately more sophisticated analysis in light of the scope of their effects. But all rulemakings benefit from a careful consideration of potential costs and benefits.⁷

That said, if the Board prefers to adopt a threshold, then AAR suggests that the Board adopt one similar to those applicable to executive agencies under Executive Order 12,866 and all agencies under the Congressional Review Act. Executive Order 12,866 defines “[s]ignificant regulatory action” to include regulations that:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues

Exec. Order 12,866 § 3(f), 58 Fed. Reg. 51,735 (Sept. 30, 1993). Similarly, the Congressional Review Act defines “major rule[s]” to be those that: (1) have “an annual effect on the economy of \$100,000,000 or more”; (2) result in a “major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions”; or (3) have “significant adverse effects on competition, employment, investment, productivity, innovation,” or the ability of American companies to compete in domestic and foreign markets. 5 U.S.C. § 804(2). These thresholds help ensure that agencies use their resources efficiently and prepare comprehensive cost-benefit analyses only for particularly consequential rulemakings. As OMB recently explained, a cost-benefit threshold “signals a rule’s relative importance and economic impacts.” CRA Guidance at 2.

⁷ Not least among the benefits of extending cost-benefit analysis to all of the Board’s rulemakings would be the judicial review advantages discussed *supra* at 4–5, as well as the improved analytical accuracy and reliability that naturally flow from process standardization and procedural routine.

Here, the Board can do the same thing by adopting a similar threshold. Specifically, AAR suggests that, at minimum, the Board adopt a threshold under which it would conduct a full cost-benefit analysis for any rule that: (1) has a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or other state or tribal governments; (2) raises novel legal or policy issues; (3) creates an inconsistency or interferes with another agency's actions; or (4) has an annual effect on the economy of \$100 million or more. *See* Exec. Order 12,866 § 3(f). A threshold along these lines would avoid unnecessarily burdensome analyses of minor rules.⁸ And adopting a threshold that focuses on economically important rulemakings will also facilitate consistency with Section 10101 and the Congressional Review Act.

⁸ A threshold like this could also help ensure the Board uses its resources as efficiently as possible as it gets started with cost-benefit analysis, although the Board may come to apply cost-benefit analysis to more proposals as its experience increases.

CONCLUSION

For these reasons and those in AAR's March 2019 petition for rulemaking, the Board should incorporate cost-benefit analysis into its rulemaking procedures.

Dated: January 31, 2020

Respectfully submitted,



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EXHIBIT A



BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 752

RESPONSE TO SOLICITATION OF INFORMATION

VERIFIED STATEMENT OF

David Zorn, Ph.D.

January 31, 2020



Introduction

I was retained by the Association of American Railroads (AAR) to prepare this comment in response to the Surface Transportation Board's Solicitation of Information on whether and how particular approaches to cost-benefit analysis might be formally integrated into its rulemaking process.¹

I earned a B.A. in Economics from Trinity University in San Antonio, Texas in 1985 and a Ph.D. in Economics from George Mason University in 1992. From 1992 to 2013, I was an economist at the U.S. Food and Drug Administration (FDA). From 1992 to 2006, I was a staff economist performing regulatory impact analyses of proposed and final regulations. From 2006 to 2008, I was the Lead Economist supervising the Economics Team in FDA's Center for Food Safety and Applied Nutrition as they conducted regulatory impact analyses, and I continued to conduct a number of regulatory analyses myself. From 2008 to 2013, I was the Director of Social Science in FDA's Center for Food Safety and Applied Nutrition where I continued to supervise and train regulatory economists, as well as oversee and also perform regulatory analyses.²

In the late 1990s, I worked with the staff of the Council of Economic Advisors and the Office of Information and Regulatory Affairs to develop the Office of Management and Budget's (OMB) *Circular A-4, Regulatory Analysis*³ guidance document. At about the same time, I assisted policymakers in the Virginia State government as they established standards, similar to *Circular*

¹ Surface Transportation Board, "Association of American Railroads—Petition for Rulemaking, Solicitation of Information." 84 *Federal Register* 60466, November 8, 2019.

² My resume is included as Exhibit 1.

³ Office of Management and Budget, *Circular A-4, Regulatory Analysis*, September 17, 2003.



A-4, for use in the executive branch review of new state regulations. During the Obama Administration, I worked with the staff of the Assistant Secretary of Planning and Evaluation in the Department of Health and Human Services (DHHS) to develop its *Guidelines for Regulatory Impact Analysis*.⁴

Prior to joining FDA, although I had a Ph.D. in Economics, I had no experience with regulatory analysis or any type of analysis of costs and benefits of policies or activities. I also had no background knowledge or experience with any of the industries regulated by the FDA. My lack of background and experience did not hinder my career as a regulatory analyst. Moreover, over the course of the 21 years of my government experience working with scores of regulatory analysts, I met only a handful who had any formal training in benefit-cost analysis. Many competent, successful regulatory analysts often have no experience in the industries covered by the regulations that they analyze. When we recruited new staff economists at FDA, we did not consider experience with benefit-cost analysis or with FDA-regulated industries to be an important factor for selecting candidates. All this is to say that the Board should not consider regulatory analysis to be such an extremely complex or challenging undertaking that it is too difficult to initiate without a great deal of preparation, experience, resources, and expense.

AAR has asked me to undertake the following analysis: (1) provide an overview of the methodology for conducting a regulatory impact analysis based on my experience as an economist for other regulatory agencies; (2) illustrate the methodology in the context of the

⁴ Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, *Guidelines for Regulatory Impact Analysis*, 2016.



Board's pending demurrage proceeding; (3) describe how the Board can identify and utilize data for cost-benefit analysis; and (4) provide an economics-based response to the Board's hypothetical rule to modify the revenue-variable cost percentage.

Regulatory impact analysis is recognized world-wide to be a valuable tool to inform regulatory policy.⁵ According to the United States Agency for International Development, "[t]he main benefits of R[egulatory] I[m]pact A[n]alysis can be summarized as follows:

- "policy makers can better understand the consequences, i.e. the costs, benefits and distributional impacts, of the decision (who has the benefits and who bears the costs);
- "better insight and understanding of the real impacts of regulations, considering that RIA helps assess and describe the costs and benefits;
- "timely discovery of indirect and unintended impacts of regulations;
- "simplification of the regulatory environment;
- "transparency of the process: stakeholders can present their views and additional facts in consultation with the regulator and in public consultation;
- "improving the work of the public administration by enhancing coordination of regulatory activities and increasing the accountability of regulators."⁶

⁵ World Bank Group, Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact Assessments, undated.

⁶ USAID – Good Governance Activity in Montenegro, Regulatory Impact Analysis (RIA) Manual, November 2011. This document is a simple and practical manual on how to begin regulatory impact analysis that is not often discussed in the regulatory economics community in the United States.



Methods

A preliminary consideration is integration of regulatory analysis into the agency seeking to conduct regulatory impact analyses. It is important that regulatory economists work closely with Board staff as regulations are developed and regulatory decisions are made. Regulatory economists should work closely with regulation drafters, policy-making officials, subject matter experts, Board attorneys, and other Board staff who are involved in the Board's rulemaking process. To the greatest extent possible, regulatory economists should attempt to provide real-time feedback to the Board's regulatory development staff on the implications for costs and benefits of certain regulatory alternatives as they are explored. Additionally, economists should work with subject matter experts throughout the regulatory development process to understand how the rules will affect stakeholders and the general public. In my experience, this arrangement is quite common. Every executive branch regulatory agency has staff economists to conduct regulatory analyses, and many of the executive branch departments have economists on staff whose primary responsibility is to review and oversee regulatory analyses.

There are publicly available guidance documents that provide detailed information related to regulatory impact analyses, including *Circular A-4*, the Department of Transportation's *Benefit-Cost Analysis Guidance for Discretionary Grant Programs*,⁷ DHHS Guidelines for Benefit Cost Analysis,⁸ and the Environmental Protection Agency Guidelines for

⁷ Despite its title, this guidance document provides extremely practical instruction on many issues relating to regulatory analysis. Office of the Secretary, Department of Transportation, *Benefit-Cost Analysis Guidance for Discretionary Grant Programs*, December 2018.

⁸ Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, *Guidelines for Regulatory Impact Analysis*, 2016.



Preparing Economic Analyses.⁹ In my experience, regulatory analysts at the Board should be able to obtain assistance from regulatory analysts in the Department of Transportation and other regulatory agencies of the federal government who are usually willing to help with analytical problems. Industry stakeholders are another available resource. Additionally, there are economists working both for freight shippers as well as freight carriers who would have experience understanding the implications of regulations for their specific industries.

Although *Circular A-4* provides a well-established, universal framework for how to conduct a regulatory impact analysis across federal agencies, there is no universal formula or recipe for how to estimate the specific costs and benefits of each individual regulation, any more than there is a universal way to draft a regulation. Regulatory analysis is best thought of as an investigation, rather than as a one-size-fits-all, mechanical procedure. The best way for analysts to conduct regulatory impact analyses is to consider the proposed rule and ask simple questions, such as:

- How will the regulation affect stakeholders?
- What will affected entities have to do to comply with any new requirements?
- How will entities respond to the regulatory changes?
- How many entities will be required to make changes?
- What is involved in making the changes?
- How much does making the change cost?
- What is the value of the benefits to U.S. consumers?

⁹ National Center for Environmental Economics, Office of Policy, U.S. Environmental Protection Agency, *Guidelines for Preparing Economic Analyses*, December 17, 2010 (updated May 2014).



The method described below and in the Application section of this comment follows the long-established standards for a regulatory analysis set out in OMB *Circular A-4* and the OECD's *Introductory Handbook for Undertaking Regulatory Impact Analysis*.¹⁰ The standards for regulatory impact analyses set out in those documents are generally applicable to any type of regulation of any regulated industry. The same general method is employed in most of the wide range of federal regulatory agencies, including the Department of Labor, the Department of Health and Human Services, the Environmental Protection Agency, the Department of Homeland Security, the Department of Transportation, and the Federal Communications Commission. The railroad industry, of course, has unique attributes. But the means of analyzing regulations imposed on the railroad industry does not differ significantly from other industries.

As the Board notes, there are two different general types of regulation that are common among the Board's regulations in Title 49, Chapter X of the U.S. Code of Federal Regulations. In this Methods section, I illustrate how the Board might produce a regulatory analysis of a rule that prescribes a particular action or technology. The example I have selected is the regulatory changes to demurrage billing requirements that the Board proposed in October 2019 (EP 759).¹¹ In the Application section below, I show how the Board might approach a regulatory impact analysis for the hypothetical rule posed by the Board, which would affect administrative litigation before the Board by lowering the revenue-variable cost (R/VC) percentage used as a threshold for demonstrating market dominance from 180 to 165.

¹⁰ Organisation for Economic Co-operation and Development, *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, October 2008.

¹¹ Surface Transportation Board, "Demurrage Billing Requirements." 84 *Federal Register* 55114, October 15, 2019.



Although the specific costs and benefits of the two different types of rules might be different, they would be analyzed using the same basic approach:

- identifying and investigating the need for the rule,
- describing how the rule would address that problem,
- identifying some reasonable regulatory alternatives,
- estimating the costs of the rule and regulatory alternatives,
- estimating the benefits of the rule and regulatory alternatives, and
- considering the extent to which adding additional regulation is redundant, inconsistent with other existing regulations, or would increase the cumulative burdens that regulations impose on the regulated industry.

Regulatory impact analyses and benefit-cost analyses are part of the field of economics called welfare economics. The purpose of welfare economics is to quantify the costs and benefits to society of projects and actions. Welfare economics, and thus regulatory impact and benefit-cost analysis, does not consider wealth transfers—that is, the transfer of wealth from one entity to another. Examples of transfers include mandatory changes in prices and mandatory purchases. For example, if a rule requires one entity to charge a lower price to another entity, that is a transfer of wealth from the seller to the purchaser. It is neither a social cost or a social benefit, since the overall amount of wealth in society has neither increased nor decreased. The best practice is to not count wealth transfers as “costs” or “benefits” in regulatory impact analyses. However, as I will demonstrate below, wealth transfers can have implications that affect social costs and benefits that are relevant for regulatory impact



analysis, so the Board will need to understand and consider wealth transfers that are caused by its proposed rules in order to understand their potential costs and benefits.

NEED FOR REGULATION

The first step of any regulatory impact analysis is identifying the problem that the Board is trying to solve and explaining the need for the rule. For example, the Board's regulatory impact analysis of its proposed changes to the demurrage billing requirements would begin by explaining the need for those changes. The preamble to the proposed rule explains that shippers and warehousemen have complained to the Board about shortcomings in the information provided in invoices from rail carriers. As a need for the regulation, the analysis could articulate the Board's statement that the proposal is intended to more fairly allocate, between carriers and shippers, the burden of obtaining information necessary to assess the validity of demurrage invoices.¹²

DESCRIPTION OF REGULATION

Next the Board's regulatory impact analysis should describe how a proposed regulation would address the market failure that the Board has identified. For example, in the demurrage proceeding, the Board would explain how its proposed rule would address the alleged shortcomings in railroads' invoices.

¹² To be clear, my discussion of the Board's demurrage proposal is solely for the purpose of demonstrating how the Board could approach regulatory impact analysis in its rulemakings. This discussion is not intended to convey my opinion on the merits of that proposal or any of the Board's conclusions, and should likewise not be confused with AAR's position in that proceeding.



REGULATORY ALTERNATIVES

The regulatory impact analysis should describe the other reasonable regulatory alternatives that the Board considered in addition to the solution settled on in the final rule. A discussion of regulatory alternatives provides stakeholders with information regarding the alternative solutions to the problem the Board is trying to solve. It also ensures that the Board actually considers other options for how best to solve the problem. One alternative that should generally be considered by agencies is taking no new regulatory action. This is essential and the Board should follow suit as it provides a baseline against which to measure the costs and benefits of new regulation. Thus, in the demurrage proceeding, the Board would consider the option of taking no action in addition to other reasonable alternatives to the proposal. For example, the Board might consider alternative minimum requirements for invoices that contain less detail than the proposed rule, and alternative minimum requirements that contain even more detail.

COSTS

After describing the regulation and other regulatory alternatives, the Board's regulatory impact analysis should quantify the costs resulting from the rule to the maximum extent feasible. This exercise also involves identifying any costs that the Board *cannot* quantify, explaining why it cannot do so, and attempting to qualitatively measure those costs. At the most rudimentary level, regulatory cost estimation is about multiplying the number of changes made in response to the rule by the cost of making each change.

Although specific potential costs will depend on the specific proposed rules, there are certain kinds of costs that the Board would frequently want to consider in the context of the



economic regulation of railroads. For example, the Board will obviously always want to consider the administrative costs of its proposed rules, including litigation expenses for proceedings at the Board (both for litigating parties and the Board itself), and compliance costs. The Board will also want to consider the potential effects of its rules on railroad revenue and the prices and terms of rail transportation. Although many of these effects take the form of transfer payments, which are not the types of costs included in the quantification of costs (e.g., lower rates transfer money from railroads to shippers), these transfer payments could have important social costs that the Board will want to be cognizant of. For example, a decrease in prices for some shippers could lead to reduced investment in railroad infrastructure or reduced availability of rail transportation for other shippers. An increase in prices for some shippers (including where necessary to offset regulatory constraints on prices of other shippers) could lead to reduced output. The Board should identify and consider all of these potential impacts of a proposed rule in detail. And to the extent that the Board lacks and is unable to identify existing data that would help it estimate these effects, the Board should solicit information from stakeholders during the notice-and-comment process (or, even better, before proposing a new rule), including quantified cost estimates and information that would help the Board complete a more robust analysis.

In the case of the demurrage proposal, Board analysts could use something like the following method to measure the regulatory costs of expanding the fields of information reported on demurrage invoices. Note that in performing an analysis like this the Board could draw on its existing practices for complying with the Paperwork Reduction Act, and guidance from OMB and elsewhere on best practices under the Act.



- Begin with the Board’s estimated labor hours that each Class I railroad would incur in order to implement the changes to their invoicing processes.¹³ This includes the Board’s assumption that each railroad will require 40 hours to implement the process in its invoicing system and 80 additional hours to verify that the information on the invoice is reported accurately.¹⁴
- Because the Canadian National Railway Company indicated in its comment to EP 759 that it already includes all fields of information on its existing demurrage invoices,¹⁵ only count labor hours to implement process changes for six Class I railroads. However, count verification hours for all seven Class I railroads.
- Next, multiply the total number of labor hours ($800 = (40 \times 6) + (80 \times 7)$) by a per hour labor cost of \$56.18 derived from railroad 2018 wage-forms A and B for professional and administrative staff, including a fringe benefit factor of 30 percent derived from

¹³ Surface Transportation Board, “Demurrage Billing Requirements.” 84 *Federal Register* 55114, October 15, 2019.

¹⁴ For illustrative purposes only, I have used the Board’s estimate of the number of hours to make changes. However, some railroads have indicated that the Board’s estimates do not adequately account for the amount of time that would be needed to make the changes. For example, in its EP 759 comments, Norfolk Southern Railway Company stated that “there would be a substantial amount of IT programming required to make this additional information available to invoice recipients” and requests a “minimum of three months...to complete the necessary systems upgrades necessary to effectuate these changes.” Norfolk Southern Railway Company, *Comments of Norfolk Southern Railway Company*, EP 759, at 1 (STB served Nov. 6, 2019). In its EP 759 comments, the Union Pacific Railroad Company states that “[t]he proposed rule would require Union Pacific to take several resource-intensive steps to ensure its printed invoices meet the mandate: (1) map the newly-required data to the invoice style sheet; (2) work with the contracted printer to create the new invoice format with contracted printer; and (3) reprogram Union Pacific’s invoicing systems.” Union Pacific Railroad Company, *Comments*, EP 759, at 6 (STB served Nov. 6, 2019) (“UP Comment Letter”).

¹⁵ Canadian National Railway Company, *Opening Comments on Behalf of CN*, EP 759, at 4 (STB served Nov. 6, 2019).



administrative support expense data in Schedule 410 of the railroads' 2018 R-1 Annual Reports, to determine a total one-time labor cost of implementing the proposed rule of \$44,940.

- Certain information required on demurrage invoices is captured by equipment readers and stored in massive event data warehouses. Therefore, it is reasonable to also include an assumed annual IT cost of \$10,000 for integrating the event data into the invoice processing system for six Class I railroads, totaling \$60,000 in annual recurring costs for carriers to generate invoices with additional information.

- The cost of implementing a new demurrage system does not fall only on carriers. Shippers will incur costs for adapting their review and dispute processes to incorporate the new information on the demurrage invoices. Based on information provided by Union Pacific in its EP 754 supplemental comments (specifically that it has over 10,000 customers and that 19 percent receive demurrage invoices)¹⁶ and considering the different sizes of the seven Class I railroads, assume that there are on average 1,000 shippers on each Class I railroad receiving demurrage invoices,¹⁷ and that it would take each shipper eight labor hours to adapt their systems to load and process the revised invoices from each railroad.

¹⁶ Union Pacific Railway, *Union Pacific's Supplemental Comments*, EP 754, at 3 (STB served June 6, 2019).

¹⁷ Canadian National Railway Company indicated in its EP 754 comments that 80 percent of customers incur no demurrage charges, and Kansas City Southern indicated in its EP 754 comments that 62 percent of its customers incurred no demurrage charges. Canadian National Railway Company, *Supplemental Comments on Behalf of CN*, EP 754, at 2-3 (STB served June 6, 2019); The Kansas City Southern Railway, *The Kansas City Southern Railway Company's Written Testimony, Pursuant to the Board's Order of April 8, 2019*, EP 754, at 3 (STB served May 8, 2019).



- This yields a total labor hours estimate of 56,000, which, when multiplied by an average hourly labor cost of \$56.18, gives a total one-time cost for shippers to implement the proposed rule of \$3,145,812.
- Reviewing the additional information provided on invoices will take shippers additional time.¹⁸ Based on the overall demurrage revenues collected by Class I railroads in 2018 of \$937 million divided by an assumed amount per invoice of \$500, estimate that there are approximately 2 million total demurrage invoices issued annually. Multiplying that by the hourly labor rate of \$56.18 and assuming an average of one additional minute of review for each invoice would result in an annual recurring cost of \$1,872,507 for shipper review of demurrage invoices.
- Summing one-time costs for carriers and shippers yields about \$3.2 million, and summing annual recurring costs for carriers and shippers yields annual recurring costs of about \$1.9 million.

Beyond this model for calculating the implementation costs of a new demurrage invoicing system, the Board would also want to consider any other costs identified by commenters, including any potential impact of its proposal on railroad revenue sufficiency and the efficient operation of the rail system, and update its analysis based on that additional

¹⁸ For example, Kinder Morgan stated in its comments in EP 759 that “Reviewing each of the numerous line items for billing and car errors imposes significant costs and burdens on receivers for tariff compliance, review, and objection.” Kinder Morgan Terminals, *Comments of Kinder Morgan Terminals*, EP 759, at 12 (STB served Nov. 6, 2019). Union Pacific’s EP 759 comments state that “Our customers’ employees would necessarily spend more time each month examining longer, more cluttered invoices. These efforts and costs may seem intuitively modest, but they will add up to become a significant unintended burden for Union Pacific’s customers.” UP Comment Letter at 6.



information. The demurrage rule is relatively discrete. However, for a large or complex rule there would also be administrative costs associated with reading the rule, interpreting it, and determining what changes need to be made to comply. These administrative costs occur before any compliance changes are made.

BENEFITS

Like the estimation of costs, estimating benefits involves determining how the changes caused by a new rule result in benefits, and then multiplying the estimated dollar value of each beneficial event by the estimated number of beneficial events. As with costs, the Board should quantify potential benefits to the maximum extent feasible. Where doing so is impracticable, the Board should explain why, and evaluate those potential benefits qualitatively as part of its analysis. Analysts must always recognize that regulations are rarely 100 percent effective in achieving their intended results. For example, seat belts and airbags save many lives every year in car accidents. However, seat belts and airbags do not prevent all automobile accident deaths or even all deaths that could have been prevented with seat belts and airbags. Potential lack of effectiveness must be accounted for in the analysis of benefits.

As with costs, the specific benefits of any proposed rule will be largely unique to that rule. But there are certain kinds of benefits that the Board should routinely consider. For example, the Board should consider reduced administrative, litigation, or compliance costs that could result from any rule that simplifies existing procedures or repeals existing rules. And the Board will want to consider the potential benefits that could follow if a proposed rule would increase revenue to railroads, including the extent to which railroads would reinvest that revenue in infrastructure, improvements in operations, and increased capacity. Similarly, to the



extent the Board's rules reduce prices for shippers, the Board will want to consider any potential increases in output, or benefits that could flow from increased competition with other modes of transportation.

In every calculation of regulatory benefits and costs, it is important that agencies take into consideration the current expenditures and the value already derived from those expenditures. In the demurrage example, if shippers receive more complete information from carriers about the demurrage charges as a result of the rule, then the rule will provide shippers with an incremental addition of information on top of the information that carriers already provide to shippers. In many cases carriers already provide shippers with a significant amount of information. The proposed rule would only increase that marginally. The other benefits of the demurrage proposal are fewer disputes over the legitimacy of demurrage charges. To quantify these benefits, regulatory analysts on the staff of the Board could communicate with carriers, shippers, and warehousemen to determine how much time they spend dealing with disputes over demurrage charges and misplaced invoices.

Board analysts could use something like the following method to measure the benefits of expanding the fields of information reported on demurrage invoices.

- Begin by identifying the annual expenses that Class I railroads currently incur for clerical and accounting functions as reported in their 2018 annual R-1 reports (including a 30 percent adjustment for fringe benefits). That amount is \$79.5 million.
- Using the expanded shipments in the 2018 Public Carload Waybill Sample, estimate total waybill invoices issued annually, assume 90 percent are associated with Class I shipments, and assume railroads issue one additional invoice for every five waybill



invoices to account for other billing functions including accessorial, switch, and demurrage charges. This results in a total estimate of approximately 28 million total waybill invoices.

- Based on the overall demurrage revenues collected by Class I railroads in 2018 (\$937 million) divided by an assumed amount per invoice of \$500, estimate that there are 2 million total demurrage invoices issued annually.¹⁹
- Assign a share of clerical expenses proportional to the relative number of invoices for demurrage -- 7.1 percent.
- Based on information reported by the railroads in their responses to question three of the Board's information request in anticipation of the EP 754 hearing on demurrage, estimate that five percent of demurrage charges are disputed.
- The railroads' EP 754 comments indicate that most disputes are handled informally through electronic portals before invoices are issued, and only a fraction of disputes are resolved formally after invoices have been issued. Using Kansas City Southern Railway Company's statement in its EP 754 response that 80 percent of disputes are resolved informally yields an estimated 20,000 formal disputes.

¹⁹ Kansas City Southern's EP 754 response supports the \$500 per invoice assumption as reasonable. Specifically, it reports that 2,293 demurrage invoices were disputed, representing 4 percent of demurrage revenues, which suggests 57,325 total demurrage invoices ($2,293 \div 0.04 = 57,325$). Dividing Kansas City Southern's \$29.3 million demurrage revenues in 2018 by this figure yields approximately \$500 per invoice. The Kansas City Southern Railway Company, *The Kansas City Southern Railway Company's Informational Filing Pursuant to the Board's Order of April 8, 2019*, EP 754, at 2–5 (STB served May 1, 2019).



- Based on the functions involved in issuing and disputing invoices, assume that one-third of clerical invoice-handling expenses are associated with dealing with disputed invoices.
- This yields a total cost per disputed invoice of \$94.57.
- To determine total savings for the railroads, assume that the expanded information on demurrage waybills will on net lead to 25 percent fewer disputes over demurrage invoices. This assumes that a greater percentage of disputes will be avoided by having the additional information on demurrage invoices than will be engendered by the additional information.
- Therefore, 5,000 invoices will no longer be disputed, which yields an estimate of the total savings to the railroads of \$472,864 from the proposed rule.
- Because shippers are reviewing the same information on the same invoices to determine disputes, it is reasonable to assume their cost savings for having fewer disputes would be at a comparable level as the railroads, \$472,864.
- Adding the cost savings from fewer disputed invoices of both carriers and shippers puts the total benefits of the rule at \$945,728.

One of the key lessons of these models for estimating the costs and benefits of the demurrage rule is that the framework for cost-benefit analysis is flexible and need not follow a predetermined, one-size-fits-all formula to provide the Board with important information. In fact, it is doubtful that the specific approach for estimating the costs and benefits of the demurrage rule would apply to other Board regulations addressing different topics. The successful execution of a regulatory impact analysis depends on the investigative determination of the regulatory analysts and the support of the agency. Yet, as this example shows, the



categories of costs and benefits implicated by the Board's rules are likely to be reasonably predictable and regulatory analysts are more than capable of developing ways to predict the impact of specific rules on regulated parties.

CUMULATIVE IMPACTS OF REGULATION

Over time the amount of regulation of businesses has increased on an almost uninterrupted annual basis.²⁰ Agencies regularly add new regulations, but rarely remove unnecessary or ineffective regulations. President Obama noted this problem in his Executive Order 13563.²¹ The potential problems flowing from cumulative regulation is particularly important for the economic regulation of railroads, where history shows that excessive regulation can suffocate the industry to the detriment of carriers, shippers, and the broader public alike, and that in contrast deregulation can benefit all stakeholders by allowing the industry to prosper and offer better, cheaper, and safer services.²² Accordingly, the Board should consider the cumulative impact of regulation on railroads before adopting any rules that impose additional burdens. In the demurrage example, the Board's analysts would consider the extent to which its new rules may cause conflicts with existing rules, and how the new proposed rules would contribute to the overall regulatory burden that the Board's rules impose. In addition, analysts would consider whether the proposed rule would allow other

²⁰ George Washington University, Regulatory Studies Center, [Total Pages Published in the Code of Federal Regulations \(1950-2018\)](#). June 12, 2019.

²¹ President Barack Obama, "Improving Regulation and Regulatory Review, Executive Order 13563 of January 18, 2011." 76 *Federal Register* 3821.

²² Laurits R. Christensen Associates, Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition, November 2008, at ES-1.

rules related to demurrage or similar issues to be removed, or whether other regulatory changes should be considered to offset the new costs imposed by the proposed rule.

Data

The Board already requires railroads to submit a large volume of different types of data on an ongoing basis. Some of this data will be valuable for estimating the costs and benefits of the Board's proposed rules, although the Board's data needs for specific rules will be dependent on the specifics of the proposal and its potential consequences. Table 1 lists some of the data collected by the Board and the Department of Transportation along with some of the potential ways the Board could use that data in a regulatory impact analysis.

Table 1. Sources of Data Collected by the Surface Transportation Board and the Department of Transportation Along with Potential Uses in Regulatory Analysis

Data Set	Some Potential Uses
Surface Transportation Board Data	
Carload Waybill Data	Rail Pricing, Rail Volume, Commodity Volume, Rail Cost Models, Rail Revenues
Uniform Rail Costing System	Rail Cost Models
Annual R-1 Reports and Submitted Financial Data	Rail Cost Models, Rail Revenue Models
Demurrage & Accessorial Charges	Rail Cost Models, Rail System Efficiency, Rail Revenue Models
Rail Service Data	Rail Cost Models, Rail System Efficiency, Commodity Usage, Rail Traffic Models, Rail Service Models, Rail Revenue Models
Economic Data	Rail Revenue Models, Rail Cost Models, Rail Labor Costs, Rail System Efficiency
Department of Transportation Data	
Freight Analysis Framework	Broad Freight System Usage and Service Models
Motor Carrier Registrations	Interstate Truck and Bus Activity
Federal Railroad Administration GIS Web Mapping Application	Rail System Service Models, Rail System Efficiency

National Transportation Atlas Database – Rail Network	Rail System Service Models
SaferBus API	Interstate Bus Service Models
Passenger Intermodal Facility (National)	Interstate Bus Service Models
National Geospatial Data Asset Rail Nodes	Rail System Service Models
Highway-Rail Crossings Inventory Data	Rail System Service Models
Travel Monitoring Analysis System	Freight System Models
National Geospatial Data Asset, Ports	Freight System Models
Motor Carrier Inspections - Data Mining Tool	Interstate Bus Service Activity, Interstate Truck Service, Freight System Models
Motor Carrier Crash Data	Interstate Bus Service Activity, Interstate Truck Service, Freight System Models
Costs of Surface Transportation Congestion ²³	Freight System Benefit Models

The information in Table 1 is not exhaustive by any means. Within each database there are many kinds of data that may become useful for analyzing a potential rule in a way that is impossible to anticipate in the abstract. And there are many other data sets maintained by the Board and the Department of Transportation.

The Board’s Solicitation of Information also notes the possibility of collecting data as a matter of course for the purpose of regulatory impact analysis. I cannot foresee a need for the Board to collect additional specialized data solely for the purpose of conducting regulatory impact analyses of future regulations. Trying to pre-collect data in anticipation of unspecified and undefined future rulemakings is almost certain to lead to wasted resources and wasted

²³ HDR, *Assessing the Full Costs of Congestion on Surface Transportation Systems and Reducing Them through Pricing*, prepared for the Office of Economic and Strategic Analysis, U.S. Department of Transportation, February 2009.



effort. And the experience of other agencies shows that effective cost-benefit analysis does not require burdensome ongoing data collection or maintenance of related databases. Collecting data on an ongoing basis is costly, either for the Board to purchase from a third party supplier or, if the Board requires the industry to supply it, for the industry to provide to the Board.

For specific rulemakings, however, the Board can and should seek specific information from the carriers, shippers, and other stakeholders. And the Board should do this as early in the proceedings as possible. In my experience with regulatory analysis, when agencies begin to consider a new rulemaking, regulatory analysts and other policymakers can identify the types of data that would be relevant for that specific rulemaking.

The Board and its analysts should also be prepared for the inevitable lack of “perfect” data. Of course, the Board should always rely on the most current, complete, and accurate data that is reasonably available to it. But where analysts are forced to use less than perfect or complete data or to use proxies to substitute for missing data, as sometimes occurs, the Board should specifically note the data limitations, probe the basis for any estimates, and request that interested parties provide verifiable data to be used in place of the missing or proxied information.

Application

The Board has also sought a detailed description of how cost-benefit analysis would apply to a hypothetical rulemaking, using relevant methods and data sources. Specifically, the Board has suggested that commenters consider a hypothetical proposed rule to modify the threshold R/VC percentage used for purposes of determining whether a railroad could have



market dominance from 180 percent to 165 percent.²⁴ The hypothetical rule posed by the Board is actually extremely difficult to analyze for a number of reasons. First of all, the threshold is a statutory jurisdictional limit, and changing it would require legislation from Congress. Second, even in the context of the hypothetical, the Board has provided no context for the change or explanation of the problem that the Board would be trying to solve. The absence of this information complicates my ability to respond to the Board's request, since a regulatory impact analysis requires knowledge of the problem that the regulator is trying to solve. Finally, such a jurisdictional change is very different from regulations previously issued by the Board. Thus, there is no way to compare this hypothetical change to any real world experience with the Board's previous rules.

Regulatory impact analysis should never be performed on a vaguely conceptualized regulation that is unmoored from any identifiable problem. For the sake of responding to the Board's solicitation of information, however, the following discussion is based on the assumption that the codified text of the Board's hypothetical rule would be limited to just the change from a jurisdictional threshold of R/VC 180 to R/VC 165. If such a proposed rule contained other provisions, then the effects of those regulatory changes would need to be analyzed separately.²⁵

²⁴ In the following text, I use R/VC 180 and R/VC 165 to refer to standards of 180 percent revenue-to-variable cost ratio and 165 percent revenue-to-variable cost ratio, respectively.

²⁵ As I noted previously, this discussion is solely for the purpose of demonstrating how the Board could approach regulatory impact analysis in its rulemakings. This discussion is not intended to convey any opinion on the merits of the proposal, to provide an exhaustive list of the factors that a regulatory impact analysis would consider in a real rulemaking, or to take a position on any other matter besides the Board's ability to incorporate regulatory impact analysis into its rulemakings. Likewise, this discussion should not be interpreted to reflect the

NEED FOR REGULATION

A regulatory analysis begins with an analysis of the need for the regulation. It is not enough for the Board to state that the proposed rule is needed to carry out the Board's mission or to execute the intent of the Staggers Act or other enabling legislation. This section of the analysis should describe the specific reason that the proposed new regulation is needed. Here, for purposes of responding to the Board's hypothetical I will assume that the Board perceives a problem of railroads with market dominance abusing their power to impose unreasonable rates on shippers for at least some shipments traveling between R/VC 180 and R/VC 165.

This part of the analysis would answer the following questions:

- What was the original justification for the jurisdictional threshold of R/VC 180 when it was established?
- If a threshold of R/VC 180 was appropriate when it was established, what has changed or what new information has come to light that leads the Board to think that a different threshold is now warranted?
- What evidence is there to indicate that R/VC 180 is insufficient to protect shippers?
- Quantitatively, what is the scope of the perceived problem? In other words, when the effects of market dominance are unaddressed below R/VC 180, what is the impact of that market dominance on the supply, demand, and price of freight transportation in the United States?

position of AAR for any purpose other than to demonstrate that the Board is capable of incorporating robust regulatory impact analyses into its rulemaking proceedings.



One way to look for evidence of a need for regulation would be to look to information that is publicly available from research on rail rates and from litigation experience with rate challenges, as I do below. If there is a need for the hypothetical regulation, then there should be a demonstrable pattern showing that railroads are earning supracompetitive profits for shipments traveling below R/VC 180, or, at minimum, a pattern of rates not far *above* the current threshold that have consistently been found to be above a competitive rate by the Board. It seems very hard to argue that a significant number of rates *below* the R/VC 180 threshold would be found unreasonable if the Board had jurisdiction over those shipments if the Board does not regularly find that rates with a higher R/VC ratio are unreasonable.

The Board's Research

In 2008, the Board published the results of a study of the competitiveness of the freight rail industry in the United States conducted by Laurits R. Christensen Associates (Christensen).²⁶ The Board charged Christensen with reporting on whether freight rail carriers were abusing market power and charging excessive rates under the existing market conditions and the existing regulatory environment (including the 180 percent standard). Some of the primary findings of Christensen's 2008 study include:

- "For most years in the 1987 to 2006 period of our study, the Class I railroad industry does not appear to be earning above normal profit.

²⁶ Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition*, November 2008.

- “Current market circumstances imply that providing significant rate relief to certain groups of shippers will likely result in rate increases for other shippers or threaten railroad financial viability.”²⁷

In 2010, the Board published an update of the Christensen report.²⁸ Some of the primary findings of Christensen’s 2010 study are:

- “The basic findings from our original study remain unchanged.
- “Railroad industry marginal cost has been increasing at a faster average annual rate than railroad revenue per ton-mile. Consequently, the measure of railroad market power has been decreasing.
- “2007 and 2008 Carload Waybill Sample data show lower shares of tons and ton-miles moving at rates exceeding 180 percent of URCS variable cost than in 2005 and 2006.
- “Because the railroad industry has remained approximately revenue sufficient in recent years, we reemphasize one of our original conclusions: providing significant rate relief to some shippers will likely result in rate increases for other shippers or threaten railroad financial viability.”²⁹

Thus, the most recent research commissioned by the Board concludes that under the regulatory regime implementing a jurisdictional threshold of R/VC 180 , “the measure of railroad market power has been decreasing,” “[s]ince 2006, the railroad industry has remained approximately revenue sufficient,” and “providing significant rate relief to some shippers will

²⁷ Ibid, p. ES-5.

²⁸ Laurits R. Christensen Associates, Inc., *An Update to the Study of Competition in the U.S. Freight Railroad Industry*, January 2010.

²⁹ Ibid, pp. i-ii.



likely result in rate increases for other shippers or threaten railroad financial viability.”³⁰ The research does not show a reason to believe that rates under R/VC 180 are unreasonable. However, a look at more recent data would be essential. Analysts would look to the actual regulatory experience of the Board and new research on rates below the 180 threshold.

Regulatory Experience

Regulatory experience is another source of information and data that informs the analysis. The record of rate challenges before the Board does not show a pattern of problematic rates even under the current 180 percent standard. Data from the Board show 51 rate challenge cases filed over the 23-year period from 1996 (the inception of the Board) to 2018.³¹ Of those 51 cases, the Board found that in 11 cases the rates were reasonable and two of the challenges were withdrawn by the challenger. The Board found in 12 cases that rates were unreasonable, while the rest of the cases were settled by the parties. In the context of the thousands of rail rates posted annually, these few instances of litigated disputes, and the even rarer cases where the Board actually found rates to be unreasonable, there is little reason to conclude that railroads are routinely charging unreasonable rates.

The evidence from the Board’s own research and regulatory activities certainly suggests that the R/VC 180 threshold (which has been in place since 1985) has not allowed railroads to exercise dominance and charge supracompetitive prices. Therefore, an analysis of the need for a hypothetical rule reducing the threshold to 165 would likely reveal early on that there is no need to reduce the threshold. Importantly, this demonstrates that going through the steps of a

³⁰ Ibid.

³¹ Surface Transportation Board, *Rail Rate Cases at the STB*, February 26, 2019.



complete regulatory impact analysis would help prevent the Board from adopting unnecessary and potentially harmful regulations based on *ad hoc* concerns about a hypothetical problem.

New Research

However, if the Board still perceived a problem, then research on rates for traffic moving below R/VC 180 would be necessary to establish a need for the Board to reduce the threshold to 165. The research cited above (especially the Christensen studies) is somewhat dated. In order to demonstrate the need for a reduction of the threshold to R/VC 165, the Board could consider updating the research (as it did in 2010) using more recent data. Regulatory analysts commonly examine data from a recent multi-year period in order to avoid single-year anomalies. A Christensen report-style analysis to investigate railroad pricing behavior for shipments moving between R/VC 180 and R/VC 165 could rely on an econometric analysis of confidential information in the Board's Carload Waybill data over a period of years to help provide the necessary information. Following the Christensen report, Board analysts would use a profit-maximization model of railroad behavior, subject to constraints from alternative shipping modes and other forms of competition, to develop pricing equations that compare reported revenue per ton-mile to the cost and market structure features of these shipments. This would allow the Board's analysts to describe the effects of cost and market structure on variations in per-unit revenue at the commodity level. In this process, it is essential that the Board consider the extent to which the availability of truck, pipeline, and water transportation options, as well as the presence of railroad competition, and product and geographic competition, limit any individual railroad's ability to exercise market dominance. The Board could find a market failure at rates below R/VC 180 only if the Board is able to



demonstrate a multiyear pattern of railroad pricing that exploits market dominance on rail traffic moving between R/VC 180 and R/VC 165.

DESCRIPTION OF PROPOSED REGULATION

After describing the reason that a proposed rule is necessary, a regulatory impact analysis should provide a brief overview of the proposed rule. The description of the proposal should explain specifically how the proposed regulation would address the problems identified in the description of the need for the regulation.

As shown above, in the case of the hypothetical proposal posed by the Board it is unlikely that the evidence would demonstrate a need for the proposed change in the R/VC threshold. But assuming that the evidence demonstrated a need for shippers to seek rate relief for shipments traveling between R/VC 180 and R/VC 165, the Board would explain how its proposed rule would address the problem by giving the Board jurisdiction over those shipments. Even when the need for regulation is in question, it is standard practice for analysts to estimate the costs and the benefits of proposed regulations in order to provide as much relevant information as possible to decision makers.

REGULATORY ALTERNATIVES

A regulatory analysis should include an analysis of reasonable alternatives to the proposed rule. If the Board cannot articulate alternatives to the proposed R/VC 165 threshold, then regulatory analysts should offer some alternatives. One alternative that is virtually always open to regulators is to take no new regulatory action. And this option usually serves as the most easily identified baseline for analysis and a basis for comparison of other alternatives. In the case of the Board's hypothetical proposal, doing nothing would mean leaving the threshold



at R/VC 180. Other alternatives might be to set the threshold at R/VC 200, R/VC 100, or to eliminate the threshold completely. Ideally, Board analysts would estimate costs and benefits for each identified option. At a minimum, the analysis should discuss how the benefits and costs of each alternative would compare to the benefits and costs estimated for the proposed rule.

COSTS

A regulatory analysis should to the fullest extent possible quantify the costs of the proposed rule. The Board’s hypothetical has no compliance provisions, but it would expand the Board’s jurisdiction to regulate rates that were previously not subject to challenge. Therefore, analysts must estimate how carriers and shippers would respond to the Board’s new authority over shipments traveling between R/VC 180 and R/VC 165. There are a wide range of possibilities.

In order to keep the analysis tractable, Board analysts could develop a matrix of possibilities such as the one shown in Table 2. The left two columns of the table show three potential responses of the railroads to the regulatory change. One of the primary findings of both Christensen studies is that railroads are revenue sufficient, but not receiving excessive revenue, and that any significant reduction in rates to some shippers would require railroads to raise rates for other shippers. That finding informs the likely options for the railroads. Analysts would need to assign probabilities to the likelihood of each railroad’s response. For the purpose of responding to the Board’s hypothetical rule, we have assigned some probabilities. In the event of an actual rulemaking, analysts would need to provide some explanation for how probabilities were assigned. The top two rows of the matrix show three potential responses of



shippers to whatever choice carriers make. Again, we have assigned hypothetical percentages to each choice for illustrative purposes only.

The remaining nine cells in the lower right area of the matrix show the hypothetical probabilities of any of the possible outcomes, derived by multiplying the likelihood that carriers make a certain choice in response to the new threshold by the likelihood that shippers choose to respond to the carriers' choice in a certain way. The results imply that the mostly likely state of affairs caused by a change in the Board's jurisdictional threshold will be for carriers to reduce rates on a small percentage of the traffic moving between R/VC 180 and R/VC 165, for carriers to also increase rates on a small percentage of their traffic, for shippers to challenge a small percent of the rates that remain between R/VC 180 and R/VC 165, and for shippers to also challenge a slightly greater percentage of the rates on traffic moving above R/VC 180. The probabilities attached to the carrier and shipper choices are hypothetical assumptions used for illustrative purposes only.

Table 2. Matrix of Carrier and Shipper Response to Board Change in Jurisdiction (likelihood of choice in parentheses)

		Shipper Action (Second Move)		
		Challenge No Rates Between 180 and 165 AND Challenge Same % of Rates Above 180 (1%)	Challenge a Small % of Rates Between 180 and 165 AND Challenge Slightly Greater % of Rates Above 180 (89%)	Challenge All Rates Between 180 and 165 AND Challenge Significantly Greater % of Rates Above 180 (10%)
Rail Action (First Move)	Change No Rates (10%)	0%	9%	1%
	Reduce a Small % of Rates Between 180 and 165 to 165 AND Raise a Small % of All Other Rates (80%)	1%	71%	8%
	Reduce All Rates Between 180 and 165 to 165 AND Raise a Significant % of All Other Rates (10%)	0%	9%	1%

The changes in rail rates amount to wealth transfers between carriers and shippers. Such transfers are neither costs nor benefits for the purposes of the regulatory impact analysis. However, the transfers do have implications for social costs and benefits that are considered.

For example, the analytical matrix described above is based on the assumption that, under the new jurisdictional standard of R/VC 165, railroads will be able to successfully reduce some rates and raise some others in a way that maintains their revenue sufficiency. If there are small but significant overall transfers of wealth from rail carriers to shippers in the form of reduced rates, it could result in some railroads not being able to maintain revenue sufficiency.



Maintaining railroad revenue sufficiency has significant societal benefits for maintaining a system of transportation that is extremely fuel efficient, provides shippers with an environmentally sustainable alternative to over-the-road freight, and is an essential part of intermodal freight transportation. If, in the process of investigating the implications of a change in the threshold to R/VC 165, Board analysts concluded that there is even a small but significant probability (15-20 percent or more) that railroads would not be able to successfully adjust rates to the new rule, then they would need to estimate the consequences of that decrease in railroad revenue, including reductions in investment, industry consolidation, deterioration in the quality of service, and the potential abandonment of less-profitable lines. Further, to the extent that railroads offset lost revenue by increasing prices on some shippers, that could impose the social cost of reduced output from those shippers. For all of these potential costs, the Board would want to solicit information from stakeholders, including both railroads and shippers, to obtain more detailed and quantifiable information about the potential consequences of the change and the likelihood of different potential responses by railroads and shippers to the new proposal.

Litigation costs are another obvious potential social cost of the Board's hypothetical rule. The *result* of litigation (the change or maintenance of contested rates) is a transfer that is not counted in regulatory impact analysis (as discussed, the transfer is still an important consideration because it could have implications for railroad investment and shipper output, among other social costs). However, the cost of the litigation itself is a social cost that should be counted in the regulatory analysis.



Using the information contained in the complete confidential Waybill dataset, analysts would need to estimate which rates that are currently set between R/VC 165 and R/VC 180 railroads are likely to decrease to R/VC 165 as a result of the change and also which rates railroads are likely to increase as they attempt to maintain revenue sufficiency. Board analysts could reasonably assume that the remaining rates above R/VC 165, and the rates above R/VC 180 that increased to offset lost revenue, are the maximum number of rates that could be challenged before the Board as a result of the hypothetical rule. Analysts would then need to estimate how many of those rates would be challenged before the Board on an annual basis, taking into consideration that the cost and uncertainty of litigation would make some rate challenges financially irrational.

Once the Board's analysts have estimated the number of additional rate challenges that would be caused by the change to a threshold of R/VC 165, they would multiply that estimate by the cost of challenging and defending and judging a rate challenge. In 2007, the Board reported that the litigation cost (in legal and consulting fees) was \$250,000 for a shipper to bring a Three-Benchmark rate case, \$1 million to bring a Simplified SAC case, and \$5 million to bring a Full SAC case.³² Those estimates can be adjusted for the rising cost of legal services over time using the Consumer Price Index for Legal Services, published by the U.S. Bureau of Labor Statistics. In 2019, adjusted for inflation, the litigation cost for a shipper would be \$350,000 to bring a Three-Benchmark rate case, \$1.4 million to bring a Simplified SAC case, and \$7 million to bring a Full SAC case. And this is only the litigation cost for shippers. The Board has not

³² Surface Transportation Board, *Surface Transportation Board Decision, STB Ex Parte No. 646 (Sub-No. 1), Simplified Standards for Rail Rate Cases*, decided September 4, 2007, Table 4, p. 32.



provided an estimate of the cost to railroads of responding to a rate challenge. However, a reasonable assumption is that rate litigation costs railroads about the same amount as it costs shippers. This leads to a doubling of the private costs of rate litigation to \$700,000 in the smallest cases to \$14 million in the largest cases. Additionally, there are budgetary implications for the Board too. If the number of the Board's rates cases increases substantially, then there would be costs to the federal government of allocating more Board staff time to address the increase in the Board's caseload.

Multiplying the number of additional expected cases by the amount that litigants and the Board spend per case on litigation would yield the litigation cost of the rule. Without the confidential Waybill data to see how many rates are between R/VC 180 and R/VC 165, I am unable to make the calculation that analysts on the Board would be able to make if such a rule were to actually be proposed. However, to give some context of the potential cost of such a rule, we can look at the history of rate cases since the inception of the Board. Since 1996, there have been roughly 2 rate challenges filed per year under the current threshold of R/VC 180. A reduction in the threshold may lead to a flurry of rate challenges in the first few years. If the number of annual rate challenges increased to 7 per year³³ in the first 3 years after the jurisdictional change (2 cases in a typical year plus 5 additional cases spurred by the change in jurisdiction), and if the cost per case was \$8 million, then the total litigation cost in the first three years caused by the hypothetical rule could be estimated at \$120 million (5 cases x \$8 million x 3 years).

³³ For context, in 2009 seven rate challenges were filed with the Board, the most in any year since the Board's inception.



BENEFITS

A regulatory impact analysis is responsible for estimating the social benefits of a regulation as well as the social costs. Many entities may benefit from a regulation that increases the demand for the products and services that they sell or that reduces the prices they pay. For example, a regulation that increased access to health care would benefit health care providers, but their financial gain would come at the expense of those paying them. This is an example of a wealth transfer that is not a benefit ordinarily counted in regulatory impact analyses. The social benefit of such a rule, however, would be the improvement in health outcomes that resulted from increased access to health care.

Similarly, the potential social benefit of the Board's hypothetical change from a jurisdictional threshold of R/VC 180 to R/VC 165 would not be any reduction in the prices that shippers pay as the result of successful rate challenges, or the impact of the reduction on railroad pricing or negotiated rates. Instead, the benefit of such a rule would be the reduction in the price to consumers of products shipped by rail or the products derived from the shipped products, or potential increases in output by those shippers.

Any commodities that travelled at R/VC 180 before the jurisdictional change, and that experienced a reduction in rates to R/VC 165 after the jurisdictional change, would receive an eight percent reduction in rates ($8.3 = (180 - 165) / 180$). Without the confidential Waybill data, we are not able to estimate the number of rates, the number of shipments, the volume of shipments, and the value of shipments for which rates might change because of such a rule. Board analysts would have such data and could make estimates of the potential reduction in rates for various affected commodities. It would then be necessary to find the percentage of



the final consumer price that is attributable to rail shipment rates. And, for the same reasons discussed above, the Board's analysis would have to account for a range of possible responses to the change in the R/VC threshold, including the possibilities that many rates would remain unchanged and that railroads would increase rates to offset lost revenue.

For illustration, we can use publicly available Department of Energy data for one commonly shipped commodity – coal. According to the U.S. Energy Information Administration, in 2018, the cost of rail shipment accounted for about 50 percent of the price of coal delivered to electric power generators.³⁴ If rail rates for shipping coal decrease by eight percent, then the price of coal delivered to electric power generators could be estimated to decrease by four percent ($4 = 8 \times .50$). Of course, not all rates would drop evenly, so analysts could estimate ranges of potential benefits based on the different potential decreases in rates. Analysts would then need to estimate how much the price of rail-shipped coal contributes to the overall national spending on electricity in order to estimate the potential societal benefit from lower rail shipping prices for coal. The same process could be carried out for other major rail-shipped commodities in order to estimate a range of potential benefits of reduced rail rates caused by the change in threshold jurisdiction.

There would also be offsetting factors. Remember that in order to maintain revenue sufficiency, railroads would be expected to raise rates on some traffic traveling over R/VC 180 if they are forced to lower some rates below R/VC 180. That could lead to price increases for other products—including major commodities like coal, a scenario the Board could consider by

³⁴ U.S. Energy Information Agency, Average Nominal Transportation and Delivered Costs of Coal, by Year and Primary Transport Mode, undated.



applying the same formula above, except this time as a potential social cost of its proposed rule. Board analysts would need to consider all of these factors when calculating the benefits of a rule such as the hypothetical rule posed by the Board.

Such a wide range of uncertainties may sound daunting. However, uncertainties like these are common in all agencies that perform regulatory impact analysis. *Circular A-4* describes a variety of methods to deal with such uncertainties, and analyses in the various federal agencies demonstrate the use of different methods on different occasions. Often the solution is for the agency to simply present a range of effects or a few different possible scenarios that describe the reasonable range of possibilities. Analysts should work with policymakers in the agency and with outside stakeholders to apply the simplest but most useful method for dealing with uncertainties over future outcomes. And the Board can, as always, solicit comments from stakeholders to help address these uncertainties. At the end of the day the goal is not necessarily to provide the agency with a 100% certain calculation of the costs and benefits of its proposal; rather the goal is to ensure that the agency has considered all of the potential costs and benefits of its proposal and knows as much as possible about the likely consequences of proposed rules.

CUMULATIVE IMPACTS OF REGULATION

As described above, the Board's regulatory analysts should investigate whether the cumulative impacts of the Board's proposal could cause conflicts or inconsistencies with other



regulations, practices and policies. There are at least three places where the Board has used the R/VC 180 threshold other than for establishing jurisdiction to hear a rate reasonableness case.³⁵

1. The Board's methods for determining whether a rate is reasonable include the Three-Benchmark test. Under that test, the Board compares the challenged rate to three benchmark figures. All three benchmarks are based on the rates charged to "potentially captive" traffic, which is defined as traffic that is priced above R/VC 180.
2. In the Board's proposed rule changing the requirements for mandatory switching,³⁶ the Board incorporated the market dominance test from litigation over rates, including the R/VC threshold, into the Board's new test for a shipper to demonstrate entitlement to mandatory switching. So, if the Board adopted its proposed mandatory switching rule and the hypothetical rule described in the Board's Solicitation for Information, then a change in the threshold from 180 to 165 could lead to increased switching litigation and mandatory switching, in addition to increased rate litigation and lower rates for some shippers.
3. In its proposal to revoke regulatory exemptions for crushed or broken stone or rip rap; hydraulic cement; and coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes, or tailings,³⁷ the Board used the R/VC 180 threshold to identify

³⁵ I am not taking any position on the Board's use of R/VC thresholds to identify market problems. I am only noting how that Board has used the R/VC ratio in the past and the implications of that use for the cumulative impact of a hypothetical regulation changing the R/VC threshold.

³⁶ Surface Transportation Board, "Petition for Rulemaking to Adopt Revised Competitive Switching Rules; Reciprocal Switching." 81 *Federal Register* 51149, August 3, 2016.

³⁷ Surface Transportation Board, "Review of Commodity, Boxcar, and Trailer-on-Flatcar/Container-on-Flatcar (TOFC/COFC) Exemptions." 81 *Federal Register* 17125, March 28, 2016.



“potentially captive” traffic. If the Board continues to use the R/VC threshold as a proxy for market problems, then a decrease in the threshold could cause the Board to revisit even more exemptions, which would dramatically increase the overall regulatory burden on railroads in ways the Board might not expect if it considered the hypothetical rule in isolation.

If the threshold is changed to R/VC 165, then there will be potential inconsistencies with the Board’s use of the threshold or, if these rules are also changed to R/VC 165, then there will be additional potential costs and potential benefits of the hypothetical rule that should be quantified or at least acknowledged and considered in the regulatory impact analysis.

Beyond the incremental effect of the hypothetical rule, there is also the accumulated bulk of rail regulation that has built up over the years. Accordingly, when the Board considers new rules it should specifically consider how the costs of those rules would contribute to the overall regulatory burden, and consider whether those costs should be offset with corresponding deregulatory proposals. In the hypothetical rule, for example, the Board could consider whether the potential additional litigation costs and impact on railroad pricing could be offset by new exemptions for certain types of shipments. As another example, the Board could also consider whether it could offset increased litigation costs by taking steps to reduce the costs of litigating individual cases.

Conclusion

I will conclude my remarks by putting the question of performing regulatory impact analysis at the Board in context of general regulatory policy.



Currently, regulatory impact analysis is a well-established input into the regulatory decision-making process for a wide range of industries and regulatory bodies in the United States³⁸ and in 85 countries around the world.³⁹ But that has not always been true. Forty years ago, every U.S. federal regulatory body was in the same position that the Board is now. Over time, out of necessity, regulatory analysts have developed ways to provide useful estimates of some of the most seemingly unanswerable questions, including the value of statistical life,⁴⁰ the value of improved outdoor visibility,⁴¹ the value of time,⁴² and the value of information.⁴³ These issues are no simpler to address from an analytical standpoint than the Board's rules. And as all of these other agencies recognize, regulatory impact analysis helps ensure that decision makers are well-informed and therefore leads to better policy decisions.

³⁸ As the American Chemistry Council notes, "It is now a well-established principle with academics, policymakers, and the public that agencies should regulate only when the benefits of regulation outweigh the cost." American Chemistry Council Comment Letter, EPA-HQ-OA-2018-0107, at 1 (Aug. 13, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0107-1852>.

³⁹ World Bank Group, Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact Assessments, undated.

⁴⁰ For an extensive discussion of this and many other issues see National Center for Environmental Economics, Office of Policy, U.S. Environmental Protection Agency, *Guidelines for Preparing Economic Analyses*, December 17, 2010 (updated May 2014).

⁴¹ U.S. Environmental Protection Agency, Office of Air and Radiation, *Regulatory Impact Analysis for the Final Clean Air Visibility Rule or the Guidelines for Best Available Retrofit Technology (BART) Determinations Under the Regional Haze Regulations*, June 2005.

⁴² U.S. Department of Transportation, "Revised Departmental Guidance on Valuation of Travel Time in Economic Analysis." Memorandum to Secretarial Officers and Modal Administrators from Vinn White, Assistant Secretary for Transportation Policy, September 27, 2016.

⁴³ U.S. Department of Health and Human Services, Food and Drug Administration, *Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, Final Regulatory Impact Analysis*, November 2014.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. I further certify that I am qualified and authorized to file this testimony.

Executed on January 31, 2020



David Zorn

EXHIBIT 1

David Zorn, PhD

david@mangumeconomics.com

703-505-4913

2015-present Adjunct Professor, Scalia Law School at George Mason University

Teach law students to write effective comments to influence the regulatory process.

2016-present Economist, Mangum Economics – Northern Virginia

Analyze regulatory and policy issues and economic development opportunities and impacts for corporations, trade associations and public/private partnerships.

Advise corporations and trade associations on options for responding to new federal regulations.

2013-2019 Independent Consultant

Analyze regulatory and public administration issues for non-profit organizations.

Edit the style and substantive content of reports, white papers, working papers and op-eds for authors.

2008-2013 Director of Social Sciences, US Food and Drug Administration

Directed 22 scientists on the Economics and Consumer Studies Teams in research on the impact of food safety and nutrition policies and oversaw the Food Advisory Committee program.

- Represented the FDA social science program within the executive branch and to international bodies.
- Wrote, edited and cleared memos, official reports, research manuscripts and analyses.
- Standardized and promoted FDA's unique method for quantifying the severity of public health risks.
- Advised policymakers about the appropriate use of different research methods.

Reviewed economic analyses by interest groups affected by enforcement actions such as

- FDA refused entry for frozen concentrated orange juice contaminated with an unapproved fungicide.
- FDA refusal to publicly release production details included in reports on facility inspections.

Directed all aspects of contracted economics research and oversaw contracted social science research to inform risk management decisions and improve research methods.

Helped negotiate final federal clearance of significant regulations with senior officials from cabinet-level offices, including HHS, OMB, USDA, Commerce, USTR and SBA.

2006-2008 Economics Team Leader, US Food and Drug Administration

- Persuaded management to integrate input from economists into the regulatory development process.
- Wrote, edited and cleared memos, official reports, research manuscripts and analyses.
- Peer reviewed FDA's 2009 Methylmercury Risk Assessment.

1992-2006 Staff Economist, US Food and Drug Administration

Analyzed costs and benefits of a variety of public health policies including

- | | |
|---------------------------------------|---|
| • Bioterror vulnerability | • Prescription drug importation |
| • Water quality standards | • Tobacco marketing restrictions |
| • Trans fat labeling | • Shellfish harvesting restrictions |
| • Folic acid and iodine fortification | • Quality control system implementation |

1992 PhD, Economics, George Mason University, Fairfax, VA
Fields: Public Choice, Industrial Organization and Law & Economics
1985 BA, Economics, Trinity University, San Antonio, TX

Publications

- Zorn, D. (2018). Science and Democratic Policy in a Data-Driven World. *The Regulatory Review*, June 20, 2018.
- Lutter, R. and Zorn, D. (2015). Reinforcing Reproducibility: What Role for the Federal Government? *Regulation*, 38(4), 15-16.
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- Allhouse, J., Buzby, J., Harvey, D., and Zorn, D. (2003). International Trade and Seafood Safety. Chapter 7 in *International Trade and Food Safety: Economic Theory and Case Studies*. USDA/ERS Agricultural Economic Report No. 828.
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- Zorn, D. (1996). Defending Coase Against False Charges: A Comment on Block. *European Journal of Law and Economics*, 3(3), 287-289.
- Williams, R. and Zorn, D. (1994). New Inspection Program for the Nation's Seafood. *FoodReview*, 17(2), 32-35.

Select Reports and Working Papers

- [The Public Health, Financial and Employment Impacts of Excluding Handmade Cigars from Coverage by FDA's Final Rule.](#) (2018) for Cigar Rights of America.
- [Public Interest Comment on the U.S. Food & Drug Administration's Advanced Notice of Proposed Rulemaking: Tobacco Product Standard for Nicotine Level of Combusted Cigarettes.](#) (2018) for the George Washington Regulatory Studies Center's comment to FDA.
- [Comments on the Food and Drug Administration's Regulatory Impact Analysis and Cost Estimate for the Menu Labeling Final Rule.](#) (2017) for the National Association of Convenience Stores' comment to FDA.
- [On the Benefits and Costs of Public Access to Data Used to Support Federal Regulation.](#) (2016) with R. Lutter for the Mercatus Center.
- [Improving Regulatory Cooperation Between the FDA and the EU.](#) (2016) with R. Lutter for the George Washington University Regulatory Studies Center.

Selected Presentations

- 2016 EU conference "US-EU International Regulatory Cooperation in Practice."
- 2010 NIH conference "Economic Analysis of Nutrition Interventions."
- 2009 World Trade Organization workshop "Using Economic Analysis to Inform SPS Decision Making."

EXHIBIT B



Committee on Transportation and Infrastructure
U.S. House of Representatives

Washington, DC 20515

Peter A. DeFazio
Chairman

Sam Graves, MO
Ranking Member

Katherine W. Dedrick, Staff Director

December 9, 2019

Paul J. Sass, Republican Staff Director

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

Dear Chairman Begeman, Vice Chairman Fuchs, and Board Member Oberman:

We write to urge the Surface Transportation Board to incorporate a thorough cost-benefit analysis into its regulatory framework towards future significant rulemakings. We appreciate the Board's recent solicitation of information (Docket No. EP 752) on integrating cost-benefit analysis into STB's rulemaking process. The incorporation of cost-benefit analysis will improve the transparency and clarity of the Board's decisions and help ensure that any new regulatory action appropriately promotes the long-term health of the freight transportation sector for shippers, railroads, and consumers alike.

To meet rail transportation policy mandates, the Board should impose new regulations only where made necessary by compelling public need and after thoroughly weighing the costs and benefits of any proposed actions. As part of this analysis, the Board should consider how its intervention in the private marketplace will affect the broader industry's ability to respond to changing market conditions and to what degree new regulations will interact with existing regulations.

A thorough consideration of the costs and benefits of any regulation is the bedrock upon which a clearly articulated vision for the future of freight transportation is built. We therefore encourage the Board to adopt rules that align its rulemaking proceedings with the best practices of the federal government, taking into account its obligations under existing law.

We also ask that the Board carefully consider the recommendations contained in the Task Force's report. Since the passage of the Staggers Act and the resulting economic deregulation, the rail industry has achieved substantial improvements in safety, made significant investments in infrastructure including PTC implementation, and developed new technologies to improve its operations. It is crucial that the regulatory structure under which railroads, a network industry, operate remains balanced. Regulatory policy must recognize the importance of railroads' ability to invest, grow their networks, and meet the nation's freight transportation demands.

We thank you for your consideration of this matter and look forward to working with you in the future. If you have any questions or need any further information, please contact Michael Falencki on the Committee on Transportation and Infrastructure staff at (202) 226-0727.

Sincerely,



Sam Graves, Ranking Member



Lloyd Smucker
Member of Congress



Doug LaMalfa
Member of Congress



Russ Fulcher
Member of Congress



Ken Buck
Member of Congress



Ron Estes
Member of Congress



Roger Williams
Member of Congress



Paul Cook
Member of Congress



Jodey Arrington
Member of Congress



Mike Gallagher
Member of Congress



Ron Wright
Member of Congress



Will Hurd
Member of Congress



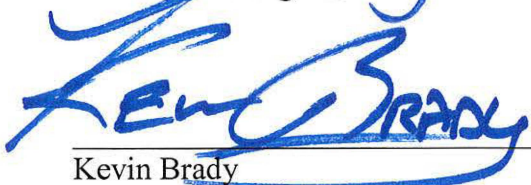
John Carter
Member of Congress



Cathy McMorris-Rodgers
Member of Congress



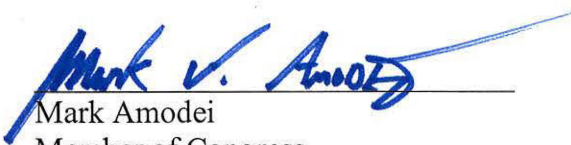
Ann Wagner
Member of Congress



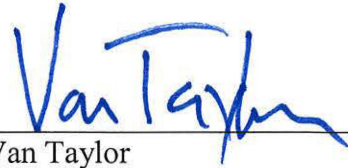
Kevin Brady
Member of Congress



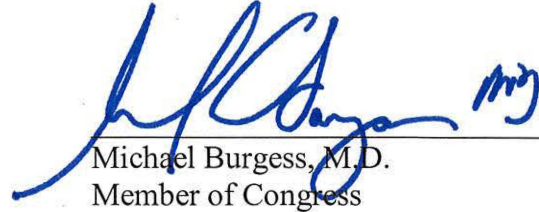
Jason Smith
Member of Congress



Mark Amodei
Member of Congress



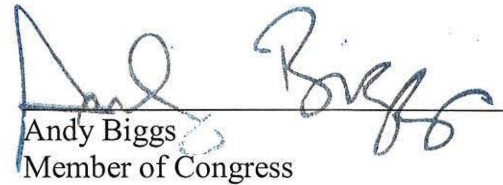
Van Taylor
Member of Congress



Michael Burgess, M.D.
Member of Congress



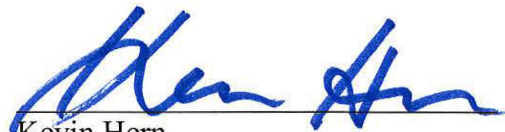
John Ratcliffe
Member of Congress



Andy Biggs
Member of Congress



Tom McClintock
Member of Congress



Kevin Hern
Member of Congress



Greg Gianforte
Member of Congress



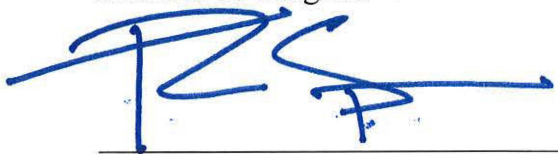
Adrian Smith
Member of Congress



Greg Pence
Member of Congress



Carol Miller
Member of Congress



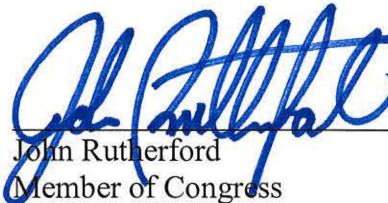
Ross Spano
Member of Congress



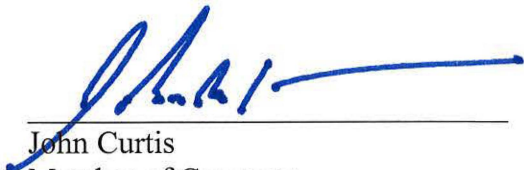
Dan Newhouse
Member of Congress



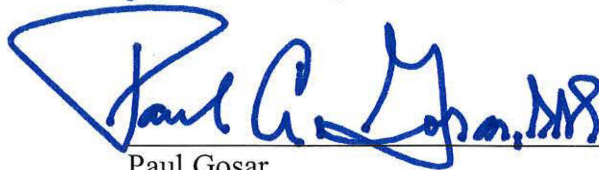
Jennifer Gonzalez-Colon
Member of Congress



John Rutherford
Member of Congress



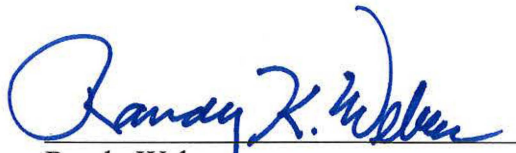
John Curtis
Member of Congress



Paul Gosar
Member of Congress



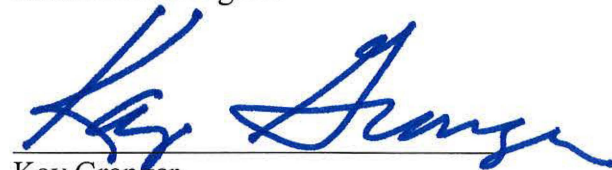
Garret Graves
Member of Congress



Randy Weber
Member of Congress



Dan Crenshaw
Member of Congress



Kay Granger
Member of Congress



Billy Long
Member of Congress



Brian Babin
Member of Congress



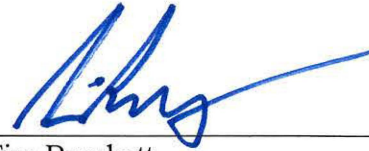
Mark Meadows
Member of Congress



Lance Gooden
Member of Congress



Michael Waltz
Member of Congress



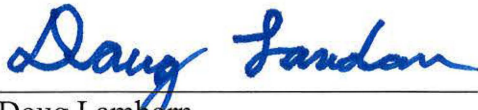
Tim Burchett
Member of Congress



Mark Walker
Member of Congress



Denver Riggleman
Member of Congress



Doug Lamborn
Member of Congress



Drew Ferguson
Member of Congress



David P. Roe, MD
Member of Congress



Mark Green
Member of Congress



H. Morgan Griffith
Member of Congress



Trey Hollingsworth
Member of Congress

EXHIBIT C



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 11, 2019

M-19-14

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Russell T. Vought
Acting Director

SUBJECT: Guidance on Compliance with the Congressional Review Act

I. Introduction

The Constitution vests all Federal legislative power in Congress.¹ In our system of separation of powers, agencies may prescribe rules only insofar as they have statutory authority delegated to them by Congress. The Congressional Review Act (CRA),² enacted in 1996, establishes a mechanism by which Congress is able to exercise direct oversight of Federal agency action in real time, consistent with its role as the sole constitutionally authorized legislative authority. This Memorandum reinforces the obligations of Federal agencies under the CRA in order to ensure more consistent compliance with its requirements across the Executive Branch. It also sets forth guidelines for analysis that the Office of Information and Regulatory Affairs (OIRA) will use to properly classify regulatory actions for purposes of the CRA.

The CRA provides that agencies must submit “rule[s],” defined expansively,³ to Congress. Congress may then pass a joint resolution of disapproval that, if signed by the President or enacted over the President’s veto, invalidates the rule.⁴ If a rule is disapproved, an agency may not issue another rule in substantially the same form unless the new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.⁵

The CRA places specific responsibilities on Federal agencies, OIRA, and the Government Accountability Office (GAO). The CRA requires Federal agencies to notify Congress of rules they have promulgated and to provide information regarding compliance with the CRA and other

¹ U.S. CONST. art. I, § 1, cl. 1.

² 5 U.S.C. §§ 801-808 (reprinted in Appendix).

³ In this Memorandum, “rule” refers to the CRA definition of the term, which includes a wide range of regulatory actions. *See* Part II *infra*.

⁴ *Id.* § 801. Moreover, “[a]ny rule that takes effect and later is made of no force or effect by an enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.” *Id.* § 801(f).

⁵ 5 U.S.C. § 801(b)(2).

statutes. To help prioritize congressional review of rules with important economic impacts, the CRA requires that OIRA designate whether a rule is “major,” which signals a rule’s relative importance and economic impacts. The major designation triggers a report by GAO and a delayed effective date while Congress may consider whether it will disapprove the rule.

The CRA’s definition of major rule mirrors President Reagan’s Executive Order 12291,⁶ which established OIRA’s centralized regulatory review function, and closely corresponds to the economic standard for “significant regulatory action” in President Clinton’s Executive Order 12866,⁷ which currently governs centralized review. Moreover, the CRA incorporates and reinforces other statutory and executive order requirements for regulatory actions overseen by OIRA.⁸ OIRA thus has a number of overlapping responsibilities and review functions that relate to the CRA.

This Memorandum reaffirms the broad applicability of the CRA to all Federal agencies and a wide range of rules; sets forth a process for OIRA to make major determinations; and provides guidance for the type of analysis required for these determinations. While agencies have an ongoing responsibility to comply with the CRA, the major determination process outlined here will take full effect on May 11, 2019. This Memorandum supersedes earlier OMB guidance on the CRA.⁹

II. The Congressional Review Act’s Broad Scope

Congress legislated broadly when setting forth a process for reviewing agency action. The CRA applies to all Federal agencies, including the historically independent agencies.¹⁰ Furthermore, the CRA adopts the Administrative Procedure Act’s (APA) expansive definition of “rule,” which includes, subject to certain exceptions, “the whole or a part of an agency statement

⁶ See Exec. Order No. 12291 § 1(b), 46 Fed. Reg. 13193 (Feb. 19, 1981); see also Joint Statement for the Record by Senators Nickles, Reid, and Stevens, S3683 (Apr. 18, 1996) (“The definition of a ‘major rule’ in subsection 804(2) is taken from President Reagan’s Executive Order 12291. . . . The authors intend the term ‘major rule’ in this chapter to be broadly construed, including the non-numerical factors contained in the subsections 804(2)(B) and (C).”).

⁷ See Exec. Order No. 12866, § 3(f), 58 Fed. Reg. 51735 (Oct. 4, 1993). A regulatory action is economically significant if it “is likely to result in a rule that may . . . [h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” *Id.* § 3(f)(1).

⁸ The CRA requires agencies to report to Congress any available cost-benefit analysis and a rule’s compliance with the Regulatory Flexibility Act (RFA) and the Unfunded Mandates Reform Act (UMRA). OIRA has statutory obligations to ensure agency compliance with the RFA’s requirement that certain agencies receive input from affected small businesses and the UMRA’s requirement that OIRA submit a Cost-Benefit Report to Congress tracking agency compliance with the UMRA. See 2 U.S.C. §§ 1531-1538; 5 U.S.C. §§ 601-612. Additionally, Executive Order 12866 requires OIRA to ensure that agencies conduct meaningful cost-benefit analysis of “significant” or “economically significant” rules.

⁹ Office of Mgmt. & Budget, Memorandum No. M-99-13, “Guidance for Implementing the Congressional Review Act” (Mar. 30, 1999).

¹⁰ Section 804(1) of the CRA uses the Administrative Procedure Act (APA) definition of “agency,” which includes “each authority of the Government of the United States” including the historically independent agencies. See 5 U.S.C. § 551(1). The CRA does not cover Federal entities that fall outside the definition of “agency” under 5 U.S.C. § 551(1).

of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”¹¹

The CRA applies to more than just notice-and-comment rules; it also encompasses a wide range of other regulatory actions, including, *inter alia*, guidance documents, general statements of policy, and interpretive rules.¹² The CRA provides exemptions for rules: “of particular applicability”; “relating to agency management or personnel”; or “of agency organization, procedure, or practice that do[] not substantially affect the rights or obligations of non-agency parties.”¹³ The CRA also specifically exempts rules concerning monetary policy developed by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee and rules promulgated under the Telecommunications Act of 1996 and subsequent amendments.¹⁴ These limited and explicit exemptions underscore that all other rules must follow the requirements of the CRA.¹⁵

III. Major Determination Process

Under the CRA, Federal agencies must coordinate with OIRA regarding a major determination for all final, interim final, and direct final rules, irrespective of whether a rule would otherwise be submitted for regulatory review.¹⁶ The CRA creates a special category of “major rules” and requires OIRA to determine whether a rule is major based on a finding by OIRA that the rule “has resulted in or is likely to result in—

¹¹ 5 U.S.C. § 551(4); *id.* § 804(3) (incorporating § 551’s definition of “rule” for purposes of the CRA). The APA’s definition of “rule” also covers agency statements of “particular applicability,” but, as noted, the CRA exempts such statements from its reach. *See id.*

¹² 5 U.S.C. § 551(4).

¹³ 5 U.S.C. § 804(3).

¹⁴ *See* 5 U.S.C. §§ 804, 807.

¹⁵ 5 U.S.C. §§ 551(4), 804; *see also* Letter of Susan Poling, General Counsel, Gov’t Accountability Office, to The Honorable Pat Toomey (Oct. 19, 2017), *available at* <https://www.gao.gov/assets/690/687879.pdf>.

¹⁶ The CRA’s legislative history confirms the breadth of the statute’s plain text:

Certain covered agencies, including many “independent agencies,” include their proposed rules in the Unified Regulatory Agenda published by OMB but do not normally submit their final rules to OMB for review. Moreover, interpretative rules and general statements of policy are not normally submitted to OMB for review. Nevertheless, it is the Administrator that must make the major rule determination under this chapter whenever a new rule is issued. The Administrator may request the recommendation of any agency covered by this chapter on whether a proposed rule is a major rule within the meaning of subsection 804(2), but the Administrator is responsible for the ultimate determination. Thus, all agencies or entities covered by this chapter will have to coordinate their rulemaking activity with OIRA so that the Administrator may make the final, major rule determination.

Joint Statement for the Record by Senators Nickles, Reid, and Stevens, S3683 (Apr. 18, 1996).

- (A) an annual effect on the economy of \$100,000,000 or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”¹⁷

The CRA requires Federal agencies to submit a rule to Congress along with a report that includes OIRA’s major determination and the proposed effective date of the rule.¹⁸ A major rule may take effect no sooner than 60 calendar days after an agency submits a CRA report to Congress or the rule is published in the *Federal Register*, whichever is later.¹⁹ Agencies should not publish a rule—major or not major—in the *Federal Register*, on their websites, or in any other public manner before OIRA has made the major determination and the agency has complied with the requirements of the CRA.

To make the required major finding under the CRA, OIRA sets forth the following determination process for all Federal agencies, including the historically independent agencies.

A. Regulatory actions submitted through the Executive Order 12866 process

For regulatory actions submitted pursuant to Executive Order 12866 review, OIRA will continue to incorporate the CRA major determination into its standard process. Agencies should include both a proposed significance determination and a proposed determination of whether the rule is major under Section 804(2). OIRA will review the agency’s CRA determination consistent with the principles outlined in this Memorandum.

B. Regulatory actions not submitted through the Executive Order 12866 process

At present, OIRA does not consistently receive from agencies the information necessary to determine whether a rule is major, in part because some regulatory actions are rules under the CRA are not submitted to OIRA through the centralized review process of Executive Order 12866. To ensure faithful execution of its statutory duty, OIRA is instituting a systematic process to determine whether rules that would not be submitted to OIRA under Executive Order

¹⁷ 5 U.S.C. § 804(2).

¹⁸ 5 U.S.C. § 801(a)(1)(A).

¹⁹ 5 U.S.C. § 801(a)(3)(A). The CRA creates limited exceptions to this requirement. *See id.* § 801(c); § 808. An agency may invoke the “good cause” exception under § 808(2) in the case of rules for which the agency has found “good cause” under the APA, § 553(b)(3)(B), to issue the rule without providing the public with an advance opportunity to comment. Application in other circumstances will be considered on a case-by-case basis.

The major designation also triggers a requirement that the Comptroller prepare a report assessing the rule’s compliance with statutory provisions and executive orders. *See id.* § 801(a)(2). The GAO provides information on the submission of rules to GAO and to Congress on its website. *See* <https://www.gao.gov/legal/congressional-review-act/faq>. Agencies are to use the Submission of Federal Rules form for this purpose. *See Submission of Federal Rules Under the Congressional Review Act* (Nov. 9, 1999), <https://www.gao.gov/decisions/majrule/fedrule2.pdf>.

12866 are major. Agencies should implement, in consultation with OIRA desk officers, the process outlined below:

1. Each agency should notify OIRA regularly of upcoming rules. An agency may provide such a notification by submitting a list of planned rules, including summaries of each rule and the agency's recommended designation of whether a rule is major. For example, an agency may recommend that a rule should not be deemed major by explaining in the summary that it is routine, ministerial, or otherwise does not meet the statutory criteria for a major rule.
2. For rules that an agency considers not major, within ten days of notification, OIRA may inform the agency that OIRA agrees with the agency and may designate such rules as not major. Otherwise, such rules will be subject to the major rule determination process.
3. For rules the agency considers major and those rules not previously designated by OIRA as not major, the agency should submit the rule to OIRA for a CRA determination at least 30 days before the agency publishes the rule in the *Federal Register* or otherwise publicly releases the rule.
4. Agencies should include analysis with each rule sufficient to allow OIRA to determine whether the rule is major under the criteria of Section 804(2). This analysis should be appropriate to the type of rule and the degree of uncertainty concerning its impacts, and consistent with the principles enunciated in Circular A-4 and Part IV of this Memorandum. Insufficient or inadequate analysis may delay OIRA's determination and an agency's ability to publish a rule and to make the rule effective. To make the required finding, OIRA may request additional information from the agency.
5. OIRA will review each rule and the related analysis, make the findings required by the CRA, and inform the agency of OIRA's designation of the rule as major or not major.
6. After the designation, agencies may send the CRA report to Congress and the Comptroller in accordance with the applicable provisions of Section 801(a), and may then publish the rule in the *Federal Register*, and otherwise publicly release the rule. If OIRA designates a rule as major, agencies should delay the effective date of the rule by 60 days from the date of the rule's submission to Congress or the rule is published in the *Federal Register*, whichever is later, subject to the CRA's limited exceptions to this requirement.²⁰

OIRA anticipates designating certain categories of rules as presumptively not major in order to prioritize evaluation of rules more likely to be major. OIRA will work with senior agency officials to identify categories of rules that are presumptively not major because they are unlikely to result in the impacts described for a major rule. Rules within these categories would not be subject to the major determination process described in this Memorandum. OIRA, however, reserves the right to revoke this categorical "not major" determination for any category or for any particular rule.

²⁰ 5 U.S.C. §§ 801(c), 808.

For all rules, agencies should include a CRA compliance statement in the body of the rule to provide transparency and notice to Congress. Agencies should include language within the body of the rule as to whether OIRA designated the rule as major or not major. For instance: “Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as [a ‘major rule’ or not a ‘major rule’], as defined by 5 U.S.C. § 804(2).”

IV. Regulatory Analysis Principles

To find whether a rule is likely to result in the impacts of a “major rule,” OIRA will use longstanding analytical principles applied under Executive Order 12866 to determine economic significance.

In general, major designations have focused on rules that have an annual effect on the economy of \$100 million or more, as specified in CRA Section 804(2)(A).²¹ Yet the CRA includes additional, distinct criteria for major rules. A rule is also major if it is likely to result in a “major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions,” Section 804(2)(B), or in “significant adverse effects on competition, employment, investment, productivity, innovation” or the ability of U.S. entities to compete with foreign entities, Section 804(2)(C). The CRA clearly lists these criteria as alternatives, so a rule can qualify as major under Section 804(2)(B) or (C) even if its annual effect on the economy is less than \$100 million.

To determine a rule’s economic effect for all three criteria of Section 804(2), agencies should follow the analytical approach set forth in OMB Circular A-4,²² which includes the following instructions:

1. The scope of the analysis should incorporate significantly affected entities and the time horizon should encompass all important effects of the agency action.²³
2. A rule’s costs, benefits, and transfer impacts must be assessed relative to a baseline—that is, the predicted future state of the world in the absence of the rule being analyzed. The baseline should reflect an agency’s best assessment of market evolution and other factors that may change independent of the rule. In general, when assessing the economic effects of the first rule that implements a statutory requirement, agencies should use a pre-statutory baseline. In some instances, an agency may provide analysis using multiple

²¹ See Office of Mgmt. & Budget, Memorandum No. M-99-13, “Guidance for Implementing the Congressional Review Act” (discussing only the \$100 million threshold).

²² Office of Mgmt. & Budget, Circular A-4 (2003), *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>. Other helpful references on regulatory analysis may be found at <https://www.whitehouse.gov/omb/information-regulatory-affairs/regulatory-matters/>.

²³ A regulatory analysis should present undiscounted year-by-year streams of benefit, cost, and transfer estimates for the full analytic time horizon. See Circular A-4, at 14, 31 and 45. If any undiscounted benefit, cost, or transfer estimate is at least \$100 million in at least one year (that is, in any consecutive twelve-month period), then OIRA will designate the rule major under CRA Section 804(2)(A) and economically significant under Executive Order 12866.

baselines, especially when doing so would highlight areas of agency policy discretion. In cases where both pre-statutory and post-statutory baselines are analytically informative, the pre-statutory baseline will typically be used to determine major status under the CRA.²⁴

3. Agencies should assess potential impacts of substantial magnitude on any individuals or entities in society. These may include, for example, “private-sector compliance costs and savings; government administrative costs and savings; gains or losses in consumers’ or producers’ surpluses; discomfort or inconvenience costs and benefits; and gains or losses of time in work, leisure [or] travel settings.”²⁵
4. Agency analysis should look beyond the direct effects of agency action and consider any important ancillary or indirect effects.
5. Although the precise consequences (benefits, costs, or transfers) of rules may be uncertain, agencies should analyze and present important uncertainties, including the probability of their occurrence.
6. Any information that the agency relies upon for its analysis should comply with the Information Quality Act (IQA), OMB’s information quality guidance, and the agency’s supplemental IQA guidance.²⁶

Analysis required by Sections 804(2)(B) and (C) may sometimes be difficult to quantify; however, agencies should provide quantitative analysis when reasonably possible and otherwise should provide qualitative analysis.

Section 804(2)(B) suggests that a rule may qualify as major under the CRA if it imposes disproportionate costs on a particular group, in comparison to the burdens experienced by other groups or the benefits experienced by the burdened group. OIRA recommends that agencies begin with a screening analysis by region and industrial sector and evaluate effects on private consumers and public entities separately. If the screening analysis reveals that burdens faced by any one of these groups are likely to be significant and disproportionate to the benefits experienced by that group or the burden borne by other groups, the agency should evaluate whether the rule is major under Section 804(2)(B). The evaluation should include, *inter alia*, review of any relevant studies and could include informal consultations with representatives of the potentially disproportionately burdened group.

Section 804(2)(C) instructs agencies to examine a rule’s effects on various aspects of the U.S. economy. An agency’s Section 804(2)(C) analysis should also begin with a screening analysis to determine whether a rule might be expected to place significant burdens on the economy, for instance, by depressing wages, creating barriers to investment from domestic or

²⁴ See Circular A-4, at 15-16 (explaining how to identify the appropriate baseline for regulatory analysis).

²⁵ *Id.* at 37.

²⁶ Office of Mgmt. & Budget, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies” (Feb. 22, 2002), *available at* <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/fedreg/reproducible2.pdf>.

foreign sources, or reducing incentives to innovate. If the screening analysis suggests that the rule may result in significant economic burdens, the agency should conduct an evaluation that includes, *inter alia*, review of any relevant studies and that could include informal consultations with representatives of the potentially burdened component of the economy.

V. Miscellaneous

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Please consult with your agency's OIRA desk officer if you have questions regarding this Memorandum.

Attachment

Congressional Review Act (5 U.S.C. Chapter 8)

§ 801. Congressional review

(a) (1) (A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing--

- (i)** a copy of the rule;
- (ii)** a concise general statement relating to the rule, including whether it is a major rule; and
- (iii)** the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress--

- (i)** a complete copy of the cost-benefit analysis of the rule, if any;
- (ii)** the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii)** the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv)** any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2) (A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

- (A) the later of the date occurring 60 days after the date on which--
 - (i) the Congress receives the report submitted under paragraph (1); or
 - (ii) the rule is published in the Federal Register, if so published;
 - (B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date--
 - (i) on which either House of Congress votes and fails to override the veto of the President; or
 - (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or
 - (C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).
- (4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).
- (5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)

- (1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.
- (2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)

- (1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.
- (2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is--
- (A) necessary because of an imminent threat to health or safety or other emergency;
 - (B) necessary for the enforcement of criminal laws;
 - (C) necessary for national security; or
 - (D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d) (1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring--

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

(2) (A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though--

(i) such rule were published in the Federal Register (as a rule that shall take effect) on--

(I) in the case of the Senate, the 15th session day, or

(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

(e)

(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter [March 29, 1996].

(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though--

(A) such rule were published in the Federal Register on the date of enactment of this chapter [March 29, 1996]; and

(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

§ 802. Congressional disapproval procedure

(a) For purposes of this section, the term "joint resolution" means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: "That Congress disapproves the rule submitted by the ----- relating to -----, and such rule shall have no force or effect." (The blank spaces being appropriately filled in).

(b)

(1) A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction.

(2) For purposes of this section, the term "submission or publication date" means the later of the date on which--

(A) the Congress receives the report submitted under section 801(a)(1); or

(B) the rule is published in the Federal Register, if so published.

(c) In the Senate, if the committee to which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.

(d)

(1) In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.

(2) In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall

be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.

(3) In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the Senate, the vote on final passage of the joint resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.

(e) In the Senate the procedure specified in subsection (c) or (d) shall not apply to the consideration of a joint resolution respecting a rule--

(1) after the expiration of the 60 session days beginning with the applicable submission or publication date, or

(2) if the report under section 801(a)(1)(A) was submitted during the period referred to in section 801(d)(1), after the expiration of the 60 session days beginning on the 15th session day after the succeeding session of Congress first convenes.

(f) If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply:

(1) The joint resolution of the other House shall not be referred to a committee.

(2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution--

(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but

(B) the vote on final passage shall be on the joint resolution of the other House.

(g) This section is enacted by Congress--

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

§ 803. Special rule on statutory, regulatory, and judicial deadlines

(a) In the case of any deadline for, relating to, or involving any rule which does not take effect (or the effectiveness of which is terminated) because of enactment of a joint resolution

under section 802, that deadline is extended until the date 1 year after the date of enactment of the joint resolution. Nothing in this subsection shall be construed to affect a deadline merely by reason of the postponement of a rule's effective date under section 801(a).

(b) The term “deadline” means any date certain for fulfilling any obligation or exercising any authority established by or under any Federal statute or regulation, or by or under any court order implementing any Federal statute or regulation.

§ 804. Definitions

For purposes of this chapter--

(1) The term “Federal agency” means any agency as that term is defined in section 551(1).

(2) The term “major rule” means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in--

(A) an annual effect on the economy of \$ 100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

(3) The term “rule” has the meaning given such term in section 551, except that such term does not include--

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing;

(B) any rule relating to agency management or personnel; or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

§ 805. Judicial review

No determination, finding, action, or omission under this chapter shall be subject to judicial review.

§ 806. Applicability; severability

(a) This chapter shall apply notwithstanding any other provision of law.

(b) If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

§ 807. Exemption for monetary policy

Nothing in this chapter shall apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

§ 808. Effective date of certain rules

Notwithstanding section 801--

- (1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or
- (2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines.