Fair Pay and Safe Workplaces in Government Contracting: Reassessing Labor Law Benefits in Light of Infrastructure Investments and Buy American

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When purchasing infrastructure, goods or services, the U.S. government has "to promote economy, efficiency and effectiveness."[1] *Executive Order No. 13,673, issued by President Obama, expanded the requirement to encompass social sustainability: to promote economy and efficiency in procurement, the government was required to "contract with responsible sources who comply with labor laws."*[2] *The Fair Pay and Safe Workplaces rule (the Rule), proposed in 2014, required contractors of federal agencies to provide fair wages and safe workplaces to their workers.*[3] *Because industries feared that the Rule would lead to contractors being unfairly excluded from public contracts, opponents of the Rule called it the "blacklisting rule."*[4] *After having reviewed the final rule and its regulatory impact analysis,*[5] *the Office of Management and Budget (OMB) approved the Rule in 2016.*[6] *Shortly after his inauguration, President Trump revoked the Rule.*[7] *Now, with Congress' passage of the "once-in-a-generation" Infrastructure Investment and Jobs Act,*[8] *and the proposed Buy American*

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1. Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974).
2. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014).
3. *Id.* § 1.
4. Patricia Hill, Matthew Clarke, Yash Dave, Ian Jones & Jennifer Lawson, *President Trump Revokes Fair Pay and Safe Workplaces Executive Order*, SMITH, GAMBRELL & RUSSELL (Mar. 30, 2017), https://www.sgrlaw.com/client-alerts/president-trump-revokes-fair-pay-and-safe-workplaces-executive-order/ [https://perma.cc/MS8G-K9WE].
5. *Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563*, DEP'T OF DEF. (Aug. 26, 2016) [hereinafter *FAR Regulatory Impact Analysis*].
6. Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58,562 (Aug. 25, 2016) [hereinafter Fair Pay and Safe Workplaces (2016)].
7. Erik Dullea, *The Fate of "Fair Pay and Safe Workplaces" Under President Trump*, HUSCH BLACKWELL (Feb. 5, 2017), https://www.contractorsperspective.com/compliance/undoing-executive-order-13673/ [https://perma.cc/4LGF-E8QZ]; Hill et al., *supra* note 4.
8. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021); The White House, *Fact Sheet: The Bipartisan Infrastructure Deal* (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal [https://perma.cc/5TY9-FQUX].

rule,[9] *the U.S. government will employ thousands of American workers to build highways, bridges, and public transit.*[10] *Hence, improving the quality of workplaces in government purchasing is more relevant than ever and may very well necessitate the promulgation of a new version of the Rule. Therefore, taking a closer look at the Rule's regulatory impact assessment and evaluation of labor law benefits is warranted and can provide a helpful model for understanding and improving cost-benefit analysis of government purchasing.*

This Article is the first and long overdue attempt to assess the costs and benefits in government contracting. It critically analyzes the methods and results of the Rule's regulatory impact assessment of 2016.[11] *In particular, the Article criticizes the lack of a thorough evaluation of qualitative benefits and suggests a decision rule for agencies to select the most appropriate method for different benefit types. The Article also discusses the issue of evaluating social benefits and "transfer payments" between different groups of society. While wealth transfers are better researched in tax regulation (the government's income side),*[12] *currently no research exists on transfer payments in procurement regulation (the government's expenditure side). To account for the unique nature of the Rule—i.e., the non-monetized benefits and the involvement of the government as a regulated entity—this Article suggests a multi-method approach, rather than the applied one-size-fits-all solution. The Article recommends using an economic impact analysis to evaluate transfer payments, a cost-effectiveness analysis to evaluate safety at work, and a break-even analysis to assess fair wages and reduced employment discrimination.*

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10. Shawn Hubler, Emily Cochrane & Zach Montague, *This Is Where the States Want Billions in Infrastructure Funding Spent,* N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2021/11/06/us/states-infrastructure-bill-funding.html [https://perma.cc/4GHY-88PD].

11. *FAR Regulatory Impact Analysis*, *supra* note 5

12. David A. Weisbach, Daniel J. Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507 (2018).

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Introduction

Based on Executive Order No. 13,673, the Department of Defense (DoD), the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), and the Department of Labor (DOL) (the Agencies) drafted a proposed[13] and final rule[14] on fair pay and safe workplaces that was adopted into the Federal Acquisition Regulation (FAR) in 2016.[15] Because the Agencies qualified the Rule to be a "significant regulatory action" with an economic effect of $100 million or more,[16] they had to conduct a regulatory impact assessment. The Rule captured significant public attention, attracting more than 800 public comments, while DOL's Guidance received more than 7,000 comments.[17] Substantively, the Rule consisted of three provisions regulating labor law in the context of government purchasing:

Violations disclosure provision: Contractors must disclose *labor law violations* to contracting agencies, and subcontractors must disclose them to the DOL.

13. Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,548 (May 28, 2015).

14. Fair Pay and Safe Workplaces (2016), *supra* note 6.

15. Federal Acquisition Regulations, 48 C.F.R. Ch. 1 (2005).

16. *FAR Regulatory Impact Analysis*, *supra* note 5, at 1.

17. Fair Pay and Safe Workplaces (2016), supra note 6; Sheila A. Amstrong & Stephen E. Ruscus, *Congress Repeals Controversial Fair Pay and Safe Workplaces Regulations*, MORGAN LEWIS (Mar. 7, 2017), https://www.morganlewis.com/pubs/congress-repeals-controversial-fair-pay-and-safe-workplaces-regulations [https://perma.cc/4QKK-NJ32].

Paycheck transparency clause: Contractors must disclose *information about compensation and employment status* to workers for federal contracts exceeding $0.5 million.

Arbitration prohibition provision: Contractors are *prohibited from arbitrating discrimination and harassment claims* of workers for federal contracts exceeding $1 million.[18]

In October 2016, two months after the Rule had been adopted, construction associations filed a preliminary injunction against the Rule in the Eastern District of Texas.[19] The district judge granted the injunction, fearing a violation of contractors' due process and First Amendment rights.[20] In early 2017, shortly after his inauguration, President Trump signed a Congressional Review Act that rolled back President Obama's Fair Pay and Safe Workplaces Executive Order.[21]

Due to recent developments, labor law in government contracting has regained importance. The new Infrastructure Investment and Jobs Act allows the U.S. government to spend $1.2 trillion to build highways, bridges, dams, public transit, rail, ports, airports, and broadband over the next 10 years.[22] To implement these infrastructure projects, the government will engage contractors and employ thousands of American workers. In July 2021, DoD, GSA, and NASA announced a proposed rule that implements President Biden's Executive Order No. 14,005 on "Ensuring the Future is Made in America by All of America's Workers"[23] to strengthen the Buy American requirements for federal procurements.[24] The rule intends to increase the procurement of domestic end products and domestic construction materials,[25] which currently amount to almost $300 billion in annual procurement spending.[26] Hence, the rule encourages the use of federal procurements to support domestic businesses and workers.[27]

18. Exec. Order No. 13,673, *supra* note 2.

19. Dullea, *supra* note 7.

20. *Id.* District Judge Marcia Crone saw constitutional problems with requiring firms to report labor law violations that have been detected by agencies but were not litigated in court.

21. Sheila A. Amstrong, Stephen E. Ruscus, Paul C. Evans, *Congress Repeals Controversial Fair Pay and Safe Workplaces Regulations*, NAT'L L. REV. (Mar. 7, 2017), https://www.natlawreview.com/article/congress-repeals-controversial-fair-pay-and-safe-workplaces-regulations [https://perma.cc/LUZ4-XP9E]; Hill et al., *supra* note 4.

22. Hubler et al., *supra* note 10.

23. Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 28, 2021).

24. Amendments to the FAR, *supra* note 9.

25. *Id.* at 40,981.

26. Press Release, Office of the Press Sec'y, White House, Fact Sheet: Biden-Harris Administration Issues Proposed Buy American Rule, Advancing the President's Commitment to Ensuring the Future of America is Made in America by All of America's Workers (July 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-biden-harris-administration-issues-proposed-buy-american-rule-advancing-the-presidents-commitment-to-ensuring-the-future-of-america-is-made-in-america-by-all-of-americas [https://perma.cc/SC4D-8MME].

27. David S. Gallacher & Ariel Debin, *Fasten Your Seatbelts – Proposed Rule Implementing Biden's "Buy American" Mandates*, NAT'L L. REV. (Aug. 16, 2021),

While the Infrastructure Investment and Jobs Act and the proposed Buy American rule intend to increase the quantity of workplaces, the here discussed Rule intended to increase *the quality of workplaces*, guaranteeing fair wages and safety at work for employees. Hence, the positive effect of a similar rule would be multiplied by the infrastructure deal and the proposed rule. These new developments and the Rule's flawed benefit analysis call for a reassessment of the costs and benefits in government purchasing.

This Article critically analyzes how to evaluate qualitative labor law benefits in the context of government contracting. Part I briefly describes the Rule's direct and indirect regulatory effects. Part II explains why procurement regulation should be assessed differently than most economic regulations and draws a comparison with tax regulation. Part III analyzes the methods and results of the Rule's impact assessment. It focuses on the evaluation of non-monetized labor law benefits, fleshes out issues related to the idiosyncrasy of procurement regulation, and suggests alternative approaches to evaluate these benefits. Part IV elaborates on the different methods to evaluate the Rule's qualitative labor law benefits, such as wage fairness, and suggests a decision rule that can help agencies choose the appropriate evaluation method for each benefit. Lastly, the Article concludes with a policy recommendation to adopt a multi-method, rather than a one-size-fits-all, approach to assess qualitative benefits, and recommends applying an economic impact analysis to assess welfare transfers, a cost-effectiveness analysis to evaluate safe workplaces, and a break-even analysis to measure the benefits of fair pay and reduced employment discrimination in procurement regulation.

I. The Rule's Direct and Indirect Regulatory Effects

In line with Justice Brandeis' famous statement that sunlight is the best disinfectant,[28] the Rule strongly relied on disclosure.[29] It formed part of the Obama Administration's efforts to create "economic incentives to encourage . . . desired behavior,"[30] including "warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public."[31] Cass R. Sunstein, the Administrator of the Office of Information and Regulatory Affairs (OIRA) under the Obama

https://www.natlawreview.com/article/fasten-your-seatbelts-proposed-rule-implementing-biden-s-buy-american-mandates [https://perma.cc/M35F-QP76].

28. Louis Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (Dec. 20, 1913).

29. *FAR Regulatory Impact Analysis*, *supra* note 5, at 87.

30. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

31. *Id.* § 4.

Administration, was a strong proponent of behavioral regulatory instruments and "nudges."[32]

Sunstein describes nudges as "low-cost, choice-preserving, behaviorally informed approaches to regulatory problems, including disclosure requirements, default rules, and simplification."[33] Nudges rely on small policy changes to steer consumers toward a particular choice.[34] They are voluntary and do not mandate or force a behavior. The goal is to alter behavior that is not in people's self-interest, such as negative internalities that produce within-person harms like smoking, or behavior that is not in the public interest, such as negative externalities like environmental pollution.[35] One example of a nudge is the idea of a default enrollment into the 401(k)-retirement savings plan. This approach would take advantage of people's inertia to opt out of the default option and enroll more people into pension programs.[36]

But disclosure is not always a nudge.[37] The nudge's twin is mandatory disclosure as part of "command-and-control" or prescriptive regulation.[38] Mandatory disclosure requirements force market participants to change their business practices, which often incur high compliance costs. The most prominent example in government contracting is the mandatory disclosure rule regulated in FAR 52.203-13, the Contractor Code of Business Ethics and Conduct. This rule requires contractors to disclose any federal crime such as fraud or bribery, false claims, or significant overpayment on the contract.[39] In environmental regulation, a mandatory disclosure rule that was estimated to create significant reporting and compliance costs for firms of $132 million in the first year was the Environmental Protection Agency (EPA)'s mandate to report greenhouse gases.[40] Also, the Credit CARD

32. Benjamin Wallace-Wells, *Cass Sunstein Wants to Nudge Us*, N.Y. TIMES MAG. (May 13, 2010), https://www.nytimes.com/2010/05/16/magazine/16Sunstein-t.html [https://perma.cc/732R-AC7B].

33. Cass R. Sunstein, *Nudges.gov: Behaviorally Informed Regulation*, *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 1 (Eyal Zamir & Doron Teichman eds., 2014) (citation omitted); *see also* R. H. THALER & CASS R. SUNSTEIN, NUDGE 6 (2008) (describing a nudge as "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives").

34. Sunstein, *Nudges.gov*, *supra* note 33, at 1.

35. *Id*. at 22.

36. Ryan Bubb, Patrick Corrigan & Patrick L. Warren, *A Behavioral Contract Theory Perspective on Retirement Savings*, 47 CONN. L. REV. 1317, 1325 (2015).

37. See definition of "nudge" above.

38. Command-and-control policy refers to environmental policy that relies on regulation (i.e., permission, prohibition, standard setting and enforcement) as opposed to financial incentives, i.e., economic instruments of cost internalization. *See* Glossary of Statistical Terms, OECD (Nov. 2, 2021), https://stats.oecd.org/glossary/detail.asp?ID=383 [https://perma.cc/MY52-R886].

39. ABA, GUIDE TO THE MANDATORY DISCLOSURE RULE: ISSUES, GUIDELINES, AND BEST PRACTICES, at A-5 (2010).

40. *Regulatory Impact Analysis for the Mandatory Reporting of Greenhouse Gas Emissions Final Rule (GHG Reporting) 8-2, Env't Prot. Agency* (Sept. 2009),

Act of 2009 forced credit card companies to disclose hidden fees to customers.[41]

According to the Rule's regulatory impact assessment, the disclosure of labor law violations has two effects: It encourages more responsible behavior on behalf of *contractors* and subcontractors, and informs *purchasing officers* about contractors' past labor law violations, enabling them make more responsible procurement decisions.[42] Similarly, the paycheck transparency clause disciplines contractors to disclose information to workers about their compensation and employment status, which in turn, allows workers to claim back wages and ask for social benefits.[43]

Overall, the Rule's provisions can be qualified as mandatory command-and-control regulations. The Rule required contractors to disclose information and aimed to remedy information asymmetries between contractors and purchasing officers. The disclosure rules' prescriptive nature intended a quality-increasing function on contractors' performance and purchasing officers' award practice.

But the Rule also had some less obvious indirect, nudge-like effects on workers and taxpayers. Like the disclosure rules of the Credit CARD Act, which nudge customers to make better-informed financial decisions, the Rule's mandatory disclosure provision nudged workers into making better-informed choices in terms of their taxes, Social Security, healthcare, and unemployment benefits. By forcing contractors to disclose workers' employment status, workers could claim fair compensation and social benefits, rather than being treated as independent contractors with limited social benefits.[44] Unlike the mandatory nature of the Rule for contractors, workers could choose whether to act upon the paycheck and status information. Similarly, citizens who got access to the DOL database[45] and firms' past labor law violations could choose if and how they want to respond to this information—for example, with political pressure.

The Rule affected different regulated entities, two directly and two indirectly.[46] While the Rule was intended to compel and directly impact contractors and purchasing officers, it also had indirect, nudge-like effects on workers and taxpayers.

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https://www.epa.gov/sites/default/files/2015-07/documents/regulatoryimpactanalysisghg.pdf [https://perma.cc/V87E-RHJS].

41. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

42. *FAR Regulatory Impact Analysis*, *supra* note 5, at 88.

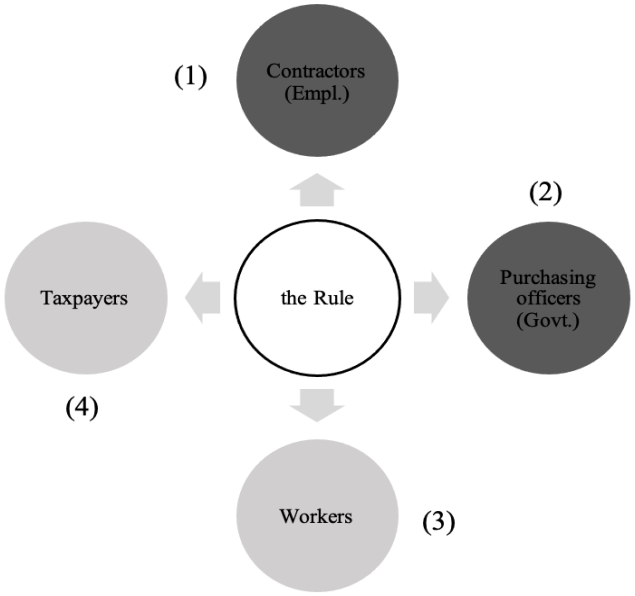
43. *Id.* at 99.

44. *Id.*

45. The DOL database is not public, but information on past violations can be requested by the public through a Freedom of Information Act (FOIA) request.

46. See discussion about term "affected" in ENV'T PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES 9-2 (2014) [hereinafter GUIDELINES].

Figure 1: Affected Entities of the Rule



Dark grey = Directly affected entities; Light gray = Indirectly affected entities

Based on the distinction made above, this Article distinguishes between the Rule's direct and indirect effects on different regulated entities:

1. Direct effect on contractors: The disclosure provision forced firms to disclose labor law violations, which the Agencies estimated to have a positive impact on both the compliance and performance of contractors.[47]
2. Direct effect on purchasing officers: The disclosure provision made labor law violations more salient to purchasing officers and allowed them to make more responsible decisions,[48] i.e., to award contracts to compliant, rather than non-compliant, firms.
3. Indirect effect on workers: The paycheck transparency clause required firms to disclose information about compensation and employment status,[49] which gave workers the choice to claim fair compensation and government benefits.

47. *FAR Regulatory Impact Analysis, supra* note 5, at 88.
48. *Id.*
49. *Id.* at 2.

4. Indirect effects on taxpayers: The accessibility of past labor law violations and publicity of discrimination claims could raise public awareness and increase political pressure on government agencies to spend taxpayers' money responsibly,[50] i.e., to award contracts to compliant rather than non-compliant firms.

For a rule and its expected effects on different regulated entities to be approved by OMB, agencies must provide an assessment of its regulatory impact, or costs and benefits. The following Part provides an overview of the methods used to evaluate quantitative and qualitative benefits and explains how regulatory impact assessments of procurement regulation should learn from cost-benefit analysis of tax regulation.

II. Evaluating Benefits in Procurement Regulation

The United States was one of the first countries to adopt regulatory impact assessments, most importantly cost-benefit analysis. In 1981, President Reagan issued Executive Order No. 12,291,[51] which requires federal agencies to evaluate the positive and negative economic effects of a major rule, which is defined as a rule with an annual economic effect of $100 million or more.[52] According to the executive order, regulatory action shall not be undertaken unless "the potential benefits to society . . . outweigh the potential costs to society."[53] Hence, cost-benefit analysis follows a net benefit principle. The agency responsible for reviewing impact assessments is OIRA, a subagency of OMB and part of the White House.

A. From Quantitative to Qualitative Impact Analysis

To evaluate the effects of the Rule, the Agencies conducted a cost-benefit analysis pursuant to Executive Orders Nos. 12,866 and 13,563.[54] Executive Order No. 12,866, issued by President Clinton in 1993, builds the basis for most modern cost-benefit analyses and emphasizes that many consequences of policies are difficult to quantify and that qualitative concerns should be considered as well.[55] Executive Order No. 13,563,

50. The increased pressure from civil society and the public is not mentioned in the *FAR Regulatory Impact Analysis*. This Article suggests it as a fourth and indirect effect of the disclosure rules.

51. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

52. *Id.* § 1(b).

53. *Id.* § 2.

54. *FAR Regulatory Impact Analysis*, *supra* note 5, at 1.

55. Exec. Order No. 12,866 § 1, 58 Fed. Reg. 51,735 (Oct. 4, 1993); W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 28 (2018).

issued by President Obama in 2011, similarly stressed that agencies have discretion to consider qualitative values such as "equity, human dignity, fairness, and distributive impacts."[56] In line with the Obama Administration's committed preference for nudge policies over command-and-control regulations,[57] the executive order required agencies to assess economic incentives to encourage the desired behavior by providing information as an alternative to direct regulation.[58]

Because many benefits, such as environmental pollution, safety, or fairness, do not have a market value, the evaluation of benefits is often more challenging than the measurement of costs, which are already expressed in dollar amounts. Non-quantifiability is often understood as a problem of incommensurability. Sunstein describes incommensurability as the challenge that moral goods, such as human dignity, do not have a unitary standard, but that each human values the good differently.[59] When evaluating moral commitments, agencies can resort to a break-even analysis, which Eric A. Posner and Sunstein see as "far better than no analysis at all."[60] When it comes to assessing environmental regulation, the EPA evaluates health and safety benefits through cost-effectiveness analyses,[61] and distributional effects by means of economic impact analyses.[62] The different approaches to estimate costs and qualitative benefits are applied to the Rule in Part IV.

B. Social Benefits and Wealth Transfers: A Comparison with Tax Regulation

Tax and procurement regulation are similar in many aspects. Both regulate the financial relationship—both sizeable—between the government and taxpayers. Tax regulation covers the government's income side, and procurement regulation regulates the government's expenditure side. In both tax and procurement regulation, the government is involved as a regulated entity. This is not typical for economic regulations, where the government often regulates the conduct of individuals and firms, rather than itself.[63] Due to their similarities, both

56. Exec. Order No. 13,563 § 1(c), 76 Fed. Reg. 3821 (Jan. 21, 2011).

57. VISCUSI, et al., *supra* note 55, at 31.

58. Exec. Order No. 13,563 § 1(b)(5).

59. Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. R. 1369, 1378-79 (2014) [hereinafter Sunstein, *The Limits of Quantification*]; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782-785 (1993); *Incommensurable*, Lexico.com, https://www.lexico.com/en/definition/incommensurable [https://perma.cc/TU65-NWEM].

60. Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1852 (2017).

61. See GUIDELINES, *supra* note 46, at 7-12.

62. *Id.* at x-ii.

63. Economic regulations in this context mean binding legal norms issued by administrative agencies that shape the conduct of individuals and firms in the economy and

areas of law are confronted with similar problems, which makes them worthwhile to compare when assessing costs and benefits. But despite the considerable economic dimension of government purchasing, cost-benefit analyses of procurement regulation have not received the same attention as those of tax regulation. The following paragraphs will highlight two similarities and explain what procuring agencies can learn from tax regulation when assessing costs and benefits.

In April 2018, the Department of the Treasury and OMB released a memorandum of understanding (MoA), which requires agencies to conduct a formal cost-benefit analysis of any tax regulation that has an annual "non-revenue effect" on the economy of $100 million or more.[64] Traditionally, major rules that require a cost-benefit test are regulations that effectively generate real economic value, rather than zero-sum-transactions. Tax regulations customarily affect the revenue of a government, which is reflected in a change in the amount that taxpayers transfer to the government.[65] To account for all other effects that do not directly affect the governments revenue, as required in the MoA, David A. Weisbach, Daniel J. Hemel, and Jennifer Nou have proposed a marginal revenue rule, where the total social benefits equal the net increase in revenue resulting from reporting and behavioral changes, plus any non-revenue-based benefits like health or environmental benefits.[66]

Similarly, this Article suggests that in public procurement, the economic value of the regulation should not consist of the amount of government expenditures, i.e., the purchased works, goods, and services, but of the related negative and positive effects—social, environmental, and health-related—that the regulation creates. Against this backdrop, this Article suggests a cost-benefit test for procurement regulation when "non-expenditure effects" amount to $100 million or more. Let's call this rule "the marginal expenditure rule," where the total social benefits equal the net decrease in government expenditures resulting from rules that change contractors' compliance and performance behavior, plus any non-expenditure-based benefits like social and environmental sustainability.

The second similarity of tax and procurement regulation is the importance of social costs and benefits, which affect the entire society as a whole, including the government and taxpayers. Social costs and benefits encompass the private costs and benefits of businesses and consumers plus

financial market. For the meaning of regulation, see David P. Baron, *Design of Regulatory Mechanisms and Institutions*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1349, 1349 (Richard Schmalensee & Robert D. Willig eds., 1989), and Barak Orbach, *What Is Regulation?*, 30 YALE J. REG. ONLINE 1, 4-6 (July 25, 2016).

64. Memorandum of Agreement from the Dep't of the Treasury & Off. of Mgmt. and Budget on Review of Tax Regulations Under Exec. Order 12866 § 1(c) (Apr. 11, 2018).

65. Weisbach et al., *supra* note 12, at 1507.

66. *Id.*

positive and negative externalities on third parties, such as pollution.[67] Many economic regulations regulate the relationship between private parties, focusing on private costs. For example, the Occupational Safety and Health Administration (OSHA) imposes a concentration limit of arsenic on employers to which employees can be exposed during an eight-hour shift.[68] In this example, OSHA regulates the relationship between two private parties—firms and workers—not the society at large.[69]

While in tax regulation the government and taxpayers are on opposite sides of the transaction, in procurement regulation the government and taxpayers are on the same side. The government buys goods and services from private companies, spending taxpayer money. Hence, procurement regulation involves a third regulated entity: the contractors. Hence, impact assessments of procurement regulation—different from tax regulation—do not only need to account for social costs and benefits, but also for the costs and benefits of private parties, and the wealth transfers between those parties.

III. Scrutiny of the Rule's Regulatory Impact Assessment

This Part explains the different approaches and results of the Rule's evaluation of costs, benefits, and transfer payments resulting from labor law violations disclosure, paycheck transparency, and arbitration prohibition.

Overall, it is noteworthy that the regulatory impact assessment of the Rule focused primarily on the estimation of costs.[70] Important elements regarding the estimation of benefits were missing. This imbalance is problematic since the costs and benefits can only be compared when they are both evaluated properly and expressed in the same unit. However, benefits often lack a market value and require alternative valuation

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68. *Inorganic Arsenic*, OSHA, https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1018 [https://perma.cc/U5VU-857J].

69. Other examples of economic regulations include the Securities and Exchange Commission's regulation of offshore sales of equity securities, Final Rule: Offshore Offers and Sales, 63 Fed. Reg. 9632 (Feb. 25, 1998) (codified at 17 C.F.R. pts. 230, 249); the Federal Trade Commission's financial activities regulations, 12 C.F.R. § 225.28 (2017); and the Environmental Protection Agency's greenhouse gas regulations for passenger cars, The Safer Affordable Fuel Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2020) (codified at 49 C.F.R. pts. 523, 531, 533, 536, and 537). On the other hand, regulations can also be "social" regulations, which focus on providing benefits, such as healthcare services, public education, and fair housing.

70. The cost estimation was analyzed over the span of 86 pages, and the benefit estimation took up 28 pages. *See FAR Regulatory Impact Analysis*, *supra* note 5.

methods, such as a break-even analysis.[71] This Article argues that a more thorough analysis of benefits and the use of alternative methods would have delivered a more solid basis for assessing the effects of the Rule and any similar, future rule in government purchasing.

A. The Rule's Underestimated Costs

For the cost estimation of the labor law violations disclosure provision, the Agencies identified three cost categories:

1. Compliance costs of contractors (number of contractors multiplied by hours necessary for contractors to familiarize themselves and comply with the regulation);
2. Material and maintenance costs of contractors to track labor law violations; and
3. Government costs to train personnel.[72]

Together with the paycheck transparency provision, the Agencies estimated the cost of the Rule to be $2.9 billion over the course of ten years, with a 7% discount rate.[73]

For the arbitration prohibition provision, the Agencies created the following formula:

1. Costs for litigation versus arbitration (with higher costs for litigation);
2. Probability of the worker winning the case in litigation versus arbitration (with a higher winning probability in litigation); and
3. Payout awards to the worker in litigation versus arbitration (with higher awards/recoveries in litigation).[74]

This formula reflects the most important elements for calculating litigation costs—probability of success, probability of reward, and legal fees. Nevertheless, the Agencies did not put this formula into use by inputting the relevant numbers. Hence, the cost estimates for the arbitration prohibition were missing entirely. This meant that the total estimated costs of the Rule were likely underestimated in the 2016 impact assessment—which would give the benefits even more weight. The

71. GUIDELINES, *supra* note 46, at 7-50.

72. *FAR Regulatory Impact Analysis*, *supra* note 5, at 21-61. The discounting of future effects is another, contentious topic in cost-benefit analyses, with suggested ranges between 3 percent and 7 percent (*Circular A-4: Regulatory Analysis*, OMB 11 (Sept. 17, 2003) [hereinafter Circular A-4], https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 [https://perma.cc/3Z9P-ZL4U]) or even zero percent (Guidelines, *supra* note 46, at 6-1 et seqq.).

73. *Id.* at 78.

74. *Id.* at 82.

simplest way to cure this issue and to have the Rule's total costs would have been to input the numbers into the formula and provide a rough cost estimate for discrimination litigation.

B. Missed Opportunity to Monetize Fair Pay and Safe Workplaces

In the Rule's impact assessment, the Agencies identified qualitative benefits and partly quantified them. However, they did not perform the third and last step of the estimation process: monetizing the benefits. The failure to appraise benefits is problematic because, to compare the costs and benefits, they need to be expressed in the same unit: dollars. Otherwise, one is comparing apples with oranges. This Section summarizes the benefits of the labor law violations disclosure provision, identifies potential issues (like missing values), and suggests assessment methods to quantify and monetize the different qualitative benefits, which will be discussed in more detail in the Part IV.

For the disclosure of labor law violations, the Agencies identified five "quantified" benefits.[75] Regrettably, only one of the five benefits, safer workplaces, was monetized. That benefit, however, was estimated for the entire U.S. population, rather than being adjusted to account specifically for the population of contractors (hence, it was overestimated). As outlined in Table 1 below, for four of the identified disclosure benefits, this Article suggests applying alternative evaluation methods, rather than using the default cost-benefit analysis.

Table 1: Estimating Benefits of Labor Law Violations Disclosure

Identified Benefits[76]	**Identified Issues**	**Suggested Methods**
Improved contractor performance: Studies found a correlation between labor law violations and low contractor performance.[77]	Missing values.	**Cost-benefit analysis** to estimate cost savings (less delays and defects) of compliant firms versus non-compliant firms.
Safer workplaces with fewer injuries, illnesses,	Cost of injuries were not	**Cost-benefit analysis**, relying on

75. *Id.* at 90-98.

76. *Id*.

77. *Id.* at 90. *See* U.S DEP'T OF HOUS. AND URB. DEV., OFF. OF INSPECTOR GEN., AUDIT REPORT ON MONITORING AND ENFORCING LABOR STANDARDS (1983); Moshe Adler, *Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects*, FISCAL POL'Y INST. (May 5, 2003), https://illinoisepi.files.wordpress.com/2016/10/prequalification.pdf [https://perma.cc/3WPV-TMKV]; David Madland & Michael Paarlberg, *Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs*, CTR. FOR AM. PROGRESS (Dec. 8, 2008, 9:00 AM), https://www.americanprogressaction.org/issues/economy/reports/2008/12/08/5348/making-contracting-work-for-the-united-states/ [https://perma.cc/8J7L-QT62]; Karla Walter & David Madland, *At Our Expense: Federal Contractors That Harm Workers Also Shortchange Taxpayers*, CTR. FOR AM. PROGRESS (Dec. 11, 2013, 8:48 AM), https://www.americanprogressaction.org/issues/economy/reports/2013/12/11/80799/at-our-expense/ [https://perma.cc/T5L7-RJU6].

and fatalities. Based on the 2013 value of statistical life (VSL) of $9.1 million,[78] annual costs of workplace fatalities in the U.S. were estimated at **$40 billion**.[79] Fatal and nonfatal occupational injuries and diseases combined were estimated at **$250 billion** in 2007, consisting of $67 billion medical costs and $183 billion indirect costs like lost productivity.[80]	specified to the population of government contractors.	contingent valuation, is correct, but lives saved need to be adjusted to account specifically for the contractor population. **Cost-effectiveness analysis** to estimate the costs necessary to save a set number of lives or prevent a set number of deaths.
Reduced employment discrimination, leading to more qualified employees and more hires from minority groups.	Missing values.	**Cost-benefit analysis**, asking people about their willingness to pay (WTP) for increased employment equality. **Cost-effectiveness analysis** to estimate the costs to achieve a specified number of candidates from diverse backgrounds.[81] **Break-even analysis** to estimate the number of diversity hires that outweigh the hiring costs or estimate the value to achieve a specified number of diversity hires.
Fairer wages, leading to less absenteeism, better employee morale and higher productivity, reduced worker turnover, and the attraction of better-quality workers who produce higher-quality goods and services.	Missing values. Increased wages are a transfer* from contractors (less profit)[82] or taxpayers (lower costs)[83] to workers (higher wages).	**Cost-benefit analysis**, relying on contingent valuation, asking about people's WTP for a specific wage increase. **Cost-effectiveness analysis** to estimate the costs to achieve a specific wage increase. **Break-even analysis** to estimate the wage increase that outweighs the hiring costs or to estimate the value to achieve a specific wage increase.

78. *FAR Regulatory Impact Analysis*, *supra* note 5, at 92.

79. *Id.* at 93.

80. J. Paul Leigh, *Economic Burden of Occupational Injury and Illness in the United States*, 89 MILBANK Q. 728, 729 (2011).

81. In this Article, "candidates from diverse backgrounds," "diverse candidates" or "diversity hires" are used as neutral terms to describe the hiring of candidates only based on their ability to perform their job effectively and efficiently, without considering biases like race or gender. *See e.g.*, Sona Patel, *What Racial Terms Make You Cringe?*, N.Y. TIMES (Mar. 26, 2017), https://www.nytimes.com/2017/03/26/us/cringeworthyraceterms.html [https://perma.cc/7GXW-Y866].

82. If additional wages are paid out of profits, costs for employers increase. *See FAR Regulatory Impact Analysis*, *supra* note 5, at 98.

83. If contractor fees increase due to the need to pay higher wages to employees, costs for taxpayers increase. *See id.*

		Economic impact analysis to estimate the benefits for contractors, taxpayers, and workers separately.
Fewer labor law violations lead to enforcement cost savings, and reduce the amount firms pay in fees, penalties, and awards.	Missing values. Reduced fines are a transfer* from the government (less income) to contractors (less expenses).[84]	**Economic impact analysis** to estimate the value of penalties and enforcement cost savings separately.

** Transfers are discussed under the paycheck transparency rule*

To estimate safety at workplaces, the Article suggests a cost-effectiveness analysis as the superior method over cost-benefit analysis. To estimate wage fairness and reduced employment discrimination, the break-even analysis provides for a sensible solution. Lastly, an economic impact analysis would allow to estimate the wealth transfers resulting from reduced labor law violations and penalties.

C. The Rule's Identified, But Non-Quantified Wealth Transfers

For each of the Rule's three provisions, the Agencies also identified the transfer impacts. A transfer payment is a redistribution of wealth from one group of society to another.[85] Cost-benefit analyses focus on the net benefits by summing all benefits, including spillover effects, minus costs, including externalities.[86] Across all provisions, the Agencies identified four transfer payments:

1. "From a societal perspective, increased wages are not a benefit but a transfer."[87] Increased wages would transfer wealth from employers to workers if additional wages were paid out of the contractors' profits, or from taxpayers to workers if the government has to pay higher contractor fees, given contractors' obligation to pay higher wages to their employees (passed-on fees).[88]
2. The reduced penalties, fees, and awards firms had to pay by complying with the labor laws would constitute a wealth transfer from the government to the firms, rather than a cost savings or benefit.[89] Instead of filling the state's pockets, the firms would keep the money on their balance sheets.

84. Less labor law violations would likely reduce the amount firms pay in fines and worker awards, which would, in turn, reduce the firms' bottom lines. *See id*.
85. *Id*. at 99.
86. GUIDELINES, *supra* note 46, at 1-4.
87. *FAR Regulatory Impact Analysis*, *supra* note 5, at 98.
88. *Id*.
89. *Id*.

3. Due to improved compliance with tax and employment laws, the paycheck transparency clause would have likely led to wealth transfers from employers to employees.[90] The back wages and social benefits that are saved by firms' misclassification of workers would have been paid out to the workers, rather than increasing the firms' bottom lines.
4. The potential increase in workers awards resulting from litigating discrimination claims would represent a transfer payment from employers to employees.[91] Other than the increased litigation costs, the awards do not represent a real economic cost since they do not affect the total resources available to society.[92]

Even though the Agencies correctly identified the transfer impacts, they only quantified or monetized one of those transfer payments (see Table 2 below). To measure distributional effects, agencies like the EPA usually apply economic impact analyses. This method would have been better suited to evaluate the different transfer payments and estimate their magnitude. The following Table summarizes the transfer impacts of the paycheck transparency clause, while the transfer impacts of the labor law violations disclosure and the arbitration prohibition provision are addressed under the respective section.

Table 2: Transfer Impacts of Paycheck Transparency

Transfer Impacts[93]	**Identified Issues**	**Suggested Methods**
Quantified transfer impacts: For the paycheck transparency clause, the Agencies have monetized wealth transfers from employers and taxpayers[94] to employees (back wages[95] owed to misclassified workers) and federal revenues (income taxes, Social Security, Medicare taxes, and unemployment taxes owed to misclassified workers) with **$15.5 million**.[96] Reasoning: If 33% of U.S. workers were misclassified, 20% of mis-classifications can be corrected.[97]	Transfers are not benefits, but their value still needs to be accounted for.	**Economic impact analysis** to estimate wealth transfers between employers, taxpayers, and employees separately.
Non-quantified transfer impacts: Agencies	Missing values.	**Cost-benefit analysis** to estimate the

90. *Id.* at 99.
91. *Id.* at 86.
92. *Id.*
93. *Id.* at 62-82.
94. If increased employers' costs are passed through in the form of higher bids for federal contracts. *See id.* at 102.
95. *Id.* at 100, 101, 104, 111.
96. *Id.* at 102.
97. *Id.*

have identified five non-quantified transfer impacts of the paycheck transparency clause: Increased *unemployment benefits* for workers Increased access to *medical services and retirement* and pension programs for workers Reduced *employment discrimination* due to increased transparency, leading to labor market efficiency Fewer legal *discrimination disputes* due to amicable settlements Less *unfair competition* from non-compliant firms, leading to higher bids for federal contracts		increase in social benefits (lives saved). Cost-benefit analysis to calculate the cost savings due to fewer discrimination claims. Cost-benefit analysis to compare bid prices (costs) of compliant versus non-compliant firms. **Economic impact analysis** to estimate benefits for misclassified workers and costs for employers separately. **Break-even analysis** to specify the number of diversity hires at which the benefits outweigh the hiring costs, or to estimate the value to achieve a certain number of diversity hires.

D. Un-Quantified Benefits of Employment Discrimination Litigation

Lastly, the Agencies identified three benefits resulting from the prohibition to arbitrate discrimination claims. However, the Agencies did not attempt to quantify or monetize the benefits, but conducted a mere qualitative analysis. Even though a qualitative analysis is better than ignoring the benefits entirely, this Section suggests alternative methods to monetize said benefits.

To approximate reduced employment discrimination (the benefit), this Section proposes three options—two focus on increasing diversity (positive approach) and one focuses on reducing discrimination (negative approach). The three options are the following:

1. Define the desired number of candidates from diverse backgrounds and estimate the costs to achieve this hiring target by means of a cost-effectiveness analysis.
2. Estimate the number of diverse candidates necessary to break even, i.e., define the number of candidates that can be hired for a fixed amount, using a break-even analysis.
3. Estimate the cost savings from fewer discrimination claims based on a cost-benefit analysis.

To evaluate transparency is even more challenging since it is even less defined and often more subjective than employment discrimination. This Section suggests three different methods to tackle the issue. One method to measure transparency in legal proceedings is whether litigants can appeal a decision. Appealing a decision forces the decision maker (often

agencies) to give reasons; those reasons are then probed in court proceedings against legal standards, such as the rule of law and equal treatment. While appeals in court proceedings are generally allowed, appeals are usually excluded in arbitration proceedings. Hence, the simplest approach to measure the increased transparency in litigation would be to count the number of appeals. Since arbitration usually does not allow for appeals, every appeal in litigation increases transparency. This approach, however, only quantifies and does not monetize the benefit of litigating discrimination claims. The two other here suggested methods can better monetize transparency in litigation.

First, by means of a cost-benefit analysis, the Agencies could ask about people's willingness to pay (WTP) for an increase in transparency (in this case, their WTP for a worker's opportunity to appeal a decision), and then multiply the value with the number of total appeals in employment discrimination litigation. Second, with a cost-effectiveness analysis, the Agencies could estimate the costs (mostly lawyer and court fees) for achieving a set number of appeals (the benefit).

Lastly, to monetize worker recoveries resulting from discrimination litigation, the Agencies should have compared the size of awards in arbitration with the size of awards in litigation by means of a cost-benefit analysis. As put forward in the previous Section, to estimate the value of transfer payments, the Agencies should have estimated the employers' costs for paying the awards and the amount of worker recoveries separately, using an economic impact analysis.

Table 3: Benefits of the Arbitration Prohibition Provision

Non-Quantified Benefits[98]	**Identified Issues**	**Suggested Methods**
Reduced employment discrimination due to improved contractor compliance.	Missing values.	**Cost-benefit analysis** to estimate the cost savings of fewer reported and litigated discrimination claims. **Cost-effectiveness analysis** to estimate the costs to employ a specified number of diversity hires. **Break-even analysis** to specify the number of diversity hires at which the benefits outweigh the hiring costs or to estimate the value to achieve a specified number of diversity

98. *Id*. at 82-86.

		hires.
Increased transparency, procedural safeguards, appeal rights, and class actions in civil litigation.	Missing values.	**Cost-benefit analysis**, relying on contingent valuation to estimate people's WTP for appeals. **Cost-effectiveness analysis** to estimate the costs to achieve a certain number of appeals.
Increased recoveries for workers in civil litigation.	Missing values; Transfer* from employers to workers.	**Cost-benefit analysis** to estimate the award size of arbitrated versus litigated discrimination claims. **Economic impact analysis** to estimate employers' costs and workers' awards separately.

** Transfers are discussed under the paycheck transparency rule*

IV. Suggested Methods to Evaluate Qualitative Labor Law Benefits

This Part elaborates on the foregoing suggested methods to evaluate the Rule's qualitative labor law benefits, starting with the most common method, the cost-benefit analysis. To evaluate qualitative benefits, one important metric discussed is willingness to pay, or WTP, used in contingency valuation. This Part also explains how to evaluate transfer impacts by means of economic impact analyses, as the EPA applies them to evaluate transfers in environmental regulations. The Part continues in outlining two alternative methods to evaluate non-quantified benefits if the cost-benefit analysis fails: the cost-effectiveness and the break-even analysis. Even though these two methods are quite similar, there are some important differences. Lastly, this Article suggests a decision matrix for agencies to decide which method is best fitted to estimate different types of benefits, including quantitative and qualitative benefits, cost savings, and transfers impacts.

A. Four Approaches to Evaluate Qualitative and Distributional Impacts

Incommensurability is a longstanding difficulty associated with quantifying and monetizing qualitative benefits.[99] President Clinton attempted to address this problem by extending agencies' discretion to also

99. *See supra* note 59.

evaluate qualitative benefits in cost-benefit analyses.[100] Despite this extension, the issue of incommensurability has not been fully solved as the Rule's impact assessment shows. The cost-benefit analysis is often not the most appropriate method to monetize qualitative benefits. This Article elaborates on three alternatives to the cost-benefit analysis and suggests which one is best suited to evaluate the different qualitative benefits of the Rule. Approaches from other areas of law, most importantly environmental regulation, will serve as helpful guidance.

1. Monetizing Qualitative Benefits and Contingent Valuation

Before applying the method to the provisions of the Rule, this Section provides an overview of the strengths and weaknesses of the cost-benefit analysis. In the United States, analyzing costs and benefits is the traditional method used to evaluate the effects of major rules on the economy, society, and the environment. Cost-benefit analyses aim at measuring the benefits of a policy and the associated opportunity costs of this policy.[101] The standard rule of regulatory cost-benefit analyses is that "the benefits justify the costs" and the goal is to maximize net benefits.[102] The underlying rationale of cost-benefit analyses is Kaldor-Hicks efficiency, which recognizes policy changes as efficient if the winners of the regulation can hypothetically compensate the losers.[103] A core feature of Kaldor-Hicks efficiency is that it enables decision makers to conduct an interpersonal comparison of utility by aggregating and netting the utilities of people who will be affected by the policy decision.[104]

The costs usually consist of the compliance costs the firms face by a new regulation. Benefits, especially qualitative benefits, are much more complex to measure, as the impact assessment of the Rule illustrates. For example, to identify the disadvantages of discrimination, many statistical studies were conducted, but none of them could put a price tag on discrimination. Surveys, such as the General Social Survey, have mostly focused on identifying whether and in which settings racial or gender discrimination exists.[105] Experimental and quasi-experimental studies have been used to identify and observe discriminating patterns in real-world

100. Exec. Order No. 12,866 § 1, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

101. GUIDELINES, *supra* note 46, at xi.

102. Exec. Order No. 12,866 § 1(b)(6).

103. Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 706 (1939).

104. Kaldor, *supra* note 103, at 551.

105. *See General Social Survey 2020*, NORC U. Chi. (Dec. 22, 2020, 12:57 PM), https://gss.norc.org/Documents/quex/GSS2020panel_Ballot1_English_WEB.pdf [https://perma.cc/MB2R-URSU].

settings, like restaurants or job applications.[106] There were also attempts to count reported incidents of discrimination based on the number of filed complaints with agencies and courts.[107] These methods are valuable, but they are not monetizing the costs of discrimination claims. Similarly, the Agencies have fallen short of monetizing the benefits of litigating discrimination cases in court versus arbitration when assessing the Rule's benefits.

To approximate the value of the Rule's qualitative benefits, rather than leaving them unevaluated, this Article suggests that the Agencies should have resorted to contingent valuation or stated preference studies. Contingent valuation studies rely on people's WTP for a marginal improvement, or to avoid a diminution, in a good.[108] These studies are often used to measure the value placed on *human health and safety*. The studies ask people how much they are willing to pay to eliminate, for example, a mortality risk of 1/100,000 or a morbidity risk of 1/10,000.[109]

Hence, the monetized benefit of safe workplaces could be expressed in the number of lives saved.[110] The answers give an indication of how much people value life—the so-called value of statistical life, or VSL. The EPA Guidelines describe the VSL as "a summary measure for the dollar value of small changes in mortality risk experienced by a large number of people."[111] An alternative way to estimate the VSL are wage-risk studies, which estimate the value of life based on risk premiums for riskier jobs.[112] Because agencies evaluate the mortality risk in different contexts, different values for VSL exist. The EPA estimates the mean VSL at $7.4 million (in 2006 currency value)[113] while the DOT estimates it at $9.6 million (in 2016 currency value).[114]

A similar approach can be used to monetize the qualitative benefit of reduced employment discrimination. The Agencies could ask the following questions: "How much are you willing to pay to reduce employment discrimination by one case?" or "How much are you willing to pay to increase diversity hires by 1%?" This measure gives an indication about

106. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, UCLA WILLIAMS INST. 8 (July 2011), https://williamsinstitute.law.ucla.edu/publications/employ-discrim-effect-lgbt-people/ [https://perma.cc/JWG6-MAK5].

107. Tom W. Smith, *Measuring Racial and Ethnic Discrimination*, 96 GSS METHODOLOGICAL REP. 1, 1 (2002).

108. *See e.g.*, VISCUSI, et al., *supra* note 55, at 745.

109. Posner & Sunstein, *supra* note 60, at 1823.

110. D. . .sir. . .e U. Klingler, *Measuring What Matters in Public Procurement Law: Efficiency, Quality and More*, 21 J. MGMT. POL'Y & PRAC. 73, 87 (2020).

111. GUIDELINES, *supra* note 46, at xv.

112. *Id*. at 5-22.

113. *Id*. at 5-18.

114. *Guidance on Treatment of the Economic Value of a Statistical Life (VSL) in U.S. Department of Transportation Analyses—2016 Adjustment, Dep't Transp.* (Aug. 8, 2016).

people's WTP for reduced employment discrimination—similar to lives saved.

Given safety and human health are already challenging to appraise, *moral values* like wage fairness are even more subjective and therefore more difficult to evaluate within regulatory impact assessments. To evaluate moral commitments, Posner and Sunstein use the example of dolphin-safe tuna products. They illustrate how the moral commitment of a dolphin activist can be measured by means of contingent valuation, relying on his WTP a charitable donation of $1,000 per year for the protection of dolphins.[115] Similarly, to evaluate the fairness of wages, one could rely on how much people are willing to pay for a union membership (e.g., $500 per year). Alternatively, and in line with contingent valuation, one could ask people: "How much are you willing to pay for an increase of the federal minimum wage from $7.25 to $15?"[116] Since this question entails a monetary value rather than a number of cases, it bears the risk that people would limit their WTP to the absolute dollar amount difference between the higher and lower bound.

Hence, rather than relying on the default cost-benefit analysis, the Article suggests the alternative of using contingent valuation to assess and monetize the qualitative values of work safety, wage fairness, and employment discrimination.

2. Measuring Distributional Impacts with the Economic Impact Analysis

An alternative to measure costs and benefits is the economic impact analysis, also known as distributional analysis.[117] According to the EPA Guidelines, "an EIA [economic impact analysis] examines the distribution of monetized effects of a policy, such as changes in industry profitability or in government revenues, as well as non-monetized effects, such as increase in unemployment rates or numbers of plant closures."[118] The EPA applies those analyses when it assesses the benefits and costs of environmental regulations on different entities, like the industry, consumers, workers, and the government. For example, in the Economic Impact Analysis of the Petroleum Refineries and their compliance with air pollution standards, the EPA conducted a market analysis and measured impacts of the

115. Posner & Sunstein, *supra* note 60, at 1823.

116. *See* Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021); Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 38,816 (July 22, 2021) (to be codified at 29 C.F.R. pts. 10 & 23); Fact Sheet: Biden-Harris Administration Issues an Executive Order to Raise the Minimum Wage to $15 for Federal Contractors, White House (Apr. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/27/fact-sheet-biden-harris-administration-issues-an-executive-order-to-raise-the-minimum-wage-to-15-for-federal-contractors [https://perma.cc/3RJH-ESMF].

117. GUIDELINES, *supra* note 46, at xii.

118. *Id.*

pollution standards on unemployment and small businesses.[119] This Article argues that economic impact analyses may be applied to assess transfers in economic regulations, such as procurement regulation, and that they are often more apt to measure transfers between different groups of society than the cost-benefit analysis.

To date, it is mostly the EPA that has applied distributional analyses to assess environmental effects on different groups of society. However, distributional analyses are not limited to the assessment of environmental regulations. Nothing speaks against applying distributional analyses to assess transfers in health, social, or economic regulations. The EPA Guidelines define the economic impact analysis very broadly, including the monetization of effects, their distribution, changes in both industry and government revenues, and unemployment effects. Based on this rather broad definition, this Article argues that the economic impact analysis can and should have been applied to assess wealth transfers in procurement regulation.

Economic impact analyses differ in two main points from cost-benefit analyses. First, while the social benefits and costs are of primary importance in a cost-benefit analysis, the economic impact analysis focuses on the *components and distribution* of the total social benefits and costs.[120] Second, contrary to cost-benefit analyses, which rely on the net benefit of a regulation, transfers of economic welfare from one group to another are not assumed to cancel each other out.[121] The idea of economic impact analyses is to consider taxpayers, consumers, producers, and governments separately rather than netting their benefits.[122] While cost-benefit analyses estimate the social benefits and costs of a regulation, economic impact analyses also account for the *private* benefits and costs associated with the compliance response to the regulation.[123]

Due to these unique features, this Article suggests that the Agencies should have applied an economic impact rather than a cost-benefit analysis to analyze the Rule's transfer payments for two main reasons. First, the identified transfers of the Rule mainly focused on the distribution of benefits rather than the net benefits. The Rule distinguished three groups of transfers: (1) the transfers from employers to workers due to increased wages, paycheck transparency, and discrimination litigation, (2) transfers from taxpayers to workers due to increased wages, and (3) transfers from the government to firms due to reduced penalties. What they all have in common is that they do not leave a net benefit to society but transfer

119. *See Economic Impact Analyses for Air Pollution Regulations*, EPA (Feb. 18, 2021), https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/economic-impact-analyses-air-pollution [https://perma.cc/HZ7W-AJV3].

120. GUIDELINES, *supra* note 46, at 9-2.

121. *Id.*

122. *Id.*

123. *Id.*

wealth from one group to another. Hence, in economic impact analyses—different than in cost-benefit analyses, it not only matters how much benefit is generated but also *who receives the benefit*. Second, the Rule's identified transfer payments are focused on *private* benefits and costs, either between the government and firms, or between firms and their workers. The example of increased wages shall help illustrate this point. Due to the labor law violations disclosure provision, contractors would have had to pay higher wages to workers. This in turn would have reflected in higher contractor fees for the government, leading to a transfer of wealth from the taxpayers (who finance public contracts) to workers (who are being paid higher wages).

Hence, whenever distributional effects between different groups of society—even including the government—are analyzed, these private benefits and costs are better accounted for by economic impact analyses than by cost-benefit analyses. This also holds true for regulations other than environmental regulations, such as procurement regulation.

3. Assessing Non-Monetized Benefits: The Cost-Effectiveness and Break-Even Analysis

A prominent method to evaluate non-monetized or unquantified benefits is the cost-effectiveness analysis. According to the EPA Guidelines, the cost-effectiveness analysis "examines the costs associated with obtaining an additional unit of an outcome. It is designed to identify the least expensive way of achieving a given environmental quality target, or the way of achieving the greatest improvement in some environmental target for a given expenditure of resources."[124] It is important to note that unlike cost-benefit and economic impact analyses, the cost-effectiveness analysis does not rely on the concept of economic efficiency, but on cost effectiveness. According to the OMB Circular A-4, the cost effectiveness should be considered for rules in which the primary effect is *human health or safety*.[125] Hence, cost-effectiveness analyses are often applied to find the optimal level of a regulation, such as the optimal level of emissions or hazardous material at a given cost.[126]

Because this method is used to estimate regulatory effects on human health and safety, the cost-effectiveness analysis is well suited to evaluate safety at workplaces. Rather than relying on the number of deaths multiplied by the VSL (contingent valuation), cost-effectiveness analysis estimates the costs for safety equipment and other precautions to save a set number of lives (positive perspective) or to prevent a set number of deaths (negative perspective). This very analysis can be used to measure

124. *Id*. at xi.
125. Circular A-4, *supra* note 72.
126. VISCUSI, et al., *supra* note 55, at 766.

employment discrimination as well. Using the cost-effectiveness analysis, the Agencies could have either estimated the least expensive way to achieve a specified number of candidates from diverse backgrounds or to achieve the most diverse workforce for a given cost.

The second alternative to evaluate non-monetized benefits is the break-even analysis. Simply put, the break-even analysis approves new regulations where the benefits equal the costs. Sunstein, a proponent of the break-even analysis, suggests agencies to ask the following question: "How high would the qualitative benefits have to be in order for the benefits to justify the costs?"[127] Hence, the break-even analysis focuses on the benefits, while cost-benefit and cost-effectiveness analyses focus on costs. According to Sunstein, a major field of application for break-even analyses is where agencies need to consider non-quantified benefits, such as *human dignity and fairness*.[128]

According to Sunstein, break-even analyses are particularly useful in the following three scenarios: First, they can help identify lower and upper bounds of a good's value; second, they allow for comparisons in which values have already been assigned, like the value of statistical life; and third, if neither lower and upper bounds nor comparisons are available, break-even analyses help identify missing information and specify the conditions under which benefits would justify the costs.[129] The EPA Guidelines suggest applying break-even analyses when risk data or valuation data are missing.[130] In that case, the agency must either estimate *the number of cases* at which the overall net benefit becomes positive (costs and WTP are known) or estimate *the value* at which a certain specified target is achieved (costs and number of cases are known).[131]

The following example will help illustrate how to apply the break-even analysis in the context of the discussed Rule. Assume that the labor law violations disclosure provision reduces employment discrimination and increases diversity hires with an associated cost of $1 million. First scenario: the agency knows how much people are willing to pay to hire one more candidate with a diverse background (WTP = $200) based on contingency studies. In that case, the Rule would need to increase the number of diversity hires by 5,000 people. Second scenario: the agency knows that with 5,000 diversity candidates, the benefits would outweigh the costs. In that case, people's WTP would be $200 per diversity hire. Hence, the Agencies would either need to conduct a contingency study to find out people's WTP for an increase in employment diversity, or they

127. Sunstein, *The Limits of Quantification*, *supra* note 59, at 1385.
128. *Id*. at 1369.
129. *Id*. at 1392-93.
130. GUIDELINES, *supra* note 46, at 7-50.
131. *Id*.

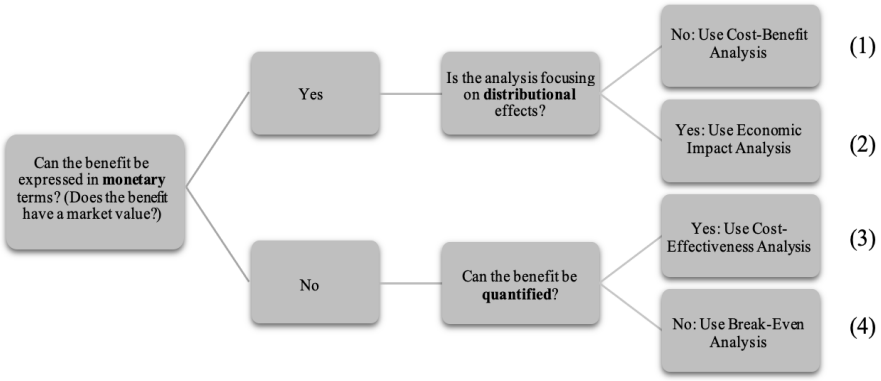
would need to estimate the number of people from diverse backgrounds at which the benefits equal the costs.

These two alternative evaluation methods—the cost-effectiveness and break-even analyses—are a valuable addition to the default rule of cost-benefit analysis and often open up new possibilities to approximate the value of a qualitative benefit, rather than leaving it open.

B. Decision Rule to Identify the Appropriate Benefit Evaluation Method

To decide which type of analysis fits best to evaluate each benefit, this Article has developed a simple decision tree, based on which the best method to measure each type of the Rule's benefit can be identified. To suggest the best method, different forms of benefits need to be distinguished first: quantifiable and monetizable benefits, qualitative benefits, benefits in the form of cost savings, and transfer impacts which are neither cost savings nor real benefits.

Figure 2: Decision Rule for Different Benefit Types



Based on this decision tree, this Article suggests the following action plan to apply more appropriate methods to assess qualitative benefits in procurement regulation:

1. The standard approach to deal with qualitative benefits is to approximate the benefits to monetized values by means of a cost-benefit analysis. This approach works to monetize the benefits of labor law violations disclosure and arbitration prohibition. For example, the Agencies could have estimated the difference in performance (e.g., profit or timely delivery) of compliant versus non-compliant firms,[132] the bid mark-up (in dollars) of compliant versus non-compliant firms, and the worker recoveries (in dollars) of discrimination litigation versus arbitration. For other qualitative benefits, like reduced employment discrimination, the Agencies could have conducted contingent valuation studies to assess people's WTP for a marginal improvement (more diversity) in the good.
2. When there are transfer payments between different groups of the society (distributional effects), the application of an economic impact analysis lends itself better to evaluate the costs and benefits than a cost-benefit analysis. In the latter, wealth transfers cancel each other out and would be disregarded. Even though the Agencies correctly identified transfer payments in the Rule's impact assessment, they did not monetize them. More specifically, the Agencies should have estimated the value of the following wealth transfers using economic impact analyses, in particular the transfer from taxpayers to workers resulting from higher wages, the transfer from the government to firms resulting from fewer labor law penalties, and the transfer from employers to workers resulting from claimed social benefits and higher worker recoveries from discrimination litigation.
3. When the benefit cannot be monetized, the second best solution is to quantify it by specifying the target outcome and estimating the costs to reach that target by means of a cost-effectiveness analysis. This approach

132. Audit Report on Monitoring and Enforcing Labor Standards, U.S. Dep't Hous. & Urb. Dev., Off. Inspector Gen. (1983) found a "direct correlation between labor law violations and poor-quality construction" on HUD projects and revealed that poor-quality work contributed to excessive maintenance costs.

works well for health and safety regulations like safe workplaces. In the Rule's impact assessment, the Agencies mostly relied on the value of statistical life (VSL) to monetize the benefit. Alternatively, the Agencies could have estimated the costs to reduce a set number of deaths or preserve a set number of lives. Similarly, the Agencies could have applied a cost-effectiveness analysis to estimate the value of reduced employment discrimination by specifying the target number of candidates from diverse backgrounds and estimating the costs to hire them.

4. If a quantification of the benefit is not possible, the last and next best solution is to conduct a break-even analysis. For example, the Agencies could have specified the number of diverse candidates at which the benefits (more productive employees) outweigh the costs (of hiring them). This gives at least an indication of how many new diversity hires the Rule could have achieved, compared to the status quo.

Conclusion

There are superior alternatives to the default cost-benefit analysis when evaluating non-monetized or unquantified benefits in government purchasing. The same holds true for wealth transfers, which are common not only in tax regulation but also in procurement regulation. Therefore, one size does not fit all. Quantitative and qualitative benefits and wealth transfers need to be assessed differently. This Article suggests the application of a multi-method approach. There is no bar to combining different methods to evaluate different types of a regulation's benefits. As the OMB has recognized, the cost-effectiveness analysis is better suited to evaluate human health and safety benefits than the cost-benefit analysis.[133] The here suggested approach aims to close the gap of a missed in-depth benefit analysis of the Fair Pay and Safe Workplaces Rule for federal contractors.

While for health and safety benefits, the cost-effectiveness analysis provides for the most appropriate approach, this Article recommends applying contingent evaluation and the break-even analysis for the assessment of non-quantified benefits, like wage fairness and reduced employment discrimination. Distributional impacts like wealth transfers from one regulated group to another—such as transfers from the government to firms—are best analyzed by means of an economic impact analysis. To provide some guidance for procurement agencies, this Article has designed a simple decision rule to identify the most appropriate assessment method for each type of benefit.

The reassessment of labor law benefits in government procurement proves particularly relevant now that the $1.2 trillion infrastructure deal has been approved by Congress, and a new rule on Buy American has been proposed, leading to an increased employment of American workers by federal contractors. However, the application of the suggested multi-method approach goes beyond government procurement and labor law in the United States. It informs how to assess the costs and how to monetize qualitative benefits of regulations, which allows for a more accurate comparison of costs and benefits and promotes a more flexible way of conducting regulatory impact analyses—with the goal to build more robust impact

133. *Circular A-4, supra* note 125, at 9.

assessments and regulations. Hence, the here suggested multi-method approach can be applied to other regulatory initiatives and jurisdictions that need to assess the value of non-monetized benefits, such as labor law benefits, and are confronted with assessing a variety of different types of benefits.