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Policy Integrity
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To: Office of Information and Regulatory Affairs

Subject: Comments on Draft 2018, 2019, 2020 Reports to Congress on the Benefits and Costs of Federal Regulations

Docket: OMB-2019-0004

The Institute for Policy Integrity at New York University School of Law¹ respectfully submits these comments on OMB's draft reports on the benefits and costs of federal regulations.² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Timely Releases of the Draft Reports: To begin, OMB should return to the practice of issuing timely draft reports at the end of each fiscal year. Timely reports are not only essential for Congress and the public to review whether agencies' regulatory actions are tending to enhance or hurt net public welfare, but also serve as an opportunity for OMB to provide more holistic advice and recommendations to agencies to improve their practices for regulatory analysis.

Discuss Unquantified Benefits and Forgone Benefits in Both Report Text and Spreadsheets: OMB asks for comments on how best to provide information to the public, and specifically whether placing the bulk of the data on benefits and costs in separate electronic spreadsheets is appropriate.³

A key concern with both the spreadsheet attachments and the discussion in the report itself is the failure to sufficiently discuss unquantified benefits and forgone benefits. For example, presenting certain rules in the spreadsheets as having "estimates of both annual benefits and costs"⁴ obscures the fact that the spreadsheets are listing only the monetized benefits and costs for those rules. Many of those rules also had significant unquantified effects, but such effects are not listed in the spreadsheets or summarized in the report's text. For example, the two tabs labeled "Table A-1" in the 2017-2018 and 2018-2019 spreadsheets together list 88 regulatory actions, but for only a single rule (RIN 1615-AA22, Inadmissibility on Public Charge Grounds) does the "Notes" column even mention unquantified effects, and, even then, the description does little to characterize the possible significance of the unquantified forgone benefits. Major rules for which the spreadsheets list none of the significant unquantified forgone benefits include the repeal of the Definition of Waters of the United States (RIN 2040-AF74) and the repeal of the Waste Prevention Rule (RIN 1004-AE53), among many others.⁵

¹ This document does not purport to present New York University School of Law's views, if any.

² 84 Fed. Reg. 71,981 (Dec. 30, 2019); OMB, 2018, 2019, and 2020 Draft Report to Congress on the Benefits and Costs of Federal Regulations (2020), https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5899-REV_DOC-Draft2018_2019_2020Cost_BenefitReport11_20_2019.pdf [hereinafter Draft Report].

³ Draft Report at 5.

⁴ See various attached spreadsheets.

⁵ Note also that in addition to any unquantified effects the agencies might have discussed in their regulatory impact analyses, public comments have identified many important categories of forgone benefits that the agencies failed to discuss at all in their regulatory impact analyses. See, e.g., Policy Integrity et al., Comments on the Proposed Rescission of the Waste Prevention Rule (Apr. 23, 2018), https://policyintegrity.org/documents/Joint_SCM_Comments_to_BLM_on_Methane_Rescission.pdf.

While the report does briefly discuss the general concept of non-monetized costs and benefits, the actual text seems to suggest, incorrectly, that encroachments on privacy and dignity are perhaps the most significant (if not only) non-monetized costs of regulation.⁶ In fact, many of the deregulatory actions taken over the last several years will cause significant forgone benefits to the environment, health, and consumer wellbeing that the agencies have not quantified or monetized. Especially given the fact that in both fiscal year 2018 and fiscal year 2019, the range of monetized costs overlaps with the range of monetized benefits,⁷ raising the distinct possibility that the regulatory actions during these years were net harmful to public welfare, proper disclosure of the significant unquantified forgone benefits associated with these rules is directly relevant to the review by Congress and the public of whether federal agencies' deregulatory efforts have been net harmful to public welfare.

For each entry in the spreadsheet, OMB should clearly list which rules had important unquantified effects and provide a summary of key unquantified effects. In the report's text, OMB should clarify in its summation of costs and benefits for each fiscal year that the rules also had significant unquantified effects, including forgone benefits associated with deregulatory actions. Such additional discussion of unquantified effects is necessary to fulfill the statutory requirement for OMB to estimate "the total annual costs and benefits (*including quantifiable and nonquantifiable effects*)."⁸

Indeed, it may not be clear to all members of the public and Congress that when the spreadsheets list negative figures for monetized benefits, the regulatory effect captured there is actually a cost to public welfare, usually in the form of a forgone protection of the environment, health, or consumers. The spreadsheets should clarify that negative cost figures reflect an estimated cost savings to industry while negative benefit figures reflect costs imposed on the public through harms to the environment, public health, or consumer protections. The report text should include a paragraph explaining how deregulatory actions trade off cost savings against such forgone benefits.

Correct Misleading Examples on Energy Efficiency and Double Counting: The draft report includes a few examples that are misleading and so require more context and adjustments. For example, the statement that "energy efficiency regulations tend to adversely affect lower-income consumers more than those who earn a higher income"⁹ is misleading. Though it may be true that any moderate upfront price increase caused by energy efficiency regulations could be somewhat harder at first for lower-income consumers to bear, it is also true that the long-term cost savings delivered by energy efficiency regulations will be relatively more beneficial to lower-income consumers, who spend a disproportionate share of their income on energy. The sole paper that OMB cites for its proposition that energy efficiency regulations are regressive (i.e., Levinson 2016) makes the simplifying (but ultimately unrealistic) assumption that energy efficient regulations cannot generate private consumer benefits and instead must inevitably "reduce welfare," admitting that that paper's conclusions would be "moot" "if the regulation makes consumer better off."¹⁰ In reality, the Department of Energy has historically found energy efficiency regulations to be massively beneficial to the public, both in terms of private consumer savings as well as public benefits to the environment and national security from reducing the

⁶ Draft Report at 8-9.

⁷ *Id.* at 11.

⁸ *Id.* at 7 (citing the Regulatory Right-to-Know Act) (emphasis added).

⁹ *Id.* at 9.

¹⁰ Arik Levinson, *Energy Efficiency Standards Are More Regressive Than Energy Taxes: Theory and Evidence* at 5-6 (2016, NBER Working Paper 22956).

consumption of energy.¹¹ As such, Levinson’s conclusions are not relevant to any of the energy efficiency regulations promulgated to date.

OMB could easily correct this misleading example by deleting both the word “adversely” from the sentence as well as removing the citation to Levinson. OMB should instead cite analysis from the Department of Energy and simply explain that “energy efficiency regulations can at times affect lower-income consumers more than those who earn a higher income, both in terms of upfront price increases on appliances but also in terms of longer-term net savings from reduced energy consumption” as it remains true that the net *benefits* of energy efficiency regulations will particularly help those low-income consumers who spend a disproportionate share of their income on energy.¹²

OMB also should make a slight correction to its example of double counting. OMB gives the hypothetical of an initial OSHA regulation that aimed to entirely eliminate a workplace toxin, followed by a second regulation based on subsequent data showing that the workplace exposure had not in fact been entirely eliminated by the first regulation; OMB then cautions that, in such a scenario, OSHA might double count benefits by ascribing benefits to the second rule that had already been counted during the first rule.¹³ The trouble with this example is OMB fails to mention the possibility of double-counted costs: if, for example, the continued exposure was caused by—and the second regulation so necessitated by—industry’s failure to fully comply with the first regulation, then the initial regulatory impact analysis overestimated actual compliance costs, which would again be re-estimated as additional compliance costs for the second regulation. OMB should be careful to treat costs and benefits equally, and so should not focus solely on the potential to double count benefits without also mentioning the potential to double count costs.

Place New Literature on Employment Effects in Context: By presenting only recent contributions to the literature on regulatory impacts on employment and economic growth (and, indeed, only a select subset of such literature), instead of following the past practice of offering a fuller summary of all existing literature to date,¹⁴ the draft report paints a skewed picture of the economic literature. A reader might be left with the mistaken impression from the few studies described here¹⁵ that individual regulations often have quantifiable and negative impacts on employment. In fact, OMB’s past reviews of the literature has a whole have found that, for example, evidence of environmental regulations’ impacts on employment is only “suggestive and mixed,”¹⁶ that assessing any individual regulation’s impact is “difficult,”¹⁷ that new regulations may be just as likely to increase employment as to lead to temporary layoffs,¹⁸ and that analysts must be careful of “several potential pitfalls” when interpreting the literature.¹⁹ OMB should restore its prior discussions of pitfalls and limitations of the literature, should place any discussion of new literature in the context of all the literature to date, and should ensure it has fairly captured all recent additions to the relevant peer-reviewed literature.

¹¹ See, e.g., Energy Conservation Program: Energy Conservation Standards for Uninterruptible Power Supplies, 84 Fed. Reg. 1447, 1449 (Jan. 10, 2020) (finding up to \$3 billion in net present value for consumer benefits).

¹² See, e.g. *id.* at 1484-85 (showing greater average life-cycle cost savings for low-income households than for all households).

¹³ Draft Report at 9-10.

¹⁴ *Id.* at 14 & n.34 (calling for comments on this change in approach).

¹⁵ *Id.* at 14-15.

¹⁶ OMB, 2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations at 45 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf [hereinafter 2016 Report].

¹⁷ *Id.* at 41.

¹⁸ *Id.*

¹⁹ *Id.* at 38.

Reflect the Consensus View that Particulate Matter Has No Threshold: In the report’s appendix on the particulate matter co-benefits valued in EPA’s American Clean Energy regulation, OMB cautions about the uncertainty on whether low concentration exposure is causally associated with premature death, and suggests that “[t]his assumption carries with it uncertainty that is currently not accounted for in the analysis.”²⁰ In prior reports, OMB has instead explained that both EPA and the Clean Air Scientific Advisory Committee have “determined that the weight of available epidemiological evidence indicates that exposure to fine particles is causally related to premature death.”²¹ OMB should add back that prior language, and should further supplement this discussion with the conclusions from Kimberly Castle and Richard Revesz’s 2019 article on *Environmental Standards, Thresholds, and the Next Battleground of Climate Change Regulations*.²² That article collects and analyzes the robust support for valuing particulate matter benefits, including the scientific basis for calculating particulate matter benefits from reducing even lower concentration exposures.

Any Revisions to Estimates of the Value of Mortality Risk Reduction Should Be Conducted Very Carefully and Transparently: OMB raises questions about the value of mortality risk reduction, for example noting that “[t]he average life extension from PM regulations tends to be measured in days or weeks whereas in labor market studies the expected life extension is measured in multiple decades,”²³ and then observing that “[s]ome studies indicate that willingness to pay for reductions in risk may change with age.”²⁴ OMB should be very careful with implying that an older person’s life is less worth saving than a younger person, and learn from the lessons of the “senior death discount” episode of the early 2000s.²⁵ Several studies show that willingness to pay for mortality risk reductions does not decline with age.²⁶ There are also many reasons why the current estimates of the value of mortality risk reduction may underestimate overall willingness to pay, such as a lack of bargaining power among the employees on whom many of the underlying studies were based.

As such, OMB should be more careful before advising agencies, as the draft does, to “supplement the existing VSL approach with alternative measures of mortality valuation consistent with Circular A-4.”²⁷ Such alternative measures should be developed very carefully and transparently, based on peer-reviewed literature and subject to public review and comment. EPA’s Science Advisory Board notably undertook a thorough review of its valuation of mortality risk reductions, and in 2011 did make some recommendations for updating the values.²⁸ Any updates should be consistent with those recommendations.

Balance the Request for Comments on Deregulation with a Request for Comments on Regulatory Expansion: Requesting comments on deregulation²⁹ without also requesting comments on chances to enhance net welfare by expanding regulation is biased. The draft report also shows bias in praising the

²⁰ Draft Report at 25.

²¹ 2016 Report at 14.

²² 103 Minn. L. Rev. 1349 (2019).

²³ Draft Report at 26.

²⁴ *Id.* at 27.

²⁵ Richard Revesz & Michael Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 41 (2008).

²⁶ *Id.* at 81.

²⁷ Draft Report at 27.

²⁸ EPA Science Advisory Board, Review of “Valuing Mortality Risk Reductions for Environmental Policy: A White Paper” (2011), [https://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/9AD85A964396181C852578460074C75A/\\$File/EEAC-VRR+Master+File+3-1-11.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/9AD85A964396181C852578460074C75A/$File/EEAC-VRR+Master+File+3-1-11.pdf).

²⁹ Draft Report at 4.

value of public input for identifying redundancy, inefficiency, outdated requirements, and data on costs,³⁰ but failing to mention the value of public input on valuing regulatory benefits or identifying opportunities to expand regulations and increase net social welfare. OMB should not focus solely on deregulation, but rather should look for any opportunity to enhance net public welfare.

Sincerely,

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³⁰ *Id.* at 18.