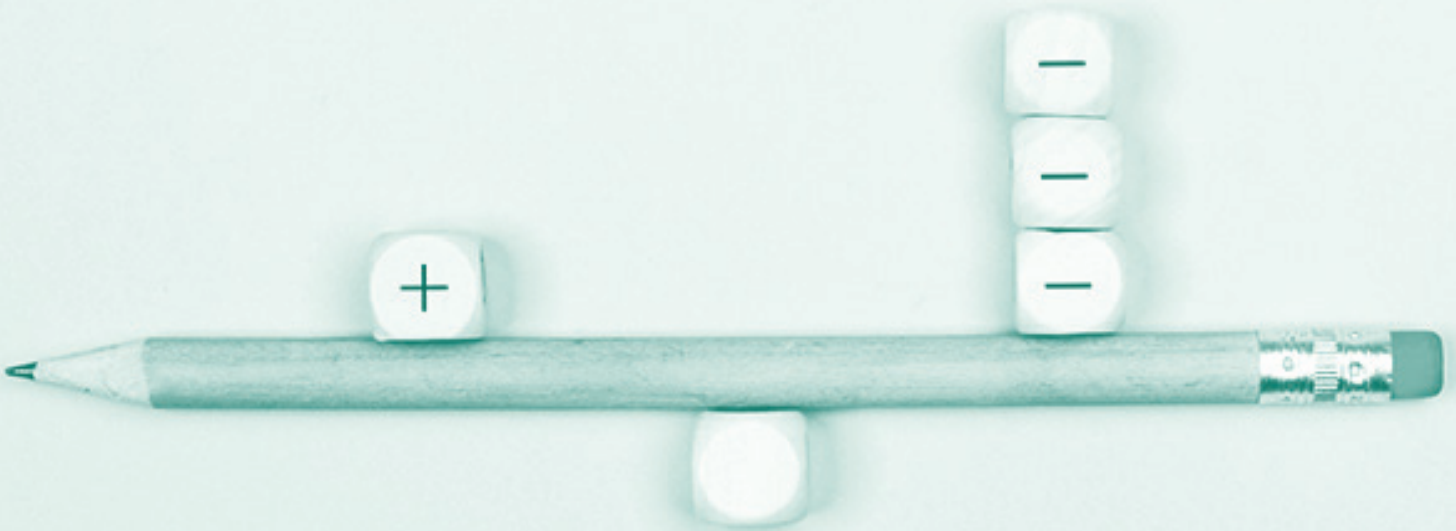


Reforming regulation: A proposal to end unsound cost-benefit analysis requirements for tax and transfer rules

Greg Leiserson



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Reforming regulation: A proposal to end unsound cost-benefit analysis requirements for tax and transfer rules

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BROOKINGS

Abstract

The White House has required federal agencies to conduct a formal cost-benefit analysis for certain regulations since the early 1980s. In principle, cost-benefit analysis can inform policymakers and the public about the likely effects of a rule and help guide policymakers to better decisions, at the expense of a somewhat slower and more resource-intensive rulemaking process. However, formal cost-benefit analysis does not provide useful guidance for a large class of rules related to tax and transfer programs, including Social Security, major health care programs, and the Supplemental Nutrition Assistance Program, because it ignores the distributional and fiscal goals that motivate those rules. For these rules, referred to as transfer rules, requirements for formal cost-benefit analysis bias the regulatory process, mandate public release of misleading metrics, and delay rules for no gain. Changes to White House guidance on cost-benefit analysis during the Biden administration—since rescinded—would have improved analysis in many ways but would not have resolved the fundamental challenges of conducting such analysis for transfer rules. I instead propose eliminating the requirement for formal cost-benefit analysis and substantive Office of Information and Regulatory Affairs review of transfer rules. Doing so would streamline the regulatory process and eliminate a prejudicial form of analysis.

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Introduction

The White House has required federal agencies to conduct a formal cost-benefit analysis for certain regulations since the early 1980s. Tax regulations, among others, were effectively exempt from the requirement for most of this period. In principle, cost-benefit analysis can inform policymakers and the public about the likely effects of a regulation and help guide policymakers to better decisions. Of course, conducting the analysis takes time and requires resources that could be spent elsewhere. As a result, there is a tradeoff between additional analytic insight, which can inform the development of a regulation, and slowing down the regulatory process.

For regulations implementing many tax and transfer programs, however, there are only costs to conducting a cost-benefit analysis. For these regulations, the formal cost-benefit analysis that agencies are required to do does not provide useful guidance.¹ Why? Because formal cost-benefit analysis views transfers—including transfers between individuals and the government, such as tax payments or Social Security benefits—as an offsetting gain and loss to different groups that can be set aside in determining a regulation’s net benefits. Such analysis therefore sets aside critical effects of tax and transfer regulations, including redistributing resources and increasing or decreasing deficits. As a result, the analysis will almost always find that regulations that expand transfers or increase revenues have costs greater than their benefits—and regulations that cut transfers or reduce revenues will usually have benefits greater than their costs.

Taxation is the canonical case of a policy where formal cost-benefit analysis mechanically finds that costs exceed benefits because transfers are set aside. Taxation imposes administrative and compliance costs and can cause undesirable changes in behavior. Through the lens of formal cost-benefit analysis, administrative and compliance costs are viewed as costs, and accompanying changes in behavior can create additional costs.² However, the tax payments—the reason policymakers adopt taxes in the first place—are not viewed as a benefit. Formal cost-benefit analysis will therefore find that taxation has costs greater than its benefits.

This conclusion about the tax system overall carries through to specific tax regulations. Consider a regulation that imposes additional documentation requirements to make it more difficult to avoid paying a tax. Such a regulation imposes additional compliance

costs to raise additional revenues. In a traditional cost-benefit framework that sets aside the transfer of resources from individuals to the federal government, this regulation will impose costs and generate no benefits. Economic analysis of tax regulations can be useful precisely because it can help policymakers judge whether the compliance and other costs imposed by a documentation requirement—or any other requirements—are worth it. But it makes no sense to do so in a framework that sets aside the revenues that are the reason for taxation in the first place.

This proposal argues that formal cost-benefit analysis suffers from this deficiency for a broad set of rules relating to tax and transfer programs known as transfer rules. For purposes of this proposal, I define “transfer rules” as rules where either distributional impacts or fiscal impacts are a primary consideration in developing and adopting the rule. This definition includes tax rules and rules relating to a wide variety of transfer programs, including Social Security, Medicare, and the Supplemental Nutrition Assistance Program (SNAP), among others. (I use the terms “regulation” and “rule” interchangeably throughout; the laws governing the federal regulatory process are written primarily in terms of rules, but regulation is also widely used with a similar meaning.)

As is well understood by academics and practitioners working on tax and transfer policies, formal cost-benefit analysis does not provide useful guidance for transfer rules because it ignores the distributional and fiscal goals that motivate such rules. Prior research has documented the deficiencies of this approach (see, e.g., Leiserson 2020; Leiserson and Looney 2018; Lienke 2024; and Posner 2003). Nonetheless, the White House Office of Information and Regulatory Affairs (OIRA) requires agencies to evaluate transfer rules using the same cost-benefit framework that applies to all other rules. (Perhaps unsurprisingly, agency compliance with this requirement for transfer rules is often poor; the case studies presented later illustrate some of the shortcomings.)

While transfer rules are ill-suited to formal cost-benefit analysis, they account for a large share of rules subject to OIRA review—roughly half for the period from 2002 to 2023. The Centers for Medicare and Medicaid Services (CMS) accounts for more transfer rules than any other agency because the rules administering Medicare, Medicaid, and the health insurance marketplaces generally fall into this category. CMS

transfer rules account for more than 40 percent of all major transfer rules and nearly a quarter of all major rules. During the period from 2018 to 2023, when most tax rules were subject to a requirement for cost-benefit analysis, tax rules accounted for 11 percent of major transfer rules and 6 percent of all major rules.

Mandating that agencies do formal cost-benefit analysis for transfer rules undermines effective regulatory policymaking. Adopting the view that transfers should be set aside biases the regulatory process against revenue-raising and redistributive policies that move resources from those with more to those with less. Requiring that agencies do this analysis—and requiring that OIRA review the analysis—wastes agencies’ resources that could be put to better use elsewhere and delays rules. The requirement also has the potential to create vulnerabilities in court when applied to rules for which it does not provide useful guidance. However, while there is broad agreement on the shortcomings of formal cost-benefit analysis for transfer rules, there is no consensus on the path forward.

I propose eliminating both the requirement for cost-benefit analysis of transfer rules and substantive review of transfer rules by OIRA. OIRA would continue to fulfill its statutory responsibilities with respect to those rules and could play a role in facilitating appropriate review by the White House and other relevant agencies, but it would have no formal clearance role and would not be responsible for approving the rules for publication. This proposal would streamline and accelerate the regulatory process and eliminate a prejudicial form of analysis. No legislation is required to implement this proposal; an interested administration could adopt it administratively.

This proposal also considers and rejects other approaches to addressing the deficiencies of current analytic and review requirements for transfer rules.

One such approach would be to revise Circular A-4 (OMB 2023), which contains OIRA’s guidance to agencies on cost-benefit analysis, to require a more useful alternative analysis for transfer rules. Indeed, the Biden administration committed substantial intellectual and staff resources to revising Circular A-4 to support high-quality rulemaking and, in 2023, updated the Circular to incorporate recent scientific developments, authorize the use of weighted cost-benefit analysis, and allow agencies greater flexibility, among other changes. These changes were rescinded by the Trump administration in 2025.

The updated guidance was a significant improvement and, if maintained, would have facilitated better regulations in a variety of policy areas. However, as explained further below, that guidance would not have

resolved the fundamental challenges of valuing the fiscal and distributional impacts of transfer rules. Other proposed approaches to producing net benefit metrics for these rules, such as using cost-effectiveness analysis or the marginal value of public funds (MVPF), also suffer from serious shortcomings that make them unfit for this purpose.

Even absent a specific analytic requirement, OIRA could retain its current gatekeeping role for transfer rules. However, retaining a gatekeeping role while fundamentally changing the perspective the organization uses to review transfer rules would require a challenging organizational transformation. Moreover, an important argument for centralized substantive review of regulations by OIRA is that there is a common mode of analysis that is appropriate for all regulations. This argument is incorrect and, in those cases where OIRA’s traditional approaches are not appropriate, the argument for OIRA’s substantive review is correspondingly weak. Finally, additional layers of review necessarily slow the regulatory process down. In the absence of relevant expertise and institutional history, the downsides of delay outweigh the upsides.

A final concern with this proposal is that rules could be at greater risk of legal challenge absent a formal cost-benefit analysis. However, as discussed in greater detail below, there is no general statutory or judicial requirement for cost-benefit analysis. Moreover, proponents of a general requirement for such analysis usually argue for it on the grounds that it would be a useful guide for policymaking, but this is emphatically not true in the case of transfer rules, for the reasons described above. Using cost-benefit analysis where it is not appropriate is not evidence of the reasoned decisionmaking required by the Administrative Procedure Act (APA). If anything, given the fact that formal cost-benefit analysis sets aside effects of profound importance in tax and transfer policy, using it as a decision framework for transfer regulations could be seen as showing a lack of reasoned decisionmaking.

The current requirement for cost-benefit analysis could also create unnecessary legal risks for agencies issuing transfer rules because it invites judges to rely on an inappropriate and incomplete analytic framework to determine whether reasoned decisionmaking has occurred. Agencies may develop rules with appreciation for the shortcomings of this framework only to find that judges nonetheless seek to apply it. In general, an administration should be on firmer ground foregoing cost-benefit analysis for transfer rules and encouraging agencies to produce appropriate analysis that supports the specific regulatory decisions they are making.

The challenge

I first review the relevant statutory and administrative authorities governing the regulatory process. I then discuss the conceptual problems in applying cost-benefit analysis to tax and transfer regulations. Finally, I document the ways in which OIRA review undermines effective regulatory policymaking for transfer rules.

Background: Statutory and administrative requirements for regulatory analysis

With limited exceptions, requirements for formal cost-benefit analysis are a product of executive orders, not legislation. This section reviews statutory and administrative requirements for cost-benefit analysis and briefly describes how the system operates in practice.

Statutory requirements for cost-benefit analysis

The Administrative Procedure Act (APA), which establishes the basic structure of federal rulemaking, imposes no explicit requirement for formal cost-benefit analysis (5 USC § 500 et seq.). Indeed, the APA's explicit requirements are quite specific and limited, including that the agency provide a statement of the time, place, and nature of public rulemaking proceedings; the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule, or a description of the subjects and issues involved. The APA also authorizes judges to set aside rules that are arbitrary or capricious, establishing what is often referred to as a requirement for reasoned decision-making. (I address claims that the APA creates an implicit requirement for formal cost-benefit analysis in the Questions and Concerns section below.)

The Unfunded Mandates Reform Act (UMRA) of 1995 requires cost-benefit analysis for a limited set of federal actions (2 USC § 1501 et seq.). Specifically, UMRA requires agencies to conduct a cost-benefit analysis of certain federal mandates that cause \$100 million or more in expenditures by state, local, and tribal governments; or by the private sector, adjusted annually for inflation.

The scope of UMRA's requirement for cost-benefit analysis is modest both because it applies only to federal mandates and therefore does not apply to any

rule that does not impose a private or intergovernmental mandate, and because it has several exemptions. The law exempts mandates that are a condition of federal financial assistance, involve participation in a voluntary program, enforce the constitutional rights of individuals, enforce rights prohibiting discrimination, relate to certain programs under the Social Security Act, or are subject to a statute that prohibits consideration of costs and benefits, among other exceptions (Fantone 2011). Though not explicitly exempted by statute, tax regulations generally do not impose mandates beyond those already imposed by statute and are therefore best read not to trigger UMRA's analytic requirements. According to a review conducted by the Government Accountability Office (GAO), between 2000 and 2009 federal agencies concluded that only 13 percent of 452 major final rules triggered UMRA requirements (Fantone 2011).

UMRA also limits judicial review of agency compliance with the statute. The law prohibits courts from using the failure to prepare the required cost-benefit analysis as the basis for invalidating a rule, though the law empowers courts to compel agencies to produce a missing analysis.

Administrative requirements for cost-benefit analysis

In contrast to the limited statutory requirements for cost-benefit analysis, the White House has imposed a far-reaching administrative requirement for cost-benefit analysis through executive order since the early 1980s. Specifically, since 1981, federal agencies have been required to prepare a formal cost-benefit analysis for federal regulations that would have an annual effect on the economy of \$100 million or more, except for a brief period in the Biden administration when the threshold was increased to \$200 million. In contrast to the UMRA requirement, the \$100 million threshold imposed via executive order is not adjusted for inflation.

The requirement for cost-benefit analysis was first imposed by President Reagan in Executive Order (EO) 12291 (Federal Register 1981). In 1993, President Clinton rescinded EO 12291 and issued EO 12866 (Federal Register 1993), which set up the process at it stands today.³ Under the Reagan EO, agencies were directed to adopt only those regulations where the benefits outweigh the costs if the statutory framework permits

that approach. Under the Clinton EO, agencies were directed to adopt only those regulations where the benefits justify the costs, which is generally understood as a more flexible requirement. The Clinton EO also gestured at a broader set of potential benefits than the Reagan EO, including distributive impacts and equity.

OIRA publishes guidance for agencies on how to conduct cost-benefit analysis in Circular A-4 (OMB 2003).⁴ (Unless otherwise stated, references to Circular A-4 in this report refer to the version first published in 2003 and reinstated by the Trump administration in 2025.) Notwithstanding EO 12866's statements about distributive impacts and equity, this guidance defines cost-benefit analysis as an assessment of a regulation's effect on economic efficiency: "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, that is, the alternative that generates the largest net benefits to society (ignoring distributive effects)" (OMB 2003).

The effect of a regulation is assessed relative to a baseline. When evaluating regulations that implement legislation, OIRA generally instructs agencies to use a pre-statutory baseline. That is, OIRA instructs agencies to develop a cost-benefit analysis for the legislation and regulation as a single, combined policy.

Circular A-4 also requires agencies to consider alternatives to the chosen regulatory approach, assess their effects, and explain the reasons the agency chose the approach it did. Notably, the Circular instructs agencies to consider alternatives that are not legally available and to estimate the opportunity cost of statutory constraints that "prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866" (OMB 2003).

Under the process established by EO 12866, agencies submit draft regulations, including a cost-benefit analysis, to OIRA before they are published. OIRA and other parts of the White House, such as the National Economic Council and Domestic Policy Council, review and comment on the rule and analysis. OIRA then passes the package of comments back to the agency. This process may repeat a few times before OIRA clears the rule, at which point the agency can publish it. This process occurs at both the proposed rule stage and the final rule stage, and the cost-benefit analysis is published when the rule is published. Notably, OIRA's role in this process is not limited to discussion of analytic issues. Indeed, Circular A-4, while presented as guidance on doing cost-benefit analysis, also includes recommendations about how agencies should regulate; in practice OIRA staff often comment on substantive regulatory decisions.

Background: Tax and transfer rules

Tax regulations were exempted from OIRA review for most of the past 40-plus years, but that exemption was revoked during both the first and second terms of the Trump administration. The Biden administration restored the exemption in 2023, in between those two terms. Nontax transfer rules have generally been subject to OIRA review, and OIRA's guidance has provided no special treatment of these rules. However, OIRA has acknowledged the distinction between transfer rules and other rules, and OIRA's review of transfer rules has tended to be less intensive than other rules. This section reviews administrative requirements for cost-benefit analysis for these types of rules and provides some statistics documenting the prevalence of transfer rules.

Administrative requirements for regulatory analysis of tax regulations

In 1983, the U.S. Department of the Treasury (Treasury) and the Office of Management and Budget (OMB) signed a memorandum of agreement (MOA) exempting most tax regulations from the centralized review process run by the White House (Wallison and DeMuth 1983).⁵ This exemption was reaffirmed in 1993 (Hanson and Katzen 1993). During the more than 30-year period this exemption was in effect, few tax regulations went through OIRA review.

In 2018, Treasury and OMB signed a new MOA under which many more tax regulations would be subject to both OIRA review and the requirement for formal cost-benefit analysis (McIntosh and Rao 2018). The agencies reversed course and restored the exemption in 2023 (MacBride and Revesz 2023). Then, in July 2025, the agencies reversed course yet again and reinstated the 2018 MOA with modest changes (Bessent and Vought 2025).

OIRA has provided no formal guidance on cost-benefit analysis specific to tax regulations. A GAO report published in 2020 suggests that OIRA's view at that time was that there is nothing unique about tax regulations, and Treasury and the IRS should follow the guidance in Circular A-4 as written (GAO 2020).⁶

During the 2018–23 period when tax regulations were subject to OIRA review, one major source of tension between OIRA and Treasury concerned the appropriate baseline for the analysis. OIRA's view was that Treasury and the IRS should use a pre-statutory baseline, which in practice means that Treasury's focus should frequently be on conducting cost-benefit analysis of tax legislation, and not on its regulatory choices. Treasury's view was that the agencies had agreed to a post-statutory baseline for the analysis

as part of the MOA, meaning that the baseline would already reflect the legislation and the cost-benefit analysis would only look at the effect of the regulation itself. During the period in which the 2018 MOA was in effect, the regulatory impact analyses for Treasury rules used a post-statutory baseline. The language of the 2025 MOA on this front was unchanged, and the experience to date indicates that Treasury and the IRS will use a post-statutory baseline under the 2025 MOA as well.

Administrative requirements for regulatory analysis of nontax transfer regulations

This proposal defines a transfer rule as a rule for which either fiscal or distributional impacts are a primary consideration in developing or proposing the rule. Under this definition, tax rules and rules relating to a wide variety of transfer programs, including Social Security, Medicare, and SNAP, will be transfer rules. Rules that are not related to tax and transfer programs can also be transfer rules, potentially including a variety of program integrity rules among others.

Circular A-4 does not define transfer rules, but the transfer rule concept has appeared in various OIRA publications and in guidance, albeit with varying definitions. Perhaps most notably, OIRA's annual reports to Congress on the benefits and costs of federal regulations generally report transfer rules separately from other rules. In early years, the report defined transfer rules as rules that implement federal budgetary programs (see, e.g., OIRA's 2002 report to Congress [OIRA, n.d.-a]). In later years, the report defined transfer rules as rules that primarily cause income transfers (see, e.g., OIRA's 2015 report to Congress [OIRA, n.d.-n]). In the most recent years, no explicit definition has been offered, but usage appears broadly consistent with the income transfer definition.

In most cases, the same rules will be categorized as transfer rules under the income transfers definition and the definition used in this proposal. Under both definitions, transfer rules would include most tax regulations and most regulations relating to Social Security, Medicare, Medicaid, and the Affordable Care Act (ACA) marketplaces. Other transfer rules issued in recent years include rules related to SNAP, COVID relief funds, and special financial assistance payments by the Pension Benefit Guaranty Corporation.

Formally, OIRA has maintained that the analytic requirements that apply to transfer rules are the same as the requirements that apply to other rules.⁷ Agencies must prepare a formal cost-benefit analysis for nontax transfer rules in the same circumstances in which one is required for nontransfer rules and must use the same methods in developing that analysis.

However, it is generally understood that OIRA's review of the cost-benefit analysis conducted for transfer rules is more cursory, especially if the agency does not claim benefits (Sunstein 2013). Actual practice with respect to these rules can vary, depending on interests, priorities, and capacity of OIRA personnel.

The prevalence of transfer rules

While OIRA review of transfer rules receives far less attention than OIRA review of nontransfer rules, transfer rules account for a substantial share of the most impactful rules going through OIRA review every year. Since fiscal year 2002, OIRA has concluded review on an average of 56 major rules each fiscal year, of which an average of 30 were transfer rules (figure 1).⁸ Transfer rules account for roughly half of all major rules during this period, with some year-to-year variation.

CMS consistently accounts for a large share of major transfer rules and of all major rules. Since 2002, 23 percent of all major rules were CMS transfer rules (figure 2). Between fiscal years 2019 and 2021, when Treasury and the IRS finalized many regulations implementing the Tax Cuts and Jobs Act of 2017, tax rules accounted for an additional 9 percent of all major rules. (The share was somewhat lower, at 6 percent, over the full 2018–23 period that the 2018 MOA was in effect.)

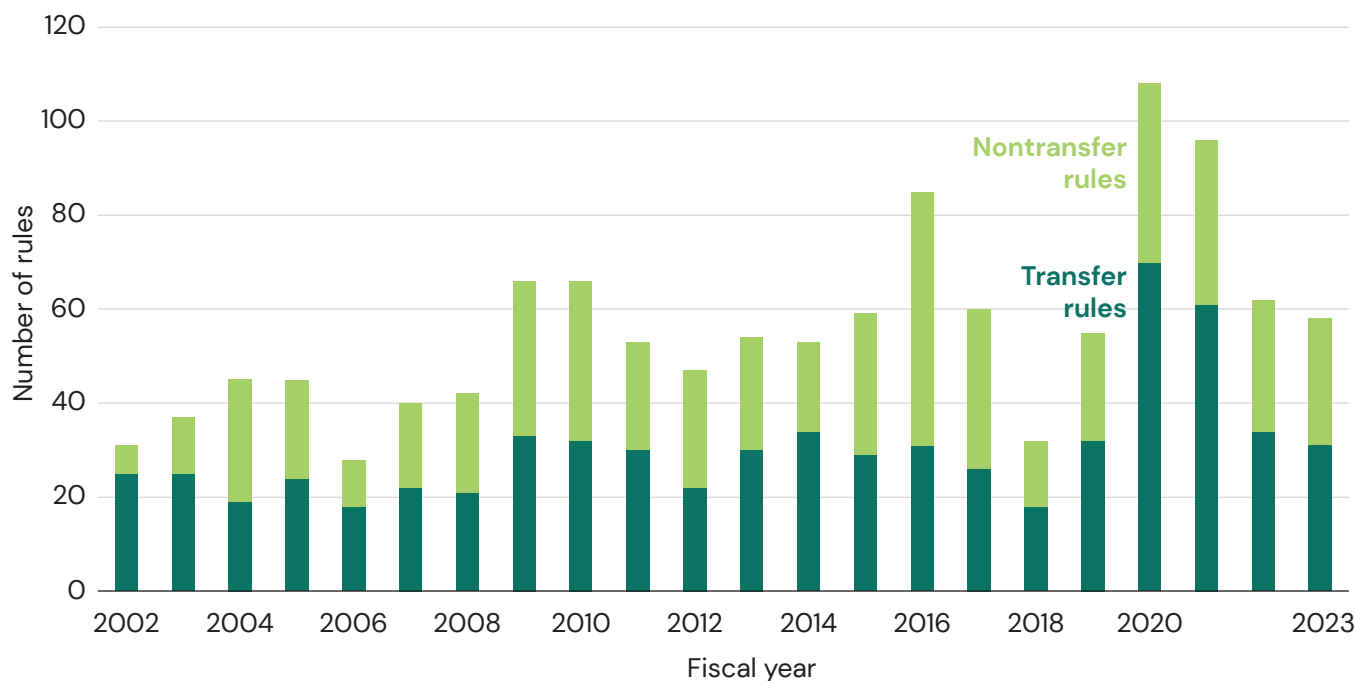
Formal cost-benefit analysis for transfer rules is analytically unsound

Cost-benefit analysis is useful to the extent that it can either inform agencies' decisionmaking about potential regulatory actions or provide insight into that decisionmaking. To inform decisionmaking it must answer—at least in principle—the question of whether adopting a regulation is a good idea. However, formal cost-benefit analysis as mandated by Circular A-4 examines whether a regulation increases or decreases efficiency. For many nontransfer regulations, efficiency can be a reasonable outcome to study in deciding whether adopting the regulation is a good idea. For transfer regulations it is not.

This section first demonstrates that a central feature of formal cost-benefit analysis is that it aggregates benefits and costs borne by different people and then argues that cost-benefit analysis can usefully inform the decision of whether to adopt a regulation only when that aggregation is reasonable. It next discusses why, judged in that light, cost-benefit analysis works for many environmental regulations and generally fails for transfer rules.

FIGURE 1

Major transfer rules and nontransfer rules, FY2002–FY2023



Source: OIRA, n.d.–a–s.

Note: The definition of a “major rule” is that used in OIRA’s annual reports to Congress: (1) a rule that is major for purposes of the Congressional Review Act (CRA), (2) a rule that meets the threshold for analysis under the Unfunded Mandates Reform Act (UMRA), or (3) a rule that is economically significant under EO 12866. The definition of transfer rules is that used in the source report with the following modifications: tax regulations without quantification in FY2019–23 are classified as transfer rules and SBA regulations related to pandemic-era programs in FY 2020–21 are classified as transfer rules.



Formal cost-benefit analysis aggregates benefits and costs borne by different people

Formal cost-benefit analysis is not simply the development of a list of the pros and cons of a policy: It is a specific approach to evaluating the consequences of a regulation that combines a positive assessment of how the regulation will affect outcomes with a normative framework for how a potentially wide range of disparate effects should be summarized in a single number. Summarizing the impact of a policy in a single number requires combining costs and benefits experienced by different people. In formal cost-benefit analysis, these costs and benefits are simply added together.

Consider a hypothetical environmental regulation that requires the adoption of a more expensive pollution control technology to reduce the quantity or severity of a pollutant emitted. Businesses subject to the requirement will incur costs to install the new technology. Those costs may increase prices for the good or service the business sells, reduce the quantity of inputs purchased by the business, and reduce profits for the owners of the business, among other possible effects. The reduction in pollution may improve

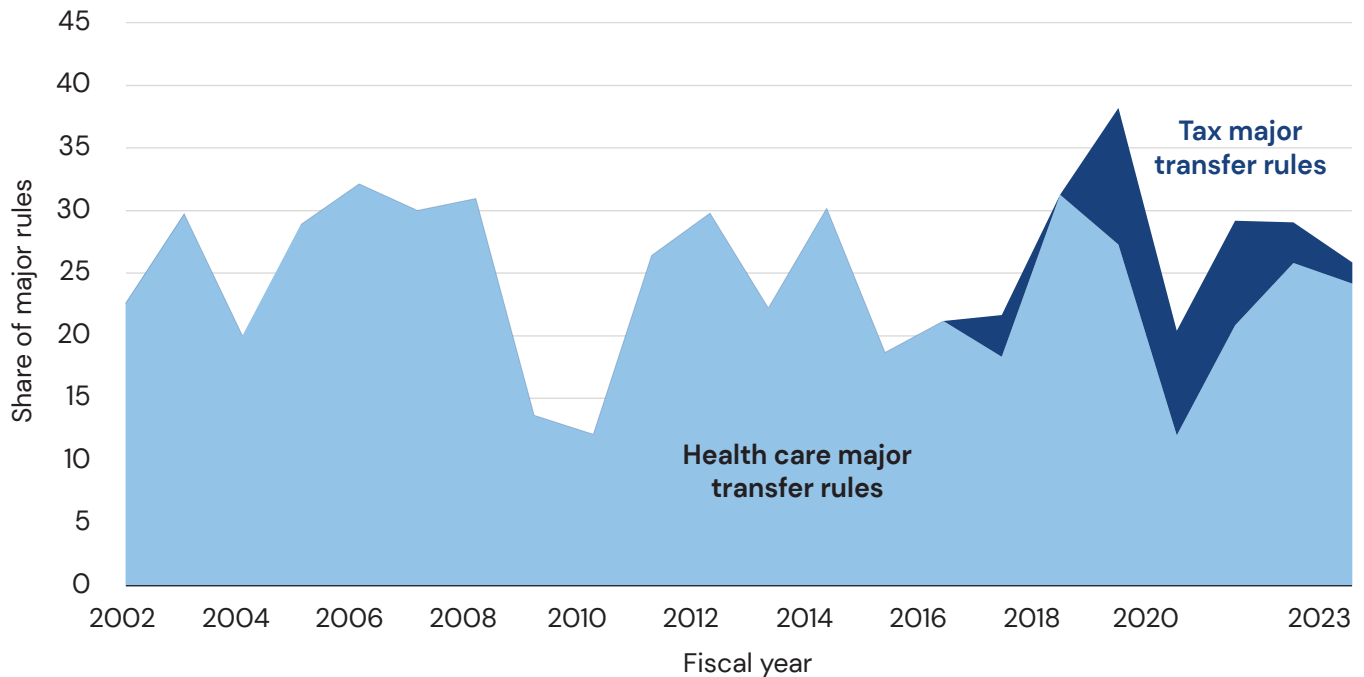
health for area residents, improve health for residents outside the local area, and increase property values in the area.

Even beginning to catalogue these effects demonstrates how wide-ranging the impacts of a regulation may be and the extent to which costs and benefits of a regulation may be borne by many different people. Aggregating those costs and benefits is a fundamental part of the exercise.

It remains the case that cost-benefit analysis involves aggregating costs and benefits borne by different people even when analysts use short-cuts such as calculating the total costs of installing the technology for the regulated entity without looking through to the different ways people may ultimately bear those costs. Tallying the costs of installing the technology for the regulated entity is a useful analytic convenience because there are relationships between the costs imposed on the regulated entity and the ultimate costs even though the entity itself may not bear all or even any of the costs. However, it remains the case that those costs are ultimately borne by different people, and the analyst adds them together when doing the analysis.

FIGURE 2

Health care and tax major transfer rules as a share of all major rules, FY2002–FY2023



Source: OIRA, n.d.–a–s.

Note: The definition of a “major rule” is that used in OIRA’s annual reports to Congress: (1) a rule that is major for purposes of the Congressional Review Act (CRA), (2) a rule that meets the threshold for analysis under the Unfunded Mandates Reform Act (UMRA), or (3) a rule that is economically significant under EO 12866. The definition of transfer rules is that used in the source report with the following modifications: tax regulations without quantification in FY2019–23 are classified as transfer rules and SBA regulations related to pandemic-era programs in FY 2020–21 are classified as transfer rules. Health care rules include only rules issued by the Centers for Medicare and Medicaid Services (CMS).



For cost-benefit analysis to be useful, aggregation of benefits and costs borne by different people must be reasonable

A consequence of adding up costs and benefits experienced by different people is that it makes transfers between people and transfers between people and the government appear to be irrelevant. For example, if a regulation would increase person A’s taxes by \$1, increase person B’s taxes by \$2, and increase government revenues by \$3, when the costs to person A and B are summed with the gains to the government budget, the regulation has no net effect. Similarly, if a regulation increases SNAP benefits to person A by \$5 and increases the deficit by \$5, when the gains to person A are combined with the costs to the government budget, the regulation has no net effect.

As these examples show, formal cost-benefit analysis cannot provide useful guidance when the distributional impacts or fiscal impacts of a regulation are primary considerations in developing the regulation. In

these cases, the aggregation underlying cost-benefit analysis obscures the actual impacts of interest.

For cost-benefit analysis to be useful, aggregation must be reasonable. I identify two criteria that must be met for cost-benefit analysis to be useful: (1) The distributional effects of the policy are not a primary consideration in the use of the relevant regulatory authority, and (2) the impact on the federal deficit is not a primary consideration. These criteria are necessary to justify aggregating costs and benefits across the population as cost-benefit analysis does. When the criteria fail, aggregating benefits and costs generates an analysis that does not usefully inform the regulation at hand.⁹

Why cost-benefit analysis works for many environmental regulations

U.S. Environmental Protection Agency (EPA) pollution regulations based on a broad grant of authority are perhaps the canonical case in favor of using cost-benefit analysis to guide policy. I therefore return

to the environmental regulation examined above and evaluate it in light of the proposed criteria. Recall that, in stylized form, the example regulation requires the adoption of a more expensive pollution control technology to reduce the quantity or severity of the pollutant emitted.

This regulation clearly meets the two proposed criteria:

- **The distributional effects of the policy are not a primary consideration in the use of the relevant regulatory authority.** While an EPA regulation may have important distributive implications, the threshold question is whether the harms of the pollutant justify the costs needed to mitigate them. This question is not inherently distributional. Distributional implications may arise because of where a pollutant is emitted or who is exposed to it, but the regulations' purpose is to address the harms and not as an indirect means of providing benefits to the affected population.
- **The impact on the federal deficit is not a primary consideration.** The regulation could affect the federal budget directly, through payments of fees or other costs associated with the regulatory regime, or indirectly, through its effects on other behavior. The purpose of the regulation, however, is not to increase or decrease the federal deficit.

Because these two criteria are met, and barring any other challenges, assessing the benefits and costs of the hypothetical environmental regulation by aggregating benefits and costs across individuals is reasonable. An assessment of the aggregate costs and the aggregate benefits of the regulation is a useful input into the decisionmaking process.

Why cost-benefit analysis generally does not work for transfer rules

As defined above, transfer rules are rules where either distributional impacts or fiscal impacts are a primary consideration in developing and adopting the regulation. As such, transfer rules will necessarily fail the criteria established for cost-benefit analysis to be useful. I consider each of these failures in turn.

Rules where distributional effects are a primary consideration. A rule may transfer resources to or from particular populations, whether through financial or in-kind transfers or other economic mechanisms, and this redistributive impact may be a primary consideration in the development of the rule. For example, the Biden administration's family glitch rule expanded eligibility for the Premium Tax Credit for a specific population that had previously been excluded from eligibility under the prior rules for determining the

affordability of employer-provided health insurance. The regulation was intended to make health insurance more affordable for people with certain characteristics in the context of a broader statutory arrangement—in other words, to transfer resources to a specific population. The rule is inherently distributional. Similarly, the Biden administration's rule creating the Saving on A Valuable Education (SAVE) Plan for student loan repayments reduced student loan payments and expanded student loan forgiveness. This rule was intended to provide financial relief to people with student loans, and useful analysis of the rule must directly assess the merits of that transfer.

Because formal cost-benefit analysis ignores transfers across individuals, rules that increase transfers almost always have negative net benefits under that mode of analysis. The rules impose costs, such as administrative costs for the agency responsible for the program, paperwork burden for applicants, and compliance costs for third parties—and can change behavior in undesirable ways—yet they yield few or no benefits.

Rules where fiscal impacts are a primary consideration. A rule may significantly increase or decrease the deficit, and that may be a primary consideration in developing the rule. For example, a rule could allow more tax avoidance either directly by relaxing anti-abuse requirements or indirectly by relaxing documentation requirements. A rule could strengthen program integrity requirements, thereby reducing spending and increasing administrative and compliance costs. In these cases, the size of the effect on the deficit is a primary consideration in evaluating the merits of the rule. If relaxing documentation requirements increases the deficit too much, it is more likely to be a poor rule. If improving program integrity saves a lot, it is more likely to be a desirable rule.

Cost-benefit analysis under Circular A-4 dictates that these fiscal impacts are merely transfers. The net benefits of these rules would typically hinge on whether achieving those transfers increases or decreases administrative and compliance costs. As a result, this mode of analysis will typically find that deficit-increasing rules have net benefits (because they decrease compliance and/or administrative costs) and deficit-reducing rules have net costs. In the extreme, cost-benefit analysis could conclude that a regulation prohibiting all tax audits has net benefits, because the resulting revenue loss is not a cost.¹⁰

It is important to distinguish this critique—that the conceptual framework for cost-benefit analysis is biased against the goals of transfer rules—from other, more-general critiques of cost-benefit analysis. In nontransfer contexts, a common argument against requirements for cost-benefit analysis is that it biases the system against policies with benefits that are especially difficult to prove or quantify. Additionally,

some argue against cost-benefit analysis on the basis that quantifying the value of certain benefits (e.g., lives saved) is difficult and inherently subjective.

The argument here is more fundamental: Even if agencies knew everything about how their rules would affect outcomes, and could precisely quantify all of those effects, they would have trouble making the case for many tax and transfer rules under a cost-benefit paradigm because the distributional and fiscal objectives of the rules are not considered benefits.

Why mandating uninformative cost-benefit analysis matters

OIRA's guidance directs agencies to complete a formal cost-benefit analysis when developing economically significant rules. These analyses bias the regulatory process against revenue-raising and in favor of upward redistribution. Although EO 12866 and Circular A-4 do not require that agencies adopt only regulations with positive net benefits according to a formal cost-benefit analysis, in my experience in government, I found that determining that regulations have negative net benefits makes it more difficult to get them done, and publication of cost-benefit analyses finding that rules have negative net benefits can undermine support for an administration's regulatory agenda. Moreover, on top of the shortcomings arising from the inappropriate analytic framework, OIRA review delays rules and causes agencies to waste time on make-work rather than on useful analytic projects.

Cost-benefit mandates bias the regulatory process

As described in the previous section, formal cost-benefit analysis is an inappropriate way to evaluate the merits of transfer regulations; its analytic flaws contribute to a number of practical problems.

First, requiring a formal cost-benefit analysis for transfer regulations biases the rulemaking process itself. It can encourage agencies to scale back transfer programs, weaken enforcement of the tax law, and increase inequality, and it will do so under the guise of technocratic assessment when it in fact relies on inappropriate normative assumptions.

In particular, a determination that a rule has costs larger than its benefits makes it more difficult for an agency to adopt that rule. While agencies can—and do—issue regulations with costs greater than their benefits, these rules typically receive extra scrutiny in internal processes. Indeed, if determining that rules have costs greater than their benefits did not lead to questions about the merits of the rules, that would

raise serious questions about whether it is worthwhile to conduct cost-benefit analysis of rules.

Second, formal cost-benefit analyses of transfer rules will often provide critics with an easy means of attacking the rules. They can point to an administration's own analysis to argue that the rule reduces efficiency or harms the economy to no purpose. While technical audiences may understand that efficiency is not a sensible goal for transfer regulations, the plain language meaning of the words “costs” and “benefits” suggests that it is presumptively unreasonable for an agency to adopt a rule with negative net benefits.

As an example of how this could play out in practice, consider the Biden administration's efforts to combat a tax avoidance strategy used by related-party partnerships that allows large businesses to inflate their tax deductions and potentially write off the same investment multiple times. In 2024, Treasury announced a series of actions to address these tax avoidance strategies that was estimated to raise more than \$100 billion over a decade.¹¹ However, evaluated through the lens of formal cost-benefit analysis, the regulations planned as part of that enforcement campaign would likely have negative net benefits. The revenue itself would not be a benefit, and the regulations would impose material compliance costs on affected partnerships.¹²

Indeed, when the Trump administration subsequently moved to remove a regulation implementing one small piece of this initiative, the cost-benefit analysis for the proposed removal concluded that its only economic effects would be to reduce compliance costs by \$163 million. In their words, “[t]he Treasury Department and the IRS do not anticipate any other material economic effects of the [regulation] beyond the filing burden reduction” (Federal Register 2025). In this way, the analysis demonstrates exactly how such an analysis biases the regulatory process against tax enforcement and is inconsistent with the requirement for reasoned decisionmaking under the APA. If a future administration moved forward with a similar enforcement campaign again, declaring the regulations involved to have negative net benefits with no consideration of revenues would not only mislead policymakers, but would also invite public criticism that could be damaging to the administration's efforts to defend the rule.

Third, traditional cost-benefit analysis can help policymakers obscure their reasons for adopting a policy because it deemphasizes the primary considerations in setting transfer policy in how it defines costs and benefits. For example, if an administration believes that rich people pay too much in tax, one easy way to address that is to weaken regulations preventing abuse and avoidance. The new regulation could be marketed as reducing the compliance costs for these

tax regulations, but such a public relations campaign obscures the true motivation for the policy.

Notably, this type of obfuscation is much more difficult to do in the regulatory contexts where cost-benefit analysis is most useful. Suppose a regulation were to deliver \$100x in health or environmental benefits and cost \$85x. In this scenario, a cost-benefit analysis would correctly show that repealing the regulation would be harmful. An administration could say they are repealing the regulation because the compliance costs are too high, but it would still be clear in a complete analysis that the benefits are larger. Hiding behind compliance costs is uniquely useful in the context of transfer rules because they have no benefits under efficiency analysis.

Supporters of OIRA review for transfer rules sometimes observe that its guidance to agencies directs them to discuss distributional effects alongside the net benefits analysis. But this instruction does not address the prejudicial effects of labeling such rules as having costs in excess of their benefits. Moreover, OIRA does not prioritize distributional analysis or attempt to enforce this requirement. For additional discussion of agencies' current practice for transfer rules, see the case studies below.

OIRA review delays rules and leads to worse resource allocation

Requiring agencies to do formal cost-benefit analysis and then having OIRA review that cost-benefit analysis also introduces unnecessary delay into the rulemaking process. The OIRA review process can take several months or longer, and involve multiple rounds of review, with substantive feedback and requests for changes at each round.

Hickman and Dooling (2025) provide estimates of the time it took for OIRA to review tax rules in recent years. Specifically, they find that, among all proposed and final rules reviewed between 2016 and mid-2023, OIRA review took 33 days on average. The average for proposed rules was 37 days, and the average for final rules was 29 days.¹³ There was a significant upper tail of regulations that took more than the 45-day limit stated in the 2018 MOA, which included some more-complex regulations implementing the Tax Cuts and Jobs Act. For example, among the top 10 regulations with the longest review times are (1) a rule implementing the deduction for the foreign-derived intangible income and global intangible low-taxed income, (2) a rule prohibiting certain workarounds to the limit on the state and local tax (SALT) deduction relying on charitable contributions, and (3) rules relating to the treatment of hybrid entities for purposes of the tax on global intangible low-taxed income and the dividends received deduction. However, also among the longest

review times are some rules that are likely less important and less consequential.

These review times for tax rules compare favorably to prior estimates of review for nontax rules. Copeland (2013), writing for the Administrative Conference of the United States, finds that the average review time from 1994 through 2011 was 51 days, and significantly higher in 2012 and 2013. Similar tallies kept by OIRA suggest review times were higher after the temporary spike in 2012 and 2013, with the 2023 average 74 days (OMB n.d.).

Measuring delay only by the length of formal review may over- or understate the delay that results from OIRA. Perhaps most notably, OIRA review may cause agencies to spend more time drafting a rule than they otherwise would in anticipation of the review. On the other hand, an agency could send a draft rule to OIRA before they have finished drafting with the intention of continuing to revise during the review process. In addition, OIRA sometimes extends review at the request of other parts of the White House; absent OIRA review, the White House would likely still intervene to delay the rule in these cases.

Nonetheless, these estimates suggest that OIRA review is adding significant time to the rulemaking process for tax and nontax transfer rules. Other metrics also suggest that agencies are expending meaningful resources on conducting required cost-benefit analyses.

Hickman and Dooling (2025) document that the length of the Special Analyses section for tax regulations published when the 2018 MOA was fully in effect during the first Trump administration far exceeds that for regulations published before the MOA was signed: 2,900 words for the former and only 350 words for the latter across both proposed rules and final rules. (The Special Analyses section includes the cost-benefit analysis if one is required.) The authors also find that the Supplementary Information portion of the preamble, which provides additional background and discussion of the regulation, is much longer for regulations published during the latter portion of the first Trump administration than for regulations pre-dating the MOA: 9,200 words compared to 4,900 words. Interpreting these differences is difficult because they combine both the causal effect of the MOA and other ongoing legal developments, including the enactment of the Tax Cuts and Jobs Act of 2017 and changes in administrative law more generally. However, these estimates are certainly suggestive of an impact of the MOA, consistent with the conventional wisdom about what happened during this period.¹⁴

Meanwhile, evaluations of the regulatory impact analyses for tax regulations have found them to be of low quality. Major decisions were not explained, and the statements that were made did little to elucidate decisionmaking. For example, Leiserson (2020)

concluded that the analyses provided little information relevant to assessing the merits of the regulations and failed to identify windfalls provided by the guidance or to conduct critical analysis of them. The analyses rarely included quantification or any interrogation of distributional impacts. Writing from a more favorable perspective on the requirement for cost-benefit analysis, Ellig (2019) nonetheless criticizes the baseline, the primary benefit Treasury identified, and the absence of quantification. Similar deficiencies are apparent in the analyses of rules implementing the One Big Beautiful Bill Act of 2025 to this point.

Analyses of nontax transfer rules also point to serious deficiencies in the analysis. A case study related to the Medicare Advantage program is considered below, and additional case studies for nontax rules can be found in Lienke (2024).

Finally, the resources devoted to preparing these analyses are necessarily drawn from other agency activities. Given the deficiencies of the analyses in practice and the fact that OIRA's requirements are ill-suited to transfer rules in general, many of those other activities would likely be a better use of resources.

The proposal

Motivated by the conclusions that (1) formal cost-benefit analysis is analytically unsound as applied to transfer rules and (2) existing OIRA review processes undermine effective regulatory policymaking for transfer rules, I propose to eliminate the requirement for cost-benefit analysis and substantive OIRA review for these rules. This section first walks through the details of this proposal and then reviews three recent case studies to illustrate current practice and what could be done differently under the proposal.

Exempt transfer rules from the requirement for cost-benefit analysis

As discussed above, formal cost-benefit analysis is poorly suited to evaluating transfer rules because such rules fail basic criteria required to justify aggregation of costs and benefits across a population. Its use even when rules fail those criteria can mislead policymakers and the public, lead to worse regulatory choices, and slow the regulatory process. For these reasons, formal cost-benefit analysis should not be required for these rules. This section lays out a proposal for how regulatory processes should be changed to achieve this end.

Exempt regulations relating to transfer policies and programs from cost-benefit requirements

Rather than requiring all agencies to identify transfer rules on a rule-by-rule basis, I recommend broad exemptions for rules relating to transfer policies and programs. In particular, the longstanding exemption from cost-benefit analysis for tax rules should be restored, and parallel exemptions for regulations relating to Social Security, Medicare, Medicaid, the ACA marketplaces, and SNAP should be adopted.

The prototypical tax regulation implicates both revenues and distribution because it reflects a tradeoff between additional revenue and the burden on various taxpayers of collecting that revenue, including both the liability itself and the associated compliance costs. Likewise, distributional and fiscal impacts are primary considerations in any major regulatory policy

changes related to Social Security, Supplemental Security Income (SSI), and SNAP.

CMS regulations relating to Medicare, Medicaid, and the ACA marketplaces, which together comprise a substantial share of all federal transfer rules, should also be exempt from the requirement for formal cost-benefit analysis. However, those regulations raise somewhat more-complex issues and merit some additional discussion.

Fundamentally, the major health care programs are transfer programs, shifting resources from young to old, wealthy to poor, and healthy to sick. Some of these transfers occur within the same person, such as from a person during their working life to their older self in retirement, while others occur between people.

Cost-benefit analysis of regulations that affect health care costs and coverage fails for the same reasons that cost-benefit analysis of tax regulations fails: These regulations squarely implicate both deficits and distribution. These regulations should be evaluated through a transfer lens, one that evaluates impacts on coverage, federal spending, out-of-pocket costs, and administrative burdens.

Some CMS regulations for health programs do not directly implicate cost and coverage, including the annual Medicare payment rules. However, cost-benefit analysis is no more useful for these rules than it is for those that do affect costs and coverage. By statute, Medicare pays for all reasonable and necessary expenses. It is beyond the scope of the payment rules to decide whether care is worth it in most cases, and so the payment rules generally do not have a direct effect on the quantity or quality of services that beneficiaries receive. As a result, there is no direct way to evaluate the benefits of the rule using an estimate of the value of a statistical life or similar approaches.

Instead, the primary function of Medicare payment rules is to implement the payment systems that Congress has set out in statute. The regulations increase or decrease payments to different providers, but CMS has limited discretion in developing these rules. Where CMS does have discretion, decisions are often centrally motivated by fiscal considerations. Of course, in those cases where formal cost-benefit analysis could be useful, there is nothing that would prevent CMS from conducting such an analysis.

Allow case-by-case exemptions for other agencies and programs

Under the proposal, agencies could also exempt transfer rules that are not covered by these programmatic exemptions from the requirements for cost-benefit analysis on a rule-by-rule basis. CMS and Treasury/IRS issue large numbers of rules implementing tax and transfer policies for which cost-benefit analysis is ill-suited, making it reasonable to provide formal exemptions for rules related to their programs. Fewer rules are issued for the administration of Social Security, SSI, and SNAP, but those programs are also fundamentally transfer programs and a broad exemption is therefore appropriate.

Many other agencies issue fewer rules or rules on a more diverse array of topics, only some of which are a poor fit for cost-benefit analysis. Thus, rather than specifying in advance the contours of an exemption for every agency or program, agencies should instead be authorized to identify the relevant rules themselves. Other agencies or bureaus that may issue transfer rules for which cost-benefit analysis is ill-suited include, for example, the Administration for Children and Families at the U.S. Department of Health and Human Services and the Pension Benefit Guaranty Corporation.

Defer to agencies to provide their own analysis supporting reasoned decisionmaking

Agencies are required to engage in reasoned decisionmaking in support of their rulemaking. If they do not, their rules could be challenged and might be invalidated in court. While proponents of cost-benefit analysis sometimes suggest that formal cost-benefit analysis is a primary means by which agencies should document that the development of a rule reflected reasoned decisionmaking, courts have not required agencies to conduct formal cost-benefit analysis for this purpose. Moreover, as the discussion above shows, there is especially good reason for courts not to have required formal cost-benefit analysis to meet the requirement for reasoned decisionmaking when it comes to transfer rules since cost-benefit analysis is ill-suited to evaluating these rules. (See the Questions and Concerns section below for additional discussion of judicial review of agency rulemaking.)

Under this proposal, agencies would be responsible for providing adequate documentation of reasoned decisionmaking for exempted rules. To the extent that there is a question of whether an agency's regulations provide adequate documentation of their reasoned decisionmaking process, that question is best addressed by the agency's general counsel office,

who will be better able to assess the unique features of each agency's regulatory authorities and contexts. If a cross-cutting perspective is needed, additional support can be obtained from, or direction provided by, the White House Counsel's Office, OMB General Counsel, or the U.S. Department of Justice. Notably, while assistance in protecting rules from legal challenges is sometimes offered as a rationale for OIRA's role in the regulatory process, OIRA itself does not have a legal team. Agency general counsels, OMB General Counsel, the Department of Justice, and the White House Counsel's Office are more appropriate sources of legal expertise.

To illustrate how agencies could document decisionmaking for some of the rules covered by the programmatic exemptions described above, I provide some general guidance below. The analysis that is conducted should focus on questions that inform decisionmaking or that help protect the rule from legal challenge. Agencies should not conduct blank-slate evaluations of existing transfer programs or legislated changes to those programs.

In the case of tax regulations, the primary outcomes of interest are revenues, burden, and compliance costs. Treasury and the IRS could evaluate how tax regulations affect federal revenues, the increase or decrease in tax burden for different groups of taxpayers, and the impact of the rules on compliance costs.¹⁵ Even when it is not feasible to quantify impacts, Treasury can use this analytic framework to evaluate the choices it makes. A more-stringent regulation will generally raise additional revenues at the cost of higher tax burdens and sometimes higher compliance costs. A less stringent regulation will reduce revenues and reduce tax burdens, with potentially higher or lower compliance costs, depending on the nature of the regulation.

Similarly, when considering changes that affect Social Security benefits, the Social Security Administration could evaluate how changes affect benefits, deficits, and administrative burdens.

In the case of health regulations affecting cost and coverage, CMS could evaluate how regulations affect coverage, federal spending, out-of-pocket expenses, and administrative burdens. For example, a regulation that makes enrollment easier may reduce administrative burdens, reduce out-of-pocket expenses, increase coverage, and increase federal spending. Regulations that require additional documentation for eligibility verification may increase administrative burdens, increase out-of-pocket expenses, and reduce coverage and spending.

In the case of Medicare payment rules, CMS could evaluate how changes in the payment rates affect reimbursements for different specialties and in different settings, as it currently does. In addition, it could provide supplemental analyses appropriate to specific

changes in the payment rule. The nature of this analysis would depend on the specific changes in the rule and could include impacts on the availability of a service, the setting in which care is provided, who provides a service, or any other aspect of the experience relevant to the changes of interest.

In the case of regulations implementing a recent legislative change, it will often be difficult to distinguish the effects of the regulation from that statutory change. In these cases, it will often be most useful to evaluate only regulatory alternatives relative to the chosen alternative. It is not a productive use of scarce agency resources to task agencies with evaluating congressional action after the action has occurred and while the administration is under pressure to implement it. Moreover, the agency does not have the option of refusing to implement the statute; the only choices available to the agency are those that implement the statute in a different manner.

Importantly, revoking the requirement for formal cost-benefit analysis would not prevent agencies from conducting cost-benefit analysis in cases where it might be useful. For example, the Inflation Reduction Act of 2022 assigned Treasury rulemaking responsibilities in certain areas where environmental externalities are a primary consideration; formal cost benefit of certain regulatory alternatives could be appropriate and would still be available.

Eliminate substantive OIRA review of transfer regulations

Under this proposal, agencies would provide transfer rules in draft form to the White House. OIRA would continue to fulfill its statutory responsibilities under the Congressional Review Act, Paperwork Reduction Act, and other authorities, and would serve any necessary coordination functions within the White House. If requested by other parts of the White House or the rulemaking agency, OIRA would also coordinate inter-agency circulation. Critically, OIRA would have no formal clearance role and would not be responsible for approving the rule for publication. Its role would be limited to these coordination functions.

The exemption for tax regulations has traditionally carried with it a broader exemption from OIRA review, both informally under the pre-2018 status quo and formally under the 2023 MOA (MacBride and Revesz 2023). Conceptually, the question of whether cost-benefit analysis is the right mode of analysis and the question of whether OIRA should review whatever analysis is done are distinct. However, in practice, having OIRA review transfer rules under this proposal is unlikely to be beneficial.

The history of requiring inappropriate analysis of transfer rules means that continued OIRA review

of these rules is likely to result in significant confusion and requests for inappropriate analysis. Circular A-4 defines cost-benefit analysis as efficiency analysis, and OIRA staff have consistently held that such analysis is well-suited to transfer rules. Achieving productive OIRA review of transfer rules would require a substantial change in organizational culture for these rules. There is no reason to make that kind of challenging, time-consuming organizational transformation a prerequisite to addressing the existing issues around analysis.

Moreover, an important argument for centralized substantive review of regulations is that there is a single, common mode of analysis that is appropriate for all regulations. However, the issues associated with transfer rules make clear that different modes of analysis are appropriate for different regulations. Rather than attempting to build entirely different expertise within OIRA (and divert the organization's limited resources from its core competencies), an institutional design that decentralizes the responsibility for the analytic work to agencies could better align the analytic expertise and the responsibility to do the analysis.

Finally, the reality is that additional layers of review necessarily slow the regulatory process down. OIRA's review of cost-benefit analysis is often a forum for OIRA staff to express views on the substance of a rule, further contributing to delays. In the absence of relevant expertise and institutional history, the downsides of an additional layer of review outweigh the upsides.

A potential downside of this model is that, absent OIRA review, the quality of agency analysis could deteriorate. While this may occur in some cases, there are two important countervailing considerations. First, the highest-quality cost-benefit analysis today likely occurs in agencies where the agency has a degree of commitment to the analysis as being useful to them. The EPA is often viewed as a leader in using cost-benefit analysis among federal agencies; this in part reflects the fact that at least some EPA leaders believe cost-benefit analysis is useful to them (see, e.g., McGartland 2021). This will remain the case under the reform proposed here. More speculatively, this proposal has the potential to increase agency commitment to regulatory analysis by offering agencies the opportunity to define analysis that they believe is more useful to them.

Second, much of the analysis produced for transfer rules today is of little value because it is done after the fact and does not inform decisionmaking or provide real insight into the agency's motivation for adopting a rule. If agencies do less of this sort of pro forma analysis, the loss of insight will be minimal and the potential for better use of agency resources substantial.

Implementation

Because requirements for formal cost-benefit analysis are largely a creation of executive order rather than statute, this proposal can be adopted without legislation.¹⁶ The most straightforward approach would be to amend EO 12866, but other approaches are also possible, such as an OMB memorandum limiting the scope of the EO's requirements. In the rare cases where a formal cost-benefit analysis would be required by statute under this proposal, the agency would produce such an analysis, but OIRA would not review it.

Regardless of the mechanism chosen for implementing the change, it could be valuable for the Office of White House Counsel, in collaboration with the Council of Economic Advisers and other relevant offices, to prepare a memorandum making clear that the requirement for cost-benefit analysis for these regulations is being eliminated because the mode of analysis is inappropriate. This memorandum would serve two purposes: (1) making clear to agencies the rationale for the change, and (2) making clear to courts why this change is consistent with agencies' obligations to engage in reasoned decisionmaking under the APA.

Case studies

To make the preceding discussion more concrete, this section considers three recent regulations in more detail: two of them relating to taxes and the other relating to the Medicare Advantage program. For each regulation, this section examines the cost-benefit analysis that was done (if any), what a formal cost-benefit analysis would look like, and what a more useful regulatory analysis could look like. The discussion illustrates why the existing framework does not lead to useful analysis and how alternative analyses could be more useful.

Allowance of state and local tax (SALT) workarounds

The Tax Cuts and Jobs Act of 2017 capped the deduction for state and local taxes for individual taxpayers to \$10,000.¹⁷ In Notice 2020-75 (IRS 2020), Treasury and the IRS blessed an approach by which states can effectively eliminate the cap for taxes on income from pass-through businesses, a workaround known as a pass-through entity tax (PTET). PTETs allow pass-through owners to shift the responsibility for paying state income taxes from the pass-through owner, where the cap applies, to the pass-through entity, for which state and local taxes are deductible without a cap. As a result, pass-through owners can get around the SALT cap on the portion of their income attributable to the pass-through entity.

Release of the notice caused a surge in state legislation establishing PTETs; as of April 2026, 38 of the 42 states with personal income taxes on income from pass-through entities had adopted a PTET (American Institute of Certified Public Accountants and Chartered Institute of Management Accountants 2026).

Notice 2020-75 (IRS 2020) effectively implemented a roughly \$200 billion tax cut over the following decade.¹⁸ Roughly 80 percent of the benefits accrue to the top 1 percent of the income distribution (Comey, Gallagher, and Gorman 2025). The notice could have either increased or decreased compliance costs. Its impact on compliance depends on how SALT cap avoidance strategies would have evolved in the absence of PTETs, which is hard to predict, but these effects are likely modest in comparison to the revenue and distributional effects.

PTETs reduce the marginal tax rate on pass-through income in states that adopt a PTET. As with any other rate cut, this rate cut encourages additional work and investment in the pass-through form. It also encourages relabeling of income because the deduction for taxes on wage income is limited while the deduction for taxes on the profits of a partnership is not.

Treasury and the IRS did not conduct (or, at least, did not publish) a formal cost-benefit analysis for the notice, though it would appear that one would have been required by EO 13891.

A formal cost-benefit analysis of this notice would conclude that the merits of the notice depend on the net benefits associated with the behavioral responses to the expansion of PTETs, which can be approximated as the net change in revenue from those responses, less the administrative and compliance costs of PTET proliferation.¹⁹ For example, if PTETs induce \$30 billion of additional revenue from increased labor supply and investment over the decade, cost \$10 billion due to relabeling of other sources of income as pass-through income to benefit from PTETs, and generate \$2 billion of administrative and compliance costs, then authorizing PTETs would create \$18 billion of net benefits under a formal cost-benefit analysis.

This approach would likely conclude that authorizing PTETs is a good idea because it is a means by which Treasury and the IRS can implement a marginal rate cut administratively. However, it does not provide useful guidance and obscures the issues relevant for an informed decision about the policy merits of the guidance.²⁰

The primary policy question in evaluating Notice 2020-75 (IRS 2020) is whether delivering a \$200 billion tax cut targeted to high-income pass-through owners is normatively desirable. The efficiency impact—the net revenues from changes in behavior less the net change in compliance cost—is inadequate to answering that question. Moreover, by deemphasizing the transfer, formal cost-benefit analysis directs

analysts' attention away from the most important empirical questions, such as how large the transfer is and what the take-up of PTETs will be, and toward less-important questions. A more appropriate analysis of Notice 2020-75 would estimate the effect on revenues (taking into account behavioral responses), the distribution of the tax cut, and the impact on compliance costs, and it would assess whether the transfer was normatively desirable.

No tax on tips

The One Big Beautiful Bill Act created a new deduction for tip income (26 USC § 224). As relevant here, deductible tip income is tip income "received by an individual in an occupation which customarily and regularly received tips on or before December 31, 2024, as provided by the Secretary," and meets certain other criteria. The law directed the Secretary to publish a list of the qualifying occupations within 90 days of the law's enactment. The congressional Joint Committee on Taxation estimated that this provision would cost \$32 billion over the 10-year window, or about \$8 billion per year for the four years it is in effect (Joint Committee on Taxation 2025).

Under the statute, Treasury and the IRS must determine the details of who is and who is not eligible for this provision. A broader list of occupations means more taxpayers would be eligible and more revenue would be lost. A narrower list of occupations means the reverse.

As with other tax regulations, a formal cost-benefit analysis of this provision provides little useful guidance. Under such an approach, an expansive reading of the statute would reduce marginal rates in eligible occupations, potentially encouraging some additional labor supply in those occupations, discouraging labor supply in other occupations, and encouraging relabeling of occupations such that they are eligible for the deduction. An expansive reading has positive net benefits if the revenue gain from additional labor supply in tipped occupations exceeds the revenue loss from discouraging labor supply in other occupations and relabeling and any net increase in compliance costs.

As with the SALT workarounds discussed above, this approach fundamentally misapprehends the relevant considerations in making tax policy. It instructs Treasury and the IRS to pursue backdoor marginal rate cuts to the extent they do not unduly encourage avoidance. But the tax system is a system for effectuating transfers. The income tax collects revenues to fund public services, and the deduction for tip income provides tax cuts for a favored set of occupations. In assessing whether a more expansive reading of the provision is desirable, the key quantities of interest are the revenue loss attributable to the more expansive

reading, the distribution of the tax cut, and the associated impact on compliance costs.

Treasury and the IRS published final rules relating to the tip deduction in April 2026. The cost-benefit analysis for the rule provides essentially no information about the economic effects of the rule. Treasury and the IRS use a post-statutory, no-regulation baseline and conclude that the effects of the regulation relative to this baseline are small.

While a post-statutory baseline is appropriate, rather than considering the impact of the regulation relative to a post-statutory, no-regulation baseline, Treasury should consider the impact of alternative, legally available regulations relative to the proposed regulation.²¹ In this case, that would mean alternative specifications of the occupation list and permitting tips for illegal occupations and pornography.²² Treasury and the IRS should estimate how these alternatives would affect revenues, the distribution of the tax change that would result, and the effect on compliance costs. Such an analysis would allow Treasury and the IRS to explain their reasoning for concluding that the proposed rule is superior to these legally available alternatives.

Medicare Advantage program integrity rule

Medicare Advantage payments are determined, in part, by adjusting a base amount for the risk of the enrolled population. Risk is determined based on the diagnosis codes for the enrolled population.²³ CMS conducts audits of enrollee medical records to ensure that they support the diagnosis codes used for risk adjustment and recoup overpayments when they do not.

In 2023 CMS published a rule formalizing procedures for determining overpayments in the Medicare Advantage Risk Adjustment Program (Federal Register 2023). Most consequentially, under the rule CMS uses the results of medical record audits to estimate overpayments for entire contracts, and not just for the specific enrollees who were audited. In addition, under the rule CMS would not make a technical adjustment to those estimates that would reduce recoveries as it had previously proposed.

This rule allows CMS to recover a much larger share of Medicare Advantage overpayments at minimal cost. The absence of material administrative and compliance costs is somewhat unusual for a program integrity rule. It reflects the fact that, in this case, CMS was already incurring the relevant administrative and compliance costs under existing regulations and the new regulation simply changed the methodology for determining the amount recovered, which had little incremental cost.

The cost-benefit analysis for the rule estimates that it will recoup \$4.5 billion over a decade (Federal Register 2023). In addition, the analysis estimates about \$175,000 in regulatory familiarization costs.

Consistent with its general bias toward increasing the deficit, a formal cost-benefit analysis of this rule would tend to push CMS in the direction of simply allowing Medicare Advantage plans to bill aggressively. The large savings achieved by the rule are a transfer and do not affect the net benefits. The modest regulatory familiarization costs would therefore be sufficient to make the net benefits of the rule negative.

The cost-benefit analysis for the rule does not consider an alternative in which CMS shuts down the audit program entirely. However, the analysis indicates that the audit program costs more than \$400 million over a decade, and a rule that shuts down the program would therefore offer a large benefit at relatively modest cost as judged by a formal cost-benefit analysis. Thus, an analysis with a more thorough set of alternatives could be read to suggest that shutting down the program is the best way forward.

More generally, a formal cost-benefit analysis could find that policies to prevent overpayments like

those in this rule have positive net benefits if Medicare Advantage plans incur substantial administrative costs in pursuit of higher reimbursements. However, if the administrative costs of excessive billing are relatively modest, formal cost-benefit analysis will tend to push against program integrity efforts.

As this example demonstrates, the same fundamental problems that make formal cost-benefit analysis inappropriate for assessing revenue-raising tax regulations apply equally to nontax transfer rules for which deficit reduction is a primary consideration.

In contrast to the tax rules discussed above, in this case the agency has largely already conducted the analysis that would be useful for understanding the rule as part of its formal cost-benefit analysis. Specifically, the primary quantities of interest are the amount recovered and the administrative and compliance costs associated with those recoveries. However, rather than presenting those impacts in the benefits, costs, and transfers frame of cost-benefit analysis, they should be presented with the fiscal savings as the goal of the regulation. Further analysis of the incidence of the recoveries could be useful for some program integrity rules.

Questions and concerns

Does eliminating the requirement for formal cost-benefit analysis of transfer rules make it more likely that these rules will be struck down in court?

As discussed above, there is no general statutory requirement for cost-benefit analysis of federal regulations. Moreover, while courts regularly review agency rulemaking and invalidate rules found to be arbitrary and capricious, they have not found that formal cost-benefit analysis of regulations is required. In *Michigan v. EPA*, the Supreme Court held that the EPA must consider cost when determining whether a regulation is appropriate and necessary under the Clean Air Act, and observed that “reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions (*italics in the original*),” but explicitly stated that it was not concluding that the agency was required to conduct a formal cost-benefit analysis (*Michigan v. EPA* 576 U.S. 743 2015).

Courts will rule against agencies for deficiencies in a cost-benefit analysis if they read the relevant statutes to require such an analysis, but this is not generally relevant for tax and transfer regulations. For example, in *Business Roundtable v. SEC* (2011), the court found that the agency’s cost-benefit analysis failed to meet the statutory requirement that the agency evaluate “the rule’s effect upon efficiency, competition, and capital formation”. Courts also regularly rule against agencies on the grounds that their rules are arbitrary and capricious when they fail to consider certain costs. But these decisions do not fault the agency for failing to conduct a cost-benefit analysis since there is no general statutory requirement for such an analysis.²⁴

Although the Court declined to impose a cost-benefit requirement in *Michigan v. EPA* (2015), Masur and Posner (2018) argue that courts should impose such a requirement and that *Michigan v. EPA* is simply a temporary stop on the way to that conclusion. They argue that the requirement is a form of federal common law reflecting the fact that judges appreciate “the value of CBA and have increasingly mandated it because they believe that CBA should play a role in regulation.”²⁵

Even if Masur and Posner (2018) were correct that there is a broad cost-benefit requirement, their analysis is insufficient to establish such a requirement with respect to transfer rules. Masur and Posner do not explicitly limit the scope of the requirement for cost-benefit analysis in their paper, but their argument depends on the merits of cost-benefit analysis as a tool for evaluating regulations. The contrary argument developed in this proposal, that cost-benefit analysis is not useful for transfer regulations, is therefore sufficient to establish that any such requirement, if it exists, should not apply to transfer rules.²⁶

Similarly, Cass Sunstein has argued that the APA imposes an implicit cost-benefit analysis requirement (Sunstein 2017). Unlike Masur and Posner (2018), however, Sunstein explicitly stipulates that cost-benefit is not required where it not the appropriate mode of analysis. Specifically, he argues that the APA establishes what is effectively a rebuttable presumption in favor of quantified cost-benefit analysis and identifies five categories of considerations relevant for rebutting that presumption. He identifies dignity, equity, and fairness as one such category, consistent with our analysis finding that formal cost-benefit analysis is ill-suited to evaluating transfer regulations for similar reasons.

Equally important, mandating traditional cost-benefit analysis can itself create legal risk for transfer rules. It encourages judges to rely on an ill-suited analytic framework for assessing whether reasoned decisionmaking has occurred. Because the framework has a strong bias for finding that deficit-reducing and redistributive rules have negative net benefits, agencies that fulfill such a mandate may find themselves dismissing its conclusions as they attempt to issue regulations that fulfill the purposes and goals of the statutory regime. Doing so could invite skeptical attention from judges.

Indeed, courts’ tendency to identify specific costs that are un- or under-considered when finding rules arbitrary and capricious suggests that additional discussion of the advantages and disadvantages of a rule in the preamble, with attention given to the specific regulatory approaches adopted and potential alternatives, as well as to responding to comments, may be more protective than a formal cost-benefit analysis of the rule as a whole.

Does UMRA require cost-benefit analysis of tax regulations?

UMRA requires cost-benefit analysis of a limited set of federal mandates (2 USC § 1531 et seq.). This requirement is best read not to apply to most tax regulations, and Treasury and the IRS have consistently held that it has little applicability to tax regulations since it was enacted. Most importantly, UMRA adopts a post-statutory baseline, and the responsibility to pay tax is imposed by Congress and not by regulations. Even when Treasury and the IRS set forth reporting or other requirements related to paying taxes, they are following through on congressional direction. Second, UMRA was enacted during the lengthy period from the early 1980s through 2018 during which tax regulations were largely exempt from the cost-benefit analysis requirements imposed by EO 12866; while there are critics of the exemption, it was clear in the record at the time. UMRA's requirements have generally been understood as a subset of those imposed by EO 12866. Indeed, the public discussion of the 2018 MOA and its rescission has paid relatively little attention to UMRA, likely reflecting the broad agreement that it does not apply in this context.

Moreover, even if tax regulations were subject to UMRA's requirements, there is no reason to interpret the cost-benefit analysis required by UMRA under the narrow definition imposed by Circular A-4, especially since its enactment followed soon after the release of EO 12866 in 1993, which has a more expansive definition of costs and benefits, and predated the publication of Circular A-4. Thus, even if UMRA were interpreted to apply to certain tax regulations, the law should still be read not to require Treasury and the IRS to use formal cost-benefit analysis.

Finally, even if courts ultimately disagree with this interpretation, UMRA limits judicial review of agency compliance with the statute to compelling production of the missing analysis. Thus, there is little reason for agencies to preemptively change course on the chance that a court will change the common understanding of the statute.

Can weighted cost-benefit analysis make cost-benefit analysis of transfer rules useful?

Weighted cost-benefit analysis, which sums the welfare impacts of a regulation on different people using a set of weights specified by the analyst, can introduce equity considerations into the cost-benefit paradigm, but it will generally be inadequate to address the challenges of applying cost-benefit analysis to transfer regulations.

First, weighting cannot resolve the challenge of applying cost-benefit analysis to rules where deficit

impacts are a primary consideration. At the time such a rule is adopted, it cannot be known what effect that change in the deficit will have on future taxes or spending, and so it is not clear what set of policies to apply weighted cost-benefit analysis to.²⁷

Second, there is no widely accepted set of weights to serve as the basis for weighted cost-benefit analysis. Not only do different administrations have different views on distributional questions, but also a single administration will likely hesitate to publicly commit to a single set of distributional weights that must be used across all contexts.²⁸

Finally, using weighted net benefits is poorly suited to anything other than limited types of vertical equity. For example, Congress has often prioritized families with children as beneficiaries of programs. This prioritization could lead to scenarios where children in families with higher incomes are getting benefits before adults with lower incomes. Congress also targets programs based on geography either directly or based on the history of an area. While it is possible to reverse engineer a set of weights that could rationalize any program, such an analysis would be inherently post hoc.

Can the marginal value of public funds replace cost-benefit analysis for transfer rules?

The marginal value of public funds (MVPF) is the ratio of the willingness-to-pay for a policy by its beneficiaries to the net budgetary cost for the government.²⁹ The MVPF is a useful tool for comparing policies with the same costs (or savings) and similar distributional profiles: all else equal, a policy with a larger MVPF is more desirable than a policy with a smaller MVPF.

However, the MVPF is ill-suited to determining whether to proceed with a specific regulatory project. There is no critical value of the MVPF that determines whether a policy is desirable. In developing regulations, agencies must decide whether to proceed with a specific project. They have some discretion in the design of the regulation, but that discretion is necessarily limited. The agency generally is not choosing between two completely different projects (at least not at the relevant stage of the regulatory process).

Additionally, because the MVPF depends on the aggregated willingness-to-pay for a policy by its beneficiaries, it treats transfers as having no net benefit in the same way that cost-benefit analysis does. It therefore suffers from the same defects as cost-benefit analysis when it comes to evaluating policies with significant distributional impacts. Similarly, the MVPF does not speak to the value of deficit reduction in absolute terms.

Can agencies use cost-effectiveness analysis to meaningfully evaluate transfer regulations?

Similar to this analysis, Posner (2003) observes that transfer programs presumptively have negative net benefits in an efficiency framework because they incur costs to achieve transfers. However, he proposes a different solution, arguing that agencies should use cost-effectiveness analysis to evaluate transfer rules. Broadly speaking, cost-effectiveness analysis compares different regulatory approaches that endeavor to deliver the same outcome and seeks to determine which of those approaches can do so at the lowest cost.

While there are circumstances in which cost-effectiveness analysis can be a useful mode of analysis, it does not offer a general solution to the challenge of evaluating transfer rules. In fact, there is a quite limited set of regulations for which cost-effectiveness is a useful guide and cost-benefit analysis is not.

Posner (2003) gives an example in which an agency must choose between different approaches for providing school lunches. In this context, cost-effectiveness analysis can help an agency choose between two approaches for providing school lunches that provide lunches to the same students but involve different administrative or compliance costs. In other words, if regulation A would provide lunches to 5 million students at a cost of \$10 per lunch and regulation B would provide lunches to the same 5 million students at a cost of \$11 per lunch, then regulation A is more cost-effective. But this is a highly contrived and limited example.

To extend the scope of cost-effectiveness analysis beyond this type of comparison, Posner suggests that agencies use a minimum average cost rule for choosing between different approaches even when the potential benefits differ more substantially. He develops an extension of the school lunch example in which the agency can pay higher administrative costs to reduce the number of students outside the targeted population receiving lunches, and argues that a policymaker should adopt the rule for which the average cost of providing a lunch to a student in the targeted population is lowest. Selecting a rule on this basis will generally favor options with higher administrative costs because there is no value to providing lunches to students outside the target population. However, analysts and policymakers may reasonably differ on the relative merits of such transfers. Posner can rank different policies only because he makes assumptions about the value of these transfers. In doing so, he demonstrates that evaluating different transfer rules requires interrogating the value of different transfers.

In sum, Posner (2003) correctly notes that cost-effectiveness analysis can be used to evaluate regulations where the benefits are fixed. But that is nothing more than saying cost-effectiveness analysis can be used to evaluate transfer regulations that do not change transfers. This approach can be useful in certain limited contexts but is not a viable solution to the problem of analyzing transfer rules in general.

Could Treasury and the IRS use Weisbach, Hemel, and Nou's (2018) marginal revenue rule to evaluate tax regulations?

Weisbach, Hemel, and Nou (2018) propose an approach to the analysis of tax regulations using what they term the marginal revenue rule. Under the marginal revenue rule, the net benefit of a regulation is the increase in revenues attributable to behavioral responses to the rule. As the authors note, the marginal revenue rule is an approach to measuring the efficiency impacts of tax regulations and can be viewed as a means of implementing the cost-benefit analysis required by Circular A-4. The marginal revenue rule therefore suffers from the weaknesses of cost-benefit analysis of tax regulations described in this proposal. However, to the extent that a formal cost-benefit analysis is of interest in a specific context, the marginal revenue rule can be a useful framework in which to approach estimating those effects. See the discussion of the allowance of SALT workarounds above for an example of how this can be done.

Is the definition of transfer rule too vague?

There is some ambiguity about whether a rule is a transfer rule under this definition because it requires analysts to determine whether fiscal or distributional impacts are a primary consideration in the development of the rule. While it is desirable to minimize the ambiguity in the definition, some degree of ambiguity is unavoidable. The theory related to transfer rules contemplates an idealized all-cash tax-transfer system cleanly separable from policies that pursue other goals. In practice there is no perfectly clear distinction between transfer programs enacted for distributional reasons and nontransfer programs enacted for other reasons.

If fiscal impacts are small, that will generally be sufficient to determine that fiscal impacts are not a primary consideration. Even when fiscal impacts are large, however, they may still not be a primary consideration. For example, a fee imposed on a polluting activity may deliver revenues that are large relative

to other impacts, but if the fee is imposed as part of an effort to address environmental harms, then the fiscal impacts would generally not be a primary consideration.³⁰

Determining whether distributional impacts are a primary consideration is more ambiguous, in large part because most regulations have distributional impacts. Again, if distributional impacts are small relative to other impacts, that would generally be sufficient to determine that a rule is not a transfer rule. If a rule implements a federal transfer program (such as those relating to Social Security, Medicare, Medicaid, and SNAP) or tax laws, that rule generally will be a transfer rule. However, many rules that do not implement federal transfer programs but nonetheless have large distributional impacts are not transfer rules. For example, a rule that bans companies from selling products that contain certain harmful substances to kids would have large distributional impacts on children relative to purchasers who are not children, shareholders, and other relevant actors. But this rule would not be a transfer rule because the key question for evaluating the merits of the rule is whether the benefits to the kids exceed the costs imposed on those other groups, regardless of who they are, and not whether a transfer to kids from those populations is worth it.

As described above, I propose to exempt regulations related to certain programs from the requirement for cost-benefit analysis on the grounds that those regulations are overwhelmingly transfer rules. While this approach necessarily involves some degree of overinclusion, I see that overinclusion as worth it to simplify the practical implementation of the exemption.

A more stringent test, perhaps looking to whether fiscal or distributional tests are the exclusive considerations, would be underinclusive. Indeed, it is not

clear that any regulation would be appropriately considered a transfer regulation under such a definition if interpreted strictly.

Likewise, it would be a mistake to restore the exemption for tax rules but ignore the problems with traditional cost-benefit analysis for other transfer rules. Transfers are merely negative taxes, and the tax system itself includes similar programs, such as the Earned Income Tax Credit and the Premium Tax Credit. It is difficult to offer an analytically persuasive reason for treating refundable tax credits in one way and SNAP or SSI benefits in a different way. Indeed, the tax system is increasingly integrated with the delivery of nontax transfer programs, as illustrated by the Affordable Care Act, which combines tax and nontax policies to achieve its health policy aims.

How does this proposal relate to other proposals to limit OIRA review or requirements for regulatory analysis?

This proposal identifies a specific policy context in which formal cost-benefit analysis does not usefully inform regulatory decisionmaking and argues for exempting such rules from analytic requirements and OIRA review. It is motivated in part by long-standing theoretical results that are used to justify formal cost-benefit analysis in nontransfer contexts on the grounds that tax-and-transfer programs are the best place to achieve distributional aims (see, e.g., Kaplow and Shavell 1994). However, this analysis does not attempt to establish whether requirements for formal cost-benefit analysis or OIRA review are justified in other contexts; this proposal in no way precludes the adoption of broader proposals for OIRA reform that would further limit OIRA review or requirements for regulatory analysis.

Conclusion

Formal cost-benefit analysis of transfer rules makes no sense. Nonetheless, OIRA's Circular A-4 requires agencies to evaluate transfer rules using the same cost-benefit framework that applies to all other rules. Unsurprisingly, the result is often meaningless, especially when agencies do not simply ignore or resist that requirement. In addition to encouraging bad analysis, the requirement also creates risks for agencies by inviting judges to use an inappropriate analytic framework to determine whether reasoned decisionmaking has occurred.

The exemption from requirements for cost-benefit analysis for tax regulations should be restored;

a similar exemption should be provided for regulations relating to Social Security, major health care programs, and SNAP; and all federal agencies should be empowered to exempt transfer regulations from these requirements on a rule-specific basis. Agencies should conduct the analysis necessary to document reasoned decisionmaking or inform agency decisionmaking, which will generally focus on the nature of the transfers resulting from the rule. As it has in the past, regulations exempted from the requirement for cost-benefit analysis should also be exempt from substantive review by OIRA.

Endnotes

1. This proposal uses the term “formal cost benefit analysis” to refer to an evaluation of a regulation’s impact on economic efficiency. White House guidance to agencies has traditionally required—and currently requires—this form of analysis for regulations. As discussed further below, the Biden administration made significant efforts to modernize and improve cost-benefit analysis, but these changes—even if they were to be restored—would not solve the fundamental problems in using cost-benefit analysis for transfer rules.
2. Measuring the costs that result from changes in behavior can be complicated and is often counterintuitive. Doing so generally requires netting various benefits and costs associated with the change in behavior that occurs.
3. The Trump administration has issued additional regulatory process EOs, but these largely layer on top of the requirements of EO 12866 so I set them aside for purposes of this discussion.
4. The cost-benefit analysis for a rule is required as part of the regulatory impact analysis for that rule. In addition to the cost-benefit analysis, a regulatory impact analysis also includes a discussion of the need for the regulation and an examination of alternative approaches. For simplicity, and because the focus of this proposal is on the requirement for cost-benefit analysis, I refer to cost-benefit analysis throughout and ignore the distinction between different parts of a regulatory impact analysis.
5. More concretely, the 1983 MOA exempted nonlegislative tax regulations from OIRA review. While there was some variation over the years in how broadly this exemption was construed, in practice Treasury and the IRS determined that the vast majority of tax regulations were not legislative. Because the analysis in this proposal places little weight on the distinction between interpretative and legislative regulations, I do not interrogate these issues further.
6. GAO revisited the topic of cost-benefit analysis for tax regulations in a 2026 report, but the more recent report did not attribute a view to OIRA in the way the earlier report did (GAO 2026).
7. In 2017, OIRA’s guidance implementing an executive order on regulatory policymaking during the first Trump administration explicitly defined transfer rules as rules “that cause only income transfers between taxpayers and program beneficiaries (e.g., regulations associated with Pell grants and Medicare spending)” (White House 2017). While the requirement in the definition that rules only cause transfers would be quite limiting, the parenthetical suggests that the definition was intended to sweep somewhat more broadly (White House 2017).
8. In this section, the definition of a “major rule” is that used in OIRA’s annual reports to Congress: (1) a rule that is major for purposes of the Congressional Review Act (CRA), (2) a rule that meets the threshold for analysis under the UMRA, or (3) a rule that is economically significant under EO 12866.
9. These criteria also follow directly from traditional justifications for using cost-benefit analysis to evaluate policies. Under one such justification, cost-benefit analysis should evaluate the efficiency impacts of a regulation because any distributive gains achieved by a regulation can be better achieved through the tax-transfer system. See, for example, Kaplow and Shavell (1994). This justification for cost-benefit analysis implies that a different mode of analysis is needed for changes to the tax-transfer system, irrespective of whether those policies are implemented through legislation or regulation. Another justification considers cost-benefit analysis to be a means of evaluating whether the winners from a policy could compensate the losers. The paradigmatic tool for providing such compensation is, again, the tax-and-transfer system. Under this logic, then, it also makes no sense to evaluate changes in the tax-and-transfer system by imagining some other mechanism of compensation.
10. Arguably, the fiscal prong of this definition of transfer rule is just a specific application of the distributional prong, since an increase in the federal budget deficit is ultimately a redistribution away from whoever bears the burden of financing it and a decrease in the federal budget is ultimately a redistribution in favor of those who benefit from the spending increases it makes possible. In practice, however, it is helpful to categorize rules using both tests.
11. At the time of the announcement, Treasury estimated the actions would raise more than \$50 billion (Treasury 2024). Treasury later increased the estimate to more than \$100 billion (Weil 2024).
12. In principle, if the reduction in tax planning expense resulting from the new regulations exceeded the increase in compliance costs imposed by the regulations, the regulations could have positive net benefits. However, it is not clear that this would be true, and the merits of the regulations do not materially depend on whether it is true.
13. GAO (2026) conducts a similar analysis for the period from 2017 through March 2026 looking at medians rather than means. It finds a median review time for proposed rules of 34 days and a median review time for final rules of 21 days.
14. I do not conduct a parallel investigation of the analysis length of nontax rules, largely because there is no similar variation in the requirements in recent years.
15. The analysis recommended here overlaps with the analysis produced by the congressional Joint Committee on Taxation during the legislative process. The modes of analysis used by Congress should not be dispositive—there is nothing preventing Congress from directing the Joint Committee on Taxation to produce irrelevant or misleading analysis—but it makes sense for Congress and the executive branch to use related modes of analysis in the same policy area. In this case, the practices developed by Congress over time reflect the key economic considerations in tax legislation.
16. Legislative reforms to the modest requirements for cost-benefit analysis imposed by the UMRA (reviewed above) and other forms of regulatory analysis are beyond the scope of this proposal. However, the argument set forth in

this proposal naturally extends to an argument for a comprehensive repeal of statutory requirements for cost-benefit analysis for transfer rules.

17. The One Big Beautiful Bill Act increased the limit to \$40,000 in 2025, with modest annual increases through 2029. The limit reverts to \$10,000 in 2030.
18. The Tax Policy Center estimated in 2023 that PTETs cost roughly \$20 billion per year. See Rubin (2023). See also Comey, Gallagher, and Gorman (2025).
19. For more on using revenue impacts to proxy for the costs (or benefits) associated with changes in behavior in response to taxation, see Weisbach, Hemel, and Nou (2018) and the related discussion in the Questions and concerns section below.
20. I set aside for purposes of this analysis the merits of the guidance as a matter of legal interpretation. See Hemel (2023) for additional discussion of that issue.
21. Focusing instead on the clarity benefits of the regulation does not provide useful insight into the actual decision facing the agencies and generally leads to the conclusion that some regulation is better than no regulation. While generally true for implementing tax legislation, such a conclusion is not particularly useful.
22. It is not clear that the occupation list published by Treasury/IRS reflects the best reading of the statute or that all of the listed occupations meet the standard of “customarily and regularly received” tip income. Nonetheless, for our purposes here it suffices to observe that a less expansive list would certainly be legally available and therefore should have been evaluated.
23. For a more thorough description of Medicare Advantage payments, see Medicare Payment Advisory Commission (2024).
24. More narrowly, the author is unaware of a case where a tax regulation was challenged on the absence of a cost-benefit analysis and the court found for the plaintiff on that basis. As tax regulations were long largely exempt from the administrative requirements for cost-benefit analysis and tax regulations often impose burdens on well-advised and well-financed entities, this would seem to be an opportune environment for litigants to establish such a requirement if it existed.
25. *Rodriguez v. Federal Deposit Insurance Corporation* (2020) states that there are “strict conditions” on common law-making and may suggest that Masur and Posner’s (2018) proposed common law source for an analytic requirement might not find support at the Supreme Court, whether or not it is economically justified.
26. Indeed, for broadly similar reasons to those articulated in this proposal, Posner (2003) argues that transfer regulations should be evaluated using cost-effectiveness analysis, not cost-benefit analysis. Lienke (2024) points out that courts have applied *Michigan v. EPA* to transfer rules in some cases. However, neither of the cases Lienke cites shows a court interpreting *Michigan v. EPA* to require a traditional cost-benefit analysis for these rules. Indeed, the opinion in one of the cited cases (*Council of Parents Attorneys and Advocates v. DeVos* 2018) criticizes the agency for treating reliance interests as sunk costs, making the requirement to consider reliance interests “illusory.” But consideration of reliance interests is an awkward fit for traditional cost-benefit analysis, and the treatment of certain costs incurred by prior agency action as sunk costs is entirely appropriate in that context. This finding further supports the view that formal cost-benefit analysis is neither necessary nor sufficient to protect regulations from legal challenges.
27. Applying a marginal cost of public funds does not resolve this problem since doing so simply assumes that the deficit impact will be resolved using a stylized set of tax policies, which is purely hypothetical, and ignores the distributional merits of those tax policies.
28. The Biden administration’s update to Circular A-4 authorized the use of weighted cost-benefit analysis and provided a set of weights that could be used, but it did not mandate the use of those weights when agencies conduct weighted cost-benefit analysis and it did not mandate the use of weighted cost-benefit analysis (2023).
29. See Hendren and Sprung-Keyser (2020) for an introduction and applications of the MVPF.
30. That said, when the fee becomes larger relative to other tax legislation, as would likely be true in the case of a carbon tax, transfer rule concepts become more relevant. Some judgment will always be required and multiple modes of analysis may be useful in some cases.

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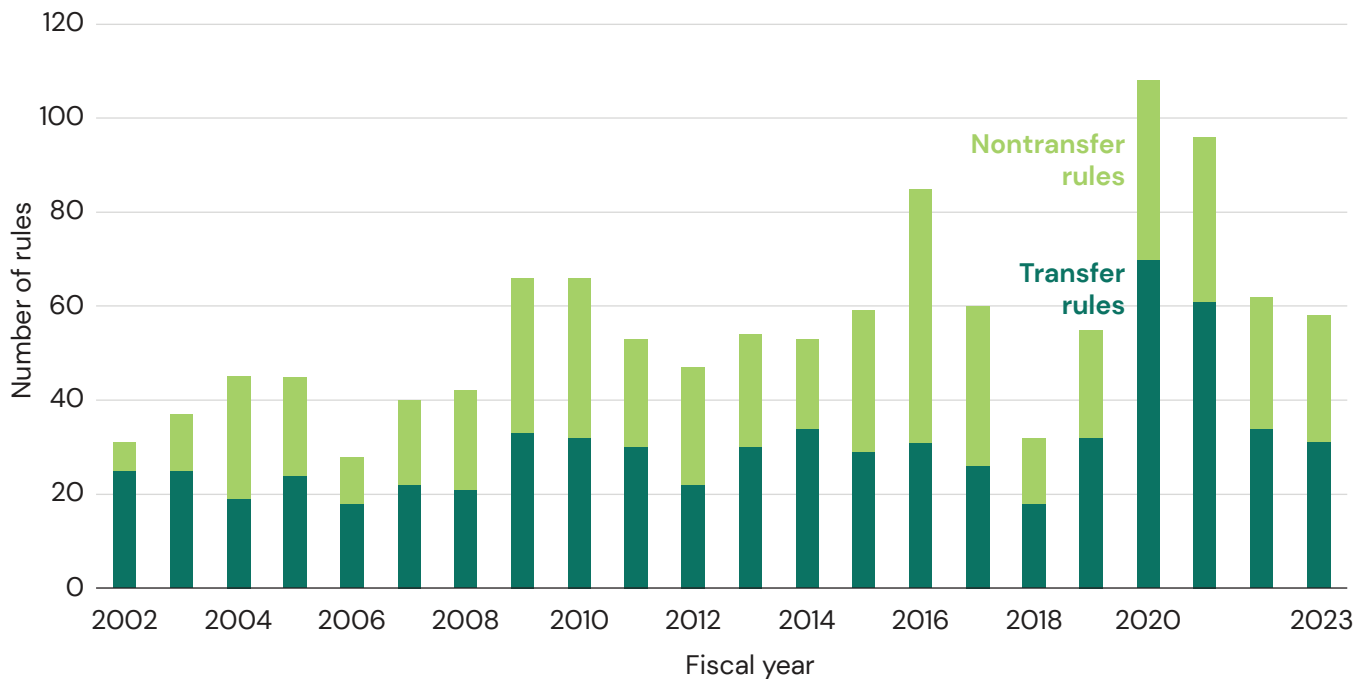
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The White House has required federal agencies to conduct a formal cost-benefit analysis for certain regulations since the early 1980s. In principle, cost-benefit analysis can inform policymakers and the public about the likely effects of a rule and help guide policymakers to better decisions, at the expense of a somewhat slower and more resource-intensive rulemaking process. However, formal cost-benefit analysis does not provide useful guidance for a large class of rules related to tax and transfer programs, including Social Security, major health care programs, and the Supplemental Nutrition Assistance Program, because it ignores the distributional and fiscal goals that motivate those rules. For these rules, referred to as transfer rules, requirements for formal cost-benefit analysis bias the regulatory process, mandate public release of misleading metrics, and delay rules for no gain. Changes to White House guidance on cost-benefit analysis during the Biden administration—since rescinded—would have improved analysis in many ways but would not have resolved the fundamental challenges of conducting such analysis for transfer rules. I instead propose eliminating the requirement for formal cost-benefit analysis and substantive Office of Information and Regulatory Affairs review of transfer rules. Doing so would streamline the regulatory process and eliminate a prejudicial form of analysis.

Major transfer rules and nontransfer rules, FY2002–FY2023



Source: OIRA, n.d.–a–s.

Note: The definition of a “major rule” is that used in OIRA’s annual reports to Congress: (1) a rule that is major for purposes of the Congressional Review Act (CRA), (2) a rule that meets the threshold for analysis under the Unfunded Mandates Reform Act (UMRA), or (3) a rule that is economically significant under EO 12866. The definition of transfer rules is that used in the source report with the following modifications: tax regulations without quantification in FY2019–23 are classified as transfer rules and SBA regulations related to pandemic-era programs in FY 2020–21 are classified as transfer rules.

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