

Institute *for* Policy Integrity

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VIA ELECTRONIC SUBMISSION

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Department of Justice
950 Pennsylvania Avenue, NW, Room 4252
Washington, DC 20530
Attention: Docket ID No. OAG-131

Subject: Comments on Advance Notice of Proposed Rulemaking for National Standards to Prevent, Detect, and Respond to Prison Rape, 75 Fed. Reg. 11077 (Mar. 10, 2010), Docket No. OAG-131; AG Order No. 3143- 2010, RIN 1105-AB34

The Institute for Policy Integrity at New York University School of Law submits the following comments in support of the efforts of the Department of Justice (“DOJ” or “the Department”) to develop national standards to prevent, detect, and respond to the alarming rates of rape in the nation’s prisons. The Institute for Policy Integrity (“IPI”) is a non-partisan advocacy organization and think-tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, cost-benefit analysis, and public policy.

In its Advance Notice of Proposed Rulemaking, published on March 10, 2010, the Department asked for public comment on costs, particularly whether any of the proposed standards would “impose ‘substantial additional costs’” in violation of the Prison Rape Elimination Act.¹ When designing these new standards, DOJ should give equal attention to both the costs and benefits of regulation, and should propose standards that will maximize net social benefits. The language and purpose of the Prison Rape Elimination Act, the Department’s obligations under administrative law, and best practices for rulemaking all require DOJ to conduct a thorough cost-benefit analysis in the early stages of its decisionmaking process, rather than simply focusing on compliance costs. In particular, the Department should only determine whether standards will impose “substantial costs” by comparing potential costs to anticipated benefits.

These comments explain why DOJ must use cost-benefit analysis to weigh regulatory options. They also suggest how DOJ can structure such an analysis to satisfy best practices without unnecessarily delaying the promulgation of new regulations. IPI is poised to offer additional guidance on the appropriate scope of a cost-benefit analysis as the Department moves through the rulemaking process.

¹ Advance Notice of Proposed Rulemaking for National Standards to Prevent, Detect, and Respond to Prison Rape, 75 Fed. Reg. 11,077, 11,079 (Mar. 10, 2010) (to be codified at 28 C.F.R. pt. 115) [hereinafter ANPR].

I. DOJ Must Analyze Costs and Benefits Together, Early in the Process

The Prison Rape Elimination Act of 2003 (“PREA” or “the Act”)² established a National Prison Rape Elimination Commission (“the Commission”) to study and recommend national standards for enhancing the detection, prevention, reduction, and punishment of sexual assaults committed in prisons.³ Under PREA, the Attorney General must consider those recommendations—along with any other appropriate data, opinions, and proposals—and apply his “independent judgment” to develop and adopt final standards.⁴ Importantly, the statute instructs:

The Attorney General shall not establish a national standard under this section that would impose *substantial additional costs* compared to the costs presently expended by the Federal, State, and local prison authorities. The Attorney General may, however, provide a list of improvements for consideration by correctional facilities.⁵

The Commission submitted its recommendations to the Attorney General in 2009.⁶ On March 10, 2010, DOJ initiated the rulemaking process by publishing its Advance Notice of Proposed Rulemaking (“ANPR”). In its ANPR, the Department responded to the statute’s language on “substantial additional costs” by announcing that it will “carefully examine the potential cost implications of the standards” through an independent cost analysis.⁷ That review of compliance costs is a crucial step in the decisionmaking process; but it does not fulfill the Department’s obligations under the statute, administrative law, and best practices. DOJ must also carefully and comprehensively analyze the benefits of this regulation, and understand the costs in relation to these benefits.

“Substantial” Costs Are Defined in Light of Expected Benefits

Neither the text nor the legislative history of the Prison Rape Elimination Act provides a clear definition for “substantial additional costs.” In the congressional findings that introduce the Act, Congress offers an alternate formulation—“[s]tates that do not take basic steps to abate prison rape by adopting standards that do not generate *significant additional expenditures* demonstrate such indifference [to the constitutional rights of individuals in prisons].”⁸ Unfortunately, this alternative does little to elucidate the meaning of the statutory mandate to the Attorney General on cost consideration.

“Additional” clearly means “compared to the costs presently expended by . . . prison authorities.”⁹ But terms like “substantial” and “significant” are not defined in the statute and do not articulate a bright-line monetary threshold. There is no set dollar amount or percentage increase at which costs suddenly and obviously become “substantial.”

Some witnesses at congressional hearings on the Act understood the phrase to bar any standard from imposing “unfunded mandates” on the states.¹⁰ The Congressional Budget Office also

² Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2009) [hereinafter PREA].

³ *Id.* § 15606.

⁴ *Id.* § 15607(a)(2).

⁵ *Id.* § 15607(a)(3) (emphasis added). This same “substantial additional cost” language also applies to the Commission’s initial recommendation of standards. *Id.* § 15606(e)(3).

⁶ NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf> [hereinafter Commission Report].

⁷ ANPR, 75 Fed. Reg. at 11,078.

⁸ PREA, 42 U.S.C. § 15601(13) (emphasis added).

⁹ *Id.* § 15607(a)(3).

¹⁰ See *Prison Rape Reduction Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 23 (2003) (hearing on the House’s companion legislative proposal to the Senate’s

discussed the standards' potential costs in its analysis of the Act under the Unfunded Mandates Reform Act ("UMRA"), and found that PREA costs fell below the UMRA threshold.¹¹ UMRA requires federal agencies to analyze regulations that will impose \$100 million in new costs on local governments.¹² But this figure is not an appropriate measure of "substantial" costs under PREA. First, UMRA excludes from its monetary thresholds any regulations that protect constitutional rights,¹³ such as those afforded individuals incarcerated in prisons under the Eighth and Fourteenth Amendments. Second, if new regulatory costs to local governments exceed a certain level, UMRA simply requires additional analysis before these regulations can be finalized; however, PREA's "substantial additional cost" language limits the actual adoption of regulations. The different consequences of a finding of an "unfunded mandate" under UMRA versus "substantial additional costs" under PREA counsels against importing the \$100 million threshold into the more recent law.¹⁴

Though Congress did not articulate a monetary threshold for "substantial costs," PREA's structure and history support interpreting the phrase in light of the Act's overall purpose. Congress intended PREA to "establish a zero-tolerance standard for the incidence of prison rape," "make the prevention of prison rape a top priority," and "reduce the costs that prison rape imposes."¹⁵ Legislative sponsors repeatedly spoke of the need to "priorit[ize] efforts to abate prison rape," "reverse the perverse prison administrative incentives,"¹⁶ and address the high price to both victims and society of rapes in prisons.¹⁷

Congress expected that new national standards would effectively and significantly reduce the incidence of rapes in prison, and not simply focus on cost containment. "Substantial" should

Prison Rape Elimination Act of 2003) (statement of Charles Kehoe, Pres. of Am. Correctional Assoc.) ("We appreciate the extent to which the sponsors of H.R. 1707 have gone to ensure that this bill does not place unfunded mandates upon the States However, we believe that this term needs to be further defined. Thus, we recommend that the legislation be revised to define what, if any, further costs the implementation of national standards can place upon States and localities."); *Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (hearing on the Senate's earlier version of PREA) (testimony of Mark Earley, Pres. of Prison Fellowship Ministries and former Virginia Attorney General) ("[The Act] has no unfunded mandates. It even has an opt-out provision [from the national standards].").

¹¹ CONGRESSIONAL BUDGE OFFICE, COST ESTIMATE FOR H.R. 1707 PRISON RAPE ELIMINATION ACT OF 2003, 108th Cong. 3 (2003) ("Though the language specifies that those standards may not place substantial additional costs . . . CBO has no basis for estimating what those standards might be or what costs state and local government would face in complying with them."). See also *id.* at 1 (estimating that the Act's overall costs fall below UMRA thresholds). DOJ recognizes that its PREA rulemaking does not contain any unfunded mandates. Dept. of Justice, Spring 2010 Agenda of Regulatory and Deregulatory Actions, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201004&RIN=1105-AB34>.

¹² UMRA, 2 U.S.C. § 1532 (2010).

¹³ *Id.* § 1503(1). Also, a rulemaking under PREA may not qualify as a "mandate," considering states can opt-out of the national standards (admittedly at the cost of some federal grant money). PREA, 42 U.S.C. § 15607(c)(2).

¹⁴ Additionally, standards under PREA affect the federal as well as local governments, while UMRA is only concerned with costs to local governments.

¹⁵ PREA, 42 U.S.C. §§15602(1), (2), (9).

¹⁶ See, e.g., *Prison Rape Reduction Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 3 (2003) (statement of Rep. Coble).

¹⁷ See, e.g., H.R. REP. NO. 108-219, at 8 (2003) (accompanying H.R. 1707) (statement of Rep. Frank Wolf) ("Victims of prison rape often suffer severe psychological trauma, and are sometimes infected with HIV/AIDS, tuberculosis, and other diseases. Treatment for these infectious diseases costs federal, state, and local jurisdictions additional dollars in administering their prison systems. Prison rape not only costs its victims their health and dignity, society also pays a price."). See also *Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (hearing on Senate's earlier version of PREA) (testimony of Robert Dumond, Bd. of Advisors, Stop Prison Rape, responding to Senator Kennedy's question on how to break through the culture of tolerance) ("From a cost-benefit analysis, [society does] itself a disservice by allowing for prison sexual assault.").

therefore be interpreted with these goals in mind; otherwise, the language could thwart the entire purpose of the Act.¹⁸ For example, to cash-strapped prisons facing further budget cuts, any cost increase may seem “substantial”;¹⁹ yet Congress clearly intended to force at least some administrative changes. PREA’s structure and history may not fully resolve the ambiguity of the term “substantial,” but they do suggest that DOJ should balance costs with benefits.

Ultimately, “where Congress leaves a statutory term undefined, it makes an implicit ‘delegation of authority to the agency to elucidate a specific provision of the statute’ through reasonable interpretation.”²⁰ While the word “substantial” does not have a single dictionary definition,²¹ it generally operates as a relative term—a comparator that implicitly calls for the balancing of factors. According to a recent Supreme Court ruling, comparative terms that “admit[] of degree” (such as “best,” “minimize,” “significant,” or “reasonable”) often give agencies discretion to consider both the costs and benefits of regulation, even if the statute does not explicitly address benefits: “Whether it is reasonable to bear a particular cost may well depend on the resulting benefits.”²²

Similarly, the U.S. Court of Appeals for the D.C. Circuit held that a statute requiring regulations to generate “substantial” benefits gave an agency discretion to consider costs.²³ The D.C. Circuit has also held that terms like “significant” cannot reasonably be “measured in only one dimension” but instead may require the consideration of both costs and benefits.²⁴

DOJ must define “substantial additional costs” in a reasonable manner.²⁵ Here, particularly given the Supreme Court and D.C. Circuit precedents, the most appropriate definition is one that balances costs and benefits. More specifically, DOJ should decline to adopt a regulatory standard under PREA for imposing “substantial additional costs” only if the standard’s estimated long-term costs unjustifiably exceed estimated benefits, giving due consideration to all benefits—including those that cannot be directly quantified. In other words, policies that do not impose “substantial costs” are those that are benefit-cost justified.

¹⁸ Cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412-13 (1971) (explaining that the overall purpose of a statute—and even the simple existence of a statute intended to accomplish some beneficial purpose—can explain how agencies should balance costs and benefits under a particular section: “[T]he very existence of the statute indicates that protection of parkland was to be given paramount importance.”), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

¹⁹ See *Michigan v. Env’tl. Prot. Agency*, 213 F.3d 663, 677-78 (D.C. Cir. 2007) (explaining that for a pollutant like ozone with no safe exposure threshold for human health, any risk, however small, could be considered “significant” if the agency is not permitted to consider factors besides public health).

²⁰ *Grand Canyon Air Tour Coal. v. Fed. Aviation Admin.*, 154 F.3d 455, 474 (D.C. Cir. 1998) (quoting *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984)).

²¹ *Id.* at 474-75 (explaining that “substantial” “has a host of much vaguer dictionary meanings, ranging from ‘not seeming or imaginary’ to ‘considerable in amount’”); *id.* at 475 (finding the term “substantial” to be “simply too ambiguous to compel the ‘plain meaning’ claimed” by the litigant); *Victor v. Nebraska*, 511 U.S. 1, 19-20 (1994) (noting the different definitions of “substantial”). The American Heritage Dictionary defines “substantial” as “considerable in importance, value, degree, amount, or extent.” AMERICAN HERITAGE DICTIONARY (4th ed. 2000).

²² *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1501, 1506 (2009). See also *id.* at 1508-09 (distinguishing *Whitman v. Am. Trucking Assns.*, 531 U.S. 457 (2001), where unique statutory structure and history did imply that congressional silence intended to bar cost consideration, and distinguishing *Am. Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490 (1981), because even if Congress must speak to *require* an agency to conduct cost-benefit analysis, silence does not mean cost-benefit analysis is *precluded*).

²³ *Grand Canyon*, 154 F.3d at 475 (finding FAA had discretion to consider the costs of its rule on the air industry although statute mentioned only benefits and not costs).

²⁴ *Michigan*. 213 F.3d at 677-78 (also distinguishing *Am. Textile*, 452 U.S. 490); see also *id.* (“[T]he upshot of inserting the adjective ‘significant’ was a consideration of which risks are worth the cost of elimination.”).

²⁵ *Chevron*, 467 U.S. at 843-44.

This interpretation is also consistent with the definition implicitly adopted by the National Prison Rape Elimination Commission. The statute similarly prohibited the Commission from issuing recommendations that would impose “substantial additional costs.”²⁶ The Commission interpreted its statutory mandate as follows:

To the extent that the [recommended] standards create new costs, those expenditures are necessary to fulfill the requirements outlined in PREA. And *those costs are not substantial when compared to* the significance of lives damaged or destroyed by sexual abuse and the broader costs of undermining the purposes of corrections in America.²⁷

The Commission’s recommended standards themselves are based on this interpretation of “substantial costs.” Keeping in line with the Commission’s correct reading of PREA, DOJ should explicitly define “substantial additional costs” to include only those costs that unjustifiably exceed estimated benefits, giving due consideration to unquantifiable, qualitative benefits.

Executive Order Requires a Thorough and Timely Cost-Benefit Analysis

For nearly thirty years, the White House has required agencies to conduct a cost-benefit analysis of important regulations. Under the current Executive Order, federal agencies must perform a cost-benefit analysis for any “significant regulatory action.”²⁸ DOJ’s rulemaking under PREA is clearly a significant regulatory action, and DOJ has now properly classified it as such.²⁹

“Regulatory actions” include “any substantive action by an agency . . . expected to lead to the promulgation of a final rule or regulation, including . . . *advance notices of proposed rulemaking*, and notices of proposed rulemaking.”³⁰ Therefore, contrary to DOJ’s statement,³¹ the Executive Order’s precepts apply to this ANPR to prevent rapes in prisons.³² More importantly, the Executive Order’s principles are intended to guide even the earliest stages of the decisionmaking process and undisputedly will apply to DOJ’s Notice of Proposed Rulemaking on this matter.³³ DOJ states that it will conduct any required analyses as it continues in the rulemaking process.³⁴ It is crucial that DOJ conduct such analysis early enough in the process so that it can shape the decision, as opposed to merely serving as a *post hoc* rationalization for predetermined policy choices.³⁵

²⁶ PREA, 42 U.S.C. § 15606(e)(3).

²⁷ Commission Report, *supra* note 6, at 28 (emphasis added); *see also id.* at 3 (“If correctional agencies incur new costs to comply with the Commission’s standards, those costs are not substantial compared to what these agencies currently spend and are necessary to fulfill the requirements of PREA.”).

²⁸ Exec. Order No. 12,866 § 6(a)(3), 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993) (codified at 45 C.F.R. pt. 88); *see also id.* § 3(f) (defining “significant regulatory action” as one “likely to result in,” *inter alia*, an annual effect on the economy of \$100 million or more).

²⁹ Dept. of Justice, Spring 2010 Agenda, *supra* note 11.

³⁰ Exec. Order No. 12,866 § 3(e) (emphasis added).

³¹ *See* ANPR, 75 Fed. Reg. at 11,079 (“This action is an Advance Notice of Proposed Rulemaking (ANPRM). Accordingly, the requirement of Executive Order 12866 to assess the costs and benefits of this action does not apply.”).

³² Though strict quantification or monetization of costs and benefits may not be “feasible” at the stage of an ANPR, some level of assessment is required. Exec. Order No. 12,866 § 6(a)(3)(C) (requiring quantification only where “feasible”).

³³ *See also* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR A-4, 1 n.1 (2003) [hereinafter OMB, Circular A-4] (explaining that “proposed” means “any regulatory actions under consideration regardless of the stage of the regulatory process”).

³⁴ ANPR, 75 Fed. Reg. at 11,079.

³⁵ *See* WINSTON HARRINGTON, LISA HEINZERLING & RICHARD D. MORGENSTERN, REFORMING REGULATORY IMPACT ANALYSIS (Resources for the Future 2009) (discussing the need to incorporate analysis into the early stages of decisionmaking).

DOJ's rulemaking under PREA qualifies as "significant" regulatory action on several grounds:

- It is likely to "[h]ave an annual effect on the economy of \$100 million or more."³⁶ U.S. prisons confine approximately 2.4 million Americans at an annual cost of more than \$68.7 billion.³⁷ Correctional facilities have lost millions of dollars in litigation damages when sexual assaults have occurred,³⁸ and lose millions more in health costs related to preventable sexual assaults. National standards will stem these large financial losses and generate other quantifiable benefits with real and large economic impacts.
- It likely "[m]aterially alters . . . the rights and obligations of [grant] recipients."³⁹ If states fail to adopt the national standards, they risk losing 5% of their prison-related federal grants.⁴⁰
- It likely "[r]aise[s] novel legal or policy issues."⁴¹ The rulemaking will, for the first time, create a uniform national policy to prevent sexual assaults in prisons.

Therefore, under the Executive Order, DOJ must classify all steps in this rulemaking process as "significant regulatory actions."⁴² Moreover, PREA's direction to the Department to examine "substantial cost" directly implicates the cost-benefit principles set forth in the Executive Order.

The Executive Order instructs agencies on the proper methodology for conducting cost-benefit analyses. "Costs and benefits" must be understood "to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."⁴³ Similarly, agencies must quantify costs and benefits "to the extent feasible."⁴⁴ Especially at early stages of analysis, it may not be "feasible" for agencies to fully quantify costs or benefits; some benefit categories may even resist precise quantification after considerable study and investigation. DOJ's analysis must give appropriate attention to all costs and benefits, whether they are direct, indirect, quantifiable, or qualitative.

The Executive Order also requires agencies to consider the costs and benefits of all reasonable regulatory alternatives. The set of policy recommendations reported by the National Commission provides an excellent catalogue of regulatory options to consider, but it is not necessarily exhaustive. The Attorney General is required by the Prison Rape Elimination Act to exercise

³⁶ Exec. Order No. 12,866 § 3(f)(1).

³⁷ See HEATHER WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008 – STATISTICAL TABLES 2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf> (reporting that 1,610,584 people were incarcerated in a federal or state prison on June 30, 2008); TODD D. MINTON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2008 – STATISTICAL TABLES 2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf> (reporting that 785,556 people were detained in a county jails in at midyear 2008). According to the Bureau of Justice Statistics, overall corrections expenditures were \$68,747,203,000 for 2006. Bureau of Justice Statistics, *Key Facts at a Glance, Direct Expenditures by Criminal Justice Function, 1982-2006*, available at <http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm> (last revised Apr. 26, 2010).

³⁸ Commission Report, *supra* note 6, at 144; *see also infra* at p.10 (discussing how PREA standards would decrease litigation costs to prisons).

³⁹ Exec. Order No. 12,866 § 3(f)(3).

⁴⁰ PREA, 42 U.S.C. § 15607(c) (2).

⁴¹ Exec. Order No. 12,866 § 3(f)(4).

⁴² DOJ has classified the PREA rulemaking as "other significant," presumably meaning the Department does not believe the rule is likely affect the economy by \$100 million but believes the rule is significant under either of the two other definitions discussed. Dept. of Justice, Spring 2010 Agenda, *supra* note 11. For the reasons explained, DOJ should classify this rulemaking as significant under all three definitions.

⁴³ Exec. Order No. 12,866 § 1(a).

⁴⁴ *Id.* § 6(a)(3)(C).

“independent judgment” and consider all appropriate “data, opinions, and proposals.” DOJ may need to analyze a range of alternatives broader than the Commission’s recommendations in order to find the options that maximize net benefits. While the Commission interpreted “substantial costs” in light of benefits, it also acknowledged difficulty in “find[ing] the correct balance among competing considerations.”⁴⁵ The Attorney General must balance the factors himself and determine the proper range of regulatory alternatives. DOJ must also analyze any reasonable alternative suggested during public comments.⁴⁶

Best Practices Require Quantification of Benefits Where Possible

Cost-benefit analysis for major regulations is not just required by administrative law; it is also a good idea. Cost-benefit analysis is widely used by government and private actors when making decisions or choosing between multiple courses of action, legislation, or regulation.⁴⁷ For government agencies, cost-benefit analysis is a tool to both maximize the net benefits of regulation and ensure decisions are based on reasoned analysis.⁴⁸ Cost-benefit analyses assist decisionmakers in identifying and selecting policies that are rational, transparent, and efficient.

Cost-benefit methodology involves a rigorous and analytical assessment of the potential effects of a range of alternate actions.⁴⁹ When the process is performed correctly, it values and weighs not only purely financial and economic effects, but the entire range of effects of an agency rulemaking, including effects on health, safety, the environment, and general welfare.⁵⁰

Once an agency begins a cost-benefit analysis as part of its decisionmaking process, it cannot perform the analysis in an arbitrary or capricious manner.⁵¹ In fact, while a court will not

⁴⁵ Commission Report, *supra* note 6, at v (“Yet Congress also and appropriately required us to seriously consider the restrictions of cost, differences among systems and facilities, and existing political structures. We have endeavored to comply with these directives, sometimes struggling to find the correct balance among competing considerations.”) The Report further explains:

One outstanding area of concern was the anticipated cost of some changes required by the standards as originally drafted. Although concerns about cost are understandable, Congress, State legislatures, and county and city officials must provide adequate resources to ensure safe correctional and detention facilities. The Commission acknowledges that this is a formidable task, especially in the current economic climate. From the outset, we have been mindful of the statutory prohibition against recommending standards that would impose substantial additional costs compared to current expenditures. With the assistance of information provided during the public comment period, the Commission attempted to further limit potential new costs and to shape realistic standards that represent what is minimally required to meet Congress’ mandate to eliminate sexual abuse in confinement.

Id. at 27.

⁴⁶ Exec. Order No. 12,866 § (1)(a); *id.* § (1)(b)(3), (8); *id.* §6(a)(3)(C).

⁴⁷ See Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1139 & n.15 (2001) (finding that “[t]he annual number of cost-benefit reports in the Federal Register has increased about sixfold” between 1980 and 1999, to over 2000 reports).

⁴⁸ See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1069-70 (2000) (“A virtue of cost-benefit analysis is that it tends to overcome people’s tendency to focus on parts of problems, by requiring them to look globally at the consequences of apparently isolated actions.”).

⁴⁹ *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1516 (2009) (“Cost-benefit analysis requires the agency to first monetize the costs and benefits of a regulation, balance the results, and then choose the regulation with the greatest net benefits.”).

⁵⁰ See Exec. Order No. 12,866 § 6(3)(C)(i) (stating that benefits of regulatory action include “the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias”).

⁵¹ See *Ctr. for Biological Diversity v. Nat’l Highway Transp. & Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (holding that once an agency voluntarily decides to rely on a cost-benefit analysis, “it cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs” in an arbitrary and capricious manner); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1217-19 (D.C. Cir. 2004) (finding agency’s rulemaking to be “troubling” because it

“substitute its judgment for that of the agency,”⁵² if a cost-benefit analysis “fail[s] to consider an important aspect of the problem” or “runs counter to the evidence before the agency,”⁵³ a court may invalidate the rulemaking under the Administrative Procedure Act.⁵⁴

Courts will review cost-benefit analyses performed by federal agencies to ensure that they comply with standards of reasoned decisionmaking.⁵⁵ When promulgating standards under PREA, this means DOJ’s analysis must include the full range of costs and benefits; the Department cannot pick and choose data.⁵⁶ DOJ must do the work of quantifying and estimating costs and benefits in a responsible manner, and the cost-benefit analysis must be as accurate as reasonably possible.⁵⁷

Even if quantification is difficult or there is some uncertainty about which estimate is accurate, the Department cannot abdicate its responsibility and refuse to quantify an important category of costs or benefits. As the D.C. Circuit has warned: “The agency’s job is to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct Regulators by nature work under conditions of serious uncertainty, and regulation would be at an end if uncertainty alone were an excuse to ignore a congressional command.”⁵⁸

In summary, statutory structure, administrative law, and best practices all require DOJ to undertake a thorough cost-benefit analysis. DOJ has invested resources in “carefully examin[ing] the potential cost implications of the standards” through an independent cost analysis.⁵⁹ In order to fulfill its legal obligations, DOJ also must invest resources in undertaking a rigorous benefits analysis. DOJ is prohibited from paying more attention to the costs than to the benefits. The following section provides initial guidance on how to best conduct a cost analysis and benefits analysis of the PREA standards.

relied on a “questionable” cost-benefit analysis that employed “dubious” assumptions and distorted the costs and benefits).

⁵² *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342-43 (D.C. Cir. 1985) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983)).

⁵³ *State Farm*, 463 U.S. at 43.

⁵⁴ Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2009) (explaining that a court may hold an agency’s formal or informal rulemaking or adjudication unlawful if that action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”).

⁵⁵ See *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1146 (D.C. Cir. 2005) (holding a training rule arbitrary and capricious in part because the agency said “practically nothing about the projected benefits” and “blithe[ly]” made assumptions about the rule’s effects).

⁵⁶ See *Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 205-06 (D.C. Cir. 2007) (finding an agency rule to be arbitrary and capricious because the regulatory impact analysis ignored factors affecting costs); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 55-62 (2d Cir. 2003) (finding a rule arbitrary and capricious because the cost-benefit analysis was incomplete).

⁵⁷ *Ctr. for Biological Diversity*, 538 F.3d at 1200 (finding that an agency’s refusal to monetize and include important cost and benefits in its analysis was arbitrary and capricious); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d at 1219-20 (stating that an agency’s cost-benefit justifications for its rule would have been unlikely to pass judicial scrutiny because the agency failed to estimate and quantify costs and account fully for benefits).

⁵⁸ *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d at 1220-21; see also *Chamber of Commerce of U.S. v. Sec. & Exch. Comm’n*, 412 F.3d 133, 144 (D.C. Cir. 2005) (“Uncertainty may limit what an agency can do, but it does not excuse an agency from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.”); see also *Center for Biological Diversity*, 538 F.3d at 1172.

⁵⁹ ANPR, 75 Fed. Reg. at 11,078.

II. Guidelines to Conduct a Thorough Cost-Benefit Analysis on PREA Regulations

These comments now turn to exploring the proper scope of analysis, starting first with anticipated costs, then benefits, and finally turning to quantification.

Categories of Costs to Consider

DOJ has already commissioned an independent study to analyze the costs of the national standards to prevent rapes in prison. While this is a crucial first step, DOJ must take further action to ensure that there is a thorough and accurate cost-benefit analysis.

First, though corrections administrators are an undeniably valuable resource in estimating compliance costs, their participation in the study should not be the only input. Aside from the potential for bias,⁶⁰ regulated parties do not always factor in how initial costs may decrease over time as they adapt to new standards. The federal guidelines on cost-benefit analysis advise agencies that “learning’ will likely reduce the cost of regulation in future years” in some cases, and recommend that agencies “take into account cost-saving innovations” when regulations promote adaptation.⁶¹

To accurately estimate compliance costs, DOJ must not only look at the options available to prison authorities in the *status quo ante*, but must also anticipate adaptation to new regulations.⁶² In addition to applying standard assumptions about how learning can decrease compliance costs over time, DOJ may also consider other sources for estimating compliance costs, such as academic reports or case studies from jurisdictions that have already implemented certain standards.⁶³

Second, compliance costs are not the only category of costs to consider. DOJ must consider all potential non-financial or indirect costs. For example, it is possible that a general prohibition on cross-gender searches may limit employment opportunities for female guards in prisons if most individuals incarcerated in prisons are male. If such potential indirect costs exist, DOJ must include them in its analysis.

Finally, though cost-savings could be considered a benefit, they can also be treated as a “negative” cost. DOJ rightly acknowledges in its ANPR the importance of reviewing cost-savings and has decided to include such considerations in its review. In particular, DOJ asked for public comment on “whether and to what extent implementation of particular standards would mitigate costs currently

⁶⁰ David Kaiser & Lovisa Stannow, *The Way to Stop Prison Rape*, 57 THE NEW YORK REVIEW OF BOOKS 5, n. 19 (Mar. 25, 2010), available at <http://www.nybooks.com/articles/23738#fn19> (noting corrections officials may have bias either to oppose the standards or inflate costs to attract more funding).

⁶¹ See, e.g., OMB, CIRCULAR A-4, 37.

⁶² See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT OUR ENVIRONMENT AND OUR HEALTH 131 (2008) (“Cost-benefit analysis, by assuming that industry does not respond to regulations by finding the cheapest possible way to comply, has traditionally overestimated the costs of compliance—in some cases quite significantly.”); see also *Pub. Citizen v. Mineta*, 340 F.3d at 59 (“[T]he agency’s innovation argument focuses exclusively” on a less stringent approach, and “ignores the possibility that the costs of [a more protective system] could be reduced.”).

⁶³ Three correctional systems (Oregon Department of Corrections, California Department of Corrections and Rehabilitation, and the Macomb County Sheriff’s Office in Michigan) are already implementing the Commission’s recommended standards, without increased spending. For example, in Oregon, officials have modified their existing training curricula and repurposed staff to satisfy the standards without needing further appropriations. Max Williams & Lovisa Stannow, *Rape is Not Part of the Penalty*, THE OREGONIAN, June 21, 2009.

expended.”⁶⁴ The cost study should therefore consider at least the following potential cost-savings to prison authorities as a result of the PREA standards:⁶⁵

- *Decrease in Litigation Costs:* Corrections systems have lost millions of dollars in litigation damages when defending against actions for sexual assault.⁶⁶ In one incident in Alabama, fifteen employees were fired or resigned as a result of the allegations, and that litigation ended with a \$12.5 million settlement. In Michigan, the government paid a settlement of \$100 million in a series of lawsuits by female inmates.⁶⁷ Adopting national standards to prevent sexual assaults in prisons will translate into less litigation, and save prison authorities the costs of settlements as well as substantial legal fees.
- *Decrease in Grievance Petitions:* Individuals incarcerated in prison have the right to file grievances after a sexual assault. The grievance process tends to be long, involved, and costly. Fewer sexual assaults will reduce the number of grievances filed, saving prisons money.⁶⁸
- *Decrease in Medical Treatment Costs:* The average cost of medical services to treat a rape victim in the prison community is \$500.⁶⁹ A Bureau of Justice Statistics (“BJS”) study found that in the previous year alone, approximately 60,500 inmates in state and federal prisons were sexually abused at their current facility.⁷⁰ A similar BJS study estimated that nearly 25,000 county jail inmates were sexually abused at their current facility in the past six months.⁷¹ A third BJS study determined that 12% of youth confined in juvenile detention facilities (or 3,220 youth) were sexually assaulted by staff or another resident at the facility in the past year.⁷² Reducing sexual assault in detention will dramatically reduce medical costs. Sexual assaults also contribute to the spread of sexually transmitted diseases like HIV/AIDS. Not only are these diseases expensive to treat, but some are fatal.⁷³ Finally, the health problems of victims of prison rape persist even after they return to their communities. Many individuals released from prisons are on Medicaid, and government agencies pay for their treatment; others must use emergency rooms as their primary care—a high cost to hospitals and state agencies.⁷⁴

⁶⁴ ANPR, 75 Fed. Reg. at 11,079.

⁶⁵ PREA itself notes that prison rape “increases the costs incurred by Federal, State, and local jurisdictions to administer their prison systems.” 42 U.S.C. § 15,601(14)(a).

⁶⁶ Commission Report, *supra* note 6, at 144.

⁶⁷ Kaiser & Stannow, *supra* note 60.

⁶⁸ See discussion in Commission Report, *supra* note 6, at 66.

⁶⁹ AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, DEPT. OF HEALTH & HUMAN SERVICES, MEDICAL EXAMINATION AND TREATMENT FOR VICTIMS OF SEXUAL ASSAULT, EVIDENCE-BASED CLINICAL PRACTICE AND PROVIDER TRAINING 40 (2003) available at <http://www.ahrq.gov/research/victsexual/victsexual.pdf>.

⁷⁰ ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES 1 (updated 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf>.

⁷¹ ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN LOCAL JAILS REPORTED BY INMATES 2 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svljri07.pdf>.

⁷² ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>.

⁷³ Nationwide, more than \$8 billion is spent each year to diagnose and treat sexually transmitted diseases and their complications, not including HIV. GUTTMACHER INSTITUTE, FACTS ON SEXUALLY TRANSMITTED INFECTIONS IN THE UNITED STATES 1 (2009), available at http://www.guttmacher.org/pubs/FIB_STI_US.pdf.

⁷⁴ Cassi Feldman, *In New State Law, a Wait-Free Return to Medicaid Rolls After Prison*, N.Y. TIMES, July 27, 2007.

- *Decrease in Mental Health Treatment Costs:* The average cost of mental health treatment for a victim of rape or sexual assault in the prison community is \$2,200.⁷⁵ Reducing sexual assaults and rapes in prisons will save hundreds of thousands of dollars in mental health care.
- *Decrease in Prison Security Breaches:* More generally, “facilities rife with sexual abuse cannot function effectively.”⁷⁶ For example, some victims may “break rules in an attempt to escape a perpetrator, whether or not they disclose the abuse.”⁷⁷ Likewise, prison staff who sexually abuse inmates often also engage in other security breaches, such as disseminating contraband to inmates.⁷⁸ Reducing sexual assault in prisons can lead to more effectively functioning prisons.

Although it may be difficult to calculate exact dollar amounts for these cost-savings, all these categories must be fully discussed in DOJ’s cost analysis and must be quantified to the extent possible.

Categories of Benefits to Consider

Standards to prevent rapes in prisons across the country will generate significant benefits for the health and well-being of victims, their families, and society. All such benefits must be analyzed and quantified to the extent possible. As DOJ completes and improves upon its commissioned cost analysis, it must also undertake an equally rigorous and comprehensive benefits analysis that covers all benefits of PREA standards, including but not limit to the following:

- *Improved Mental Well-Being of Individuals Living in Prisons:* Sexual assaults in prison “substantially increas[e] the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates.”⁷⁹ Between 60-40% of incarcerated individuals currently exhibited symptoms of mental health disorders, compared with only approximately 11% of the population as a whole.⁸⁰ Survivors of sexual violence endure a number of mental health consequences, including guilt, shame, fear, anxiety, and tension.⁸¹ Implementing PREA standards may have a significant impact on the number of suicides in prisons and the general mental health of prison populations.⁸²
- *Decrease in Sexually-Transmitted Diseases:* Sexual assaults in prisons “reduce[] the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases.”⁸³ The rates of sexually transmitted disease are much greater within the correctional system than in the

⁷⁵ AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, MEDICAL EXAMINATION AND TREATMENT FOR VICTIMS OF SEXUAL ASSAULT, *supra* note 69, at 40.

⁷⁶ Commission Report, *supra* note 6, at 48.

⁷⁷ *Id.* at 47-48:

⁷⁸ OFFICE OF THE INSPECTOR GENERAL EVALUATION AND INSPECTIONS DIVISION, THE DEPARTMENT OF JUSTICE’S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES, i (2009), *available at* <http://www.justice.gov/oig/reports/plus/e0904.pdf>.

⁷⁹ PREA, 42 U.S.C. § 15,601(14)(D).

⁸⁰ DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (updated 2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>.

⁸¹ JUST DETENTION INT’L, MENTAL HEALTH CONSEQUENCES OF SEXUAL VIOLENCE IN DETENTION 1 (Feb. 2009), *available at* http://www.justdetention.org/en/factsheets/JD_Fact_Sheet_Mental_Health_vC.pdf.

⁸² Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing the Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 151-54 (2006).

⁸³ PREA, 42 U.S.C. § 15,601(14)(C).

general population, due in significant part to the prevalence of sexual assault. In 2008, almost 22,000 individuals incarcerated in state and federal prisons (1.5% of the prison population) were known to be living with HIV/AIDS.⁸⁴ The prevalence of Hepatitis C is even higher in prisons because of intravenous drug use prior to incarceration.⁸⁵ Almost all individuals in prison (95%) are eventually released back to their communities,⁸⁶ and these diseases eventually spread to the populations outside the incarceration system. The Commission's proposed standards will decrease the incidence of these diseases, resulting health and economic benefits.

- *Reduction in Unwanted Pregnancies:* Women incarcerated in prisons are susceptible to unwanted pregnancies. Standards to prevent sexual assaults in prison may help reduce unwanted pregnancies. This will also prevent women living in prisons from being subjected to threats of retaliation or forced abortions after becoming pregnant.
- *Decrease in Medical Costs:* Sexual assaults not only have devastating psychological effects, they also have physical ramifications. The beatings that frequently accompany sexual assault in prison often result in injuries ranging from torn flesh and bleeding to broken bones. Of all victims of sexual abuse in prisons, 20% said that they had sustained an injury—85% of which reported at least one serious injury.⁸⁷ As explained in the discussion of costs, reducing sexual assault in detention will dramatically reduce medical costs spent treating rape victims.
- *Reduction in Violence:* Sexual assaults in prison “increase[] the levels of violence, directed at inmates and at staff, within prisons.”⁸⁸ In addition to the medical and mental health impact, this violence creates greater security burdens for the facility, often resulting in additional costs associated with increased staffing and greater use of isolation.
- *Decreased Fear of Rape and Sexual Assault:* Reducing sexual assaults in prisons will reduce fear and dread among both individuals living in prisons and those working in prisons. Even inmates who are not victims are adversely affected by sexual assaults committed in prisons.
- *Improved Quality of Life of Those Living In Prisons:* Reducing sexual assaults in prison improves quality of life for potential victims. Estimates put the quality of life cost amount at \$81,400 per rape victim in the prison community.⁸⁹ Emotional trauma accompanies rape and sexual assault. Nearly 50% rape victims contemplate suicide, while 17-19% attempt suicide.
- *Improved Well-being of Families of Individuals Living in Prisons:* Families of rape victims suffer the consequences as well. When individuals return home after incarceration and are unable to work due to emotional trauma, families are affected. Sexual assaults in prison also reduce the quality of life of these families. Sexual assault also often carries a stigma and can

⁸⁴ LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, BULLETIN, HIV IN PRISONS (updated 2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf>.

⁸⁵ Commission Report, *supra* note 6, at 129.

⁸⁶ TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES 1 (2003), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf>.

⁸⁷ Commission Report, *supra* note 6, at 41.

⁸⁸ PREA, 42 U.S.C. 15601§ (14)(b).

⁸⁹ AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, MEDICAL EXAMINATION AND TREATMENT FOR VICTIMS OF SEXUAL ASSAULT, *supra* note 69, at 40 (“The quality of life estimates were derived from the analysis of 1,106 jury awards and settlements to assault, rape and burn survivors to compensate for pain, suffering and lost quality of life (excluding punitive damages).”).

disrupt relationships with family members. Past assaults can threaten marriages.⁹⁰ The Commission's standards will improve the emotional and financial well-being of families of sexual assault victims.

- *Decrease in Recidivism:* Sexual assault in prisons “increase[] the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape.”⁹¹ Implementing the Commission's standards could potentially save society and governments millions of dollars per year in decreased recidivism. Recidivism costs states and taxpayers an enormous amount of money. For example, in addition to the economic costs of crime, its negative consequences, and the cost of investigating and prosecuting crimes, it is expensive to house individuals in prisons. The average annual operating cost per individual housed in state prisons in 2001 was \$22,650 (\$62.05 per day); prisons operated by the Federal Bureau of Prisons cost \$22,632 per individual (\$62.01 per day).⁹² If victims of sexual abuse recidivate, they will end up back in prison, with high costs to state and federal governments.
- *Improved Reentry of Offenders:* Sexual assaults in prison often lead to long-term trauma, especially if they are not treated properly in the immediately after they occur. When victims return to their communities, this trauma frequently results in an inability to maintain employment. Victims of sexual abuse in detention who may have been able to sustain themselves prior to their incarceration may end up on disability benefits upon release, receiving financial support from the state.
- *Increased Well-Being of Prison Employees:* Reducing sexual assaults in prison will create safer facilities for everyone inside, including staff. Improving safety in prisons increases staff retention, decreases work-related injuries, and improves staff morale, providing overall savings to human resource expenses.
- *Decreased Security Breaches and Prosecution of Corrections Staff:* In the long term, the Commission's standards will ensure that fewer prison employees will be charged with felony sexual abuse crimes, as the incidence of sexual abuse declines. The number of prison staff prosecuted for sexual abuse of inmates has steadily increased, and so has the stigma of working in prisons.⁹³ Additionally, personnel who have sexually abused incarcerated individuals “also have been found to have provided contraband to prisoners, accepted bribes, lied to federal investigators, and committed other serious crimes as a result of their sexual involvement with federal prisoners.”⁹⁴ Reducing sexual assaults in prisons will also decrease the likelihood that prison staff will coerce inmates or subvert prison security measures.
- *Improved Management through Effective Oversight:* The standards' requirement to monitor compliance will help identify best practices, which other prisons can replicate. Monitoring will also help identify security breaches and other problems that can be addressed

⁹⁰ Commission Report, *supra* note 6, at 127 (“Hope Hernandez was raped by a corrections officer in 1997 in the hospital ward In her testimony to the Commission, Hernandez spoke about the lasting effects of sexual assault. ‘Although it’s been eight years, I’m still suffering from the effects of that rape. On the one-year anniversary of this rape, I kept seeing the guard’s face over me I wanted to see something besides his face [M]y husband has tried to be intimate with me. All I could see was this guard’s face flashing back in my mind, and I would become ill.’ Such vivid flashbacks are not uncommon for victims of sexual abuse.”).

⁹¹ PREA, 42 U.S.C. § 15601(14)(E).

⁹² JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: STATE PRISON EXPENDITURES 1 (updated 2004) *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>.

⁹³ *See generally* OFFICE OF THE INSPECTOR GENERAL, EFFORTS TO PREVENT STAFF SEXUAL ABUSE, *supra* note 78.

⁹⁴ *Id.*

proactively and serve as lessons for other agencies and facilities. Beyond increasing the efficiency of addressing sexual assault in prisons, these outside reviews can positively impact all components of prison management.

- *Improved International Standing of the United States:* The United States incarcerates more people than any other country in the world,⁹⁵ and its prisons have a reputation for being dangerous and fraught with sexual abuse. When reviewing the United States’s compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, the Committee Against Torture noted concern over “reliable reports of sexual assault of sentenced detainees, as well as persons in pre-trial or immigration detention, in places of detention” in the United States.⁹⁶ Strong PREA standards would address these concerns and enhance the United States’s efforts to be a global leader in protecting human rights.

In addition to these considerable and valuable direct benefits, adopting national standards to prevent rapes in prisons may generate certain ancillary benefits: unintended or indirect consequences that are nevertheless important to measure. For example, the increased use of video monitoring, where appropriate, may also assist prison guards in the detection and prevention of non-sexual crimes. Similarly, setting new standards on cross-gender searches may prompt prison authorities to more generally revise their search policies. DOJ must also identify and quantify ancillary benefits in its cost-benefit analysis.

The brief discussion of benefits in this section is merely a starting point for the Department to begin its comprehensive, accurate, and rigorous catalogue of benefits of the PREA standards.

Principles for Quantification

Many of the direct and indirect benefits highlighted above may be difficult to quantify in precise terms. Others may require considerable time and resources committed to study before even rudimentary quantification is possible. Though a full and accurate cost-benefit analysis is crucial to the decisionmaking process, it should not be a hindrance to the prompt promulgation of new standards. DOJ should consider the following principles for the appropriate quantification of costs and benefits.

DOJ should attempt to monetize all benefits of the PREA standards if possible. One starting place for quantification is the information compiled by the Bureau of Justice Statistics. The Department can obtain preliminary data on the number of individuals potentially affected by PREA and the costs associated with sexual assaults committed in prisons to assist with its monetization of costs and benefits of the PREA standards. Some social science literature exists that attempts to monetize the cost of sexual assaults to society.⁹⁷ Of course, sexual assaults that occur specifically in the context of prison have unique costs and benefits, but the methodologies of these studies will still be applicable.

If monetization is challenging, the Department can turn to other forms of quantification. Quantification may prove especially useful when evaluating the benefits of reducing sexual assault. The costs of sexual assault include pain, suffering, and quality of life—items that may not be as easy to monetize. As many social scientists have noted, “relative to the tangible costs, the intangible cost

⁹⁵ ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (6th ed. 2005).

⁹⁶ U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, United States of America*, ¶ 32, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006).

⁹⁷ For examples, see the studies cited *infra* in note 98.

of sexual assault is far greater than that for any other type of crime. The cost of sexual assault would be significantly underestimated were intangible costs excluded.”⁹⁸ For this reason, DOJ must be especially careful to include in its analysis what are traditionally thought of as “intangible” costs. These costs can at least be quantified by an estimate of the number of victims that would be spared the pain, suffering, and lowered quality of life after implementation of the PREA standards.

Where precise quantification and monetization prove impossible, DOJ can use a sensitivity analysis to determine whether the magnitude of a particular benefit or cost would affect a policy choice. The White House’s Office of Management and Budget recommends a sensitivity analysis to federal agencies as a best practice when determining the consequences of a regulatory action in conditions of uncertainty:

Sensitivity analysis is especially valuable when the information is lacking to carry out a formal probabilistic simulation. Sensitivity analysis can be used to find “switch points”—critical parameter values at which estimated net benefits change sign or the low cost alternative switches. Sensitivity analysis usually proceeds by changing one variable or assumption at a time, but it can also be done by varying a combination of variables simultaneously to learn more about the robustness of [an agency’s] results to widespread changes.⁹⁹

Governments agencies frequently use this type of analysis when they are unable to quantify or monetize costs and benefits with precision.¹⁰⁰

It might be difficult to estimate the number of sexual assaults any particular policy would effectively prevent. In such cases, DOJ can employ a breakeven analysis, to estimate the point at which the benefits of a particular policy justify the potential compliance costs. In a breakeven analysis, an agency measures how high the unquantified or unmonetized benefits would have to be in order for the benefits to justify the costs (the breakeven point), and then estimates whether the unquantified or unmonetized benefits are likely to be higher or lower than this point. The Office of Management and Budget has endorsed a breakeven analysis as “an important tool ... that [] has analytical value when quantification is speculative or impossible.”¹⁰¹ At the very least, DOJ should “include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs.”¹⁰²

⁹⁸ See, e.g., John Roman & Graham Ferrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities*, 14 CRIME PREV. STUDIES 53 (2002). The authors advocate for the quantification of all costs of a crime, but recognize the difficulty in doing so. They cite a victim-compensation model to derive a cost of a rape in 1993 dollars at \$86,500 per rape, with \$5,100 in tangible costs (medical costs, lost earnings, government costs of victim assistance programs) and \$81,400 in intangible costs (pain, suffering, quality of life). *Id.* at 70-71. See also MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* (1991) (discussing fear among women as a cost of rape); Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Personal Violence*, 17 J. OF INTERPERSONAL VIOLENCE 773 (2002) (estimating that in 1996, rape and sexual assault cost Michigan more than \$6.5 billion, most of which were intangible costs).

⁹⁹ OMB, CIRCULAR A-4, 41.

¹⁰⁰ See, e.g., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,381 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600, and 49 C.F.R. pts. 531, 533, 536, 537, 538) (noting that the agencies included in their regulatory impact analyses a number of sensitivity analyses on future costs and benefits that involve some uncertainty—including, *inter alia*, forecasts of future fuel prices, value to the U.S. economy of reducing carbon dioxide emissions, and reduction in external economic costs resulting from lower U.S. oil imports).

¹⁰¹ OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REG. AFFAIRS, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 42 (2010).

¹⁰² OMB, CIRCULAR A-4, 27.

Without attempts to quantify benefits, it is impossible to conclude whether a given suite of policy options is too stringent or not stringent enough to maximize net benefits.

Alternatives and Other Considerations

As mentioned, the Department may need to investigate alternatives beyond the recommendations of the National Commission in order to identify the policies that will maximize net benefits. These could include, for example, more stringent limitations on cross-gender supervision, increased reliance on direct supervision of detainees, or mandated periodic classification reviews of inmates.¹⁰³

Though DOJ is instructed to adopt national standards, state governments do not all enjoy the same resources or face the same challenges. DOJ must analyze the costs and benefits of various policy alternatives from a national perspective and select the standards that will generally maximize net benefits across the country. However, even if DOJ does not adopt a certain alternative as a national standard, that standard still might be beneficial if implemented in particular states. PREA instructs the Attorney General to first finalize national standards that do not carry “substantial additional costs” (i.e., that are benefit-cost justified), but then also instructs the Attorney General to “provide a list of improvements for consideration by correctional facilities.” In its Proposed Rule, DOJ should list optional policies and explain how they may be welfare-maximizing to particular states or local jurisdictions with certain resources or challenges.

Conclusion

The Department has begun its effort to implement the Prison Rape Elimination Act’s mandate to develop national standards. These comments encourage DOJ to continue its rulemaking process and consider the economic and social costs and benefits of different policies, and choose those that are most benefit-cost justified to include in its future Proposed Rule.

Respectfully submitted,

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¹⁰³ Mandated periodic classification reviews would require corrections officials to revisit incarcerated individuals’ housing and programmatic assignments after certain time periods. So, for example, if a corrections department initially classified an individual into the general population of a high-security facility, the department would be required to review that classification after a year to determine whether it is still appropriate. The department could then either re-classify the individual into special housing and/or at different security level facility, or maintain him in the current facility.