June 6, 2023

VIA ELECTRONIC SUBMISSION

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Re: Request for Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis," Office of Management and Budget; (88 Fed. Reg. 20,915 - 20,916, April 7, 2023)

Dear Administrator Revesz:

I. Introduction

The undersigned business community organizations ("Business Community") offer these comments in response to Office of Management and Budget's ("OMB") April 7, 2023, "Request for Comments on Proposed OMB Circular No. A–4" and simultaneous "Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023."[1] The Business Community recommends to OMB that it withdraw the proposed Circular A-4 and draft 2(e) Guidance, and instead issue a revision of Circular A-4 that is limited to objective, technical updates that enjoy the wide bipartisan support that has benefitted regulatory review for decades.

II. Background

For over forty years, a formalized review and analysis of regulatory impacts, with a rigorous cost-benefit analysis at its center, has been a fundamental requirement for all consequential executive rulemaking. Cost-benefit analysis, despite its limitations, is the best tool to ensure that regulations do more good than harm. There is longstanding bipartisan consensus on this point. Regulatory review and analysis was developed by President Nixon's administration, expanded by President Ford's, mandated by President Carter, and given a more formal framework by President Reagan.[2] The constituting documents of the modern

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[1] Request for Comments on Proposed OMB Circular No. A–4, ''Regulatory Analysis'', 88 Fed. Reg. 20915 (Apr. 7, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-07/pdf/2023-07364.pdf; Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review), 88 Fed. Reg. 20916 (Apr. 7, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-07/pdf/2023-07360.pdf.

[2] *See* Andrew Rudalevige, *Regulation Beyond Structure and Process*, Nat. Aff. 98–102 (Winter 2018); Susan Dudley, *OIRA Past and Future*, C. Boyden Gray Center for the Study of the Administrative State, Working Paper

cost-benefit state—President Clinton's E.O. 12866 and President George W. Bush administration's Circular A-4—have been carried forward by presidents of both parties, with no direct changes or alterations for thirty and twenty years, respectively. Simultaneously, Congress has endorsed and ratified the widespread use of cost-benefit analysis.[3] In a period of deep political polarization, it is striking how stable the cost-benefit regime has been, and that stability has benefitted consumers, businesses, and the public interest.

Cost-benefit analysis has enjoyed the support of both parties because, to the extent there is a cross-partisan consensus as to the purposes and methods of regulation, cost-benefit analysis reflects that consensus. While Americans might differ on the proper goals for individual regulatory initiatives and on precise questions of regulatory outcomes, several propositions about regulatory policy are broadly accepted. As the Clinton administration put it:

> [R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive, and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.
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> The only way we know [how] to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits.[4]

In other words, worthwhile regulation should seek to address market failures (like externalities) in the most socially efficient manner. Achieving that requires comprehensive, objective analysis.

Presidents of both parties have also recognized that agency consideration of costs and benefits is not enough. Left to their own devices, agencies may suffer from what Justice

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19-17 (Sept. 13, 2019), https://administrativestate.gmu.edu/wp-content/uploads/2019/09/Dudley-Working-Paper-19-17.pdf.

[3] *See, e.g.*, Regulatory Right to Know Act, Pub. L. 106–554, § 1(a)(3) [title VI, § 624], Dec. 21, 2000, 114 Stat. 2763, 2763A–161 (requiring what became Circular A-4); Congressional Review Act, 5 U.S.C.§ 801(a)(1)(A) (requiring calculation of costs).

[4] Office of Management and Budget, Office of Information and Regulatory Affairs, *Report to Congress on the Costs and Benefits of Federal Regulation* (Sept. 30, 1997), at p. 10.

Breyer called "tunnel vision."[5] It is easier (and more intuitive) for agencies to see the benefits for which they are aiming than it is for them to see the full scope of impacts, particularly those outside the agency's area of expertise. Forty years later, the solution still suggests itself: require the agencies to quantify projected costs and benefits "to the extent feasible" and then conduct a review of that analysis from the White House's Office of Information and Regulatory Affairs (OIRA). To enable this process, OIRA and the agencies must use a consistent, transparent, and rigorous methodology, so that policymakers and the public can be assured that regulations are doing more good than harm.[6] For twenty years, that methodology has been set forth in the same Circular A-4.[7]

The Business Community and its members are concerned that the revised Circular A-4, proposed on April 6, 2023, departs dramatically from that decades-long bipartisan consensus. Instead of the concrete, circumscribed-but-effective efficiency analysis in which OIRA and the agencies have become expert, the proposal incorporates a number of intangible values and contested extra-statutory aims, like redistribution and global benefits.[8] Instead of requiring agencies to quantify costs and benefits where feasible, the proposal allows and perhaps encourages agencies to evade cost-benefit analysis altogether whenever some of the benefits are sufficiently difficult to quantify.[9] Instead of choosing alternative discount rates that reflect the full range of expert opinion, the proposal suggests an astonishingly low rate that would seemingly support the basis for overregulation.[10] Already, a former OIRA Administrator has expressed concern that, because the proposed Circular is not "neutral, objective and focused on efficiency" but rather "appears to be trying to achieve a progressive agenda," the proposed Circular "won't survive a Republican administration."[11]

The proposed Circular also appears to forfeit OIRA's historic role as a check against agency tunnel vision. The proposed Circular would over-endow agencies with options and overly broad discretion. For instance, an agency may apply extraordinarily powerful distributional weights, or it may leave the analysis unweighted.[12] The agency may choose to adopt the Ramsey approach to discounting, or it may apply the social rate of time

[5] For discussion of the problem of agency tunnel vision, see Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 11–19 (1993); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 Mich. L. Rev. 877 (2010).

[6] E.O. 12866.

[7] Office of Management and Budget, *Circular A-4* 9 (Sept. 17, 2003) (hereinafter "2003 Circular A-4").

[8] Office of Management and Budget, *Circular A-4* (Proposed Draft for Public Review) (Apr. 6, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf (hereinafter "Proposed Circular A-4").

[9] *Id.* at 10–11, 65–66.

[10] *Id.* at 4.

[11] Coral Davenport, *You've Never Heard of Him, but He's Remaking the Pollution Fight*, N.Y. Times (May 28, 2023).

[12] Proposed Circular A-4 at 65.

preference.[13] The agency has free rein to decide, in its "professional judgment," whether the non-monetized benefits justify a net-costly rule, or vice versa.[14] The agency can decide for itself whether to account for transfers within the cost-benefit analysis or separate from it.[15] And so on and so forth. If OMB expects a standard will govern these decisions, it does not say so. The result is predictable: agencies will generate analyses that are incommensurable with each other, leading to inconsistencies in application by agencies and less predictability for regulated industries. Such analytic inconsistency will weaken OIRA's critical role, deprecate its ability to ensure proposed rules will do more good than harm, and invite agencies to select the analysis that most supports their regulation.

Equally concerning is the departure of the proposed Circular A-4 from the fundamental legal basis for cost-benefit analysis. It is an ironclad rule of constitutional law that "[a]n agency literally has no power to act … unless and until Congress confers power upon it."[16] Indeed, regulatory review with cost-benefit analysis is legally sound and legally uncontroversial because the agencies have almost always been required to consider costs, often by multiple statutes. In most cases, the statutory provision that directly authorizes the rulemaking requires consideration of cost with specific commands or with general, cost-inclusive language like "reasonable," "appropriate," or "feasible."[17] The Administrative Procedure Act, with its baseline prohibition against arbitrary and capricious regulation, also demands consideration of costs and benefits for the simple reason that it would be arbitrary for an agency to decide to regulate so as to do more harm than good.[18] The many simultaneous aims that the proposed Circular seeks to integrate into the analysis—principally, foreign effects and redistribution—have not been authorized by statute in this or in any other way, particularly in light of background assumptions about the reach of regulatory statutes. The image of regulators implicit in the proposed Circular is of roving social engineers dedicated to the absolute optimization of welfare. But constitutional and statutory law gives regulators a specific, limited mandate. The agency is fundamentally a faithful agent of the law, and so any agency action must begin with the law. Indeed, it is the

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[13] *Id.* at 76. The Ramsey approach, developed by the economist Frank Ramsey derives the discount rate from the pure rate of time preference, the marginal utility of consumption, and the consumption growth rate.

[14] *Id.* at 43.

[15] *Id.* at 57.

[16] *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.").

[17] *See, e.g.*, *Michigan v EPA*, 576 U.S. 743, 752–53 (2015); *Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208, 219–20 (2009).

[18] 5 U.S.C. § 706(2)(A); *cf.* Antonin Scalia, "Regulatory Review and Management," *Regulation Magazine* 19 (Jan./Feb. 1982) ("Is it conceivable that a rule would not be arbitrary or capricious if it concluded with a statement to the effect that 'we are taking the foregoing action despite the fact that it probably does more harm than good, and even though there are other less onerous means of achieving precisely the same desirable results'?").

President's solemn constitutional duty under Article II—as abetted by OIRA—to ensure regulations faithfully execute the law.[19]

The risks of the administration's ambitious proposal are enormous. While inflation is at the highest level in recent memory and economic growth is faltering and uncertain, the administration has been doubling down on costly regulation. Already, this administration has imposed an estimated $365.8 billion in costs from final rules and 221 million new paperwork hours.[20] Those figures are almost twice the burden imposed by the Obama administration at this stage of his presidency.[21] And that does not even account for what would be the costliest rule in U.S. history ($180 billion), which the Environmental Protection Agency proposed in April.[22] The proposed Circular will only compound those costs, since its bakes several one-sided, pro-regulatory assumptions into the analytic framework and improperly expands agency discretion.

The Business Community thus recommends that OMB limit any revision of Circular A-4 to objective, technical updates that will enable OIRA to better execute or administer its legal authority. For the sake of regulatory stability, the Business Community urges OMB to refrain from encoding any methodological assumption that does not enjoy the wide bipartisan support that has benefitted Circular A-4 for two decades. In cases where there is no avoiding the fact of genuine methodological disagreement, the full range of disagreement should be disclosed in the analysis. Here, in brief, are the Business Community's key concerns with OMB's proposals:

- ***Analytical Approaches* –** OMB should not allow agencies to evade meaningful cost-benefit analysis by citing unquantifiable benefits.

- ***Scope of the Analysis* –** Unless clearly authorized by statute, the scope of the analysis must be limited to effects on U.S. citizens and residents, the U.S. economy, and the U.S. homeland.

- ***Developing an Analytic Baseline* –** Several of the proposals risk enabling agencies to hide important costs of the rule in the baseline or to create the misimpression that the most likely baseline is on par with overly optimistic or overly pessimistic scenarios.

- ***Identifying the Need for Federal Regulations* –** Behavioral economics may be useful for identifying the best means of regulation, but the Circular should not encourage agencies to regulate for the sake of mitigating "behavioral biases," unless Congress

[19] *See Sierra Club v. Costle*, 657 F.2d 298, 405–06 (D.C. Cir. 1981).

[20] Dan Goldbeck, American Action Forum, "Week In Regulation: A Wild Week for the EPA" (May 30, 2023), https://www.americanactionforum.org/week-in-regulation/a-wild-week-for-the-epa/

[21] *Id*.

[22] *See* EPA, *Proposed Rule: Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles*, 88 Fed. Reg. 29184 (May 5, 2023).

has so directed. That straightforward paternalism is inconsistent with basic notions of self-government.

- ***Developing Benefit and Cost Estimates*** – Agencies must continue to maintain the distinction between primary and ancillary benefits, which is important to identifying whether the agency has overreached.

- ***Distributional Effects*** **–** Regulatory analysis should disaggregate impacts by relevant population groups so that policymakers and the public can identify the distributional consequences of a proposed rule. In many cases, a disproportionate share of the costs of any rule will be borne by small business or specific industrial sectors, in addition to income-based or other groups. The Circular should require agencies to identify these disproportionate effects in their regulatory analysis. At the same time, the Business Community strongly opposes the use of distributional *weights*, which are non-transparent, based on questionable assumptions, and contrary to statute.

- ***Treatment of Uncertainty*** **–** Instead of embracing the one-sided presumption of risk aversion, which is arbitrary, the final Circular should reaffirm the 2003 Circular's sound commitment to risk neutrality.

- ***Discount Rates*** **–** The 2003 Circular required two discount rates: a 7% "base-case" rate approximating the opportunity cost of capital and a 3% rate approximating the social rate of time preference. Jarringly, this proposal suggests only a single rate: 1.7%, reflecting the social rate of time preference, plus a shadow price of capital. The 2003 Circular had the right approach. The discount rate should measure social opportunity cost, which will often track the opportunity cost of capital, especially for capital-intensive rules. Moreover, the 1.7% time-preference rate is improperly derived from an anomalous sample.

- ***Draft Guidance*** **–** The Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023, is concerning, because it appears to discriminate based on viewpoint in the allocation of meetings with parties interested in a regulation under review and because it limits the free-flow of knowledge, particularly when the review process would benefit from iterative discussion. OIRA should maintain and reaffirm its open-door policy.

- ***Executive Order 14094*** **–** Regulatory review is a feature, not a bug, of modern government. As such, it makes little sense to shrink its domain, but that is exactly what E.O. 14094's changes to the thresholds for OIRA review do. These changes will allow for more rules that impose unjustified costs to become law.

III. Specific Comments

Analytical Approaches

The Business Community and its members are concerned that the proposed Circular substantially relaxes the requirement that agencies conduct a rigorous cost-benefit analysis

of major rules. While the 2003 Circular directs that a major rulemaking "should be supported by" both cost-benefit analysis and cost-effectiveness analysis "wherever possible," the proposed Circular provides an easy out.[23] According to the proposal, an agency may choose to use a cost-effectiveness analysis *instead of a cost-benefit analysis* in the not-infrequent circumstance where "some of the primary benefit categories cannot be expressed in monetary units."[24]

A cost-benefit analysis will still have important—perhaps even crucial—informative value even when a category of primary benefits cannot be quantified. It can reveal, for instance, the monetary gap those unquantifiable benefits are presumed to make up, which can inform policymakers and the public about the nature of the implicit trade-offs. The agency must, of course, be careful to identify the unquantified categories so that the ultimate analysis is not misleading. Yet, even acknowledging the risk that a partially monetized cost-benefit analysis could be misleading, cost-effectiveness analysis is not a sufficient substitute, because it is not adept at comparing disparate outcomes, like the difference between a 10% reduction in emissions and a 20% reduction. Nor is cost-effectiveness analysis analytically useful when some of the cost categories cannot be expressed in monetary units.

Scope of the Analysis

Global Impacts

The proposed Circular's discussion of the geographic scope of regulatory analysis appears to suggest that agencies may justify regulatory proposals demonstrated to be net harmful to U.S. citizens and the U.S. economy by adding global impacts to the analysis. That is not the law.

Agencies are not permitted to regulate for benefits abroad absent a clearly conferred power to do so. "Congress legislates against the backdrop of the presumption against extraterritoriality."[25] Thus, absent Congress's clearly expressed intention to apply a regulatory statute abroad, the agency may not give it such extraterritorial effect.[26] This canon applies "regardless of whether there is a risk of conflict between the American statute and a

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[23] 2003 Circular A-4 at 9.

[24] Proposed Circular A-4 at 4.

[25] *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

[26] *See Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."). *See also Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182 (2d Cir. 2014) (rejecting the view that an "an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given [*Chevron*] deference"); Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic § 20, at 21 (Boston, Hilliard, Gray & Co. 1834) (explaining that "it would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories").

foreign law."[27] Vanishingly few regulatory statutes clearly intend to have extraterritorial effect. For example, even though the proposed Circular's section on geographic scope seems to be designed, at least in part, to create a framework for more stringent regulation of greenhouse gas emissions, the major environmental statutes do not include the sort of clear statement that would permit regulation for the purpose of extraterritorial effects.[28] To the contrary, the Clean Air Act's codified purpose is "to protect and enhance the quality of *the Nation's* air resources so as to promote the public health and welfare and the productive capacity of its population." Similarly, the National Environmental Policy Act states its purpose as, *inter alia*, "assur[ing] *for all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings."[29] To be sure, the president possesses significant foreign affairs powers, but the power to regulate—like the power to prosecute—is limited to those powers granted by Congress, which are strongly presumed not to include extraterritorial considerations.

In addition, the circumstances in which the Circular licenses analysis of global impacts are highly speculative and ripe for abuse by an agency with a strong motivation to regulate. These circumstances should not be assumed generally, or even regularly, and so they are best excluded from the proposed Circular. It is not clear, for instance, how the use of impacts on noncitizens residing abroad as a "proxy for effects on U.S. national interests" is distinct from the use of impacts on noncitizens residing abroad *because* those impacts further some foreign policy interest, which itself is a question of an agency's statutory authority and the presumption against extraterritoriality. Likewise, even where statutorily authorized, it makes little sense to base regulatory analysis on the hypothesis that the regulation would "suppor[t] a cooperative international approach … by potentially inducing other countries to follow suit."[30] Such complex domino effects are rare in international relations. Indeed, given the well-known incentive to free ride, it is often just as possible that another country will decide to relax its standards.

Simply put, an agency properly adhering to its statutory charge would consider impacts outside of the United States in only the exceptional case. We suggest that the Circular simply state that an agency may not include effects on noncitizens residing abroad except where the statute clearly authorizes it. Should OMB insist on the analysis of global impacts despite these concerns, it will be imperative that agencies prepare a separate and supplementary analysis of domestic impacts. The proposed Circular appears to give agencies the option to avoid even a supplementary analysis of domestic impacts. It commits to the

[27] *Morrison*, 561 U.S. at 255.

[28] *See, e.g.*, *Louisiana v. Biden*, 585 F. Supp. 3d 840, 865 (W.D. La. 2022), *vacated on other grounds by Louisiana by & through Landry v. Biden*, 64 F.4th 674 (5th Cir. 2023) (Social cost of carbon measure "contradicts Congress' intent regarding legislative rulemaking by mandating consideration of the global effects.").

[29] 42 U.S.C. §§ 7401(b)(1), 4331(b)(2). In addition, the proposed Circular directs agencies to disobey the binding E.O. 12866, which directs agencies to regulate for "the well-being of the American people," not the whole globe.

[30] Proposed Circular A-4 at 10.

discretion of the agency whether, under the totality of the circumstances, such a supplementary analysis "would likely be misleading or confusing."[31] This is a recipe for obfuscation. A separate presentation—even with caveats—is always more informative than no presentation.

Developing an Analytic Baseline

The Business Community is concerned that the proposed Circular allows agencies too much discretion in the selection of the analytic baseline, potentially enabling agencies to hide total costs of a rule in the baseline.

First, the proposed Circular appears to make the *post-statutory* baseline the default baseline whenever the agency is engaging in its first regulatory action implementing a new statutory authority. Any additional threshold requirement is unclear.[32] The concern is that agencies opting for a post-statutory baseline will be able to hide the total cost of the rule in the baseline by assuming the not-yet-implemented statute will have certain effects under any rulemaking. If the agency believes the statute will have certain costs and benefits under any rulemaking, it can transparently note that assessment without hiding those costs and benefits in the baseline. Post-statutory baselines should be used only when the agency can separate out the specific areas where it has discretion, as the current Circular directs.[33]

Second, the proposed Circular appears to allow agencies to conduct a multi-baseline analysis under a wide range of circumstances.[34] The risk of a multi-baseline analysis is that the presentation of multiple baselines will falsely portray the baseline that best reflects the likely range of events with an overly optimistic or overly pessimistic baseline. Agencies should aim to analyze regulatory impacts against a single basis that takes the range of uncertainty into account.

Identifying the Need for Federal Regulatory Action

Behavioral Biases

Compared to the 2003 version, the proposed Circular A-4's section on "Identifying the Need for Regulation" lists several additional circumstances that could spur the agency to regulate. Most notably, the proposal emphasizes the possibility of regulating to correct or ameliorate "behavioral biases" that stem from common psychological phenomena like

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[31] *Id.*

[32] The proposed Circular states that the post-statutory baseline may be used in cases where "substantial portions of a regulation may simply restate statutory requirements that are self-implementing even in the absence of the regulatory action or over which an agency clearly has little (or no) regulatory discretion." Proposed Circular A-4 at 13. If this is a threshold condition for use of a post-statutory baseline, it needs to be defined with greater precision. For instance, what constitutes a *substantial* portion? Must the regulation restate self-implementing or non-discretionary statutory requirements to trigger a post-statutory baseline or does the Circular use "may" to suggest this factor is optional?

[33] 2003 Circular A-4 at 15–16.

[34] *See* Proposed Circular A-4 at 13–14.

"limited attention, focus, and time" or "imperfect self-control."[35] While the current Circular communicates to agencies a presumption in favor of private market ordering such that regulation is, generally speaking, justified only if there is a market failure or serves an important intangible value, this proposal communicates the opposite. According to the proposed Circular, the private market is rife with behavioral biases that cause individuals to impose harm on themselves and that need to be corrected with government regulation.

Behavioral biases are surely relevant to decisions about *how* to regulate. When assessing the likely effects of a proposed rule, it is helpful to consider how psychological traits like loss aversion, availability bias, or confirmation bias may impede an efficient result and thus to also consider how the proposed rule may be tweaked in light of those biases. It is likewise helpful for agencies to analyze how behavioral biases might affect regulators themselves, something the proposed Circular unfortunately fails to suggest.

It is another thing entirely, however, to cite behavioral biases as the reason for regulation in the first place. That paternalistic vision of the state is in deep tension with the fundamental principles of self-government.[36] It is thus to be expected that vanishingly few statutes authorize regulation for the sole purpose of protecting individuals from their own cognitive biases. Instead, the major regulatory statutes seek to correct for market failures[37] or else pursue specified intangible values like equality before the law, privacy, and the like.

The Business Community and its members thus recommend that OMB remove the section on behavioral biases as a potential reason for federal regulation. Instead, OMB should limit the discussion of behavioral biases to the section on "Developing Benefit and Cost Estimates."

Developing Benefit and Cost Estimates

Ancillary Benefits and Countervailing Risks

The Business Community and its Members are concerned that the proposed Circular invites a model of regulatory decision-making that is untethered to an agency's statutory authorization. Of particular concern is the proposed Circular's elimination of the distinction between primary and ancillary benefits. As the 2003 Circular discussed, a primary benefit is the sort of favorable impact from the rule clearly contemplated by the authorizing statute,

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[35] *Id.* at 18–19.

[36] *Cf.* Alexis De Tocqueville, *Democracy in America* 663 (Harvey C. Mansfield and Delba Winthrop, trans.) (Chicago 2000).

[37] And, of course, the agency must be attentive to the fact that many purported market failures are in fact no failure at all. For example, at the time George A. Akerlof wrote his famous paper purportedly finding a market failure in the used car market due to information asymmetry—cited by economics textbooks ever since, and for which Akerlof would win a Nobel Prize in economics—the market had *already solved* the alleged market failure through used car warranties. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488 (1970). Examples of markets solving alleged market failures are the rule, not the exception, and occur through mechanisms such as reputation, repeat dealings, quality assurance, consumer reporting, free returns, and, unsurprisingly, *competition itself*.

while an ancillary benefit is a "favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking."[38] The proposal instead collapses the distinction, asserting that the two categories "are not meaningfully different for analytical purposes."[39]

Respectfully, we submit that the distinction between primary and ancillary benefits is essential to an agency's work, as all agencies are bodies of limited authority given to them by law. Without such a distinction, cost-benefit analysis would too often serve the role of a fig leaf: justifying regulatory choices made for reasons unrelated to the text and purpose of the statutory authorization.[40] Instead, agencies should present the results of the cost-benefit analysis in a transparent way that allows the public to understand the projected benefits that are attributable to the statutory authorization and those that are not.

But the issue is not only one of transparency. Just as the statute must guide regulatory decision-making, so too the distinction between primary and ancillary benefits must inform the regulatory analysis. The Circular should direct agencies to begin the comparison of costs and benefits by comparing only the primary benefits to the costs. If the primary benefits exceed the costs, then the regulation is likely justified. If, instead, one must take the sum of the primary and ancillary benefits to obtain a figure that exceeds the costs, then regulation is not necessarily justified by the statutory authority being invoked and so the agency must consider a subsidiary set of questions. The agency must ask, for instance, whether there are other statutory authorities through which the claimed ancillary benefits could be achieved and, if so, whether there are more cost-effective regulatory mechanisms (or a non-regulatory approach) that could obtain those same benefits.

Cumulative Costs

The Circular fails to address several important considerations that should inform regulatory analysis.

First, the Circular should direct each agency to consider cumulative costs when imposing additional rules on heavily regulated industries. The proposed Circular gives added attention to the distribution of regulatory burdens. The cumulative burden matters more to the affected person than the incremental burden. Thus, in line with the proposed Circular's concern for the distribution of regulatory burdens, OMB should stipulate that, where cumulative costs are already disproportionately high, an agency should consider

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[38] 2003 Circular A-4 at 26.

[39] Office of Management and Budget*, Preamble: Proposed OMB Circular No. A-4, "Regulatory Analysis"* 7 (Apr. 6, 2023) (hereinafter "A-4 Preamble").

[40] *Cf. West Virginia v. EPA*, 597 U.S. __ (2022) ("Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line."); Transcript of Oral Argument, *Michigan v. E.P.A.* (U.S. Mar. 25, 2015) ("[T]he issue that I think raises the red flag, at least, is there's such a tiny proportion of [primary] benefit from the HAP program and such a disproportionate amount of [ancillary] benefit. … [I]t's sort of an end run around the [statutory] restrictions.") (Roberts, C.J.).

offsetting the cost of a proposed regulation with simultaneous deregulatory action, among other means.

Relatedly, each agency should consider the cumulative job loss or displacement resulting from regulation. Many regulatory statutes require consideration of job losses. But even where the statute is silent, job losses are relevant to the overall evaluation of the reasonableness of the rule. Rules that cause job losses may produce adverse health effects, even severe health effects.[41] Those adverse effects must be accounted for. As with other costs, the cumulative burden is often more relevant than the incremental burden. Importantly, for analysis of cumulative job losses or displacement, OIRA should request each agency look not only at the agency's cumulative impact on employment but also how the totality of government regulation contributes to job losses in the affected sector.

Distributional Effects

The Business Community agrees with OMB that the likely distribution of regulatory costs and benefits may be an important factor in deciding whether to regulate or deciding among regulatory alternatives. To that end, the proposed Circular is right to recommend that agencies develop tables that disaggregate the total benefits and costs by the relevant population groups. That can only improve regulatory decision-making. Should those tables reveal that a particular population group will bear an outsized share of the costs, the administration has many options: from selecting a more equitable alternative, to using an independent government program to ameliorate the harm caused, to abandoning the rulemaking altogether. The Business Community wishes to stress that, for many rules, the most relevant groups will often be based on firm size or industrial sector, in addition to the factors the proposed Circular stresses, like income. Fixed upfront compliance costs, for instance, are a pervasive issue in regulation and they tend to have an outsized impact on small businesses.[42] Likewise, individual rules tend to concentrate their costs on particular industries.

While a disaggregated cost-benefit analysis would be helpful and revealing, the proposed Circular's suggestion of distributional weights would be inflexible and obfuscatory. They would be inflexible because they "do not contemplate the possibility that a rule supported through traditional cost-benefit analysis would be adopted, but then mitigated through separate measures," nor that "agencies other than the one promulgating the regulation would be the ones mitigating these adverse consequences," nor that there are

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[41] *See* Jonathan S. Masur & Eric A. Posner, *Regulation, Unemployment, and Cost-Benefit Analysis*, 98 Va. L. Rev. 579, 618 (2012) (concluding "that an average worker who loses his job in a mass layoff will suffer earnings losses of more than $100,000 over the rest of his life, plus a host of nonpecuniary costs including increased mortality and unhappiness, which could be valued at as much as another $160,000").

[42] *See* Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (finding, inter alia, that "uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources").

important population groups distinguished by factors other than income.[43] And distributional weights have a tendency to mislead because they encode contested normative judgments as coefficients, hiding all the incremental judgments in the black-box of cost-benefit analysis. The proposed Circular and its Preamble each fail to justify the use of the interpersonal utility function that underlies these weights, despite neoclassical economics' longstanding opposition to interpersonal utility comparisons.[44] And OMB follows the implications of decreasing marginal utility of income only so far.[45]

Despite these pitfalls, OMB proposes rates that are staggeringly powerful. With the marginal utility of income of 1.4 stipulated by the proposed Circular, an impact on the lowest quintile would, by our calculation, be weighted at 5.6 times the impact on the median quintile and 40 times the impact on the highest quintile.[46] To illustrate the power of these weights, consider a rule that shuts down several factories in low-income neighborhoods that emit a small amount of pollutants. It increases costs evenly across the population by making whatever is produced at these factories scarcer and more expensive. The total increase (unweighted) would be $5 billion. The total benefits (unweighted) would be $1 billion, largely in the form of higher housing values and reduced morbidity risks experienced by a smattering of those who live near the plant. Such a rule would never be justified under the current Circular, but, under the proposed weights, it would be justified, even as it shrinks the economy.

These weights would put a strong thumb on the scale in favor of the regulatory alternative that most aggressively redistributes wealth from the median and upper quintiles to the lower. That is what the distributional weights were designed to do. Yet at no point does the proposed Circular ever instruct the agency to ask whether the statute directs or even permits the agency to regulate for the sake of redistribution. Indeed, given the long-running (and correct) view among economists that the tax-and-transfer system is a more efficient means of redistribution than is regulation, it is unlikely that Congress would have thought generic standards for rulemaking, like "reasonable" and "feasible," convey

[43] Richard L. Revesz, *Regulation and Distribution*, 93 NYU L. Rev. 1489, 1570 (2018); *see also* Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 Envir. L. 53 (2022).

[44] *See, e.g.*, Kenneth Arrow, *Social Choice and Individual Values* (Wiley 1951).

[45] For instance, while marginal utility is used to skew monetary effects of regulation, it plays no role in the estimate of mortality and morbidity effects. The rationale for such a contradictory approach is "elusive" and it will result in "regulations that lower-income individuals would rationally reject." Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. Chi. L. Rev. 649, 683–84 (2022).

[46] Numbers derived from Congressional Budget Office, *The Distribution of Household Income, 2019* (Nov. 2022), https://www.cbo.gov/system/files/2022-11/58353-HouseholdIncome.pdf. In 2019, the most recent year in the dataset, the average household income (before taxes and transfers) for the lowest quintile was $23,800, the median was $81,800, and the highest quintile was $332,100. Thus the weight for the lowest quintile is = (23,800/81,800)^(-1.4), or 5.6. The weights are staggering even when using household income *after* taxes and transfers, which would more accurately measure the actual marginal utility effects of regulation. By that measure, an impact on the lowest quintile would be 2.5 times the impact on the median quintile and 13.7 times the impact on the highest quintile. *See id.* at 25 (Average household income after taxes and transfers is $38,900 for lowest quintile, $74,800 for median, and $252,100 for highest quintile).

redistributive goals.[47] With the exception of the tax code and certain Medicaid provisions, the major delegations of regulatory authority direct agencies to pursue aims other than redistribution. The Clean Air Act directs EPA to mitigate pollution risks without causing undue harm to the economy.[48] The Energy Policy and Conservation Act directs the Department of Energy to set energy conservation standards, with the same concern for economic feasibility.[49] And the Motor Vehicle Safety Act directs the National Highway Traffic Safety Administration to promulgate reasonable safety standards.[50] These are not statutes about redistribution, and they should not be treated as such. At best, redistribution is an ancillary benefit of a given regulation and, as an ancillary benefit, it should not play a primary role in driving regulatory outcomes. These distributional weights, however, give redistribution a primary role. The final Circular should not include them.

Treatment of Uncertainty

Risk Neutrality

The 2003 Circular specifies that agencies should assume risk neutrality. The proposed Circular rejects that assumption and asks agencies to "determine the risk preferences of the population" impacted by the regulation, which, in the very next sentence, OMB and OIRA assume to be risk *aversion*.[51] That shift is self-defeating and unjustified. The finalized Circular A-4 should reject these changes, and continue the risk-neutral approach embraced in 2003.

A presumption of risk aversion— is arbitrary. Uncertainty in regulation is always two-sided. A regulation that seeks to avert losses of uncertain magnitude will, for instance, require reductions in economic growth of uncertain magnitude. Which is the weightier risk? Losses not averted or advances not achieved? Regulatory analysis should not stack the deck in favor of one of these kinds of risk. Instead, it should "attempt to counteract, rather than to embody, the various cognitive limitations that people face in thinking about risks" by "produc[ing] a fair accounting of the universe of dangers."[52] The Business Community and its members thus encourage OMB to reaffirm presumption of risk neutrality in the final Circular.

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[47] *See generally, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (2006).

[48] *See, e.g.*, 42 U.S.C. § 7412(n)(1)(A).

[49] *See, e.g.*, 42 U.S.C. § 6295(o).

[50] *See, e.g.*, 42 U.S.C. §§ 30102(a)(8), 30111.

[51] Proposed Circular A-4 at 71.

[52] Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. Penn. L. Rev. 1003, 1057 (2003); *see also* John Graham, Heritage Foundation, "The Perils of the Precautionary Principle: Lessons from the American and European Experience," (Jan 15, 2004), https://www.heritage.org/government-regulation/report/the-perils-the-precautionary-principle-lessons-the-american-and.

Discount Rates

The 2003 Circular required two discount rates: a 7% "base-case" approximating the opportunity cost of capital and a 3% rate approximating the social rate of time preference. The proposed Circular collapses this dual-rate approach rates into a single 1.7% rate, reflecting "updates" to the social rate of time preference, plus a shadow price of capital.[53] That is an astonishing reduction in the discount rate, and it runs the risk of inflating predictions of far-off and speculative impacts while minimizing the opportunity cost of a proposed rule in the here-and-now. OMB should be mindful that policies promulgated under too low of a discount rate effectively force future generations to endure lower incomes for the sake of some benefit. Those future generations might be able to more efficiently achieve the benefit—they will, after all be wealthier than we are. Those future generations might likewise have a different preference in the income-benefit tradeoff than the one we impose on them.

Fundamentally, the discount rate should seek to measure the opportunity cost of the resources that are diverted from the private market and are "invested" in the proposed rule.[54] The 2003 Circular identified this rationale—the "opportunity cost of capital"—as the first among equals of rationales for discounting, but the proposed Circular inexplicably demotes it.[55] The Business Community urges OMB to require agencies to analyze net benefits under a discount rate keyed to the average before-tax rate of return to private capital in the U.S. economy. If anything, the 7% opportunity cost of capital discount rate may need to be raised.[56]

If OMB uses the shadow price approach to the opportunity cost of capital, the recommended sensitivity analysis should encompass the full range of plausible shadow prices. OMB's conclusion back in 2003 that the shadow price of capital is "not well established for the United States" remains true, and as the recent proposal's Preamble admits, "estimates of the closed economy shadow price ranges from 1.1 to 2.2 across the cited literature."[57] The adoption of a much narrower range—1.0 to 1.2—is conspicuously left unexplained. OMB must be transparent about the actual range of uncertainty implicit in its methodological choices.

Whether OMB uses the average before-tax rate of return to private capital or the social rate of time preference in conjunction with the shadow price of capital, such a method

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[53] *Compare* 2003 Circular A-4 at 33, *with* Proposed Circular A-4 at 75–81.

[54] *See* W. Kip Viscusi et al., *Responsible Precautions for Uncertain Environmental Risks*, 10(2) J. Benefit-Cost Analysis 296 (2019); David Weisbach & Cass R. Sunstein, *Climate Change and Discounting the Future: A Guide for the Perplexed*, 27 Yale L. & Policy Rev. 433 (2009); Louis Kaplow, *Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U. Chi. L. Rev. 79 (2007).

[55] *Compare* 2003 Circular A-4 at 32, *with* Proposed Circular A-4 at 74–75.

[56] *See* Arnold C. Harberger & Glenn P. Jenkins, *Musings on the Social Discount Rate*, 6(1) J. Benefit-Cost Analysis 6–32 (2015) (suggesting an upward adjustment to the investment rate).

[57] A-4 Preamble at 27.

should be *de rigueur* because the displacement (or inducement) of capital is a pervasive consequence of rulemaking. OMB should not leave the use of these methods up to a judgment about whether "*substantial* incidence on capital is anticipated."[58] Incidence on capital should be presumed.

As in 2003, the proposed Circular also stipulates that the "rate available on riskless personal savings" should approximate the social rate of time preference at any given moment. The 30-year average of the rate of return on 10-year Treasury notes (less inflation) is, however, unlikely to approximate the social rate of time preference going forward. Limiting the sample to only the last thirty years causes the average rate to be skewed by the historical anomaly of hyper-low interest rates over the past two decades.[59] Indeed, for several of those years—particularly during the Great Recession and the COVID-19 pandemic—the 10-Year Real U.S. Treasury Rate was negative. We suggest an average of a much larger dataset—perhaps the past 50 years, or even the entire postwar period. We also question whether it is appropriate, in the first place, to use ten-year Treasury rates as a proxy for the social rate of time preference when so few citizens own them.[60] Credit rationing is pervasive in the economy, suggesting that a descriptive approach to the rate of time preference should be substantially higher than the rate available on riskless personal savings.[61]

The Business Community also objects to the proposal for a lower intergenerational discount rate. OMB's proposal is self-consciously value-laden, switching from a "descriptive" method to a "prescriptive" one in order to vindicate "special ethical considerations."[62] To be sure, regulatory decisions will often ask future generations to bear certain risks, including, in some cases, the risk of a catastrophic outcome. However, the proper response to any ethical misgivings is not to distort discounting, which can just as easily "injure, rather than promote, the interests of future generations."[63] Rather, agencies that are concerned about

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[58] Proposed Circular A-4 at 79 (emphasis added).

[59] It is a bit rich for the Preamble to criticize (as it does on page 20) the 3% figure derived in 2003 as having been inflated by "unusually high" Treasury rates during the 1980's, while centering its calculation on the "unusually low" rates over the past twenty years. A larger sample is needed to smooth out these anomalies.

[60] *See* Council of Economic Advisers, Discounting for Public Policy: Theory and Recent Evidence on the Merits of Updating the Discount Rate (Jan. 2007).

[61] *See, e.g.*, John T. Warner & Saul Pleeter, *The Personal Discount Rate: Evidence from Military Downsizing Programs*, 91 Am. Econ. Rev. 33 (Mar. 2001) (finding personal discount rate varied between 10% and 54%); Dimitris Damigos et al., *Dissecting Subjective Discount Rates and Investment Literacy for Energy-efficient Investments*, 14 Energy Efficiency, 1 (2021) (finding mean nominal discount rate of 77%); Glenn W. Harrison et al., *Estimating Individual Discount Rates In Denmark: A Field Experiment*, 92 Am. Econ. Rev. 1606 (Dec. 2002) (finding mean nominal rate of 27%).

[62] Proposed Circular A-4 at 81.

[63] Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. Chi. L. Rev. 171, 174 (2007); *see also* Louis Kaplow, *Discounting Dollars, Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U. Chi. L. Rev. 79 (2007) (explaining that

the fairness of the risks that future generations are being asked to bear should transparently identify the particular ethical consideration that is motivating the regulatory choice.

Draft Guidance Implementing Section 2(e) of Executive Order 14094

OIRA's open-door policy granting meetings to any party interested in a regulation under review has been a boon to the rigor and legitimacy of regulatory review. Stakeholders with first-hand knowledge and expertise can often identify trouble spots in regulatory proposals and thus help OIRA and the agencies overcome their inherent informational disadvantages. At least as important, OIRA's open-door policy has helped rebut accusations that OIRA is "by far the least transparent step in the rulemaking process" and has been captured by idealogues.[64] It is precisely because OIRA is open to all comers that it enjoys broad bipartisan support.

The proposed guidance could have damaging ramifications for OIRA's standing and for regulatory outcomes.

In the first place, the Business Community is gravely concerned the draft guidance counsels unconstitutional viewpoint discrimination.[65] All Americans have a right to petition the government. Yet the draft guidance creates two different sets of standards that govern that right. For individuals and organizations that have "not historically requested" such meetings, OIRA will, for the first time, proactively reach out, including to specific "civil society organizations."[66] The goal of these efforts, according to the underlying Executive Order, is to counteract the influence of private groups that have "historically requested" such meetings.[67] Of particular concern, OIRA anticipates that for the most controversial and analytically intensive rulemakings it will need to limit its meetings and thus will "prioritize the scheduling of requests that come from those that have not historically requested meetings" over those who have historically requested meetings.[68] It is hard to read this warning and not conclude that OIRA expects to allocate opportunities to petition based on the opinions petitioners are likely to offer, soliciting meetings with those likely to support regulatory proposals (perhaps tepidly, and so have thus never been moved to participate)

"intergenerational distributive justice and efficiency are largely distinct"); W. Kip Viscusi, *Rational Discounting for Regulatory Analysis*, 74 U. Chi. L. Rev. 209, 212 (2007) (observing that a consistent discount rate "already

embodies a quite strong degree of altruism toward future generations that might greatly exceed the current citizenry's actual valuation of future generations' welfare).

[64] James Goodwin, *The Progressive Case Against OIRA*, Center for Progressive Reform (Jan. 5, 2019), https://progressivereform.org/publications/progressive-case-against-oira/.

[65] *See generally Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

[66] Office of Management and Budget, *Draft Guidance Implement Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)* 4 (Apr. 6, 2023) (hereinafter "2(e) Guidance").

[67] Executive Order 14094.

[68] 2(e) Guidance at 6.

while stiff-arming those who bear the bulk of the costs of regulation and who thus routinely exercise their First Amendment rights to advocate for less costly rules.

Second, the categorical rule against repeat meetings will negatively affect regulatory outcomes. According to the draft Guidance, "OIRA will not schedule multiple E.O. 12866 meetings for the same meeting requester during a single E.O. 12866 review of the same regulatory action at the same stage of the regulatory process."[69] This is a mistake. Many rules are highly complex, with significantly different impacts on different industries and sectors. In such cases, it is highly unlikely that a single entity could adequately discuss the details of the rule in a 30-minute meeting. Regulatory review must be an empirical process. As such, analytical and factual development will often be iterative. The categorical rule against repeat meetings threatens to cut that process off, denying OIRA the help of highly knowledgeable outside groups.

Further, the Business Community observes that, under the current open door policy, many entities participate in the same rulemaking through different coalitions in order to emphasize different impacts of the proposed rule. This division of labor is efficient. The draft Guidance would, however, block these entities from participating in more than one coalition meeting. The consequence of the proposed one-meeting rule might be that OIRA staff winds up having more meetings, not fewer.

Amendments to E.O. 12866

The Business Community urges the administration to reconsider Executive Order 14094, which directly amends the Executive Order 12866. Although the administration did not specifically request comment on these changes, the Business Community provides them for the sake of a shared belief in the promotion of good government.

Fundamentally, cost-benefit analysis is a necessity to good government. It makes sure policymakers are informed by objective criteria, and helps protect against unintended consequences and other negative outcomes. Yet when the full scope of regulation is considered, it is striking how limited cost-benefit analysis's reach is. On average, OIRA reviews about 400 rules a year, but the total number of rules finalized in any given year is between 3,000 and 4,500.[70] Before the changes introduced by E.O. 14094, nine out of every ten rules have escaped OIRA review. Now that number will be even higher, as the executive order raises the threshold for OIRA review in multiple respects. Reforms should seek to go in the opposite direction, subjecting more and more rules to rigorous review, such as by

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[69] Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register (Sept. 3, 2019).

[70] Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register 7, 12 (Sept. 3, 2019), https://sgp.fas.org/crs/misc/R43056.pdf.

requiring independent agencies to submit their significant proposed rules to OIRA for review.[71]

First, the Business Community strongly disagrees with the decision to raise the threshold for economic significance from $100 million to $200 million per year in annualized impacts. A rule costing $199 million per year is serious, particularly if it is concentrated on a small group. Moreover, this change creates a curious inconsistency with the Congressional Review Act. The "major rules" subject to the Congressional Review Act are those rules that have an annual effect on the economy of $100 million or more.[72] Congress chose this threshold so that it would match the threshold for economic significance under E.O. 12866. This was not just symmetry for symmetry's sake. Rather, Congress knew that rules subject to OIRA review under E.O. 12866 would include the comprehensive regulatory impact analyses that would enable Congress to effectively evaluate the rule. These changes would deprive Congress of that thorough record for some subset of rules.

Second, the Business Community strongly disagrees with the decision to remove the requirement to review rules that "raise novel legal or policy issues." Like the parable about the camel's nose in the tent, initial policy choices have a way of perpetuating themselves. It is thus especially important to get them right in the first instance. Novelty is an objective standard concerning precedent-setting rules and, as such, private parties can hold the administration accountable when it lets a novel and significant issue slip past its review. Executive Order 14094 announced a replacement catch-all standard that eliminates the presumption of review concentrates discretion in the OIRA Administrator, a political appointee.[73] Such a change represents a move away from public accountability towards the politicization of interagency regulatory review, and it should be reversed.

IV. Conclusion

The Business Community has no objection to a straightforward and objective update to Circular A-4. Unfortunately, much of the proposal fails at that. Cost-benefit analysis has stood the test of time because it reflects principles on which there is bipartisan consensus. Yet the proposed Circular A-4 threatens that consensus, and thus threatens regulatory stability and the public's confidence in the rigor of regulatory analysis.

The proposed Circular treats agencies like freewheeling social engineers and counsels them to incorporate a number of intangible values and contested aims, like redistribution, risk aversion, and global benefits. Statutory law is seen as only a potential impediment to that work. But the proposal has it backward. Agencies are creations of law; their regulatory authority is delegated from Congress and is limited by the basic terms of

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[71] *Cf.* Executive Order 13579 (encouraging agencies to employ cost-benefit analysis).

[72] 5 U.S.C. § 804(2)(A).

[73] Executive Order 14094.

that delegation. In deciding whether and how to regulate, agencies must start with the statute. And, throughout the process, agencies must be faithful agents of the applicable law.

Consequently, OMB should reconsider much of its proposal, including, but not limited to:

1. OMB should not allow agencies to evade cost-benefit analysis by citing unquantifiable benefits.

2. OMB should require that regulatory impact analysis consider only effects on U.S. citizens and residents, the U.S. economy, or the U.S. homeland, unless the statute clearly authorizes the consideration of global impacts.

3. OMB should direct agencies to default to a pre-statutory baseline when assessing effects of the first rule implementing a new statutory authority.

4. OMB should limit the use of the potentially distortionary multi-baseline analysis.

5. OMB should eliminate the section of the proposed Circular inviting agencies to regulate for the sake of mitigating "behavioral biases."

6. OMB should reaffirm the essential distinction between primary and ancillary benefits.

7. OMB should advise agencies to, where it is possible and would be informative, disaggregate impacts by relevant population groups so that policymakers and the public can identify the distributional consequences of the rule. OMB should further advise agencies to be especially attentive to distributional consequences on small business or on specific industries.

8. OMB should eliminate the proposal for distributional weights, whether based on declining marginal utility of income or any other factor.

9. OMB should reaffirm the assumption of risk neutrality.

10. OMB should select a discount rate (or two alternative discount rates) that measures social opportunity cost. If OMB is committed to using the shadow price of capital, it should recommend a sensitivity analysis that includes the full range of evidence-supported shadow prices.

11. OMB should select the social rate of time preference on the basis of a much larger sample that is not overpowered by the anomalously low rates in the wake of the Great Recession and COVID-19 Pandemic. Alternatively, it should select another proxy that better reflects revealed preferences across the population.

12. OIRA should not institute preferential treatment for any person seeking to exercise its petition rights—and it especially should not institute preferential treatment on the

basis of expected viewpoint. It should also reject any categorical rules that would bar potentially informative meetings.

Thank you for your consideration of our comments on this important topic.

Sincerely,

American Chemistry Council
American Coke and Coal Chemicals Institute
American Exploration & Production Council
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Gas Association
American Petroleum Institute
American Public Gas Association
American Public Power Association
American Wood Council
Associated Builders and Contractors
Associated General Contractors of America
Corn Refiners Association
Council of Industrial Boiler Owners
Independent Petroleum Association of America
Interstate Natural Gas Association of America
National Association of Home Builders
National Automobile Dealers Association
National Grain & Feed Association
National Lime Association
National Mining Association
National Roofing Contractors Association
National Rural Electric Cooperative Association
National Stone Sand and Gravel Association
National Waste & Recycling Association
Plumbing-Heating-Cooling Contractors Association
Portland Cement Association
The Fertilizer Institute
U.S. Chamber of Commerce