

## JUSTIFYING REDISTRIBUTIVE REGULATIONS

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*Conventional cost-benefit analysis asks whether a regulation's total benefits exceed its total costs but not whether those benefits and costs are distributed fairly across society. The traditional justification for this indifference to equity is that distributional concerns are most efficiently addressed through the tax-and-transfer system. Agencies issuing regulations, the story goes, should focus on growing the pie (i.e., increasing aggregate welfare). If the regulation that yields the largest pie also yields inequitably apportioned slices, Congress can correct the problem with taxes and transfers.*

*But Congress often relies on agencies to fill in the details of its transfer programs with regulations, such as those setting eligibility criteria for healthcare, housing, and nutritional assistance. The standard rationale for ignoring distributional consequences does not apply to these “transfer rules.” Yet the standard White House guidance on cost-benefit analysis does.*

*This Article uses three recent rulemakings to illustrate how conventional cost-benefit analysis tends to obscure rather than illuminate agencies' (often distributional) reasons for issuing transfer rules—generating unnecessary legal risk for the agencies and unnecessary confusion for the public. The Article then explains why recently proposed revisions to White House guidance on cost-benefit analysis—including the introduction of an analytic technique called income-based distributional weighting—will not fully resolve this problem. Finally, the Article recommends a new analytic framework for transfer rules that recognizes the particular relevance of distributional concerns to their promulgation and the distinct challenges of assessing their net benefits.*

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## INTRODUCTION

Agencies do bad cost-benefit analysis for transfer rules. Among regulatory scholars, this is received wisdom.<sup>1</sup>

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<sup>1</sup> See, e.g., Eric Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L. J. 1067, 1067 (2003) (“Although agencies do, usually, say something about the costs of a [transfer] regulation, their comments are rarely illuminating and often incoherent.”); Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis? Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. 179, 181 (2011) (“We find the average quality of analysis for transfer regulations scores about 47% lower than the average quality of analysis for prescriptive regulations.”); Cass R.

Whereas prescriptive rules (like pollution standards) prescribe limits on behavior, transfer rules (like implementing regulations for Medicare and Medicaid) transfer money from one entity or individual to another.<sup>2</sup> Eric Posner, a leading proponent of cost-benefit analysis for prescriptive rules, concluded twenty years ago that such analysis simply “cannot be used to evaluate transfer regulations.”<sup>3</sup> Yet agencies are still trying.<sup>4</sup>

Indeed, they have little choice. Executive Order 12,866—signed by President Clinton in 1993 and reaffirmed by every administration since— instructs agencies in the executive branch to assess the costs and benefits of any “intended regulation” and, where otherwise consistent with statute, to adopt the rule “only upon a reasoned determination that the benefits . . . justify the costs.”<sup>5</sup> Compliance with E.O. 12,866 is overseen by the White House Office of Information and Regulatory Affairs (OIRA), which has long interpreted the order to extend to transfer rules.<sup>6</sup>

But while OIRA demands cost-benefit analyses for transfer rules, it does not demand particularly *good* ones. Cass Sunstein, who led OIRA during President Obama’s first term, has publicly acknowledged that OIRA staff undertake a more cursory review of transfer-rule analyses, because it is

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Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1869 (2013) (“[A]gencies do provide Regulatory Impact Analyses for budgetary transfer rules, but they typically outline only the budgetary costs and do not discuss social costs and benefits.”).

<sup>2</sup> Posner, *supra* note 1, at 1073. The vast majority of transfer rules involve transfers to or from the government, but a transfer rule can also cause entirely private transfers. In 2018, for example, agencies in the executive branch issued 25 major rules involving budgetary transfers and one major rule involving non-budgetary transfers. *See* OMB 2018 Benefit Cost Report XLS tpls.1-7(a) & 1-7(b), <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/>.

<sup>3</sup> Posner, *supra* note 1, at 1067 (“Cost-benefit analysis cannot be used to evaluate transfer regulations because all transfer regulations fail cost-benefit analysis.”).

<sup>4</sup> *See, e.g.*, Ctrs. for Medicare & Medicaid Servs., Streamlining the Medicaid, Children’s Health Insurance Program, and Basic Health Program Application, Eligibility Determination, Enrollment, and Renewal Processes, 87 Fed. Reg. 54,760, 54,833 (proposed Sept. 7, 2022) (“[W]e have prepared a Regulatory Impact Analysis that to the best of our ability presents the costs and benefits of the rulemaking.”).

<sup>5</sup> Exec. Order No. 12,866 § 1(b)(6) 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993); *see also* Exec. Order No. 14,094 § 1, 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023) (“supplement[ing] and reaffirm[ing] the principles, structures, and definitions governing contemporary regulatory review established in” E.O. 12,866).

<sup>6</sup> OIRA, Regulatory Impact Analysis: Frequently Asked Questions (2011), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/assets/OMB/circulars/a004/a-4\\_FAQ.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf) [hereinafter RIA FAQ] (explaining that E.O. 12,866 requires the preparation of a regulatory impact analysis for any rule with “an annual effect on the economy of \$100 million or more” and that “the \$100 million threshold . . . includes . . . transfers” (emphasis in original)).

“difficult to use the standard tools to determine whether the benefits” of such rules “justify the costs.”<sup>7</sup>

Now the standard toolkit is getting an upgrade, as part of the Biden administration’s initiative to “modernize the regulatory process.”<sup>8</sup> This Article argues that the modernization effort should include the adoption of a new analytic framework for transfer rules. The new framework should better accommodate the fairness concerns that often (but not always) drive agencies’ choices about whether to issue transfer rules and how to design them. The framework should also expressly recognize the distinct challenges that agencies face in estimating transfer rules’ largely indirect costs and benefits. In short, if the standard tools don’t work for transfer rules, then OIRA should create special tools for evaluating these regulatory interventions.<sup>9</sup>

But first: why *don’t* the standard tools work for transfer rules?

Agencies struggle to justify transfer rules with conventional cost-benefit analysis because such analysis—as outlined in a longstanding OIRA guidance document, Circular A-4—is indifferent to transfers.<sup>10</sup> Circular A-4 contends that an agency’s analysis should focus primarily on identifying the “most efficient” regulatory option, which it defines as “the alternative that generates the largest net benefits to society.”<sup>11</sup> Transfers—including rule-driven changes in government subsidies, taxes, and fees—are deemed irrelevant to this inquiry, on the assumption that they cause a redistribution of wealth but no “direct change in aggregate social welfare.”<sup>12</sup> Any loss for the transferor is perfectly offset by the corresponding gain to the transferee, making the transaction a wash from the perspective of society as a whole.<sup>13</sup> Accordingly, transfers are treated as neither costs nor benefits and are instead

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<sup>7</sup> Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1869 (2013); see also McLaughlin & Ellig, *supra* note 1, at 188 (“Several former OIRA officials have told us that most OMB review of transfer regulations is conducted by budget analysts, whose main concern is ensuring that agencies correctly estimated the effects on the federal budget, rather than focusing on the economic analysis.”).

<sup>8</sup> Exec. Order No. 14,094, 88 Fed. Reg. at 21,879.

<sup>9</sup> Another option would be to exempt transfer rules from E.O. 12,866 review altogether. In Part IV.A, *infra*, I explain why full exemption would increase litigation risk for transfer rules and undermine regulatory transparency.

<sup>10</sup> Off. of Mgmt. & Budget, Circular A-4, “Regulatory Analysis,” at 38 (2003), [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf) (“You should not include transfers in the estimates of the benefits and costs of a regulation.”).

<sup>11</sup> *Id.* at 2 (emphasis added).

<sup>12</sup> *Id.* at 46; see also *id.* at 5-6 (providing examples of transfers).

<sup>13</sup> Posner, *supra* note 1, at 1069 (“A transfer regulation that pays \$100 to farmers also costs taxpayers \$100; the costs and benefits wash out . . .”).

relegated to a “separate discussion of the regulation’s distributional effects.”<sup>14</sup>

Though controversial, this approach makes some intuitive sense for analysis of prescriptive rules.<sup>15</sup> For example, consider an environmental standard requiring five power plants to use a particular emissions-reduction technology. The rule’s benefits are the improvements in public health and environmental quality associated with any resulting decreases in air pollution.<sup>16</sup> Its costs are the resources expended to create, install, and operate the reduction technology at the five plants.<sup>17</sup> To calculate the rule’s *net* benefits to society, the agency subtracts the dollar value of the costs from the dollar value of the benefits.<sup>18</sup>

Now imagine that the pollution-reduction technology named in the environmental standard is *also* eligible for a small, pre-existing federal subsidy, paid to each plant that installs the technology. Assume that this subsidy, standing alone, is insufficiently generous to induce any of the five plants to adopt the technology, but that, once the environmental standard *requires* installation of the technology, all five plants will claim the subsidy to offset some of their compliance burden. Accordingly, the environmental standard will increase the government’s expenditures on the subsidy program.

These expenditures are *not* an additional “real” cost of the standard.<sup>19</sup> They are a transfer—a mechanism by which some of the costs of adopting

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<sup>14</sup> *Id.* at 38.

<sup>15</sup> As discussed *infra* in Section I.C, the assumption that a rule’s aggregate effect on social welfare can be assessed without regard to distribution is contested even for prescriptive rules, because it is premised on the assumption of a constant marginal utility of income. If one instead assumes a declining marginal utility of income, one needs to understand how costs and benefits are distributed in order to appropriately value them (because a dollar in costs borne by a low-income person will generate a greater welfare loss than a dollar in costs borne by a high-income person).

<sup>16</sup> See OIRA, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS ch.2.1.b (1997), [https://obamawhitehouse.archives.gov/ombinfo/foreg\\_intro](https://obamawhitehouse.archives.gov/ombinfo/foreg_intro) [hereinafter 1997 OIRA Report] (“The benefits of environmental protection are represented by the value that society places on improved health, recreational opportunities, quality of life, visibility, preservation of ecosystems, biodiversity, and other attributes of protecting or enhancing our environment.”).

<sup>17</sup> See *id.* (“[T]he true social cost of regulations aimed at improving the quality of the environment are represented by the total value that society places on the goods and services foregone as a result of resources being diverted to environmental protection.”).

<sup>18</sup> Circular A-4, *supra* note 10, at 10 (net benefits are the “the absolute difference between the projected benefits and costs”). Both benefits and costs are, at least in theory, valued by reference to the affected parties’ “willingness to pay” for the relevant resources. *Id.* at 18.

<sup>19</sup> *Id.* at 38 (explaining that “cost estimates should reflect real resource use”).

the technology are shifted from the plant owners to the government.<sup>20</sup> The subsidy payments are thus most directly relevant not to the agency's assessment of the environmental standard's aggregate costs and benefits (i.e., its efficiency analysis) but to its assessment of how those costs and benefits are distributed across society (i.e., its distributional analysis).<sup>21</sup>

Even if one accepts the “efficiency first, distribution second” model for prescriptive rules, however, it makes little sense for transfer rules. After all, the defining effect of a transfer rule *is redistribution*: OIRA defines a transfer rule as one “that primarily cause[s] income or wealth transfers.”<sup>22</sup> To the extent that such a rule has traditionally cognizable consequences for economic efficiency, they are “subsidiary to the transfers involved.”<sup>23</sup> Put another way, while a prescriptive rule requires behavioral changes that may result in redistribution, a transfer rule requires redistribution that may result in behavioral changes.

Again, an example is instructive. This time, imagine that an agency issues a rule that modifies the eligibility requirements of a subsidy program for rural hospitals. As a result of the changes, payments under the program will increase by \$100 million. Once again, the additional subsidy payments are transfers—treated as neither costs nor benefits under Circular A-4.<sup>24</sup> But with the subsidy increase excluded, what is left to include? What *are* the rule's costs and benefits?

Most readily estimated—but likely least significant—are any rule-driven changes in the costs of *administering* the hospital subsidy.<sup>25</sup> Such

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<sup>20</sup> For the sake of simplicity, I assume here that the existence of the subsidy has no effect on the baseline level of technology adoption (i.e., the number of plants who would install the technology even absent the environmental standard) and no effect on the marginal cost of producing, installing, or operating the technology.

<sup>21</sup> This is, to be sure, a simplification. In reality, the distribution of costs between industry and government will affect the rule's indirect consequences. Costs initially borne by regulated entities may, for example, be partially or fully passed through to consumers in the form of higher prices, who may, in turn, alter their consumption patterns. Costs initially borne by the Treasury, on the other hand, may have consequences for future taxation or future spending under other programs.

<sup>22</sup> OIRA, 2018, 2019, AND 2020 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 3 (2021) [hereinafter 2018, 2019 & 2020 OIRA Report], [https://www.whitehouse.gov/wp-content/uploads/2021/01/2018\\_2019\\_2020-OMB-Cost-Benefit-Report.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/01/2018_2019_2020-OMB-Cost-Benefit-Report.pdf).

<sup>23</sup> 1997 OIRA Report, *supra* note 16, ch.3.3.

<sup>24</sup> Circular A-4, *supra* note 10, at 38.

<sup>25</sup> Posner, *supra* note 1, at 1069 (noting that, under a conventional cost-benefit analysis, transfer rules produce “a social loss if administrative costs are greater than zero, as they always are”).

expenditures do reflect real resource use (government labor, paper, data storage capacity, and so on).<sup>26</sup> Standing alone, though, they say very little about the wisdom of a transfer rule. No one could reasonably argue that the rule increasing the hospital subsidy by \$100 million is desirable solely because it will also decrease administrative costs by a single dollar. Nor would it necessarily be undesirable simply because it increased such costs by a dollar.

Likely weightier—but much harder to estimate—are indirect effects on resource use that flow *from* the rule’s transfers. For example, because of the subsidy increase, some rural hospitals may now provide more or higher-quality care to some patients.<sup>27</sup> Those behavioral changes could carry both costs, in the form of labor and equipment use, and benefits, in the form of improved health outcomes.

There may also be behavioral consequences on the other side of the transfer, though these are even more attenuated. For example, as a result of spending more on hospital subsidies, the government might someday raise taxes. Depending on the nature of the tax, that decision might change behavior in desirable and/or undesirable ways.<sup>28</sup> Or perhaps instead of raising taxes, the government will offset its increased spending on the hospital subsidy with reduced spending on some other program. As with taxation, that spending cut could have desirable and/or undesirable effects on behavior, depending on the nature of the affected program. While such effects are in theory cognizable in a Circular A-4-style cost-benefit analysis, they are also, to put it mildly, “challenging to measure.”<sup>29</sup>

Thus, an agency attempting to justify a transfer rule under Circular A-4 has two options: the agency can argue that the rule’s indirect behavioral consequences will be net positive, even though those effects are highly

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<sup>26</sup> MICHAEL A. LIVERMORE & RICHARD L. REVESZ, REVIVING RATIONALITY: SAVING COST-BENEFIT ANALYSIS FOR THE SAKE OF THE ENVIRONMENT AND OUR HEALTH 167 (2020) (“To the extent that a [transfer] payment involves transactions costs—writing and mailing a check, for example—those costs should be counted in a cost-benefit analysis.”).

<sup>27</sup> Dep’t of Health & Human Servs., Guidelines for Regulatory Impact Analysis 23 (2016), [https://aspe.hhs.gov/system/files/pdf/242926/HHS\\_RIAGuidance.pdf](https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf) [hereinafter HHS RIA Guidelines].

<sup>28</sup> *Id.*

<sup>29</sup> Sunstein, *supra* note 7, at 1869. *See also* Circular A-4, *supra* note 10, at 46 (stating that, if transfers have “significant efficiency effects in addition to distributional effects, [agencies] should report them”); Proposed OMB Circular No. A-4 at 19, 88 Fed. Reg. 20,915 (Apr. 7, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf> [hereinafter Proposed A-4 Update] (explaining why agencies “generally should not” include “an estimate of the distortionary cost of taxation” in analyses of “regulations associated with spending programs”).

uncertain, or the agency can ignore behavioral incentives and point to administrative cost savings, even though those savings are almost certainly not the rule's most significant impact in the eyes of the agency or the public.

Alternatively, an agency could justify a transfer rule on purely distributional grounds—that is, it could (1) concede in its primary analysis that the rule's net benefits cannot be reliably estimated due to uncertainty regarding the rule's indirect effects; (2) prepare a separate, distributional analysis in which it estimates the transfers caused by the rule and concludes that those transfers will result in a *fairer* distribution of resources than the status quo; and (3) argue that this increased fairness alone justifies promulgation of the rule, notwithstanding the uncertainty regarding the rule's ultimate consequences for economic efficiency. But Circular A-4's authorization of this third path is oblique at best.<sup>30</sup> Perhaps as a result, agencies rarely invoke fairness as their primary justification for rulemaking—not even when remedying a perceived distributional inequity seems quite clearly to be the agency's actual goal. Instead, agencies produce analyses that either unpersuasively purport to find a net social benefit or remain silent on the rule's net effects altogether—on the apparently safe assumption that OIRA will not object.<sup>31</sup>

In sum, for an agency looking to justify a transfer rule under Circular A-4, bad cost-benefit analysis is the path of least resistance.

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After acknowledging the challenges of transfer-rule analysis in 2013, Sunstein suggested that “additional work would be valuable on this complex topic.”<sup>32</sup> But, at least among legal scholars, such work has not materialized. As of this writing, Posner's 2003 piece remains the only published law review article on E.O. 12,866 analysis of (non-tax) transfer rules. This state of affairs is curious, for several reasons.

One is that transfer rules are exceedingly common. As Sunstein points out, in some years they account for a majority of the cost-benefit analyses reviewed by OIRA.<sup>33</sup> It seems cause for wider concern that, even within

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<sup>30</sup> See *infra* Part I.D for a discussion of relevant Circular text.

<sup>31</sup> See Sunstein, *supra* note 7, at 1869 (suggesting that OIRA does not push back when agencies submit transfer-rule analyses that “outline only the budgetary costs and do not discuss social costs and benefits”); McLaughlin & Ellig, *supra* note 1, at 188 (noting, based on conversations with OIRA officials, that OIRA analysts “rarely have time to press agencies to analyze the price distortions and changes in behavior created by” transfer rules).

<sup>32</sup> Sunstein, *supra* note 7, at 1869 n.114.

<sup>33</sup> *Id.* at 1868-69.



government, Circular A-4's approach to analysis is deemed unworkable for half of the rules to which it formally applies.

Another reason for surprise at the inattention to transfer rules is that legal scholars have in recent years made a significant push for agencies to better assess and address the distributional consequences of their regulatory actions.<sup>34</sup> That push has yielded dividends from the Biden administration in the form of proposed revisions to Circular A-4 that, among other things, seek to ensure that regulatory analyses “recognize distributive impacts and equity.”<sup>35</sup> As noted earlier, transfer rules are redistributive by definition. Yet the robust scholarly conversation around distributional analysis has, to date, focused almost entirely on the distributional side effects of prescriptive rules.<sup>36</sup> And the most significant distribution-related element of the Biden administration's Circular A-4 modernization effort—the introduction of an analytic technique called income-based distributional weighting—is expressly inapplicable to many transfer rules.<sup>37</sup>

Additionally, there *was* recently a spate of articles on economic analysis of Internal Revenue Service (IRS) tax rules, in the wake of a short-lived

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<sup>34</sup> See, e.g., Matthew D. Adler, *Factoring Equity into Benefit-Cost Analysis*, REG. REV. (Apr. 26, 2021); Caroline Cecot, *Efficiency and Equity in Regulation*, 76 VAND. L. REV. 361 (2023); Carl F. Cranor & Adam M. Finkel, *Toward the Usable Recognition of Individual Benefits and Costs in Regulatory Analysis and Governance*, 12 REG. & GOVERNANCE 131 (2018); Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495 (2022); Richard L. Revesz & Samantha Yi, *Distributional Consequences & Regulatory Analysis*, 52 ENV'T L. 53 (2022); Lisa A. Robinson, James K. Hammitt & Richard J. Zeckhauser, *Attention to Distribution in U.S. Regulatory Analyses*, 10 REV. ENV'T ECON. & POL'Y 308 (2016); David A. Weisbach, *Distributionally Weighted Cost-Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151 (2015).

<sup>35</sup> Exec. Order No. 14,094, 88 Fed. Reg. at 21,879-81; Preamble: Proposed OMB Circular No. A-4, “Regulatory Analysis,” 88 Fed. Reg. 20,915 (Apr. 7, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4Preamble.pdf> (proposing revisions to Circular A-4 pursuant to E.O. 14,094). The updates, which have not been finalized as of this writing, are discussed *infra* in Part III.

<sup>36</sup> See, e.g., Cecot, *supra* note 34, at 362 (supporting its “arguments by drawing on examples from the environmental context”); Revesz & Yi, *supra* note 34, at 57 (reviewing how “distributional consequences were considered” in “major environmental regulations promulgated by the Obama administration”); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 649 (2022) (using a 2014 vehicle safety rule as a case study to explore “what it might mean in practice for agencies to incorporate distributive considerations into cost-benefit analysis”); Robinson et al., *supra* note 34, at 311 (reviewing regulatory analyses only for “major environmental, health, and safety regulations”).

<sup>37</sup> Proposed A-4 Update, *supra* note 29, at 67 n.114 (explaining that “[a]n appropriate weighting for effects on government budgets depends on the use or source of funds, which will often be indeterminate in regulatory contexts”). See *infra* Part III.A for further discussion of this issue.

agreement between OIRA and the Department of Treasury that for the first time subjected IRS regulations to OIRA review (2018 Tax Agreement).<sup>38</sup> Tax rules are a species of transfer rule.<sup>39</sup> Yet the 2018 Tax Agreement did not appear to prompt any reevaluation by scholars or policymakers of whether and how transfer rules in general should be evaluated.

Finally, the continued indifference to the quality of transfer-rule analysis is surprising in light of the judiciary's increased willingness over the past two decades to take a hard look at agencies' cost-benefit analyses for all kinds of rulemaking, as part of arbitrary-and-capricious review under the Administrative Procedure Act.<sup>40</sup> Case law in the United States Court of Appeals for the D.C. Circuit, for example, provides that an agency's reliance on a cost-benefit analysis with a "serious flaw" can render its rule arbitrary and capricious, even if the analysis was not required by statute.<sup>41</sup> And this judicial scrutiny has extended to transfer rules.<sup>42</sup> Thus, administrations looking to make legally durable changes to revenue and spending programs have an interest in ensuring that agencies and courts know what can—and

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<sup>38</sup> See Memorandum of Agreement from the Dep't of the Treasury and the Office of Mgmt. & Budget on Review of Tax Regulations under Executive Order 12866 (Apr. 11, 2018) [hereinafter 2018 Tax MOA]; GREG LEISERSON & ADAM LOONEY, A FRAMEWORK FOR ECONOMIC ANALYSIS OF TAX REGULATIONS (2018); Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455 (2018); David A. Weisbach, Daniel Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507 (2018); Reuven S. Avi-Yonah & Yoseph M. Edrey, *Putting the Public Benefit in Cost Benefit Analysis of Tax Regulations: A Response to Hemel, Nou and Weisbach* (Univ. of Mich. Pub. Law Research Paper No. 618, 2018). In June 2023, the Biden administration largely rescinded the 2018 Tax MOA. See Memorandum of Agreement from the Dep't of the Treasury and the Office of Mgmt. & Budget on Review of Tax Regulations under Executive Order 12866 (June 9, 2023) [hereinafter 2023 Tax MOA].

<sup>39</sup> The revenue raised by a tax rule is, to state the obvious, a transfer from affected taxpayers to the federal government.

<sup>40</sup> Cass Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV'T L. REV. 1, 14 (2017) ("The number of decisions that scrutinize agency failure to engage in cost-benefit analysis, or to give adequate consideration to it, is large and growing.").

<sup>41</sup> Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1036, 1040 (D.C. Cir. 2012).

<sup>42</sup> See, e.g., Cook Cnty. v. Wolf, 962 F.3d 208, 231 (7th Cir. 2020) (affirming an injunction of a rule expected to cause significant Medicaid disenrollment based, in part, on a finding that the agency arbitrarily failed "to acknowledge or address the [disenrollment's] significant, predictable collateral consequences"); District of Columbia v. USDA, 496 F. Supp. 3d 213, 255-56 (D.D.C. 2020) (vacating new restrictions on eligibility for Supplemental Nutritional Assistance Program benefits where agency failed to "provide any substantive analysis" of "foreseeable costs of the rule," including "adverse second order impacts on health and local economies").

cannot—fairly be characterized as a serious flaw in this context. That interest is poorly served by Circular A-4.<sup>43</sup>

This Article contends that OIRA can better mitigate legal risk for transfer rules—and better promote transparency regarding agencies’ reasons for issuing them—by adopting new, separate guidance on transfer-rule analysis. That guidance should recognize the centrality of transfers to any reasonable assessment of a transfer rule’s desirability. In other words, OIRA should make clear that an agency seeking to justify a discretionary increase (or decrease) in the generosity of a transfer program must address whether and why that increase (or decrease) is *itself* desirable, rather than pointing only to ancillary effects on administrative costs. The guidance should also clarify that an agency may, where otherwise consistent with statute, justify a transfer rule on purely distributional grounds, so long as the agency explains why the relevant transfers are, in its view, equity enhancing. Finally, the guidance should provide more detailed instructions on assessing a transfer rule’s indirect behavioral consequences—and should expressly acknowledge the attendant uncertainties.

The remainder of the Article proceeds as follows. Part I provides background on the executive orders and guidance documents that govern regulatory analysis at most federal agencies. I explain Circular A-4’s prioritization of efficiency over equity, the traditional justification for this approach to rulemaking, and why that justification does not apply to transfer rules, even as Circular A-4 itself does. Part II uses three recent transfer rulemakings to illustrate why efficiency justifications for transfer rules are often unpersuasive in practice. The examples also demonstrate agencies’ reluctance to justify transfer rules on expressly distributional grounds, even when a distributional preference seems to be an agency’s actual reason for issuing a rule.

Part III turns to the Biden administration’s recently proposed updates to Circular A-4. I find that some of the draft revisions will be helpful to agencies issuing transfer rules but that the revisions will not fully resolve the concerns raised in Parts I and II. In particular, I explain why the introduction of distributional weights that reflect the diminishing marginal utility of income will be of limited use for transfer rules. Finally, Part IV weighs options for further reform. For both normative and pragmatic reasons, I counsel against

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<sup>43</sup> While “[c]ompliance with Circular A-4 is not required by any statute or regulation,” *Louisiana v. Biden*, No. 22-30087, 2022 WL 866282, at \*1 (5th Cir. Mar. 16, 2022), courts nevertheless look to the document as evidence of analytic best practices when reviewing challenges to agency rulemaking under the Administrative Procedure Act. *See* cases discussed *infra* in Section IV.A.

exempting transfer rules from E.O. 12,866 review altogether. Instead, I outline a new approach to transfer-rule analysis that would highlight and contextualize transfer rules' most significant foreseeable impacts and elicit reasoned explanations from agencies on whether and why those impacts are desirable.

## I. HOW AGENCIES JUSTIFY TRANSFER RULES IN THEORY: EXISTING GUIDANCE

For thirty years, Executive Order 12,866 has required agencies in the executive branch to assess the costs and benefits of planned regulatory actions.<sup>44</sup> This Part explains E.O. 12,866's core requirements, their interpretation in Circular A-4, and the economic reasoning underlying them. It then explains why this reasoning breaks down for transfer rules. Finally, it surveys agencies' options for justifying transfer rules within the Circular A-4 framework.

### *A. E.O. 12,866 and the Primacy of Efficiency in Regulatory Analysis*

Issued by President Clinton in 1993, E.O. 12,866 provides that, where otherwise consistent with statute, agencies are to propose or finalize a rule “only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>45</sup> Agencies are further instructed, when choosing among regulatory alternatives, to select the “approach[] that maximize[s] net benefits”—again, “unless a statute requires another regulatory approach.”<sup>46</sup> Though costs and benefits should be quantified “to the fullest extent that [they] can be usefully estimated,” agencies' net-benefits calculations are also

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<sup>44</sup> Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. at 51,735 (“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”). This requirement does not apply to independent agencies, though other provisions of E.O. 12,866—like the requirement to prepare an annual regulatory plan—do. *Compare id.* § 3(b), *with id.* § 4(b)-(c). E.O. 12,866 replaced the similar, Reagan-era Executive Order 12,291. *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 25-31 (2011) (discussing the history of the Reagan order and summarizing changes made by the Clinton replacement).

Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (“reaffirm[ing] the principles, structures, and definitions governing contemporary regulatory review” from E.O. 12,866); Exec. Order No. 14,094, 88 Fed. Reg. 21,879, 21,879 (Apr. 6, 2023) (same).

<sup>45</sup> Exec. Order 12,866 § 1(b)(6), 58 Fed. Reg. at 51,735.

<sup>46</sup> *Id.* § 1(a).

expected to account for effects “that are difficult to quantify, but nevertheless essential to consider.”<sup>47</sup>

It is commonly remarked that regulatory cost-benefit analysis focuses only on a policy’s total costs and benefits and ignores how those costs and benefits are distributed among subpopulations.<sup>48</sup> This disregard for distribution is not, however, obvious on the face of E.O. 12,866; the order suggests that a net-benefits calculation should factor in “distributive impacts” and “equity.”<sup>49</sup> But Circular A-4, OIRA’s “instruction manual” for performing 12,866 analyses,<sup>50</sup> treats cost-benefit analysis and distributional analysis as entirely distinct inquiries—and strongly implies that the former inquiry is more important.<sup>51</sup>

Specifically, Circular A-4 characterizes the goal of cost-benefit analysis as “provid[ing] decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (*ignoring distributional effects*).”<sup>52</sup> While acknowledging the potential relevance of distributional concerns to rulemaking, it instructs agencies to discuss such effects separately from “effects on economic efficiency.”<sup>53</sup> It also sends mixed signals on the importance of this separate analysis. On the one hand, it says that an agency’s “regulatory analysis *should* provide a separate discussion of distributional effects.”<sup>54</sup> On the other, it characterizes cost-benefit analysis but not distributional analysis as “a

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<sup>47</sup> *Id.*; see also Exec. Order 13,563 § 1(c), 76 Fed. Reg. at 3821 (noting that agencies’ 12,866 analyses “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts”).

<sup>48</sup> See, e.g., Revesz & Yi, *supra* note 34, at 55 (“Cost-benefit analysis focuses only on aggregate costs and aggregate benefits. It does not take account of who bears these costs and benefits.”); Adler, *supra* note 34 (“Standard [cost-benefit analysis] is indeed indifferent to how a policy’s income costs are distributed among the population.”).

<sup>49</sup> E.O. 12,866 §1(a), 58 Fed. Reg. at 51,735 (“[A]gencies should select those approaches that maximize net benefits (including . . . distributive impacts . . . and equity.”). By contrast, E.O. 12,866’s Reagan-era predecessor, Executive Order 12,291, did not flag distributional concerns as relevant to a net-benefits finding, see Exec. Order 12,291 § 2(c)-(e), 46 Fed. Reg. 13,193 (Feb. 17, 1981), though it did instruct agencies to identify “those likely to receive the benefits” and “bear the costs” of a rule, *id.* at 3(d)(1)-(2).

<sup>50</sup> Revesz & Yi, *supra* note 34, at 60. Circular A-4 is officially branded as a guidance document of the Office of Management and Budget (OMB), of which OIRA is a part.

<sup>51</sup> As already noted and discussed at length *infra* in Part III, OIRA has recently proposed revisions to Circular A-4. In this Part, I focus on the currently operative text of the Circular, as issued in 2003.

<sup>52</sup> Circular A-4, *supra* note 10, at 2 (emphasis added).

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.* (emphasis added).

primary tool” of regulatory analysis, and its list of the “three basic elements” of a “good regulatory analysis” makes no mention of distribution.”<sup>55</sup>

As Richard Revesz—now OIRA administrator—explains in past scholarship, Circular A-4’s focus on net benefits reflects a long “dominant academic view . . . that individual regulations should not concern themselves with questions of distribution.”<sup>56</sup> This view, “generally traced to an influential body of work by Professors Louis Kaplow and Steven Shavell,” stems not from a belief that distributional effects are unimportant but from a contention that they can be better addressed by Congress through taxes and transfers.<sup>57</sup> The thinking is that redistribution through regulation creates more welfare-reducing distortion of behavior than does redistribution through the tax-and-transfer system.<sup>58</sup>

Thus, an agency’s best bet when regulating, according to the traditional view, is to focus on “increasing the size of the pie (maximizing net benefits).”<sup>59</sup> If the rule that yields the largest pie also yields inequitably apportioned slices—because, say, its costs are borne by the poor and its benefits are enjoyed by the rich—Congress can correct the imbalance by taxing the rich and transferring the proceeds to the poor.<sup>60</sup>

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<sup>55</sup> *Id.* at 2; see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM L. REV. 1260, 1326–27 (2006) (arguing that Circular A-4’s brief discussion of distributional effects “sends a clear message that consideration of distributional consequences is a peripheral concern at best” and that, as a result, agencies “in general, pay little attention to distribution”).

<sup>56</sup> Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1490 (2018).

<sup>57</sup> *Id.* at 1490. See also Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

<sup>58</sup> Revesz, *supra* note 56, at 1503-05. As Revesz explains, Kaplow and Shavell’s argument originally focused on common law liability rules, but both they and other scholars have subsequently applied their argument in the regulatory context. *Id.* at 1506.

<sup>59</sup> *Id.* at 1491.

<sup>60</sup> *Id.* As Zachary Liscow—who recently served as OMB’s Chief Economist—has explained, the type of efficiency achieved by a net-benefits-maximizing rule is known as Kaldor-Hicks efficiency, as distinct from Pareto efficiency. Liscow, *supra* note 34, at 1658-60. A Pareto-efficient outcome is one in which at least one person is made better off and no one is made worse off. A Kaldor-Hicks-efficient outcome, meanwhile, can leave some people worse off, so long as the gains to the winners outweigh the losses to the losers. In theory, every Kaldor-Hicks-efficient outcome is a *potential* Pareto-efficient outcome, because the winners could fully compensate the losers for their losses and still be better off than they were prior to the rule. But an agency can demonstrate Kaldor-Hicks efficiency without showing that such redistribution is certain or even likely.

*B. The Awkward Application of E.O. 12,866 to Transfer Rules*

But what if an agency is issuing a regulation that *implements* the tax-and-transfer system? Just as Congress often leaves certain details of prescriptive programs for agencies to address through rulemaking—tasking the Environmental Protection Agency, for instance, with determining which air pollutants “endanger public health and welfare”<sup>61</sup>—it also frequently relies on agencies to establish the precise contours of taxes and transfer programs through rulemaking.<sup>62</sup> An agency asked to set eligibility standards for government financial assistance or to specify the parameters of that assistance cannot leave distributional concerns to be dealt with later, through a transfer program. Congress has already created a transfer program and asked the agency to implement it. Later has arrived.<sup>63</sup>

Yet most transfer rules are at least putatively subject to the same E.O. 12,866 and Circular A-4 requirements as prescriptive rules.<sup>64</sup> E.O. 12,866

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<sup>61</sup> 42 U.S.C. § 7408(a)(1).

<sup>62</sup> See Proposed OMB Circular No. A-4 at 19, 88 Fed. Reg. 20,915 (Apr. 7, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf> [hereinafter Proposed A-4 Update] (“Congress has enlisted agencies to implement [social welfare] programs, including through agency regulations that help determine who is eligible for program benefits and what sorts of benefits they may receive under which circumstances.”); see also Posner, *supra* note 1, at 1077 (explaining that transfer “[r]egulations are needed because Congress does not want to determine every detail about how funds are allocated and disbursed; that is why Congress transfers these functions to an agency.”).

<sup>63</sup> To be sure, Kaplow and Shavell contemplate redistribution through cash transfers rather than in-kind benefits. See Kaplow & Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, *supra* note 57, at 680 n.23. But Congress often prefers the in-kind approach—likely because it is more popular with the public. See Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 515 (2022). That legislators have chosen an arguably inefficient design for a redistributive program does not negate the program’s redistributive purpose. And asking an agency to ignore that purpose when making choices about implementation leads to absurd results. Assume, for example, that an agency has been asked to issue implementing regulations for a housing-voucher program that appears net costly under a conventional cost-benefit analysis. Standard, distribution-indifferent analysis would suggest that the agency should design its regulations to *minimize* the voucher program’s reach—making the application process as onerous, the eligibility criteria as strict, and the benefits as meager as the statutory text will bear. This cannot be right. It is one thing to suggest that agencies should, in the first instance, leave redistribution to Congress; it is quite another to ask agencies to intentionally undermine Congress’s redistributive choices whenever conventional cost-benefit analysis deems those choices inefficient.

<sup>64</sup> For most of E.O. 12,866’s existence, OIRA and Treasury have agreed to exempt IRS tax rules from the order’s requirements. See Chye-Ching Huang, *Modernizing Tax Regulatory Review*, NOTICE & COMMENT BLOG, YALE J. ON REG. (June 29, 2023). But no other agency has received similar dispensation for its transfer rules.

requires agencies in the executive branch to submit any “significant” regulatory action for pre-publication review by OIRA—and to prepare particularly detailed cost-benefit assessments for *economically* significant actions.<sup>65</sup> A rule qualifies as economically significant if it is likely to “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.”<sup>66</sup> (President Biden recently raised the “annual effect” threshold to \$200 million and instructed OIRA to further adjust it every three years to account for changes in GDP.<sup>67</sup>) And even if a rule does not satisfy the test for economic significance, it may be deemed significant if it conflicts “with an action taken or planned by another agency,” “[m]aterially alter[s] the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof,” or “raise[s] legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles” of E.O. 12,866.<sup>68</sup>

Both categories of significance encompass some transfer rules. For example, OIRA clarified in a 2011 “Frequently Asked Questions” document that “\$100 million in annual benefits, *or* costs, *or* transfers is sufficient” to surpass the threshold for economic significance.<sup>69</sup> And transfer rules that do not meet the threshold may still be deemed significant by virtue of “materially alter[ing] the budgetary impact” of a spending program or the “rights and obligations” of its beneficiaries.<sup>70</sup>

Accordingly, many transfer rules are sent to OIRA for review. In fact, transfer rules often account for the majority of economically significant rules that OIRA reviews in a given year.<sup>71</sup>

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<sup>65</sup> Compare Exec. Order 12,866 § 6(a)(3)(B), 58 Fed. Reg. at 51,741 (requirements for significant rules), with *id.* § 6(a)(3)(C) (requirements for economically significant rules). “Independent regulatory agencies,” as defined in the Paperwork Reduction Act, are exempt from this requirement. *Id.* § 3(b), 58 Fed. Reg. at 51,737.

<sup>66</sup> *Id.* § 3(f)(1).

<sup>67</sup> Exec. Order No. 14,094 § 1(b)3, 88 Fed. Reg. at 21,879.

<sup>68</sup> *Id.*; see also Exec. Order 12,866 § 3(f)(2)-(3), 58 Fed. Reg. at 51,738.

<sup>69</sup> RIA FAQ, *supra* note 6, at 1. As noted *supra* in the text accompanying note 67, that threshold has since been raised to \$200 million by E.O. 14,094.

<sup>70</sup> Exec. Order 12866 § 3(f)(3), 58 Fed. Reg. at 51,738.

<sup>71</sup> Sunstein, *supra* note 7, at 1868. See also 2018, 2019 & 2020 Report, *supra* note 22, at 3 (noting that 18 of the 32 major rules promulgated in 2018 and “over half” of the 55 major rules promulgated in 2019 were transfer rules). The definition of “major rule” includes all rules designated as economically significant under E.O. 12,866, as well as additional rules meeting very similar criteria. *Id.* at 7.



Circular A-4 does not, however, recognize transfer rules as a distinct regulatory category meriting a distinct analytic approach. The phrase “transfer rule” does not appear in the guidance document at all, even though OIRA has used the designation since 1997 in annual reports to Congress on the total costs and benefits of federal regulation. In the 1997 report, the Clinton-era OIRA noted that, of the 41 economically significant rules it had reviewed between April 1996 and March 1997, “20 were rules necessary to implement Federal budgetary programs.”<sup>72</sup> It provided a separate table of these actions, labeled “Transfer Rules,” and noted that “[e]stimates of the magnitude of the social costs and benefits associated with these rules are typically not available.”<sup>73</sup> It suggested that the omission of such effects from its tally of the year’s total regulatory costs and benefits was not particularly concerning, however, because the “the social costs involved” in such rules “are generally viewed as subsidiary to the transfers involved.”<sup>74</sup> “For these reasons,” the report went on, an OIRA document detailing best practices for regulatory analysis “specifically notes that instead of a complete benefit-cost analysis, a different form of regulatory analysis may be appropriate for regulations implementing these Federal programs.”<sup>75</sup>

That best practices document, a Circular A-4 predecessor released by OIRA in January 1996, did acknowledge in its introduction that transfer rules might warrant a different type of analysis than prescriptive rules. After first stating that an E.O. 12,866 analysis should enable “decisionmakers to determine that” a rule’s “potential benefits to society justify the potential costs” and that the rule will “maximize net benefits to society,” among other things, the document offered this disclaimer:

While most [E.O. 12,866 analyses] should include these elements, variations consistent with the spirit and intent of the Executive Order may be warranted for some regulatory actions. In particular, regulations establishing terms or conditions of Federal grants, contracts, or financial assistance may call for a different form of regulatory analysis, although a full-blown benefit-cost analysis of the entire program may be appropriate to inform Congress and the President more fully about its desirability.<sup>76</sup>

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<sup>72</sup> 1997 OIRA Report, *supra* note 16, Introduction.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> OIRA, Economic Analysis of Federal Regulations Under Executive Order 12866 (1996), [https://obamawhitehouse.archives.gov/omb/inforeg\\_riaguide/](https://obamawhitehouse.archives.gov/omb/inforeg_riaguide/) [hereinafter 1996 Best Practices Document].

Thus, OIRA expressly recognized that “regulations establishing terms or conditions of Federal grants, contracts, or financial assistance”—i.e., transfer rules—might at least sometimes “call for a different form of regulatory analysis” than one focused primarily on calculating net benefits, though it offered no details on what this “different form” might be.<sup>77</sup>

But when the George W. Bush administration replaced the Clinton administration’s best practices document with Circular A-4 in 2003, it cut the language blessing a different analytic approach for transfer rules. Circular A-4’s introduction does include more general concessions that an agency “cannot conduct a good regulatory analysis according to a formula” and that “different regulations may call for different emphases in the analysis.”<sup>78</sup> But it does not, in contrast to the 1996 document, suggest that transfer rules *categorically* call for different emphases or, for that matter, acknowledge transfer rules as a distinct category of rule at all.<sup>79</sup>

Furthermore, in a 2005 report to Congress, while continuing to list transfer rules in their own table, President Bush’s OIRA expressly rejected the idea that such rules were “subject to less stringent analytical and review requirements” than prescriptive rules:

In fact, agencies thoroughly analyze and OMB thoroughly reviews all significant Federal budget rules under E.O. 12866. If economically significant, these rules must be accompanied by regulatory impact analyses that comply with OMB Circular A-4.<sup>80</sup>

OIRA has repeated versions of this disclaimer in subsequent reports to Congress on the costs and benefits of federal regulation.<sup>81</sup>

Thus, on paper at least, the Circular A-4 model of regulatory analysis, in which distributional concerns take a back seat to efficiency, applies to transfer rules as well as prescriptive rules—even though the traditional justification for prioritizing efficiency is inapplicable to transfer rulemaking.

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<sup>77</sup> *Id.*

<sup>78</sup> Circular A-4, *supra* note 10, at 2.

<sup>79</sup> *Id.*

<sup>80</sup> OIRA, VALIDATING REGULATORY ANALYSIS: 2005 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 17 (2005). This and all subsequent OIRA reports to Congress are available at <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/>.

<sup>81</sup> *See, e.g.*, OIRA, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 18 (2009); OIRA, 2017 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 20 (2017).

### C. Circular A-4's Zero-Sum Treatment of Transfers

While Circular A-4 does not acknowledge the existence of transfer rules as a distinct category of regulation, it provides more general guidance on how an agency conducting a cost-benefit analysis should account for transfers.<sup>82</sup> The gist? Ignore them.

In a subsection titled “The Difference between Costs (or Benefits) and Transfer Payments,” Circular A-4 cautions that costs and benefits must reflect regulation-induced change in “real resource use.”<sup>83</sup> An air pollution standard, for instance, consumes real resources in the form of the “goods and services required to comply” with it and creates a real resource in the form of cleaner air (which will, in turn, yield reduced “premature death, illness, or disability”).<sup>84</sup> The value of these resources is determined by reference to society’s willingness to pay for them (which, depending on the resource, can be directly or indirectly observed in markets or adduced through surveys).<sup>85</sup>

Transfers, meanwhile, “are monetary payments from one group to another that do not affect total resources available to society.”<sup>86</sup> In a 2011 “primer” intended to assist agencies in preparing A-4-compliant analyses, OIRA provides examples, including:

- “[c]hanges in sales tax revenue due to changes in sales,” which are “transfers from consumers to government”;
- Medicare program reimbursements, which are “transfers [from] the government to [medical] service providers”; and
- “fees to government agencies for goods or services provided by the agency,” which are “transfers from fee payers to the government.”<sup>87</sup>

While transfers might *lead* to a change in resource use (more on that later), the transfer payment itself is not such a change. Instead, the payment is a

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<sup>82</sup> Transfers, it should be emphasized, are not exclusive to transfer rules. They can also arise as an indirect effect of a prescriptive rule. *See, e.g.*, EPA, EPA-420-D-23-003, MULTI-POLLUTANT EMISSIONS STANDARDS FOR MODEL YEARS 2027 AND LATER LIGHT-DUTY AND MEDIUM-DUTY VEHICLES: DRAFT REGULATORY IMPACT ANALYSIS 10-33 (2023), <https://www.epa.gov/system/files/documents/2023-04/420d23003.pdf> (acknowledging, in an E.O. 12,866 analysis for vehicle greenhouse gas emission standards, that compliance with the standards would cause three types of transfers from the government due to increased uptake of electric-vehicle-related tax credits and reduced fuel tax payments).

<sup>83</sup> *Circular A-4*, *supra* note 10, at 38.

<sup>84</sup> OIRA, Regulatory Impact Analysis: A Primer (2011), [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4\\_regulatory-impact-analysis-a-primer.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf) [hereinafter RIA Primer] (listing examples of real costs and benefits).

<sup>85</sup> *See* *Circular A-4*, *supra* note 10, at 18-22 (discussing concepts and techniques relevant to the valuation of costs and benefits).

<sup>86</sup> *Id.*

<sup>87</sup> RIA Primer, *supra* note 84, at 8.

“redistribution of wealth.”<sup>88</sup> If an agency’s cost-benefit analysis were, for example, to classify a rule-driven increase in sales tax revenue as a benefit to the recipient government, it would also have to classify that same revenue as a cost to the taxpayer.<sup>89</sup> The rule’s *net* benefits—Circular A-4’s focus—would be unaffected.<sup>90</sup> Accordingly, Circular A-4 instructs agencies that they “should not include transfers in the estimates of benefits and costs of a regulation” and should instead address them “in a separate discussion of the regulation’s distributional effects.”<sup>91</sup>

Importantly, Circular A-4’s contention that transfers work no “direct change in aggregate social welfare”<sup>92</sup> is premised on the controversial assumption of a constant marginal utility of income. That is, the gain (or loss) of a dollar is presumed to increase (or decrease) the wellbeing of every individual by the same amount, regardless of that individual’s starting income. The “conventional assumption in economics,” by contrast, is that the marginal utility of an additional unit of income *declines* as income increases.<sup>93</sup> Or, as Daniel Hemel more evocatively explains in a recent article:

Traditional [cost-benefit analysis] accords the same weight to a dollar in the hands of Amazon founder Jeff Bezos and to a dollar in the hands of a struggling single parent living at the poverty line, even though virtually everyone agrees that the single parent has greater need for, or derives greater utility from, a dollar than Bezos does.<sup>94</sup>

As discussed *infra* in Part III, many scholars have argued that cost-benefit analysis should quantitatively account for the declining marginal utility of income by applying “distributional weights that reflect the different social-welfare value of dollars in different individuals’ hands.”<sup>95</sup> Under this approach, the net value of a transfer would depend on the relative incomes of the transferor and transferee. A \$1 transfer from Bezos to the struggling single parent, for example, would be viewed as net beneficial rather than zero-sum.

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<sup>88</sup> 1997 OIRA Report, *supra* note 16, ch.1.

<sup>89</sup> *Id.*, ch.2 (“[T]ransfers are payments from one group in society to another and therefore are not real costs to society as a whole. One person’s loss is another person’s gain.”).

<sup>90</sup> RIA Primer, *supra* note 84, at 8 (noting that a tax payment has “no effect on the net benefits of the regulation”).

<sup>91</sup> Circular A-4, *supra* note 10, at 38.

<sup>92</sup> *Id.* at 46.

<sup>93</sup> Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1660 (2018); *see also* ANTHONY E. BOARDMAN ET AL., *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* 37 n.8 (4th ed. 2018) (“Economists generally assume declining marginal utility of money.”).

<sup>94</sup> Hemel, *supra* note 36, at 651.

<sup>95</sup> *Id.* at 652 & nn.10-11 (collecting sources on distributional weighting) (internal quotation marks omitted).

OIRA's recently proposed updates to Circular A-4 would permit but not require agencies to present a distributionally weighted analysis alongside a traditional one in some circumstances (though, as also discussed in Part III, this option would not be available for rules in which the primary regulatory effect is a transfer to or from the government). The currently operative version of Circular A-4, in any event, does not allow distributional weighting. Thus, under current guidance, agencies must treat transfers as having no direct, quantitative effect on efficiency.

#### *D. Agencies' Three Options for Justifying Transfer Rules*

How, then, *can* an agency conclude, as required by E.O. 12,866, that a transfer rule's benefits justify its costs? In his 2003 article, Posner contended that an agency simply cannot, that "all transfer regulations fail cost-benefit analysis."<sup>96</sup> He reasoned that "a conventional cost-benefit analysis of a transfer regulation will always yield a negative outcome," because the transfer itself "wash[es] out"—whether it is from Bezos to the single parent or the single parent to Bezos—"producing a social loss if administrative costs are greater than zero, as they always are."<sup>97</sup> But as discussed below, even with the assumption of a constant marginal utility of income, Circular A-4 arguably leaves agencies three ways to "pass" cost-benefit analysis. Whether these are normatively appealing options is a separate question, addressed in Part II.

##### 1. Administrative Cost Savings

Unlike transfers themselves, the costs of administering transfer programs count in a Circular A-4 cost-benefit analysis because they "reflect real resource use,"<sup>98</sup> such as the time that potential beneficiaries spend filling out applications and the time that government employees spend reviewing those applications.<sup>99</sup> Posner assumes that these costs will "always" be "greater than zero" and that transfer rules will thus always appear net costly.<sup>100</sup> But while it is true that rules establishing *entirely new* transfer programs will always have positive administrative costs, rules making discretionary modifications to *existing* transfer programs might not. An agency might, for example, loosen eligibility criteria for a government benefit in ways that both increase

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<sup>96</sup> Posner, *supra* note 1, at 1067.

<sup>97</sup> *Id.* at 1069.

<sup>98</sup> Circular A-4, *supra* note 10, at 38.

<sup>99</sup> See RIA FAQ, *supra* note 6, at 6-7 (explaining how to value the cost of time).

<sup>100</sup> Posner, *supra* note 3, at 1069.

the number of beneficiaries *and* make administering the benefit less burdensome for agency staff.<sup>101</sup> While the former effect (however large) will have no direct impact on the agency's net-benefits calculation, the administrative cost savings (however small) could, in theory, justify the action to Circular A-4's satisfaction.

## 2. Positive Behavioral Incentives

Next, although transfers do not themselves represent changes in resource use, they might *incentivize* such changes.<sup>102</sup> Circular A-4 acknowledges this only obliquely, telling agencies to report any "significant efficiency effects" of transfers but offering no indication of what such efficiency effects might be.<sup>103</sup> Other OIRA documents, however, make clear that transfers' real costs and benefits stem from their behavioral consequences.

For instance, OIRA's 2011 primer on regulatory analysis offers the following "stylized example":

Consider a regulation that taxes an air pollutant that is harmful to human health and is a by-product of some manufacturing process. In response to the tax, firms modify their manufacturing process to reduce (but not eliminate) the pollutant. The benefits of the regulation are reductions in premature death, illness, and disability resulting from the decreased emission of the regulated pollutant, as well as benefits to ecosystems, improvements in visibility, and so on. The cost of the regulation is equal to the cost to firms of modifying their production process (e.g., purchasing abatement technology).<sup>104</sup>

In other words, the tax revenue itself is a transfer that has "no effect on the net benefits of the regulation," but the behavioral changes induced by the tax have cognizable costs and benefits under Circular A-4.<sup>105</sup>

In its 1997 report to Congress, OIRA likewise acknowledged that "rules necessary to implement Federal budgetary programs," like "Medicaid, Medicare, and Social Security," could have both negative and positive effects on efficiency. The report notes that payments to beneficiaries could yield "social costs" because they "must be financed through mechanisms—for

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<sup>101</sup> See, e.g., discussion of the HHS Streamlining Rule *infra* in Section II.

<sup>102</sup> LIVERMORE & REVESZ, REVIVING RATIONALITY, *supra* note 26, at 168 (noting that transfer payments often "affect economic behavior"); HHS RIA Guidelines, *supra* note 27, at 23 ("Where the imposition of transfer payments affects behavior, associated impacts should be taken into account in the benefit-cost analysis.").

<sup>103</sup> Circular A-4, *supra* note 10, at 46.

<sup>104</sup> RIA Primer, *supra* note 84, at 8.

<sup>105</sup> *Id.*

example, income and payroll taxes—that affect the use of real resources.”<sup>106</sup> But it also acknowledged that “beneficiaries realize marginal benefits from the payments”—such as improved health—and that such benefits could be “greater than the loss for those who finance the payments (i.e., taxpayers).”<sup>107</sup>

Thus, an agency might, consistent with Circular A-4, justify a transfer rule that increased government spending by arguing that the spending would incentivize behavioral changes among its beneficiaries (such as consuming more or better healthcare) and that the welfare gains associated with those changes (such as reductions in the incidence of disease or premature death) would outweigh any welfare losses associated with the consequences of future tax increases that the new spending might cause (such as reduced workforce participation).<sup>108</sup>

### 3. Distributional Fairness

Finally, while Circular A-4 requires agencies to treat transfers as *quantitatively* neutral, it leaves room to for agencies to make a *qualitative* case for the distributional desirability of a transfer. As already noted, E.O. 12,866, which Circular A-4 implements, expressly recognizes “distributive impacts” and “equity” as relevant to an agency’s determination of which regulatory alternative will “maximize net benefits.”<sup>109</sup> President Obama’s Executive Order 13,563, which “is supplemental to and reaffirms the principles, structures, and definitions” in E.O. 12,866, further emphasizes that an agency preparing an E.O. 12,866 analysis “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”<sup>110</sup> And Circular A-

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<sup>106</sup> As discussed *infra* in Section III.A.5, it is not necessarily the case that increased spending on any given program will lead to increased taxation. Nor is it necessarily the case that an increase in taxation would cause deadweight loss.

<sup>107</sup> 1997 OIRA Report, *supra* note 16, ch.3.

<sup>108</sup> See HHS RIA Guidelines, *supra* note 27, at 23 (explaining how changes in government healthcare spending can change healthcare consumption and health outcomes and that such outcomes “should be addressed in the benefit-cost analysis, if significant”); *id.* (noting that “taxes can also change behavior; for example, taxes on wages provide a disincentive for working and higher taxes may lead more people to stay out of the labor force”).

<sup>109</sup> Exec. Order 12,866 § 1(a), 58 Fed. Reg. at 51,735 (“in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including . . . distributive impacts; and equity)”).

<sup>110</sup> Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. at 3821.

4 itself acknowledges “promoting . . . distributional fairness” as a “compelling public need” that might justify regulation.<sup>111</sup>

In theory, then, an agency promulgating a transfer rule could (1) conduct a primary analysis that excludes transfers and finds zero or negative net benefits, (2) conduct a separate distributional analysis in which it acknowledges the size and direction of transfers caused by the rule, and then (3) conclude that the distributional desirability of those transfers justifies issuance of the rule despite the findings of the primary analysis.<sup>112</sup> Circular A-4, however, provides no guidance as to how an agency should assess distributional desirability or how it should weight distributional desirability against efficiency.<sup>113</sup>

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In sum, E.O. 12,866 requires an agency issuing a discretionary transfer rule to conclude that the rule’s benefits justify its costs, but, under Circular A-4, transfers themselves count as neither benefits nor costs in such an analysis.<sup>114</sup> Accordingly, an agency has three permissible paths to the required conclusion. It can find that, in addition to increasing or decreasing transfers, the rule will reduce administrative costs. It can determine that the transfers required by the rule will incentivize net-beneficial behavioral changes. Or it can find that the transfers caused by the rule will promote distributional fairness.

## II. HOW AGENCIES JUSTIFY TRANSFER RULES IN PRACTICE: THREE CASE STUDIES

Part I identified three options for justifying a transfer rule in accordance with Circular A-4: administrative cost savings, positive behavioral

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<sup>111</sup> Circular A-4, *supra* note 10, at 4; *see also id.* at 4 (including “removing distributional unfairness” in a list of “possible justifications” for regulation).

<sup>112</sup> *See* Revesz & Yi, *supra* note 34, at 97 (arguing that “the better distributional consequences of a particular [regulatory] alternative should be regarded as an unquantified benefit” that can potentially overcome any deficit that alternative presents with respect to quantified net benefits).

<sup>113</sup> JACK LIENKE, ILIANA PAUL, MAX SARINSKY, BURCIN UNEL & ANA VARELA VARELA, MAKING REGULATIONS FAIR: HOW COST-BENEFIT ANALYSIS CAN PROMOTE EQUITY AND ADVANCE ENVIRONMENTAL JUSTICE i (2021).

<sup>114</sup> I say *discretionary* transfer rule because the requirements of E.O. 12,866 apply only “to the extent permitted by law.” Exec. Order 12,866, § 1(b), 58 Fed. Reg. at 51,735. If an agency is statutorily required to issue a particular rule, and if there is no permissible design of the rule that would be net beneficial, the agency can issue the rule without concluding that its benefits justify its costs.



incentives, and distributional fairness. In Part II, I use recent agency analyses to explore how these justifications play out in practice. The first two examples—the Department of the Interior’s Valuation Rule and the Department of Health and Human Services’ Streamlining Rule—show why administrative cost savings, standing alone, provide an unsatisfying justification for transfer rules. The next—the Department of Education’s Borrower Defense Rule—illustrates the challenges of predicting transfer rules’ indirect behavioral consequences. Additionally, all three case studies exemplify agencies’ reluctance to justify transfer rulemaking on expressly distributional grounds—even though context suggests that remedying a perceived distributional inequity was, in reality, a central motivation for each rulemaking.

### A. *The Valuation Rule*

Over forty percent of U.S. coal production and around ten percent of U.S. oil and gas production occurs on federally owned lands.<sup>115</sup> Royalties paid by private companies for extracting these fossil fuels are “the largest source of income for the federal government outside of taxes.”<sup>116</sup> Because the federal government typically splits the royalties with the state in which the extraction occurs, federal mineral royalties are also a significant source of funding for projects like school and road construction in some states.<sup>117</sup>

But critics have long maintained that the government could earn even more from its mineral leasing program if not for its “systematic undervaluation of reserves.”<sup>118</sup> A 2007 report from the Government Accountability Office, for example, found that the U.S. government’s share of the cash flow from oil and gas extracted on its lands was “among the lowest government [shares] in the world.”<sup>119</sup> In 2012, a *Reuters* investigation detailed how federal coal lessees reduced their royalty payments by calculating the royalty on coal’s domestic value, even when the coal in

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<sup>115</sup> Bureau of Land Mgmt., Notice of Intent To Conduct a Review of the Federal Coal Leasing Program and To Seek Public Comment, 86 Fed. Reg. 46,873 (Aug. 20, 2021) (“In recent years and on average, approximately 42 percent of the Nation’s annual coal production came from Federal lands.”); Bureau of Land Mgmt., About the BLM Oil and Gas Program, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about> (last visited on July 24, 2023) (noting that oil and gas “produced from the Federal mineral estate accounted for approximately 11 percent of all oil and 9 percent of all natural gas produced in the United States” in fiscal year 2022).

<sup>116</sup> LIVERMORE & REVESZ, REVIVING RATIONALITY, *supra* note 26, at 170.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, OIL AND GAS REVENUES, GAO-07-676R, at 2 (2007), <https://www.gao.gov/products/GAO-07-676R>.

question would ultimately be sold overseas at ten times the domestic price.<sup>120</sup> And in 2013, both Interior’s Office of the Inspector General and a bipartisan group of Senators called for reform.<sup>121</sup>

In response—and “[a]fter years of studying the problem, a series of public workshops, and review of thousands of comments”<sup>122</sup>—Interior’s Office of Natural Resource Revenue (ONRR) issued the Valuation Rule in 2016.<sup>123</sup> The rule changed the procedures used to value coal, oil, and gas sold in “non-arm’s length transactions,” where the initial sale price was not a reliable indicator of the fuel’s true market value.<sup>124</sup>

ONRR projected that its new valuation procedures would have two categories of economic impact.<sup>125</sup> First, they would increase annual royalty payments from lessees to federal and state governments by “between \$71.9 and \$84.9 million.”<sup>126</sup> Second, by simplifying the process by which mineral values were determined, the procedures would decrease lessee’s annual administrative costs by \$3.61 million.<sup>127</sup> In other words, under the new rule, lessees would owe more royalties but spend less time figuring out what they owed.

Even though the first effect was roughly twenty times larger, only the second counted for purposes of a Circular A-4 cost-benefit analysis. The increased royalty payments were a transfer from lessees to taxpayers, while the administrative cost savings were a cognizable benefit because they would save lessees’ labor, a real resource. Thus, the Valuation Rule had annual net benefits of \$3.61 million.<sup>128</sup>

This meant that the Trump administration’s *repeal* of the Valuation Rule, issued two years later, had \$3.61 million in annual net costs. But the Trump-era ONRR was not keen on clearly acknowledging that fact, as Michael Livermore and Richard Revesz detail in their book *Reviving Rationality*,

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<sup>120</sup> Patrick Rucker, *Asia Coal Export Boom Brings No Bonus for U.S. Taxpayers*, REUTERS (Dec. 4, 2012), <https://www.reuters.com/article/us-usa-coal-royalty/asia-coal-export-boom-brings-no-bonus-for-u-s-taxpayers-idUSBRE8B30IL20121204>.

<sup>121</sup> U.S. DEP’T OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, EVALUATION: COAL MANAGEMENT PROGRAM (2013), <http://www.documentcloud.org/documents/712402-inspector-generals-report-on-coalleases.html>; Letter to Ken Salazar from Senators Lisa Murkowski and Ron Wyden (Jan. 2, 2013), <https://www.energy.senate.gov/public/index.cfm/2013/2/interiorresponds-to-wyden-murkowskicoal-letter>.

<sup>122</sup> LIVERMORE & REVESZ, *REVIVING RATIONALITY*, *supra* note 26, at 171.

<sup>123</sup> Dep’t of the Interior, Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43,338 (July 1, 2016) [hereinafter Valuation Rule].

<sup>124</sup> *Id.* at 43,339, 43,346.

<sup>125</sup> *Id.* at 43,358.

<sup>126</sup> *Id.* at 43,360.

<sup>127</sup> *Id.*

<sup>128</sup> LIVERMORE & REVESZ, *REVIVING RATIONALITY*, *supra* note 26, at 171.

which catalogs the Trump administration’s failures to observe the traditional “guardrails” of regulatory cost-benefit analysis:

In justifying the repeal, [ONRR] focused on the fact that the repeal would result “in an overall savings to industry” . . . Thus, the Trump administration treated the reduction in royalty payments as the benefit of the rescission, the additional administrative costs as its costs, and the amount by which the first amount exceeded the second as the net benefit. But in a properly conducted analysis, royalty savings for fossil fuel companies would be considered one side of a transfer payment, with the other side being the lost royalty revenue for federal and state treasuries. Both sides, taken together, would cancel each other out, leaving the forgone administrative cost savings as the net impact of the repeal. A proper analysis would thus have clearly shown that the repeal was net costly.<sup>129</sup>

By focusing on net impacts to industry instead of net impacts to society, Livermore and Revesz argue, ONRR effectively treated a mere transfer (avoided royalty payments from lessees to the government) as a real benefit that could be weighed against the rule’s real administrative costs.

Livermore and Revesz persuasively explain why the Trump administration’s analysis was both misleading and improper under Circular A-4. I redeploy the example here to highlight a second fact—namely, that the “proper” approach to calculating the Valuation Rule’s net impacts is *also* fundamentally unsatisfying.

To suggest, as Circular A-4 implicitly does, that the original Valuation Rule was desirable only because it decreased administrative costs and that its repeal was undesirable only because it increased administrative costs is to miss the point of the Valuation Rule. ONRR reformed its valuation procedures, after all, to address complaints that lessees’ royalty bills were too small, not complaints that they were too burdensome to calculate. The agency’s internal assessment of the Valuation Rule’s desirability thus almost certainly turned far more on the transfers Circular A-4 deems irrelevant than on the administrative cost impacts that the Circular treats as determinative.

Northern District of California Judge Sandra Brown Armstrong implicitly recognized this in an opinion vacating the Valuation Rule’s repeal as arbitrary and capricious. In recounting the origins of the rule, Judge Armstrong emphasized that it “responded to concerns that companies were significantly undervaluing coal sold in non-arm’s length transactions.”<sup>130</sup> She

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<sup>129</sup> *Id.* at 172; *see also id.* at 31 (characterizing Trump as “kick[ing] at the guardrails that constrain agency decision making” and “treat[ing] the practice of cost-benefit analysis . . . like a charade”).

<sup>130</sup> *California v. U.S. Dep’t of the Interior*, 381 F.Supp.3d 1153, 1160 (N.D. Cal. 2019).

went on to conclude that ONRR had failed to provide a “reasoned explanation” for forfeiting not just the rule’s “administrative cost savings” but also its “royalty benefits.”<sup>131</sup>

The judge’s characterization of the Valuation Rule’s royalty impacts as “benefits” is inconsistent with Circular A-4, which would deem them mere transfers. But her wording reflects a common-sense reality, which is that, independent of any ancillary effects on administrative costs, the transfers expected to flow from the Valuation Rule mattered, to ONRR and to the public. Accordingly, their reversal required an explanation.

So, by logical extension, did their initial imposition. Yet the Obama administration’s original E.O. 12,866 analysis for the Valuation Rule did not make an affirmative case for the royalty increases the rule would cause. ONRR did not, for instance, argue that federal and state governments would put additional royalty revenue to more productive use than lessees would have if permitted to retain the money (an efficiency rationale). Nor did it expressly claim that the increased royalty payments represented a *fairer* distribution of resources than the status quo (a distributional rationale).

In other words, while the Obama administration’s analysis of the Valuation Rule was more consistent with the dictates of Circular A-4 than the Trump administration’s analysis of the rule’s repeal, *neither* administration expressly addressed the desirability of the Valuation Rule’s largest quantified effect: an increase in transfers from lessees to the government.

### B. The Streamlining Rule

A fairly recent proposal to “streamline” procedures for obtaining and retaining federally subsidized health insurance provides another example of a rule that is technically but unpersuasively justified by administrative cost savings alone under the Circular A-4 framework.<sup>132</sup> In September 2022, the Department of Health and Human Services’ Centers for Medicare and Medicaid Services (CMS) proposed a broad suite of provisions aimed at simplifying “applications, verifications, enrollment, and renewals” for Medicaid and the Children’s Health Insurance Program (CHIP) (“Streamlining Rule”).<sup>133</sup> Medicaid provides free health coverage for low-

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<sup>131</sup> *Id.* at 1170.

<sup>132</sup> Streamlining the Medicaid, Children’s Health Insurance Program, and Basic Health Program Application, Eligibility Determination, Enrollment, and Renewal Processes, 87 Fed. Reg. 54,760 (proposed Sept. 7, 2022) [hereinafter Streamlining Rule].

<sup>133</sup> HHS, Fact Sheet: Streamlining Eligibility & Enrollment Notice of Proposed Rulemaking (Aug. 31, 2022), <https://www.cms.gov/newsroom/fact-sheets/streamlining-eligibility-enrollment-notice-propose-rulemaking-nprm>. The rule also affected enrollment procedures

income children and adults, and CHIP provides low-cost health coverage to uninsured children whose families earn too much to qualify for Medicaid.<sup>134</sup>

In the E.O. 12,866 analysis accompanying the Streamlining Rule, CMS projected that some of the rule’s provisions would yield time savings for both the state government employees that evaluate eligibility for Medicaid and CHIP and for prospective enrollees themselves.<sup>135</sup> These savings were modest on a per-enrollee basis—two to three hours each—but significant in aggregate. Specifically, CMS estimated that “State Eligibility Interviewers” would avoid 2.3 million hours of administrative labor annually, valued at just over \$106 million (or \$46.70 per hour), and that prospective enrollees would avoid 4.6 million hours of paperwork time, valued at just under \$129 million (or \$28.01 per hour).<sup>136</sup>

These administrative impacts were tiny, however, compared to the transfers predicted to flow from the Streamlining Rule. For example, CMS projected that the rule would lead almost 3 million additional people to enroll in Medicaid by 2027 and prompt \$100 billion in additional Medicaid spending between 2023 and 2027.<sup>137</sup> The CHIP program, meanwhile, was expected to grow by 120,000 enrollees and to spend \$1.7 billion more between 2023 and 2027 due to the Streamlining Rule.<sup>138</sup>

As with the Valuation Rule, then, the estimated effects that did *not* count for Circular A-4 purposes (transfers) were far larger—in this case over 400 times larger—than those that did (administrative cost savings). And as with the Valuation Rule, the issuing agency made little effort to explain why the former were desirable in and of themselves, independent of accompanying reductions in administrative costs—even though context made clear that increasing enrollment in Medicaid and CHIP was a primary goal of the Streamlining Rule.<sup>139</sup> CMS did not, for instance, describe any indirect

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for the Basic Health Program, which is currently available in only two states. SABRINA CORLETTE ET AL., URBAN INST., *THE BASIC HEALTH PROGRAM v* (2023), <https://www.urban.org/research/publication/basic-health-program>.

<sup>134</sup> Medicaid & CHIP, <https://www.healthcare.gov/medicaid-chip/> (last visited July 31, 2023).

<sup>135</sup> Streamlining Rule, 87 Fed. Reg. at 54,839.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 54,838.

<sup>138</sup> *Id.*

<sup>139</sup> *See, e.g., id.* at 54,761 (explaining that the rule was prompted by Executive Order 14,070); Exec. Order 14,070 § 2, 87 Fed. Reg. 20,689 (Apr. 8, 2022) (instructing “agencies “with responsibilities related to Americans’ access to health coverage . . . to help more Americans enroll in quality health coverage”); Press Release, Biden-Harris Administration Proposes to Make Health Care Enrollment Easier for Millions of Americans (Aug. 31, 2022), <https://www.hhs.gov/about/news/2022/08/31/biden-harris-administration-proposes-to-make-health-care-enrollment-easier-for-millions-of-americans.html> (“Under the Biden-

efficiency benefits of increased Medicaid and CHIP spending, such as improved health outcomes associated with the consumption of additional or higher-quality healthcare. And while CMS did, in its opening “Statement of Need,” briefly suggest that the Streamlining Rule was needed to “improve health equity,”<sup>140</sup> the agency did not subsequently explain how it defined equity in this context or why the rule could be expected to further it.<sup>141</sup>

### C. *The Borrower Defense Rule*

The Valuation Rule and Streamlining Rule show why transfer-rule analyses that point only to administrative cost savings are so unsatisfying: they fail to address the desirability of a transfer rule’s most significant impact, its transfers. But making a persuasive efficiency case for transfers themselves is also quite difficult, as illustrated by the supporting analysis for the Department of Education’s (ED) 2016 Borrower Defense Rule.

The federal government has been a pivotal player in higher-education lending since the 1960s (first participating primarily as a guarantor and later as a direct lender), and it currently holds over \$1.6 trillion in outstanding student debt.<sup>142</sup> In 1994, as part of a reauthorization of the Higher Education Act, Congress instructed ED to issue regulations specifying the circumstances under which students could cite their school’s misconduct “as a defense to repayment” of their federal loans.<sup>143</sup> ED shortly thereafter released a rule explaining that any “act or omission” that would give the student “a cause of action against the school under applicable State law” would also support a borrower defense claim at the Department.<sup>144</sup> The 1994

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Harris Administration . . . more Americans than ever before have health insurance coverage. Today’s proposed rule will build on these efforts. . . .”).

<sup>140</sup> Streamlining Rule, 87 Fed. Reg. at 54,833.

<sup>141</sup> In a press release accompanying the rule, however, CMS Administrator Chiquita Brooks-LaSure stated that the Streamlining Rule would ensure that “individuals and families, often from underserved communities, can access the health care and coverage to which they are entitled—a foundational principle of health equity.” Press Release, *supra* note 139.

<sup>142</sup> New America, Student Loan History, <https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/federal-student-loan-history/> (last visited on July 24, 2023); Federal Student Aid, Federal Student Aid Posts Quarterly Portfolio Reports to FSA Data Center (Sept. 21, 2022), <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-09-21/federal-student-aid-posts-quarterly-portfolio-reports-fsa-data-center>.

<sup>143</sup> 20 U.S.C. § 1087e(h) (instructing the ED Secretary to “specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan”).

<sup>144</sup> Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher

rule said nothing, however, about the procedures for asserting such a claim.<sup>145</sup> Perhaps as a result, few borrower defense claims were filed in the ensuing two decades.<sup>146</sup>

Then came the collapse of the for-profit Corinthian Colleges in 2015. Two weeks after incurring a \$30 million fine from ED for misrepresenting its job placement rates—and with additional state and federal action looming—Corinthian announced that all 28 of its remaining campuses would immediately and indefinitely close.<sup>147</sup> It left behind 16,000 displaced students with tens of millions of dollars in outstanding federal loans for degrees they could no longer complete.<sup>148</sup>

In attempting to process the resulting “flood of borrower defense claims,”<sup>149</sup> ED realized that the 1994 rule “made this process burdensome, both for borrowers and for the Department.”<sup>150</sup> Tying federal relief to the availability of a state cause of action, for instance, required ED staff “to devote significant resources to reviewing individual State laws to determine which law to apply to each borrower’s claim.”<sup>151</sup>

Accordingly, ED decided to “develop new regulations to establish a more accessible and consistent borrower defense standard and clarify and streamline the borrower defense process.”<sup>152</sup> The resulting Borrower Defense Rule also included provisions aimed at helping ED recover the value of discharged loans from the educational institutions whose misconduct gave

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Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926, 76,061 (Nov. 1, 2016) (citing 34 C.F.R. § 685.206) [hereinafter Final 2016 BD Rule].

<sup>145</sup> Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39,330, 39,335 (proposed June 16, 2016) (emphasis added) [hereinafter Proposed 2016 BD Rule].

<sup>146</sup> *Id.*

<sup>147</sup> *Corinthian Closes for Good*, Inside Higher Ed (Apr. 26, 2015), <https://www.insidehighered.com/news/2015/04/27/corinthian-ends-operations-remaining-campus-affecting-16000-students>.

<sup>148</sup> *Id.* ED eventually discharged \$5.6 billion in loans for all 560,000 students who had borrowed to attend Corinthian during its twenty years in operation. Press Release, U.S. Dep’t of Educ. (June 1, 2022), <https://www.ed.gov/news/press-releases/education-department-approves-58-billion-group-discharge-cancel-all-remaining-loans-560000-borrowers-who-attended-corinthian-colleges>.

<sup>149</sup> Proposed 2016 BD Rule, 81 Fed. Reg. at 39,330.

<sup>150</sup> *Id.* at 39,387.

<sup>151</sup> Final 2016 BD Rule, 81 Fed. Reg. at 76,047.

<sup>152</sup> *Id.* at 75,926. The uniform federal standard articulated in the rule allowed “a borrower to assert a borrower defense on the basis of a substantial misrepresentation, a breach of contract, or a favorable, nondefault contested judgment against the school for its act or omission relating to the making of the borrower’s [federal loan] or the provision of educational services for which the loan was provided.” *Id.* at 76,048.

rise to the claims. To this end, it specified “actions and events”—such as certain lawsuits or actions by the school’s accreditors—“that would trigger a requirement that a school provide financial protection, such as a letter of credit, to insure against future borrower defense claims.”<sup>153</sup>

In its E.O. 12,866 analysis for the Borrower Defense Rule, ED projected that, relative to the 1994 regulations, annualized discharges would almost quadruple under the new policy—from \$637 million to \$2.465 billion.<sup>154</sup> Moreover, the share of discharges that ED managed to recover from offending schools would almost double—from 24 to 40 percent.<sup>155</sup> Consistent with Circular A-4, however, the analysis recognized that the value of discharged loans should not be treated as a benefit but as “a transfer between the Federal government and affected student borrowers.”<sup>156</sup> It likewise acknowledged that any recovery of such discharges from offending schools would be a transfer “between [those] institutions and the Federal government.”<sup>157</sup>

But while acknowledging that discharges were not *themselves* a benefit, ED found that they “could have significant positive consequences for affected borrowers and associated spillover economic benefits.”<sup>158</sup> Relief from “debts they may not have been able to repay” could enable the students “to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses.”<sup>159</sup> ED cited recent studies suggesting “that high levels of student debt may decrease the long-term probability of marriage, increase the probability of bankruptcy, reduce home ownership rates, and increase credit constraints.”<sup>160</sup> Additionally, ED found that increased recovery of discharges from the responsible educational institutions would have the benefit of “detering misconduct by other

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<sup>153</sup> *Id.* at 75,927.

<sup>154</sup> *See id.* at 76,059 (showing total annualized discharges of \$637 million for the baseline scenario and \$2.465 billion under the “primary estimate” for the Borrower Defense Rule, both using a 3% discount rate).

<sup>155</sup> *See id.* at 76,058 tbl.4 (showing discharge costs to federal government of \$485 million under baseline scenario and \$1.471 billion under the “primary estimate” for the Borrower Defense Rule, both using a 3% discount rate). To calculate corresponding recovery percentages:  $(637 - 485)/637 = 24\%$  under the baseline scenario and  $(2.465 - 1.471)/2.465 = 40\%$  under the primary estimate.

<sup>156</sup> *Id.* at 76,051.

<sup>157</sup> *Id.* at 76,052.

<sup>158</sup> *Id.* at 76,051.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



schools.”<sup>161</sup> In other words, the transfers to students could, by inducing behavioral change, yield benefits cognizable under Circular A-4.

When the Trump administration sought to indefinitely stay implementation of the rule seven months later, it was not so careful in its characterizations.<sup>162</sup> In discussing the benefits of a stay, ED noted that the Borrower Defense Rule was projected to have “a net budget impact in costs . . . of \$16.6 billion” and claimed that postponing the rule’s effectiveness would “avoid these significant costs to the Federal government and ultimately the Federal taxpayer.”<sup>163</sup> ED insisted, however, that borrowers would suffer no harm from the stay, because the Department would “continue to process borrower defense claims” under the standard articulated in the 1994 regulations.<sup>164</sup>

It was, of course, impossible for both of these claims to be true. If a stay of the Borrower Defense Rule would, by avoiding discharges, yield huge savings for the federal government, then it would necessarily also yield huge, corresponding losses for borrowers. If, on the other hand, the stay would cause *no* loss to borrowers, then it would also offer no savings to the government.

ED’s creative accounting did not impress Judge Randolph Moss of the United States District Court for the District of Columbia, who vacated the stay fourteen months later.<sup>165</sup> Among the bases for his decision: ED’s “failure to consider how the public interest or the interest of student borrowers would be affected by its decision.”<sup>166</sup> More specifically, Judge Moss faulted ED for failing to consider “the harm [student borrowers] would sustain from being denied the benefits of the new regulations, which were promulgated to address deficiencies that the Department itself found in the old rule.”<sup>167</sup>

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<sup>161</sup> *Id.* at 76,049; *see also id.* at 76,056 (explaining that the Department expected to see a pattern in which, over “a period of several years . . . the worst performers are removed from the system and . . . other institutions adapt to the new requirements and a lower steady state [of misconduct] is established”); *id.* at 76,058 (explaining that, under a business-as-usual scenario, institutional conduct was expected to improve at a “slower rate than occurs under the [Borrower Defense Rule]”).

<sup>162</sup> *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 27,621, 27,621 (June 16, 2017) [hereinafter “BD Stay”].

<sup>163</sup> *Id.* at 27,621-22.

<sup>164</sup> *Id.*

<sup>165</sup> *Bauer v. Devos*, 325 F.Supp.3d 74, 110 (D.D.C. 2018).

<sup>166</sup> *Id.* at 108.

<sup>167</sup> *Id.* at 108 n.13.

As with the Valuation Rule, Livermore and Revesz's *Reviving Rationality* fairly criticizes the Trump administration for ignoring the dictates of Circular A-4 and attempting to justify suspension of the Borrower Defense Rule by casting a transfer—in this case from student borrowers to the government—as a pure benefit.<sup>168</sup> But as with the Valuation Rule, the Obama administration's original analysis, while more observant of OIRA guidance, *also* leaves something to be desired.

As already noted, ED's 2016 analysis of the Borrower Defense cited two categories of beneficial behavioral effects associated with loan discharges: fuller participation by affected borrowers in the economy and deterrence of future misconduct by schools. But by ED's own admission, the rule was not tailored to maximize these effects. For example, ED's summary of relevant studies suggested that discharge would be most economically beneficial for borrowers with "high levels of debt," borrowers with debt they "may not have been able to repay," and borrowers who might otherwise default.<sup>169</sup> But it conceded that it could not be sure that these were the sorts of borrowers who would receive relief under the Borrower Defense Rule:

We have limited experience with borrower defense claims to draw upon in generating a profile of those likely to make successful claims. There are different potential profiles of student loan borrowers in terms of loan amounts, loan type composition, likelihood of default, fields of employment, degree level, and other factors. We do not have a basis in the data from existing claims to know how borrower profiles and the distribution and nature of claims will intersect.<sup>170</sup>

ED nevertheless concluded that "benefits associated with the substantial transfers to students from successful borrower defense claims [would] be significant."<sup>171</sup>

As for the deterrence rationale, making it easier for misled students to discharge their loans would deter misconduct only to the extent that schools themselves expected to bear the cost of discharge. But ED expected that less than half of discharged loans would be recovered and that taxpayers would

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<sup>168</sup> LIVERMORE & REVESZ, *supra* note 26, at 175 ("[F]or the delay of the Borrower Defense Rule, the administration treated reduced outlays by the federal Treasury and private lenders as benefits, while ignoring the symmetric cost imposed on student borrowers.").

<sup>169</sup> Final 2016 BD Rule, 81 Fed. Reg. at 76,051; *see also id.* ("The economic and psychological benefits of debt relief may vary for a graduate student with high income potential receiving partial relief on a high level of debt and a student who dropped out of a certificate program with a lower level of debt and lower earnings potential from that program of education.").

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

“bear the burden of . . . unreimbursed claims.”<sup>172</sup> The Department further acknowledged that such discharges would consume “Federal government resources that could have been used for other purposes,” though it hazarded no guess as to what such purposes (and their attendant behavioral consequences) would have been.<sup>173</sup>

If ED were truly issuing the Borrower Defense Rule to maximize economic efficiency, the Department presumably would have considered altering the rule’s design to better ensure realization of its potential productivity and deterrence benefits. For instance, relief could have been limited to borrowers who could demonstrate an inability to repay their loans. It could also have been limited to loans from still-solvent institutions from which ED could successfully seek at least partial recovery.

That ED did *not* consider such limitations suggests, perhaps, that it was focused less on ensuring that the borrower defense program was economically efficient than it was on ensuring that program was *fair*. The program’s beneficiaries, after all, were students who had taken on federal debt because their schools had, to put it bluntly, lied to them—told them, for instance, that they were “guaranteed” employment after graduation when in reality less than half of the school’s graduates found jobs.<sup>174</sup> Yet, as in the prior examples in this Part, fairness did not factor into ED’s 12,866 analysis for the Borrower Defense Rule. ED did not argue that the discharges resulting from the rule would yield a more equitable distribution of resources, even if not necessarily a more efficient one. Instead, it maintained, without any mention of distributional considerations, that “[i]n choosing among alternative regulatory approaches, [it] selected those approaches that maximize net benefits”—in other words, that it had been guided purely by efficiency considerations.<sup>175</sup>

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Cost-benefit analysis is generally characterized as having two potential functions. The first is optimization. By focusing on maximizing net benefits, an agency can, in theory, produce rules of optimal stringency—reducing pollution, for example, only up to the point where the incremental health

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<sup>172</sup> *Id.* at 76,055; *see also supra* note 154 (calculating recovery percentage).

<sup>173</sup> *Id.*

<sup>174</sup> *See* Memo from Borrower Defense Unit to Under Secretary Ted Mitchell, Recommendation for ITT Borrowers Alleging That They Were Guaranteed Employment – California Students 1, 6 (Jan. 10, 2017), <https://apps.npr.org/documents/document.html?id=6572882-1-9-2017-Memo>.

<sup>175</sup> *Id.* at 76,046-47.

benefits of abating an additional unit are not outweighed by the accompanying incremental costs.<sup>176</sup> The second is transparency. Under this view, cost-benefit analysis is a form of structured storytelling that clearly conveys regulators' views as to the "key effects, good and bad" of a proposed rule, as well as those of available regulatory alternatives.<sup>177</sup>

As Circular A-4 acknowledges, true optimization is often unachievable even for prescriptive rules, because agencies are frequently unable to quantify important benefits of regulatory effects like pollution reduction and must thus "exercise professional judgment" as to how much weight to afford them relative to the costs and benefits that *can* be quantified.<sup>178</sup> Even in such situations, though, proponents of cost-benefit analysis argue that it can still ensure that an agency's "discretion is exercised in a way that is transparent rather than opaque" by helping to "show exactly why the decision about how to regulate . . . is genuinely difficult and why, and where, reasonable people might differ."<sup>179</sup>

The transfer-rule analyses described above, however, serve neither purpose effectively. Because the relevant agencies did not (and likely could not) quantify all or even most of the featured rules' most significant social costs and benefits, their analyses do not provide a "clear indication" of the optimal level of fossil fuel royalty collection, or Medicaid spending, or student loan forgiveness.<sup>180</sup> But the analyses also fail to promote transparency in decisionmaking. That is, they do not candidly communicate agency views as to the key pros and cons of their policies, due to a mismatch between what

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<sup>176</sup> See Circular A-4, *supra* note 10, at 2 ("Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative . . ."); Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 95 (2015) (formal cost-benefit analysis "provides, at least in theory, a standard-setting tool for identifying the optimal choice from among a whole range of regulatory alternatives").

<sup>177</sup> Circular A-4, *supra* note 10, at 1-2 (regulatory analysis "provides a formal way of organizing the evidence on the key effects – good and bad – of the various alternatives that should be considered in developing regulations"); see also Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L. J. 2255, 2259 (2002) (arguing that CBA can be "understood as a way of compiling relevant information").

<sup>178</sup> Circular A-4, *supra* note 10, at 2.

<sup>179</sup> Sunstein, *The Arithmetic of Arsenic*, *supra* note 177, at 2259 (arguing that even where "an assessment of costs and benefits cannot determine the appropriate regulatory outcome . . . the assessment is indispensable to informing the inquiry and to ensuring that discretion is exercised in a way that is transparent rather than opaque"); see also John Coates, *Toward Better Cost-Benefit Analysis: An Essay on Regulatory Management*, 78 LAW & CONTEMP. PROBS. 1, 5 (2015) ("Even if relevant costs and benefits cannot be reliably quantified, it is useful for a regulator—and potentially the public and other actors—to identify and analyze, as a theoretical matter, why a rule could be good or bad, for whom, and how.").

<sup>180</sup> Circular A-4, *supra* note 10, at 2.

the agencies seemed most focused on in reality (equity) and what Circular A-4 deems most important to analyze (efficiency).

The omission of distributional considerations from 12,866 analysis is not, however, unique to transfer rulemaking. Many scholars have more generally observed that, even though E.O. 12,866 and E.O. 13,563 recognize the potential relevance of “distributive impacts” and “equity” to regulatory decisionmaking, agencies rarely even prepare the “separate description of distributional effects” contemplated by Circular A-4, much less rely on it when choosing among regulatory alternatives.<sup>181</sup> In apparent response, the Biden administration has recently proposed updates to Circular A-4 for the express purpose of ensuring that 12,866 analyses “recognize distributive impacts and equity.”<sup>182</sup> Though the proposed revisions are not aimed specifically at transfer rules, might they nevertheless prevent repetition of the analytic missteps identified above? I consider this question in Part III.

### III. WHY PROPOSED REFORMS ARE HELPFUL BUT INSUFFICIENT

In Part I, I explained why the traditional justification for focusing only on efficiency in regulatory analysis does not hold for transfer rules: the argument that distributional concerns should be addressed by the tax-and-transfer system cannot excuse disregarding the distributional consequences of rules that are *part of* the tax-and-transfer system. But in recent years, “an increasing chorus of scholars” has challenged the efficiency-only approach even for prescriptive rulemaking.<sup>183</sup> These critics argue that it is unrealistic to expect Congress to adjust the tax-and-transfer system to correct for the undesirable distributional consequences of efficiency-focused regulations.<sup>184</sup>

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<sup>181</sup> See, e.g., Robinson et al., *supra* note 36, at 323 (reviewing “supporting analyses for 24 economically significant regulation issued over a four-year period that focus on improving health and longevity” and finding that they “pay relatively little attention to distribution”); Caroline Cecot & Robert W. Hahn, *Incorporating Equity and Justice Concerns in Regulation*, REG. & GOVERNANCE (2022) (reviewing 189 regulatory impact analyses prepared by agencies between October 2003 and January 2021 and finding that “virtually no agency prepares a distributional analysis that could help regulators evaluate whether a proposed regulation, on net advantages or disadvantages a particular group and whether an alternative could generate a preferred distributional outcome”); Revesz & Yi, *supra* note 34, at 62-63 (discussing additional literature on the prevalence of distributional analysis).

<sup>182</sup> Exec. Order No. 14,094 § 3, 88 Fed. Reg. 21,879 (Apr. 6, 2023); Proposed A-4 Update, *supra* note 62.

<sup>183</sup> Cecot, *supra* note 34, at 367.

<sup>184</sup> Revesz, *supra* note 56, at 1512 (arguing that “the gridlock that has bedeviled Congress over the last few decades makes it unlikely that the income tax system would be modified to address the negative distributional consequences of regulatory activity”); Liscow, *supra* note **Error! Bookmark not defined.**, at 501 (“Even without [a closely divided Congress], it is not reasonable to expect taxes and transfers to do all redistribution.”).

They note that, even if Congress is willing to act, the tax-and-transfer system is ill suited to address inequitable distribution of many regulatory effects, such as reductions in the risk of long-latency illnesses like cancer.<sup>185</sup> And they point out that distribution-blind cost-benefit analysis fails even on its own terms. That is, it does not achieve “true efficiency”—the maximization of social welfare—because it does not account for the fact that a dollar in regulatory costs imposed on a low-income person works a bigger welfare change than a dollar in regulatory costs imposed on a high-income person.<sup>186</sup>

These arguments have found a sympathetic ear in the Biden administration. In fact, on his very first day in office, President Biden issued a Presidential Memorandum on Modernizing Regulatory Review, which instructed the Director of the White House Office of Management and Budget (OMB), of which OIRA is a part, to

propose procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, [and] to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.<sup>187</sup>

The administration subsequently appointed two of the legal academy’s most prominent critics of distribution-blind cost-benefit analysis, Zachary Liscow

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<sup>185</sup> Revesz, *supra* note 34, at 1511-12 (“[P]erhaps the most important benefit of environmental, health, and safety regulation is the prevention of premature mortality, and the income tax system is poorly suited to deal with such distributional consequences that are not income-based.”); see also Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478 (2014) (“the tax-and-transfer system may be poorly equipped or unable to redistribute based on non-income characteristics important for welfare”).

<sup>186</sup> Cecot, *supra* note 34, at 368. For similar reasons, Zachary Liscow has contested the idea that any rule-driven inequities are likely to balance out over time, because subpopulations that are disproportionately harmed by some rules will disproportionately benefit from others. Liscow, *supra* note 93, at 1656. As noted earlier, cost-benefit analysis, at least in theory, values costs and benefits in accordance with the affected individual’s willingness to pay. A diminishing marginal utility of consumption means that richer people are “generally willing to pay more for the things that legal entitlements confer” (because each dollar is worth less to them). *Id.* Accordingly, distribution-blind cost-benefit analysis will systematically favor policies that disproportionately benefit the rich. *Id.* As Liscow acknowledges, this argument is complicated by the fact that, in practice, agencies often use “population averages of willingness to pay instead of disaggregating willingness to pay” by income. *Id.* 1689. For example, each agency uses a uniform figure when valuing reductions in the risk of premature death. Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 385 (2004).

<sup>187</sup> Modernizing Regulatory Review § 2(b)(ii), 86 Fed. Reg. 7223 (Jan. 20, 2021).

and Richard Revesz, to senior roles at OMB—with Liscow serving as Chief Economist and Revesz as OIRA Administrator.<sup>188</sup>

And in April 2023, Biden signed Executive Order 14,094, which instructs OMB to finalize revisions to Circular A-4 within a year.<sup>189</sup> Those revisions must, among other things, ensure that regulatory analyses “recognize distributive impacts and equity” where “practical,” “appropriate,” and “permitted by law.”<sup>190</sup> Simultaneous with the release of E.O. 14,094, OIRA released a draft update of Circular A-4 for public comment (Proposed A-4 Update).<sup>191</sup>

The obvious question, then, is whether the Proposed A-4 Update will resolve the analytic difficulties identified above. The short answer? Not fully. In this Part, I highlight some of the most notable transfer-rule-relevant changes that OIRA has proposed for Circular A-4. I then discuss their merits and limitations.

#### *A. Key Components of the Proposed A-4 Update*

For purposes of this Article, the Proposed A-4 Update does five notable things: it (1) acknowledges that transfer programs and the rules that implement them are often designed to promote distributional fairness; (2) authorizes an alternative accounting approach for transfers in which transfers are included in the agency’s primary assessment of costs and benefits rather than listed separately; (3) authorizes the use of distributional weights that reflect the diminishing marginal utility of income; (4) expressly recognizes transfers’ potential to induce both positive and negative behavioral changes; and (5) rejects the ideas that increased spending will always result in increased taxation and that increased taxation will always produce deadweight loss. I summarize each change in more detail below.

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<sup>188</sup> Professor Liscow Appointed Chief Economist at White House Budget Office, YLS TODAY (Aug. 24, 2022), <https://law.yale.edu/yls-today/news/professor-liscow-appointed-chief-economist-white-house-budget-office>; Richard Revesz confirmed as head of the White House OMB’s Office of Information and Regulatory Affairs, NYU LAW NEWS (Dec. 29, 2022), <https://www.law.nyu.edu/news/richard-revesz-oira-confirmation>.

<sup>189</sup> Exec. Order 14,094 § 3(b), 88 Fed. Reg. at 21,881.

<sup>190</sup> *Id.* § 3(a), 88 Fed. Reg. at 21,880.

<sup>191</sup> Request for Comments on Proposed OMB Circular No. A-4, “Regulatory Analysis,” 88 Fed. Reg. 20,915 (Apr. 7, 2023).

### 1. Acknowledgment that Fairness Is of Particular Relevance for Transfer Rules

As noted earlier, Circular A-4 briefly acknowledges that “promoting . . . distributional fairness” and “removing distributional unfairness” can be legitimate justifications for regulation.<sup>192</sup> The Proposed A-4 Update, though, significantly expands on this point and, in so doing, acknowledges the particular relevance of fairness considerations to transfer rules (though it does not use that term):

Regulations can play a key role in promoting distributional fairness and advancing equity. Such regulations are sometimes issued pursuant to statutes that reflect congressional determinations that advancing these goals serves a compelling public need. For example, some statutes create social welfare programs, such as Medicaid, Medicare, and the Supplemental Nutrition Assistance Program. Congress has enlisted agencies to implement these programs, including through agency regulations that help determine who is eligible for program benefits and what sorts of benefits they may receive under which circumstances.<sup>193</sup>

Thus, the Proposed A-4 Update recognizes that Congress creates at least some transfer programs for the express or implicit purpose of furthering distributional fairness and that Congress relies on agencies to implement these programs through regulation.

### 2. Creation of Alternative Accounting Approach for Transfers

Under the Proposed A-4 Update, the “default approach to analyzing transfers” is still to “exclude[] both sides of a transfer from [an agency’s] estimates of benefits and costs and provide[] a separate accounting of transfers.”<sup>194</sup> But the update also authorizes an “alternative approach” that accounts for transfers as part of an agency’s primary cost-benefit analysis:

An alternative approach that you may choose to adopt is to include one side of a transfer as a benefit and the other side of a transfer as a cost, such that the transfer is treated symmetrically in your estimate of net benefits. Under this approach, a larger transfer will result in larger

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<sup>192</sup> Circular A-4, *supra* note 10, at 4 (instructing an agency to explain, when identifying “the problem that it intends to address . . . whether the action is intended to address a significant market failure or to meet some other compelling public need” such as “promoting . . . distributional fairness”); *id.* (noting that “possible justifications” for regulation “include . . . removing distributional unfairness”).

<sup>193</sup> Proposed A-4 Update, *supra* note 62, at 19.

<sup>194</sup> *Id.* at 57.



benefits and larger costs and a smaller transfer will result in smaller benefits and smaller costs.<sup>195</sup>

OIRA notes that this alternative approach may “provide greater clarity in documenting the impacts on different parties”—i.e., greater clarity regarding the rule’s distributional effects.<sup>196</sup>

Additionally, for both the default approach and the alternative approach, OIRA emphasizes the importance of even-handed treatment. Thus, if an agency adopts the default approach, it “must, for consistency, *exclude* both sides of the transfer from [its] estimates of benefits and costs.”<sup>197</sup> Otherwise, its “estimate of net benefits will be incorrect.”<sup>198</sup> Conversely, if the agency adopts the alternative approach, it must “*include* both sides of a transfer in [its] accounting.”<sup>199</sup>

### 3. Introduction of Distributional Weights

The Proposed A-4 Update acknowledges that the “traditional approach” to calculating a regulation’s net benefits assumes “that a dollar is equal in value for each person, regardless of income (or other economic status).<sup>200</sup> But it gives agencies the option of instead applying “weights to the benefits and costs accruing to different groups in order to account for the diminishing marginal utility of goods.”<sup>201</sup> OIRA explains how to calculate the relevant weights and notes that analyses that use them can even be treated as a “*primary* estimate of net benefits,” though it discourages agencies from forgoing “traditionally-weighted estimates” altogether.<sup>202</sup>

In a footnote, however, OIRA offers an important caveat:

[C]alculating the income weighted sum of subgroup-specific net benefits is most useful when net transfers to government—if the analysis does not account for what such governments do with such transfers—are small relative to other effects, and thus the estimate of income weighted net benefits is relatively insensitive to the weighting applied to such transfers. Note that an appropriate weighting for effects

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<sup>195</sup> *Id.* at 59.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 57-58 (emphasis added).

<sup>198</sup> *Id.* at 58.

<sup>199</sup> *Id.* at 59 (emphasis added). OIRA thus seems determined to prevent repetition of the Trump-era manipulations described in Part II.

<sup>200</sup> *Id.* at 65.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* (emphasis added).

on government budgets depends on the use or source of funds, which will often be indeterminate in regulatory contexts.<sup>203</sup>

In other words, if a rule’s most significant effect is to increase or decrease transfers to or from the government, income-weighting is likely inadvisable. Why? Because an agency will, in most cases, have no reasonable basis for assigning a weight to the government’s side of the transfer. For a rule that raises (or reduces) revenue, the agency likely does not know how the collected money will be (or would have) been spent and thus does not know the income of the recipients.<sup>204</sup> And for a rule that increases (or cuts) spending, the agency likely does not know the manner in which the government will (or would have) funded that spending, and thus does not know the income of those who pay for it.<sup>205</sup>

#### 4. Express Recognition of Transfers’ Potential to Induce Behavioral Change

As discussed in Part I, the currently operative version of Circular A-4 makes vague reference to potentially “significant efficiency effects” of transfers without explaining what those might be.<sup>206</sup> The Proposed A-4 Update, by contrast, clearly recognizes that “[t]ransfers can induce important behavioral changes.”<sup>207</sup> It then gives two examples of transfer rules that

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<sup>203</sup> *Id.* at 66 n.114.

<sup>204</sup> As Daniel Hemel and Kyle Rozema have illustrated, it is extremely difficult to predict whether the expansion (or contraction) of a particular transfer program will ultimately have a progressive effect. Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 770 TAX L. REV. 667 (2017). Specifically, Hemel and Rozema show that a repeal of the mortgage interest deduction could either increase or reduce inequality depending on how Congress chose to reallocate the resulting revenue.

<sup>205</sup> The United Kingdom, which already uses income weights in cost-benefit analysis, simply assumes that all spending is funded by taxpayers of average income. HER MAJESTY’S TREASURY, THE GREEN BOOK: CENTRAL GOVERNMENT GUIDANCE ON APPRAISAL AND EVALUATION ch.11.A3 (2022), <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government>. It also assumes, however, that all individual spending decisions by agencies are made “in the context of pre-determined budgets” and can thus affect the distribution but not the magnitude of total spending. *Id.* In the United States, by contrast, transfer rules often affect the generosity of programs—like Medicaid, Medicare, and the student loan program—that are not subject to the annual appropriations process. See CONGRESSIONAL BUDGET OFF., MANDATORY SPENDING IN FISCAL YEAR 2022: AN INFOGRAPHIC (Mar. 28, 2023), <https://www.cbo.gov/publication/58889>. As a result, U.S. agency rules can affect the magnitude *and* distribution of total spending, which makes the actual source of funding a more relevant concern.

<sup>206</sup> Circular A-4, *supra* note 10, at 46.

<sup>207</sup> Proposed A-4 Update, *supra* note 62, at 60.

would have such an effect (though, again, it does not use the phrase “transfer rule”). In the first, the behavioral change is of ambiguous desirability:

For example, consider a regulation that increases payments to recipients of a public benefits program available only to retired individuals by five percent. The most straightforward impact of this regulation is a transfer to these recipients. In addition, this regulation might have important implications for retirement decisions for individuals eligible for the public benefits program. This, in turn, could have broad impacts across the labor market, with potentially large implications for the benefits and costs of the regulation.<sup>208</sup>

In other words, the provision of more generous retirement benefits might induce some eligible recipients to retire earlier than they would have in the policy’s absence, which could in turn affect the composition and size of the remaining labor force, which could in turn affect income tax revenues, and so on.<sup>209</sup> OIRA suggests that a “full analysis of this regulation” would incorporate such behavioral effects “if feasible,” but it gives no indication of whether, on net, the changes would be considered welfare reducing or enhancing.<sup>210</sup>

In the Proposed A-4 Update’s second example, the behavioral changes induced by transfers are more clearly desirable:

[C]onsider a regulation that implements a new Federal spending program in a market characterized by some distortion, such as a positive externality. The payment amount may be most readily categorized as a transfer. This effect would be accompanied by external benefits, that is, benefits experienced by individuals not directly receiving payments.<sup>211</sup>

Here, the government is subsidizing a good with a positive externality—i.e., a beneficial effect enjoyed by “people not involved in [the good’s] production or consumption.”<sup>212</sup> Thus, to the extent that the rule’s transfers incentivize an increase in aggregate consumption of the good, they will also yield an increase in the external benefits associated with its consumption.

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<sup>208</sup> *Id.*

<sup>209</sup> See, e.g., Nat’l Bureau of Econ. Research, *Social Security and Early Retirement*, THE DIGEST, No. 12 (Dec. 2005), <https://www.nber.org/digest/dec05/social-security-and-early-retirement> (“Early retirement increases expenditures by increasing the number of retirees. It also reduces the tax revenues generated by people in the labor force.”).

<sup>210</sup> Proposed A-4 Update, *supra* note 61, at 60.

<sup>211</sup> *Id.*

<sup>212</sup> Boardman et al., *supra* note 93, at 91.

### 5. Rejection of the Idea that Additional Spending Necessarily Causes Future Taxation-Related Social Costs

Finally, OIRA rejects the idea—not expressly stated in Circular A-4 but endorsed by OIRA and OMB in other documents<sup>213</sup>—that rules that increase spending will necessarily cause future costs in the form of deadweight loss associated with taxation.

On the one hand, the Proposed A-4 Update recognizes that “[r]egulations that affect net transfers from the government will lead to changes in the Federal debt, taxes or other revenues, or government spending.”<sup>214</sup> It also concedes that, “[a]s governmental transfers make up a larger share of a regulation’s total effects, partial estimation of that regulation’s net benefits—i.e., estimates that do not account for resulting changes to the Federal debt, taxes, or government spending—becomes increasingly less informative.”<sup>215</sup>

But OIRA nevertheless discourages agencies from attempting to account for the efficiency effects of federal spending by applying “a factor known as the marginal cost of public funds” (MCPF), which is meant to reflect the “distortionary cost of taxation.”<sup>216</sup> Such distortionary costs, OIRA explains, reflect actions that people take to “avoid paying tax, such as choosing to work fewer hours, sheltering more income from tax using available deductions, or hiring a tax lawyer to set up trusts to minimize tax liabilities.”<sup>217</sup>

OIRA gives several reasons not to use the MCPF “in analysis of individual regulations” associated with spending programs.<sup>218</sup> First, the regulations do not *themselves* “make offsetting changes to tax policy”:

For example, if a regulation would increase Medicare spending by some amount but would not directly affect the tax system, applying a marginal cost of public funds in the primary analysis may inappropriately express false certainty about the attribution to the Medicare regulation of effects of an assumed change in tax rates. In practice, these two policies (i.e., changes to Medicare, and changes to tax rates) may not be correlated at all.<sup>219</sup>

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<sup>213</sup> See, e.g., Office of Mgmt. & Budget, Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs 13 (Oct. 29, 1992) (Circular A-94 governs cost-benefit analysis of federal programs in contexts other than regulatory review, such as the annual agency budgeting process).

<sup>214</sup> Proposed A-4 Update, *supra* note 62, at 60.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 60-61.

Second, even if it were fair to assume that all spending increases yield future tax increases, it is not clear that all future taxes will cause the distortionary costs described above:

The benefits and costs of behavioral responses to taxation will vary with the form of taxation enacted; for example, taxation of a negative externality may produce behavioral responses with substantial net social benefits.<sup>220</sup>

In other words, taxation may, in some cases, reduce deadweight loss rather than increase it. Finally, OIRA notes that future taxation may have distributional benefits that partially or fully offset any distortionary costs.<sup>221</sup>

### *B. The Update's Implications for Transfer Rules*

Assuming these revisions are finalized, how will they change things on the ground for agencies issuing transfer rules? On the one hand, agencies will now be permitted (but not required) to include transfers as offsetting costs and benefits in their primary cost-benefit analyses, rather than having to discuss them separately and imply, as a result, that they are of secondary concern. On the other hand, even if characterized as costs and benefits, the two sides of a transfer will still sum to zero and thus still have no quantitative effect on the agency's assessment of net benefits—*unless* the agency also uses income-based distributional weights.

But the Proposed A-4 Update discourages the use of weights for rules with net effects on total federal revenue or spending. Weighting would thus remain inapplicable to all three of the rules discussed in Part II. Additionally, even for transfer rules that affect the distribution of federal spending without also affecting its magnitude, an agency's distributional concerns may focus on characteristics other than income, such as geography, and thus not be addressable with income-based weights. Thus, to the extent that agencies are issuing transfer rules for distributional reasons, they may need to make a largely or entirely qualitative case for their preferred policy's distributional desirability.

But as discussed in Part I, agencies already implicitly had that option under the old Circular A-4. They just consistently declined to *use it*, as discussed in Part II. Are they any more likely to choose this route under the Proposed A-4 Update?

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<sup>220</sup> *Id.* at 61.

<sup>221</sup> *Id.* at 61 (citing Bas Jacobs, *The Marginal Cost of Public Funds Is One at the Optimal Tax System*, 25 INT'L TAX AND PUB. FIN. 883 (2018)).

Arguably, the Proposed A-4 Update gives a purely distributional justification for transfer rules greater legitimacy by recognizing that Congress established social welfare programs like Medicaid, Medicare, and the Supplemental Nutritional Assistance Program (SNAP) to “promot[e] distributional fairness” and “advanc[e] equity.”<sup>222</sup> But OIRA does not acknowledge that agencies issuing rules governing eligibility standards and benefit parameters for such programs will be called upon to exercise their own judgment as to the relative fairness of multiple, otherwise lawful regulatory alternatives (just as agencies are often called upon to exercise qualitative judgment as to the relative efficiency of multiple design options for prescriptive standards<sup>223</sup>). In other words, the Proposed A-4 Update recognizes the relevance of fairness to transfer rulemaking but not agencies’ role in determining what fairness *means*.

As for justifying transfer rules on efficiency grounds, the Proposed A-4 Update does not expressly reject the notion that administrative cost savings alone can justify transfer rules. It does, however, suggest that “[a]s governmental transfers make up a larger share of a regulation’s total effects,” net-benefits estimates that “do not account for resulting changes to the Federal debt, taxes, or government spending” become “increasingly less informative.”<sup>224</sup> In other words, a finding of net benefits based entirely on administrative cost savings is not a good indicator of a rule’s efficiency when those savings are accompanied by large changes in transfers that the analysis treats as a wash.

Finally, while the Proposed A-4 Update much more clearly recognizes that transfers can have positive behavioral consequences, it does not provide agencies much new help in resolving the attendant uncertainties. OIRA notes that its hypothetical rule increasing the generosity of a retirement benefit “could have broad impacts across the labor market, with potentially large implications for the benefits and costs of the regulation,”<sup>225</sup> but it does not explain what those impacts or implications would be. It simply suggests that

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<sup>222</sup> *Id.* at 19. The Proposed A-4 Update also recognizes that an agency’s “description of the need” for the regulation should “inform[] the scope” of its regulatory analysis. *Id.* at 15. While subtle, this point could, in theory, discourage analyses like that prepared for the Streamlining Rule discussed in Part II, in which CMS made a glancing reference to “health equity” in its introductory paragraph on the need for the regulation but did not, in its assessment of costs and benefits, offer any discussion of how it defined health equity or why the rulemaking furthered that goal. See *supra* text accompanying note 141.

<sup>223</sup> This is true even when all relevant social costs and benefits can be quantified, because the quantification process requires agencies to make judgment calls about various modeling assumptions.

<sup>224</sup> Proposed A-4 Update, *supra* note 62, at 60.

<sup>225</sup> *Id.*

a “full analysis” of the rule would incorporate “estimates” of their value “if feasible.”<sup>226</sup> But is such estimation ever likely to be feasible? The Proposed A-4 Update’s discussion of the MCPF suggests that the sign and magnitude of one potentially relevant effect—the social cost of future tax increases or spending cuts that result from increased present spending on the retirement plan—are essentially unknowable. Does this mean that an agency simply cannot reach a conclusion as to the net efficiency effects of any rule that increases or decreases total government spending or revenue? Or does it mean only that the agency cannot reach a *quantitative* conclusion as to those net efficiency effects?

In sum, while the Proposed A-4 Update might discourage transfer-rule analyses that focus entirely on administrative costs, it seems unlikely to yield many analyses that thoroughly discuss a transfer rule’s equity implications or that reach firm conclusions as to the costs and benefits of a transfer rule’s indirect behavioral consequences.

#### IV. WHERE TO GO FROM HERE

In this final Part, I explore possibilities for further reform of transfer-rule analysis. Fully exempting transfer rules from OIRA review, while legally permissible, is inadvisable for both pragmatic and normative reasons. Instead, OIRA should issue new, transfer-rule-specific guidance that better recognizes the particular relevance of distributional concerns in transfer rulemaking and the particular challenges of assessing transfer rules’ efficiency consequences.

##### *A. The Case Against Full Exemption*

If the version of E.O. 12,866 analysis embodied in the current Circular A-4 is a poor fit for transfer rules and the version of 12,866 analysis embodied in the Proposed A-4 Update is a poor fit for transfer rules, one might reasonably wonder: why bother with E.O. 12,866 analysis for transfer rules at all?

A President can, to be sure, change the official reach of E.O. 12,866 with the stroke of a pen. President Biden already did so once by issuing E.O. 14,094, which doubled the monetary threshold for economic significance under 12,866 and thus reduced the number of rules required to undergo OIRA’s most stringent level of review.<sup>227</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> See *supra* notes 65-67 and accompanying text.

Furthermore, because E.O. 12,866 is not judicially enforceable,<sup>228</sup> the White House can also *unofficially* modify the order's reach through acquiescence—that is, by simply allowing agencies to forgo submitting certain rules for OIRA review. As noted earlier, OIRA and the Treasury Department have long agreed to exempt essentially all IRS tax rules from 12,866 review, even though the order's text, fairly read, requires review of any IRS rule with \$100 million or more in annual revenue impacts.<sup>229</sup> The exemption was partially abandoned in 2018 but restored in 2023.<sup>230</sup>

Chye-Ching Huang of New York University School of Law's Tax Law Center has praised the 2023 restoration for “reliev[ing] the broader regulatory modernization project of having to try to fit the square tax peg into the round Circular A-4 hole.”<sup>231</sup> Huang faults Circular A-4 for failing to “treat tax revenues as a benefit, despite revenue being the tax system's primary goal.”<sup>232</sup> She also points out that Circular A-4 places “an analytical thumb on the scale of regulations that los[e] revenue but save[] compliance costs” for tax filers by, say, reducing time spent on tax avoidance strategies.<sup>233</sup>

As already discussed at length in this Article, very similar criticisms apply to Circular A-4-compliant analysis of spending rules and revenue-raising rules issued by agencies other than the IRS, like the Department of the Interior's Valuation Rule discussed in Part II. So, why not also relieve the Biden administration's modernization project of *those* square pegs?

Fully exempting transfer rules from OIRA review would be inadvisable for two reasons. The first is that exemption would not necessarily relieve agencies of the obligation to assess such rules' economic impacts but might increase the risk that their assessments will be deemed arbitrary and capricious by a reviewing court.

In *Michigan v. EPA*, the Supreme Court observed that “reasonable regulation ordinarily requires paying attention to the advantages *and* the

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<sup>228</sup> Exec. Order 12,866 § 10, 85 Fed. Reg. at 51,744 (“This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”).

<sup>229</sup> See Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 652 (2017) (explaining why the IRS's claimed exemption from E.O. 12,866 “is questionable”).

<sup>230</sup> See 2018 Tax MOA, *supra* note 38; 2023 Tax MOA, *supra* note 38; Huang, *supra* note 64.

<sup>231</sup> Huang, *supra* note 64.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*



disadvantages of agency decisions.”<sup>234</sup> Though the decision’s full implications remain in dispute, some contend that it implicitly reads a default cost-benefit requirement into the Administrative Procedure Act itself.<sup>235</sup> And while *Michigan* involved a challenge to a prescriptive rule, some courts have applied its reasoning to transfer rules.<sup>236</sup> Thus, courts may demand that agencies assess their transfer rules’ economic impacts even if the President does not. In such circumstances, it is useful for agencies to have common guidance that they can look to when preparing their analyses—and that they can point to in court as demonstrating the reasonableness of their approach.

Compliance with OIRA guidance does not, to be sure, immunize an agency’s rule against an arbitrary-and-capricious challenge.<sup>237</sup> But courts nevertheless look to OIRA for evidence of analytic best practices. For example, in a 2008 decision finding that the National Highway Traffic Safety Administration had arbitrarily failed to monetize the value of carbon reductions in a cost-benefit analysis for vehicle efficiency standards, the Ninth Circuit made a point of noting “that guidance from the Office of Management and Budget provides that agencies are to monetize costs and

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<sup>234</sup> *Michigan v. EPA*, 576 U.S. 743, 753 (2015); *see also id.* at 2707 (“No regulation is ‘appropriate’ if it does significantly more harm than good.”); *id.* (“Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate.”).

<sup>235</sup> Sunstein, *supra* note 40, at 14 (arguing that *Michigan* “at a minimum . . . implicitly requires agencies to weigh costs against benefits, at least in some sense”); Paul R. Noe & John D. Graham, *The Ascendancy of the Cost-Benefit State?*, 5 ADMIN. L. REV. ACCORD 85, 114 (2020) (arguing that, post-*Michigan*, “[o]nce it is clear that an agency has authority to use [cost-benefit analysis] . . . the failure to do so is arbitrary, absent a clear contrary statutory instruction or a compelling non-arbitrary explanation”). *But see* Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 977-79 (2018) (agreeing “that CBA is becoming a generic, judicially imposed requirement for regulation” but disputing that *Michigan* links this requirement to arbitrary and capricious review under the APA); Amy Sinden, *A Cost-Benefit State: Reports of Its Birth Have Been Greatly Exaggerated*, 46 ENV’T L. REP. 10,933, 10,933 (“It is not entirely clear that *Michigan* articulated a pro-cost presumption at all, but to the extent it did, that presumption can be read to exclude or at least de-emphasize formal CBA.”); Adrian Vermeule, *Does Michigan v. EPA Require Cost-Benefit Analysis?*, NOTICE & COMMENT BLOG, YALE J. ON REG. (Feb. 6, 2017) (arguing that *Michigan* only “preclude[s] one-sided decisionmaking” and “explicitly disavow[s] any requirement that costs and benefits must be quantified”), <https://www.yalejreg.com/nc/does-michigan-v-epa-require-cost-benefit-analysis-by-adrian-vermeule/>.

<sup>236</sup> *See, e.g.*, *Council of Parent Attorneys and Advocates, Inc. v. Devos*, 365 F.Supp.3d 28, 53 (D.D.C. 2019); *California v. HHS*, 473 F.Supp.3d 992, 1003 (N.D. Cal. 2020).

<sup>237</sup> *Louisiana v. Biden*, No. 22-30087, 2022 WL 866282, at \*1 (5th Cir. Mar. 16, 2022) (“Compliance with Circular A-4 is not required by any statute or regulation and is not binding on any agency.”)

benefits whenever possible.”<sup>238</sup> Similarly, in a 2022 decision rejecting a challenge to the Fish and Wildlife Services’ assessment of the economic impacts of a critical habitat designation under the Endangered Species Act, the Tenth Circuit observed that the challengers’ preferred analytic approach would “be inconsistent with OMB guidance.”<sup>239</sup>

The notion that complying with OIRA guidance can mitigate cost-benefit-related legal risk finds further support in the decisions of multiple independent agencies, which are expressly exempt from the E.O. 12,866 review process, to model their internal cost-benefit guidance on Circular A-4. For example, the Securities and Exchange Commission’s (SEC) “Current Guidance on Economic Analysis in SEC Rulemakings,” which the Commission adopted in 2012 after the D.C. Circuit vacated three of its rules on cost-benefit grounds, expressly notes that it “draws on principles” from the Circular.<sup>240</sup> The Commodities Futures Trading Commission similarly broadcasts that its “staff guidance for the consideration of costs and benefits in rulemaking is informed by OIRA’s guidance for the conduct of cost-benefit analyses as well as the practices of other federal agencies.”<sup>241</sup>

The second reason for not giving up on E.O. 12,866 analysis of transfer rules is simpler: cost-benefit analysis *can* provide useful transparency regarding a transfer rule’s expected consequences. When an agency makes significant, discretionary changes to a federal revenue or spending program, there is value in forcing the agency to recognize any potential “disadvantages” of its preferred course of action and to clearly explain why

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<sup>238</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 n.48 (9th Cir. 2008).

<sup>239</sup> *Northern N.M. Stockman’s Ass’n v. U.S. Fish & Wildlife Serv.*, 30 F. 4th 1210, 1226-27 (10th Cir. 2022); *see also* *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior*, 344 F. Supp. 2d 108, 130 (D.D.C. 2004) (finding that an agency has used “a reasonable method for assessing the actual costs” of a regulatory decision where that method reflected “precisely the advice that [OMB] gives to federal agencies” in Circular A-4).

<sup>240</sup> Memorandum from RSFI and OGC to Staff of the Rulewriting Divisions and Offices on Current Guidance on Economic Analysis in SEC Rulemakings 4 (Mar. 16, 2012), [https://www.sec.gov/divisions/riskfin/rsfi\\_guidance\\_econ\\_analy\\_secrulemaking.pdf](https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf); JACK LIENKE & ALEXANDER SONG, *ASSESSING THE COSTS AND BENEFITS OF MANDATORY CLIMATE RISK DISCLOSURE* 3-8 (Inst. for Pol’y Integrity 2022), <https://policyintegrity.org/publications/detail/assessing-the-costs-and-benefits-of-mandatory-climate-risk-disclosure> (summarizing the D.C. Circuit decisions that prompted the SEC to adopt the guidance).

<sup>241</sup> Memorandum of Understanding from the Office of Information and Regulatory Affairs and the U.S. Commodity Futures Trading Commission (May 9, 2012), [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/oira\\_cftc\\_mou\\_2012.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/oira_cftc_mou_2012.pdf).

they are, in its view, justified by “advantages.”<sup>242</sup> The operative definitions of “advantage” and “disadvantage” simply need to be broad enough to encompass the distributional consequences that are so central to a transfer rulemaking. Put another way, if transfer rules cannot fit into a round analytic hole, OIRA should build them a square one.

### *B. The Rough Contours of a Bespoke Approach*

In a 2020 article, Bridget Dooling introduced the concept of “bespoke regulatory review.”<sup>243</sup> Dooling pointed to the 2018 Tax Agreement as demonstrating that OIRA review “is not one-size fits all and can instead be tailored to suit the unique features of an agency.”<sup>244</sup> But the 2018 Tax Agreement could just as easily stand for the proposition that OIRA review can be tailored to suit the unique features of a *type of rulemaking*, even if the type in question is issued by more than one agency. Indeed, OIRA itself recognized in its 1996 best practices document that transfer rules might “call for a different form of regulatory analysis” than one focused primarily on calculating net benefits.<sup>245</sup> It just never explained what that alternative form would be.

Below, I sketch the rough contours of bespoke analytic guidance for transfer rules (“Transfer Rule Guidance”). Specifically, I discuss four things that the Transfer Rule Guidance should do that Circular A-4 and the Proposed A-4 Update do not: (1) define “transfer rule”; (2) acknowledge the centrality of transfers to transfer-rule analysis; (3) recognize the legitimacy of qualitative assessments of distributional fairness; and (4) provide instruction on assessing transfer rules’ indirect efficiency consequences.

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<sup>242</sup> *Michigan*, 576 U.S. at 753; *see also* Coates, *supra* note 179, at 5 (cost-benefit analysis “remains the best available overarching conceptual framework for organizing and communicating the pros and cons of a proposed regulation”); Jed Stiglitz, *The Reasoning State: Theory, Interpretation, and Evidence*, NOTICE & COMMENT BLOG, YALE J. ON REG. (Dec. 9, 2022), <https://www.yalejreg.com/nc/symposium-stiglitz-reasoning-state-09/> (arguing that the administrative state’s distinctive “ability to credibly reason is central to its political value as an institution and therefore to the continued viability of delegated authority and state capacity”). *But see generally* Mathilde Cohen, *Reasons for Reasons*, in APPROACHES TO LEGAL RATIONALITY, LOGIC, EPISTEMOLOGY, AND THE UNITY OF SCIENCE, VOL. 20 (Dov M. Gabbay et al., eds., Springer, 2010) (interrogating some of the traditional rationales for judicial and administrative reason-giving).

<sup>243</sup> *See* Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673, 674 (2020).

<sup>244</sup> *Id.*

<sup>245</sup> 1996 Best Practices Document, *supra* note 76.

### 1. Define “Transfer Rule”

As discussed in Part I, even though OIRA has always recognized transfer rules as a distinct regulatory category in annual reports to Congress on the costs and benefits of federal regulation, it does not use or define that term in Circular A-4 (or the Proposed A-4 Update). The Transfer Rule Guidance should provide such a definition.

OIRA’s most recent Congressional report defines a transfer rule as one “that primarily cause[s] income or wealth transfers,”<sup>246</sup> but the meaning of “primarily” is somewhat ambiguous. Does it mean that changes in transfers must be the *most direct* effect of the rule or the *largest* effect of the rule? If the latter, does the effect have to be quantified to count? Might transfers sometimes be a rule’s largest quantified effect but still not the rule’s primary effect? Conversely, might transfers sometimes be a rule’s primary effect even if they are not its largest quantified effect?<sup>247</sup>

To avoid confusion, the Transfer Rule Guidance should define a transfer rule as one that meets one or both of two criteria: (1) the rule establishes or changes implementing regulations for a government spending or revenue program, or (2) transfers are, in the agency’s view, the rule’s most significant anticipated effect. The first criterion would provide an easily implemented bright line for agencies and ensure that the Transfer Rule Guidance applies to the most common type of transfer rule—those that govern the operation of government transfer programs (such as all three of the examples in Part II).<sup>248</sup> The second criterion would reach two additional types of transfer rule—those that cause entirely private transfers and those that significantly affect government transfer programs without changing the implementing regulations for the programs themselves.<sup>249</sup>

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<sup>246</sup> 2018, 2019 & 2020 OIRA Report, *supra* note 22, at 3.

<sup>247</sup> *See, e.g.*, CMS, Medicaid Fiscal Accountability Regulation, 84 Fed. Reg. 63,722, 63,773 (proposed Nov. 18, 2019) (proposing significant changes to regulations governing state Medicaid programs but deeming the resulting “fiscal impact on the Medicaid program” too uncertain to quantify).

<sup>248</sup> 2018, 2019 & 2020 OIRA Report, *supra* note 22, at 3 (“Most transfer rules implement Federal budgetary programs as required or authorized by Congress, such as rules associated with the Medicare Program and the Federal Pell Grant Program.”).

<sup>249</sup> For an example of the former, *see* Dep’t. of Transp., Airline Ticket Refunds and Consumer Protections, 87 Fed. Reg. 51,550 (proposed Aug. 22, 2022). For an example of the latter, *see* Dep’t of Homeland Security, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

## 2. Recognize the Centrality of Transfers to Transfer-Rule Analysis

The Transfer Rule Guidance should clearly recognize what the current Circular A-4 does not: in a transfer-rule analysis, transfers matter. If an agency is issuing a rule that changes who pays for or benefits from a government revenue or spending program (or a rule that changes the degree to which some people pay or benefit), the agency cannot sidestep the questions of whether and why that distributional change is desirable.

Returning to an example from Part II, this means that, under the Transfer Rule Guidance, the Department of the Interior could not justify its Valuation Rule simply by pointing to \$3.6 million in annual, rule-driven administrative cost savings. Instead, the Department would need to explain why—as a matter of distributional fairness, economic efficiency, or both—the \$70 to 85 million in additional royalty payments expected to result from the rule were *also* desirable.<sup>250</sup> Or, if Interior did not believe that the royalty increases were desirable, it would need to explain why the \$3.6 million in administrative cost savings *outweighed* the negative distributional and/or efficiency consequences of the increased royalty payments.

## 3. Recognize the Legitimacy of Qualitative Evaluations of Transfers’ Distributional Fairness

As discussed in Part III, income-based distributional weights will be inapplicable to many transfer rules, either because the rules cause a change in the total magnitude of government revenue or spending or because the agency is concerned about distribution along a dimension other than income.<sup>251</sup> Thus, in quantitative terms, the two sides of a transfer will still, more often than not, sum to zero. The Transfer Rule Guidance should expressly recognize that an agency may nevertheless deem a transfer rule distributionally desirable, so long as it qualitatively explains the reasoning behind its judgment.

Again, it is useful to consider this recommendation in the context of an example from Part II. For the Streamlining Rule, income-based weights would be unavailable, even under the Proposed A-4 Update, because the rule

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<sup>250</sup> Importantly, this framework does not contemplate that agencies will *always* justify transfer rules on fairness grounds. For example, an agency might offer a traditional efficiency rationale when issuing implementing regulations for a clean-energy subsidy program (i.e., that clean-energy production generates positive externalities in the form of pollution reduction). My proposed framework simply makes clear that an agency *may* put forth a purely distributional justification for a transfer rule (so long as the justification is not inconsistent with a relevant statutory mandate).

<sup>251</sup> See *supra* Part III.A.3.

was expected to significantly increase total federal and state spending on Medicaid and CHIP.<sup>252</sup> But the Transfer Rule Guidance would encourage HHS to qualitatively elaborate on its contention that the rule would further “health equity.”<sup>253</sup> For instance, one significant driver of additional Medicaid spending under the rule was the elimination of a “more burdensome” renewal process that has previously applied to Medicaid participants whose eligibility stemmed from a characteristic other than income, such as a disability.<sup>254</sup> HHS could explain why, in its view, these procedural barriers resulted in inequitable access to coverage.

Income-based weights would similarly be inapplicable to the Borrower Defense Rule—not just because ED could not determine who would ultimately pay for rule-driven loan discharges, but also because ED conceded that it could not predict the incomes of the student borrowers who would receive the discharges.<sup>255</sup> ED could nevertheless have explained why it thought the increased discharges prompted by the rule represented a fairer distribution of resources than the status quo. Importantly, such an argument would need to address not just why it was fairer, in ED’s eyes, for a school that engaged in misconduct to bear responsibility for its defrauded students’ loans but also why, in cases where recovery from the responsible school was unavailable, it was fairer for *the government* to bear responsibility for the loans.<sup>256</sup> ED could argue, for example, that the government implicitly legitimized these institutions by allowing them to participate in the federal loan program and should, as a result, have more proactively monitored their marketing and recruitment activities. A rule finalized not long before the Borrower Defense Rule sought to do just that for for-profit schools and non-degree certificate programs at nonprofit schools.<sup>257</sup>

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<sup>252</sup> Streamlining Rule, 87 Fed. Reg. at 54,838.

<sup>253</sup> *Id.* at 54,833

<sup>254</sup> *Id.* at 54,781; *id.* at 54,836 tbl.8 (estimating impacts of rule provisions designed to assist with “gaining and maintaining Medicaid funding”).

<sup>255</sup> Final 2016 BD Rule, 81 Fed. Reg. at 76,051 (“We have limited experience with borrower defense claims to draw upon in generating a profile of those likely to make successful claims.”).

<sup>256</sup> Notably, the uncertainty that makes quantitative distributional weights inapplicable to transfer rules that increase (or decrease) total government spending would also be relevant here. That is, ED would need to explain why it believed that loan discharges were fair notwithstanding its uncertainty regarding the relative incomes of those who would receive the discharges and those who would ultimately pay for them.

<sup>257</sup> See ED, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,889, 64,890 (Oct. 31, 2014) (addressing concerns regarding “aggressive and deceptive marketing and recruiting practices” by establishing new eligibility criteria and disclosure requirements for certain institutional participants in the federal loan program).

#### 4. Provide Instruction on Assessing Transfer Rules' Indirect Efficiency Consequences

The Transfer Rule Guidance should also provide additional instruction on assessing transfer rules' indirect efficiency consequences (i.e., those associated with transfer-induced behavioral changes). In particular, OIRA should acknowledge the challenges of fully quantifying such effects and provide a clearer indication of what adequate consideration looks like given the relevant uncertainties.

For instance, OIRA's discussion of the Marginal Cost of Public Funds in the Proposed A-4 Update already implies that an agency will almost never be able to quantify the net efficiency effects of a transfer to or from the government, due to the indeterminacy of the ultimate use or source of funds. If this is indeed OIRA's view, the Transfer Rule Guidance should make the point explicit.<sup>258</sup>

The Transfer Rule Guidance should also expressly recognize that quantifying the costs and benefits of transfer-driven behavioral changes can be very difficult even when a rule does *not* affect the total magnitude of government revenue or spending under a given program. For example, in 2021, HHS repealed Trump-era restrictions on participation in the Title X family planning program—for which spending is fixed through annual Congressional appropriations.<sup>259</sup> In its E.O. 12,866 analysis, HHS quantified a variety of projected impacts of the repeal, including: the increase in the number of clients who would receive contraception through the Title X program; the increase in the number of clients who would receive clinical breast exams and Pap tests through the program and the percentage of those exams and tests that would result in a referral for further treatment; and the number of clients who would receive various types of STI testing through the program and the percentage of those tests that would yield positive results.<sup>260</sup> However, because some of these services might, absent repeal, be received “through other channels than Title-X-funded sites,” HHS could not

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<sup>258</sup> If this is not OIRA's view, it should explain how an agency *could* reaching a quantitative conclusion that an increase or decrease in federal revenue or spending is net beneficial.

<sup>259</sup> Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56,144, 56,175 (Oct. 7, 2021) (explaining that “total Title X funding remained unchanged upon issuance of the [Trump restrictions] and will be unchanged as a result of this final rule, so while some entities receive less funding . . . other entities receive more funding”). First established by the Public Health Service Act in 1970, Title X authorizes HHS to provide grants to nonprofits and state and local governments “to assist in the establishment and operation of voluntary family planning projects,” which must prioritize services for “persons from low-income families. 42 U.S.C. §§ 300(a), 300a-4(c)(1).

<sup>260</sup> 86 Fed. Reg. at 56,172-74 (Oct. 7, 2021).

“disaggregate[e] the effects that represent transfers from effects that represent benefits and costs.”<sup>261</sup> For example, if an STI test administered at a Title X site due to the repeal would otherwise have been administered at a different site, then HHS’s expenditure on the test was a transfer to whoever would have paid for it at the other site.<sup>262</sup> If, on the other hand, the test would have been entirely forgone absent the repeal, then it represented real benefits and costs.<sup>263</sup> In part because of this uncertainty regarding the additionality of care provided under the Title X program, HHS could not estimate the repeal’s aggregate costs or benefits.

Uncertainty regarding indirect behavioral consequences is not, to be clear, unique to transfer rules. The indirect behavioral consequences of prescriptive rules are also often very hard to predict.<sup>264</sup> But unlike prescriptive rules, transfer rules have almost no *direct* costs and benefits. Thus, while an agency issuing a prescriptive standard can often provide a partial net-benefits estimate based on direct effects,<sup>265</sup> agencies issuing transfer rules typically cannot estimate the aggregate value of any costs or benefits (except changes in administrative costs).<sup>266</sup>

This uncertainty cannot excuse ignoring potential behavioral consequences altogether. On the contrary, the Trump administration repeatedly ran into trouble in court for failing to consider likely indirect harms of its transfer rules. For instance, a United States Department of Agriculture (USDA) effort to reduce SNAP eligibility among adults without children was vacated for, among other things, failing to consider the cuts’

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<sup>261</sup> *Id.* at 56,175.

<sup>262</sup> *Id.* at 56,174 (explaining that the repeal would result in transfers to the extent that “Title X newly funds medical services that would” otherwise “be provided by charitable organizations or other private payers”).

<sup>263</sup> *Id.* (explaining that the repeal would result in “societal benefits and costs to the extent that the volume or characteristics . . . of medical services would differ with and without” it).

<sup>264</sup> For example, it can be difficult to predict what share of the costs of compliance with a pollution standard will be passed through to consumers in the form of higher prices. It can similarly be difficult to predict how consumers will adjust their consumption in response to those price changes.

<sup>265</sup> *See, e.g.*, U.S. ENV’T PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL CROSS-STATE AIR POLLUTION RULE 2 (June 2011), <https://www.epa.gov/csapr/regulatory-impact-analysis-final-cross-state-air-pollution-rule> (providing a net-benefits calculation but noting that its “model does not estimate indirect impacts associated with a regulation such as this one”); *id.* at 273 (explaining that its model does not account for “consumer reaction to electricity prices”).

<sup>266</sup> Sunstein, *supra* note 7, at 1869 (explaining that RIAs “for budgetary transfer rules . . . typically outline only the budgetary costs and do not discuss social costs and benefits” because the latter “challenging to measure”).



“second order impacts on health and local economies.”<sup>267</sup> And the Department of Homeland Security’s (DHS) “public charge” rule—which made it harder for immigrants to get green cards if DHS deemed them likely future recipients of federal health, housing, or nutritional assistance—was enjoined in the Seventh Circuit due, in part, to DHS’s failure to “adequately . . . grapple” with comments regarding potential “collateral consequences” of rule-driven disenrollment from Medicaid, such as “reduce[d] access to vaccines and other medical care.”<sup>268</sup>

But OIRA could give agencies (and the courts) a clearer indication of what constitutes adequate grappling with a transfer rule’s behavioral consequences. For instance, the Transfer Rule Guidance could elaborate on OIRA’s retirement-benefit-rule example from the Proposed A-4 Update—providing a more detailed description of what behavioral changes might result from such a rule, what costs and benefits might be associated with those behavioral changes, and how an agency could go about quantifying or qualitatively describing those costs and benefits in acceptable detail. Additionally or alternatively, if OIRA is aware of past transfer-rule analyses that include particularly robust assessments of indirect behavioral consequences, it should consider pointing agencies to them as analytic models.

Finally, the Transfer Rule Guidance should make clear that uncertainty about a transfer rule’s efficiency consequences does not bar an agency from proceeding with the rule on distributional grounds—so long as the agency explains why it believes the rule will promote distributional fairness, acknowledges any potentially countervailing costs, and considers available data on their likelihood and magnitude.

#### CONCLUSION

There is a difference between increasing spending on a social welfare program by \$10 million and decreasing spending on that program by \$10 million. But for several decades, the White House has encouraged agencies to pretend otherwise in their regulatory cost-benefit analyses.

This feigned indifference to the distributional consequences of intentionally redistributive rules serves no one. If, as experts have long acknowledged, the Circular A-4 standard of “good regulatory analysis” is both inappropriate and unworkable for transfer rules, then OIRA should make clear what good analysis for a transfer rule looks like. Specifically, it should

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<sup>267</sup> *District of Columbia v. USDA*, 496 F.Supp.3d 213, 255-56 (D.D.C. 2020).

<sup>268</sup> *Cook Cnty. v. Wolf*, 962 F.3d 208, 231 (7th Cir. 2020).

issue new guidance that recognizes the centrality of transfers to transfer-rule analysis, as well as agencies' legitimate role in determining whether a transfer promotes distributional fairness. The guidance should also acknowledge the challenges of predicting transfer rules' (largely indirect) consequences for economic efficiency. While this uncertainty regarding efficiency should not be taken as permission to ignore available evidence on potentially harmful behavioral effects, it should also not be viewed as a bar to proceeding with a transfer rule that an agency deems fairer than the status quo.

Even if OIRA adopts the reforms recommended in this Article, agencies will still not produce analysis that enables *optimization* of transfer rules. That would require, among other things, a distributional weighting system that can apply to rules with net effects on total government spending or revenue and that accounts for distributional effects along dimensions beyond income. But the reforms would better serve the *transparency* function of cost-benefit analysis, by pushing agencies to more clearly identify the regulatory effects that are actually driving their decisionmaking.