often be preferred. Measures to improve the availability of information include government establishment of a standardized testing and rating system (the use of which could be mandatory or voluntary), mandatory disclosure requirements (e.g., by advertising, labeling, or enclosures), and government provision of information (e.g., by government publications, telephone hotlines, or public interest broadcast announcements). A regulatory measure to improve the availability of information, particularly about the concealed characteristics of products, provides consumers a greater choice than a mandatory product standard or ban.

Specific informational measures should be evaluated in terms of their benefits and costs. Some effects of informational measures are easily overlooked. The costs of a mandatory disclosure requirement for a consumer product will include not only the cost of gathering and communicating the required information, but also the loss of net benefits of any information displaced by the mandated information. The other costs also may include the effect of providing information that is ignored or misinterpreted, and inefficiencies arising from the incentive that mandatory disclosure may give to overinvest in a particular characteristic of a product or service.

Where information on the benefits and costs of alternative informational measures is insufficient to provide a clear choice between them, you should consider the least intrusive informational alternative sufficient to accomplish the regulatory objective. To correct an informational market failure it may be sufficient for government to establish a standardized testing and rating system without mandating its use, because competing firms that score well according to the system should thereby have an incentive to publicize the fact.

PROBLEM 7–1: COST-BENEFIT EVALUATION OF THE DEPARTMENT OF JUSTICE'S IMPLEMENTATION OF THE PRISON RAPE ELIMINATION ACT OF 2003

Responding to the pervasive problem of rape within federal and state prisons, now housing more than two million persons, Congress unanimously enacted the Prison Rape Elimination Act of 2003 (PREA), Pub. L. No. 108–79, 117 Stat. 972 (Sept. 4, 2003), codified at 42 U.S.C. § 15601 *et seq.* Congress estimated that more than ten percent of the prison population is raped each year and sought to protect inmates against this harm. Section 7 of the law established a Commission to study the problem and make recommendations for reform. Section 8 directed the Attorney General to publish a final rule adopting "national standards for the detection, prevention, reduction, and punishment of prison rape * * * based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission * * * and being informed by such data, opinions, and proposals that the Attorney General determines to

be appropriate to consider." 42 U.S.C. § 15607(a)(1)–(2). However, the standards may not "impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. § 15607(a)(3).

After notice of proposed rulemaking and a period for public comment, Attorney General Eric Holder promulgated a final rule on May 16, 2012: "National Standards to Prevent, Detect, and Respond to Prison Rape," 28 C.F.R. Part 115. The standards are binding on the Federal Bureau of Prisons, but are voluntary for state and local facilities. 42 U.S.C. § 15607(b). A state whose governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the governor submits an assurance that such five percent will be used only to achieve and certify full compliance with the standards in future years. 42 U.S.C. § 15607(e)(2)(A)–(B).

The DOJ's standards are process-oriented rather than result- or performance-oriented. They require facilities to (1) designate a point person responsible for coordinating protective measures, (2) develop a plan to upgrade staffing and video monitoring to prevent and detect rape, (3) create special protections for juvenile inmates, (4) ban cross-gender searches, (5) implement special training protocols for staff, (6) establish a process for coordinating the actions of first responders, medical persons, and investigators involved in any given incident of prison rape, (7) implement policies to protect against any retaliation for reporting or cooperating in the investigation of prison rapes, (8) implement no-tolerance policies for inmates who commit rape and officials who approve such behaviors, and (9) provide lesbian, gay, bisexual, transgender, and intersex inmates as well as inmates with disabilities with protections against rape and sexual abuse because of their status.

The DOJ's final rule was accompanied by a detailed cost-benefit analysis, United States Dep't of Justice, Regulatory Impact Assessment for PREA Final Rule (May 17, 2012), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf (viewed July 1, 2014). Skim that analysis, which is an example of the cost-benefit analysis contemplated in OMB Circular A–4. The Department estimated that full nationwide compliance with the final standards would cost confinement facilities approximately $468.5 million per year, when annualized over 15 years at a 7% discount rate, or 0.6% of total annual correctional expenditures in 2008. (Recall that full nationwide compliance is not likely, as the states have the option of not participating.) DOJ opined that this figure met the statutory requirement that rape reform costs not be "substantial."

The more difficult part of the analysis went to the benefits of the standards, if implemented. DOJ estimated from 2008 data that 209,400 persons (including 78,500 in prisons or jails) were raped or sexually assaulted in detention facilities each year. DOJ then estimated the monetizable benefit

to an adult of *avoiding* the most severe category of prison sexual misconduct (nonconsensual sexual acts involving injury or force, or no injury or force but high incidence) to be about $310,000 per victim using the willingness to pay model (i.e., how much does society invest in preventing particular crimes) and $480,000 per victim using the victim compensation model (i.e., what amount of money would the victim "accept" in return for being raped). For juveniles, who typically experience significantly greater injury from sexual abuse than adults, DOJ valued the corresponding category as worth $675,000 per victim. The Department estimated that the cost to society for (and therefore the benefit of eliminating) prison rape each year is between $26.9 billion and $51.9 billion.

At the end of its impact analysis (pp. 157–63), the Department conducted a break-even analysis: How many prison rapes would the new standards have to eliminate each year to justify the estimated costs? (The analysis assumes full compliance at both state and federal level for both cost and benefit calculations.) DOJ concludes that if the regulations prevent between 25,000 and 35,000 rapes each year, they are cost-justified; preventing more rapes would obviously be an even better result. Based on this statute and the resulting cost-benefit analysis, consider the following questions:

(A) Monetization and Methodology. Focus on how the DOJ calculates the costs of the prison rape prevention standards and, especially, on the benefits of those standards. Is the DOJ analysis a rigorous application of the empirical methodology suggested by the cost-benefit executive orders and required by OMB's Circular A–4? Does the DOJ analysis suggest analytical problems with cost-benefit analysis as envisioned by the executive orders and the OMB circular? For one critical analysis, see Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape*, Georgetown Law Faculty Blog, June 13, 2012, http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html (viewed July 1, 2014). Jot down your own thoughts before you consult the Heinzerling analysis.

(B) Legitimacy and Statutory Purpose. PREA's stated purposes are very broad, and they include "establish[ing] a zero-tolerance standard for the incidence of prison rape in prisons in the United States" and "mak[ing] the prevention of prison rape a top priority in each prison system." PREA § 3(1)–(2), codified at 42 U.S.C. § 15602(1)–(2). Do the DOJ standards faithfully implement this purpose? More bluntly, is there any reason to believe that the DOJ standards will actually reduce the incidence of prison rape in the United States? Are there rape-prevention options that the DOJ did not consider, but should have?

(C) Reevaluation and Revision. Recall President Obama's Executive Order 13,563 (Appendix 5), directing executive agencies to review existing regulations to assure that they remain cost-effective. Assume that a new President takes office in January 2017, and that her first executive order is something like Executive Order 13,563. You are the DOJ's point person for

PREA and its regulations, so you must reevaluate its standards under a cost-benefit approach. Assume that (1) most state prison systems have implemented the DOJ standards, as has the federal Bureau of Prisons; (2) the prison system still incarcerates about two million persons, pretty much the same number of inmates as in 2003, when Congress enacted the statute, and as in 2012, when DOJ issued its regulations; and (3) the estimated number of prison rapes has increased by about ten percent since 2013, when federal prisons and most state prisons implemented the PREA standards. You are authorized to retain the RAND Corporation to help you figure out the cost-effectiveness of the PREA standards. What questions do you pose to RAND? (You can ask RAND to engage in empirical research, informed speculation from known facts, and policy analysis.)

C. SUBSTANTIVE JUDICIAL REVIEW OF AGENCY RULES

APA § 702 provides that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within a meaning of a relevant statute, is entitled to judicial review thereof." The Supreme Court has construed this language to "embod[y] a basic presumption of judicial review," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

Judicial review of agency rules is quite different from OIRA and other forms of executive department review. To begin with, courts are reactive institutions: judges will only review rules if a person or institution actually injured by the rule files a lawsuit challenging the rule (Chapter 3, § 1 of this book). Even when there is an Article III case or controversy, however, judges will decline to review issues that are rendered unreviewable, either because the statute precludes review, § 701(a)(1), or because the issues are "committed to agency discretion by law," § 701(a)(2). For these reasons, many legislative rules are, in practice, not subject to judicial review.

When courts do examine those rules, the criteria for review are very different from those followed within the executive branch. Unless there is a statutory requirement to do so, judges will not review rules for cost-effectiveness or regulatory alternatives and will, instead, only review them for consistency with both substantive and procedural requirements of law. APA § 706(2)(A) provides that a reviewing court is supposed to invalidate agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." What does this mean in the context of informal rulemaking? How wrong or misguided does an agency rule have to be for a court to strike it down as arbitrary etc.?

Finally, the process of judicial review is somewhat different from the OIRA process and other forms of executive branch review. Review within the executive branch is much more like a negotiation, where suggestions