

Working Paper¹

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Identifying Regulations Affecting International Trade and Investment:

Better Classification Could Improve Regulatory Cooperation

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Abstract

Although technological and political innovations have reduced many of the traditional barriers to international trade and investment flows, regulatory differences between countries persist as lingering barriers to trade. Countries agree that notifying each other of upcoming regulations that may affect international trade and investment is an important mechanism of international regulatory cooperation, which attempts to minimize the creation of unnecessary and costly regulatory divergence. Since 2008 regulatory agencies in the United States have been required to flag regulations they intend to issue that are likely to have an effect on international trade and investment. This paper quantifies how many of the thousands of rules published every year by U.S. agencies are likely to have a significant effect on international trade and investment and analyzes how well agencies are performing at flagging these rules. The results indicate that there is much room for improvement in notifying trade partners and expanding stakeholder participation to improve the outcomes of rulemaking.

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Technological and political innovations continue to reduce barriers to international trade. As a result, trade accounts for increasingly larger portions of economic output. During the ten years from 2002 to 2012, U.S. exports and imports grew a total of \$4.9 trillion – a change from 22.8% of U.S. gross domestic product (GDP) to 31.4% of GDP.³ Within jurisdictions such as the European Union and the United States nearly a quarter of the goods and services that are available are the direct results of international trade.⁴ Additionally, as the level of global market integration increases, markets are now characterized by increasingly complex supply chains⁵ which expand the number of countries able to participate in international trade.⁶ Although this unbundling and disaggregation of trade is largely responsible for increased competition and lower prices,⁷ it also means that country-specific regulations affecting internationally traded goods have the potential to create significant costs, reducing the economic benefits generated through trade.

Innovations within financial markets are also responsible for sizeable gains in the efficient allocation of capital towards its most productive uses via foreign direct investment (FDI).⁸ Although the United States Office of Management and Budget (OMB) points out that “...more attention has been paid to issues of international competitiveness and barriers to international

³ Government Accountability Office. (2013). *International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance*. (GAO Publication No. 13-588). Washington, D.C.: U.S. Government Printing Office

⁴ Morrall, John., III. “Determining Compatible Regulatory Regimes between the U.S. and the EU” *U.S. Chamber of Commerce. Advancing Transatlantic Business* (2011): 4

⁵ Government Accountability Office (2013)

⁶ For a further discussion of the international trade landscape, including the prevalence of intra-industry trade and multinational firms see: Melitz, Marc J., and Daniel Trefler. 2012. “Gains from Trade When Firms Matter.” *Journal of Economic Perspectives*, 26(2): 91-118.

⁷ Bollyky, Thomas J. “Better Regulation for Freer Trade” *Council on Foreign Relations. Renewing America. Policy Innovation Memorandum No. 22*. June 2012. <http://www.cfr.org/trade/better-regulation-freer-trade/p28508> : “... global production models now dominate international commerce, with intermediate products comprising 56% of global goods trade and 73% of global services trade.”

⁸ José Guimón “Government Strategies to Attract R&D-intensive FDI” *The Journal of Technology Transfer*, 34(4): 364-379.

trade than to... impacts on cross-border investment,”⁹ regulations that (intentionally or not) restrict FDI can also generate significant costs to the global economy. Within the United States alone, the Department of Commerce (DOC) estimated that as of 2013 U.S. assets of foreign affiliates totaled \$3.9 trillion with an estimated yearly inflow of FDI of \$166 billion.¹⁰ The greatest portion of these FDI flows are the result of cross-border investments between the U.S. and its largest trading partners – which account for about 80% of new FDI.¹¹

International Regulatory Cooperation

As a result of the magnitude of the market for international trade, countries are bolstering their efforts to engage in international regulatory cooperation (IRC) in an effort to improve regulatory outcomes and avoid duplicative and, ultimately, costly and unnecessary differences in the treatment of goods across borders. IRC is also a central component of current U.S. efforts to negotiate international trade agreements, such as the Transatlantic Trade and Investment Partnership (TTIP) with the European Union and the Trans Pacific Partnership (TPP) with 11 countries throughout the Asia Pacific region.¹²

The Organization for Economic Co-operation and Development (OECD) published several estimates of the potential economic savings possible through IRC that indicate its importance in efforts to continue lowering barriers to international trade and investment. For example, it finds that an elimination of half the existing non-tariff barriers to trade between the EU and the U.S. could result in an annual gain of .7% of GDP for the EU and .3% of GDP for the U.S.¹³ This amounts to an increase of \$129.22 billion for the EU and \$52.26 billion for the U.S., calculated in 2014 USD.¹⁴ Similarly, the OECD finds that a decrease of 10% in a country’s restrictions on FDI could result in a net increase of its exports by almost 2%.¹⁵ Even relatively small improvements in international regulatory cooperation such as mutual recognition agreements (MRA) or harmonization of labeling requirements can reap significant economic gains; the White House “estimates that the divergence of safety labeling requirements internationally... cost the U.S. chemical industry \$475 million annually.”¹⁶

⁹ U.S. Office of Management and Budget and Secretariat General of the European Commission. “[Review of the Application of EU and US Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment: Final Report and Conclusions](#)”. May 2008.

¹⁰ U.S. Department of Commerce, President’s Council of Economic Advisers. “[Foreign Direct Investment in the United States](#)”. October 2013.

¹¹ Ibid.

¹² Pérez, Daniel. “[Consistent Inconsistencies: Misclassification of Rules Could Hamper International Regulatory Cooperation](#)” *Commentary, the George Washington University Regulatory Studies Center*. August 26, 2015.

¹³ OECD (2013), [International Regulatory Co-operation: Addressing Global Challenges](#), OECD Publishing. 178

¹⁴ GDP calculated using 2014 World Bank estimates. <http://data.worldbank.org/country/united-states>

¹⁵ OECD (2013): 178

¹⁶ Bollyky, Thomas J. (June 2012)

Importance of Stakeholder Participation in Notice-and-Comment Process

Countries have traditionally improved the quality of their regulations and facilitated regulatory cooperation with others by employing several complementary strategies and agreements. Some of these are very high level, top-down approaches – such as bilateral and multilateral trade deals or multi-country agreements including membership in formal institutions like the World Trade Organization (WTO) and its Technical Barriers to Trade (TBT) provisions.¹⁷ Others may take the form of regulator-to-regulator dialogues that focus on particular economic sectors, e.g. the United States–Canada Regulatory Cooperation Council.¹⁸

However, as identified by OMB’s Office of Information and Regulatory Affairs (OIRA), any efforts that “increase regulatory transparency and provide early warnings”¹⁹ contribute to better outcomes in IRC. Accordingly, several U.S. initiatives focus on standardizing good regulatory practices (GRP²⁰) by engaging its rulemaking agencies in the IRC process. A substantial portion of these efforts is targeted at improving transparency and increasing stakeholder participation via improvements in agencies’ notice-and-comment rulemaking process. Public comment “has been a central element of U.S. regulatory procedure since it was required by the Administrative Procedure Act (APA) of 1946.”²¹

In contrast to the high level, top-down approaches previously mentioned, accessible and widespread participation by stakeholders—both foreign and domestic—in agency notice-and-comment rulemaking before a rule is promulgated is a bottom-up strategy that can provide valuable information agencies can use to improve regulatory outcomes. Although agencies contain significant subject matter expertise concerning the markets they are responsible for regulating, it is unlikely that they have on-hand, complete information regarding the myriad of international standards and approaches pertinent to any specific rule currently under consideration.²²

¹⁷ https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

¹⁸ http://www.trade.gov/rcc/documents/RCC_Joint_Forward_Plan.pdf

¹⁹ Office of Information and Regulatory Affairs. “[International Regulatory Cooperation and Multilateral Efforts](#)” July 13, 2011. Briefing in Mexico City.

²⁰ Office of Management and Budget. [Regulatory Working Group Guidelines, Executive Order 13609 “Promoting International Regulatory Cooperation”](#) June 26, 2015. OIRA defines good regulatory practices as: “internationally recognized processes and procedures that can be used to improve the quality and cost-effectiveness of domestic regulations... practices aimed at (a) increasing regulatory transparency and accountability by promoting public participation to ensure that stakeholders can share their views, expertise, and data during the development of regulations.”

²¹ Dudley, Susan E., Wegrich, Kai. “[The Role of Transparency in Regulatory Governance: Comparing US and EU Regulatory Systems](#)” *Journal of Risk Research*. 2015. 1-17

²² For more on the importance of public comment see: Balla, Steven J., & Dudley, Susan E. “[Stakeholder Participation and Regulatory Policymaking in the United States](#)” Report for the OECD, *The George Washington University Regulatory Studies Center*. October 2014.

Additionally, the U.S. Government Accountability Office (GAO) identified that regulatory agencies themselves state that early and ongoing participation is a “key factor that affect[s] the success of international regulatory cooperation activities.”²³ Regulatory Working Group (RWG) guidance published by OMB elaborates on the need for participation in transparent and inclusive notice-and-comment rulemaking:

Making the text... available for public scrutiny and comment is necessary to enable... decision making. Transparency and public participation can also help regulators achieve common regulatory objectives in ways that minimize potentially unnecessary divergences and identify unintended consequences of regulation that may unnecessarily hamper international trade and investment... domestic and foreign stakeholders can provide useful input on priorities and information about the practical realities of implementation.²⁴

Finally, advanced warning of pertinent rules under consideration and increased stakeholder participation in notice-and-comment rulemaking helps identify and avoid international regulatory divergences. This is particularly important because multiple experts have observed that it is particularly difficult to align regulatory approaches once countries have already issued their own regulations.²⁵

OIRA Guidance to Agencies in 2008

The United States OMB and General Services Administration (GSA) electronically publish a *Unified Agenda of Regulatory and Deregulatory Actions* twice a year that contains information concerning specific regulatory and deregulatory actions that agencies intend to implement via rulemaking. The fall version of the *Unified Agenda* also contains the Regulatory Plan which provides “additional detail about the most important significant regulatory actions that agencies expect to take in the coming year.”²⁶ Pursuant to Executive Order (E.O.) 12866, both executive and independent regulatory agencies must list their upcoming regulations in the *Unified Agenda*. Accordingly, one of the most important aspects of the *Unified Agenda* is its role in providing “early warning” for anyone with an interest in participating in the rulemaking process.

²³ Government Accountability Office (2013)

²⁴ OMB. “Regulatory Working Group Guidelines”

²⁵ Ambassador Miriam Sapiro. Deputy U.S. Trade Representative. Remarks at the European Policy Centre. “[The Transatlantic Trade Relationship – Achieving its Full Potential](#)” Brussels, Belgium. (2011). And: U.S. Office of Management and Budget, Office of Information and Regulatory Affairs. “[Promoting Regulatory Cooperation in the Asia-Pacific Region](#)” APEC 2011 Symposium. Also: U.S. Office of Management and Budget. “[International Regulatory Cooperation: Recent Developments in the United States](#)”. United Nations Economic Commission for Europe. (2012)

²⁶ <http://www.reginfo.gov/public/do/eAgendaMain>

OIRA issued guidance to agencies in 2008 to begin “flagging” rules in the 2008 *Unified Agenda* that were expected to have a significant impact on international trade and investment partly in response to public comments on its May 2008 report, jointly authored with the Secretariat General of the European Commission regarding IRC.²⁷ OIRA justified the requirements on the grounds that “an evaluation of the effect of regulation on trade may help to ensure that regulatory policy does not become a tool for establishing unnecessary barriers to trade.”²⁸

Executive Order 13609

On May 1, 2012, President Obama issued E.O. 13609: “Promoting International Regulatory Cooperation”.²⁹ Through this Executive Order the President reinforced OMB’s 2008 directive by formally directing agencies to “ensure that significant regulations... having significant international impacts are designated as such in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, on Reginfo.gov, and on Regulations.gov.”³⁰ In addition, its definition of “international impact” reinforced the fact that effects on FDI were also important to consider when promulgating rules.³¹ Although the executive branch has historically avoided attempting to increase its role to compel independent agencies to comply with executive orders, E.O. 13609 implicitly makes mention of the fact that “flagging” rules that will likely impact international trade and investment is a good regulatory practice and encourages independent agencies to comply.³²

As of the 2008 Regulatory Plan, all executive agencies should be flagging rules in the *Unified Agenda* that are likely to have a significant impact on international trade and investment. In theory, this also creates an “early warning” system and a forum that foreign stakeholders can use to identify upcoming regulations that will likely affect them and participate in the notice-and-comment period.³³

Agency Performance in Identifying Rules with an International Impact

OMB succinctly states the expectations concerning early warning and stakeholders’ ability to comment on pertinent rules in its Regulatory Working Group Guidelines of June 26, 2015 – concerning E.O. 13609:

²⁷ OMB 2008: 27 “OMB agrees that the DOT database is a promising step in providing more timely notice of planned regulatory initiatives to our international trading partners, and intends to as that all U.S. agencies include such indications in the fall, 2008 Regulatory Agenda.”

²⁸ Ibid. 14

²⁹ https://www.whitehouse.gov/sites/default/files/omb/foreg/EO_13609/EO13609_05012012.pdf

³⁰ [Executive Order No. 13609](#), 77 Federal Register 26413 (May 4, 2012).

³¹ Ibid. Definitions. Sec 4(b)

³² Ibid. Sec 5. *Independent Agencies*

³³ Dudley, Wegrich (2015)

Given that regulations with “international impacts” are flagged in the *Unified Agenda*... U.S. trading partners have an opportunity to review upcoming regulatory actions and identify potential effects and areas of upstream regulatory cooperation. Foreign governments and stakeholders have the same ability to participate in the regulatory review process... that domestic U.S. entities have.³⁴

However, this assumption may not be valid if agency performance is inconsistent in identifying rules that are likely to affect international trade and investment. If this is the case, then only stakeholders who are deeply involved in a particular issue (such as large multinational corporations with a presence in Washington) or neighboring countries involved in high-level regulatory cooperation with the United States—such as Mexico or Canada—are likely to be positioned to contribute to regulatory design and policy. It should also be noted that mechanisms for cooperation, e.g. the U.S.-Canada³⁵ or U.S.-Mexico³⁶ Regulatory Cooperation Councils (RCC) do not act as a true “early warning” system for stakeholders. The U.S.-Canada RCC, for example, focuses on discussing broad, forward-looking aspects of regulatory cooperation and shared standards in specific issue-areas such as pipeline safety and motor vehicle standards rather than serving as a forum for broadly alerting stakeholders of individual rules that agencies are in the process of promulgating.

A 2013 study conducted by GAO concerning IRC found that non-federal stakeholders continue to find it difficult to provide input to U.S. agencies, in particular because they are not always aware of agency actions that are likely to have a significant impact on their efforts to trade with the United States.³⁷ In addition, “there is no single source of public information on anticipated U.S... rulemakings with an international impact.”³⁸ This suggests that despite the 2008 OIRA requirement for agencies to flag relevant upcoming actions in the semiannual *Unified Agenda*, and President Obama’s 2012 executive order, agencies are still not consistently identifying upcoming regulatory actions with potential international trade and investment effects.

To determine whether this continues to be a problem, we examine significant regulatory actions issued between 1997 and 2014, independently determine whether they are likely to have international effects, and compare our determination with the agencies’. The remainder of this paper describes the regulatory dataset and analyzes agency performance in flagging these rules by identifying the difference between rules flagged in the *Unified Agenda* as having “international impacts” and those flagged by our method.³⁹ The study also discusses any

³⁴ OMB. “Regulatory Working Group Guidelines” 17

³⁵ <http://www.trade.gov/rcc/>

³⁶ <http://trade.gov/hlrcc/>

³⁷ Government Accountability Office (2013): 34

³⁸ Ibid. 18

³⁹ Rules concerning international trade in goods flagged by our method were also included in NIST submissions to the WTO as TBT notifications: <http://tbtims.wto.org/web/pages/search/notification/BasicSearch.aspx>

potential limitations in the dataset and suggests areas of opportunity to improve agency participation in the IRC process.

Data Collected

For this analysis, we primarily collected data on executive regulatory agencies but also include independent regulatory agencies. Although the latter are not required to comply with executive orders, their inclusion in the dataset helps inform the findings concerning how many rules the U.S. promulgates each year that are likely to affect international trade and investment. The dataset includes yearly information on major agency rules issued from 1997 through 2014. We chose this window because 1997 is the first full year that GAO began tracking independent agency rules.⁴⁰

We relied on the [Reginfo.gov](http://www.reginfo.gov) website⁴¹ maintained by OIRA and GSA for information pertaining to agency flagging of rules with a likely international impact in the *Unified Agenda of Regulatory and Deregulatory* actions. This site also provided the data for published rules finalized by executive regulatory agencies.⁴² We also used the GAO database⁴³ for published rules issued by independent regulatory agencies. In order to keep the data collection process manageable and focus on rules that were likely to have the greatest impact and, therefore be of greatest interest to stakeholders, the analysis narrows its scope to focus primarily on rules with expected impacts of \$100 million or more in a year, or “economically significant”⁴⁴ rules promulgated by executive regulatory agencies and “major”⁴⁵ rules promulgated by independent agencies. Additionally, we categorized the rules in the dataset according to the industry being regulated; this includes eight categories: Agriculture, Transportation, Manufacturing, Energy, Finance, Oil & Gas, and “Other.”

Our criteria for whether a rule should be considered as likely to have a “significant international impact” derives from E.O. 13609: “a direct effect that proposed or final regulation is expected to have on international trade and investment, or that otherwise may be of significant interest to the

⁴⁰ Pursuant to the Congressional Review Act of 1996, all agencies must submit final regulations to GAO upon publication.

⁴¹ <http://www.reginfo.gov/public/do/eAgendaAdvancedSearch>

⁴² <http://www.reginfo.gov/public/do/eoAdvancedSearchMain>

⁴³ <http://gao.gov/legal/congressional-review-act/about>

⁴⁴ [Executive Order No. 12866](#), 58 Federal Register 190 (Oct. 4, 1993): Sec. 3(f) (1): A rule is considered economically significant if it is likely to “have an annual effect on the economy of \$100 million or more.”

⁴⁵ 5 U.S.C. § 801(a)(1)(A): The CRA defines a major rule as one “likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.”

trading partners of the United States.”⁴⁶ We identified three distinct types of rules that likely create such an impact: those with a direct effect on international trade, rules concerning international investment, and rules pertaining to direct U.S. government subsidies likely to distort specific industries engaged in international trade.

Although the analysis initially counts regulations affecting areas such as domestic agricultural subsidies because these are likely to “be of significant interest to trading partners,” it also presents results with these excluded, particularly when considering agency performance in flagging rules. The logic here is that foreign trading partners may well be affected by U.S. domestic subsidies but IRC is unlikely to improve due to public comment inputs by foreign trade partners in this area as the decision to pass legislation subsidizing a domestic sector of the economy is largely a political issue involving U.S. sovereignty.

Limitations of the Data Collected

Although the analysis attempts to capture rules which are likely to have a *significant* impact on international trade and investment, it is worth noting that the parameters defining an “economically significant” rule and a “major” rule are similar but not identical.⁴⁷ This will affect the accuracy of any discussion of the total number of rules with a “significant international impact” issued by U.S. agencies since different search parameters must be used when identifying pertinent rules within the *Unified Agenda*. The data collected could also suffer from any omissions or inaccuracies in the databases of either OIRA or GAO. Furthermore, it is possible that this analysis actually understates the total number of rules that should have been flagged. This would be the case if rules were not correctly labeled as either “economically significant” or “major,” even if *ex post* costs actually justified these designations.

Finally, although the criteria used to define which rules will likely have a “significant international impact” is derived from E.O. 13609, there is an inherently qualitative aspect to the selection that includes reading through the text of rules and making judgements regarding which regulated sectors of the domestic U.S. economy involve considerable FDI. It is noteworthy, however, that the validity of our selection methodology is implicitly bolstered due to the fact that rules we identified with an impact on international trade in goods also appear on the list of the World Trade Organization’s (WTO) Technical Barriers to Trade (TBT) notifications submitted by the United States’ National Institute of Standards and Technology (NIST). NIST is the U.S. agency responsible for sending notifications to the WTO of rules that are likely to have significant impacts on international trade, as required by the Agreement of Technical Barriers to Trade, which was negotiated at the end of the Uruguay Round in 1994.⁴⁸

⁴⁶ Executive Order 13609

⁴⁷ For a concise analysis of this difference see: <http://www.regblog.org/2011/09/27/measuring-regulatory-activity-what-can-we-learn-from-the-unified-regulatory-agenda/>

⁴⁸ <http://gsi.nist.gov/global/index.cfm/L1-4/L2-12/A-219>

How Many U.S. Regulations Affect International Trade and Investment?

Although the United States issues over 3,500 rules every year, many of these include routine matters such as posting the times when drawbridges may be operated.⁴⁹ Table 1 contains information on the number of rules that were published each year in the U.S. from 1997 through 2014, how many were “significant” and, therefore, reviewed by OIRA, how many of them were “economically significant” (executive branch agencies), “major” (independent agencies), and, among these, the total number of rules we identified as likely to have a significant international impact. The data indicate that over this period, according to our analysis, an average of 20% of the larger rules likely had a significant impact on international trade and investment.

Year Published	Total Rules	Significant Rules	Economically Significant	Major	“ES/Major” Total	International Impact (GW Analysis)
2014	3,554	177	56	11	67	19
2013	3,659	191	57	23	80	11
2012	3,708	232	46	15	61	16
2011	3,807	293	53	22	75	17
2010	3,573	308	74	17	91	17
2009	3,503	260	56	16	72	17
2008	3,830	331	64	19	83	19
2007	3,595	285	44	11	55	13
2006	3,718	303	33	8	41	4
2005	3,943	285	42	8	50	9
2004	4,101	282	47	10	57	15
2003	4,148	369	43	11	54	12
2002	4,167	307	39	8	47	10
2001	4,132	298	56	10	66	8
2000	4,313	296	50	23	73	15
1999	4,684	271	36	13	49	8
1998	4,899	245	40	31	71	10
1997	4,584	229	36	26	62	10
Totals	71,918	4,962	872	282	1,154	230

Executive Regulatory Agency Data

Table 2 shows the data for executive regulatory agency rules reviewed by OIRA from 1997 through 2014. This dataset includes the number of rules concerning domestic subsidies but does

⁴⁹ Dudley, Wegrich (2015)

not count them in the total rules affecting trade and FDI because, as previously mentioned, these are likely less pertinent to our efforts to improve IRC. Of the 872 economically significant rules reviewed by OIRA during this period 165, or 18% by our measure, likely have a significant impact on international trade and investment. Of these rules, 85% concerned international trade in goods while the remaining 15% affected FDI flows.

Table 2: Executive Regulatory Agency Data, from 1997 through 2014 (GW classifications regarding international impact)

Year Published	Total Rules Reviewed by OIRA	Economically Significant Rules	Rules With Domestic Subsidies	Rules With Significant Effect on Trade	Rules With Significant Effect on FDI	Total Rules Affecting Trade and FDI
2014	177	56	3	9	2	11
2013	191	57	1	7	0	7
2012	232	46	0	7	4	11
2011	293	53	2	11	0	11
2010	308	74	3	12	1	13
2009	260	56	5	10	2	12
2008	331	64	0	12	5	17
2007	285	44	0	12	0	12
2006	303	33	1	2	1	3
2005	285	42	2	5	1	6
2004	282	47	2	10	3	13
2003	369	43	3	7	1	8
2002	307	39	4	5	0	5
2001	298	56	2	5	0	5
2000	296	50	4	9	1	10
1999	271	36	1	6	0	6
1998	245	40	0	3	3	6
1997	229	36	0	8	0	8
Totals	4,962	872	33	140	24	164

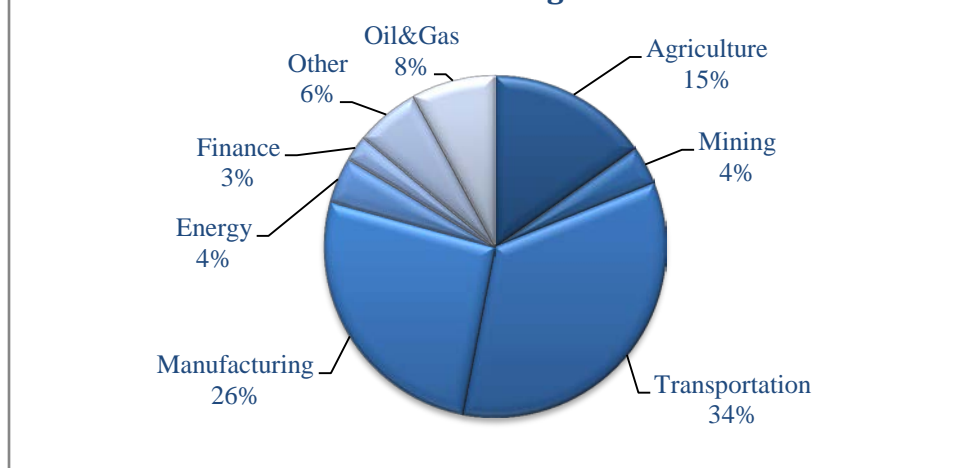
Figure 1 shows the industry breakdown of economically significant rules affecting international trade and investment. Thirty-four percent of rules with international impacts concerned transportation – which includes planes, trains, boats, and automobiles. Manufacturing was the second most prevalent category, with 26% of all rules. Agriculture, even with the exclusion of

domestic subsidies, accounted for 15% while all other sectors accounted for less than 10% each. Table 3 highlights the affected sectors for each calendar year.

Table 3: Industries Affected by Economically Significant Rules with a Significant International Impact, Executive Regulatory Agency Final Rules Issued, from 1997 through 2014

Year	Transportation	Manufacturing	Ag	Oil & Gas	Mining	Energy	Finance	Other
2014	3	6	0	0	1	1	0	0
2013	1	3	1	0	0	0	0	2
2012	3	2	0	4	0	1	1	0
2011	3	8	0	0	0	0	0	0
2010	5	5	0	1	0	1	0	1
2009	4	3	2	1	0	1	0	1
2008	7	1	2	4	2	0	1	0
2007	5	2	3	0	0	0	2	0
2006	2	0	0	0	1	0	0	0
2005	2	1	2	0	0	1	0	0
2004	3	0	5	1	1	1	0	2
2003	1	0	3	1	0	0	0	3
2002	3	2	0	0	0	0	0	0
2001	2	3	0	0	0	0	0	0
2000	4	2	3	0	1	0	0	0
1999	4	1	1	0	0	0	0	0
1998	0	2	1	1	0	1	0	1
1997	4	2	2	0	0	0	0	0
Totals	56	43	25	13	6	7	4	10

Figure 1. Economically Significant Rules Affecting International Trade and Investment by Industry, From 1997 through 2014



Executive Agency Performance in Flagging Rules

OMB, GAO, and the heads of executive regulatory agencies themselves have all pointed out the importance to IRC of early notice to facilitate stakeholder participation during notice-and-comment.⁵⁰ It is, therefore, important to determine how well agencies have provided early notice since they began flagging these rules in the *Unified Agenda* per OMB guidance.⁵¹ Even if agencies had not fully embraced the requirement to flag rules with international impacts in 2008, one would expect them to have done so under the direction of President Obama’s E.O. 13609.

Table 4 compares the number of rules executive agencies flagged in the *Unified Agenda* as likely to have a significant impact on international trade and investment with the rules flagged by our review. The table is divided into two sections: “*Unified Agenda* – Notice for Stakeholders,” which is the period of time we are most interesting in, where stakeholders can be informed with ample opportunity to participate in a rule’s notice-and-comment period, and “Final Rules Published – OIRA Review Concluded.” The latter is a count of final rules that agencies published following the conclusion of review by OIRA. For each period we identify the total number of economically significant rules, how many were flagged by executive regulatory agencies as likely to have an impact on international trade and investment, the number of rules that our criteria determined were likely to affect trade, FDI, and the total number of rules we identified—the combination of rules affecting trade in goods and FDI flows.

⁵⁰ Government Accountability Office (2013): 7, 18 Also: Office of Information and Regulatory Affairs. “[International Regulatory Cooperation and Multilateral Efforts](#)” July 13, 2011. Briefing in Mexico City. And: OMB. “Regulatory Working Group Guidelines”

⁵¹ OMB 2008: 27

To summarize, the highest percentage of success in flagging rules with an international impact occurred in 2008 but was still only 43% of the total that, according to our analysis, should have been flagged for that year. Surprisingly, agencies' performance appears to have decreased after the issuance of E.O. 13609. Using our criteria, they flagged an average of 34% of total rules affecting international trade and FDI prior to E.O. 13609 and an average of 28% thereafter. These results are illustrated in Figure 2.

Interestingly, agencies did not flag a single rule that we identified as affecting FDI in any of these years. It is also noteworthy that even excluding the rules identified in Table 4 as having a significant effect on FDI, agencies' flags in the *Unified Agenda* have only identified an average of 38% of rules we identified as likely to have an effect on international trade in goods from 2008 through 2014. As previously mentioned, our selection of rules in this case is implicitly validated as being of likely interest to international trade partners because they are rules that were also flagged by NIST and submitted to the WTO as TBT notifications.

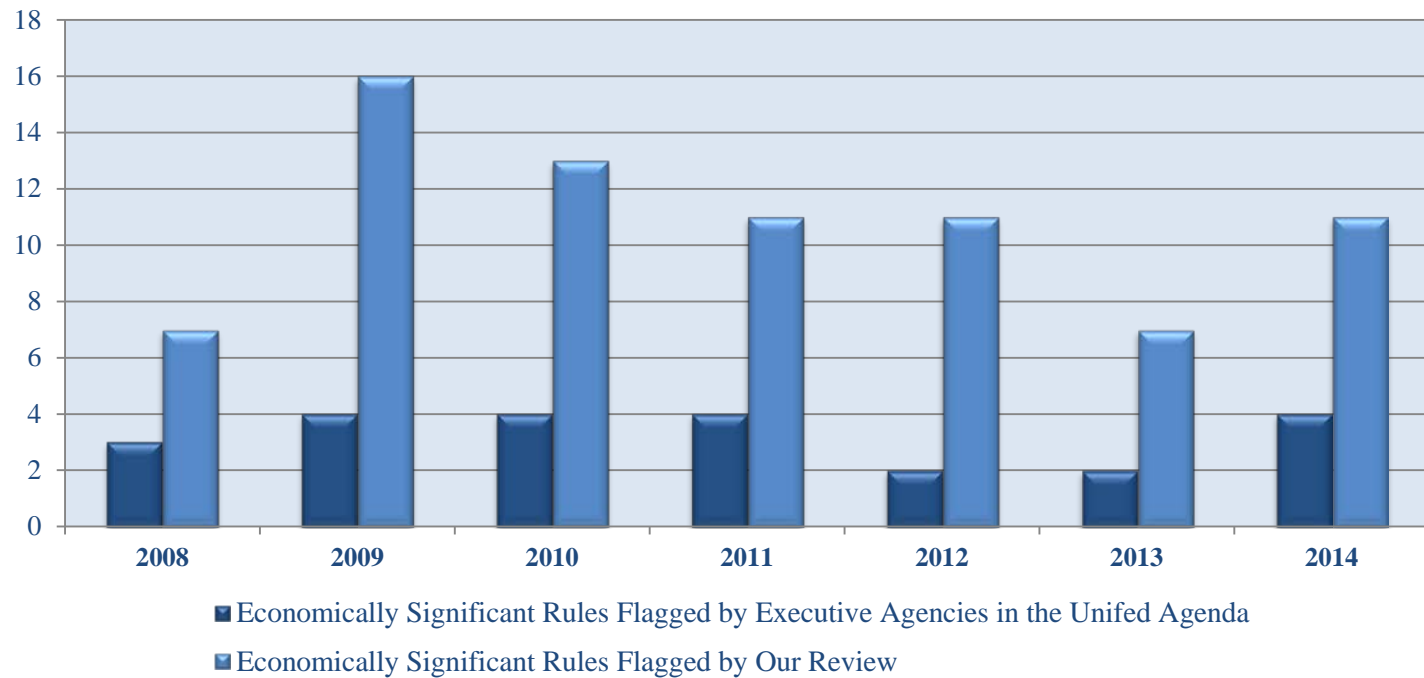
Our analysis of final rules published once OIRA review had concluded reinforces our assessment that agencies are missing opportunities to flag rules and expand stakeholder participation in notice-and-comment periods during rulemaking. Although the numbers cannot be compared directly for each year vis-à-vis the *Unified Agenda* entries—due to the fact that rules can either end up published in a different year or several rules can be combined into one, etc.—our analysis concluded that several rules that were not originally flagged in the *Unified Agenda* were flagged by the time they had completed OIRA review and were published.⁵² Three mechanisms might be responsible for eventually identifying these missed opportunities to flag rules: OIRA review could have alerted agencies that a rule should have been flagged, public comment could have demonstrated significant interest by international trade partners in a rule's outcome, or research by agencies during the rule-development process might have alerted them to potential international consequences they had not originally considered.

⁵² 4 rules; Regulation Identifier Numbers: [1904-AC00](#), [1904-AC19](#), [1904-AC22](#), and [2060-AR55](#)

Table 4: Executive Regulatory Agency Performance in Flagging Economically Significant Rules with a Significant International Impact, from 2008 through 2014

<i>Unified Agenda Proposed Rules – Notice for Stakeholders</i>						<i>Final Rules Published – OIRA Review Concluded</i>				
Year	Economically Significant Rules in the <i>Unified Agenda</i>	Flagged “International Impacts” by Agencies in the <i>Unified Agenda</i>	Rules We Identified with an Impact on International Trade	Rules We Identified with an Impact on FDI	Total for Rules We Identified with a “Significant International Impact”	Economically Significant Rules Published	Flagged “International Impacts”	Rules We Identified with an Impact on International Trade	Rules We Identified with an Impact on FDI	Total for Rules We Identified with a “Significant International Impact”
2014	58	4	9	2	11	56	4	9	2	11
2013	35	2	5	2	7	57	4	7	0	7
2012	45	2	8	3	11	46	5	7	4	11
2011	68	4	10	1	11	53	3	11	0	11
2010	64	4	13	0	13	74	7	12	1	13
2009	57	4	11	5	16	56	6	10	2	12
2008	26	3	6	1	7	64	4	12	5	17
Totals	353	23	62	14	76	406	33	68	14	82

Figure 2. Economically Significant Rules in the *Unified Agenda* flagged with an International Impact, Executive Regulatory Agency Flags vs GW Flags, from 2008 through 2014



How Well did Each Executive Agency Perform?

Table 5 shows individual agency performance in flagging rules in the *Unified Agenda*. Our analysis demonstrates significant variation among agencies in their identification of rules likely to have an effect on international trade and investment. For example, from 2008 through 2014, the Department of Transportation (DOT) and the Department of Health and Human Services (HHS) each flagged around 80% of rules identified using our criteria while the Environmental Protection Agency (EPA) flagged 20% and the Department of Energy (DOE) flagged about 5%. Agencies initiating rules with a direct effect on FDI, such as the Department of the Treasury (Treasury), did not flag any of these rules in the *Unified Agenda*.

Table 5: Executive Regulatory Agency Performance in Flagging Rules with a Significant International Impact, Agency Breakdown, from 2008 through 2014

<i>Unified Agenda</i> – Notice for Stakeholders				Final Rules Published – OIRA Review Concluded		
Agency	Economically Significant Rules in the <i>Unified Agenda</i>	Flagged “International Impacts” by Agencies in the <i>Unified Agenda</i>	Total Rules We Identified with a “Significant International Impact”	Economically Significant Rules Published	Flagged “International Impacts” by Agencies	Total Rules We Identified with a Significant International Impact
DOT	35	12	15	35	14	17
HHS	166	3	4	136	3	4
USDA	20	1	2	39	1	3
DOC	5	1	2	6	0	1
DHS	10	1	3	15	3	5
EPA	34	4	20	37	6	21
DOE	23	1	19	22	3	19
DOI	13	0	5	20	0	6
TREAS	10	0	4	8	1	2
DOL	20	0	4	40	1	4

Independent Regulatory Agency Data

Table 6 shows the data on independent regulatory agency rules listed in GAO’s database from 1997 through 2014. Independent regulatory agencies issued 282 major rules during this period, but only 11%, by our measure, were likely to have a significant effect on international trade and investment. Twenty-nine of these rules affect FDI, while only three rules have a direct effect on

trade in goods. This makes sense considering that the majority of these rules were issued by agencies that regulate financial sectors such as: the Securities and Exchange Commission (SEC), the Federal Deposit Insurance Corporation (FDIC), the Commodities Futures Trading Commission (CFTC), and the Federal Reserve System (FRS).

Table 6: Independent Agency Data, from 1997 through 2014

Year Published	Major Rules	Rules With Significant Effect on Trade	Rules With Significant Effect on FDI	Total Rules Affecting Trade + FDI
2014	11	0	5	5
2013	23	0	4	4
2012	15	2	3	5
2011	22	0	4	4
2010	17	1	0	1
2009	16	0	0	0
2008	19	0	2	2
2007	11	0	1	1
2006	8	0	0	0
2005	8	0	1	1
2004	10	0	0	0
2003	11	0	1	1
2002	8	0	1	1
2001	10	0	1	1
2000	23	0	1	1
1999	13	0	1	1
1998	31	0	2	2
1997	26	0	2	2
Totals	282	3	29	32

Independent Regulatory Agency Performance in Flagging Rules

Table 7 compares the number of rules independent regulatory agencies flagged in the *Unified Agenda* as likely to have a significant impact on international trade and investment with the rules flagged by our review. The table is divided into two sections similar to Table 4, although there is no comparison available between the rules these agencies flagged in the *Unified Agenda* and those flagged once published in final form since independent regulatory agencies are not subject to OMB review and there is no “international impacts” flag in the Federal Register.

The data show that independent regulatory agencies did not flag major rules in the *Unified Agenda* following OMB’s 2008 guidance. Additionally, only the Federal Deposit Insurance Corporation (FDIC) has flagged major rules likely to have a significant impact on international

trade and investment after President Obama issued E.O. 13609. Independent regulatory agencies are not required to comply with executive orders; this might explain their lack of participation in flagging rules in the *Unified Agenda* but reduces our ability to measure agency efforts in notifying trading partners and stakeholders as to international impacts. However, since voluntary compliance with E.O. 13609 could be a relatively low-cost way for independent agencies to improve regulatory outcomes by expanding participation of international stakeholders in notice-and-comment rulemaking, information regarding independent agency rules likely to affect international trade and FDI is still informative.

In addition to showing major rules likely to affect international trade and investment by year, Table 7 quantifies the number of opportunities, by our estimate, which independent regulatory agencies had to provide advanced notice of major rules to international trade partners. Table 8 breaks down major rules issued by specific independent regulatory agencies. As previously noted, the FDIC is the only independent regulatory agency that flagged major rules in the *Unified Agenda*.

Table 7: Independent Regulatory Agency Performance in Flagging Major Rules with a Significant International Impact 2008 through 2014

<i>Unified Agenda Proposed Rules – Notice For Stakeholders</i>						<i>Final Rules Published</i>			
Year	Major Rules in the <i>Unified Agenda</i>	Flagged “International Impacts” by Agencies in the <i>Unified Agenda</i>	Rules we Identified with an Impact on International Trade	Rules we Identified with an Impact on FDI	Total Rules we Identified with a “Significant International Impact”	Major Rules Published	Rules we Identified with an Impact on International Trade	Rules we Identified with an Impact on FDI	Total Rules we Identified with a “Significant International Impact”
2014	7	1	0	4	4	11	0	5	5
2013	15	2	1	3	4	23	0	4	4
2012	31	1	2	9	11	15	2	3	5
2011	8	0	0	3	3	22	0	4	4
2010	8	0	0	1	1	17	1	0	1
2009	7	0	0	1	1	16	0	0	0
2008	7	0	0	2	2	19	0	2	2
Totals	83	4	3	23	26	123	3	18	21

Table 8: Independent Regulatory Agency Performance in Flagging Rules with a Significant International Impact, Agency Breakdown, from 2008 through 2014

<i>Unified Agenda – Notice for Stakeholders</i>				<i>Federal Register – Final Rules Published</i>	
Agency	Major Rules	Flagged “International Impacts”	Total Rules Identified with an Effect on International Trade and Investment	Major Rules	Total Identified Rules with a Significant International Impact
FDIC	7	4	6	2	2
CFTC	36	0	12	19	10
CPSC	2	0	2	2	2
SEC	34	0	6	45	5
FRS	1	0	1	19	3

Conclusions

Our analysis estimates that an average of 20% of the economically important rules published every year by U.S. regulatory agencies are likely to have a significant effect on international trade and investment. However, our analysis of agency performance in flagging these rules indicates that neither OMB guidance in 2008 nor E.O. 13609 have been sufficient to create a robust system of “early notice” for international stakeholders. Consequently, there are still areas of opportunity for improving regulatory outcomes through earlier notice that could engage domestic and international parties during notice-and-comment periods on rules with potential international impacts.

Perhaps the most telling example of the limits of President Obama’s 2012 requirement is that, even for rules that agencies have correctly flagged as likely to have an international impact, preambles include no mention of E.O. 13609. Agencies include sections within the text of their rules—e.g., “Regulatory Assessment Under Executive Order 12866”—that disclose and elaborate on their efforts to comply with certain requirements as they consider rulemaking. Although agencies could very well be thinking seriously about avoiding the creation of technical barriers to trade by, for example, considering existing regulatory approaches used by foreign trade partners, they are not explaining this in the context of E.O. 13609 within their preambles.

Recommendations

Some agencies appear to be taking their responsibility to flag rules with significant international trade and investment effects more seriously than others. OIRA may need to provide some guidance to agencies for identifying relevant rules, and ensure that future *Unified Agenda* entries are accurately flagged.

Better identification of regulations that might have international trade and investment impacts could improve the quality of regulatory impact analysis and contribute to promoting GRP both domestically and internationally. In particular, an expansion of input from domestic and international stakeholders during notice-and-comment periods could aid agency efforts to better project costs, be more aware of additional international standards they might consider, and avoid duplicative or unnecessary regulations. Finally, better flagging could aid in efforts to improve the outcomes of IRC – where countries are focusing their efforts to eliminate unnecessary remaining barriers to international trade and investment flows.