



United States Department of Justice

**Initial Regulatory Impact Analysis
for Notice of Proposed Rulemaking**

**Proposed National Standards to Prevent,
Detect, and Respond to Prison Rape
Under the Prison Rape Elimination Act (PREA)**

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Introduction and Summary

In the Prison Rape Elimination Act of 2003 (PREA), Pub. L. No. 108-79, *codified at* 42 U.S.C. §§ 15601-15609, Congress directed the Attorney General to promulgate national standards for enhancing the prevention, detection, reduction, and punishment of prison rape. In doing so, Congress understood that such standards were likely to require federal, state, and local agencies (as well as private entities) that operate inmate confinement facilities to incur costs in implementing the standards. Given the statute's aspiration to eliminate prison rape in the United States, Congress expected that some level of compliance costs would be appropriate, and indeed necessary, to foster a zero tolerance approach to prison rape.

Nevertheless, Congress insisted that PREA's aims be balanced against a sensitivity to the "budgetary circumstances" that often challenge the ability of correctional and law enforcement agencies to make major changes to their operating procedures. 42 U.S.C. § 15605(a). In mandating national standards, Congress thus instructed the Attorney General not to adopt any standards "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. § 15607(a)(3). This statutory obligation of cost-consciousness requires that the Department investigate the PREA standards' costs and benefits before implementing a final Rule.

Moreover, separate and apart from what PREA itself requires, under Executive Order 12866, *Regulatory Planning and Review*, as amended without substantial change by Executive Order 13258, the Department is required to conduct an Initial Regulatory Impact Analysis (IRIA) to assess the benefits and costs of its proposed rule.^{1/} Similar requirements are found in the Regulatory Flexibility Act, 5 U.S.C. §§ 601-610. Such an analysis must include an assessment of both the quantitative and qualitative benefits and costs of the proposed regulation, as well as a discussion of potentially effective and reasonably feasible alternatives. The purpose of an IRIA is to inform stakeholders in the regulatory process of the effects of the proposed rule.

^{1/} The Department has determined that this rule is a "significant regulatory action" under EO 12866, § 3(f), and accordingly has submitted this rule to the Office of Management and Budget for review. OMB Circular A-4 requires Federal agencies to conduct a benefit-cost analysis for any regulation that is "economically significant"—that is, a regulation expected to have an annual impact on the economy of \$100 million or more. *See* EO 12866, § 3(f)(1). The Department has concluded that the economic impact of its adoption of the proposed standards is likely to exceed this \$100 million threshold, because the standards would potentially affect the management of virtually every inmate confinement facility in the nation – facilities which collectively house over 2.4 million individuals at any given time and spend more than \$74 billion annually. *See* Bureau of Justice Statistics, Justice Expenditure and Employment Extracts 2007, "Table 1: percent distribution of expenditure for the justice system by type of government, fiscal year 2007" (Sep. 20, 2010), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2315> (last checked September 23, 2010); Bureau of Justice Statistics, Direct Expenditures by Criminal Justice Function, 1982-2006, in *Justice Expenditure and Employment Extracts*, available at <http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm>. The proposed rule, moreover, "materially alters . . . the rights and obligations of grant recipients," and "raise[s] novel legal or policy issues." EO 12866, §§ 3(f)(3), (4).

This IRIA is divided into seven parts. Parts I through IV identify and, where possible, quantify the benefits of reducing prison rape and sexual abuse. Specifically, we estimate the monetary value to society of reducing the prevalence of prison rape and sexual abuse by 1% from the baseline level. This allows us to determine what percentage reduction would need to ensue in order for the expected benefits of the standards to break even with their expected costs. We also take into account an unquantified amount representing the numerous nonmonetizable benefits of reducing prison rape and sexual abuse. Part V then identifies and estimates the costs associated with implementing and complying with the PREA standards. Part VI evaluates the reasonableness of the proposed standards in light of these costs and benefits. Part VII offers some concluding observations.

Part I begins with the baseline: the *status quo* that would continue to apply absent regulatory action. We estimate the annual prevalence of four different types of inappropriate sexual contact (rape involving force or threat of force; nonconsensual sexual acts involving pressure or coercion; abusive sexual contacts; and other staff sexual misconduct), in three different confinement settings (adult prisons; adult jails; and juvenile facilities). We examine the available statistics on the prevalence of each type of inappropriate sexual contact and address a number of issues with those statistics including: the problem of serial victimization (prevalence vs. incidence), cross-section vs. flow, underreporting of sexual victimization (false negatives), false allegations (overreporting), and issues engendered by the complexity of sexual victimization. We also look at difficulties in measuring the prevalence of sexual assault in specific settings, such as community confinement facilities and lockups. We conclude that in 2008 there were at least 69,800 inmates who were raped under conditions involving force or threat of force, and more than 216,600 total victims of sexual abuse, in America's prisons, jails, and juvenile detention centers.

In Part II, we estimate the monetary value of certain benefits of avoiding prison rape and sexual abuse. We first list certain quantifiable costs of prison rape to the victim (these *costs* translate to avoidance *benefits* for purposes of this analysis). These costs were identified by reviewing the literature on the cost of rape generally and then extrapolating the cost of rape in the prison environment. We derive a range of values for avoiding each of the four types of inappropriate sexual contact identified in Part I, and we do so for both juvenile and adult victims. For example, we value the benefit to an adult of avoiding prison forcible rape as worth \$200,000 to \$300,000.

In Part III, we calculate the total expected monetary benefit to society of a 1% reduction from the baseline in the average annual prevalence of prison rape. For each of the four types of inappropriate sexual contact and each of the three confinement settings identified in Part I, we multiply the baseline prevalence of such events (determined in Part I) by the unit benefit of an avoided incident (determined in Part II). We then multiply this product by 1%. Thus, for example, with respect to avoided rapes involving force, in the adult prison and jail setting, the quantifiable benefit to society of a 1% reduction from the baseline is estimated to range from approximately \$131 million to \$196 million in 2010 dollars. Across all four types of sexual contacts in the three confinement settings for which prevalence data are available, the quantifiable benefit to society of

a 1% reduction from the baseline is estimated to range from approximately \$157 million to \$239 million in 2010 dollars.

Part IV concludes our assessment of the benefits of the standards by developing a list of some of the non-quantifiable benefits of prison rape avoidance, describing both the nature and scale of those benefits so that they can be appropriately factored into the analysis. We examine benefits for rape victims, for inmates who are not rape victims, for families of inmate rape victims, for prison administrators and staff, and for society at large. These intangible benefits include those relating to public health and public safety, as well as economic benefits and existence value benefits. They also include avoided rapes and sexual assaults in community confinement and lockup settings, which cannot be quantified due to the absence of prevalence statistics in these settings.

Part V estimates the compliance costs of the PREA standards. Each of the proposed standards (or groups of related standards) is examined to determine what costs correctional agencies are likely to incur in implementing and complying with it. Costs are divided between start-up implementation expenses and on-going compliance costs in the out years. Where possible, we differentiate the cost implications in order to distinguish among costs applicable to prisons, jails, juvenile facilities, community confinement facilities, and lockups. We discuss the existing sources of information for our estimated compliance costs and set forth our methodologies and assumptions used in extrapolating nationwide compliance costs from existing data. We conclude that nationwide, compliance with the proposed PREA standards is expected to cost the correctional community approximately \$213 million in upfront costs and approximately \$544 million in annual ongoing costs. In present value terms annual compliance costs from 2012 to 2026 are estimated to total \$4.2 billion when a 3% discount rate is used, and \$2.7 billion when a 7% discount rate is used.

In Part VI, we analyze the cost justification of the proposed PREA standards. First, we conduct a break-even analysis, to evaluate whether the costs of PREA compliance are justified by the anticipated benefits. Given that the monetary benefit of a 1% reduction from the baseline in the prevalence of prison rape is worth \$157 million to \$239 million, implementation of the standards would have to yield a 0.70-1.07% reduction from the baseline level of prison rape in any given year (*i.e.*, from a total of 216,600 incidents to 213,689-214,488) in order for the upfront costs and the benefits to break even, without regard to the value of the nonmonetary benefits. For the ongoing annual costs to break even, the standards would have to yield an average annual reduction from the baseline of 2.06-3.13% (*i.e.*, reducing the prevalence to 209,239-211,550 incidents per year). We think these breakeven assumptions reflect a realistic and achievable goal with respect to the anticipated effectiveness of the standards. We also examine the cost implications of the most obvious alternative to the proposed standards, to wit, the Commission's proposed standards, and find that the standards proposed here appear, at present, to have lower net costs.

Finally, in Part VII we summarize our analysis and offer some concluding observations.

I. Determining the Baseline

For purposes of regulatory impact analysis, a benefit is an incremental improvement in the *status quo* engendered by implementation of the proposed rule. See OMB Circular A-4, at 2, 15-16. Accordingly, to appropriately measure and quantify a proposed regulation's benefit, one needs first to establish the baseline that would apply in the absence of regulation, so that changes to that baseline attributable to the regulation can be identified. *Id.* In the context of the PREA standards, the relevant baseline is the level of rape, sexual assault, and other events of inappropriate sexual contact that would exist in America's prisons, jails, lockups, juvenile detention centers, and community confinement settings in the absence of the PREA standards.

Some commenters at the ANPRM stage^{2/} – particularly those representing correctional agencies – disputed the notion that the sexual assault of inmates is a serious problem in their facilities.^{3/} As elaborated below, however, available data compiled by the Department's Bureau of Justice Statistics (BJS) make it clear that the prevalence of sexual abuse in America's inmate confinement facilities is a problem of substantial magnitude.

Sources of Baseline Data. In enacting PREA, Congress noted the difficulty of pinpointing the exact prevalence of prison rape but concluded that the problem was large:

Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.

42 U.S.C. § 15601(2). As of 2003, when PREA was enacted, there were few reliable, empirical data available concerning the frequency with which inmates in this country were subjected to sexual abuse. One of the purposes of PREA was to solve this problem: Congress directed BJS to undertake

^{2/} In March 2010, the Department issued an Advance Notice of Proposed Rulemaking (ANPRM) which, among other things, solicited public comment on the costs and benefits of the Commission's recommended PREA standards. See 75 Fed. Reg. 11077 (DOJ Mar. 10, 2010). The Department received many comments in response to the ANPRM and it has taken those comments into consideration both in developing the proposed standards and during the regulatory assessment process.

^{3/} See, e.g., Association of State Correctional Administrators, *Comments on PREA Standards*, Docket No. OAG-131, at 1-2 (May 10, 2010) (noting that there are "relatively few documented instances" of sexual assault occurring in correctional facilities).

annual comprehensive studies and statistical reviews aimed at improving the resolution and accuracy of estimates of sexual violence in prisons. See 42 U.S.C. §§ 15602(4), 15603.

BJS established the National Prison Rape Statistics Program, which collects data in two ways. First, it conducts an annual national review of institutional records documenting allegations of sexual violence in adult and juvenile correctional facilities (the *Survey of Sexual Violence (SSV)*). To date, three such annual surveys have been conducted in adult facilities and two in juvenile facilities. The most recent surveys were published in 2007; the results of an even more recent set are forthcoming.^{4/} These surveys were designed to measure the number of reported allegations of inmate-on-inmate and staff-on-inmate sexual misconduct and also to collect detailed information on the outcomes of follow-up investigations, including whether the reported incidents were substantiated. Items in the surveys included the circumstances surrounding each alleged incident, characteristics of victims and perpetrators, the type of physical force or pressure used, victim injuries, and sanctions imposed. These surveys (which reached facilities housing more than 1.8 million inmates, or 81% of all inmates held in adult facilities in 2006), provide an understanding of what corrections officials know, what information is recorded, how allegations are handled, where incidents occur, and how officials respond to allegations brought to their attention.

Second, BJS developed an annual national survey of inmates (the *National Inmate Survey (NIS)*) and a corresponding annual national survey of juvenile detainees (the *National Survey of Youth in Custody (NSYC)*). Since 2007, these surveys have collected allegations of sexual victimization directly from victims, through audio computer-assisted self-interviews administered to adult inmates in prisons and jails and to youth held in juvenile correctional facilities. These surveys were also conducted on a very large scale: the most recent adult survey (2008-09) was administered to 32,029 inmates in 167 state and federal prisons nationwide, and to 48,066 inmates in 286 jails nationwide.^{5/} The most recent juvenile survey (also 2008-09) was administered to 10,263 youth held in 195 facilities across the country.^{6/}

Together, the two sets of BJS surveys provide more empirical data on the level of sexual violence in America's prisons than existed when PREA was enacted in 2003. However, the statistics based on institutional reports reflect a very different (and much lower) level than do those based on inmate reports. This can perhaps be expected, because only a fraction of incidents of sexual abuse in a prison environment will come to the attention of correctional authorities or be reflected in

^{4/} Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities 2006* (NCJ 218914) (August 2007) (hereinafter BJS Adult SSV 2006); Bureau of Justice Statistics, *Sexual Violence Reported by Juvenile Correctional Authorities 2005-06* (NCJ 215337) (July 2008) (hereinafter BJS Juv. SSV 2005-06).

^{5/} Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* (NCJ 231169) (Aug. 2010) (hereinafter BJS Adult NIS 2008-09).

^{6/} Bureau of Justice Statistics, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09* (NCJ 228416) (Jan. 2010) (hereinafter BJS Youth NSYC 2008-09).

institutional records.^{7/} But the existence of a significant difference between the two data sets requires a choice to be made as to which set to use, or as to how to reconcile the two sets for purposes of assessing the correct baseline.

In estimating the baseline of prison sexual abuse for purposes of an IRIA, we propose to rely on the data from BJS's inmate-reported surveys rather than those from the facility-reported surveys. We do so for several reasons. First, as BJS itself noted in its reports of allegations compiled from institutional administrative records, "given the absence of uniform reporting, caution is necessary for accurate interpretation of the survey results. Higher or lower counts among facilities may reflect variations in definitions, reporting capacities, and procedures for reporting allegations as opposed to differences in the underlying incidence of sexual violence." BJS Adult SSV 2006, at 1.

Second, in all likelihood the institution-reported data significantly undercount the number of actual sexual abuse victims in prison, due to the phenomenon of underreporting. As elaborated below in the section on false negatives, for a variety of reasons many sexual abuse victims do not or cannot report their abuse to institutional managers. Indeed, of the adult respondents to the inmate surveys, between 69% and 82% of inmates who reported sexual abuse in response to the survey stated that they had never reported an incident to correctional managers. *See* BJS Adult NIS 2008-09, at 22-23. Thus, the data drawn from institutional surveys almost certainly misses thousands of victims that the inmate surveys capture.

However, while the BJS inmate-reported data are the most comprehensive statistics available on sexual victimization in confinement facilities, even they do not provide a complete picture of the phenomenon. Any attempt to use them to define the baseline for purposes of assessing regulatory benefit must take into account several limitations. The following sections discuss a number of those limitations and explain how we have dealt with them here.

Prevalence vs. Incidence. One of the thorniest issues involves whether to focus on prevalence or incidence. Prevalence refers to the number of inmates (or more correctly the percentage of inmates) who report having been sexually victimized once or more during a given period of time while confined, whereas incidence refers to the number of discrete victimization events that take place. The distinction is consequential because a significant percentage of sexually victimized inmates report having been victimized more than once. For example, in the most recent BJS study of juvenile facilities, 81% of the youth who reported youth-on-youth victimization recounted having been victimized more than once, with 32% reporting more than ten events; similarly, 88% of youth who reported staff sexual misconduct reported more than one incident, with 27% reporting more than ten. BJS Youth NSYC 2008-09, at 12, 14. Likewise, between one half and two thirds of adult inmates who reported sexual abuse in the prison setting claimed to have been victimized more than once. BJS Adult NIS 2008-09, at 21, 23. The large-scale phenomenon of

^{7/} *See infra*, notes 14 to 15 and accompanying text.

multiple or serial victimization requires a choice to be made as to whether to rely on prevalence data or incidence data in defining the regulatory baseline.^{8/}

BJS's institutional record reviews essentially measure reported incidence, since they identify the discrete number of alleged sexual abuse incidents that were reported to and investigated by correctional authorities, regardless of whether multiple allegations relate to the same inmate. By contrast, BJS's inmate surveys primarily measure prevalence, since they identify the number of surveyed inmates who report having experienced one or more incidents of sexual abuse during the preceding twelve month period. However, the inmate surveys potentially allow a type of incidence data to be extrapolated, since they ask respondents if they have been victimized more than once in the preceding twelve months and, if so, to check one of four boxes indicating whether the total number of incidents was 2, 3 to 5, 6-10, or 11 or more.

There are several good reasons to use incidence data. For one thing, in the statute itself Congress intimated a preference for incidence data, repeatedly using that term both in defining BJS's data collection mandate (*see, e.g.*, 42 U.S.C. § 15603) and in enunciating the purpose of the statute (*see id.* at 15602(1)).^{9/} For another, an approach which relies solely on prevalence without taking into account the phenomenon of serial victimization risks understating the suffering, and the concomitant cost to society, of inmates who are repeatedly terrorized by sexual predators.

We nevertheless propose relying on prevalence data rather than incidence data, for a number of reasons. First, for reasons already explained we use BJS's inmate-reported data (which primarily count prevalence) rather than the facility-reported data. Using these data to estimate incidence presents several difficulties. When victimized inmates report multiple incidents, they are not necessarily reporting incidents of the same severity. For example, an inmate might have experienced one incident in which she was raped by another inmate using force, two incidents involving nonconsensual sexual acts under pressure or coercion, three abusive sexual contacts, and five incidents of willing sexual relations with staff. Because BJS codes inmate responses by the most serious type of incident experienced, this inmate would appear in BJS's statistics as having experienced rape involving force or threat of force and will also be listed as having experienced 11 or more incidents of sexual abuse. Counting these as 11 more incidents of rape involving force would overstate the severity of the victim's experiences. Absent the ability to break out the survey

^{8/} Compare Lori A. Post *et al.*, *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773, 777-79(2002) (“[O]ur study underestimates sexual violence because we used prevalence instead of incidence. Females who have been raped or sexually assaulted are more likely to be assaulted a second time. Therefore, calculating the cost of sexual violence using incidents would produce greater numbers.”).

^{9/} On the other hand, elsewhere in the statute Congress defined the problem of prison rape in terms of its prevalence. *See, e.g.*, 42 U.S.C. § 15601(2) (“[A]t least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.”).

responses by type of victimization, any attempt to extrapolate incidence data from BJS's inmate surveys is likely to skew in favor of the most serious incident experienced by each inmate.

Moreover, in many contexts in which serial victimization occurs over a relatively short period of time, it may be difficult to determine when one discrete incident ends and another begins. This phenomenon is exacerbated by the fact that BJS's inmate surveys ask prisoners to report their victimizations retrospectively – that is, to state whether (and the extent to which) they have been sexually victimized during the twelve months preceding the survey. While one would expect an inmate to have a strong recollection of whether they were *ever* victimized during the preceding year, inmates who have been victimized multiple times do not always have a clear recollection of how many specific times they were victimized during the reporting period. In fact, studies show that individuals have a very difficult time remembering the details of discrete victimization events beyond approximately six events.^{10/} Moreover, the very attempt to mentally relive or recollect each discrete event for purposes of counting them is often traumatic for victims, causing them to block out or misremember some subset of their experiences.

In light of these difficulties in extrapolating reliable incidence data from the BJS inmate surveys, as well as the limitations in the BJS facility surveys, we propose to use the prevalence data drawn from the inmate surveys without adjusting them to account for multiple victimizations experienced by individual inmates. If anything, this decision will result in underestimating the problem, and this is consistent with a conservative approach to the estimation of benefits.

Cross-section v. Flow. Another limitation of the BJS reports is that they only capture data from a sampling of inmates who happen to be in the facility on the day(s) the survey is administered, missing inmates who may have been in the facility during the survey's twelve-month reporting period but who had been released or transferred before the date(s) of the survey. Put otherwise, the surveys take a cross-sectional view of the prevalence of prison rape rather than one which accounts for the flow of inmates through a facility over the period covered by the study. This is a particular problem in jails and lockups, where many inmates remain for very short durations: *e.g.*, statistics suggest that some 13.5 million releases from jails take place each year, after an average detention period of just two to three days.^{11/} Meanwhile, the average jail inmate who participated in BJS's most recent sexual victimization survey had only been in jail for 3.4 months during the 12 months prior to the survey. BJS Adult NIS 2008-09, at 31. The problem is less pronounced in prisons, but even there inmates responding to the BJS survey had spent an average of 7.9 (for State) to 9 (for

^{10/} NATIONAL INST. OF JUSTICE RESEARCH REPORT, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK at 2 (NCJ 155282) (Jan. 1996), available at www.ncjrs.gov/pdffiles/victcost.pdf.

^{11/} Bureau of Justice Statistics, *Jail Inmates at Midyear 2008 – Statistical Tables*, Table 4 (NCJ 225709); Bureau of Justice Statistics, *Mortality in Local Jails 2000-2007*, table 4 (NCJ 222988); and unpublished data from the 2004 *Survey of Local Jails*. The number of releases for the 12 months ending June 30, 2008, was estimated based on the number of admissions during the last week in June times 52, and then rounded. Total admissions exceeded releases by approximately 5,400 during the period.

federal) months in the facility during the 12 months prior to the survey. The number of inmates released from prison during 2008 totaled 735,454.^{12/}

It would thus appear inappropriate to rely on the figures from the BJS report without a flow adjustment, for that would under-report the baseline prevalence. We asked BJS to provide estimates based on its survey data to take into account the flow of prisoners, so that the baseline figures account for all inmates in prisons, jails, and juvenile facilities during the reporting period.

For prisons, the total number of persons victimized among prisoners released during the 12 months prior to the survey was estimated based on the average monthly victimization rate by type of victimization, multiplied by the number of prison releases (735,454), times the average exposure (6 months). For jails, the total number of persons victimized among persons released during the 12 months prior to the survey was estimated based on the average daily victimization rate by type of victimization (adjusted for the higher rates in first 3 days as reported in the survey), and then multiplied by the estimated number of days of exposure (which represented 13,561,000 releases times the estimated average length of stay).

For juvenile facilities, BJS first determined the prevalence of sexual abuse as of the date of its survey among juvenile facilities that were not included in the NSYC.^{13/} It did this by multiplying the number of committed youth not sampled in the survey (38,000) by the average daily rate by type of victimization, times the estimated average time served by committed youth excluded from the survey (119 days). This number was then added to the total number victimized at juvenile facilities included in the survey, from which was derived the combined average daily rate by type of victimization. This rate was then multiplied by the estimated number of days of exposure for committed youth released during the preceding 12 months. The number of days of exposure was estimated by multiplying the number of releases times the estimated length of stay (and adjusting for incomplete exposure for youth released in the first 3 months).

This flow adjustment increases the baseline prevalence figures, especially in jails and juvenile detention centers. For example, when accounting for annual flow, the prevalence of sexual abuse in jails in 2008 increases from 24,000 victims to 108,100. The prevalence in juvenile facilities increases from 3,220 to 17,100. In prisons, the prevalence increases from 64,500 victims to 91,400. See Table 1, below.

^{12/} Bureau of Justice Statistics, *Prisoners in 2008*, table 3 (NCJ228417).

^{13/} The NSYC included state-owned or operated juvenile facilities and large locally or privately operated facilities that held adjudicated youth for at least 90 days. The survey excluded juvenile detention centers that are primarily (>75%) designed to house status offenders, pre-adjudicated youth, and other youth held for periods shorter than 90 days. It also excluded smaller (<150 youth) facilities operated by non-State entities regardless of the adjudication status of the youth detained. See BJS Juv. NSYC 2008-09, at 1-2, 15-16.

False negatives and false positives. The BJS inmate surveys rely solely on self-reporting of sexual abuse experiences. This introduces the risk of false negatives, or underreporting, for many inmates who have experienced sexual abuse may be unwilling or unable to talk about it.^{14/} Whether a rape occurs inside or outside prison walls, victims are often so mentally and emotionally traumatized by their experience that they lack the wherewithal to discuss it.^{15/} Other victims have a difficult time reporting the incident because doing so requires them to relive an experience that was traumatic to them, or because they feel shame or embarrassment about the event, or because they live in fear of retribution or retaliation from their assailant should they bring the abusive acts to light. *See, e.g., Dumond, supra* note 14, at 154-55.

In gathering its data, BJS attempted to compensate for the problem of underreporting by assuring surveyed inmates that their responses would be kept anonymous and confidential. It also used established statistical methods to adjust its results to account for inmates who were selected for interviews but who refused to participate. *See BJS Adult NIS 2008-09*, at 30. These measures are likely to have at least somewhat mitigated the problem of false negatives, for between 69% and 82% of inmates reporting sexual abuse in response to the inmate surveys claimed to have never reported an incident to correctional administrators. *See BJS Adult NIS 2008-09*, at 22-23. It is nevertheless still likely that the BJS prevalence figures fail to capture a certain percentage of victims due to underreporting.

On the other hand, false positives are also an issue in the prison setting. Prisoners sometimes make false, spurious, or exaggerated allegations about the conduct of staff members or other inmates – whether out of spite, for strategic or retaliatory reasons, or simply for their personal amusement. BJS’s data from facility surveys suggest that many of the reported allegations of sexual abuse put forward by adult inmates involving staff-on-inmate sexual misconduct cannot be proven. Approximately 28% proved “unfounded” (meaning that the investigation determined that the alleged incident did not actually occur), while another 46% of those allegations proved “unsubstantiated” (meaning that the investigation failed to yield sufficient evidence to determine whether or not the alleged incident actually occurred). *BJS Adult SSV 2006*, at 3-4 & Table 2. Allegations of inmate-on-inmate sexual abuse among adults are even less likely to be substantiated (14%) and more likely to be unfounded (32%). *Id.* Among juveniles, the problem of false allegations of sexual abuse is even more pronounced: 46% of staff-on-inmate sexual misconduct allegations, and 39% of inmate-on-inmate abuse allegations made by juveniles proved unfounded upon investigation (the

^{14/} *See* Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 – The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 142, 147 (2006) (“To fully understand the implications of the BJS study, one must recognize that of all categories of crime, rape and sexual violence are known to be one of the most underreported, making an accurate assessment of its occurrence difficult.”).

^{15/} *See* Post, *supra* note 8, at 774 (“Rape and sexual assault have been difficult to research because an estimated 50% to 90% of rapes are not reported. The problem of underreporting contributes to the difficulty of estimating the prevalence and incidence, as well as the cost of rape and sexual assault.”).

substantiated percentages are 18% and 21%, respectively). BJS Juv. SSV 2005-06, at 3 & Tables 3-4.

BJJ's inmate surveys do not involve any follow-up investigation or substantiation of reported incidents. They do, however, endeavor to minimize the potential for false positives in two ways. First, the survey responses are anonymous and confidential and do not call upon inmates to identify the names of their abusers, which presumably reduces an inmate's incentive to fabricate allegations of abuse for strategic or retaliatory purposes. Second, BJJ designed their surveys with a number of internal checks and controls aimed at identifying and excluding at least some inmates whose interview responses suggested (*e.g.*, through inconsistent response patterns) either a lack of sincerity or a lack of understanding of the questions. *See, e.g.*, BJJ Adult NIS 2008-09, at 31; BJJ Juv. NSYC 2008-09, at 6, 17.

In the end, BJJ is essentially agnostic on the issue of false negatives and false positives:

The NIS-2 collects only allegations of sexual victimization. Because participation in the survey is anonymous and reports are confidential, the survey does not permit any follow-up investigation or substantiation of reported incidents through review. Some allegations in the NIS-2 may be untrue. At the same time, some inmates may remain silent about sexual victimization experienced in the facility, despite efforts of survey staff to assure inmates that their responses would be kept confidential. Although the effects may be offsetting, the relative extent of under reporting and false reporting in the NIS-2 is unknown.

BJJ Adult NIS 2008-09, at 6. We propose to be the same, and to make no adjustment to the BJJ statistics to account for the possibility of false negatives or false positives.

We do this because, like BJJ, we lack any additional method for measuring the extent of underreporting or false reporting. The data on substantiation from BJJ's institution surveys do provide one potential source of information on the degree to which inmate survey responses could be discounted for false positives. But because the incentives for inmates to make false allegations of misconduct in reports to prison authorities are far greater than their incentive to fabricate responses to a confidential survey, it is not clear to what extent the substantiation data would be helpful in pinpointing the true prevalence of prison sexual abuse. Moreover, in the absence of a corresponding source of information to assess the extent of false negatives, it would seem overly conservative to adjust the prevalence statistics based solely on the data concerning substantiation of allegations. We believe that the internal methodological controls that BJJ has incorporated into its inmate surveys to compensate for both underreporting and false reporting are adequate to the task and provide an adequate measure of prison rape prevalence for present purposes.

The Complexity of Sexual Victimization. Progress in eliminating prison rape would benefit from all stakeholders in the process establishing consistent definitions for the different types of sexual victimization that occur in prison settings. In fact, in the statute itself Congress defined one of the purposes of PREA as to “standardize the definitions used for collecting data on the incidence of prison rape.” 42 U.S.C. § 15602(5). Thus, in 2004 BJS developed standardized definitions to guide its data collection methodologies, and to drive efforts to unify institutional reporting procedures across the country.^{16/}

BJS divides sexual victimizations reported by inmates into six different event categories – two for inmate-on-inmate victimizations and four for staff sexual misconduct. Inmate-on-inmate sexual victimizations are divided into “nonconsensual sexual acts” and “abusive sexual contacts only.” The former refers to a broad range of conduct, including “unwanted contacts with another inmate . . . that involved oral, anal, vaginal penetration, hand jobs, and other sexual acts.” BJS Adult NIS 2009-09, at 7, 32. “Abusive sexual contacts only,” by contrast, refers to “unwanted contacts with another inmate . . . that involved touching of the inmate’s buttocks, thigh, penis, breasts, or vagina in a sexual way.” *Id.* Staff sexual misconduct is divided between “unwilling activity” (incidents of unwanted sexual contacts) and “willing activity,” which subsumes contacts characterized by the reporting inmate as voluntary, even though all sexual contacts between inmates and staff are legally nonconsensual. *Id.* Within each of the categories of “willing” and “unwilling” contacts with staff, the BJS statistics divide the victimizations into “touching only” and “excluding touching.” *Id.* “Touching only” equates to “abusive sexual contacts only” in the inmate-on-inmate context, while “excluding touching” equates to “nonconsensual sexual acts” in the inmate-on-inmate context. *Id.*

The BJS definitions work well for the statistical tabulation purposes for which they were designed, but they suffer from certain limitations for our current purposes. One aim in this IRIA is to assign a unit cost to various types of sexual victimization that occur in prison settings. As elaborated in Part III below, to assign a unit cost to various types of events, we need to account, at least to some extent, for the complexity of sexual victimization. Numerous considerations factor into the cost to a victim or to society of a specific incident of sexual victimization. These include: whether the event involved force or threat of force; whether it involved pressure or coercion; whether the victim has been victimized once or more than once; whether the victim suffered a physical injury, and if so the severity of that injury; and other factors.

The BJS definitions do not fully reflect this complexity of sexual victimization. Thus, the definition of “nonconsensual sexual acts” includes a broad range of victimization events that are likely to have drastically different impacts for cost valuation purposes. It would include, for example, both a forcible gang-rape involving vaginal penetration and serious physical injury, and an incident in which an inmate is pressured into giving a staff member sexual gratification in

^{16/} Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities 2004* (NCJ 210333).

exchange for added time in the recreation deck. Both types of “nonconsensual sexual acts” are illegal and reprehensible, and the PREA standards aim to eliminate both; but for benefit-cost evaluation purposes the former type of event is very likely to have a much greater avoidance benefit than the latter.

Of course, there are also limits to the extent to which a benefit-cost analysis can account for the complexity of the problem analyzed, and even a benefit-cost analysis must avail itself of some simplifying definitions and assumptions. For purposes of this IRIA, we therefore propose to divide sexual victimizations in prison settings into four categories, which are somewhat differently calibrated from those BJS uses in its statistical compilations.

We have divided BJS’s category of “nonconsensual sexual acts” into two event categories based on the level of coercion involved. First, we use the category labeled “rape involving force/threat of force” to denote incidents of anal or vaginal penetration, oral contact with the penis or vagina, and “hand jobs,” which result from physical force or threat of physical force – such as by physically holding down or restraining the victim, or threatening the victim with a weapon. We use this category both for staff-on-inmate and inmate-on-inmate forcible rapes.

Second, we differentiate “nonconsensual sexual acts involving pressure/coercion,” which we use to denote incidents of anal or vaginal penetration, oral contact with the penis or vagina, and “hand jobs,” in which the perpetrator, without using force or the threat of force, pressured the inmate or made the inmate feel that they had to participate. This would include sexual contact procured through bribes or blackmail, offers of protection or special treatment or privileges, offers to settle a debt, provision of drugs, or verbal persuasion.^{17/} We use this category both for staff-on-inmate and inmate-on-inmate nonconsensual sexual acts.

We are able to divide BJS’s “nonconsensual sexual acts” category into these two different categories because the survey questions posed to inmates asked about the level of coercion used for the various sexual acts they reported, and BJS tabulated those responses by level of coercion. *See* BJS Adult NIS 2008-09, at 25-26, 31, 46-51, 74-81; BJS Juv. NSYC 2008-09, at 3, 9, 13, 14, 18-19, 22, 44-48. We believe it appropriate to make this distinction because the cost to the victim and to society of a rape involving force or threat of force is, in our view, substantially greater than the cost of a nonconsensual sexual act involving lesser forms of pressure or coercion. *See* Part IV.

^{17/} *See* Dumond, *supra* note 14, at 149 (“Aggressors employ several methods to control their victims, including entrapment (blackmail), pressure tactics, and physical force, accompanied by psychological manipulation. A common form of entrapment is to give a new prisoner a number of goods which are ‘on loan,’ since new inmates often have few resources available to them. In the correctional economy, loaned goods must be repaid at exorbitantly high rates When an inmate cannot repay the loan, he or she is forced to pay with sex. Pressure tactics include persuasion, bribes, threats to withdraw love, and use of alcohol or drugs. Force tactics include threats of harm; intimidation by the perpetrator’s size and strength; being physically held down; having a weapon present; and, a variety of physical assaults.”).

Our third category, “abusive sexual contacts,” has the same meaning that BJS uses in its statistical compilations but is limited here to inmate-on-inmate contacts, to wit, “unwanted [i.e., forced, coerced, or pressured] contacts with another inmate . . . that [only] involved touching of the inmate’s buttocks, thigh, penis, breasts, or vagina in a sexual way.” Our final category, “willing sex with staff,” includes incidents in which the inmate reported that he or she willingly (i.e., without any form of force or pressure) had sex or sexual contact with staff.

Issues related to specific institution types. The final limitation of the BJS baseline prevalence statistics for which we need to account in this IRIA has to do with the types of institutions covered by the BJS surveys. BJS’s data with respect to adult prisons and jails are comprehensive, reflecting the massive scale of the National Inmate Survey, and they provide a robust if not complete picture of the prevalence of prison rape and sexual abuse in those facilities nationwide. BJS’s data with respect to juvenile facilities are somewhat more limited, since the NSYC only studies facilities that hold adjudicated youth for at least 90 days. BJS has nevertheless been able to extrapolate for purposes of this IRIA data on the estimated prevalence of sexual assault in facilities not covered by the survey. *See supra* note 13 and accompanying text.

BJS has not, however, studied the prevalence of sexual assault in community confinement facilities, and we are aware of no available studies conducted by other entities. Many community confinement facilities are operated by (or in association with) neighboring or nearby prisons or jails; to the extent they are, data on the prevalence of sexual abuse within such facilities may in some cases be subsumed within the data for the operating prison or jail. Beyond that, we are not aware of any empirical attempt to assess the prevalence of sexual abuse in community confinement facilities or to propose a methodology for doing so.

Nor are we aware of any statistics purporting to assess the prevalence of sexual abuse in America’s lockups. An estimated 13.7 million arrests were made in 2009, and it can be assumed that a significant percentage of these passed through the (conservatively-estimated) 4,500 lockups across the country each year.^{18/} Because the amount of time each person spends in a given lockup facility is brief (typically less than 24 hours), conducting a meaningful survey of lockup detainees to assess the prevalence of sexual abuse in those settings is difficult. While the short amount of time detainees usually spend in lockup facilities, together with the typical physical layout of lockups, would suggest that lockup detainees face a lower risk of sexual abuse than do inmates in other settings, we cannot ignore the anecdotal evidence that sexual abuse can and does occur in lockup settings. Statistics suggesting that 15% of sexual abuse victims in jails report having been abused by another inmate within the first 24 hours of their arrival at the jail^{19/} also indicate that the problem of sexual abuse

^{18/} See Bureau of Justice Statistics, *2008 Census of State and Local Law Enforcement Agencies* and *2005 National Survey of State Court Prosecutors*.

^{19/} See BJS Adult NIS 2008-09, at 22-23.

in lockups cannot and should not be ignored. Nevertheless, we are currently constrained by an absence of empirical data as to the magnitude of that problem.

Due to the limitations in the available data, we have decided not to estimate the baseline prevalence of sexual abuse in lockups or community correctional facilities. This adds a further conservative element to our baseline prevalence figures, in the sense of underestimating the extent of the problem. We do include the benefits of avoiding sexual abuse in these facilities in our accounting of non-quantifiable benefits in Part IV below, and we invite public comment as to whether there is a better way of capturing the benefit of preventing sexual abuse in these settings.

Baseline Prevalence Matrix. Taking into account the foregoing considerations, we set forth in Table 1 our estimate of the baseline prevalence of prison rape for benefit-cost analysis purposes. Our matrix uses four different event types (rape involving force, nonconsensual sexual acts involving pressure, abusive sexual contacts, and willing sex with staff) in three different confinement settings (adult prisons, adult jails, and juvenile facilities). For each event type, we list the total number of individuals who were victimized during 2008, as adjusted to account for the flow of inmates over that period of time. Inmates who experienced more than one type of victimization during the period are included in the figures for the most serious type of victimization they reported.

Table 1
Baseline Prevalence of Prison Rape and Sexual Abuse
by Type of Incident and Type of Facility, 2008^{20/}

	Adult Prisons	Adult Jails	Juvenile Facilities
Rape involving force/threat of force	26,200	39,200	4,400
Nonconsensual sexual acts involving pressure/coercion	18,400	14,800	2,900
Abusive sexual contacts	19,000	23,000	3,000
Willing sex with staff	27,800	31,100	6,800
TOTAL	91,400	108,100	17,100

^{20/} Includes cross-sectional number covered in BJS surveys plus number of estimated victims released in the twelve months prior to the survey. Juvenile facilities include adjudicated/committed youth only.

II. Estimating the Quantifiable Unit Benefit of Avoiding a Prison Rape or Sexual Assault

Placing a monetary value on an avoided sexual assault confronts considerable methodological difficulties, and the enterprise may even seem objectionable to some people. However, the monetary value of an avoided sexual assault is only one dimension of the total benefits that will be achieved by the reduction in the prevalence of such assaults in prison. This Part discusses that monetary value. Part IV discusses benefits from reducing rape and sexual assault in confinement facilities that are not quantifiable.

As for the difficulties inherent in any attempt to monetize the value of an avoided sexual assault, Executive Order 12866 instructs agencies that they must measure quantifiable benefits “to the fullest extent that [they] can be usefully estimated.” EO 12866, § 1(a). Some uncertainty in such estimates is not itself sufficient reason to abandon the effort. “Uncertainty may limit what an agency can do, but it does not excuse an agency from its statutory obligation to do what it can to apprise itself – and hence the public and the Congress – of the economic consequences of a proposed regulation before it decides whether to adopt the measure.” *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005). Put otherwise, “the agency’s job is to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct. . . . Regulators by nature work under conditions of serious uncertainty, and regulation would be at an end if uncertainty alone were an excuse to ignore a congressional command.” *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1220-21 (D.C. Cir. 2004).

Moreover, despite the uncertainties, our legal system does have mechanisms for placing a monetary value on the pain, suffering, and physical and dignitary losses experienced by inmates who have been abused while in confinement – for example, through jury verdicts and litigation settlements. We also have means to estimate the average cost of the medical and mental health care, and other services, that a rape victim typically requires after his or her ordeal. Moreover, social scientists from a number of disciplines have developed convincing data on the cost of various forms of sexual victimization to the victim and to society.

A Review of the Literature. We are not aware of any empirical studies that have attempted to place a value on rape or sexual abuse specifically in the prison setting. For this reason, we have relied primarily on studies that place a value on rape and sexual abuse generally, and we have attempted, where appropriate and feasible, to adjust the conclusions of those studies to reflect as best we can the differing circumstances posed by sexual abuse in the confinement setting.

The studies that have calculated the cost of rape to the victim and to society have generally done so using two different methodologies. Some studies, following what is known as the victim compensation model, have looked at the problem *ex post* and have determined how much society would have to pay to fully compensate a victim who has already been assaulted (or correspondingly how much a victim would be willing to accept to compensate for the assault). Other studies,

following what is known as the contingent valuation model, have looked at the problem *ex ante* and have asked how much society (or a prospective victim) is willing to pay to avert a future sexual assault.^{21/} Both approaches have their advantages and disadvantages, and our analysis draws lessons and conclusions from each type of study.

The Victim Compensation Model. The victim compensation model endeavors to identify the costs of sexual violence to the victim, both tangible (such as medical and mental health care) and intangible (such as pain and suffering). Costs are monetized in reference to amounts appropriate to compensate for the various harms caused by the assault.

The largest quantifiable cost to victims of sexual assault is pain, suffering, and loss of dignity – put otherwise, a diminution in their quality of life. See NIJ VICTIM COSTS, *supra* note 10, at 1, 9, 15-16. “The effects of sexual violence are well-known and extremely deleterious. Victims of sexual violence undergo a destructive, catastrophic, life-changing event. They are likely to experience physical, emotional, cognitive, psychological, social, and sexual problems as a result. Even one event may precipitate a life-time of pain and suffering.” Dumond, *supra* note 14, at 150-51.

Another significant cost relates to mental health care and psychological support services. Survivors of sexual violence endure a number of mental health consequences, including but not limited to guilt, shame, fear, anxiety, and tension. “One study noted that even seventeen years after the assault, 16.5% of rape victims manifested symptoms of posttraumatic stress disorder (PTSD).” Dumond, *supra* note 14, at 150-51 (footnotes and internal quotations omitted). “Short-term (and long-term) effects on male and female sexual violence victims might include a wide range of psychiatric problems such as PTSD, rape trauma syndrome, anxiety, depression, exacerbation of preexisting psychiatric disorders, and suicidal feelings.” *Id.* at 151.

There is good reason to assume that the mental health care cost of sexual violence is greater when the assault takes place in the correctional setting than it is when it occurs in the general population. Even absent any assault, between 30% and 40% of incarcerated individuals exhibit symptoms of mental health disorders upon intake, compared with only approximately 11% of the population as a whole.^{22/} This greater prevalence of mental illness in America’s prisons means that compared to society as a whole a larger portion of the inmate community is predisposed to being

^{21/} See generally John Roman & Graham Ferrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings, and Crime Externalities*, 14 CRIME PREV. STUDIES 68-69 (2002).

^{22/} See Bureau of Justice Statistics, *Special Report: Mental Health Problems of Prison and Jail Inmates* 3 (updated 2006), available at bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf.

vulnerable to sexual abuse, and to experiencing that abuse in an especially debilitating manner.^{23/} As Congress recognized, sexual assault exacerbates the prevalence of mental illness in our prisons by “substantially increasing the rate of post-traumatic stress disorder, depression, [and] suicide . . . among current and former inmates.” 42 U.S.C. § 15601(14)(D).

In addition to devastating psychological effects, prison sexual assaults often have physical ramifications. A significant percentage of inmates suffer physical injury as a result of sexual assault, especially when the assault takes place under force or threat of force. *See, e.g.*, BJS Adult NIS 2008-09, at 22-23. Such injuries can include knife or stab wounds, broken bones, anal or rectal tearing, chipped or broken teeth, internal injuries, bruises, cuts, scratches, loss of consciousness, and other injuries. *Id.* at 22. Of all victims of sexual abuse in prisons, an estimated 20% said that they had sustained an injury – 85% of whom reported at least one serious injury. NPREC Report, at 41. These physical ramifications carry with them tangible, quantifiable costs in the form of injury response and other medical care.

Sexual assault in the prison environment also exposes victims to an increased risk of suicide.^{24/} Nearly 50% of prison rape victims contemplate suicide, while 17-19% actually attempt it. A suicide attempt, successful or otherwise, has been estimated to cost an average of \$223,400 in 2010 dollars.^{25/}

Likewise, sexual abuse in prison exposes victims to an increased risk of contracting HIV/AIDS, other sexually transmitted infections, and infectious diseases such as tuberculosis and hepatitis B and C. *See* 42 U.S.C. § 15601(14)(C). The rates of sexually transmitted infections are much greater within confinement facilities than in the general population.^{26/} For example, in 2008

^{23/} *See* Dumond, *supra* note 14, at 154 (“In jails and prisons . . . the unique structure of incarceration may result in even more debilitating effects on victims. Research has demonstrated that incarcerated victims are more often physically assaulted during attacks, and they may experience repeated assaults by multiple assailants over time. As a result, victims may experience on-going psychological trauma, terror, helplessness, and fear as the physical/sexual abuse continues. . . . In addition, victims experience enormous social consequences; victims routinely experience a loss of social status, and they might be more vulnerable for future attacks within the jail or prison.”).

^{24/} Dumond, *supra* note 14, at 151-54.

^{25/} *See* Ted R. Miller *et al.*, COSTS OF SEXUAL VIOLENCE IN MINNESOTA, at 11 (Minn. Dep’t Health July 2007), available at http://www.pire.org/documents/mn_brochure.pdf. Miller estimated that an act or attempt of suicide resulting from sexual assault costs \$5,400 in medical expenses and \$191,300 in quality of life losses, in 2005 dollars. We have adjusted these 2005 dollar totals to 2010 dollars using the CPI adjuster of 1.136, which was derived from the Bureau of Labor Statistics, History of CPI-U U.S. All Items Indexes, available at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

^{26/} *See* Terry A. Kupers, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 152 (“The incidence of AIDS in prison in 1994 was 518 cases per 100,000, compared to a comparable annual incidence in the total population of 31 cases per 100,000.”).

almost 22,000 individuals incarcerated in state and federal prisons (1.5% of the total population) were known to be living with HIV/AIDS.^{27/} The prevalence of Hepatitis C is even higher in prisons because of intravenous drug use prior to incarceration. *See* NPREC Report, at 129. These diseases are expensive to treat and are sometimes fatal. One study estimated the cost of HIV to a victim of sexual assault as \$2,407,600 in 2010 dollars.^{28/}

Various studies based on the victim compensation model have attempted to calculate the monetary value of rape and sexual assault by determining the cost to the victim of medical and mental health care, diminished quality of life, and increased risk of suicide and contracting serious infections. One such study, published by the Department's National Institute of Justice, put the average cost per rape victim at \$110,000 in 1993 dollars, which translates to \$165,000 in 2010 dollars.^{29/} When the victim is a juvenile, that study put the average cost of rape per victim at \$125,000 in 1993 dollars, which translates to \$187,500 in 2010 dollars.^{30/} These estimates considered both immediate use of medical care and mental health services, lost productivity, and permanent disability, as well as the cost of pain, suffering, fear, and lost quality of life. They also took into account the impact of multiple or serial victimization. The quality of life estimates were derived from the analysis of 1,106 jury awards and settlements to assault, rape, and burn survivors to compensate for pain, suffering, and lost quality of life (excluding punitive damages).

A more recent study by Prof. Ted Miller and others, commissioned by the Minnesota Department of Public Health, placed the costs at \$198,960 (in 2010 dollars) per adult victim for rape in the general population and \$386 for abusive sexual contact not resulting in physical injury or attempted penetration.^{31/ 32/} When the victim was a juvenile, the cost was \$263,800 per victim. The

^{27/} Bureau of Justice Statistics, *Bulletin: HIV in Prisons* (updated 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf>.

^{28/} *See* Miller *et al.*, *supra* note 25, at 12.

^{29/} *See* NIJ VICTIM COSTS, *supra* note 10, at 16. The figures used here are those presented per victim rather than per victimization, since we have chosen to use prevalence figures rather than incidence figures: "The [per victim] figure is probably a more useful estimate, since the quality of life losses (the largest component of rape costs) are estimated from jury awards to victims (not victimizations)." *Id.* at 21. The 1993 figures were converted to 2010 dollars using the CPI adjuster of 1.5, which was derived from the Bureau of Labor Statistics, History of CPI-U U.S. All Items Indexes, available at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.txt>.

^{30/} *Id.* The victim costs associated with loss of quality of life are higher for juveniles than they are for adults because of juveniles' longer expected lives and because of higher mental health treatment costs for juvenile victims. *See* Miller, *supra* note 25, at 10 ("Adults had lower mental health costs, lost less quality of life, and had less likelihood of turning to suicide or substance abuse than children following a sexual assault."); *see also* Ted R. Miller *et al.*, *Costs of Juvenile Violence: Policy Implications*, 107 PEDIATRICS 1, 3 (Jan. 2001).

^{31/} *See* Miller, *supra* note 25, at 11. The figures here are derived first by multiplying the figures from the authors' Table 7 (which reflect cost per victimization) by 1.26 to yield the cost per victim (in 2005 dollars). *See id.* at 17-18. These figures were then multiplied by 1.136 to convert from 2005 dollars to 2010 dollars. The CPI adjuster of

quality of life estimates were again derived from the analysis of jury awards and settlements. Table 2 on the next page displays the breakdown of constituent costs which Miller *et al.* identified.

Because Table 2 reflects the costs of rape and sexual abuse in the general population, a number of adjustments need to be made to account for the differences of rape and sexual abuse in the prison context. First, the elements of lost work, property damage, and perpetrator's earning loss while confined must be deleted as inapplicable in the prison context. We also reduce the cost of pregnancy to account for the fact that the vast majority of prison sexual assault victims are male, making the risk of pregnancy per victimization much lower than it is in the general non-correctional setting. Similarly, the entry for sexually transmitted diseases must be roughly doubled to account for the fact that in the prison setting the risk of contracting a sexually transmitted disease is much greater than the risk in the general population. *See supra* notes 26-28 and accompanying text. Likewise, we double the cost of mental health care to account for the facts that the incidence of mental illness in the prison setting is at least twice the incidence in the general population and that the psychological impact of rape in the prison setting is generally more debilitating than it is in the non-correctional setting, especially given the frequency of multiple or serial victimization. *See supra* notes 23-22 and accompanying text.^{32/}

1.136 was drawn from the Bureau of Labor Statistics source cited *supra* in note 25.

^{32/} We contacted Professor Miller for further elucidation of the seemingly low cost per victim of incidents of "other sexual assault for adults over 18" (i.e., sexual assault short of rape). Professor Miller explained that for purposes of his article "other sexual assault" refers to conduct that falls well short of an attempted or completed sexual penetration. Any conduct that involved any degree of sexual aggressiveness on the part of the perpetrator was considered an attempted rape in his study and classified as such. Thus, "other sexual assault" referred only to contacts that involve sexual touching or abuse without any coercion, pressure, force, or threat of force. Victims of such assaults, in Professor Miller's view, are unlikely to encounter any costs beyond a small diminution of quality of life due to embarrassment, humiliation, and the like. There may also be a small cost associated with avoidance behaviors undertaken in response to bullying. But in Professor Miller's view these costs are small per average victim, especially since a certain percentage of victims will have zero monetizable cost.

We questioned the basis for Professor Miller's apparent assumption that victims of "other sexual assault" incur no costs for mental health treatment. Professor Miller explained that the cost of mental health care per victim in his article was determined by first calculating the total amount spent on mental health care as a result of sexual violence and then dividing that total by the number of victims. For this purpose, all of the mental health care resulting from sexual violence was assumed to relate to actual or attempted rape, and all of that cost was assigned to that category of victim, rather than to the category of "other sexual assault."

^{33/} We are not aware of any academic studies that have attempted to extrapolate from rape-associated mental health costs in general settings to those in the prison setting. Given that the prevalence of serious pre-existing mental health issues in prisons is two to five times greater than in the population at large, and that the risk of multiple victimization is at least ten times greater, we view a multiplier of two as conservative. Both the exacerbation of pre-existing mental health conditions and the phenomenon of serial victimization are likely to increase the cost of therapeutic responses by at least 100%. We invite public comment as to whether a different approach is more appropriate and as to whether there are established methodologies or data for deriving an estimate of mental health costs in the prison setting.

As shown in Table 3 on the next page, these adjustments yield a cost per prison rape victim in 2010 dollars of \$197,000 for each adult rape victim, \$271,000 for each juvenile victim, and \$386 for each prison sexual abuse victim.

Table 2
Victim Compensation Costs of Rape and Abusive Sexual Contact,
per Victim in the General Population, in 2010 dollars^{34/}

Cost	Child Rape	Adult Rape	Sexual Abuse
Medical Care	\$1,002	\$1,002	
Mental Health Care	\$13,455	\$2,004	
Lost Work	\$5,582	\$4,008	
Property Damage	\$145	\$143	
Suffering and Lost Quality of Life	\$205,257	\$169,044	\$386
Sexually Transmitted Diseases	\$1,574	\$1,574	
Pregnancy	\$429	\$573	
Suicide Acts	\$23,617	\$11,737	
Substance Abuse	\$6,584	\$3,292	
Victim Services	\$429	\$143	
Criminal Justice: Investigation/Adjudication	\$859	\$716	
Sanctioning	\$3,006	\$2,863	
Perpetrator's Earning Loss While Confined	\$1,861	\$1,861	
Total	\$263,800	\$198,960	\$386

^{34/}

Source: Miller *et al.*, COSTS OF SEXUAL VIOLENCE IN MINNESOTA, *supra* note 25, at 11.

Table 3
Victim Compensation Costs of Rape and Abusive Sexual Contact,
per Victim in Confinement Settings, in 2010 dollars^{35/}

Cost	Child Rape	Adult Rape	Sexual Abuse
Medical Care	\$1,002	\$1,002	
Mental Health Care	\$26,910	\$4,008	
Suffering and Lost Quality of Life	\$205,257	\$169,044	\$386
Sexually Transmitted Diseases	\$3,149	\$3,149	
Pregnancy	\$429	\$573	
Suicide Acts	\$23,617	\$11,737	
Substance Abuse	\$6,584	\$3,292	
Victim Services	\$429	\$143	
Criminal Justice: Investigation/Adjudication	\$859	\$716	
Sanctioning	\$3,006	\$2,863	
Total	\$271,242	\$196,527	\$386

The Contingent Valuation (or Willingness to Pay) Model. While the victim compensation model calculates the *ex post* costs associated with incidents of sexual abuse, the willingness to pay model calculates the *ex ante* benefits of avoiding such incidents. Willingness to pay advocates point to the ability of this model to capture the value that society places on avoidance as being more appropriate for a regulatory cost-benefit assessment. “While jury awards are one way to capture some of the intangible costs of crime that previous approaches had ignored, the method is not entirely appropriate for use in cost-benefit analysis. Conceptually, when deciding whether to fund a program, we want to know how much the public expects to benefit – hence how much they would be willing to pay. Thus, economists generally prefer *ex ante* measures of ‘willingness-to-pay’ (WTP) when conducting cost-benefit analysis as opposed to the *ex post* analysis of victim costs and jury awards used in previous studies.”^{36/}

Crime, in other words, has an “existence value” separate and apart from its impact on its victims – it is worth something to people to know that they live in a crime-free (or crime-reduced) society. It is also worth something to people to know that their loved ones who are incarcerated, or who might face incarceration some day, are less likely to be raped during their confinement. The

^{35/} Source: Miller *et al.*, COSTS OF SEXUAL VIOLENCE IN MINNESOTA, *supra* note 25, at 11.

^{36/} Mark A. Cohen *et al.*, *Willingness-to-Pay for Crime Control Programs*, 42 CRIMINOLOGY 86, 91 (2004).

victim compensation model fails to take account of this existence value, which the contingent valuation method endeavors to measure

A 2001 study by Professor Mark Cohen and others used this method to estimate the economic value that people in society place on preventing various crimes, including sexual assault. This study was based on a national survey which asked people how much they would be willing to pay to reduce the prevalence of various types of crime in their community by 10%; from these survey responses and other data, Prof. Cohen then extrapolated the value to society of avoiding one incident of each type of crime studied. According to Prof. Cohen, people are willing to pay on average \$237,000 (in 2000 dollars, which translates to \$304,308 in 2010 dollars) to prevent rape and sexual assaults.^{37/}

Professor Cohen's study looked at society's willingness to pay to reduce rape in the community in general and did not specifically examine the willingness to pay to reduce rape in the prison setting. As a result, there are reasons for caution in using these figures for purposes of this IRIA. On the one hand, Professor Cohen's study looked to the survey respondents "to value crime reduction that affects them in some manner – whether through their own household, their families, friends, or coworkers." Cohen, *supra* note 36, at 93 n.5. This focus on reducing crime in the "community" may not translate well to the reduction of rape in prison settings, which to many members of the public may seem distant and unrelated to their lives. Thus, respondents to Professor Cohen's survey may not have been thinking of the prison setting when formulating their willingness to pay responses. On the other hand, the number of incarcerated persons in the United States is very large (estimated at 2.4 million), and the number of people who are arrested and pass through jail or a lockup each year is even larger (estimated at 14 million). Thus, the size of the population with incarcerated "families, friends, or coworkers," who may be personally affected by the reduction in the prevalence of rape in confinement settings, may be large enough to counteract the "community" problem to some extent.

Another potential objection to extrapolating from Professor Cohen's work to the prison setting is that some people may believe sexual assault in confinement facilities is a less pressing problem than it is in the society as a whole, and might therefore think that the value of avoiding such an assault in the confinement setting is less than the value of avoiding a similar assault in the non-confinement setting.^{38/} However, one of Congress's purposes in enacting PREA was to counteract the cultural tendency to take prison rape for granted; this tendency is in turn largely driven by the diminished value society may place on the tribulations of prisoners. Because Congress has unanimously rejected this devaluation, we deem it inappropriate to discount the value that empirical studies have placed on rape and sexual abuse simply because those studies did not deal specifically

^{37/} *Id.* at 98. To convert from 2001 to 2010 dollars, we use a CPI multiplier of 1.284, drawn from the BLS source cited above at note 25.

^{38/} *See, e.g.*, Tamar Lewin, "Little Sympathy or Remedy for Inmates Who Are Raped," N.Y. TIMES, Apr. 15, 2001, at 11.

with the prison setting. Even if we wanted to attempt such a discount, in the absence of any empirical data the amount of the diminution would be purely speculative. We have invited public comment on the question whether an adjustment should be made to Professor Cohen's willingness to pay figures.^{39/}

What is more, rapes and sexual assaults in a prison setting have a constitutional dimension that is absent from similar events occurring in the general population. To the extent society assigns inherent value to constitutional rights and their protection, one could argue that rape and sexual assault in the prison setting actually cost society *more* than they do in general terms.

In the end, we believe that contingent valuation methodologies such as Prof. Cohen's study, while not dispositive of our analysis, provide useful information in assessing the monetary benefit of avoiding a prison rape and may provide an appropriate upper bound for that benefit.

Conclusions as to the Unit Benefit of Avoiding Prison Rape. Having reviewed the foregoing literature, we now proceed to our assumptions and conclusions as to the unit benefit of avoiding the various types of sexual abuse in various confinement settings. As elaborated in Part I above, to assign a unit benefit to various types of avoided events, we need to account, at least to some extent, for the complexity of sexual victimization. Our event-type matrix in Table 1 aimed to account for some of this complexity by dividing the different types of sexual abuse events into four categories based on the level of coercion involved and on the nature of the sexual contact.

The most serious category of sexual abuse in our matrix is rape involving force or threat of force. We believe that \$200,000, drawn from the "Adult Rape" column of Table 3 (and rounded up slightly), provides an appropriate lower bound for the unit cost of rape involving force or threat of force in an adult prison or jail setting. We likewise believe that \$275,000, drawn from the "Child Rape" column of Table 3 (and rounded up slightly), provides an appropriate lower bound for the unit cost of rape involving force or threat of force in the juvenile detention setting.^{40/}

We also believe that \$300,000 (rounded down slightly from Prof. Cohen's figure, as adjusted to 2010 dollars) provides an appropriate upper bound for the unit cost of rape involving force or threat of force in an adult prison or jail setting. We increase this figure by approximately 33%, to \$400,000, to provide the upper bound for the unit cost of rape involving force or threat of force in

^{39/} Another significant difference between sexual assault in the prison setting and in the general population has to do with the gender of the typical victim. In the general population, the vast majority of sexual assault victims are female; in the confinement setting the victims are overwhelmingly male. It is not clear whether and to what extent this difference is relevant for purposes of using the contingent valuation method to monetize the cost of an incident of sexual abuse. We invite public comment on this subject.

^{40/} "Aside from murder, child sexual abuse is the most serious crime, followed by rape, child physical abuse, and arson." NIJ VICTIM COSTS, *supra* note 10, at 16.

the juvenile detention setting. We derive 33% from the approximate difference between the child rape and rape figures in the NIJ victim compensation study. *See supra* note 30.

The second category of sexual abuse in our matrix is nonconsensual sexual acts involving coercion or pressure. Placing a value on this category is considerably more difficult, as we are not aware of any study that has specifically attempted to place a value on this form of sexual assault, to the exclusion of rape involving force or threat of force. It is an event that is less costly to both the victim and to society than is forcible rape, in part because there is typically no physical injury. Its seriousness can nevertheless not be overemphasized. As several studies have recognized, even rape involving pressure or coercion rather than force has costs to the victim: “Perpetrators . . . utilize five major psychological components to engage victims: conquest and control, revenge and retaliation, sadism and degradation, conflict and counteraction, and status and affiliation, aimed primarily at exercising control and aggression. The process is seductive and manipulative, has a significant impact on the psyche of the victim, and often contributes to feelings of guilt, shame, and humiliation.” Dumond, *supra* note 14, at 149. Moreover, “the intimate and complex nature of coercive sexuality itself may also contribute to feelings of guilt, shame, humiliation, confusion, and despair within victims. *Id.* at 151-52 (citing studies).

In the absence of any specific studies purporting to place a value on this species of sexual conduct, we invite public comment on how best to assess the benefit of avoiding it. In the meantime, for purposes of this IRIA, we estimate the costs of this species of sexual assault as being 20% the cost of forcible rape.

The third category in our event-type matrix is abusive sexual contacts between inmates. Consistent with the figures in Table 3, we assign a value of \$375 to each such event for adults and \$500 for juveniles. As noted above in note 32, we consider this value to be conservative, and we invite public comment as to whether a higher figure would be more appropriate.

The final category in our event-type matrix involves incidents of “willing” sex with staff. In the context of juveniles, we assign this the same value as nonconsensual sexual acts involving coercion or pressure. Given laws against statutory rape and the generally deep-seated revulsion to sexual intercourse between adults and children, we believe that society treats all such intercourse as coerced or pressured, no matter how “willing” the juvenile might profess it to be, and that all such intercourse is harmful to both the juvenile and to society. On the other hand, in the context of adult prisons and jails, while sex between inmates and staff is illegal and inappropriate no matter the degree of volition on the part of the inmate, for benefit-cost valuation purposes we treat the cost of “willing” sex between an inmate and staff as equivalent to abusive sexual contacts with an inmate, and we assign it a conservative cost of \$375. We emphasize that “willing sex with staff” is defined very narrowly to exclude any events for which the inmate reports indicia of pressure or coercion.

Thus, Table 4 presents the range of cost values we assign to each event in our matrix for purposes of benefit cost valuation.

Table 4
Range of Unit Avoidance Benefits
By Type of Victim and Type of Facility, in 2010 Dollars

	Adult Prisons	Adult Jails	Juvenile Facilities
Rape involving force/threat of force	\$200,000 to \$300,000		\$275,000 to \$400,000
Sexual assault involving pressure/coercion	\$40,000 to \$60,000		\$55,000 to \$80,000
Abusive sexual contacts	\$375		\$500
Willing sex with staff	\$375		\$55,000 to \$80,000

III. The Total Expected Monetary Benefit of a 1% Reduction in Prison Rape

To determine the total monetary benefit of a 1% reduction from the baseline in the average annual prevalence of prison rape (*e.g.*, reducing forcible rapes in prison by an average of 262 per year, in jails by an average of 392 per year, and in juvenile facilities by an average of 44 per year), we use the following equation: $B = P \times V \times 1\%$, where B is the expected annual monetary benefit, P is the baseline prevalence, and V is the quantifiable unit avoidance benefit. Using this formula, we set forth the total monetary benefit in Table 5, using both lower bound and upper bound assumptions for V.

Table 5: Total Monetary Benefit of a 1% Reduction from the Baseline
in the Average Annual Prevalence of Prison Rape
in Thousands of 2010 Dollars

	Adult Prisons	Adult Jails	Juvenile Facilities	Total
Rape involving injury/force/threat of force	\$52,400 to \$78,600	\$78,400 to \$117,600	\$9,636 to \$17,600	\$140,436 to \$213,800
Nonconsensual sexual acts involving pressure/coercion	\$7,360 to \$11,040	\$5,920 to \$8,880	\$1,276 to \$2,320	\$14,556 to \$22,240
Abusive sexual contacts	\$71	\$86	\$12	\$169
Willing sex with staff	\$104	\$117	\$1,496 to \$2,720	\$1,555 to \$2,779
TOTAL (ROUNDED)	\$60,000 - \$90,000	\$84,500 to \$126,500	\$12,500 to \$22,500	\$157,000 to \$239,000

By our calculation, then, the total monetary benefit of a 1% reduction from the baseline in the average annual prevalence of prison rape and sexual assault will range from approximately \$157 million to \$239 million.

IV. Describing and Assessing the Non-quantifiable Benefits of Prison Rape Avoidance

“Costs and benefits” under Executive Order 12866 must “include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify but nevertheless essential to consider.” EO 12866, § 1(a). Benefits of regulatory action include “the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias.” *Id.*

Congress predicated PREA on its conclusion – consistent with decisions by the Supreme Court – that “deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishment Clause of the Eighth Amendment.” 42 U.S.C. § 15601(13). The individual rights enshrined in our Constitution express our country’s deepest commitments to human dignity and equality, and American citizens place great value on knowing that their government aspires to protect those rights to their fullest extent. In thinking about the qualitative benefits that will accrue from the implement of these proposed standards, these values stand paramount.

To complete the analysis of the benefits of the PREA standards, we have endeavored to identify the non-monetary benefits that will result from reducing prison rape and to provide qualitative indication of their magnitude. We have been assisted in this endeavor by many useful comments submitted in response to the ANPRM. Non-monetary benefits may accrue to rape victims themselves, to inmates who are not rape victims, to prison administrators and staff, to families of rape victims, and to society at large.

Non-quantifiable benefits relating to lockups and community confinement facilities. Our analysis in Parts II and III made no estimate of the monetary benefit of reducing rapes in lockups and community confinement facilities for the simple reason that we do not have data on the baseline prevalence of rape in these settings. Although unit cost of rape in these settings can generally be assumed to be the same as for adult prisons and jails, we classify the avoidance of assaults in these settings as “non-quantifiable” because it is not possible at this juncture to ascertain how many such assaults would be avoided in a 1% reduction from the baseline prevalence.

Non-quantifiable benefits for the rape victims. The PREA standards will yield non-quantifiable benefits to victims even with regard to assaults that the standards do not prevent. Implementation of the standards will enhance the mental well-being of victims, by ensuring that they receive adequate treatment after an assault, which in turn will enhance their ability to integrate into the community and maintain stable employment upon their release from prison. Moreover, the standards will reduce their re-traumatization, together with their loss of dignity and privacy,

associated with evidence collection, investigation, and any subsequent legal proceedings that take place in connection with sexual assault and its prosecution. Victims will also benefit from the increased likelihood that their perpetrators will be held accountable for their crimes.

Non-quantifiable benefits for inmates who are not rape victims. The PREA standards will improve quality of life in prison even for those inmates who would not experience sexual assault even in the absence of the standards, in at least three ways. First, the standards should reduce the collective fear and dread of rape and sexual assault while incarcerated.^{41/} Second, standards that work to reduce sexual assault will likely reduce other forms of physical assault as well. Third, sexual assault often fosters a polarized prison climate, such as by exacerbating racial tensions, as Congress itself noted. *See* 42 U.S.C. § 15601(9), (14)(F).

Non-quantifiable benefits for families of inmate rape victims. Families of inmates also suffer from the prevalence of sexual assault in our prisons. The families of all inmates, whether victims or not, often fear that their incarcerated loved ones will be raped, assaulted, or abused while in prison. Moreover, when prison rape victims return home after their incarceration and are unable to work due to emotional trauma, their families are affected. Implementation of the standards will thus improve the emotional and financial well-being of families of individuals currently or formerly living in prisons.

Non-quantifiable benefits for prison administrators and staff. Sexual assault in correctional facilities constitutes a failure to keep inmates safe: this breakdown often has significant ripple effects for prison employees. As Congress recognized, sexual assaults in prison “increase[] the levels of violence, directed at inmates and staff, within prisons.” 42 U.S.C. § 15601(14)(b). Staff are at risk even when the abuser is a colleague: correctional staff who sexually abuse inmates often also engage in other security breaches; some have “provided contraband to prisoners, accepted bribes, lied to federal investigators, and committed other serious crimes as a result of their sexual involvement with federal prisoners.”^{42/} Staff who are compromised due to their involvement with an inmate are more likely to neglect their responsibilities, thus imperiling their colleagues. In addition, as the Commission recognized, even victims of sexual assault may be more likely to commit infractions; some may “break rules in an attempt to escape a perpetrator, whether or not they disclose the abuse.” NPREC Report at 48. By reducing the level of violence against staff and inmates alike, by reducing the need and opportunity for inmates to violate facility rules, and by diminishing the concomitant risk of insurrections and riots, the standards will make prisons a safer

^{41/} *See, e.g.,* MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* (1991) (discussing fear among women as a cost of rape).

^{42/} *See* OFFICE OF THE INSPECTOR GENERAL, EVALUATION AND INSPECTIONS DIVISION, *THE DEPARTMENT OF JUSTICE’S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES*, i (2009), available at www.justice.gov/oig/reports/plus/e0909.pdf.

and better workplace, thus promoting staff retention, decreasing work-related injuries, and improving morale.

Similarly, implementation of the standards will ensure, in the long term, that fewer prison employees will be charged with felony sexual abuse crimes, as the incidence of sexual abuse declines. The number of prison staff prosecuted for sexual abuse of inmates has steadily increased in recent years.^{43/} Both the personnel time lost due to these prosecutions and the stigma and negative morale engendered by them can be expected to abate as the prevalence of prison rape diminishes, enhancing quality of life in the workplace.^{44/}

Non-quantifiable benefits for society at large. Implementation of the PREA standards will provide numerous public health benefits for society. As noted above, the standards will improve public health by reducing the incidence and spread of HIV/AIDS, of other sexually transmitted infections, and of infectious diseases such as tuberculosis and hepatitis B and C, among prison populations. Almost all individuals in prisons and jails (95%) are eventually released back to their communities,^{45/} and the diseases the inmates contract in the prison confines eventually spread to the populations outside the correctional system. Reducing the incidence of prison sexual assault will mitigate the spread of these diseases, reducing the costs of medical treatment and mental health care for our society. Moreover, the health problems of many victims of prison rape persist well after they return to their communities. Many of these individuals end up on Medicaid, and government agencies pay for their treatment; others use hospital emergency rooms as their primary care – a high cost to hospitals and state agencies.

Sexual assault in prison often leads to long-term trauma, especially if victims are not treated properly in the immediate aftermath of their victimization. When victims return to their communities, this trauma frequently results in an inability to maintain stable employment. The standards will improve the reentry of offenders into society after their incarceration, reducing the likelihood that they will require public assistance (such as welfare, disability benefits, housing vouchers, food stamps) and other forms of governmental financial support upon their reentry.

Society also will derive a number of public safety benefits from the PREA standards. As Congress recognized, sexual assault in prisons “increases the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape.” 42 U.S.C. § 15601(14)(E).

^{43/} See generally, OIG Report, *supra* note 42.

^{44/} Of course, in the short term there may be additional costs to prison authorities associated with a potential increase in prosecutions of staff as prisons adopt measures that enhance the detection and investigation of prison rape and the punishment of perpetrators. Once the level of prison rape has been reduced, however, prisons should feel the benefit of having fewer of their employees charged with felony sexual abuse crimes.

^{45/} Bureau of Justice Statistics, *Reentry Trends in the United States* 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf>.

Implementation of the standards will enhance public safety by reducing the likelihood that inmates released from prison and jail each year will commit crimes (especially violent crimes) after their release. Reducing the prevalence of sexual abuse in juvenile detention settings similarly increases the likelihood that delinquent juveniles can be rehabilitated and reduces the likelihood that they will embark on a life of crime when reaching adulthood. Reducing recidivism could potentially save society and governments tens of millions of dollars per year by avoiding the economic and human costs of crime, the cost of investigating and prosecuting crimes, and the considerable expense of incarceration itself (\$22,600 per prisoner per year, or \$62 per day, as of 2001).^{46/}

The PREA standards will also result in significant cost savings to the criminal justice system: as the prevalence of prison rape diminishes over time, police and investigative costs, adjudication costs (prosecutors, courts, defense), incarceration costs including offender treatment, post-release costs (e.g., halfway houses, supervision), costs associated with risk assessment and community notification programs, and victim compensation and reparation program administration costs, will all correspondingly be reduced.

Finally, given the frequently interracial character of prison sexual assaults,^{47/} minimizing their prevalence will reduce interracial tensions, both within prison and, upon release of perpetrators and victims from prison, within the community at large. *See, e.g.*, 42 U.S.C. § 15601(9), (14)(F).

V. Identifying and Monetizing the Estimated Costs of Complying with the Proposed DOJ Standards.

In this Part, we undertake a preliminary assessment of the anticipated compliance costs associated with the Department's proposed PREA standards. Each of the proposed standards is examined to estimate the costs to correctional agencies in implementing that standard. In setting forth our estimates, we assume that the first full year for which the standards will be applicable is 2012, and we assign all start-up expenses associated with the standards to that year. We then estimate annual or on-going compliance costs in the out years, in present value terms (using both a 3% and a 7% discount rate), for a fourteen year period from 2013-2026. Where possible, we differentiate the cost implications based on facility type: prisons, jails, juvenile facilities, community confinement facilities, and lockups. For purposes of these cost estimates, we assume that the Department's standards will apply to, and will be adopted and implemented by: 1,668 prisons; 3,365

^{46/} Bureau of Justice Statistics, *Special Report: State Prison Expenditures 1* (updated 2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>.

^{47/} *See* BJS Adult SSV 2006, at 4 (“[A]t least half of inmate-on-inmate sexual violence was interracial: 65 of incidents in 2006 involved a white perpetrator and non-white victim; 35%, a black perpetrator and non-black victim; and 8%, a Hispanic perpetrator and non-Hispanic victim.”).

jails; 2,810 juvenile facilities; lockups operated by at least 4,469 different agencies; and approximately 530 community confinement facilities.^{48/}

Table 6 sets forth in summary fashion our conclusions as to how much we expect compliance with the Department’s proposed standards to cost, on a startup, ongoing, and total (15 year) basis. Following the chart we set forth an explanation of our sources, assumptions, and methodology, as well as an analysis of each standard and its anticipated implementation costs. As elaborated below, no adjustment is made in the out years for inflation or for anticipated cost savings due to innovation – that is, costs are assumed to be constant in nominal terms over the course of the fifteen year period.

Table 6
Total Expected Compliance Costs, 2012-2026
By Facility Type, in Thousands of Dollars

	Startup	On-going	Total 2012-2026 3% discount rate (Present Value)	Total 2012-2026 7% discount rate (Present Value)
Prisons	\$26,304	\$56,407	\$411,494	\$249,035
Jails	\$117,742	\$356,618	\$2,745,729	\$1,762,524
Juvenile Facilities	\$24,087	\$78,497	\$602,546	\$386,128
Community Confinement	\$300	\$2,358	\$17,680	\$11,177
Lockups	\$44,913	\$50,583	\$417,672	\$278,212
TOTAL	\$213,346	\$544,463	\$4,195,121	\$2,687,076

Sources of Data. In preparing these cost estimates, we rely on several sources of information. Our primary source is the June 18, 2010, Phase II Final Report of the Cost Impact Analysis completed by Booz Allen Hamilton (“Booz Allen Report”).^{49/} Booz Allen is a consulting firm with which the Department’s Bureau of Justice Assistance (“BJA”) contracted early in 2010 to develop a preliminary cost analysis of the Commission’s recommended standards. As elaborated below, for purposes of this IRIA, the conclusions of the Booz Allen Report have been adjusted in three ways: (1) to estimate the compliance costs of the Department’s proposed standards, rather than the Commission’s recommendations, by reassessing the cost of a subset of standards to which the

^{48/} Bureau of Justice Statistics, *2005 Census of State and Federal Correctional Facilities*, *2006 Census of Jail Facilities*, and the *2008 Juvenile Residential Facility Census*.

^{49/} See <http://www.ojp.usdoj.gov/programs/pdfs/preacostimpactanalysis.pdf>.

Department made significant revisions from the Commission's proposals; (2) to extrapolate a nationwide cost estimate from the data derived from the specific facilities included in the Booz Allen survey; and (3) to develop a fifteen year (2012-2026) cost projection.

Other sources of information on which we have relied in preparing this cost analysis include: (a) internal assessments by the federal Bureau of Prisons (BOP) and the United States Marshals Service (USMS, or the Marshals) as to the costs they expect to incur in implementing the standards; and (b) comments and cost estimates submitted in response to the ANPRM.

The Booz Allen Report. The Commission's recommendations did not include an estimate of their costs. Subsequently, BJA contracted with Booz Allen to prepare a preliminary cost analysis of the Commission's recommended standards in order to assist the Attorney General in exercising his required "independent judgment" when issuing PREA standards.^{50/}

Booz Allen selected a representative sampling of various types of correctional systems and facilities from throughout the country (including 13 state prison systems, 6 community confinement jurisdictions, 10 juvenile agencies, 16 jail jurisdictions, and four lockup facilities). It assembled a team of criminal and juvenile justice subject matter experts and cost estimation experts who conducted on-site face-to-face meetings with representatives of each of the 49 selected sites. Its conclusions as to the cost impact of the Commission's recommended standards were drawn from the site representatives' responses at these meetings and at followup interviews, as well as from reviews of relevant documentation (including policy statements and staffing and facility plans), and in many cases facility tours.

Of the 41 Commission-recommended standards, the Booz Allen Report identified three (PP-3, PP-4, and PP-7) as having major compliance costs. PP-3 related to staff supervision and monitoring of inmates; PP-4 restricted cross-gender pat-down searches, among other provisions; and PP-7 called upon agencies to use video monitoring systems to supplement its sexual abuse prevention, detection, and response efforts. These three standards accounted for 99% of all up-front costs determined in the Booz Allen study – with PP-7 alone accounting for 96% of startup costs. These three standards also accounted for 85% of the total on-going compliance costs in the out years.^{51/} Twenty-six of the Commission-recommended standards were determined to have a very minimal to modest compliance cost. The remaining twelve had a negligible or non-existent cost based on Booz Allen's analysis. Finding a general correlation between lower compliance rates and

^{50/} 42 U.S.C. § 15607(a)(2) (the Department's standards "shall be based upon the independent judgment of the Attorney General, . . . and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.").

^{51/} Similarly, in the comments submitted by the Association of State Correctional Administrators (ASCA) in response to the ANPRM, PP-3, PP-4, and PP-7 accounted for 86% of total startup costs and 94% of ongoing costs. *See supra* note 3. ASCA was the only commenter at the ANPRM stage that provided nationwide compliance cost estimates relating to the Commission's recommended standards.

higher costs, Booz Allen found that sites had varying degrees of compliance with the Commission's recommended standards – ranging from 38% to 88%, with an average compliance rate of 63%.

Methodology for Cost Assessment in this IRIA. As the Department developed its own proposed PREA standards, it asked Booz Allen to undertake additional analyses and to make adjustments in their data to estimate the compliance costs associated with the Department's proposed standards, which make a number of significant modifications to the Commission recommendations.

The Department asked Booz Allen to look at a discrete subset of the proposed standards to assess the extent to which the compliance cost associated with those standards may have changed due to revisions in the Commission's version of the standards. These efforts focused on what the Commission called PP-3, PP-4, and PP-7 (now denominated in the Department's standards as sections 115.13, 115.14, and 115.17 in Subpart A and their analogs in Subparts B, C, and D), which as noted above were the three largest anticipated cost drivers. We also asked Booz Allen to re-assess the compliance costs of the Commission's recommended standards PP-1 (now 115.11), PP-2 (115.12), TR-1 to TR-5 (115.31-.35), SC-1 to SC-2 (115.41-.42), MM-3 (115.83), and AU-1 (115.93), based on changes to those standards that the Department made from the Commission versions that were studied in the Booz Allen Report. These eleven standards, after PP-3, PP-4, and PP-7, made up some of the largest cost drivers in the standards, either according to the Booz Allen Report or to comments received in response to the ANPRM.

In re-assessing these standards, Booz Allen conducted a detailed analysis of the cost drivers and variables for each of the fourteen Commission-recommended standards we identified. Those cost drivers and variables were standardized across the full spectrum of the 49 sites included in the Booz Allen Report. Booz Allen then (1) determined which cost drivers and variables were impacted by the Department's changes to the Commission's standards, (2) developed a set of assumptions to determine the degree to which they are impacted, and (3) developed metrics to determine a quantitative impact to the cost drivers and variables that could be applied consistently to each site. Based on this analysis, Booz Allen estimated that for the 49 sites included in the Booz Allen Report, the total cost associated with implementing the Department's proposed standards (as opposed to the Commission's version) would be \$11.7 million in startup costs and \$23.8 million in ongoing costs.

Next, the Department asked Booz Allen to extrapolate from the data derived from the 49 specific sites included in its Report into a nationwide estimate of the compliance cost of the Department's proposed standards. For the fourteen standards identified in the previous paragraph, we asked Booz Allen to conduct its extrapolation using the adjusted cost figures from its supplemental analysis; for the remaining standards, we asked Booz Allen to use the cost estimates set forth in the Booz Allen Report, either because the Department's changes to the Commission's proposed versions of those standards were not expected to affect their cost, or because those standards were assessed to have a minimal cost impact in any event. We asked Booz Allen to assess start-up costs as well as annual costs from 2012-2026. We also asked Booz Allen to subdivide its nationwide cost estimates, where possible, by facility type: prisons, jails, lockups, community

confinement facilities, and juvenile facilities. And we asked Booz Allen to compare the expected nationwide compliance costs of the Department's proposed standards to the expected nationwide compliance costs of the Commission's recommended standards.

Based upon the data it had gathered from the 49 sites in its Report, Booz Allen developed parameters to extrapolate across the entire nationwide population. Under this parametric approach, the calculations for total costs, associated standard errors, and 95% confidence limits rely on large sample statistical theory for a simple random sample. For prisons, juvenile facilities, and community confinement, the total cost is the product of the number of geographical regions (e.g., States) and the sample mean. For jails, the total cost is the product of the number of facilities and the sample mean. The sample size of lockups was too small for this approach.

This parametric approach has limitations in precision, most notably the small sample size relative to the total number of facilities for all facility-types except prisons. For example, with over 4,000 jails across the country and only 16 jails included in the study, the sample size is only 0.4% of the total population. This is compounded by the wide variation of costs for many standards among the facilities (i.e., standard deviation), exhibited in the Booz Allen Report. (The cost estimates for prisons have a much tighter range of costs, resulting from a larger sample size, which constituted 25% of the total prison inmate population.)

To minimize the variability and enhance the robustness of the extrapolation, Booz Allen applied a multivariate regression analysis using characteristics of the facilities gathered during the study such as number of facilities, staff counts, PREA compliance percentages, capacity, average daily population, whether the facility has been accredited by the American Correctional Association, cost of care per day, whether facility staff belong to a union, number of reported incidents of sexual abuse (2008 and 2009), and annual operating budget. The results were validated against data gathered during Booz Allen's study to determine an order of magnitude or level of reasonable confidence. The standard error of the total cost is a function of the standard error of the sample and an adjustment for the sampling fraction. The confidence limits are a function of the estimated total cost, the standard error, and a Student's t distribution quartile indexed for the sample size.

In order to validate the results from the previous approach, a second cost estimate was calculated for all facility types except community confinement based on the average costs per inmate. The average cost per inmate for each facility was found by dividing the total sample costs by the total sample average daily population. Extrapolating this value to the entire U.S. population was performed by multiplying this average cost across the total U.S. population for each facility type. The population figure was determined using figures from BJS. The parametric and cost-per-inmate calculations determined the cost range (low to high) for prisons, jails, and juvenile facilities, with the average of these two calculations serving as the medium estimate. Due to data limitations, for community confinement facilities, only the parametric calculation was used, whereas for lockups only the cost-per-inmate calculation was used.

Booz Allen’s supplemental cost analysis relies upon three assumptions given the limitations of the data from which the nationwide estimates and forecasts were extrapolated. The first assumption is that the data were a simple random sample of all correctional facilities of a given type. This assumption is potentially tenuous, since the collecting agents picked the facilities that they felt were representative, as opposed to at random. The second, more plausible, assumption is that the sample comes from a normal (bell curve) distribution. Finally, the cost-per-inmate approach assumes that the sample accurately represents the average costs per inmate for each facility.

Once the total startup costs were determined using the above procedures, they were assigned to the year 2012. Estimated annual costs were assigned to the year 2013. These ongoing costs were assumed for purposes of this analysis to remain constant in nominal terms from 2013 through 2026 – thus, no adjustment was made for inflation or for the possibility that costs will diminish over time due to new innovations. For present value purposes, alternative discount rates of 3% and 7% were applied to the out years, using the following equation:

$$C(x) = \frac{C(x-1)}{(1+d)^n}$$

where $C(x)$ is the cost for any year x , d is the discount rate (.03 or .07, as the case may be), and n is the n th year following 2013 (i.e., $n = x - 2013$).

We invite public comment as to whether the foregoing methodology yields the best estimate of the expected cost of compliance with the proposed standards or whether enhancements or refinements to this methodology are appropriate for purposes of assessing the benefit-cost justification of the proposed standards.

Standard-by-Standard Assessment. The Department has extrapolated the nationwide compliance costs associated with the proposed standards taken in the aggregate, as reflected in Table 6 above and Tables 13, 14A, and 14B below. The Department has also estimated the nationwide compliance costs for each of the most cost-intensive standards (or groups of related standards), which together account for a very high percentage of the total estimated costs associated with the standards. We have not, at this juncture, quantified the estimated nationwide compliance costs, on a per standard basis, for those standards judged not to have a major cost impact but have instead developed qualitative descriptions of the relative magnitude of the impact of those standards – classifying startup and ongoing costs for each as zero, negligible, minimal, modest, or moderate, as the case may be.

In the following discussion, we set forth our estimate of nationwide compliance costs associated with each of the proposed standards (or groups of related standards). We note Booz Allen’s conclusions regarding the costs of the Commission’s recommended standards for the 49 facilities studied in the Report; we analyze how the Department’s changes to the standard are likely

to have affected that impact; we offer a sense of the magnitude of the anticipated compliance cost in relation to the nationwide total; and we set forth the internal cost assessments of BOP and USMS with respect to the standard.

Sections 115.11, 115.111, 115.211, and 115.311 (compare to the Commission's PP-1 standard): This standard requires that agencies establish a written zero-tolerance policy toward sexual abuse and harassment and mandates that certain agencies employ or designate an agency-wide PREA coordinator to oversee efforts to comply with PREA standards. Its principal benefit derives from the change in institutional culture that a zero tolerance policy and PREA coordinator will likely engender and from prompting agencies to make prison rape prevention a priority in making decisions with regard to policy, personnel, and physical plant.

Cost of 115.11:

Startup MINIMAL

(~\$1M)

Ongoing MAJOR

(~\$99M)

The cost of this standard derives from the mandate that agencies operating facilities whose total rated capacity exceeds 1000 inmates hire an upper-level, agency-wide, full-time PREA compliance director to oversee efforts to comply with the PREA standards. Other agencies are directed either to hire a full-time PREA compliance manager or else to assign full-time or part-time PREA coordination duties to a designated existing employee. All facilities whose total rated capacity exceeds 1000 are also called upon to assign full-time or part-time PREA coordination duties at the facility level to a designated existing employee. These are significant changes from the Commission's recommendation to require all agencies, regardless of size, to hire a full-time PREA compliance manager.

BOP has estimated the cost of this standard to be approximately \$600,000 per year, comprising salary and benefits for one national coordinator at the GS-13 pay level plus two hours of staff time per week at each of BOP's 113 facilities. USMS estimates that it will cost approximately \$550,000 per year to comply, consisting of salary and benefits for one national coordinator at the GS-13 pay level, plus two hours of staff time per week in each of 94 districts.

As reflected in Table 7, and commensurate with the cost expectations of BOP and USMS, we expect the total cost of compliance with this standard to be approximately \$99 million annually, with upfront costs of less than \$1 million. Nationwide, an estimated 319 agencies are likely to need a full-time PREA compliance director (at an approximate cost of \$150,000 per year in salary and benefits): in addition to BOP and USMS (which is the one lockup agency in Table 7), this would include all 50 States' prison systems, approximately 11 state juvenile systems, and 256 jail jurisdictions.^{52/} We assume for cost estimation purposes that those agencies will assign PREA coordination responsibilities at the facility level to existing employees, who will spend an average of two hours per week (at an average \$38 per hour in salary and benefits) on PREA coordination

^{52/} See Bureau of Justice Statistics, *2005 Census of State and Federal Correctional Facilities*, *2006 Census of Jail Facilities*, and the *2008 Juvenile Residential Facility Census*.

responsibilities. We likewise assume that agencies that do not operate any facilities whose total rated capacity exceeds 1000 inmates will assign part-time PREA coordination responsibilities to existing employees, who again will spend an average of two hours per week per facility on those responsibilities. These cost estimates are very conservative given the likelihood that corresponding salary and benefit costs for State and local agencies are generally lower than the costs of a GS-13 employee based in Washington, DC.

Table 7
Estimated Annual Compliance Costs for Standard 115.11, .111, .211, .311
(Cost of PREA Coordinator Positions)

	No. Agency Directors	Salary and Benefits for Agency Directors	No. Facility Coordinators	Salary/Benefits for Facility Coordinators ^{53/}	Total
Prisons	51	\$7,650,000	1,668	\$6,591,936	\$14,241,936
Jails	256	\$38,400,000	3,365	\$13,298,480	\$51,698,480
Juvenile	11	\$1,650,000	2,810	\$11,105,120	\$12,755,120
Community Confinement	0	\$0	529	\$2,090,608	\$2,090,608
Lockups	1	\$150,000	4,563	\$18,032,976	\$18,182,976
Total	319	\$47,850,000	12,935	\$51,119,120	\$98,969,120

Sections 115.12, 115.112, 115.212, and 115.312 (compare to the Commission’s PP-2 standard): The cost of this standard derives from the expectation that, as some entities who operate confinement facilities under contract with agencies come into compliance with the PREA standards, they will pass the costs of that compliance onto the public agencies that hired them. The benefit of this standard derives from its assurance that the protections of PREA and of the standards reach inmates in facilities operated by private, corporate, and non-profit entities in addition to inmates in facilities operated by public authorities.

Booz Allen found that most agencies that contract with private and public facilities for the confinement of offenders already mandate that contract facilities follow the same policies and procedures as the jurisdiction places on its own facilities, oftentimes having regulations codified in

^{53/} Assumes an average of two hours of labor per week devoted to PREA coordination responsibilities, for 52 weeks, at a rate of \$38/hour. The rate for staff time is based on salary (\$70,794) and benefits (approximately \$35,400) for a GS-11 Step 5 federal employee in the Washington, DC area.

contracts. Some sites, however, have unique contracting agreements with private entities that prevent any additional or higher fees regardless of whether requirements and regulations change. Booz Allen estimated that the startup cost associated with the Commission's PP-2 was zero and that the ongoing cost was modest, given the high level of baseline compliance.

Cost of 115.12:

**Startup: NEGLIGIBLE,
Ongoing: MODERATE
(~\$67M)**

The Department's changes to the Commission's standards significantly decreased the compliance costs associated with this standard. The total cost of this standard is dependent upon all other PREA related costs (with the exception of the costs of the PREA compliance director and coordinators in standard 115.11). Since the Department's revisions to the Commission's recommended standards reduced the cost by more than 90%, the cost of this standard decreased proportionately.

BOP notes that the precise level of costs implicated by this standard will be determined by private corporations and will be subject to negotiations, making it difficult to derive estimates at this time. USMS estimates the annual compliance cost of this standard to be \$61,557, for an additional one hour per week of contract monitoring work on each of USMS's 15 contracts.

Booz Allen reports that the 49 jurisdictions that participated in its study would collectively have to spend approximately \$3.4 million per year to comply with this standard. Extrapolated to nationwide figures, this translates to approximately \$67 million in annual compliance costs, as reflected in Table 8. We invite comment as to whether there are other methods of estimating the extent to which contract renewals and renegotiations over the 15 year period will lead to costs for agencies that adopt the proposed standards.

Table 8
Estimated Annual Compliance Costs for Standard 115.12, .112, .212, .312
(Contractor Compliance) in Thousands of Dollars

	Jurisdictions in Booz Allen Study	Nationwide Extrapolation
Prisons	\$768	\$3,020
Jails	\$476	\$49,683
Juvenile	\$2,130	\$14,318
Community Confinement	\$36	\$300
Lockups	\$0	\$0
Total	\$3,410	\$67,321

Sections 115.13, 115.113, 115.213, and 115.313 (compare to the Commission’s PP-3 standard): The principal cost impact of the Commission’s recommended version of this standard derives from the requirement that each facility maintain “an adequate level of supervision and/or monitoring of inmates and staff to protect inmates from sexual abuse,” which for some facilities may

Cost of 115.13:

Startup: ZERO

Ongoing: NEGLIGIBLE

translate to a need to hire more staff as a means of preventing sexual abuse. A substantial majority of the systems and facilities studied in the Booz Allen Report identified no cost associated with this standard: 9 of the 13 prison systems, 13 out of the 16 jail jurisdictions, 5 out of 6 community corrections facilities, 8 of the 10 juvenile detention facilities, and all four of the lockups reported no cost associated with the requirement of adequate supervision.

However, a small number of facilities who reported a cost impact from the Commission’s recommended version of this standard justified their estimate on the premise that they were understaffed relative to levels commensurate with adequate supervision necessary to meet minimal constitutional staffing levels and best practices. These facilities exhibited significant variations in costs, largely due to varying interpretations regarding the level of staff that is considered adequate to prevent sexual abuse, combined with the characteristics (age and design) of the physical plant. Based on the reports of these facilities, Booz Allen estimated that the nationwide compliance cost of the Commission’s recommended PP-3 amounted to \$26.8 million in startup costs and \$1.823 billion dollars in annual ongoing costs.

The Department’s proposed standard reduces the costs of compliance by not mandating any particular level of staffing, and by not requiring the use of video monitoring. It calls upon agencies to conduct an annual assessment of their prevailing staffing patterns and deployment of video monitoring systems and other technologies to determine whether adjustments or other measures should be taken to eliminate rape and sexual abuse. Agencies are also called upon to determine what the adequate levels of staffing and video monitoring are for each facility, taking into account physical layout, composition of the inmate population, and other relevant factors. The benefits of the Department’s proposed standard derive from the requirement that agencies undertake a focused assessment of their staffing patterns and monitoring systems, with the prevention and detection of prison rape specifically in mind, so that deficiencies can be identified and corrective measures incorporated into the facilities’ development plans.

We anticipate that, consistent with the Booz Allen Report, the great majority of facilities nationwide will find no compliance costs associated with the standard as proposed, since most agencies assess their staffing and monitoring patterns as being adequate. Both BOP and USMS have determined that this standard will have minimal cost impact on them. Some agencies may, upon conducting the required assessments, decide to undertake additional measures with regard to the supervision and/or monitoring of inmates, in order to adequately protect them from sexual abuse. Some of these measures may involve implementation costs. However, because this standard only

requires assessments and does not mandate specific corrective measures, we do not attribute any such costs to this standard. Moreover, we have no way of anticipating the decisions that agencies would make in light of the findings of these assessments, or the cost of those decisions.

We invite public comment on the cost implications of this proposed standard as well as on alternative approaches to this standard.

Sections 115.14, 115.114, 115.214, and 115.314 (compare to the Commission's PP-4 standard): Booz Allen assessed the Commission's version of this standard as having the largest ongoing cost impact of all the recommended standards. The entire impact derived from the Commission's prohibition of all cross-gender pat-down searches, which a number of facilities interpreted as requiring them either to hire significant numbers of additional male staff or to lay off significant numbers of female staff, due to their overwhelmingly male inmate population and substantial percentage of female staff. In addition, many agencies expressed concern that the necessary adjustments to their workforce would expose them to liability for violating federal and/or state equal employment opportunity laws.

Cost of 115.14:

Startup: ZERO
Ongoing: MINIMAL

The Department's proposed standard does not prohibit cross-gender patdown searches in any setting except juvenile facilities, which tend to conduct pat-down searches less frequently. Indeed, many juvenile facilities already ban cross-gender pat-down searches absent exigent circumstances. In addition, under the Department's standard, adult prisons, jails, and community confinement facilities should not allow cross-gender pat-down searches of inmates who have previously suffered cross-gender sexual abuse while incarcerated. The benefit of this standard derives from the protection it provides to the privacy and dignity of inmates and from the reduction in opportunities for staff-on-inmate sexual abuse.

We believe that the standards as currently drafted will not necessitate the workforce realignment implicated by the Commission's PP-4, except in those few juvenile facilities where cross-gender pat-down searches are currently permitted. This should entirely eliminate the cost impact of this standard, except in juvenile facilities. BOP's and USMS's internal assessments do not expect a substantial compliance cost associated with this standard, which is largely consistent with current practice. We do not anticipate any cost (or anything more than a minimal cost) associated with the aspects of this standard other than those dealing with cross-gender pat-downs, although we invite public comment as to whether the limitations on cross-gender viewing might impose costs. In particular, we recognize that these limitations on cross-gender viewing might require some facilities to undertake retrofitting, or to construct privacy panels; we do not have data from which a cost estimate can be developed for such measures.

Sections 115.15, 115.115, 115.215, and 115.315 (compare to the Commission's PP-5 standard): The cost impact of this standard, as assessed by Booz Allen, is rather minimal and

primarily affects lockups, and to a lesser extent jails and community confinement facilities. The primary cost driver is the mandate to ensure that all inmates are able to communicate effectively and directly with staff, which in some cases may require costs associated with ensuring that sign-language and foreign language interpreters are available. The Department's standards somewhat

Cost of 115.15:

**Startup: NEGLIGIBLE
Ongoing: MINIMAL**

mitigate this cost by allowing inmates to interpret for other inmates in exigent circumstances – something the Commission's recommendation did not allow. Otherwise, the Booz Allen Report's assessment of the minimal cost of the Commission's PP-5 – for the 49 facilities in its study, startup costs collectively amounted to \$2,000, and on-going costs a mere \$47,000 annually – is an appropriate indicium of the nationwide cost of the Department's proposed standard. BOP reports no estimable cost

associated with this standard but noted that compliance may require additional contracts for interpretation services, which will vary by location, duration, and nature of services required. USMS was unable to estimate a cost associated with this standard, noting that it may require additional services and equipment that would vary by location and situation. The benefit of this standard primarily derives from ensuring that all inmates have the ability to communicate effectively and directly with staff.

Sections 115.16, 115.116, 115.216, and 115.316 (compare to the Commission's PP-6 standard): The primary compliance cost associated with the Commission's recommended PP-6 standard derived from the requirement of background checks on any employee being considered for promotion. Even so, the Booz Allen Report assessed a minimal cost from the Commission's proposal, with no impact on lockups: for the 49 facilities in the study, startup costs of \$4,000 and ongoing costs of \$284,000. The Department's proposed standard would reduce that burden even further: it would not mandate background checks on all employees up for promotion but instead would require agencies to conduct criminal background checks of all current employees at least every five years (as BOP currently does) or else have in place a system for otherwise capturing such information for current employees. The primary benefit of this standard comes from limiting the risk that employees of correctional and detention facilities may bring to the workplace a history of criminal behavior suggestive of a propensity to engage in sexual abuse.

Cost of 115.16:

**Startup: NEGLIGIBLE
Ongoing: MODEST
(~\$7.2M)**

Neither BOP nor USMS cite any cost in connection with this standard, noting that it is consistent with current practice.

One way to calculate the total cost of this standard is to multiply the total number of correctional employees in the nation by \$10, since the average background check costs \$50 (according to Booz Allen), and a check would only be required once every five years. Because the

latest available data show approximately 717,000 correctional employees nationwide,^{54/} the total cost of this standard could be estimated at approximately \$7.2 million annually.

Sections 115.17, 115.117, 115.217, and 115.317 (compare to the Commission's PP-7 standard): The Booz Allen Report assessed the Commission's PP-7 as accounting for 96% of all up-

Cost of 115.17:

Startup: ZERO
Ongoing: ZERO

front costs associated with implementation of the recommended standards, largely due to the requirement for agencies to utilize video monitoring systems and other technology to eliminate sexual abuse. This requirement would engender significant investment costs associated with procuring and installing monitoring technology; there would also be costs in the out years associated with maintaining such systems.

The Department has eliminated the requirement of using video monitoring systems, replacing it with a new standard requiring agencies to take into account how best to combat sexual abuse when designing or expanding facilities and when installing or updating video monitoring system or other technology.^{55/} The benefits of the Department's proposed standard derive from the requirement that agencies undertake a focused assessment of their video monitoring technology when designing or expanding facilities, with the prevention and detection of prison rape specifically in mind, so that deficiencies can be identified and corrective measures incorporated into the facilities' plans.

The Department believes that most agencies already consider the effects of design, acquisition, expansion, and upgrading of technological systems on their ability to protect inmates from all destabilizing activities, including sexual abuse, and already consider how technology may enhance their abilities to protect inmates from these same activities. The additional marginal cost of such consideration for agencies that do not currently do so is expected to be negligible. Thus, all up-front and ongoing costs associated with the Commission's recommended PP-7 have been eliminated.^{56/}

^{54/} The number of employees is based on the *2005 Census of State and Federal Correctional Facilities*, *2006 Census of Jail Facilities*, and the Council of Juvenile Correctional Administrators' *Yearbook, 2010*. Staff in state juvenile facilities were limited to direct care staff. A total count was estimated to account for employees in 6 participating states that did not provide staff counts; the number of employees in 2 states (IA and VT) could not be estimated. Otherwise, federal, state and local staff counts include full-time, part-time, payroll, non-payroll, and contract staff. Community volunteers were excluded.

^{55/} Standards 115.13, .113, .213, and .313 also require facilities to annually assess, and determine whether adjustments are needed to, its deployment of video monitoring systems and other technologies.

^{56/} BOP and USMS identify no cost associated with this standard, observing that the cost of an assessment is minimal.

Some agencies may, upon conducting the required assessments, decide to undertake additional measures with regard to installation or upgrading of video monitoring technology, in order to adequately protect inmates from sexual abuse. Some of these measures may involve implementation costs. However, because this standard only requires assessments and does not mandate specific corrective measures, we do not attribute any such costs to this standard. Moreover, we have no way of anticipating the decisions that agencies would make in light of the findings of these assessments.

Sections 115.21-23, 115.121-123, 115.221-223, 115.321-323 (compare to the Commission's RP-1, RP-2, RP-3 standards): The primary cost driver behind the Commission's RP-1 standard is the requirement for agencies to make available a victim advocate during the medical examination process following a prison rape or sexual assault – which could have a cost associated with hiring a new employee or developing and maintaining a Memorandum of Understanding. Booz Allen assessed this recommended standard as having a relatively minimal cost impact, observing that the majority of prisons and jails already provide a victim advocate through arrangements with local hospital Sexual Assault Nurse Examiner (SANE) programs. It noted, however, that there are some sites and scenarios that suggest this standard could have a sporadic impact across the country. Among the 49 facilities that participated in its cost study, costs associated with the Commission's RP-1 standard were estimated to amount to \$25,000 in startup costs and \$1.4 million in annual ongoing costs.

Cost of 115.21-.23:

**Startup: NEGLIGIBLE
Ongoing: MINIMAL**

In revising this standard from the Commission's version, the Department has made the minimal cost impact identified by Booz Allen even smaller by specifying that the victim advocate can either be "a qualified staff member" or "a victim advocate from a community-based organization that provides services to sexual abuse victims."^{57/} Qualified staff member is defined as a facility employee who has received education concerning sexual assault and forensic examination issues in general. The Department's revision of the Commission's standard is intended to clarify that an existing employee with appropriate education can fulfill this role, thus reducing the burden on the facility while ensuring support for the victim.

For facilities that elect to train and then rely on their own staff to provide victim advocate services, the Department estimates that providing specialized training to "qualified staff members" will require approximately eight hours of staff time at each facility where the training is conducted, plus approximately forty staff hours to develop the training. On the basis of these assumptions, BOP estimates that it will cost it \$35,872 to implement 115.21 at each of its 113 facilities, with no annual cost in the out years. USMS assigns no cost to 115.121; since the Marshals do not hold primary

^{57/} The Department also eliminated the requirement of a victim advocate altogether in lockup settings.

jurisdiction for the investigation of prisoners in custody, they do not foresee needing to provide training to their personnel in evidence protocol. USMS already pays for prisoner medical examinations.

Booz Allen combined the Commission's RP-2, RP-3, and RP-4 for purposes of assessing the cost, and determined that the total cost of those standards on the facilities and systems it studied is minimal. Among the 49 entities that participated in Booz Allen's cost study, the compliance costs associated with those three recommended standards would total \$75,000 in startup expenses and \$2.1 million in annual ongoing costs. The primary cost driver for the Commission's recommended standards is the need for jurisdictions to establish Memorandums of Understanding with outside service providers to provide inmates with confidential emotional support services related to sexual abuse and to help victims of sexual abuse during their transition from incarceration to the community.

The Department proposes to scale back the scope of services that a community service organization would provide, deleting from standard 115.22/222/322 the requirement that the provider "help victims of sexual abuse during their transition from incarceration to the community." This reduces any cost associated with this standard. BOP estimates no costs in connection with standard 115.22. The Department has also deleted the Commission's RP-2 insofar as it relates to lockups.

The Department proposes to eliminate the Commission's RP-3 and RP-4 standards, which would require agencies to enter into Memorandums of Understanding with outside investigative agencies and with prosecutorial agencies. Booz Allen did not identify any significant costs associated with either of those standards,^{58/} although a number of agency commenters expressed concern that these requirements would impose a burden, especially in State systems where investigations and prosecutions are conducted by numerous different agencies at the county or municipal level.

The Department's proposed new standard 115.23/123/223/323 mandates that each agency must have in place policies to ensure that allegations of sexual abuse or sexual harassment are investigated by an agency with the legal authority to conduct criminal investigations. The policy must be published on the agency's website, and, if a separate entity is responsible for investigating criminal investigations, the website must delineate the responsibilities of the agency and the investigating entity. The Department is not aware of any cost associated with this standard, although it is conceivable that some agencies could incur costs associated with developing such a policy; moreover, some agencies may incur costs due to the increased number of investigations that could result from designating an investigative entity. BOP and USMS report that the standard is consistent with their existing policy and therefore would not impose any additional costs.

^{58/} Among the 49 jurisdictions that participated in Booz Allen's cost study, total costs associated with the Commission's proposed RP3 and RP4 were \$42,000 in startup costs and \$508,000 in ongoing annual costs.

Sections 115.31-35, 115.131-135, 115.231-235, 115.331-335 (compare to the Commission's TR standards): Booz Allen combined the Commission's training standards (TR-1 through TR-5) for purposes of assessing their associated implementation costs, and determined that the total cost on the facilities and systems it studied is moderate to major. Most of the agencies it studied had additional work to do to comply with this standard, and 80% of them reported costs associated with them. Among the 49 agencies, the total cost associated with the five training standards amounts to approximately \$7 million in startup expenses and \$4.8 million in annual ongoing expenses. The primary cost drivers derive from the requirement that agencies train all employees (including non-sworn officers and administrative assistants), train all contractors and volunteers, provide education to inmates and offenders, and ensure specialized training is provided to investigators and the medical and mental health care staff.

Cost of 115.31-.35:

**Startup: MAJOR
(~\$166M)**

**Ongoing: MAJOR
(~\$93.7M)**

The Department's proposed standards in this group are substantively similar to the corresponding standards recommended by the Commission,^{59/} with the addition that each standard requires documentation that the required training was provided – and, for staff training, that the training was understood. In order to facilitate compliance, the Department has revised the Commission's recommendations to allow electronic documentation in addition to written documentation.

BOP anticipates complying with standards 115.31, .32, and .33 by using existing training sessions, available lesson plans, inmate handbooks, inmate training, and unit team meetings. Thus, BOP does not anticipate any additional costs in connection with these standards. BOP estimates that implementation of the other two training standards will involve a one-time cost of \$70,892 and then an annual cost of \$34,352. With regard to standard 115.34 (involving specialized training for investigators), it will cost \$5,000 to pay for an outside consultant to provide specialized training, and eight hours of staff time to attend the training, for one staff member per institution, amounting to an annual expense of \$39,352. With regard to standard 115.35 (involving specialized medical training), BOP estimates eighty hours of staff time to develop the training plus three hours to attend the training for approximately 250 staff, amounting to a one-time expense of \$31,540.

^{59/} The Department did make one substantive change to the training standards recommended by the Commission, to wit, to include training for staff on "how to communicate effectively and professionally with residents, including lesbian, gay, bisexual, transgender or intersex residents" for all facility types other than lockups. See Standard 115.31, 115.231, 115.331. It is not known at this juncture whether or not this change will lead to additional costs for correctional facilities in comparison to the training costs reported by the facilities that participated in the Booz Allen study. We invite public comment on this question.

USMS estimates an annual cost of \$400,000 plus a startup cost of \$2,000 to implement standard 115.131 – which would involve 5,000 USMS operational personnel and other employees receiving a two-hour on-line training session. Forty hours of startup work would be required to create the training module; an additional fee would be required if a private contractor were used. Another \$5000 startup cost and \$3000 per year would be needed for 115.132, which requires notification posters and periodic replacement and update of materials.

As reflected in Table 9 below, the total nationwide implementation cost of the five training standards, extrapolated from the cost estimates provided by the 49 agencies that participated in Booz Allen’s cost study, amounts to \$166 million in startup costs and \$93.7 million in ongoing annual costs. The Department intends to assist agencies across the country in mitigating the costs associated with the training standards by making models, modules, and other resources available through the PREA Resource Center and other support mechanisms.

Table 9
Estimated Annual Compliance Costs for Standards
115.31-.35, .131-.135, .231-.235, .331-.335 (Training)
in Thousands of Dollars

	Jurisdictions in Booz Allen Study		Nationwide Extrapolation	
	Startup	Ongoing	Startup	Ongoing
Prisons	\$5,286	\$544	\$20,784	\$2,138
Jails	\$938	\$527	\$97,833	\$54,908
Juvenile	\$631	\$3,597	\$4,244	\$24,176
Community Confinement	\$205	\$148	\$1,940	\$1,270
Lockups	\$7	\$20	\$41,561	\$11,173
Total	\$7,067	\$4,836	\$166,362	\$93,665

Sections 115.41-43, 115.241-242, 115.341-342 (compare to the Commission’s SC standards and AP standards for juveniles): Booz Allen combined the Commission’s recommended screening standards (SC-1 and SC-2, called “Assessment and Placement” (AP-1 and AP-2) for juvenile facilities) for purposes of assessing their cost impact, and determined that the total impact on the facilities and systems it studied is moderate. Most sites in the Booz Allen Report currently utilize a formal screening process, but the majority felt that they would need to update their screening instruments to include PREA-related questions, mostly because they fell short of meeting all the PREA criteria or were not gender-specific. Each site was at a different degree of compliance, some requiring modest modifications with little or no costs and some requiring significant modifications depending on the state of their

Cost of 115.41-.43:

Startup: MODERATE
(~\$33M)

Ongoing: MODERATE
(~\$55M)

classification process and the gap between that and the PREA standards. Thus, the principal cost drivers relate to modifications of existing screening tools and implementation of procedures where they do not already exist. The 49 agencies that participated in Booz Allen's cost study reported collective startup costs of \$3.5 million and ongoing annual costs of \$3.8 million.

The Department's changes to the Commission's recommended screening standards should somewhat reduce the cost of those standards. First, the Department's standard does not apply to lockups. Second, although the Commission would require use of a written instrument in the classification process, the Department has not adopted this requirement in order to allow for electronic evaluations; this may serve to reduce costs in some instances. Third, several agency commenters expressed concern about the cost and burden of conducting detailed screening upon an inmate's entrance into a facility. By clarifying that the detailed initial classification need only be conducted within 30 days of confinement, the Department intends to allow agencies with rapid turnover to avoid conducting a full classification, while still ensuring that an inmate is screened appropriately upon intake. This added flexibility may reduce costs in many instances.

Fourth, to the extent there was a cost associated with the protective custody provisions of the Commission's SC-2 (no such impact was reported by Booz Allen), those provisions now only apply to prisons and jails (in 115.43) and not to any other setting. Fifth, the increased clarity and specificity of this standard compared to the Commission's version may also serve to reduce costs.

As reflected in table 10 below, the total nationwide implementation cost of the screening (or assessment and placement) standards, extrapolated from the cost estimates provided by the 49 agencies that participated in Booz Allen's cost study, amounts to \$33 million in startup costs and \$55 million in ongoing annual costs.^{60/}

BOP estimates its costs of complying with standard 115.41 as an initial cost of \$4560 to develop and disseminate a new screening instrument, which it estimates will take approximately 120 hours of staff time. If negotiation with the union proves necessary, additional staff time may be required. Standards 115.42 and .43 would not impose additional costs on BOP, as they are consistent with existing BOP policy.

^{60/} In its comments in response to the ANPRM, ASCA reported standard SC2 as having the biggest cost after PP3, PP4, and PP7, estimating a total startup cost for that single standard across the 50 states of \$103.2 million, with annual costs of \$19.4 million in the out years; ASCA did not provide an explanation of the basis of its calculations. *See supra* note 3.

Table 10
Estimated Annual Compliance Costs for Standards
115.41-.43, .241-.242, .341-.342 (Screening/Assessment and Placement)
in Thousands of Dollars

	Jurisdictions in Booz Allen Study		Nationwide Extrapolation	
	Startup	Ongoing	Startup	Ongoing
Prisons	\$518	\$1,906	\$2,036	\$7,493
Jails	\$118	\$356	\$12,275	\$37,106
Juvenile	\$2,760	\$1,584	\$18,550	\$10,646
Community Confinement	\$64	\$0	\$550	\$0
Total	\$3,460	\$3,846	\$33,411	\$55,245

Sections 115.51-54, 115.151-154, 115.251-254, 115.351-354 (compare to the Commission’s RE standards): The Booz Allen Report found a minimal cost to the Commission’s recommended standards relating to reporting. Standards RE-1 and RE-4 were determined to have “negligible to non-existent” cost – these two standards have not materially changed in the Department’s iterations, where they have become 115.51/151/251/351 and 115.54/154/254/354, respectively. BOP reports that neither proposed standard would impose additional costs on it. USMS estimates an annual cost of \$5000 to print posters and brochures in compliance with 115.151.

Cost of 115.51-.54:

Startup: MINIMAL
Ongoing: MINIMAL

The Commission’s recommended RE-2 standard, dealing with exhaustion of administrative remedies, has been completely rewritten in its current form at 115.52/252/352. The Booz Allen Report found the Commission’s recommendation to have a “negligible” cost and observed that where agencies were noncompliant with the Commission’s recommended standard, quantifying a cost as a result of changing the agency’s grievance policy was indeterminate or speculative at best. One agency did express a cost impact (\$6,000 startup and \$105,000 ongoing) associated with an increased level of effort required by a change in policy restricting investigations to 90 days, which the agency construed as requiring the hiring of an additional grievance officer to help meet a shortened deadline. The Department’s proposed standards ameliorate any cost impact of this sort by allowing an agency to claim an extension of time to respond, up to 70 days, if the normal 90-day time period for response is insufficient to make an appropriate decision.

Costs associated with conflicts between the standards and the Prison Litigation Reform Act, and with an inmate’s ability (under the Commission’s proposal) to exhaust administrative remedies

within 48 hours, have also been eliminated in the Department's proposed standard. We therefore assess the exhaustion of administrative remedies standards as having minimal compliance cost. BOP estimates that its systemwide costs associated with 115.52 will amount to a mere \$23,940 per year. This includes one hour of staff time, on an estimated 150 cases per year, to process and document third party notifications, and 24 hours of staff time, on an estimated 20 cases per year, to prepare for and attend court proceedings on "imminent harm" matters. BOP notes that the impact of the standard on litigation is unknown and may lead to additional costs. Because the Department's proposed standard includes significant revisions to the Commission's recommendation, we invite public comment as to whether there might be additional costs associated with this standard that we have not included.

The Booz Allen Report grouped the Commission's RE-3 standard together with standards RP-2 through RP-4, which, as noted above, it found to have a minimal cost impact. (The 49 agencies that participated in the Booz Allen study collectively reported \$98,000 in startup costs and zero ongoing costs in connection with RE-3.) As with standards RP-2 through RP-4, the Commission's RE-3 standard related to establishing Memorandums of Understanding with outside service providers – in this case, to outside victim advocates for emotional support services related to sexual abuse. The Department has not materially changed this standard from what the Commission recommended, aside from changing the requirement that communications be "private, confidential, and privileged, to the extent allowable by Federal, State, and local law" to a requirement that such communications be "as confidential as possible consistent with agency security needs." The Department believes that standard 115.53/253/353 will, like the RE-3 standard that Booz Allen assessed, have minimal cost impact on the correctional community.

Sections 115.61-67, 115.161-165, 115.261-265, 115.361-366 (compare to the Commission's OR standards): The Booz Allen Report found that four of the Commission's recommended standards relating to official response following an inmate report – to wit, OR-1, OR-2, OR-3, and OR-4 – would have negligible to non-existent cost. The Department's revisions to these recommended standards (which now appear at 115.61/161/261/361, 115.62/162/262/362, 115.63/163/263/363, and 115.64/164/264/364, respectively) do not change or add to the cost of these standards. Neither BOP nor USMS have identified any estimated costs associated with any of these proposed standards.

The Booz Allen Report found minimal cost to the Commission's recommended OR-5 standard. One prison system reported an expected up-front cost of \$500,000; the remaining 48 sites Booz Allen surveyed reported no costs. The proposed standard requires agencies to adopt policies that help ensure prisoners who do report incidents of sexual abuse are properly monitored and protected afterwards, including but not limited to providing information in training sessions, enforcing strict reporting policies, imposing strong disciplinary sanctions for retaliation, making housing changes or transfers for inmate victims or abusers, removing alleged staff or inmate

Cost of 115.61-.67:

**Startup: MINIMAL
Ongoing: NEGLIGIBLE**

abusers from contact with victims, and providing emotional support services for inmates or staff who fear retaliation. The one system that reported a cost for this standard attributed it to the need to develop a system to permit central office monitoring of inmate victims and witnesses. In drafting standard 115.65/165/265/365, the Department has not changed the Commission's recommended OR-5 in a way that would likely mitigate or affect this cost.^{61/} BOP estimates that its costs associated with implementation of standard 115.65 amount to \$11,400 per year, consisting of one hour of staff time, in 300 cases per year, to assess whether retaliation has occurred and to take appropriate action. USMS estimates no cost in connection with 115.165.

Sections 115.71-73, 115.171-172, 115.271-273, 115.371-373 (compare to the Commission's IN standards): The Booz Allen Report found that the Commission's recommended standards relating to investigation of reported abuse incidents would impose a minimal cost on agencies. Standard IN-2, which dealt with criminal and administrative agency investigations, was determined to have negligible to non-existent impact. The Department's version of this standard, 115.71/171/271/371, is similar in sum and substance to the Commission's version and like that version is expected to have a negligible cost.

Cost of 115.71-.73:

**Startup: MINIMAL
Ongoing: MODEST**

The Booz Allen Report grouped the Commission's recommended IN-1 and IN-3 standards together for purposes of assessing cost and found that the combined cost associated with those standards was minimal. Only six sites out of the 49 surveyed reported costs (\$19,000 in startup and \$1.3 million in annual ongoing). Those costs related either to the need for additional staff to conduct more frequent investigations (which were expected to increase in volume as a result of more reports being brought to the attention of prison authorities), or to the need to ensure that investigations are conducted properly and thoroughly. Ninety-six percent of the sites surveyed in the Booz Allen Report were already in compliance with IN-3 (which relates to the burden of proof for substantiation of abuse allegations), while only 41% were in compliance with IN-1.

The Department proposes to revise these standards. The Commission's IN-3 standard has been modified and is now the proposed 115.72/172/272/372; the changes the Department made should not affect the cost of the standard. The Commission's IN-1 standard has been deleted, and its provisions relating to notification to inmates have been incorporated into standard 115.73/273/373. The cost of this proposed standard should be no greater than, and will probably be less than, what Booz Allen assessed to be the cost of the Commission's IN-1 standard. BOP estimates that this standard will cost it \$5,700 per year to implement nationwide, consisting of 30

^{61/} The Department has modified sections 115.65, 115.265, and 115.365 to require agencies to continue past the initial 90-day period their monitoring of residents or staff who report sexual or who cooperate with an investigation, if the initial monitoring indicates a continuing need for monitoring or for protection against retaliation. We do not view this requirement as being likely to impose additional costs on agencies that comply with it.

minutes of staff time per allegation, for 300 allegations per year, to notify inmates of the outcome of investigations. USMS reports no estimated cost associated with this standard.

Sections 115.76-77, 115.176-177, 115.276-277, 115.376-377 (compare to the Commission's DI standards): The Booz Allen Report found the Commission's recommended standards concerning disciplinary sanctions for staff and inmates to have negligible to non-existent cost. The Department has modified the Commission's recommended standards in various ways but does not believe these changes introduce any cost that was not present in the Commission's proposals. BOP and USMS estimate no additional costs associated with this standard, which are consistent with current practice.

Cost of 115.76-.77:

Startup: NEGLIGIBLE
Ongoing: NEGLIGIBLE

Sections 115.81-83, 115.182, 115.282-283, 115.381-383 (compare to the Commission's MM standards). The Booz Allen Report assessed the first two of the Commission's recommended standards relating to medical and mental health care (MM-1 and MM-2) as having negligible to non-existent cost. The Department's changes to these two standards – as now set forth in 115.81/381 and 115.82/182/282/382 – if anything somewhat reduce the burden of the Commission's recommended standards (especially for jails) and therefore do not change the already negligible cost of those standards.

Cost of 115.81-.83:

Startup: MINIMAL
(~\$800K)
Ongoing: MAJOR
(~\$150M)

The Booz Allen Report assessed the Commission's MM-3 (which relates to ongoing mental health care for sexual abuse victims and abusers) as having a much more substantial compliance cost – in fact the highest of all standards after the major ones of PP-3, PP-4, and PP-7. The 49 agencies that participated in Booz Allen's cost study reported collective compliance costs associated with the Commission's recommended MM-3 of \$8,000 in startup costs and \$5.4 million in annual ongoing costs. The primary cost driver associated with

this standard is the requirement of providing ongoing care and mental health care particularly as it relates to care for all known sex abusers.

The Department's proposed standard, sections 115.83/283/383, is substantially similar to the Commission's recommendation, insofar as it requires that victims of sexual abuse receive access to ongoing medical and mental health care, and that abusers receive access to care as well. This standard requires facilities to offer ongoing medical and mental health care consistent with the community level of care for as long as such care is needed, and also requires that known inmate abusers receive a mental health evaluation within 60 days of learning the abuse has occurred. The Department does not believe that its changes to the Commission's version of this standard substantially affect the cost determined by Booz Allen. As depicted in Table 11, the estimated nationwide compliance costs associated with this standard, as extrapolated from the costs reported

by the 49 agencies involved in the Booz Allen study, amount to \$803,000 in startup costs and \$150 million in annual ongoing costs.

BOP estimates that it would need to spend \$1,816,272 per year to implement this standard systemwide by dedicating two additional GS-13 staff per region (12 in total) to provide ongoing counseling sessions to inmates beyond what is currently provided.

Table 11
Estimated Annual Compliance Costs for Standard 115.83, .283, .383
(Mental Health Care)
in Thousands of Dollars

	Jurisdictions in Booz Allen Study		Nationwide Extrapolation	
	Startup	Ongoing	Startup	Ongoing
Prisons	\$0	\$3,293	\$0	\$12,947
Jails	\$8	\$1,265	\$803	\$131,936
Juvenile	\$0	\$809	\$0	\$5,434
Community Confinement	\$0	\$0	\$0	\$0
Lockups	\$0	\$0	\$0	\$0
Total	\$8	\$5,367	\$803	\$150,317

Sections 115.86-89, 115.186-189, 115.286-289, 115.386-389 (compare to the Commission's DC standards): The Booz Allen Report treated the four Commission standards relating to data collection and review as a group. It found that DC-4 (which deals with data storage, publication, and destruction) had a negligible to non-existent cost. We assume that the Department's substantially similar version, at 115.89/189/289/389, likewise has a negligible cost. However, USMS intends to build a database that will track, store, and create reports, for an upfront cost of \$300,000.

The Booz Allen Report found that standards DC-1 through DC-3 collectively have "some of the highest compliance rates and lowest overall cost impact" of all the Commission's recommended standards. Of the sites which were not already in compliance with these recommended standards, the primary cost drivers are the manpower and database automation/integration expenses associated with gathering, reviewing, and reporting sexual abuse data. The agencies which participated in the Booz Allen study collectively reported costs associated with these standards of \$371,000 in startup costs and \$374,000 in ongoing costs.

Cost of 115.86-.89:

Startup: MODEST
Ongoing: MODEST

The Department made numerous clarifying changes to the Commission’s proposals but did not change their substance, and the Department’s revisions are therefore unlikely to affect the cost of this standard as assessed in the Booz Allen Report. BOP reports that standard 115.86 will require \$456,000 per year to implement, based upon reviewing an anticipated 300 allegations per year, at 40 staff hours per review. BOP also estimates a required cost of \$151,000 per year to fund a GS-11 data analyst position for the collection of data in accordance with standard 115.87. As for standard 115.88, BOP estimates a compliance cost of \$9,120 per year for 240 hours of staff time.

USMS projects an annual cost of \$16,000 to comply with standard 115.186, based on the time to conduct a review with upper management of an estimated ten incidents per year. For 115.187, the Marshals anticipate a cost of \$75,000 per year for a GS-11 part-time analyst position for the collection of data. For 115.188, USMS estimates \$10,000 per year for the additional personnel required to review and submit reports for corrective action.

Sections 115.93, 115.193, 115.293, and 115.393 (compare to the Commission’s AU-1 standard): The Commission’s recommended audit standard (AU-1) requires agencies to audit each of their facilities, including contract facilities, at least once every three years. The Booz Allen Report determined that on average, audits would cost \$32,000 for prisons, \$25,000 for jails, \$17,000 for juvenile facilities and community confinement facilities, and \$9,000 for lockups. The cost to audit every facility once every three years would equal approximately \$77.5 million per year.

Cost of 115.93:

Startup: UNKNOWN
Ongoing: UNKNOWN

The Department’s proposed standard does not specify any particular frequency of audits and only addresses the independence and certification of auditors, as well as the requirements that agencies give auditors full access and publish the audit reports on their websites. As discussed in the NPRM, the Department believes that further discussion is necessary in order to determine how frequently, and on what basis, such audits should be conducted. Accordingly, the proposed standard does not specify the frequency or breadth of audits – these will be addressed in the final Rule. At this time, it would be premature to assign any cost to this standard. However, because the Department is seeking comments on whether audits should be conducted at regular intervals, the Department invites the public to comment on the cost per facility per audit and provide the basis for those costs.

* * *

Conclusions as to Compliance Costs. The following tables, together with Table 6 above, depict in summary fashion, from a number of perspectives, the estimated nationwide compliance costs associated with the Department’s proposed standards.

Below, Table 12 lists all of the proposed standards by regulation number (with a cross-reference to the corresponding Commission designation) and describes the relative magnitude of the

estimated startup and ongoing costs associated with implementation of that proposed standard. Where applicable, each standard lists the associated costs reported by the 49 agencies that participated in the Booz Allen study and by BOP and USMS. Where an extrapolated nationwide cost estimate is available for a particular standard in dollar-figure terms, that figure is reflected in the Table, drawn from Tables 7 through 11 above. The verbal descriptions of the relative magnitude of the cost estimates use the following hierarchy:

zero < negligible < minimal < modest < moderate < major.

Table 13, on page 58, then depicts the expected upfront and ongoing compliance costs associated with the Department's proposed standards on a per facility and per inmate basis for the different facility types.

Tables 14A and 14B, on page 59, project the total compliance costs of the proposed standards over the 15-year period from 2012-2026, showing aggregate nationwide costs per year per facility type, and calculated alternatively using a 3% and 7% discount rate.

Table 12
Summary of Compliance Costs for Proposed PREA Standards
(all dollar figures in Thousands – blank entries are unknown at this time)

Standard – Reg. Nos.	NPREC Designation	Estimated Startup Costs					Estimated Ongoing Costs				
		Relative Magnitude	49 Booz Allen Agencies	BOP	Marshals	Nationwide Estimate	Relative Magnitude	49 Booz Allen Agencies	BOP	Marshals	Nationwide Estimate
115.11 etc.	PP-1	Minimal		\$0	\$0	<\$1,000	Major		\$600	\$550	\$99,000
115.12 etc.	PP-2	Negligible			\$62		Moderate	\$3,410		\$62	\$67,321
115.13 etc.	PP-3	Zero	\$0	\$0	\$0	\$0	Negligible		\$0	\$0	
115.14 etc.	PP-4	Zero	\$0	\$0	\$0	\$0	Minimal		\$0	\$0	
115.15 etc.	PP-5	Negligible	\$2	\$0			Minimal	\$47	\$0	\$0	
115.16 etc.	PP-6	Negligible	\$4	\$0	\$0		Modest	\$284	\$0	\$0	\$7,200
115.17 etc.	PP-7	Zero	\$0	\$0	\$0	\$0	Zero	\$0	\$0	\$0	\$0
115.21 etc.	RP-1	Negligible	\$25	\$36	\$0		Minimal	\$1,400	\$0	\$0	
115.22 etc.	RP-2	Negligible	\$75	\$0	\$0		Minimal	\$2,100	\$0	\$0	
115.23 etc.		Zero				\$0	Zero				
115.31 etc.	TR-1	Major	\$7,000	\$0	\$2	\$166,000	Major	\$4,800	\$0	\$400	\$93,665
115.32 etc.	TR-2				\$5					\$3	
115.33 etc.	TR-3				\$0					\$34	
115.34 etc.	TR-4										
115.35 etc.	TR-5										

Table 12 (continued)

Standard – Reg. Nos.	NPREC Designation	Estimated Startup Costs					Estimated Ongoing Costs				
		Relative Magnitude	49 Booz Allen Agencies	BOP	Marshals	Nationwide Estimate	Relative Magnitude	49 Booz Allen Agencies	BOP	Marshals	Nationwide Estimate
115.41 etc.	SC-1/AP-1	Moderate	\$3,500	\$5	\$0	\$33,411	Moderate	\$3,800	\$0	\$0	\$55,245
115.42 etc.	SC-2/AP-2										
115.43 etc.											
115.51 etc.	RE-1	Negligible	\$0	\$0	\$5		Zero	\$0	\$0	\$0	
115.52 etc.	RE-2	Negligible	\$6	\$0	\$0		Minimal	\$105	\$24	\$0	
115.53 etc.	RE-3	Minimal	\$98	\$0	\$0		Zero	\$0	\$0	\$0	
115.54 etc.	RE-4	Zero	\$0	\$0	\$0		Zero	\$0	\$0	\$0	
115.61 etc.	OR-1	Zero	\$0	\$0	\$0		Zero	\$0	\$0	\$0	
115.62 etc.	OR-2										
115.63 etc.	OR-3										
115.64 etc.	OR-4										
115.65 etc.	OR-5	Minimal	\$500	\$11	\$0		Negligible	\$0	\$11	\$0	
115.66 etc.											
115.67											
115.71 etc.	IN-2	Negligible	\$0	\$0	\$0		Negligible	\$0	\$0	\$0	
115.72 etc.	IN-3	Minimal	\$19	\$0	\$0		Modest	\$130	\$0	\$0	
115.73 etc.	IN-1			\$6	\$0				\$0	\$0	

Table 12 (continued)

Standard – Reg. Nos.	NPREC Designation	Estimated Startup Costs					Estimated Ongoing Costs				
		Relative Magnitude	49 Booz Allen Agencies	BOP	Marshals	Nationwide Estimate	Relative Magnitude	49 Booz Allen Agencies	BOP	Marshals	Nationwide Estimate
115.76 etc.	DI-1	Negligible	\$0	\$0	\$0		Negligible	\$0	\$0	\$0	
115.77 etc.	DI-2										
115.81 etc.	MM-1	Negligible	\$0	\$0	\$0		Negligible	\$0	\$0	\$0	
115.82 etc.	MM-2										
115.83 etc.	MM-3	Minimal	\$8	\$1,816	\$0	\$803	Major	\$5,400	\$1,816	\$0	\$150,317
115.86 etc.	DC-1	Modest	\$371	\$456	\$16		Modest	\$374	\$456	\$16	
115.87 etc.	DC-2			\$151	\$75				\$151	\$75	
115.88 etc.	DC-3			\$9	\$10				\$9	\$10	
115.89 etc.	DC-4	Negligible	\$0	\$0	\$300		Negligible	\$0	\$0	\$0	
115.93 etc.	AU-1	Unknown					Unknown				

Table 13
Expected Upfront and Ongoing Compliance Costs, Nationwide,
Per Facility and Per Inmate

	Upfront	Ongoing
Prisons, per Facility	\$15,770	\$33,817
Prisons, Per Inmate	\$16.48	\$35.35
Jails, Per Facility	\$34,990	\$105,978
Jails, Per Inmate	\$96.00	\$292.00
Juvenile, per Facility	\$8,572	\$27,935
Juvenile, per Resident	\$227.00	\$741.00
Comm. Conf., per Person	\$5.36	\$42.12
Lockups, per Facility	\$9,843	\$11,086

Table 14A
Expected Compliance Cost Projection, Nationwide,
Per Facility Type, Per Year, 2012-2026, in Thousands of Present Value Dollars,
Calculated Using a 3% Discount Rate

YEAR	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	TOTAL
Prisons	26,304	56,407	51,621	45,864	39,563	34,127	29,439	25,394	21,905	18,896	16,299	14,060	12,128	10,462	9,025	411,494
Jails	117,742	356,618	356,618	316,850	273,318	235,766	203,374	175,432	151,329	130,538	112,603	97,133	83,787	72,276	62,346	2, 745,729
Juvenile	24,087	78,497	78,497	69,743	60,161	51,896	44,766	38,615	33,310	28,733	24,786	21,380	18,443	15,909	13,723	602,546
Comm. Conf.	300	2,358	2,358	2,095	1,808	1,559	1,345	1,160	1,001	863	745	642	554	478	412	17,680
Lockups	44,913	50,583	50,583	44,943	38,768	33,441	28,847	24,884	21,465	18,516	15,972	13,777	11,885	10,252	8,843	417,672
TOTAL	213,346	544,463	539,677	479,496	413,617	356,790	307,770	265,485	229,010	197,546	170,405	146,993	126,797	109,376	94,349	4, 195,121

Table 14B
Expected Compliance Cost Projection, Nationwide,
Per Facility Type, Per Year, 2012-2026, in Thousands of Present Value Dollars,
Calculated Using a 7% Discount Rate

YEAR	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	TOTAL
Prisons	26,304	56,407	46,045	35,128	25,046	17,857	12,732	9,078	6,472	4,615	3,290	2,346	1,673	1,193	850	249,035
Jails	117,742	356,618	356,618	272,062	193,976	138,302	98,608	70,306	50,127	35,740	25,482	18,168	12,954	9,236	6,585	1,762,524
Juvenile	24,087	78,497	78,497	59,885	42,697	30,442	21,705	15,475	11,034	7,867	5,609	3,999	2,851	2,033	1,449	386,128
Comm. Conf.	300	2,358	2,358	1,799	1,283	915	652	465	332	236	169	120	86	61	44	11,178
Lockups	44,913	50,583	50,583	38,590	27,514	19,617	13,987	9,972	7,110	5,069	3,614	2,577	1,837	1,310	934	278,212
TOTAL	213,346	544,463	534,101	407,463	290,516	207,134	147,683	105,296	75,075	53,527	38,164	27,211	19,401	13,832	9,862	2,687,076

Assumptions with Respect to On-going Costs in the Out Years. In setting forth our cost projections for the years after the start-up year of 2012, we have projected compliance costs as remaining constant in nominal dollar terms over the period of 2013-2026 without adjusting for inflation. Nor have we adjusted for the possibility that over time the cost of compliance will decrease as correctional agencies adopt new innovations that will make their compliance more efficient and less costly. In projecting costs over the out years, we have simply applied a discount rate of 3% or 7% to render the compliance cost into present value dollars.

Some commenters in response to the ANPRM urged us to adopt a different approach. As one commenter put it, “regulated parties do not always factor in how initial costs may decrease over time as they adapt to new standards. The federal guidelines on cost-benefit analysis advise agencies that “learning” will likely reduce the cost of regulation in future years’ in some cases, and recommend that agencies ‘take into account cost-saving innovations’ when regulations promote adaptation.” Comments of the Institute for Policy Integrity, May 10, 2010, at 9, quoting OMB Circular A-4, at 37. The same commenter urged that “to accurately estimate compliance costs, DOJ must . . . also anticipate adaptation to new regulations.”^{62/}

While we understand the appeal of this recommended approach, we have elected not to pursue it at this juncture. We simply do not have an informational basis from which to draw plausible assumptions as to the extent to which compliance costs will decrease over time due to learning or to adoption of efficiencies. As it is, there is a certain amount of uncertainty in nationwide cost estimates that are extrapolated from a relatively small sample size. We have endeavored to be as conservative as possible in our cost estimates, and introducing additional uncertainty into those estimates through assumptions as to the extent of learning will, we fear, lead into the realm of speculation.

We nevertheless invite public comment on this subject and would appreciate any data from which plausible assumptions can be drawn as to the effect of future learning on the cost of compliance with the standards.

VI. Cost Justification Analysis

This Part analyzes the cost justification of the proposed standards. First, we conduct a break-even analysis to demonstrate that the costs of PREA compliance are justified by the anticipated benefits. Given that the proposed PREA standards are expected to cost the correctional community approximately \$213 million in startup costs, and that the monetary benefit of a 1% reduction in the

^{62/} Comments of the Institute for Policy Integrity, May 10, 2010; *see also* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT OUR ENVIRONMENT AND OUR HEALTH 131 (2008) (“Cost-benefit analysis, by assuming that industry does not respond to regulations by finding the cheapest possible way to comply, has traditionally overestimated the costs of compliance – in some cases quite significantly.”).

baseline prevalence of prison rape is worth between \$157 million and \$239 million, the startup costs would be offset in the very first year of implementation, even without regard to the value of the nonmonetary benefits, if the standards achieved reductions of between 0.9 and 1.4 percent. The break even point would be even lower if the analysis amortized start up costs over the entire 15 years. Moreover, because the annual ongoing costs of full compliance are estimated to be no more than \$544 million beginning in 2013, the proposed standards would have to yield approximately a 2.3 - 3.5% reduction from the baseline in the average annual prevalence of prison rape for the ongoing costs and the monetized benefits to break even, without regard to the nonmonetary benefits.^{63/}

Second, we compare the estimated compliance costs associated with the Department's standards against the costs associated with the most obvious alternative approach, to wit, the Commission's recommended standards. We conclude that in comparison to the Commission's recommendations, the Department's proposed standards reduce the upfront costs by between 31% and 99% and the ongoing costs by between 44% and 99%, depending on the facility type.

A. Breakeven Analysis

To evaluate whether the costs of the proposed PREA standards are justified in light of their anticipated benefits, we conduct a breakeven analysis. A breakeven analysis first determines how effectively the standards would have to accomplish their goal – viz., what percentage reduction from the baseline in the average annual prevalence of prison rape and sexual assault would have to ensue from the standards' promulgation – in order for the costs and benefits to break even. Then it asks whether it is reasonable and plausible to assume that the standards will be as effective as needed to break even.

Two caveats must be offered before proceeding to the breakeven analysis. First, for reasons stated in Part II, we were unable to determine the monetary benefit of a 1% reduction in prison rape in the lockup or community confinement settings, for the simple reason that we do not have data from which the prevalence of rape and sexual assault in those settings can be determined. In order to present an apples-to-apples comparison for break-even analysis purposes, we remove the costs attributable to lockups and community confinement settings and compare the costs in the other three settings against the corresponding benefits.^{64/}

^{63/} These figures differ from those depicted below in Tables 15 and 16, which include only the \$491.5 million in annual ongoing costs attributable to prisons, jails, and juvenile facilities, as opposed to the \$544 million in total annual ongoing costs attributable to all five categories (i.e., adding lockups and community confinement facilities). As noted above in Part IV, we have not attempted to quantify the benefits that will result from reducing sexual abuse in lockups and community confinement facilities. For this reason, these figures are somewhat conservative because they incorporate the costs, but not the benefits, of reducing sexual abuse in lockups and community confinement facilities.

^{64/} An alternative approach would be to estimate how many individual incidents of rape or sexual assaults (as opposed to what percentage reduction) would need to be avoided in lockups and community confinement settings in order for the costs affecting those facilities to break even with their monetary benefits. This approach is fraught with

Second, for purposes of this breakeven analysis, we assume that the costs and benefits of reducing prison rape are linear, at least within the range relevant to the present analysis. It may well be that the marginal cost of procuring an additional 1% reduction in prison rape increases as more and more rape is reduced. However, we are unaware of any data showing precisely how the marginal cost of rape reduction is likely to change once various benchmarks of reduction have been achieved. For this reason, and because our estimates show that the ongoing compliance costs associated with the proposed standards break even with the monetary benefits when the prevalence of prison rape is reduced by a mere 3% from the base line level, we believe it to be appropriate to assume linear benefits and costs, at least within the range relevant to the analysis. We invite the public to comment on whether this assumption is appropriate and to provide data on how the marginal cost of rape reduction is likely to change once various benchmarks of rape reduction have been achieved.

Table 15 uses lower-bound assumptions for the monetary benefit of a 1% reduction in prison rape (from Table 5) and shows the total percentage reduction required in each confinement setting in order for the upfront and annual compliance costs for that setting to be benefit-cost justified. Table 16 shows the same using upper-bound assumptions for monetary benefit.

Table 15
Break-Even Analysis Using Lower-Bound Assumptions of Benefit Value
By Facility Type (Dollars are in Thousands)

	Value of 1% Reduction	Upfront Costs	Breakeven Percentage	Ongoing Costs	Breakeven Percentage
Prisons	\$60,000	\$26,304	0.44%	\$56,407	0.94%
Jails	\$84,500	\$117,742	1.39%	\$356,618	4.22%
Juvenile	\$12,500	\$24,087	1.93%	\$78,497	6.28%
Total	\$157,000	\$168,133	1.07%	\$491,522	3.13%

difficulty, given its inability to account for the complexity of sexual victimization in the manner set forth in Part II. Nevertheless, this approach may offer some general insight into how successful the standards would need to be in the lockup and community confinement settings in order for the costs incurred in those settings to be justified by the corresponding benefits. Using the figures from Table 4, which provide that the monetary value of an avoided rape of an adult prisoner involving force or threat of force is \$200,000 to \$300,000, the estimated nationwide startup costs for community confinement facilities (\$300,000) break even if one to two rapes is avoided, while the estimated nationwide annual costs (\$2.4 million) break even if eight to twelve rapes are avoided each year. For lockups, the estimated nationwide startup costs (\$45 million) break even when between 150 and 225 forcible adult rapes are avoided; the estimated nationwide ongoing costs (\$51 million) break even when between 170 and 250 forcible adult rapes are avoided.

Table 16
Break-Even Analysis Using Upper-Bound Assumptions of Benefit Value
By Facility Type (Dollars are in Thousands)

	Value of 1% Reduction	Upfront Costs	Breakeven Percentage	Ongoing Costs	Breakeven Percentage
Prisons	\$90,000	\$26,304	0.29%	\$56,407	0.63%
Jails	\$126,500	\$117,742	0.93%	\$356,618	2.82%
Juvenile	\$22,500	\$24,087	1.07%	\$78,497	3.49%
Total	\$239,000	\$168,133	0.70%	\$491,522	2.06%

As these tables make clear, even without reference to the nonmonetary benefits of avoiding prison rape and sexual assault (which as we have seen are numerous, and of considerable importance) the Department's proposed standards need only be very modestly effective in order for the monetized benefits to offset the anticipated compliance costs both as a whole and with respect to each facility type to which they apply.

With respect to prisons, a mere 0.63%-0.94% decrease from the baseline in the average annual prevalence of prison rape and sexual assault would result in the monetized benefits of the standards breaking even with their ongoing costs. Such a decrease from the baseline would mean an average of 165-246 fewer forcible rapes per year, 116-173 fewer nonconsensual sexual acts involving pressure or coercion, 120-179 fewer abusive sexual contacts, and 175-261 fewer incidents of willing sex with staff. Even in the jail context, a 0.93% to 1.39% decrease from the baseline in the prevalence of rape would justify the startup costs, while a 2.82%-4.22% decrease would justify the ongoing costs. For jails, a 4.22% decrease from the baseline in the average annual prevalence would translate to 1654 fewer forcible rapes per year, 625 fewer nonconsensual sexual acts involving pressure or coercion, 971 fewer abusive sexual contacts, and 1312 fewer incidents of willing sex with staff.

We believe that all of these expectations as to the effectiveness of the standards are reasonable and plausible. When one properly takes into account the importance of the nonmonetary benefits, the effectiveness required to reach the break-even point falls further.

B. Consideration/evaluation of alternatives

In developing the proposed PREA standards, the Department considered a wide range of alternative approaches. The most obvious set of alternatives that the Department considered are the standards recommended by the Commission. As elaborated above in the discussion of specific standards, many of the Commission's recommended standards would, if implemented, have a compliance cost significantly greater than do the Department's proposed standards. Table 17 shows

the Department's internal assessment, based on analyses conducted by Booz Allen, of the total projected upfront and ongoing costs of the Commission's recommended standards, as compared to the Department's proposals:

Table 17
Comparison of Projected Nationwide Upfront and Ongoing Costs
Commission Recommendations v. Department Proposed Standards
in Thousands of Dollars

	Upfront Costs			Ongoing Costs		
	NPREC	DOJ	Difference	NPREC	DOJ	Difference
Prisons	\$2,778,770	\$26,304	99.05%	\$733,166	\$56,407	92.31%
Jails	\$3,151,806	\$117,742	96.26%	\$1,955,154	\$356,618	81.76%
Juvenile	\$475,562	\$24,087	94.94%	\$139,417	\$78,497	43.70%
Comm. Conf.	\$20,944	\$300	98.57%	\$233,735	\$2,358	98.99%
Lockups	\$65,093	\$44,913	31.00%	\$2,240,096	\$50,583	97.74%
Total	\$6,492,175	\$213,346	96.71%	\$5,301,568	\$544,463	89.73%

As is evident from Table 17, the Commission's recommended standards would cost an estimated \$6.5 billion in upfront costs plus \$5.3 billion in annual costs. In break-even terms, this would require a 27% reduction from the baseline in any given year in the prevalence of prison rape and sexual assault to break-even with the startup costs, and a 22% reduction from the baseline in the average annual prevalence of prison rape to break-even with the ongoing costs. The Department's proposed standards reduced the upfront cost of the Commission's proposed standard by between 31% and 99% and the ongoing cost by between 44% and 99%, depending on the facility type.

The Department also has alternatives other than the Commission's recommended standards. For example, we could mandate that certain standards apply to one type of facility but not others, or we could vary certain standards based on the size of the facility (as we have done for 115.11 for example). While the Department believes that its proposed standards are the most cost effective means of combating prison rape, we invite public comment as to whether alternative approaches might be worth considering from a cost-benefit point of view.

VII. Conclusions

In sum, the Department believes that the proposed PREA standards are justified from the point of view of break-even analysis, even when the substantial nonmonetary benefits of avoiding prison rape are left out of the analysis. The standards are also justified when compared to the compliance costs that would be associated with the Commission's recommended standards.

We caution, however, that the conclusions laid out in this IRIA are preliminary ones that set forth our current estimates. During the comment period, and in advance of preparing the final rules for publication, we intend to subject our cost and benefit estimates to additional analysis. Moreover, the Department actively seeks the participation of stakeholders in assessing the regulatory impact of its proposed standards and invites public comment on any aspects of this IRIA, both as to the societal benefits of adopting the standards and as to the costs of compliance. In the body of the Notice of Proposed Rulemaking we have drawn attention to a number of specific questions, which are not meant to limit any other comments that any interested person may wish to submit.