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HOMELAND SECURITY AND REGULATORY ANALYSIS: Are We Safe Yet?

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ARE WE SAFE YET?*

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ABSTRACT

During the five years since its inception, the Department of Homeland Security promulgated thirteen economically significant regulations, costing a total of at least \$4 billion annually. This study evaluates the quality of regulatory analysis that DHS has produced for these regulations. Compared to the ideal articulated in Executive Order 12866 and accompanying OMB guidance, most of these analyses are seriously incomplete. DHS, OMB, and Congress can all take steps to remedy this deficiency. The department should hire more economists, involve them early in developing alternatives, manage them in a way that ensures their job is to conduct objective analysis, and learn from both its own and other agencies' best practices in regulatory analysis. OMB should aggressively promote analysis of alternatives when it reviews DHS regulations and amend Executive Order 12866 to clarify that it expects agencies to analyze all reasonable alternatives, even if they would require a change in the law. Congress should give DHS greater discretion to craft regulations and give DHS deadlines that allow adequate time to conduct quality regulatory analysis. Congress should also hold DHS accountable by specifically articulating and measuring the outcomes the regulations are supposed to accomplish. If Congress declines to give DHS more discretion or time, then it should arrange for an objective analysis of alternatives by the Government Accountability Office or other independent entity.

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Ms. Letter (White House tour guide):

Now that we've made it through with security –

Guard:

Ma'am, one is never through with security ...

Ms. Letter:

Oh! I feel so guarded.¹

INTRODUCTION

The Department of Homeland Security (DHS) celebrates its fifth anniversary in 2008. During the five years since its inception, the department promulgated thirteen “economically significant” regulations, costing a total of at least \$4 billion annually.² Pronounced criticism of the department and its policies has come from across the political spectrum on a variety of issues.³ How can Americans know whether they’re getting their money’s worth from the lead agency designed to ensure their safety? Perhaps more importantly, how does DHS know this?

For decades, presidents have issued executive orders insisting that regulatory agencies complete a detailed Regulatory Impact Analysis that helps answer these questions for “economically significant” regulations.⁴ The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB), reviews proposed regulations and accompanying analysis and can return the regulation to the issuing agency or seek revisions if the analysis is incomplete or the regulation is inconsistent with administration policy. Regulatory Impact Analyses are unique analyses produced within the government that are intended to identify options to accomplish a regulatory goal and provide decision makers with objective analysis of their effectiveness and cost. Wherever possible, values are

¹ Karen Zacarías et. al., CHASING GEORGE WASHINGTON: A WHITE HOUSE ADVENTURE (2008) at 11, play commissioned by the Kennedy Center and the White House Historical Association, unpublished manuscript on file with authors.

² See tbl. 3 *infra*.

³ A recent example occurred earlier this year, as a particular dispute between Congress and DHS reached a boiling point as Democratic and Republican members representing border states have rankled at DHS regulations requiring individuals to present passports when crossing the border from Canada. See “I.D. Rule to Change for Canada Crossings”, Spencer Hsu, *The Washington Post*, January 22, 2008 (The article notes that after DHS chief Michael Chertoff suggested that it was time for those opposed to the measures to “grow up,” Representative Thomas Reynolds (R-N.Y.) stated that Chertoff had “as much credibility on telling people to grow up as Geoffrey the Giraffe.”)

⁴ The primary executive order governing regulatory analysis in force today is Exec. Order No. 12866, available at http://www.whitehouse.gov/omb/inforeg/eo12866/index_eo12866.html. [Hereinafter “Exec. Order 12866”] The Order requires that agencies complete Regulatory Impact Analyses whenever a rule has a \$100 million annual economic impact, or has other significant adverse impacts on the economy, the environment, or other factors enumerated in Section 3(f)(1).

quantified to make comparisons easier for decision makers. If DHS is conducting thorough regulatory analysis, Americans should be able to rest easy knowing that the government they've entrusted to keep them secure is doing its homework to ensure that it adopts effective solutions to the country's security problems without needlessly sacrificing liberty, privacy, prosperity, or other important values in the process.

This study evaluates the quality of regulatory analysis DHS has produced for each of the thirteen economically significant regulations the department has issued between its creation and December 31, 2007. Compared to the ideal articulated in Executive Order 12866 and accompanying OMB guidance,⁵ most of these analyses are seriously incomplete. We suggest and test possible explanations for what appears to be lackluster performance. We have not attempted to analyze whether the regulations DHS has implemented are actually effective or desirable, but rather, whether DHS provided itself, the public, the president, and Congress with the information necessary to answer that question before issuing the regulations.

To the best of our knowledge, this is the first overall attempt to assess the quality of DHS regulatory analysis of economically significant regulations. Because we rely solely on the publicly available rule notices and Regulatory Impact Analysis, we cannot claim to offer a comprehensive assessment of the influence of economists or other regulatory analysts on DHS regulations. The regulations actually issued may have been much improved either by extensive analysis, or simply by questions raised during internal discussions, that never saw the light of day. Nevertheless, our approach yields significant insight into the quality of the analysis DHS has made public.

Other researchers have engaged in similar "scorecard" assessments of regulatory analyses performed by other agencies. Working with various coauthors, Robert Hahn has developed a scorecard that covers most of the same topics as our evaluation in this article. The Hahn scorecard provides yes/no answers for a series of elements that OMB requires agencies to include in a Regulatory Impact Analysis. We evaluate the completeness of the analysis, rather than just the presence of various elements, but because the Hahn scorecard contains numerous elements, it provides substantial insights on the depth of the analysis similar to our assessment of completeness. Most recently, in 2007, Hahn and Dudley assessed the analyses underlying seventy-four environmental regulations enacted under three successive administrations, finding that many of these analyses were seriously incomplete.⁶ A 2000 analysis by Hahn, Lutter, and Viscusi reached

⁵ OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003), available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf> [hereinafter "Circular A-4"].

⁶ Robert W. Hahn and Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, 1 REV. ENV. ECON. AND POL'Y 192 (2007).

similar conclusions.⁷ A 1990 analysis by Hahn et. al. covering multiple agencies concluded, “The agencies’ economic analyses generally did not provide adequate information about a proposed regulation to justify decisions to proceed with the regulation.”⁸ The quality of regulatory analysis in the European Union, moreover, generally lags the United States, though some countries are better than others.⁹

Section I discusses the elements of an ideal regulatory analysis and the foundation of these elements in economic scholarship, executive orders, and OMB guidance. Section II explains how we developed criteria for evaluating regulatory analysis based on the requirements in Executive Order 12866 and OMB guidance. Section III lays out the results of our evaluation of the regulatory analyses for each of the thirteen economically significant rules promulgated between the creation of DHS and the end of 2007. Section IV analyzes several possible explanations for DHS’s failure to complete thorough regulatory analysis. In Section V, we offer some potential solutions for improving regulatory analysis that DHS, OMB, and Congress could implement.

I. REGULATORY ANALYSIS¹⁰

Respected analysts have called on the government to prioritize security initiatives based on risk assessment and cost-effectiveness.¹¹ The 9/11 Commission’s report repeatedly called on the government to implement security measures that reflect assessment of risks and cost-effectiveness.¹² The 2007–09 DHS Annual Performance Report lists six objectives related to protecting Americans from terrorists; four of the six objectives are expressed in terms of risk reduction.¹³ The department’s National Strategy for Homeland Security notes:

⁷ Robert W. Hahn, Randall W. Lutter, and W. Kip Viscusi, *Do Federal Regulations Reduce Mortality?* AEI-Brookings Joint Center for Regulatory Studies (2000).

⁸ Robert W. Hahn et. al, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply With Executive Order 12866*, 23 HARV. J. LAW & PUB. POL’Y 859, 877 (2000).

⁹ Robert W. Hahn and Robert E. Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 8 J. INTL. ECON. LAW 473, 487 (2005) [“Although the quality of assessment and oversight is higher in some European member states than others, the overall quality throughout Europe is generally poor.”]; Robert W. Hahn and Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?*, 22 J. ECON. PERSP. 67, 72-73 (2008) [Citing research showing that a much smaller percentage of European regulatory analyses include important elements.]

¹⁰ This section draws heavily on Jerry Brito and Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 COMMLAW CONCEPTS: JOURNAL OF COMMUNICATIONS LAW AND POLICY 1 (2007), and Jerry Ellig, Amos Guiora, and Kyle McKenzie, Mercatus Center, *A FRAMEWORK FOR EVALUATING COUNTERTERRORISM REGULATIONS* (2006), available at http://www.mercatus.org/repository/docLib/20060908_PS_terrorism_Complete.pdf.

¹¹ See, e.g., Henry H. Willis, Andrew R. Morral, Terrence K. Kelly, and Jamison Jo Medby, Rand Center for Terrorism Risk Management Policy, *ESTIMATING TERROR RISK* (2005).

¹² See, e.g., THE 9/11 COMMISSION REPORT 364, 365, 391, 396, available at <http://www.gpoaccess.gov/911/index.html>.

¹³ Department of Homeland Security, *ANNUAL PERFORMANCE REPORT, FISCAL YEARS 2007-2009*, 6-7, available at http://www.dhs.gov/xlibrary/assets/cfo_apr_fy2007.pdf.

The assessment and management of risk underlies the full spectrum of our homeland security activities, including decisions about when, where, and how to invest in resources that eliminate, control, or mitigate risks. In the face of multiple and diverse catastrophic possibilities, we accept that risk—a function of threats, vulnerabilities, and consequences—is a permanent condition. We must apply a risk-based framework across all homeland security efforts in order to identify and assess potential hazards (including their downstream effects), determine what levels of relative risk are acceptable, and prioritize and allocate resources.¹⁴

An almost infinite number of possible actions might serve to mitigate an almost infinite number of terrorist attacks. With limited public and private resources, we cannot invest in all of them, but rather, must find a way to prioritize possible actions. Setting priorities for government action requires an understanding of the outcomes, consequences, and forgone benefits associated with different measures to mitigate terrorist risks.

It should be no surprise that regulatory analysis provides the necessary framework for such evaluation. Regulatory analysis is rooted in economics—the social science commonly defined as the study of how people satisfy potentially unlimited wants with scarce means that have alternative uses.¹⁵ This definition of economics precisely characterizes the predicament faced by DHS: an unlimited number of things could be imagined that might make the country safer from terrorists, the resources available for the task will never be sufficient to do all the things that could be imagined, and resources have alternative uses. Along with the pesky issue of finding out which of the imagined solutions are actually likely to produce the hoped-for results.

Table 1 summarizes the most salient aspects of the regulatory analysis framework commonly advocated by economists and enshrined in several executive orders since the 1970s.¹⁶ (We include a “plain English” translation of each element for the benefit of non-economists.) Commentators sometimes refer to this framework as “cost-benefit analysis,” as if its sole purpose is to develop a quantitative comparison that automates the decision about whether to regulate. This is, however, an exceedingly narrow and highly inaccurate depiction of the framework. Of course, regulatory analysis requires identification and

¹⁴ Department of Homeland Security, NATIONAL STRATEGY FOR HOMELAND SECURITY 25, available at http://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf.

¹⁵ This classic definition was first articulated by Lionel Robbins, ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE, 2d ed. (1942) at 16, available at <http://www.mises.org/books/robbinsessay2.pdf>.

¹⁶ For a concise history of the executive orders governing regulatory analysis, see Brito and Ellig, *supra* note 10 at 7-13.

documentation of benefits and costs. Comparison of benefits and costs, however, is just one element of the framework.

OMB Circular A-4 on Regulatory Analysis states, “A good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions ... A good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.”¹⁷ Use of this framework allows decision makers to clarify objectives; assess the need for regulation; identify the nature of the problem they are trying to solve; and understand the consequences of alternative courses of action, even if comparison of quantified costs and benefits does not drive the decision. Thomas McGarity, who characterizes himself as ambivalent about regulatory analysis,¹⁸ nevertheless notes that regulatory analysis is “simply the process of applying the policy analysis paradigm to regulation.”¹⁹ The “policy analysis paradigm” consists of these steps: “(1) identify the problem, (2) break it down into its constituents, (3) clarify and rank preexisting goals, (4) identify alternative policies for resolving the problem, (5) investigate the consequences of each alternative using available information and clearly specified assumptions, (6) measure the consequences against the goals, and (7) select the policy that best advances the goals.”²⁰ What we call the six key steps in regulatory analysis parallel McGarity’s list.

Table 1: Six Key Steps in Regulatory Analysis

Identify the desired outcomes

Figure out what you’re trying to do and how you’ll know you did it.

Assess evidence of market failure or other systemic problem

Figure out whether government needs to do something, and if so, why.

Identify the uniquely federal role

Figure out what the federal government needs to do.

Assess effectiveness of alternative approaches

Think about different ways to do it and find the one that works best.

Identify costs

Figure out what you have to give up to do whatever you’re trying to do.

Compare costs with outcomes

Weigh pros and cons.

A. Identify the desired outcomes

For the purposes of regulatory analysis, an outcome may satisfy the economist's definition of a net social "benefit," or it may simply be some result that policymakers deem worthwhile.²¹ The key point is that an outcome indicates the ultimate effect of the regulation on human wellbeing.²² To effectively identify how a proposed regulation would affect outcomes, decision makers need to define the outcome they are trying to affect or achieve, outline a theory of causality or "logic model" that shows how the regulatory proposal is likely to achieve the desired outcome(s)²³, and establish measures that indicate *whether* and *how much* of the outcome is achieved as a result of the regulation.²⁴

Defining outcomes for homeland security requires understanding and acknowledging that acts of terrorism will occur. Accordingly, the question is how a liberal democratic society minimizes terrorism. If the public has realistic expectations, the government will likely develop better counterterrorism programs and institutions. Terrorism can be minimized, perhaps marginalized, but not completely eradicated—a characteristic shared with most of the social problems we confront, air pollution, food safety, crime, and political corruption.

The 9/11 Commission recognized this fact when it noted:

- We do not believe it is possible to defeat all terrorist attacks against Americans, every time and everywhere. A president should tell the American people.
- No president can promise that a catastrophic attack like that of 9/11 will not happen again. History has shown that even the most vigilant and expert agencies cannot always prevent determined, suicidal attackers from reaching a target.
- But the American people are entitled to expect their government to do its very best. They should expect that officials will have realistic objectives, clear guidance, and effective organization.

²¹ OMB Circular A-4 ("... Congress establishes some regulatory programs to redistribute resources to select groups."), *supra* note 5.

²² "In constructing measures of "effectiveness," final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided." Circular A-4, *supra* note 5 at 12.

²³ "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document." Exec. Order 12866, Sec. 1.7. "Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks." Circular A-4 at 2.

²⁴ "Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively." Circular A-4, *supra* note 5 at 9.

They are entitled to see some standards for performance so they can judge, with the help of their elected representatives, whether the objectives are being met.²⁵

DHS's National Strategy for Homeland Security emphasizes preventing terrorist acts, reducing vulnerabilities, and minimizing consequences of terrorist acts.²⁶ When risk can be measured or estimated, one desirable outcome of counterterrorism regulation is a reduction in the measurable risk of attack. Another desirable outcome is a reduction in the likely damage the attack could do to lives and property. For terrorist attacks for which probabilities are unknown, it should still be possible to measure the effects of mitigation measures intended to reduce damage. If one cannot measure the likelihood of an attack, then the best one can hope for is a transparent policymaking process that lets citizens see, understand, and evaluate decision makers' "judgment calls."

B. Assess evidence of market failure or other systemic problem²⁷

Regulatory economists generally accept that government action can enhance consumer welfare in the case of a clear "market failure" that cannot be addressed adequately by other means.²⁸ This is because voluntary action by individuals and organizations is very effective at allocating scarce resources to the uses that citizens value most highly. As Nobel laureate economist Friedrich Hayek showed, decentralized processes are superior to centralized regulatory solutions because decentralized markets focus dispersed information—information that no one individual (not even a regulator) can obtain—and convey it effectively to market participants.²⁹ Decentralized markets also permit trial-and-error experimentation

²⁵ 9/11 COMMISSION REPORT at 365.

²⁶ Department of Homeland Security, *supra* note 14, at 25-27, 27-29, 30.

²⁷ The original Exec. Order 12866 required agencies to identify the relevant problem in terms of "the failure of private markets of public institutions that warrant new agency action[.]" Exec. Order No. 12866 at § 1(a) and § 1(b)(1). Exec. Order 13492 underscores this step by amending requiring agencies to "identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action[.]" Exec. Order No. 13,492 at § 1. OMB Circular A-4 provides substantial guidance to agencies on how to identify and describe a market failure. Circular A-4 *supra* note 5, at 4-5.

²⁸ The term "market failure" is perhaps an unfortunate piece of economics jargon, because to most people the term "market" implies some form of commercial, for-profit business activity. Market failure then presumably refers to any situation in which commercial activity fails to solve a perceived problem. For many economists, however, the term "market" often has a much broader meaning, referring to any type of voluntary interaction in which people mutually coordinate their activities rather than take directions from a higher (governmental) authority. We use the term in this broader sense. A "market failure" occurs when voluntary activity fails to direct resources to the uses that people value most.

²⁹ Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AMERICAN ECONOMIC REVIEW 519 (1945).

in order to discover things that would not otherwise be discovered.³⁰ Evidence abounds that individuals with diverse, localized knowledge can make choices, generate ideas, and solve problems far better than small groups of experts, no matter how well intentioned, knowledgeable, or intelligent.³¹

Some forms of “market failure” may arise as a result of incentives or constraints for private parties created by previously-existing government policies.³² While such policy-driven problems are not technically “market” failures, the problems are likely to persist in the absence of some additional government action. The fundamental solution is to correct the original policy.

Concentrating government effort on market failure does not mean that the government should sit back and wait for a terrorist attack to reveal where the private sector has provided inadequate security. Rather, government and independent analysts need to identify situations in which private individuals, businesses, or other organizations may lack incentives to provide the desired level of security. There are two reasons why regulatory analysis should explicitly identify a market failure or some other systemic problem underlying the need for action. If in fact there is no market failure or other systemic problem, then government action will likely do more harm than good. If there is a market failure or other systemic problem, then government action can more effectively correct the problem if it has been accurately identified and understood.³³ Even in the case of security against terrorism, there are areas in which market participants are adequately motivated to protect their own assets such that there is not a role for government intervention.³⁴ In one sense, this is no different than protection against crime: governments supply police, but people also buy locks for their doors.

C. Identify the uniquely federal role

The fact that a market failure or other systemic problem prevents the achievement of desired policy outcomes does not automatically mean that the federal government will provide the most effective remedy. Federal regulation may help

³⁰ Friedrich Hayek, *Competition as a Discovery Procedure*, in Hayek, NEW STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS 179 (1978).

³¹ James Surowiecki, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (2004).

³² Susan E. Dudley, Mercatus Center at George Mason University, *PRIMER ON REGULATION* (2005) at 39, available at http://www.mercatus.org/repository/docLib/20060510_Primer_on_Regulation_Dudley_Dec_2005_Final_as_Posted.pdf.

³³ *Id.* at 39.

³⁴ See, e.g., Ellig, Guiora, and McKenzie, *supra* note 10, at 19-21 (noting that coffee houses, malls, and bus lines in Israel hire private security guards to check patrons at the door, not because any government policy compels them to do so, but because security is necessary to attract customers).

promote a uniform national solution, but leaving regulation at the state or local level may foster experimentation and choice.³⁵ As OMB Circular A-4 explains:

In assessing whether Federal regulation is the best solution, you should also consider the possibility of regulation at the State or local level. In some cases, the nature of the market failure may itself suggest the most appropriate governmental level of regulation. For example, problems that spill across State lines (such as acid rain, whose precursors are transported widely in the atmosphere) are probably best addressed by Federal regulation. More localized problems, including those that are common to many areas, may be more efficiently addressed locally.³⁶

Broadly speaking, there are strong reasons for a federal role in homeland security. Federal regulation may be appropriate if state or local regulations would burden interstate commerce or compromise the rights of national citizenship. Travel among the fifty states is commonplace, so the costs individual states would incur to protect against terrorist entry would have benefits to citizens of other states. Individual states and localities would arguably invest too little in counterterrorism measures if they bear the full costs, but the benefits accrued to the whole nation (or continent).

That's not to say that the federal government must provide, direct, or regulate all homeland security measures. Where both the costs and benefits are largely confined to a single state or locality, it is appropriate for that state or locality to take action and make the decisions. Federal authority should be involved when there are significant spillovers across state lines. In addition, federal authorities may have a comparative advantage on gathering and providing information to states and localities about potential threats.

D. Assess effectiveness of alternative approaches

A finding that market failure justifies *some* federal role does not mean that *any conceivable* federal role will do. Government has a wide variety of options to influence security-related outcomes. These include various public-private partnerships, performance-based regulation, command-and-control regulation, nonbinding guidance, information disclosure regulations, antitrust enforcement, removal of entry barriers, commercial law, tort law, and contract law.³⁷ For any

³⁵ *Id.* at 39-40.

³⁶ Circular A-4 at 6. *See also* Exec. Order 12866 § 1(b)(9) (directing agencies to “assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives.”).

³⁷ “(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.” Exec. Order

postulated outcome and market failure, regulators should assess which alternative is likely to achieve the goal most effectively.³⁸ OMB explicitly notes that agencies should analyze feasible alternatives, even if they are currently outside the scope of the law: “If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, you should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.”³⁹

In some cases, the effectiveness of different approaches is relatively easy to compare. For example, the Government Accountability Office (GAO) monitored the effectiveness of airport screeners who implement airline security regulations both before and after 9/11. This permitted a comparison of the effectiveness of three different arrangements: private contractors paid by the airlines prior to 9/11, TSA screeners after 9/11, and private contractors employed by several airports under a pilot program permitted after 9/11. One investigation involved undercover audits by DHS. According to the DHS inspector general, federal airport security screeners after 9/11 performed no better in their ability to stop prohibited items from entering the “sterile” areas of airports than private screeners before 9/11.⁴⁰ GAO examined two studies to assess the post-9/11 pilot program that allowed five airports in the US to use non-federal screeners. GAO itself performed one investigation, and BearingPoint, under contract to the TSA, performed the other. Both studies found no evidence to conclude that privately hired screeners performed worse than federal screeners.⁴¹ In fact, the BearingPoint study cited one airport (Kansas City) in which the private screeners performed better than the

12866 Sec. 1. “Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.” Circular A-4 at 6. *See also* Exec. Order 12866§6(a)(3)(B)(iii) (requiring agencies to assess “alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.”). OMB Circular A-4 describes possible alternatives agencies should consider. Circular A-4 at 7-9.

³⁸ Exec. Order 12866 §1(b)(5). *See also* Exec. Order 12866§6(a)(3)(B)(iii) (requiring agencies to assess “alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.”). OMB Circular A-4 describes possible alternatives agencies should consider. Circular A-4, *supra* note 5 at 7-9.

³⁹ Circular A-4, *supra* note 5 at 17.

⁴⁰ Richard L. Skinner, Acting Inspector General, US Department of Homeland Security, Senate Committee on Homeland Security and Government Affairs, January 26, 2005.

⁴¹ Norman J. Rabkin, Managing Director, Homeland Security and Justice. House Subcommittee on Aviation, Committee on Transportation and Infrastructure, *Aviation Security: Private Screening Contractors Have Little Flexibility to Implement Innovative Approaches*, Thursday April 22, 2004. *See* GAO Report GAO-04-505T.

federal screeners.⁴² The GAO and TSA investigations both suggest that private screeners under federal regulatory guidance provide screening at least as effectively as TSA employees.

The airline screening example demonstrates that, even for a seemingly esoteric public good like security, it is possible to design and evaluate alternative approaches.

E. Identify costs

The accurate measure of the cost of any government action is its opportunity cost: what did we, as a society, give up in order to devote resources to taking the action?⁴³ Government and private expenditures only partially measure the forgone benefits associated with a particular course of action.⁴⁴ Sound regulatory analysis also identifies hidden and indirect costs that are less obvious than direct expenditures.⁴⁵ Although difficult to estimate, one major study estimates that the annual cost of compliance with federal regulations totals \$1.1 trillion.⁴⁶

When federal agencies and private firms spend money to enforce and comply with regulations, the money has to come from somewhere. Government, of course, gets money from taxes. Businesses and other entities ultimately have to get the money by charging customers or reducing payments to the owners of resources the firm uses. In both cases, the costs of regulation are likely to affect the prices that consumers pay for the things they buy.⁴⁷

⁴² Sara Kehaulani Goo, "Airport Screeners Do Poorly, Panel Told," *Washington Post*, April 23, 2004, http://www.secure-skies.org/Airport_Screeners.php.

⁴³ Dudley, *supra* note 32, at 42.

⁴⁴ Exec. Order 12866 §6(a)(3)(B)(ii) (requiring agencies to assess "costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets . . . , health, safety, and the natural environment[.])") See also Circular A-4 at 14-42 (explaining how to identify and calculate costs and explaining the concept of "opportunity cost").

⁴⁵ Exec. Order 12866 §6(a)(3)(B)(ii) (requiring agencies to assess "costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets . . . , health, safety, and the natural environment[.])") See also Circular A-4 at 14-42 (explaining how to identify and calculate costs and explaining the concept of "opportunity cost").

⁴⁶ W. Mark Crain, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS, Report Prepared for the Office of Advocacy, U.S. Small Business Administration, RFP No. SBHQ-03-M- 0522 (Sept. 2005), p. 1, available at <http://www.sba.gov/advo/research/rs264tot.pdf>. Crain's estimates may be at the high end of the likely range, as discussed in a recent paper by Winston Harrington: *Grading Estimates of the Benefits and Costs of Federal Regulation: A Review of Reviews*, Discussion Paper, Resources for the Future, September 2006.

⁴⁷ Analyzing the effects of cost-increasing regulation is similar to analyzing the "incidence" of a tax. One of the most well-known tenets of the economics of taxation is that the party that formally "pays" a tax does not necessarily bear the burden of the tax. The incidence of the tax—who really

Costs of regulations result from the choices that both firms and consumers are expected to make if those regulations were to become effective. For firms, it may mean complying exactly with the regulation requiring greater expenditures in the form of new capital or labor. On the other hand, firms may seek to avoid those costs by getting out of the business, moving the business, or by continuing to lobby for change. Behavioral change for consumers also implies costs. For example, for those who continue to travel by plane, more time spent standing in lines and longer time at the airport decreases the quality of the trip. Numerous studies estimate the effect of security measures on the time passengers have to spend in airports, the monetary value of that time, and the reductions in air travel that occur because of the hassle.⁴⁸

Finally, regulation also involves tradeoffs between different types of risks. One cost of reducing terrorism risk could well be an increase in some other type of risk that threatens life and safety. Airline security provides a notable case in point. Federal passenger and baggage screening have increased both the monetary cost of air travel, due to higher ticket prices, and the nonmonetary costs, due to longer delays and waiting times at airports. Travelers have responded by substituting automobile travel for air travel—particularly on shorter routes. Statistically, auto travel is much more dangerous than air travel; per mile, the risk of fatality is 8.9 times greater.⁴⁹ A study by University of Maryland economists Adriana Rossiter and Martin Dresner estimates that the ten-minute increase in wait time assumed by the TSA and a security fee of \$2.50 per flight segment will lead to an additional 66.2 additional highway deaths per year.⁵⁰ Robert Hahn, in his 1997 paper, also estimates the number of highway deaths attributable to more costly

pays—depends on the elasticities of supply and demand, as well as the competitiveness of the market. See, e.g., Edgar Browning & Jacqueline Browning, *PUBLIC FINANCE AND THE PRICE SYSTEM* (1979).

⁴⁸ Harumi Ito and Darin Lee, *Assessing the Impact of the September 11 Terrorist Attacks on US Airline Demand*, 57 J. ECON. & BUS. 75 (2005); Robert W. Hahn, *The Economics of Airline Safety and Security: An Analysis of the White House Commission's Recommendations*, 20 HARVARD JOURNAL OF LAW AND PUBLIC POLICY (Summer 1997) at 791.

⁴⁹ Using average yearly data from 1992-2001 from the National Transportation Statistics (US Bureau of Transportation Statistics, 1992-2001) and the Aviation Accident Statistics cited in Adriana Rossiter and Martin Dresner, *The Impact of the September 11th Security Fee and Passenger Wait Time on Traffic Diversion and Highway Fatalities*, 10 J. AIR TRANSP. MGT. 227 (2004). Some research finds that air passengers who diverted to automobile travel are probably safer than average drivers; the diverted air passenger is only 76 percent as likely to be involved in a fatal accident as the average driver. See L. Evans, M.C. Frick, and R.C. Schwing, *Is it Safer to Fly or Drive?* 10 RISK ANALYSIS 239 (1990).

⁵⁰ Rossiter and Dresner *Id.* at 227-232. If the assumptions and parameters of their equation are varied, the number of additional deaths due to automobile travel can range from 1.0 to 99.3. See also Garrick Blalock, Vrinda Kadiyali, and Daniel H. Simon, *The Impact of Post 9/11 Airport Security Measures on the Demand for Air Travel*, (February 23, 2005), <http://ssrn.com/abstract=677563>.

security measures. He estimates that a thirty-minute delay increase at airports would generate between 30 and 140 more fatalities per year.⁵¹

Terrorists kill, but so can safety precautions. Zero risk is unattainable. Even in a wealthy country like the United States, not every policy that reduces the risk of terrorism makes society safer overall. Sound security decisions require careful analysis of all risks, not just the risk the regulation is intended to reduce.

F. Compare costs with outcomes

Cost information cannot be considered in isolation. A costly regulation may create significant positive outcomes that are valuable to policymakers and citizens.⁵² Information on outcomes and costs can be combined in a variety of ways to aid decision making, such as analysis of cost effectiveness or comparison of costs and benefits.⁵³ When costs can be estimated but benefits cannot, one can still perform a “breakeven analysis” to identify how large the benefits would have to be in order to balance the costs.

Comparing costs and benefits does not automate decisions, because different decision makers may ascribe different values to the costs or benefits.⁵⁴ Even when benefits can be expressed in monetary terms, the dollar amounts usually reflect the value of the benefits to the “average” or “typical” person.⁵⁵ Cost-benefit analysis may mask significant diversity in the value that different people attach to the benefits.⁵⁶ For this reason, a complete cost-benefit analysis should also identify who bears the costs and who reaps the benefits.⁵⁷

Two different decision makers, armed with the same information about cost effectiveness or the same cost-benefit comparisons, can still reasonably disagree about what to do, based on their values. This may be an especially relevant

⁵¹ Hahn, *supra* note 48, at 806.

⁵² Exec. Order 12866 §1(b)(6) (requiring agencies to assess “both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”)

⁵³ Exec. Order 12866 §1(b)(6) (requiring agencies to assess “both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”) OMB Circular A-4 explains the differences between Cost-Benefit Analysis and Cost-Effectiveness Analysis. Circular A-4 at 9-12.

⁵⁴ McGarity, *supra* note 18, at 142-55.

⁵⁵ Dudley, *supra* note 32, at 43.

⁵⁶ *Id.*

⁵⁷ “Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency.” Circular A-4, *supra* note 5 at 14.

consideration for security-oriented regulations, where benefits may be difficult to monetize or highly uncertain, costs may include lost civil liberties or effects on constitutional values that are not captured quantitatively, and the citizens receiving the benefits may not always be the citizens paying the costs. These factors increase the number of ways in which reasonable individuals faced with the same information might disagree as to the most desirable course of action. But the fact that people with different values may disagree when faced with the same information does not mean they should throw away the information. The alternative to making decisions based on regulatory analysis is making decisions based on supposition and hope. This converts regulation from an evidence-based initiative to a faith-based initiative.

II. EVALUATING DHS REGULATORY ANALYSIS

A. *Regulatory Analyses Examined*

To assess the completeness and quality of DHS regulatory analysis, we examined all thirteen “economically significant” DHS regulations that became final by December 31, 2007. An “economically significant” regulation is one that results in an expenditure exceeding \$100 million in one year or meets one of several other criteria outlined in Executive Order 12866.⁵⁸ The executive order requires agencies to perform a Regulatory Impact Assessment for all economically significant regulations.⁵⁹ We limited the analysis to final regulations so we could assess the final regulatory impact analysis (RIA) produced for each regulation. Since the final regulatory analysis may reflect additional information furnished to the agency during the public comment period, it is likely to be the most complete analysis that reflects the agency’s best effort.

Table 2 lists the thirteen regulations and provides a brief description of each. The regulations were issued by seven different components of DHS. Several component agencies—notably the Coast Guard and Customs and Border Protection—issued multiple major regulations. Table 3 lists cost figures for each regulation from the agency’s regulatory analysis. Each figure is the annualized net present value of costs over a ten-year period, discounted at an interest rate of 7 percent. This figure is one of the standard calculations agencies are supposed to perform when they estimate costs in a regulatory analysis.⁶⁰

⁵⁸ *Supra* note 4.

⁵⁹ *Id.*

⁶⁰ Circular A-4, *supra* note 5 at 31.

**Table 2: Economically Significant Homeland Security Regulations Finalized
Through December 31, 2007**

Full Name & Citation	Description
Area Maritime Security 33 C.F.R. Part 103, USCG-2—3-14733, RIN 1625-AA42.	This final rule adopted a previous interim final rule that established U.S. Coast Guard Captains of the Ports as Federal Maritime Security Coordinators, and requirements for Area Maritime Security Plans and Area Maritime Security Committees.
Vessel Security 33 CFR Parts 104, 160, 165, 46 CFR Parts 2, 31, 71, 91, 115, 126, and 176 USCG-2003-14749, RIN 1625-AA46.	This final rule requires the owners or operators of vessels to designate security officers for vessels, develop security plans based on security assessments and surveys, implement security measures specific to the vessel's operation, and comply with Maritime Security Levels.
Facility Security 33 CFR Part 105 USGC-2003-14732 RIN 1625-AA43	This rule requires owners or operators of facilities to designate security officers for facilities, develop security plans based on security Rules and Regulations assessments and surveys, implement security measures specific to the facility's operations, and comply with Maritime Security Levels.
United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT); Authority to Collect Biometric Data from Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry 8 CFR Parts 215, 235 and 252 DHS-2007-0002 RIN 1650-AA00	This rule established the United States Visitor and Immigrant Status Technology Program (US-VISIT), an integrated, automated entry-exit system that records the arrival and departure of aliens; verifies aliens' identities; and authenticates aliens' travel documents through comparison of biometric identifiers.
Special Community Disaster Loans Program 44 CFR Part 206 DHS-2005-0051 RIN 1660-AA44	This rule describes the procedures and requirements for a program designed to provide loans for essential services to local governments that have experienced a loss in revenue due to major disaster.
Allocation of Additional H-1B Visas Created by the H1-B Visa Reform Act of 2004 8 CFR Part 214 DHS-2005-0014 RIN 1615-AB32	This rule implemented congressional changes to the numerical limits of the H-1B nonimmigrant visa category and the fees for filing of H-1B petitions.
Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft 8 CFR Parts 217, 231 and 251 19 CFR Parts 4, 122 and 178 CBP Decision 05-12 RIN 1651-AA37	This rule requires the electronic transmission of manifest information for passengers and crew members on board commercial vessels and aircraft, in advance of arrival in and departure from the United States, and onboard commercial aircraft that continue within and fly over the United States.
Air Cargo Security Requirements 49 CFR Parts 1520, 1540, 1542, 1544, 1546, and 1548 TSA-2004-19515 RIN 1652-AA23	This rule requires airport operators, aircraft operators, foreign air carriers, and indirect air carriers to implement security measures in the air cargo supply chain.

<p>Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry from Within the Western Hemisphere</p> <p>8 CFR Parts 212 and 235 22 CFR Parts 41 and 53 USCBP 2006-0097 RIN 1400-AC10</p>	<p>This rule requires that, beginning January 23, 2007, all United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States from within the Western Hemisphere at air ports-of-entry will be required to present a valid passport.</p>
<p>Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License</p> <p>33 CFR Parts 101-106, 125 46 CFR Parts 1515, 1540, 1570, 1572 TSA 2006-24191 USCG 2006-24196 RIN 1652-AA41</p>	<p>This rule implements a plan to increase the security of ports by requiring use of the TWIC as an access control measure.</p>
<p>Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule</p> <p>8 CFR Part 103 USCIS-2006-0044 RIN 1615-AB53</p>	<p>This rule adjusts the fee schedule for U.S. Citizenship and Immigration Services (USCIS) immigration and naturalization benefit applications and petitions, including nonimmigrant applications and visa petitions.</p>
<p>Chemical Facility Anti-Terrorism Standards</p> <p>6 CFR Part 27 DHS 2006-0073 RIN 1601-AA41</p>	<p>This rule requires covered chemical facilities to prepare Security Vulnerability Assessments and implement Site Security Plans that include measures that satisfy risk-based performance standards outlined in the rule.</p>
<p>Advanced Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels</p> <p>19 CFR Parts 4 and 122 6 CFR Part 5 USCBP-2005-0003 RIN 1651-AA62</p>	<p>This rule requires that electronic manifest information for passengers onboard commercial aircraft and vessels arriving in and departing from the United States, be vetted by DHS against a government-established and maintained terrorist watch list prior to departure.</p>

Table 3: Annualized Costs of Homeland Security Regulations

Regulation	Year Final	Annualized Cost (7% discount rate)
Area Maritime Security ⁶¹	2003	\$47.7 million
Vessel Security ⁶²	2003	\$137 million
Maritime Facility Security ⁶³	2003	\$540 million
US-VISIT Biometric Data ⁶⁴	2004	Unclear
Community Disaster Loans ⁶⁵	2005	Unclear
H1-B Visa Allocation ⁶⁶	2005	\$125 million
Automated Passenger Info. System ⁶⁷	2005	\$61–190 million
Air Cargo Security ⁶⁸	2006	\$206 million
Western Hemisphere Travel Documents ⁶⁹	2006	\$206 million
Transportation Worker ID Credential ⁷⁰	2007	\$250 million
Immigration Benefit Application ⁷¹	2007	\$1.1 billion
Chemical Facilities ⁷²	2007	\$1.36 billion
Passenger Manifests ⁷³	2007	\$100 million

⁶¹ Cost Assessment and Final Regulatory Flexibility Analysis Area Maritime Security, at 5, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCG-2003-14733.

⁶² Cost Assessment and Final Regulatory Flexibility Analysis, Vessel Security, at 19-20, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCG-2003-14749.

⁶³ Cost Assessment and Final Regulatory Flexibility Analysis, Facility Security, at 13, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCG-2003-14732.

⁶⁴ United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT), Interim Rule with Request for Comments, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=DHS-2004-0002.

⁶⁵ Special Community Disaster Loans Program, Interim Rule with Request for Comments, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=FEMA-2005-0051.

⁶⁶ Allocation of Additional H-1B Visas Created by the H1-B Visa Reform Act of 2004, Interim Rule, www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCIS-2005-0004.

⁶⁷ Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft (APIS), Final Rule, 70 *F. Reg.* 17820, at 17843.

⁶⁸ Final Regulatory Evaluation...Air Cargo Security Requirements, at <http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=TSA-2004-19515>.

⁶⁹ Regulatory Assessment, The Western Hemisphere Travel Initiative Implemented in the Air Environment,

B. Criteria and Scoring

We developed a system for evaluating the regulatory analyses in order to answer two questions: (1) On an absolute scale, how well does each analysis address major elements of regulatory analysis? and (2) On a relative scale, which analyses are better?

The six principal elements of regulatory analysis provide appropriate categories for evaluating the completeness and quality of each analysis. For each of the six elements, we developed a list of questions to assess how completely and how well the analysis addressed that element. Appendix I lists the questions and, for each question, provides cites to the relevant section of Executive Order 12866 and/or OMB Circular A-4. For each element, we assigned the analysis a score ranging from zero to five, with the following meanings attached to each score:

0: No relevant content

1: Perfunctory statement with little explanation or documentation

2: Some relevant discussion with some documentation of analysis

3: Reasonably thorough analysis of some aspects

4: Reasonably thorough analysis of most aspects and/or shows at least one example of a “best practice” that other agencies could learn from

5. Complete analysis of all or almost all aspects, with one or more best practices

We did not assign point values or weights to each question listed under each element. Rather, the score for each element reflects our judgment of how well the analysis addressed the entire group of questions listed under each element. Stellar analysis of one question could help offset poor analysis of others.

This scoring system is admittedly a qualitative assessment, but we took several steps to ensure consistency. Scores reflected a consensus between the two authors. We evaluated each regulation separately, then compared scores. Our

<http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCBP-2006-0097>.

⁷⁰ Transportation Worker Identification Credential Standards for Maritime, Regulatory Assessment,

<http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064802c4d6b> .

⁷¹ Adjustment of the Immigration Benefit Application/Petition and Biometric Fee Schedule, Final Rule,

<http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648024855d>.

⁷² Regulatory Assessment for the Chemical Facility Anti-Terrorism Standards,

<http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480222d8c>.

⁷³ Passenger Manifests for Commercial Aircraft Arriving in and Departing from the United States, Regulatory Assessment,

www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCBP-2005-0003.

initial scores on any criterion never differed by more than one point. The list of questions in appendix I also helped ensure that scoring is consistent across regulations. Others using the same criteria might score the regulations more or less strictly, but we suspect most evaluators would end up with a similar ranking.

Scores on the six elements were summed to calculate a total score, which could range between 0 and 30. These total scores allow us to rank the analyses. Each of the six elements received an equal weight in calculation of the total score, because each of these elements is important and clearly required by OMB.⁷⁴

Our evaluation assesses both the completeness and the quality of the regulatory analysis. In performing this evaluation, we examined only the regulatory analyses produced by the agencies—whether as a separate document or a separate section of the final rule. We did not examine comments in the public record or other assessments of the regulations that may have been conducted by other government agencies (such as the Government Accountability Office) or published in scholarly journals. As a result, we may have overlooked some flaws in the analysis (particularly cost or benefit estimates) that could be identified only by specialists who possess extensive practical experience or have spent a great deal of time studying a particular regulation. This might bias our scores upward in some cases.

In addition to evaluating completeness and quality, we also assigned each regulatory analysis a “transparency” score ranging from 0 to 5. This score shows how easy or difficult it was to locate the rule and all the relevant elements of the agency’s regulatory analysis. In an ideal world, DHS would maintain its own docket of economically significant final regulatory actions online, with access to all of the related analyses. This is information that DHS is already required to make public to begin with. As it stands, to find the information we needed for our study, we searched OIRA records to identify each economically significant final rule that DHS sent to OIRA for review during our specified time frame.⁷⁵ From there, we found the Regulatory Identification Number (RIN) for each rule and then used www.regulations.gov to search for each docket using that number. In a few cases, we were unable to locate an e-docket by using the RIN. In those cases, we had to do extensive digging to find out whether the rule was actually published as a final rule in the *Federal Register*, but not available through www.regulations.gov. This required that we use the *Code of Federal Regulations* citations provided by OIRA. Once we located the rule either in the e-docket or the *Federal Register*, we had to search to find the regulatory analysis. For example, some agencies included the regulatory analysis in the text of the final rule, with all major elements discussed under a heading that referenced Executive Order 12866.⁷⁶ Others put the full regulatory analysis into a separate document.

⁷⁴ See Appendix I.

⁷⁵ See Historical Records, at www.reginfo.gov.

⁷⁶ Among these were: Biometric Data Collection, Community Disaster Loans, and APIS.

Some of these documents were easier to find than others, depending on whether they were included in the electronic docket and whether the citations or links provided in the rule actually worked. The more detective work we had to do to find the regulatory analysis, the lower the transparency score.

III. FINDINGS AND TRENDS

Table 4 shows the scores. Out of 30 possible points, scores on the substantive evaluation ranged from a low of 2 to a high of 15. On transparency, most analyses received either a 4 (relatively easy to locate after overcoming the initial hurdle of identifying the rule) or a 2 (findable, but only after some difficulty).

Table 4: Scores and Ranking

Regulation	Year Final	Transparency	Total Score	Define Outcomes	Systemic Problem	Fed Role	Analyze Alternatives	Costs	Cost vs. Outcome
W. Hem. Travel Documents	2006	4	15	2	2	1	3	5	2
Passenger Manifests	2007	4	12	3	1	0	3	3	2
Chemical Facilities	2007	4	10	2	2	0	2	3	1
Automated Pasgr. Info. Syst.	2005	4	9	2	1	1	1	2	2
US-VISIT Biometric Data	2004	2	8	1	0	1	2	2	2
Immigration Benefit Application	2007	2	8	2	3	0	1	1	1
Vessel Security	2003	2	6	1	0	1	0	2	2
Maritime Facility	2003	2	6	1	0	1	0	2	2
Transp. Worker ID Credential	2007	4	6	1	0	0	2	2	1
Area Maritime Security	2003	2	5	1	0	1	0	2	1
Air Cargo	2006	3	5	1	0	0	1	2	1
H1-B Visa Allocation	2005	4	4	1	1	0	0	1	1
Community Disaster Loans	2005	4	3	1	0	1	0	1	0
Average		3.15	7.46	1.46	0.77	0.54	1.15	2.15	1.38

Source: Evaluations in appendix II.

A. Overall Scores

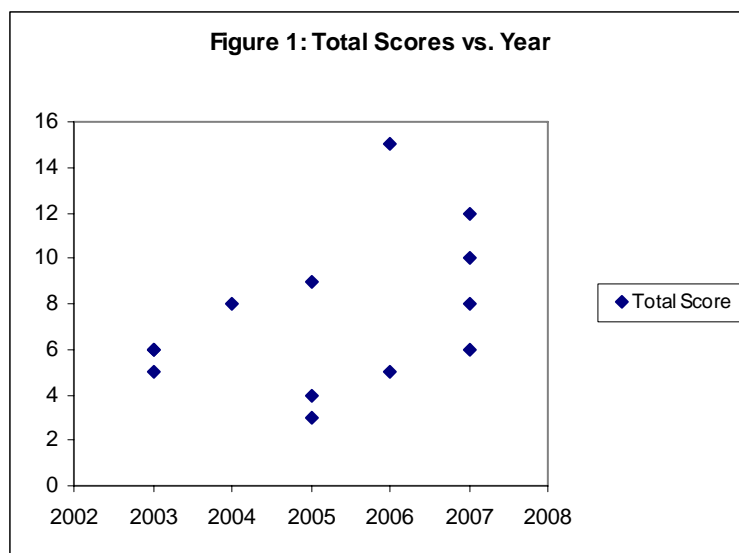
The total scores suggest that the analyses range from poor to middling, compared to the ideal of a complete regulatory analysis articulated in the executive order and OMB guidance documents. The average score was 7.46 out of a possible 30 points, or about 25 percent.

We do not know how DHS regulatory analyses would compare to those of other agencies using our criteria, because we have not performed this kind of evaluation for other agencies. Nevertheless, our results appear consistent with previous research. In a book of case studies of regulatory analysis in the 1980s, Thomas McGarity notes, “We shall see wide variations among agencies, and even within agencies, in the level of analysis achieved in a typical rulemaking. None of the

agencies, however, comes close to meeting the comprehensive analytical rationality ideal.”⁷⁷

In several papers with several coauthors, Robert Hahn has employed a scorecard approach to assess the quality of regulatory analysis produced by other federal agencies.⁷⁸ Most recently, Hahn and Dudley found that regulatory analyses of environmental regulations covered an average of approximately thirty out of seventy-six items on their scorecard—an average of 40 percent.⁷⁹ To the extent our scorecards are comparable, this result suggests that the average DHS regulatory analysis has not been as good as the average environmental regulatory analysis. Given that the environmental regulatory agencies have been around a lot longer than DHS, this is not surprising.

A quick glance at figure 1 suggests a tendency for the quality of DHS regulatory analyses to improve over time. However, closer inspection reveals a more subtle pattern. The analyses for regulations finalized in 2003 and 2004 received very low scores, but so did some of the analyses for 2005–2007. The principal difference is that some of the regulatory analyses were noticeably better in the latter years. As table 4 shows, the three best analyses—Travel Documents, Passenger Manifests, and Chemical Facilities—were for regulations finalized in 2006 and 2005. With one exception—Immigration Benefit Applications—the transparency scores are also uniformly better in 2005–2007 than in the preceding years.



Source: Evaluations in appendix II.

⁷⁷ McGarity, *supra* note 18, at 165.

⁷⁸ Hahn & Dudley, *supra* note 6; Hahn et. al., *supra* note 8; Hahn, Lutter, & Viscusi, *supra* note 7; Hahn & Litan, *supra* note 9; Hahn & Tetlock, *supra* note 9.

⁷⁹ Hahn & Tetlock, *supra* note 9 at 74.

B. Scores on Individual Elements

Some interesting patterns emerge when considering scores on individual elements of regulatory analysis. On average, the analyses received the highest scores for articulating the intended outcomes of the regulation (1.46), calculating costs (2.15), and comparing costs and benefits (1.38). In most cases, though, these scores are just 1s or 2s. A score of 1 on the cost-benefit elements indicates that the analysis names some costs and benefits; a score of 2 indicates that there is some analysis of costs and benefits but the analysis is incomplete. Neither score could be considered “satisfactory.” Average scores were higher on the outcome, cost, and cost-benefit elements because no regulatory analysis received a zero, many received 2s, and some received 3s or higher. Although most analyses discuss costs and benefits, there is still substantial room for improvement.

The differences between these scores and the lower scores on the other elements are striking. The average score for discussion of alternatives was 1.15, with five analyses receiving a zero because they did not discuss alternatives at all. Seven of the analyses did not articulate the systemic problem the regulation was supposed to solve, so they received a zero on that element. The zeroes are primarily responsible for the fact that the average scores on these two elements are below the average scores on other elements. Without the zeroes, the average score for discussion of alternatives is 1.88, and the average score for articulation of the systemic problem is 1.67. These scores are far from stellar, but they are in the same ballpark as the average scores on most of the other elements. This suggests that when DHS does analyze the systemic problem and alternatives, it does these things about as well as it does other elements of regulatory analysis.

The one exception is discussion of the unique federal role. About half offered no explanation or justification for a uniquely federal role. The other half offered only a perfunctory statement that the proposed regulation does not conflict with any other federal regulations, which was worth only one point. Little effort appears to go into this aspect of regulatory analysis at all.

The low scores and frequent omission of discussion of alternatives, the systemic problem, and the uniquely federal role suggest that decision makers at DHS have often treated regulatory analysis as cost-benefit analysis of an alternative already chosen for other reasons. For about half the regulations, little attention focused on the other elements of regulatory analysis outlined in the executive order and OMB guidance. This is a significant weakness. If an analysis does not rigorously address alternatives, the systemic problem, and the uniquely federal role, it is of limited use in guiding regulatory decisions. At best, the cost-benefit calculation merely justifies regulatory decisions that have already been made before the analysis started.

For a few of the individual elements, scores appear to improve over time. On definition of outcomes, for example, all but one analysis produced prior to 2006 received a score of 1. Three of the four analyses produced after 2003 received a score of 2 or 3 on the outcome element. A similar but weaker pattern exists for articulation of the systemic problem (mostly zeroes before 2006, some positive scores thereafter) and discussion of alternatives (mostly zeroes before 2006, some 2s and 3s thereafter). This is, of course, consistent with the pattern of improvement in the total scores over time.

C. One best practice

The only analysis that earned a score of 5 on any individual element was the cost analysis of the 2006 Western Hemisphere Travel Documents rule issued jointly by the Bureau of Customs and Border Protection and the State Department. This analysis earned the top score because it appears to have identified most major costs of all options considered, calculated how the regulation would affect the prices of goods and services purchased by consumers, and calculated some of the deadweight losses⁸⁰ that would result from these price changes. It examined the increased monetary costs of passports, plus the opportunities forgone because the costs would induce some travelers to decline traveling to or from the United States. The calculations included a sensitivity analysis and Monte Carlo analysis to examine how the cost results changed in response to changes in assumptions and uncertainty.

Two other analyses—for Passenger Manifests (2007) and Chemical Facilities (2007)—earned a score of 3 for their handling of costs. The Passenger Manifest analysis identified most recurring costs and costs that varied with the number of passengers. Many costs estimates were based on a pilot study of a system that had not yet been implemented, plus an estimate of the agency's costs based on an arbitrary but perhaps supportable assumption that only 10 percent of airlines implement an automated query system. The analysis did not examine whether increased costs would be passed on to passengers in the form of higher ticket prices, and thus it identified no passenger response to a possible price increase. It identified a diverse set of costs, including the costs imposed on passengers by delay, re-routing, and additional time spent in airports. Some sensitivity analysis is included.

The Chemical Facilities analysis appears to identify most relevant expenditures, and it considers the costs of some of the alternatives to the final rule. The expenditure estimates are fairly detailed. It does not consider how the costs of the rule might affect the prices of goods and services or the behavioral responses of

⁸⁰ When prices increase due to regulation, consumers pay more. In addition to these direct costs are the indirect costs that arise when consumers respond to the price increases by purchasing less of the products or services whose prices have increased. The value this output would have created for consumers and producers is called the “deadweight loss” or “excess burden” associated with the regulation. See Dudley, *supra* note 32, at 42.

firms and customers. A strong point is that the analysis acknowledges the inherent uncertainty of the cost estimates and conducts a Monte Carlo analysis to assess the effects of this uncertainty.

The Passenger Manifests and Chemical Facilities analyses presented a good deal of useful cost information. But they were not as complete as the cost analysis of the Travel Documents rule, which is why they earned a lower score.

IV. EXPLAINING THE RESULTS

Overall, the quality of regulatory analysis coming out of DHS has been poor to mediocre. Certain component agencies have performed better than others, and the quality of economic analysis appears to have improved over time. Additionally, DHS has usually failed to provide adequate discussion of three important elements of regulatory analysis: (1) the discussion of regulatory alternatives, (2) identifying the market failure or systemic problem that might warrant regulatory intervention, and (3) identifying why federal regulation is the appropriate response. The following discussion identifies some organizational, political, and legal considerations that may explain our observations.

A. Why has DHS often done incomplete regulatory analysis?

Despite modest improvement over time, the quality of DHS regulatory analysis remains generally inadequate. One possible explanation for the marginal improvement over time is that, as the Office of Information and Regulatory Affairs (OIRA) has become more familiar with DHS, collaboration between OIRA and DHS in developing quality economic analysis has increased. Another explanation is that DHS has become more informed of and dedicated to the preparation of sound regulatory analysis since its inception. Finally, the OIRA's detailed guidance document outlining best practices in regulatory analysis, Circular A-4, was not issued until September 2003—too late to affect the analysis of the three Coast Guard regulations issued that year. While all of these possibilities provide some explanation, we did not observe uniform improvement over time at each of the component agencies in our sample. Some agencies performed consistently better than others.

Another possible explanation might be that DHS focuses its analytical resources on the most costly regulations, under the assumption that those deserve more careful analysis. We reject this explanation after comparing the cost figures in table 3 with the scores in table 4. The regulatory analyses of the two regulations costing more than \$1 billion annually received scores of 8 and 10. The third most costly regulation, Maritime Facilities (\$540 million annually), received a score of only 6 on its regulatory analysis. The highest-scoring analysis was for the Travel Documents rule, which achieved a score of 15 and cost \$206 million annually. The second-highest score, 12, went to the analysis of the Passenger Manifests rule, which was estimated to cost \$61–190 million. Scores for analyses of the regulations costing \$100–250 million annually ranged from a low of 4 to a high of

15. There is simply no relationship between the quality of regulatory analysis and the cost of the regulation.⁸¹

Two factors could explain why, even after some time to get on its feet, DHS is still producing inadequate regulatory analysis. First, a shortage of qualified regulatory economists at DHS may detract from the agency's ability to complete thorough analysis. This could be an organization-wide problem rather than just a problem afflicting some component agencies. An informal survey revealed that as of January 2008, approximately ten economists employed at DHS work on regulatory analysis. In 2007, DHS employed about 159,000 full-time equivalent individuals. The number of economists and the ratio of economists to non-economists are both much lower at DHS than at other agencies we surveyed, as table 5 shows.⁸² Perhaps it's no surprise that economics-oriented agencies, such as the Federal Trade Commission and the Federal Communications Commission, have a relatively high proportion of economists. However, the number and proportion of economists at DHS is quite low even when compared to other health and safety regulatory agencies. One way of reducing delays imposed by a queue is to provide more resources—in this case, economists.

Table 5: Economic Resources⁸³

	Employees Sept. 2007	Economists Feb. 2008	Employees per Economist
Environmental Protection Agency	18,119	200	91
Food and Drug Administration	10,000	20	500
Dept. of Agriculture	103,923	220	472
Consumer Product Safety Commission	395	9	44
Federal Communications Commission	1,804	60	30
Federal Trade Commission	1,131	70	16
DHS	159,447	10	15,945

Second, congressionally imposed deadlines for regulatory action may have stifled DHS efforts to develop thorough regulatory analysis. Following the creation of DHS, there was a tremendous amount of pressure for the government to increase our nation's security in light of the September 11, 2001 terrorist attacks. This

⁸¹ One might argue that the costs of the regulations with better analysis would have been much higher in the absence of the analysis, and so there may be a relationship between the *potential* costs of the regulation and the quality of the analysis. Not being privy to internal discussions of these regulations at DHS, we cannot determine if this is true.

⁸² All of these figures exclude contractors. The sheer magnitude of the difference between total DHS staff and economists suggests that DHS would have to have an enormous number of economists as contractors to get its ratio in line with those of other agencies, so we doubt the omission of contractors seriously alters the conclusions that can be drawn from table 5.

⁸³ Employee figures: U.S. Office of Personnel Management, available at <http://www.opm.gov/feddata/html/2007/september/table2.asp>.

Economist figures: informal Mercatus survey, February 2008.

pressure may have translated into hurried legislative and regulatory decision making, and that could account for the nearly universal failure of DHS to examine regulatory alternatives. In regard to one controversial program, a former DHS undersecretary for preparedness told the *Washington Post*: “You have management issues, political pressure, the complexity of what is arguably a very tough thing to do, all within an unreasonable deadline and it's kind of the old adage—we can hurry up and do it fast, or we can take a little bit longer and do it right...External pressures on DHS made this a hurry-up-and-do-it-fast.”⁸⁴

Of course, the conclusion that external pressure is causing the agency to rush through its decision-making is debatable, particularly if further study shows that the regulatory analyses coming out of DHS are not significantly worse than those coming out of other agencies. Nevertheless, the fact that a large proportion of economically significant rules that DHS promulgated from 2001–2007 were interim final rules, with statutorily defined deadlines for prompt regulatory action, is evidence that the atmosphere surrounding the creation of DHS regulations has been rushed, for whatever reason. Interim final rules often become effective without public notice and comment. Of the thirteen economically significant rules we examined, seven began as interim final rules.⁸⁵

A recent paper suggests that statutory deadlines inhibit regulatory agencies' ability to develop quality analysis because they limit the time in which an agency can complete studies or elicit comments. Short statutory deadlines can also interfere with OIRA oversight by reducing the time OIRA has to complete review of agency analysis.⁸⁶ The authors found that agencies are much more likely to issue interim final rules, instead of final rules following notice and comment, in the face of short statutory deadlines, and also much more likely to use notice-and-comment rulemaking in the absence of deadlines.⁸⁷

Our observations are consistent with those conclusions. Most of the legislative mandates authorizing the interim final rules we examined imposed deadlines of some sort. In five cases, legislation urged that DHS implement interim final rules as soon as practicable, without adherence to APA notice-and-comment

⁸⁴ Spencer S. Hsu, “DHS Strains as Goals, Mandates, Go Unmet”, *The Washington Post*, March 6, 2008.

⁸⁵ “Area Maritime Security”, “Biometric Data”, “Community Disaster Loans”, “HI-B Visas”, “Chemical Facilities”. See tbl. 2 *supra*.

⁸⁶ “...statutory deadlines could undermine the prospects for effective OIRA review. The Executive Orders established a detailed timetable for the presentation and review of proposed agency actions; meeting statutory deadlines may mean failing to meet Presidential requirements.” Gersen, Jacob E. and Joseph O'Connell, Anne, “Deadlines in Administrative Law” at 32, University of Pennsylvania Law Review Working Paper, 2008, available at SSRN: <http://ssrn.com/abstract=1085377>.

⁸⁷ See *id.* at 15. The authors note that the correlation between deadlines and interim final rules is positive and statistically significant, and the correlations between deadlines and direct final rule is negative and statistically significant.

procedures.⁸⁸ Of the seven rules we examined which had their beginnings as interim final rules, only two of them were not subject to statutorily imposed deadlines—the 2005 Community Disaster Loans rule and the 2005 H1-B Visa Allocation rule. However, the preambles for both rules state that urgency required the use of an interim final rule instead of traditional notice-and-comment procedures.⁸⁹

Table 6: Haste Makes Waste

Regulation	Year Final	Transparency	Systemic Problem	Alternatives	Total Score
Interim Final Rules					
Area Maritime Security	2003	2	0	0	5
Vessel Security	2003	2	0	0	6
Maritime Facility	2003	2	0	0	6
US-VISIT Biometric Data	2004	2	0	2	8
Community Disaster Loans	2005	4	0	0	3
H1-B Visa Allocation	2005	4	1	0	4
Chemical Facilities	2007	4	2	2	10
Average		2.86	0.43	0.57	6.00
Final Rules					
Automated Pasgr. Info. Syst.	2005	4	1	1	9
Air Cargo	2006	3	0	1	5
W. Hem. Travel Documents	2006	4	2	3	15
Transp. Worker ID Credential	2007	4	0	2	6
Immigration Benefit Applic.	2007	2	3	1	8
Passenger Manifests	2007	4	1	3	12

⁸⁸ Namely, the three Coast Guard Regulations from 2004 (Area Maritime Security, Vessel Security, and Facility Security), the 2004 Biometric Data Collection Rule, and the 2007 Chemical Facilities Rule.

The statutory authority for the Coast Guard Maritime Security Initiatives is the Maritime Security Act, Public Law 107-295, 116 Stat. 339. The applicable deadlines for regulatory action under the Act can be found at 33 U.S.C.A. 1504 note, (Regulations); 46 U.S.C.A. 70101(c) note; 46 U.S.C.A. 70104 (a)(1) note (Deadline for plans).

The statutory deadlines for the 2004 Biometric Data Collection Rule comes from Data Management Improvement Act of 2000 (DMIA), Pub. L. 106-214 (2000), 114 Stat. 339, codified as amended at 8 U.S.C. 1365 (a), and the Enhanced Border Security Act, Pub. L. 107-173 (2002), 116 Stat. 553, codified at 8 U.S.C. 303(b)(1).

The statutory deadline for the 2007 Chemical Facilities Rule, comes from the Department of Homeland Security Appropriations Act of 2007, Pub. L. 109-295, sec. 550.

⁸⁹ See Special Community Disaster Loans Program, 70 Fed. Reg. 60443 (Oct. 18, 2005); see also Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23775 (May 5, 2005).

Average	3.50	1.17	1.83	9.17
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Source: Evaluations in appendix II.

The results of our evaluation support a conclusion that statutory deadlines have had a significant impact on DHS regulatory analysis quality. Table 6 shows that the average total score for the seven interim final rules in our sample was only 6, while the overall average for the six that were not interim final rules was 9.17—more than 50 percent better. Thus, there appears to be a loose correlation between the quality of analysis produced by DHS and the decision to implement interim final rules.

The 2007 Chemical Facilities rule was the only interim final rule for which DHS chose to provide the public with advance opportunity to comment. Its regulatory analysis received the highest score out of the group of interim final rules and the third highest score overall, 10 points. Tellingly, the 2006 Travel Documents rule that received the highest overall score in our evaluation was also the only rule for which DHS published an Advanced Notice of Proposed Rulemaking, in addition to a Notice of Proposed Rulemaking, which provided ample opportunity for the agency to study comments and develop its regulatory analysis.

B. Particularly weak areas in DHS regulatory analysis

DHS has performed particularly poorly in three areas of regulatory analysis: (1) discussing regulatory alternatives, (2) identifying a market failure or other systemic problems that the regulation seeks to fix, and (3) determining the uniquely federal role in fixing that problem.

1. Regulatory Alternatives

Executive Order 12866 encourages agency decision makers to consult with regulatory analysts and economists early in the rulemaking process to develop and examine regulatory alternatives *before* an agency identifies its preferred course of action. The low scores that most of the component agencies received on their analysis of regulatory alternatives suggest that planning-stage collaboration with economists has not occurred. This could be the result of the shortage of qualified economists at DHS, or perhaps an institutional unwillingness to listen to them. But it could also be the result of other legal and political considerations, such as (a) statutorily imposed deadlines for action, and (b) narrow legislative delegations from Congress to DHS.

a. Statutory Deadlines

As demonstrated earlier, Congress has caused DHS to implement a large number of interim final rules—most of which became effective without prior notice and

comment.⁹⁰ This has been the result of Congress either imposing short statutory deadlines on DHS, or explicitly directing DHS to implement interim final rules in lieu of traditional notice-and-comment rulemaking. Table 6 shows that, of the seven rules we examined which had their beginnings as interim final rules, five earned zero points for discussion of alternatives, and the other two each earned 2 points, for an average of 0.57 out of 5 possible points. The average score for the six rules that were not interim final rules was 1.83. This is consistent with the conclusion that DHS performs more poorly on its analysis of regulatory alternatives when it issues interim final rules without prior notice and comment, and that statutory deadlines may be the culprit.

Furthermore, the results suggest that when DHS takes more time and receives more public input on its regulatory analyses, it tends to do a better job at discussing alternatives. The 2004 Biometric Data and 2007 Chemical Facilities interim final rules received two points each for discussion of alternatives in their regulatory analyses. These two rules also scored the highest overall points among the group of rules that started as interim final rules. The 2007 Chemical Facilities rule was the only interim final rule for which DHS sought public comment, and it earned 10 overall points—well above average for the entire group. The 2004 Biometric Data rule was actually third in a line of previous interim final rules, and DHS had already solicited comments on the previous versions of the rule, which might explain its above-average score. Again, this suggests that when DHS engages with public it produces better, if not perfect, analysis of regulatory alternatives.

b. Narrow Delegation

Congress may also be affecting the quality of alternatives analysis coming out of DHS in another way. Congress has the ability to limit regulatory agencies' discretion to create new rules through narrow delegations of authority. Our observations suggest that where DHS has had very little discretion under the law, the agency has produced truly inadequate analysis of regulatory alternatives. An examination of the various legislative delegations to DHS that authorized each of the thirteen rules in our study revealed that the scope of the agency's discretion is generally narrow⁹¹. Interestingly, the two rules that received the lowest scores for regulatory analysis were the product of legislative mandates which provided almost no discretion at all.⁹² Both of those rules also earned zero points on their discussion of alternatives.

⁹⁰ See *ff* note 88.

⁹¹ Other rules not discussed here for which DHS was given very little discretion to adopt alternatives were, Biometric Data Collection, H1-B Visa Allocation, TWIC, and Passenger Manifests (need to bluebook this)

⁹² The two rules were the 2005 Community Disaster Loans Rule and H1-B Visa Allocation Rule.

In the case of the Community Disaster Loan Rule, Congress gave DHS/FEMA the ability to distribute community disaster loans to local governments for disaster recovery projects following the devastating 2005 hurricane season. See Community Disaster Loan Act of 2005, Pub. L. 109–

In cases where Congress delegated some discretionary authority to DHS, it usually could only be exercised in very limited circumstances. For example, in the 2006 Travel Documents rule, Congress instructed DHS to develop regulations that would require travelers entering the United States to present identification proving citizenship and identity. Congress allowed DHS to determine what the appropriate documents would be, based on the department's expertise.⁹³ The 2007 Passenger Manifest rule was another instance where Congress instructed the agency to implement a specific security plan, but gave the agency some latitude with respect to details.⁹⁴ Both of these rules achieved scores of 3 out of 5 for their discussion of alternatives—the two highest scores on this element. Notably, both of these rules also achieved the two highest total scores in our evaluation. To achieve even higher scores on alternatives analysis, DHS would have needed to discuss broader alternatives, including alternatives that fall beyond the scope of the legislative delegations that authorized both of the above rules. For instance, if in its regulatory analysis for the 2007 Passenger Manifest Rule, the agency had prepared a detailed analysis of a “no-action” alternative, the agency could have received a higher score on alternatives analysis.

In circumstances where DHS has been instructed that it *must* act, DHS may be reluctant to spend resources developing economic analyses that discuss regulatory alternatives that it is prohibited from ultimately implementing—DHS likely has a natural aversion to second-guessing congressional intent. Therefore, when Congress severely limits regulatory options, DHS usually acts as if it assumes that Congress has already evaluated regulatory alternatives and further discussion

88. The extent of FEMA's regulations in this case amounted to a definition of what kind of entities would be eligible for the money. *See* Special Community Disaster Loans Program, 70 Fed. Reg. 60443 (Oct. 18, 2005).

With regard to the H1-B Visa Allocation rule, Congress raised the cap for the number of individuals to whom DHS could allocate H1-B Visas in 2005, since the previous cap had been met earlier than expected. *See* H-1B Visa Reform Act of 2004, 8 USCA § 1184. The extent of DHS's regulations for that rule included raising fees for the visa and setting out the effective dates for the rule. *See* 70 Fed. Reg. 23775 (May 5, 2005). In both cases, there was no room for DHS to adopt alternative schemes for achieving congressionally stated goals.

⁹³ The preamble to the rule states that the Intelligence Reform and Terrorist Prevention Act of 2004 required DHS and the Secretary of State to “develop and implement a plan to require travelers entering the United States to present a passport, other document, or combination of documents, that are ‘deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship’”. *See* 71 Fed. Reg. 68412, at 68413 “Statutory and Regulatory History”. *See also*, Intelligence Reform and Terrorist Prevention Act, Pub. L. 108–458, 118 Stat. 3638 (Dec. 17, 2004).

⁹⁴ Congress instructed the agency to develop regulations requiring pre-departure transmission of passenger manifests for commercial airliners entering and leaving the United States, but allowed the agency to determine the minimum time before departure acceptable for transmission of passenger information. The preamble to the rule states that the Intelligence Reform and Terrorists Prevention Act of 2004 mandated that DHS “collect manifest information in sufficient time to ensure that the Federal government can perform security analysis and take appropriate action prior to the departure of aircraft and vessels”. *See* 72 Fed. Reg. 48320, at 48320 (Aug. 23, 2007).

would be superfluous. From that starting point, DHS has little incentive to examine the baseline and develop meaningful analysis of regulatory alternatives. However, OMB Circular A-4 does require regulatory agencies to examine alternatives that might fall outside of their statutory authority.⁹⁵ In a few instances, DHS regulatory analyses did so, and they earned higher scores for discussion of alternatives as a result.

Specifically, the regulatory analysis for the 2007 TWIC Rule included a fairly developed analysis of an alternative which involved issuing regulations that would require private facilities to conduct security threat assessments on all of their employees, instead of adopting regulations that would establish the credential system required by the Maritime Transportation Security Act (MTSA).⁹⁶ The department explained that it could not adopt this alternative because it would not meet the requirements of the MTSA. The analysis received a score of 2 out of 5 possible points for analysis of alternatives, which was above average.⁹⁷ However, the information in the analysis of that alternative could be fairly useful to policy makers.

For instance, the analysis showed that the forbidden alternative was significantly less costly than the chosen alternative, but it did not meet the particular requirements of the MTSA.⁹⁸ In this instance, the total cost for the chosen alternative was \$1.257 billion, while the total cost for the alternative was only \$326.2 million.⁹⁹ The analysis also pointed out that the chosen alternative offered two features that the extra alternative did not. Of course, the next step would be to ask whether the two features required by legislation justify the extra \$725 million in annual costs. The agency did not discuss the marginal benefits of the more expensive option; however, that kind of analysis would be particularly useful for policymakers in situations when there is uncertainty regarding the effectiveness of a chosen policy, as there almost always is with security regulation. Nothing forbids the department from developing this kind of alternatives analysis, yet in one instance, the regulatory analysis for the 2005 Automated Passenger Information System (APIS) rule, the department explicitly refused to analyze alternatives that it would not actually be allowed to implement

⁹⁵ OMB Circular A-4 states, "If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, you should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act." Circular A-4 at 17.

⁹⁶ Regulatory Impact Assessment, Final Rule, Transportation Worker Identification Credential: Implementation in the Maritime Sector, at 39 (available online at www.regulations.gov, search RIN 1652-AA41).

⁹⁷ Only two other analyses scored higher, at 3 out of 5 possible points on discussion of alternatives—the 2006 Travel Documents Rule and the 2007 Passenger Manifests Rule. While neither of those analyses discussed alternatives that fell outside of the scope of their legislative delegation, their analysis of alternatives was superior in many other respects.

⁹⁸ *Supra* note 96 at 34-39.

⁹⁹ *Id.*

under its statutory authority.¹⁰⁰ Clearly, DHS has the authority to examine any alternatives it would like to, even if for purely illustrative reasons.

2. Analysis of the systemic problem and federal role

In addition to the analysis of alternatives, DHS regulatory analysis was particularly weak in identifying the market failure or other systemic problem that warrants government intervention and identifying the unique role the federal government can play. Short deadlines may have some effect on DHS's propensity to analyze the systemic problem. Of the seven rules whose analysis of the systemic problem received a score of zero, five were interim final rules. The average score for analysis of the systemic problem, was 1.17 for final rules, but only 0.43 for interim final rules. Discussion of the federal role was never better than perfunctory, so all regulatory analyses received either a zero or a 1 on this aspect. More of the final rules received zeroes, but we read little into this result since analysis of the federal role was never very good.

Given the general lack of discretion Congress gives DHS to develop security policies, DHS regulators may feel these two prongs of regulatory analysis are of trivial importance. In cases where DHS *must* act, it appears that Congress has already determined that there is a problem that the agency has to fix, so it may seem futile for the agency to elaborate on these points.

This inference is invalid, for two reasons. First, if regulators are unable to identify the precise problem that a proposed regulation intends to fix, it becomes very difficult to complete thorough analysis with respect to any of the other elements of an Executive Order 12866 regulatory analysis. Another way of saying this is: If you don't know what problem you are trying to solve, looking at different solutions doesn't make a lot of sense. Or, as George Harrison noted, "If you don't know where you're going, any road will take you there."¹⁰¹ If Congress did a thorough job of identifying the systemic problem, then the agency's regulatory analysis should at least state the specific problem Congress said it intends the agency to solve. If Congress did not identify the systemic problem, then DHS could better exercise whatever discretion it has if it first identifies the

¹⁰⁰ The extent of the department's analysis of alternatives for the 2005 APIS rules is as follows: "The requirements of this final rule are mandated by the ATSA and the EBSA. Exploration of regulatory alternatives, therefore, was limited during the rulemaking process, as these legislative acts were explicit in the types of systems to be installed and the type of information to be submitted. CBP has, however, developed alternative submission methods for small air carriers, while the Coast Guard has developed alternative methods for vessels. These alternative methods should help small businesses comply with the final rule in the most cost effective manner...the "no action" alternative is not a feasible alternative because it does not meet legislative mandates." Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft, 70 Fed. Reg. 17820 at 17843, "Regulatory Alternatives". If not for the fact that the department adopted alternatives for small carriers and vessels, the analysis would have received 0 instead of 1 point out of five.

¹⁰¹ <http://regmis.wordpress.com/2007/08/17/any-road-george-harrison/>.

systemic problem that Congress failed to define. The same holds true for analyzing why federal regulation is the appropriate response.

The failure of regulatory agencies to identify a market failure or other systemic problem also hinders outcome-based scrutiny of regulatory policy after the policy is adopted. Congress requires OMB to produce an annual report evaluating the costs and benefits of federal regulations.¹⁰² Executive Order 12866 explicitly instructs agencies to conduct retrospective reviews of regulations to identify whether they have been effective.¹⁰³ But because agencies do little retrospective analysis, the annual OMB report usually relies on estimates the agencies produced in their regulatory analyses when the regulations were adopted.¹⁰⁴ If DHS does not identify the problem that its regulations are intended to solve, it is difficult to see how DHS and those who oversee its policies can measure the effectiveness of those policies.

V. OPPORTUNITIES FOR IMPROVEMENT

Our evaluation of DHS regulatory analysis in section III suggests that there is substantial room for improvement. Moreover, our exploration of explanations in section IV reveals specific, concrete steps that decision makers in DHS, OMB, and Congress could take to improve the quality of regulatory analysis that informs security regulation.

A. *Strengthen economic analysis at DHS*

1. Hire more economists

“Insufficient resources” can be an endemic excuse that conceals a multitude of other sins. In the case of DHS, however, there is persuasive evidence that some of the analytical shortcomings in regulatory analysis may simply reflect a shortage of economists with the training and ability to conduct regulatory analysis. With one economist per 159,000 employees, the proportion of economists to total employees is truly miniscule. We have not evaluated the quality of regulatory analysis at other agencies, but we would not be surprised if many do better than DHS simply because they are more adequately staffed to do the job. Although having a sufficient number of economists is a necessary first step to doing good analysis, there are many other necessary conditions.

¹⁰² See OMB Reports to Congress on the Costs and Benefits of Federal Regulations, available at http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html. OMB currently produces the report to comply with Section 624 of the Treasury and General Government Appropriations Act of 2001 (Pub. L. No. 106-554, 31 U.S.C. § 1105 note).

¹⁰³ Exec. Order 12866 at Sec. 5(a).

¹⁰⁴ OMB’s draft 2007 Report notes, “The estimates of the costs and benefits of Federal regulations over the period October 1, 1996 to September 30, 2006 are based on agency analyses subject to public notice and comments and OMB review under Executive Order 12866.” OMB, *supra* note 102, at 7.

2. Manage economists effectively

Sheer numbers of economists are not sufficient to guarantee that regulatory analysis is of high quality or that it effectively informs regulatory decisions. Research on other health and safety agencies suggests three factors that allow economists to make a productive contribution to the regulatory process.¹⁰⁵ First, economists are involved early in the regulatory process, so they can help develop alternatives before the agency has decided what kind of regulation to write.¹⁰⁶ Second, economists, like other scientists, have the freedom to be “truth-seekers,” charged with generating the best knowledge available about reality to inform decisions. The economist’s role in regulatory analysis should not be that of an advocate preparing a quantitative brief justifying decisions that have already been made for reasons related to politics, public relations, or wishful thinking.¹⁰⁷ Third, economists report to and are evaluated by other economists, rather than attorneys or political actors.¹⁰⁸ This helps ensure that economists’ career advancement depends on the quality of their analysis, reduces non-economists’ opportunities to tamper with the analysis, and improves the agency’s odds of hiring and retaining competent economists.¹⁰⁹

For this study, we examined only the publicly available end product of DHS economic analysis; we did not conduct detailed interviews to glean “insider” information. Therefore, we can offer no judgments about the current influence or management of economists in DHS. The general lessons learned in other agencies that conduct economic analysis of risks, however, may nevertheless prove helpful.

3. Get ahead of the curve

Executive Order 12866 requires regulators to consider alternative solutions to regulatory problems. Regulators may not feel obligated to do so when Congress specifically dictates the content of the regulations they are supposed to issue. In this context, one way DHS could improve the effect of regulatory analysis on decisions would be through an active research and public outreach program designed to generate useful knowledge on regulatory options before Congress acts. The results of DHS research, conferences, and workshops on regulation would then be an input into congressional decision-making.

¹⁰⁵ Richard A. Williams, Mercatus Center at George Mason University, “The Influence of Regulatory Economists at Federal Health and Safety Agencies” (2008), unpublished manuscript on file with authors.

¹⁰⁶ *Id.* at 14-15. A survey of economists in federal health and safety agencies revealed that most felt they could best contribute to their agency’s mission by aiding in the comparative evaluation of costs and benefits of alternatives. See *Id.* at 8-10.

¹⁰⁷ This is not always the case. See *Id.* at 10-11.

¹⁰⁸ *Id.* at 13-14.

¹⁰⁹ *Id.*

There is ample precedent for this kind of approach in the federal government. The Economic Research Service in the United States Department of Agriculture has a staff of about 250 personnel, the vast majority of whom are economists. The Federal Trade Commission has an extremely active program of basic research and public workshops relevant to its mission of preserving competition and protecting consumers.¹¹⁰ All three of the commission's large bureaus—the Bureau of Economics, Bureau of Consumer Protection, and Bureau of Competition—sponsor research, surveys, and events that create knowledge before Congress acts, so that they can inform legislative decisions.¹¹¹ The Bureau of Economics, which employs seventy economists, has its own public conferences and research publications.¹¹²

4. Share best practices

DHS was created by a merger of many different entities, each of which had their own missions, histories, cultures, strengths, and weaknesses. Our evaluation reveals substantial variation in the completeness and quality of regulatory analyses. The quality of cost analysis would increase substantially if all regulations had a cost analysis as good as the one in the Regulatory Impact Analysis for the Western Hemisphere Travel Documents rule, which scored a 5 for its cost analysis. On several other aspects of regulatory analysis, one or two of the regulations earned a 3 while most others received a zero, 1, or 2. This suggests DHS could achieve substantial improvement just by consistently adopting the practices used in the best analyses. Far more improvement is possible if DHS can adopt best practices developed at other federal agencies.

B. OMB: Emphasize alternatives

DHS regulatory analysis exhibited the most significant deficiencies in areas relevant to generation and discussion of alternatives. The most obvious element is, of course, explicit consideration of alternatives. In addition, the two other elements where the analyses scored poorly (identification of the systemic problem and the unique federal role) are both precursors to the generation and analysis of alternative solutions. OMB's regulatory review function could help improve the consideration of alternatives in several ways.

First, OMB could strongly promote generation and consideration of alternatives in the review process for individual regulations. It is true that, by the time a draft regulation goes to OMB for review, DHS has made at least a tentative decision about the option it prefers. But if OIRA returned, or at least critiqued, regulatory analyses that had inadequate consideration of alternatives, it would give DHS

¹¹⁰ Links to extensive lists of examples can be found at <http://www.ftc.gov/opa/events.shtm>.

¹¹¹ *Id.* Perusal of these links reveals events organized by each of these bureaus, as well as other FTC entities such as the general counsel's office and office of policy planning.

¹¹² See <http://www.ftc.gov/be/research.shtm> and <http://www.ftc.gov/be/events.shtm>.

greater incentive to remedy this deficiency. As of December 31 2007, OIRA had issued no “return letters” on DHS regulations.¹¹³ It had, however, issued one “post-review” letter on a DHS regulation.¹¹⁴ A post-review letter expresses OIRA’s misgivings about a regulation OIRA permitted to move forward. The post-review letter addressed the Secure Flight Program, a proposed regulation requiring airlines to provide DHS with passenger manifest data for all international flights seventy-two hours prior to departure. It explicitly asked that DHS analyze a regulatory alternative consistent with the existing APIS rule, which allows airlines to transmit passenger manifest data thirty minutes prior to departure on international flights.¹¹⁵ If this letter is meant as a sign of things to come, it’s a good sign.

Second, OMB might consider strengthening the language of EO 12866 as it relates to analysis of alternatives. In several places, the Executive Order urges consideration of a wide scope of alternatives, including modification or repeal of existing regulations,¹¹⁶ economic incentives,¹¹⁷ information disclosure,¹¹⁸ performance standards,¹¹⁹ and “nonregulatory actions.”¹²⁰ In its statement of regulatory philosophy, the executive order states that agencies should consider all “available” alternatives to direct regulation.¹²¹ The actual list of items that agencies must include in a regulatory analysis, however, states that they should assess the costs and benefits of “potentially effective and reasonably feasible alternative sot the planned regulation.”¹²² Only OMB Circular A-4 explicitly directs agencies to analyze alternatives beyond the scope of the legislation authorizing the regulation because such information might be useful if Congress decides to review the regulation under the Congressional Review Act.¹²³

Words like “available” and “reasonably feasible” could be interpreted as a mandate that agencies should consider a wide range of regulatory alternatives, as long as they are not plainly fanciful or contrary to the physical laws of the universe or human nature. Thus, an airline safety regulation that simply required

¹¹³ All OIRA return letters are listed at <http://www.reginfo.gov/public/do/eoReturnLetters>.

¹¹⁴ Letter from OIRA Administrator Susan Dudley to DHS General Counsel and Regulatory Policy Officer Gus Coldebella, December 7, 2007, available at <http://www.reginfo.gov/public/postreview/Coldebella.pdf>.

¹¹⁵ *Id.*

¹¹⁶ EO 12866 Sec. 1(b)(2).

¹¹⁷ EO 12866 Sec. 1(b)(3).

¹¹⁸ *Id.*

¹¹⁹ EO 12866 Sec. 1(b)(8).

¹²⁰ EO 12866 Sec. 6(a)(3)(c)(iii).

¹²¹ EO 13866 Sec.

¹²² *Id.*

¹²³ Circular A-4 at 17.

¹²³ Regulatory Impact Assessment, Final Rule, Transportation Worker Identification

all terrorists to raise their hands before boarding a flight would be beyond consideration, since the terrorists could not reasonably be expected to comply. But an alternative requiring a change in existing law, but otherwise feasible, could be analyzed.

Alternatively, it requires no stretch to imagine that agencies could interpret words like “available” and “reasonably feasible” much more narrowly. Regulators concerned about administrative or political expedience might construe those words to mean that they need only consider and analyze alternatives that are within the scope of current law.

An administration could remedy this ambiguity by amending section 6(a)(3)(C)(iii) to clarify that a regulatory analysis of a major regulation must include consideration of reasonably feasible alternatives to the proposed regulation, “even if such alternatives would require a change in existing law.” The agency should identify why the proposed regulation is preferable to any alternatives permitted under existing law. The agency should also identify whether and why an alternative that would require a change in the law is preferable to the proposed regulation.

C. Congressional role

DHS should seriously consider hiring more regulatory economists; Congress would, of course, have to provide the funds. Another possibility would be for Congress to establish a unit in headquarters similar to the Office of Risk Assessment and Cost Benefit Analysis (ORACBA) in USDA. This office provides oversight for all agency risk assessments and cost-benefit analyses in component agencies. Congress could also make substantial contributions toward improving regulatory analysis at DHS in several other ways outlined below.

1. Legislate ends, not means

Congress could give DHS wider latitude to consider alternatives by giving DHS wider latitude to consider alternatives! Our analysis of enabling legislation revealed that DHS had very little discretion in crafting many of the thirteen major regulations. One way to prompt (though not guarantee) consideration of alternatives would be to give DHS greater discretion.

Greater discretion, of course, begs the question of how Congress can hold a relatively new department that is often plowing new regulatory ground on sensitive topics accountable to the public. In addition to giving DHS more discretion in crafting regulations, Congress should be more explicit about the specific outcomes it expects security regulations to produce for the public. Each piece of legislation requiring DHS to regulate should include a statement of the specific outcomes the regulation is supposed to achieve. Is the regulation supposed to reduce the risk of a terrorist attack? Is it supposed to reduce the damage and loss of life from a terrorist attack? For what kind(s) of terrorist

activity is the regulation supposed to have these effects? Ideally, explicit statements of outcomes would be accompanied by measures that indicate how much of, or how well, the regulation has achieved the outcome. If Congress feels it lacks the detailed knowledge to craft such measures, then it should explicitly require DHS to develop and seek public comment on verifiable and valid outcome measures for the regulation.

2. Do your homework

If Congress continues to give DHS very little discretion in crafting regulations, then Congress has taken de facto responsibility for assessing the effectiveness and costs of a wider range of alternatives. Similarly, if Congress requires DHS to issue interim final rules, or sets deadlines that have the effect of requiring DHS to do this, then DHS cannot perform adequate regulatory analysis. It is debatable whether the current legislative process adequately assesses alternative approaches and selects the one that offers the greatest, or most cost-effective, improvements in security. If Congress wants to ensure that security-related legislation is based on an adequate analysis of alternatives, then the committees that review such legislation should arrange for extensive analysis of alternatives by the Government Accountability Office or other independent entity. This practice would help ensure that the committees have access to analysis of alternatives, and it would also provide information the rest of the members could consider prior to casting their votes on legislation. A ready template for this kind of committee report already exists—namely, the regulatory analysis requirements in Executive Order 12866.

3. Set realistic timetables and deadlines

Our evaluation revealed that DHS tends to produce less complete regulatory analysis when it must issue interim final rules because of short congressionally mandated deadlines. Congress can promote thorough regulatory analysis by adopting deadlines that realistically allow for a thorough vetting and analysis of the proposed regulations.

The most obvious objection to this proposal is that security is important, lives are at stake, and so the nation simply cannot afford “paralysis by analysis.” This objection overlooks the fact that regulations rushed into place are less likely to be effective in achieving their goals—the protection of lives and property. When lives are at stake prudence recommends that DHS “take a little bit longer and do it right.”¹²⁴

VI. CONCLUSIONS

The Department of Homeland Security issued thirteen major regulations between its inception and the end of 2007. A longstanding executive order establishes

¹²⁴ See Hsu, *supra* note 84.

criteria for thorough regulatory analysis, and DHS is a Cabinet department subject to executive orders. Yet the regulatory analyses conducted by DHS have been seriously incomplete.

No doubt some of the deficiencies have resulted from the inevitable disorganization created by the largest merger of governmental organizations in U.S. history. If that were the only explanation, we could count on the passage of time and learning by doing to alleviate the problem.

Our research suggests otherwise. Substantial systemic changes are necessary if the analysis informing security regulation is to improve substantially. DHS, OMB, and Congress can each make a contribution.

The department should hire more economists, involve them early in developing alternatives, manage them in a way that ensures their job is to do impartial, objective analysis and learn from both its own and other agencies' best practices in regulatory analysis. OMB should aggressively promote analysis of alternatives when it reviews DHS regulations and amend Executive Order 12866 to clarify that it expects agencies to analyze all reasonable alternatives, even if they would require a change in the law. Congress should give DHS greater discretion to craft regulations, but hold DHS accountable by specifically articulating and measuring the outcomes the regulations are supposed to accomplish. If Congress declines to give DHS more discretion, then it should not act until it has access to independent analysis of alternatives conducted by the Government Accountability Office or other nonpolitical source of expertise. Finally, Congress should abandon the "Ready, Aim, Fire" approach to security regulation by giving DHS deadlines that allow adequate time to conduct quality regulatory analysis.

Effective decision-making requires two things: knowledge of the consequences of alternative courses of action, and value judgments that allow the decision-maker to determine which consequences are most desirable. Regulatory analysis provides the first component, but not the second. Regulatory analysis is a tool for understanding causation—what *is*, and what *would likely* happen as a result of various policy initiatives. It is also a tool for ex-post scrutiny of security regulations because it allows policy makers to compare expectations to ultimate outcomes.

Regulatory analysis cannot, however, substitute for judgment when it comes time to make decisions. The analysis is not an algorithm that automatically produces a list of "correct" answers that can be read off of a graph or table. Some stakeholders and decision makers may believe their fellow citizens should sacrifice a great deal to achieve improvements in security and avoid the economic dislocations of a 9/11-scale attack. Others may place more emphasis on sustained economic growth, free speech, privacy, personal liberty, or other important values. Since regulatory analysis is about what *is*, it cannot tell decision makers which values *ought to be* more important.

But just as analysis is not a substitute for judgment, values are not a substitute for understanding reality. Without the firm grounding in reality provided by regulatory analysis, decision makers are flying blind. We are less prosperous, less free, *and less safe* as a result.

Appendix I: Regulatory Analysis Evaluation Questions

Identify the desired outcomes.

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?¹²⁵

Does the analysis identify how these outcomes are to be measured?¹²⁶

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?¹²⁷

Does the analysis present credible empirical support for the theory?¹²⁸

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?¹²⁹

Assess evidence of market failure or other systemic problem.

Does the analysis identify a market failure or other systemic problem?¹³⁰

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?¹³¹

Does the analysis present credible empirical support for the theory?¹³²

¹²⁵ "In constructing measures of "effectiveness," final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided." Circular A-4 at 12.

¹²⁶ "Even when a benefit or cost cannot be expressed in monetary units, you should still try to measure it in terms of its physical units. If it is not possible to measure the physical units, you should still describe the benefit or cost qualitatively." Circular A-4 at 9.

¹²⁷ "Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document." Exec. Order 12866, Sec. 1.7. "Explain how the actions required by the rule are linked to the expected benefits. For example, indicate how additional safety equipment will reduce safety risks." Circular A-4 at 2.

¹²⁸ Exec. Order 12866, Sec. 1.7.

¹²⁹ "[Y]our analysis should include two fundamental components: a quantitative analysis characterizing the probabilities of the relevant outcomes and an assignment of economic value to the projected outcomes." Circular A-4 at 40.

¹³⁰ "(1) Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively." Exec. Order 12866 Sec. 1.

¹³¹ "If the regulation is designed to correct a significant market failure, you should describe the failure both qualitatively and (where feasible) quantitatively ... For other interventions, you should also provide a demonstration of compelling social purpose and the likelihood of effective action. Although intangible rationales do not need to be quantified, the analysis should present and evaluate the strengths and limitations of the relevant arguments for these intangible values."

Circular A- at 4.

¹³² *Id.*

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?¹³³

Identify the uniquely federal role.

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?¹³⁴

Does the analysis identify “spillovers” across state borders that would justify a federal role?¹³⁵

Does the analysis identify how the proposed regulation interacts with other federal regulations?¹³⁶

Assess effectiveness of alternative approaches.

Does the analysis enumerate other options to address the problem?¹³⁷

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?¹³⁸

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?¹³⁹

¹³³ “The precise consequences (benefits and costs) of regulatory options are not always known for certain, but the probability of their occurrence can often be developed. The important uncertainties connected with your regulatory decisions need to be analyzed and presented as part of the overall regulatory analysis.” Circular A-4 at 38.

¹³⁴ “Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives ... as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.” Exec. Order 12866 Sec. 1.9. “In assessing whether Federal regulation is the best solution, you should also consider the possibility of regulation at the State or local level. In some cases, the nature of the market failure may itself suggest the most appropriate governmental level of regulation. For example, problems that spill across State lines (such as acid rain whose precursors are transported widely in the atmosphere) are probably best addressed by Federal regulation. More localized problems, including those that are common to many areas, may be more efficiently addressed locally.” Circular A-4 at 6.

¹³⁵ Circular A-4 *Id.*

¹³⁶ “Each agency shall avoid regulations and guidance documents that are inconsistent, incompatible, or duplicative with its other regulations and guidance documents or those of other Federal agencies.” Exec. Order 12866 Sec. 1.10.

¹³⁷ (3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. Exec. Order 12866 Sec. 1. “Even where a market failure clearly exists, you should consider other means of dealing with the failure before turning to Federal regulation. Alternatives to Federal regulation include antitrust enforcement, consumer-initiated litigation in the product liability system, or administrative compensation systems.” Circular A-4 at 6.

¹³⁸ *Id.*

¹³⁹ Agency regulatory analysis is to include “An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?¹⁴⁰

Identify costs.

Does the analysis identify and quantify marginal costs of all options considered?¹⁴¹

Does the analysis identify all expenditures likely to arise as a result of the regulation?¹⁴²

Does the analysis identify how the regulation would likely affect the prices of goods and services?¹⁴³

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?¹⁴⁴

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?¹⁴⁵

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?¹⁴⁶

efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;" Exec. Order 12866 Sec. 6(a)(3)(C)(i). "A regulation may be appropriate when you have a clearly identified measure that can make government operate more efficiently. In addition, Congress establishes some regulatory programs to redistribute resources to select groups. Such regulations should be examined to ensure that they are both effective and cost-effective." Circular A-4 at 5.

¹⁴⁰ "This baseline should be the best assessment of the way the world would look absent the proposed action." Circular A-4 at 15.

¹⁴¹ "When you have identified a range of alternatives (e.g., different levels of stringency), you should determine the cost-effectiveness of each option compared with the baseline as well as its incremental cost-effectiveness compared with successively more stringent requirements." Circular A-4 at 11.

¹⁴² Agency regulatory analysis is to include "An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs;" Exec. Order 12866, Sec. 6(a)(3)(C)(ii).

¹⁴³ *Id.* OMB Circular A-4 adds, "You should include these effects in your analysis and provide estimates of their monetary values when they are significant:

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers' or producers' surpluses;
- Discomfort or inconvenience costs and benefits; and
- Gains or losses of time in work, leisure and/or commuting/travel settings." Circular A-4

at 37.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ "It is usually necessary to provide a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensitive to plausible changes in the main assumptions and numeric

Compare costs with outcomes.

Does the analysis identify the approach that maximizes net benefits?¹⁴⁷

Does the analysis identify the cost-effectiveness of each alternative considered?¹⁴⁸

Does the analysis identify all parties who would bear costs and assess the incidence of costs?¹⁴⁹

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?¹⁵⁰

inputs.” Circular A-4 at 3. Rules with annual benefits or costs exceeding \$1 billion require a quantitative analysis of uncertainty. Circular A-4 at 41-42.

¹⁴⁷ “Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Exec. Order 12866 Sec. 1.6.

¹⁴⁸ “When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective.” Exec. Order 12866 Sec. 1.5. “Both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA) provide a systematic framework for identifying and evaluating the likely outcomes of alternative regulatory choices. A major rulemaking should be supported by both types of analysis wherever possible. Specifically, you should prepare a CEA for all major rulemakings for which the primary benefits are improved public health and safety to the extent that a valid effectiveness measure can be developed to represent expected health and safety outcomes.” Circular A-4 at 9.

¹⁴⁹ “Your regulatory analysis should provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency.” Circular A-4 at 14.

¹⁵⁰ *Id.*

Appendix II: Regulatory Analysis Evaluations for all economically significant DHS regulations

VESSEL SECURITY: 1625-AA46	47
AREA MARITIME SECURITY: 1625-AA42	50
FACILITY SECURITY: 1625-AA43	53
BIOMETRIC DATA COLLECTION: 1650-AA00	56
APIS: 1651-AA37	59
H1-B VISA ALLOCATION: 1615-AB32	62
COMMUNITY DISASTER LOANS: 1660-AA44	65
AIR CARGO SECURITY: 1652-AA23	68
TRAVEL DOCUMENTS: 1651-AA66	71
TWIC: 1652-AA41	74
CHEMICAL FACILITY STANDARDS: 1601-AA41	77
IMMIGRATION BENEFIT APPLICATION: 1615-AB53	80
PASSENGER MANIFESTS: 1651-AA62	83

VESSEL SECURITY: 1625-AA46	
Date	10/22/03
Component agency	Coast Guard
Total Evaluation Score	6
Transparency Score	2

Rule Summary: This rule provides security measures for certain vessels calling on U.S. ports. It also requires the owners or operators of vessels to designate security officers for vessels, develop security plans based on security assessments and surveys, implement security measures specific to the vessel's operation, and comply with Maritime Security Levels. This rule is one in a series of final rules on maritime security. *See also*, "Implementation of National Maritime Security Initiatives" (USCG-2003-14792).

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

The "benefits assessment" in the final rule discusses a risk evaluation tool called N-RAT. Used NRAT to calculate scores for each entity before and after implementing security measures. N-RAT is an attempt to calculate probability times outcome, based on expert judgments. Not very well documented.

Does the analysis identify how these outcomes are to be measured?

N-RAT "risk points" attempt to measure outcomes before the fact, but there is no proposed mechanism for testing the conclusions derived from it. This is an interesting attempt which may have significant flaws—e.g. worst case scenarios seem to have equal weight even if one worst case might have worse consequences than another worst case.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

No. Asserts measures are necessary, but also asserts vessel owners might not make the exact expenditures contemplated. N-RAT maps activity (measures to reduce vulnerability) directly into outcome (reduced vulnerability) based on expert judgment, which apparently isn't testable.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

N-RAT attempts to measure probability times outcome. But it assumes with 100 percent certainty that a measure intended to reduce vulnerability will in fact reduce vulnerability by the amount experts say it will.

Assess evidence of market failure or other systemic problem: 0

Does the analysis identify a market failure or other systemic problem?

No.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

No.

Does the analysis present credible empirical support for the theory?

No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No.

Identify the uniquely federal role: 1

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

Yes. Suite of six maritime security regulations analyzed together. Asserts no conflicts with other federal regulations.

Assess effectiveness of alternative approaches: 0

Does the analysis enumerate other options to address the problem?

No.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

N/A

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

No.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Assumes expenditures will not be made unless mandated, but provides no way of measuring improved security other than NRAT.

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?

No alternatives considered, but cost of chosen option identified pretty thoroughly.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Probably.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision-makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Not really, but the two Marsec levels might be interpreted as a range of possibilities. Not really presented as a sensitivity analysis.

Compare costs with outcomes: 2

Does the analysis identify the approach that maximizes net benefits?

No way to know.

Does the analysis identify the cost effectiveness of each alternative considered?

Cost effectiveness in terms of risk point reduction for the one alternative chosen.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Calculates costs for different types of vessels and different sizes of businesses.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

AREA MARITIME SECURITY: 1625-AA42	
Date	10/22/03
Component Agency	Coast Guard
Total Evaluation Score	5
Transparency Score	2

Rule Summary: This final rule establishes U.S. Coast Guard Captains of the Ports as Federal Maritime Security Coordinators, and establishes requirements for Area Maritime Security Plans and Area Maritime Security Committees. This rule is one in a series of final rules on maritime security. *See also*, “Implementation of National Maritime Security Initiatives” (USCG-2003-14792).

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens’ quality of life?

N-RAT used to calculate scores before and after implementing security measures. N-RAT is an attempt to calculate probability times outcome (risk), based on expert judgments.

Does the analysis identify how these outcomes are to be measured?

Not really, but they’re trying to measure something with N-RAT risk points. It would be great if there was a dollar figure associated with a risk point or something like that. Potentially significant flaws with N-RAT discussed above in Vessel Security evaluation.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

No. Asserts measures are necessary, but also asserts facility owners might not make the exact expenditures contemplated. N-RAT maps activity (measures to reduce vulnerability) directly into outcome (reduced vulnerability) based on expert judgment, which apparently isn’t testable.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

N-Rat attempts to measure probability times outcome. But it assumes, with 100 percent certainty, that a measure intended to reduce vulnerability will in fact reduce vulnerability by the amount the experts say it will.

Assess evidence of market failure or other systemic problem: 0

Does the analysis identify a market failure or other systemic problem?

No.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?
No.

Does the analysis present credible empirical support for the theory?
No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?
No.

Identify the uniquely federal role: 1

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?
No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?
No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?
Yes—suite of six maritime security regulations analyzed together.

Assess effectiveness of alternative approaches: 0

NO TO ALL

Does the analysis enumerate other options to address the problem?

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?
No options considered, but costs associated with chosen action are discussed.

Does the analysis identify all expenditures likely to arise as a result of the regulation?
Probably.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision-makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Not really, but the discussion of Marsec I and II levels might be interpreted as a range of possibilities.

Compare costs with outcomes: 1

Does the analysis identify the approach that maximizes net benefits?

No.

Does the analysis identify the cost effectiveness of each alternative considered?

Risk points reduced per dollar spent.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

No.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

FACILITY SECURITY: 1625-AA43	
Date	10/22/03
Component Agency	Coast Guard
Total Evaluation Score	6
Transparency Score	2: Cost analysis and benefit discussion in final rule. Citation for N-RAT discussion didn't work.

Rule Summary: This rule provides security measures for certain facilities in U.S. ports. It also requires owners or operators of facilities to designate security officers for facilities, develop security plans based on security Rules and Regulations assessments and surveys, implement security measures specific to the facility's operations, and comply with Maritime Security Levels. This rule is one in a series of final rules on maritime security. *See also*, "Implementation of National Maritime Security Initiatives" (USCG-2003-14792).

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Prevention of unlawful acts that threaten vessels. Risk points reduced. N-RAT used to calculate scores before and after implementing security measures.

Does the analysis identify how these outcomes are to be measured?

N-RAT risk points. See discussion above in Vessel Security. Issue with N-RAT: it assumes the probability that the measure will reduce risk by the stated amount is 100 percent....but there's not proposed way to test this.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

No: asserts measures are necessary, but also asserts facility owners might not make the exact expenditures contemplated. N-RAT maps activity directly into outcomes, based on expert judgment, which isn't testable.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 0

Does the analysis identify a market failure or other systemic problem?

No.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

Does the analysis present credible empirical support for the theory?

No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No.

Identify the uniquely federal role: 1

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

Yes. Suite of six maritime security regulations analyzed together. Asserts no conflict with others.

Assess effectiveness of alternative approaches: 0

Does the analysis enumerate other options to address the problem?

Reg. Flex. Portion mentions an “Alternative Security Program” but doesn’t analyze it.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

No options considered.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

No options considered.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

No options considered.

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?

Of the only option considered.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Probably.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision-makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Marsec levels I and II discussion could be interpreted as a sensitivity analysis.

Compare costs with outcomes: 2

Does the analysis identify the approach that maximizes net benefits?

No.

Does the analysis identify the cost effectiveness of each alternative considered?

Risk points reduced per dollar.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Yes. Examines effects on companies; separate analysis of small business impacts.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

BIOMETRIC DATA COLLECTION: 1650-AA00	
Date	08/31/04
Component Agency	Border and Transportation Security Directorate
Total Evaluation Score	8
Transparency Score	2

Rule Summary: This rule establishes the United States Visitor and Immigrant Status Technology Program (US-VISIT), an integrated, automated entry-exit system that records the arrival and departure of aliens, verifies aliens' identities, and authenticates aliens' travel documents through comparison of biometric identifiers.

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Yes, but only in terms of activities and intermediate outcomes like improving timeliness and accuracy of the determination of a traveler's immigration status and admissibility, enhancing enforcement of the law, etc.

Does the analysis identify how these outcomes are to be measured?

Not explicitly, but it would be possible to infer from some.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

No.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 0

Does the analysis identify a market failure or other systemic problem?

No—just asserts "public interest in security."

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

No.

Does the analysis present credible empirical support for the theory?

No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No.

Identify the uniquely federal role: 1

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No, but asserts no conflict because other levels of government. don't have a role.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

No.

Assess effectiveness of alternative approaches: 2

Does the analysis enumerate other options to address the problem?

Yes.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Medium: collecting biographic data only, full air, sea, and land capability, etc.—different means of gathering the data.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

Not directly, though it claims alternatives would achieve different amounts.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Assumes baseline is data not gathered.

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?

Yes, but only for the option chosen.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Only equipment.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

Notes both dollar and time costs, but doesn't translate them.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

No.

Compare costs with outcomes: 2

Does the analysis identify the approach that maximizes net benefits?

Claims option chosen accomplishes the most within funding constraints.

Does the analysis identify the cost effectiveness of each alternative considered?

Pilot study examined cost effectiveness of several ways of gathering data.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Identifies parties, but no incidence identified.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

AUTOMATED PASGR. INFO. SYST. (APIS): 1651-AA37	
Date	04/07/2005
Component Agency	Bureau of Customs and Border Protection
Total Evaluation Score	9
Transparency Score	4

Rule Summary: This rule amends the Bureau of Customs and Border Protection regulations pertaining to the filing of commercial vessel and aircraft manifests for passengers and crew members. Collectively, the provisions of this rule require the electronic transmission of manifest information for passengers and crew members onboard commercial vessels and aircraft, in advance of arrival in and departure from the United States, and for crew members and non-crew members onboard commercial aircraft that continue within and fly over the United States, in advance of the departure of those flights.

Identify the desired outcomes: 2

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Reduce risk of terrorist threat. Reduce flight diversions, cancellations, delays, etc. Reduce incidence of penalties for airlines that previously submitted inaccurate and or incomplete manifest submissions. Increased safety, fewer bad people on airplanes, less delay, lower costs from delay/inaccuracy, easier submission of info. "Enhance security" listed in accounting statement as only benefit.

Does the analysis identify how these outcomes are to be measured?

No.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Sometimes.

Does the analysis present credible empirical support for the theory?

A little—e.g. claims CBP "targeting efficiency" is thirty times better than random examinations of passengers; not sure what this means but reference is annual Performance and Accountability Report.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 1

Does the analysis identify a market failure or other systemic problem?

Not regarding original government actions—just security. But they note airlines face fines/costs due to the way the current system is designed.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?
No.

Does the analysis present credible empirical support for the theory?
No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?
No.

Identify the uniquely federal role: 1

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?
No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?
No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?
Asserts no conflict and designed to coordinate with Coast Guard.

Assess effectiveness of alternative approaches: 1

Does the analysis enumerate other options to address the problem?
Yes. Abstains from analyzing alternatives that fall outside the scope of the statutory mandate.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?
Narrow—lower-cost alternative for small carriers and “no action.”

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?
Not really—asserts “no action” wouldn’t comply with the law.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?
Says 80 percent of carriers already in compliance, but does not estimate the value of including the rest.

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Probably.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

Some suggestive figures on the costs of inaccurate info transmittal and delay; considers labor hours as well as expenditures; mentions costs of rerouting planes/passengers.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

No, but takes a conservative approach to costs, attributing all costs of the info transmission to the regulation even though 80 percent of firms are already claimed to be in compliance.

Compare costs with outcomes: 2

Does the analysis identify the approach that maximizes net benefits?

Between the two alternatives, yes. Implies higher-cost option for small firms could convey no additional benefit.

Does the analysis identify the cost effectiveness of each alternative considered?

No.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Probably all; examines incidence for different types of carriers, but doesn't discuss consumer costs.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

Identifies common carriers, passengers, and the general public as beneficiaries, but doesn't get into the details.

H1-B VISA ALLOCATION: 1615-AB32	
Date	05/05/05
Component Agency	U.S. Citizenship and Immigration Services
Total Evaluation Score	4
Transparency Score	4

Rule Summary: This rule implements changes made by the Omnibus Appropriations act for Fiscal Year 2005 to the numerical limits of the H-1B nonimmigrant visa category and the fees for filing of H-1B petitions.

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Mentions acquisition of needed workers, but no analysis. Also says "compliance with the law" and revenues to be spent on programs are benefits. "Fair and equitable allocation of additional H1-B numbers made available in FY2005" (intermediate outcome related to efficiency of govt. program).

Does the analysis identify how these outcomes are to be measured?

Only revenues.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Not really; probably assumes it's obvious.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 1

Does the analysis identify a market failure or other systemic problem?

Identified the fact that the visa cap was too low as a systemic problem. No explanation of why the fees are necessary; they appear to simply raise revenue for other goals.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

Yes, for visa cap. No, for costs.

Does the analysis present credible empirical support for the theory?

Visa cap reached in October.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No analysis of whether visa cap problem is permanent, temporary, variable, etc. or justification for fees.

Identify the uniquely federal role: 0

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

Slightly; fees will be codified.

Assess effectiveness of alternative approaches: 0

Does the analysis enumerate other options to address the problem?

No.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

None.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

No.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Implies fewer visas; nothing in regards to costs.

Identify costs: 1

Does the analysis identify and quantify marginal costs of all options considered?

Some, but not all.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Only fees; not time costs or other inefficiencies.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

Acknowledges some employers may not request visas or hire individuals who might need visas due to the fees but doesn't do any analysis.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Considers some variability that has a small effect.

Compare costs with outcomes: 1

Does the analysis identify the approach that maximizes net benefits?

No.

Does the analysis identify the cost effectiveness of each alternative considered?

No.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Discussed incidence on employers and employees.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

COMMUNITY DISASTER LOANS: 1660-AA44	
Date	10/18/05
Component Agency	FEMA
Total Evaluation Score	3
Transparency Score	4

Rule Summary: This rule implements the Special Community Disaster Loans Program authorized in the Community Disaster Loan Act of 2005. The rule describes the procedures and requirements for a program designed to provide loans for essential services to local governments that have experienced a loss in revenue due to a major disaster. These regulations do not apply to the traditional Community Disaster Loans Program which is permanently authorized.

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Analysis doesn't, but elsewhere, it says purpose is to restore local government services in areas hit by Katrina.

Does the analysis identify how these outcomes are to be measured?

No.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

No.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 0

NO TO ALL

Does the analysis identify a market failure or other systemic problem?

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

Does the analysis present credible empirical support for the theory?

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

Identify the uniquely federal role: 1

NO TO ALL (but asserts no federalism impact).

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

Does the analysis identify “spillovers” across state borders that would justify a federal role?

Does the analysis identify how the proposed regulation interacts with other federal regulations?

Assess effectiveness of alternative approaches: 0

NO TO ALL

Does the analysis enumerate other options to address the problem?

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Identify costs: 1

Does the analysis identify and quantify marginal costs of all options considered?
No (no options considered).

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Discusses how loans may exceed \$100 million per year. Notes appropriations ceiling; no measurement of compliance costs due to regulation.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

No.

Compare costs with outcomes: 0

NO TO ALL

Does the analysis identify the approach that maximizes net benefits?

Does the analysis identify the cost effectiveness of each alternative considered?

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

AIR CARGO SECURITY: 1652-AA23	
Date	05/26/06
Component Agency	Transportation Security Administration
Total Evaluation Score	5
Transparency Score	3 (had to read final plus initial because the final rule only discussed changes to the initial)

Rule Summary: This rule requires airport operators, aircraft operators, foreign air carriers, and indirect air carriers to implement security measures in the air cargo supply chain as directed under the Aviation and Transportation Security Act. The rule also amends the applicability of the requirement for a “twelve-five” security program for aircraft with a maximum certificated takeoff weight of more than 12,500 pounds.

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens’ quality of life?

Reduced risk to traveling passengers, aircraft and other property, and people/property that could be damaged by using aircraft as a weapon.

Does the analysis identify how these outcomes are to be measured?

No.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Asserts if we do these things, risk will be reduced, but doesn’t say by how much.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

Reports size of damage from terrorist events, notes that this regulation is not the only factor affecting risk, doesn’t calculate size of risk.

Assess evidence of market failure or other systemic problem: 0

Does the analysis identify a market failure or other systemic problem?

No—just assumes requiring these specific measures is mandatory.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

No.

Does the analysis present credible empirical support for the theory?

No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No.

Identify the uniquely federal role: 0

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

No.

Assess effectiveness of alternative approaches: 1

Does the analysis enumerate other options to address the problem?

Analysis doesn't, but final analysis says that DHS sought comment on several alternatives of greater or lesser severity; they were rejected based on cost or remaining vulnerability.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Medium.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

No, but it asserts some of the less-restrictive ones would leave vulnerabilities.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Implicitly assumes baseline is that none of these measures get implemented.

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?

Only for one option.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Yes, seems comprehensive, and adjusted upward in response to comments.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

No.

Compare costs with outcomes: 1

Does the analysis identify the approach that maximizes net benefits?

Not really. It tries to, but since they made no effort to quantify benefits, this is pretty hard. It appears as though they attempted to pick the alternative that was not restrictively costly, but without discussing outcomes, it's like they picked it out of a hat.

Does the analysis identify the cost effectiveness of each alternative considered?

No.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Probably, but only direct costs. Doesn't discuss how this regulation could affect consumer costs/behavior.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

TRAVEL DOCUMENTS: 1651-AA66	
Date	11/24/06
Component Agency	<i>Bureau of Customs and Border Protection; Department of State</i>
Total Evaluation Score	15
Transparency Score	4

Rule Summary: This rule finalizes the first phase of a joint Department of State plan, known as the Western Hemisphere Travel Initiative, to implement new documentation requirements for certain United States citizens and nonimmigrant aliens entering the United States. As a result of this rule, all United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States from within the Western hemisphere at air ports-of-entry will be required to present a valid passport.

Identify the desired outcomes: 2

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Correctly identifies the benefits and identifies how, in theory, to calculate the benefits.

Does the analysis identify how these outcomes are to be measured?

Theoretically, but says data doesn't permit measurement in practice. Notes some small cost savings from standardization of documents that can be measured in dollars.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Argues that requiring passports will reduce terrorists' ability to cross borders, an intermediate outcome. Relies heavily on the fact that various authorities (e.g. 9-11 commission) say this. Doesn't discuss level of effectiveness, incidence of passport fraud, or how much this will affect ultimate outcomes.

Does the analysis present credible empirical support for the theory?

No. Basically asserts that requiring passports will reduce terrorist entry.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No, but recognizes the possibility.

Assess evidence of market failure or other systemic problem: 2

Does the analysis identify a market failure or other systemic problem?

Yes. Multitude of acceptable documents increases processing time at border and increases risk of terrorists crossing borders, thus increasing costs and risk.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?
No measurement of how big the problem is or how big the threat is.

Does the analysis present credible empirical support for the theory?
Mostly anecdotes and citations to authority. They do mention the number of different document types that CBP officers have to look at under the status quo.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?
No.

Identify the uniquely federal role: 1

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?
No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?
No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?
Asserts no conflict.

Assess effectiveness of alternative approaches: 3

Does the analysis enumerate other options to address the problem?
Yes.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?
Narrow—alternative ways of verifying passenger identity and citizenship, but all assume this is necessary and will not occur in the absence of regulation.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?
Some quantitative statements about why many of the alternatives wouldn’t be as effective as the chosen action.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?
Assumes baseline is current law. Acknowledges that passport demand grows over time and the regulation will affect the size of the increase. Acknowledges that benefits baseline can’t be calculated. Doesn’t discuss the probability that airlines could require passports on their own in absence of regulation.

Identify costs: 5

Does the analysis identify and quantify marginal costs of all options considered?

Yes.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Very likely.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

Yes. Size and percentage of price change can be found in appendix.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

Calculates number of people who will forego travel due to passport costs, DW loss to consumers, but not DW loss to producers.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

Examines dollar costs of passports plus # of travelers who would forego trips from or to the United States.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Sensitivity analysis and Monte Carlo analysis.

Compare costs with outcomes: 2

Does the analysis identify the approach that maximizes net benefits?

No, because benefits aren't calculated...assertion that benefits are maximized by chosen action without any support.

Does the analysis identify the cost effectiveness of each alternative considered?

Examines costs and cost savings in many cases.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Yes.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

Not explicitly. Does discuss cost savings associated with using passports as well as security gains for the general public.

TWIC: 1652-AA41	
Date	01/25/07
Component Agency	Coast Guard
Total Evaluation Score	6
Transparency Score	4

Rule Summary: This rule requires security threat assessments of persons in secure areas of U.S. ports and implements access control measures which prevent individuals who may pose security threats from gaining unescorted access to secure areas of ports. This rule prohibits individuals who do not possess a Transportation Worker Identification Card (TWIC) from having unescorted access to secure areas at affected maritime facilities.

Identify the desired outcomes: 1

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Increase security by requiring secure biometric IDs for people entering secure areas and controlling access—reduce number of high risk individuals with unescorted access to secure areas.

Does the analysis identify how these outcomes are to be measured?

No.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Not on probability or severity of terrorist incident. Asserts biometric ID will reduce number of high-risk individuals with access.

Does the analysis present credible empirical support for the theory?

No.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 0

Does the analysis identify a market failure or other systemic problem?

No.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

No.

Does the analysis present credible empirical support for the theory?

No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No.

Identify the uniquely federal role: 0

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

No.

Assess effectiveness of alternative approaches: 2

Does the analysis enumerate other options to address the problem?

Yes.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Medium—included discussion of an alternative that fall outside of their mandate: private issuance of credentials or security threat assessment of each employee.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

No, but asserts they’d be less effective.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

“No required ID” appears to be the baseline, but no analysis of what private sector would do without regulation

Identify costs: 2

Does the analysis identify and quantify marginal costs of all options considered?

Yes—initial and recurring costs.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Probably.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

No.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Yes.

Compare costs with outcomes: 1

Does the analysis identify the approach that maximizes net benefits?

No.

Does the analysis identify the cost effectiveness of each alternative considered?

No.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Probably identifies parties.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

No.

CHEMICAL FACILITY STANDARDS: 1601-AA41	
Date	04/09/07
Component Agency	None (DHS rule)
Total Evaluation Score	10
Transparency Score	4

Rule Summary: This rule establishes risk-based performance standards for the security of chemical facilities in the United States. The rule requires covered facilities to prepare Security Vulnerability Analyses (SVA), and to develop Site Security Plans (SSP), which include measures that satisfy the identified risk-based performance standards. It also allows certain facilities to submit Alternate Security Programs in lieu of an SVA, SSP, or both. The rule contains associated provisions addressing inspections and audits, recordkeeping, and the protection of information that constitutes Chemical-terrorism Vulnerability Information. The rule provides DHS with authority to seek compliance through the issuance of orders, including Orders Assessing Civil Penalty and Orders for the Cessation of Operations.

Identify the desired outcomes: 2

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Yes. Criteria for selecting high-risk sites are related to effects on human health, national security, or economic impact.

Does the analysis identify how these outcomes are to be measured?

No. Owners of high-risk sites must develop a plan to reduce the likelihood of a terrorist attack and the likelihood of success, but the analysis never says how much security is enough, how much the various measures will improve it, or what criteria DHS will use to determine whether the performance resulting from a proposed plan is adequate. Though couched as a performance-based standard, it could turn into a design-based standard depending on judgments DHS makes in evaluating firms' plans.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Offers plausible explanations of how various measures will improve security.

Does the analysis present credible empirical support for the theory?

No. The actual level of "performance" required by the performance standard is a black box.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

Not really. Doesn't say how much the regulation will reduce risk, just that it will.

Assess evidence of market failure or other systemic problem: 2

Does the analysis identify a market failure or other systemic problem?

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?
No.

Does the analysis present credible empirical support for the theory?
No.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?
No.

Identify the uniquely federal role: 0

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?
No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?
No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?
Only in the FRFA.

Assess effectiveness of alternative approaches: 2

Does the analysis enumerate other options to address the problem?
Yes.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?
One qualitatively different option considered but not analyzed in detail—a more prescriptive design standard. Also considered cost effects of tightening or loosening criteria used to determine which facilities pose the highest risks.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?
No, but it asserts a more prescriptive standard would provide additional costs with no additional benefits.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Acknowledges that firms have improved security since 9-11 but assumes current practice will be the baseline; no further improvement without regulation.

Identify costs: 3

Does the analysis identify and quantify marginal costs of all options considered?
Considers additional costs of tightening or loosening high-risk criteria, but not for a design standard.

Does the analysis identify all expenditures likely to arise as a result of the regulation?
Probably.

Does the analysis identify how the regulation would likely affect the prices of goods and services?
No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?
No.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?
Yes. Builds up dollar cost estimates from hours, materials, etc.—focused on expenditures no opportunity costs.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?
Yes—Monte Carlo analysis.

Compare costs with outcomes: 1

Does the analysis identify the approach that maximizes net benefits?
No—amount and value of benefits not estimated.

Does the analysis identify the cost effectiveness of each alternative considered?
No.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?
Analyzes effects on firms in different risk classes and firms of different sizes.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?
No.

IMMIGRATION BENEFIT APPLICATION: 1615-AB53	
Date	05/30/07
Component Agency	United States Citizenship and Immigration Services
Total Evaluation Score	8
Transparency Score	2: <i>Accompanying Fee analysis wasn't referenced by name, with no specific citation to the docket, took some effort to find in the docket</i>

Rule Summary: This rule adjusts the fee schedule for U.S. Citizenship and Immigration Services immigration and naturalization benefit applications and petitions, including nonimmigrant applications and visa petitions. These fees fund the cost of processing applications and petitions for immigration benefits and services and associated operating costs.

Identify the desired outcomes: 2

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Asserts that the benefits of immigration are well known and supported by thousands of commenters. Rule will eliminate backlog in processing immigrants by providing more funding.

Does the analysis identify how these outcomes are to be measured?

No, but implies reduction in backlog/wait times might be a good one.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Asserts more money will eliminate backlogs. The need for the fee increase is demonstrated in the "fee analysis" document. There is a \$3 million dollar/day deficit for immigration services. Increasing the fee will close the gap if there is not an equal increase in spending on immigration services.

Does the analysis present credible empirical support for the theory?

Not systematic, though historical example seems to indicate they're right.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

No.

Assess evidence of market failure or other systemic problem: 3

Does the analysis identify a market failure or other systemic problem?

Yes—backlogs.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

Asserts that lack of funding has caused backlogs.

Does the analysis present credible empirical support for the theory?

Fee analysis supports claim that more funding will reduce backlog.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

Problem isn't uncertain.

Identify the uniquely federal role: 0

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify “spillovers” across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

No.

Assess effectiveness of alternative approaches: 1

Does the analysis enumerate other options to address the problem?

One. It mentions initiatives seeking alternative funding, but dismisses them as only presenting costs with no benefits.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Narrow.

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

No.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Yes, sort of. It discusses the problems associated with leaving the fee at its current levels and also gets credit for mentioning that current cost savings practices are still not enough to make up for the budget deficit.

Identify costs: 1

Does the analysis identify and quantify marginal costs of all options considered?

No. Just fee revenue totals.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

No.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

No.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

Asserts no change due to excess demand to immigrate to the United States. But might the fee alter the mix of immigrants?

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

No.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

No.

Compare costs with outcomes: 1

Does the analysis identify the approach that maximizes net benefits?

No, but argues that the benefits of the rule exceed the costs.

Does the analysis identify the cost effectiveness of each alternative considered?

No.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Only focuses on costs to applicants, doesn't explain how fee increase could affect the broader economy.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

Yes. It asserts that reducing the backlog provides benefits to the American public and immigrants.

PASSENGER MANIFESTS: 1651-AA62	
Date	08/23/07
Component Agency	Bureau of Customs and Border Protection
Total Evaluation Score	12
Transparency Score	4

Rule Summary: This rule implements the Intelligence Reform and Terrorism Prevention Act of 2004, which requires that electronic manifest information for passengers onboard commercial aircraft arriving in and departing from the United States, as well as passengers and crew onboard arriving and departing commercial vessels, be vetted by DHS against a government-established and maintained terrorist-watch list prior to departure of the aircraft or vessel.

Identify the desired outcomes: 3

Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?

Defines outcome as safety, or keeping risk people off planes and intermediate outcome—not risk reduction. Asserts the rule will avoid costs of interviewing/detaining suspicious people on airplanes, and various costs to airlines and passengers when flights are delayed/diverted after a dangerous person has boarded.

Does the analysis identify how these outcomes are to be measured?

Safety outcomes, no. Avoided costs, yes.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?

Apparently AQQ would automatically prevent issuance of boarding pass. For non-AQQ airlines, simply asserts sixty minutes is the right time to prepare adequate law enforcement response. Arbitrarily assumes rule would be 90 percent effective.

Does the analysis present credible empirical support for the theory?

Arbitrary assumption that rule would keep 90 percent of bad people off of airplanes. No analysis demonstrating how the rule would affect the size or likelihood of terrorist attack. Arbitrary assumption that the rule would have prevented two diversions that occurred in 2004 and one terrorist incident.

When the outcome involves uncertain events, does the analysis identify how the regulation would affect the size of the outcome and the size of the risk?

Acknowledges risk but says it's not measurable. Assumes rule may be only 90 percent effective in keeping people on watch lists off planes.

Assess evidence of market failure or other systemic problem: 1

Does the analysis identify a market failure or other systemic problem?

No. No attempt to explain why airline/airports don't have adequate incentives to produce optimal level of safety.

Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?

Current regulations don't require pre-departure vetting.

Does the analysis present credible empirical support for the theory?

Little empirical evidence justifying 90 percent effective assumption or effects on the ultimate outcome, safety.

If the existence or severity of the problem is uncertain, does the analysis evaluate the likelihood that the problem will occur or the likely extent of the problem?

No, except for the assumption that the regulation would prevent two diversions per year.

Identify the uniquely federal role: 0

Does the analysis consider whether other levels of government have better knowledge or incentives to address the problem?

No.

Does the analysis identify "spillovers" across state borders that would justify a federal role?

No.

Does the analysis identify how the proposed regulation interacts with other federal regulations?

No.

Assess effectiveness of alternative approaches: 3

Does the analysis enumerate other options to address the problem?

Yes.

Is the range of options considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?

Narrow: varying stringency of the same basic regulation (different time restrictions).

Does the analysis evaluate how alternative approaches would affect the amount of the outcome achieved?

Only with regard to avoided costs, which are a very small part of the total benefits and the only ones measured.

Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?

Assumes current regulation is baseline; doesn't consider whether airlines would eventually use AQQ or take other measures voluntarily.

Identify costs: 3

Does the analysis identify and quantify marginal costs of all options considered?
Identifiess recurring costs and defines most AQQ costs as marginal costs per query.

Does the analysis identify all expenditures likely to arise as a result of the regulation?

Expenditures based on pilot studies of an AQQ system not yet implemented, plus an estimate of CBP's implementation costs that assumes only 10 percent of airlines implement AQQ.

Does the analysis identify how the regulation would likely affect the prices of goods and services?

Doesn't examine effects of transactions costs on ticket prices.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?

Assumes no change in passenger behavior in response to delays and inconvenience, and not change in the price of airline tickets.

Does the analysis translate costs into alternative metrics of interest to decision makers (e.g., dollars, lives lost, life-years lost, etc.)?

Yes. Identifies passenger delay, earlier airport arrival, and re-routing as opportunity costs, but many key assumptions about percent of passengers affected are arbitrary.

If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?

Some sensitivity analysis.

Compare costs with outcomes: 2

Does the analysis identify the approach that maximizes net benefits?

Net benefits not calculated, but costs of each approach are.

Does the analysis identify the cost effectiveness of each alternative considered?

ID's costs, some benefits, and notes how big non-quantified benefits would have to be. Suggests the cost of one terrorist incident justifies the benefits, but notes that rule may not prevent an incident and effect on risk can't be calculated.

Does the analysis identify all parties who would bear costs and assess the incidence of costs?

Yes, but it ignores some costs.

Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?

Main focus is on airlines and passengers; larger social benefits of thwarting terrorists mentioned but not analyzed.