



July 12, 2006

Mr. Steven D. Aitken
Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Submitted electronically via OIRA_BC_RPT@omb.eop.gov

Dear Steve:

Attached are Regulatory Checkbook's comments on OMB's draft 2006 Report to Congress on the Costs and Benefits of Federal Regulation. In addition to technical economic matters, these comments also apply OMB's related initiatives on information quality, peer review and risk assessment. We believe it essential that OMB adhere to these guidance documents.

Regulatory Checkbook is a nonprofit organization whose mission is to improve the quality of scientific and economic information used in regulatory decision making. We represent no stakeholders, and no stakeholders have vetted or approved these comments prior to their submission.

Sincerely,

A handwritten signature in black ink that reads "R. Belzer".

Richard B. Belzer, Ph.D.
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Attachment



**Regulatory Checkbook Comments on OMB's
Draft 2006 Report to Congress on the
Costs and Benefits of Federal Regulation**

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I. INTRODUCTION

Section II addresses what we call “coverage defects,” by which we mean significant areas of federal regulation that are missing from the draft Report. Examples covered are so-called “budget” rules, rules issued directly by Congress, and rules issued by independent commissions.

Section III concerns a wide array of information quality deficiencies. These include excess precision, inadequate and inappropriate treatment of uncertainty, Circular A-4 compliance, ambiguous ownership, and objectivity.

Section IV discusses relevant portions of OMB’s proposed risk assessment guidance and makes the case why OMB should abide by its own guidance in preparing the final report.

II. COVERAGE DEFECTS

As was the case with each of OMB’s preceding Reports to Congress, this draft Report also excludes too many significant regulations. We agree with OMB that major rules comprise the vast majority of aggregate regulatory costs and benefits. However, OMB again neglects to report any significant information about regulations with federal budgetary consequences. As before, OMB asserts that because the *primary* effects of these regulations is redistributive, predictable and estimable *secondary* social costs and benefits can be ignored. OMB also excludes major regulations issued by independent commissions not subject to Executive order 12,866 review, and regulations issued directly by Congress. Any regulatory accounting statement that ignores these regulations is per se an invalid representation of the scope and consequences of federal regulation.

A. Rules issued by agencies subject to Executive order 12,866 but ignored in this draft Report.

Table 1-6 of the draft Report lists 24 regulations issued by federal agencies to “implement federal budgetary programs.” The list looks shorter than expected, so it would help if OMB clarified whether the list reflects *all* major Executive branch regulations meeting the definition in the title of the table, or just the subset of such regulations that OMB reviewed.¹

OMB notes that these regulations “often have opportunity costs or benefits in addition to the budgetary dollars spent.” But OMB does not report any costs or benefits for these rules on the ground that including them would

¹ Agencies can issue major regulations outside of OMB review if they are covered by one of the administrative exemptions OMB has historically provided, such as the exemptions that apply to emergencies and regulations of specific applicability.

overwhelm the incremental new regulatory impacts identified by this Report and would confuse the distinction between rules that impose costs primarily through the imposition of taxes, and rules that impose costs primarily through mandates on the private sector (p. 14).

While the potential for public misunderstanding might be real, it is an insufficient reason for failing to disclose information critical for evaluating the scale and scope of the federal regulatory state. Public misunderstanding is not threatened under OMB's intentional ignorance model of full disclosure; it is guaranteed.

OMB also warns readers

not to assume that these rules were subject to less stringent analytical and review requirements based on our less-detailed presentation of Federal budget rules in this Report. In fact, agencies thoroughly analyze and OMB thoroughly reviews all significant Federal budget rules under E.O. 12866. If economically significant, these rules must be accompanied by regulatory impact analyses that comply with OMB Circular A-4.

Thus, by its own acknowledgement OMB has in its possession all the information the public needs to understand and appreciate the opportunity costs and benefits of economically significant federal regulations implementing budgetary programs. Each such rule was accompanied by sufficient analysis to determine whether it was economically significant, and if so, the issuing agency performed a Regulatory Impact Analysis (RIA) in accordance with Circular A-4. It is merely OMB's judgment that the public should have to assemble this information on their own, after hunting it down across the government, rather than have it readily available in this Report to Congress.²

Many of these so-called budget regulations have significant, real economic effects on U.S. firms and households *independent of intended transfer payments*. Examples include agriculture rules, which affect land use across millions of acres, environmental quality, and the supply and price of

² We are not convinced that these claims are accurate. Taking the first entry in Table 1-6 as an example (USDA: Tobacco Transition Payment Program), we reviewed GAO's report on this rule and learned the following:

USDA estimates that payments to quota owners, based upon known payment rates and applicable quota levels, will be about \$6.7 billion. Tobacco producers eligible for payments under the 2004 Act are estimated to receive about \$2.9 billion, based upon the specified payment rate and known quota amounts.

The GAO report is silent about the existence of an RIA, and it reports no estimates of costs or benefits. Such estimates are required by Circular A-4.

food; Medicare and Medicaid rules, which affect the supply and demand for services throughout the trillion-dollar U.S. medical care system, including huge indirect effects on non-federally subsidized medical care; and regulations governing U.S. immigration, which affect the supply and demand for labor across a wide swath of the U.S. economy.³

In addition to real but secondary effects, programs that transfer resources always result in deadweight losses, and deadweight losses ought to be counted as regulatory costs. The only uncertainty concerns their magnitude. Simple methods were devised by Arnold Harberger more than 40 years ago that yield helpful approximations. Twenty years ago, Bradford reviewed others' estimates of the deadweight loss from income taxation and found values of 30% or more (David F. Bradford, 1986). Actual losses were highest for high-income individuals, and higher for women than men at every tax-rate level because they tended to be secondary household earners. Ten years ago, Feldstein estimated deadweight losses could exceed \$2 per dollar of income tax revenue collected (Martin Feldstein, 1995). Recently he estimated the deadweight loss of payroll taxes at 50% (Martin Feldstein, 2005).

Transfers paid by taxation reallocate wealth among subgroups of existing U.S. residents.⁴ Transfers paid by borrowing redistribute wealth from future to current U.S. residents. On average, future residents will be wealthier than current residents, which makes them more "able to pay" for the consumption of current residents, but that also means deadweight losses are likely to be greater in the future than in the present for any constant tax rate.

We are not taking a position on the specific value(s) OMB ought to "book" in its regulatory account for the deadweight losses caused by federal transfer programs. We are, however, taking the position that they clearly are not zero and they are substantial. It's misleading to continue submitting Reports to Congress implying that deadweight losses from transfer programs

³ It isn't entirely clear why the Department of Homeland Security's rule allocating H1-B visas is listed as "implementing a budgetary program." Outlays by Immigration and Customs Enforcement represent a small fraction of the real costs of immigration restrictions. Immigration rules also determine the size of subpopulations affected by all other federal regulations, and so they affect the aggregate costs and benefits of each.

⁴ In this comment we focus on U.S. residents affected by programs that transfer wealth. In fact, some regulations transfer wealth between U.S. and foreign residents. For example, import restrictions transfer wealth from U.S. households and foreign producers to U.S. producers, and these rents are distributed to a subset of U.S. households.

are zero, and contrary to the objectivity standard in OMB's information quality guidelines.⁵

B. Rules issued by Congress but not otherwise accounted for in OMB's estimates of federal regulatory costs and benefits

Sometimes Congress issues regulations directly, such as by the establishment of tariffs and import quotas. These regulations have significant impacts not accounted for in OMB's draft Report to Congress (nor in any of its predecessors). We realize that OMB lacks any Executive branch transactions to review that would provide a convenient way to obtain cost and benefit data. Nevertheless, congressionally-issued regulations are simply a subset of the vast scope of the federal regulatory state. We are not taking sides in the debate over the Constitutional propriety of Congress delegating its legislative authorities to the Executive branch (David Schoenbrod, 2003). We are, however, advocating the principle that all regulatory costs and benefits should be counted, and each counted exactly once. We believe that this principle is the only one consistent with the intent of the statute governing the Report.⁶ Failing to include the costs and benefits of congressionally-enacted regulations makes OMB's Report incomplete, and thus misleading.

A highly relevant example of the importance of congressionally-enacted regulations is the import tariff on ethanol, which stands at 14.27 cents per liter (54.05 cents per gallon) (U.S. International Trade Commission, 2006) and applies to most foreign producers, such as Brazil, which in 2002 produced 39% of the world supply (U.S. International Trade Commission, 2004).⁷ This tariff raises the price of imported ethanol and dramatically reduces the quantity imported, especially from countries such as Brazil that could compete effectively.⁸ According to the U.S. International Trade Commission, "[t]he general rates of duty on ethanol are relatively low and therefore not significantly restrictive." But the Commission notes that tariff-rate quotas

⁵ Most information quality deficiencies are discussed in Section III.

⁶ S. 59, an earlier version of the bill that became law that contains essentially the same instructions to OMB, states in § 2: "The purposes of this Act are to-- (1) promote the public right-to-know about the costs and benefits of Federal regulatory programs and rules; (2) increase Government accountability; and (3) improve the quality of Federal regulatory programs and rules."

⁷ Ethanol also benefits 54 cents per gallon from the partial waiver of federal excise taxes on gasoline. This is a tax expenditure and not a regulatory action.

⁸ The U.S. International Trade Commission reports that in 2001, ethanol shipments exceeded \$1,800 billion. Imports totaled \$51 million. See **U.S. International Trade Commission**. "The Effects of Significant U.S. Import Restraints; Fourth Update 2004," U.S. International Trade Commission, 2004, 183., Table 2-16.

(TRQs) benefiting nations in the Caribbean Basin Economic Recovery Act (CBERA) combined with the special tariff cited above “usually prohibits U.S. imports from non-CBERA sources” such as Brazil. CBERA nations cannot export enough ethanol to even meet their duty-free TRQ, and if this protectionist duty were eliminated, the Commission says that imports would significantly displace domestic production. Given the significant role of ethanol in federal air pollution policy during the period covered by this draft Report, the indirect but predictable regulatory effects of the ethanol tariff are likely to be quite substantial. We know they also are growing exponentially as a result of the ethanol mandates in the Energy Policy Act of 2005, and it is important that the costs and benefits of that mandate are captured in OMB’s 2007 Report.

We respectfully suggest that before finalizing this year’s Report, OMB obtain estimates of the benefits and costs of congressionally-enacted regulations from non-Executive branch sources, including nongovernmental sources such as international trade scholars and other experts. Our recommendation is different in degree but not in kind to OMB’s existing practice. In the draft Report, OMB acknowledges that it previously excluded a major 2003 automobile safety regulation on the ground that Congress had mandated it and the Executive branch agency directed to implement it had no discretion in the matter (pp. 26-27). This exclusion was anomalous; traditionally, OMB has required agencies to estimate the benefits and costs of regulations irrespective of their degree of administrative discretion (Office of Management and Budget, 1990a, b), a position that it confirmed again in Circular A-4 (Office of Management and Budget, 2003a). This position is entirely logical, for both the burden and the benefit of regulation have little to do with whether Congress legislates or delegates legislative authority to an agency. Our recommendation would eliminate the remaining inconsistency that the public is informed about benefits and costs only when Congress delegates.

C. Rules issued by agencies not subject to executive order 12,866.

Like all of its predecessors, this draft Report excludes any significant reporting of the estimated benefits and costs of regulations issued by agencies not subject to OMB review under Executive order 12,866. OMB continues to rely on reports submitted by these agencies to the Government Accountability Office (GAO) pursuant to statutory requirements under the Small Business Regulatory Enforcement Fairness Act (SBREFA).

This exclusion has always been suspect, but six years later it has become simply untenable. First, the Regulatory Right-to-Know Act (RRTK) does not direct OMB to exclude from its analysis regulatory benefits and costs just because they arise from non-Executive branch actions. It is true that

Congress specifically excluded from the GAO reporting requirement regulations implementing the Telecommunications Act of 1996.⁹ However, Congress did not extend that exemption to RRTK.¹⁰

Other independent commissions besides the FCC were busy during the period covered by this draft Report. For example, the Securities and Exchange Commission (SEC) issued several major regulations, including a highly controversial rule regulating hedge funds.¹¹ In previous years, SEC issued major new regulations implementing Sarbanes-Oxley, and a wealth of independent estimates of the effects of these rules is available. As in the case of congressionally-enacted regulations, OMB should at least summarize the evidence available from non-governmental sources and include that in its Report to Congress, not simply ignore rules issued by independent commissions. A Report that excludes the benefits and costs of a host of major regulations just because they were not transactions in the OMB review process is per se incomplete and unreliable.

III. INFORMATION QUALITY DEFICIENCIES

In 2002 OMB issued government-wide guidelines on information quality (Office of Management and Budget, 2002a) and specific guidelines applicable to information disseminated by OMB (Office of Management and Budget, 2002b). These guidelines include significant provisions related to the objectivity of disseminated information. In its draft 2003 Report (Office of Management and Budget, 2003b), OMB mentioned these guidelines in the context of a draft of its latest RIA guidelines and the references are codified in the final version of Circular A-4 (Office of Management and Budget, 2003a).¹²

⁹ See 5 U.S.C. 804(2).

¹⁰ OMB also notes this exemption in the draft report and suggests that the issue is moot because the Federal Communications Commission (FCC) issued no major rules during the period covered by this report. See p. 14, fn. 13. However, FCC issued rules that would have been “major” during the periods covered by previous reports, and OMB did not provide estimates of benefits and costs for these rules.

¹¹ On June 23, 2006, this SEC rule was vacated by the D.C. Circuit as arbitrary and capricious. See Goldstein et al. v. SEC (<http://pacer.cadc.uscourts.gov/docs/common/opinions/200606/04-1434a.pdf>.)

¹² This reference is limited to an instruction to agencies that they comply, without any information concerning what OMB expects of them (e.g.: “Finally, you should assure compliance with the Information Quality Guidelines for your agency and OMB’s “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies” (“data quality guidelines”) (<http://www.whitehouse.gov/omb/fedreg/reproducible.html>.) (p. 17)

Perhaps ironically, most of OMB's draft Report to Congress does not meet these information quality standards. Significant information quality defects are apparent in several different areas. Most of these information quality deficiencies are independent of the question of whether the reported estimates are *substantively* biased.¹³

A. Excess precision

The tables in OMB's draft Report present quantitative estimates of benefits and costs to the nearest \$1 million. This includes both "raw" tables such as Table A-1 ("Summary of Agency Estimates for Final Rules") and the highest level summary table, Table 1-1 ("Estimates of the Total Annual Benefits and Costs of Major Federal Rules, October 1, 1995 to September 30, 2005 (millions of 2001 dollars)"). As OMB knows, many readers (including Members of Congress and the press) will gravitate to the highest level summary table and rely on it exclusively as the "bottom line" of the Report.

It is uniformly understood that numbers that are uncertain should be rounded to the last significant digit. This means estimates presented by OMB to the nearest \$1 million should be correct within \$500,000 in either direction. For many reasons, Agency estimates reported in Table A-1 to the nearest \$1 million are not precise within \$500,000. It is almost certain that the reported precision in these values reflects the arbitrary choice of default format and units used in an underlying spreadsheet program, such as Microsoft Excel. If millions of dollars are used as the default unit with zero figures to the right of the decimal place, the result is estimates reported to the nearest \$1 million.

OMB's information quality guidelines require agencies, including OMB, to disseminate information that is objective in presentation (Office of Management and Budget, 2002a, b). False precision is inconsistent with presentational objectivity. By reporting excess precision, OMB leads the public to incorrectly believe that the government knows more about the true benefits and costs of federal regulatory action than it really does.

OMB should take a close look at the estimates in Table A-1 and report them with precision justified by the analytic methods used to produce them. The degree of legitimate precision is certain to vary, and in many cases it will be orders of magnitude less precise than \pm \$500,000. Both Congress and the

¹³ In comments we have provided on previous draft reports to Congress, we have noted that the figures reported by OMB are almost certainly substantively biased. OMB relies exclusively on agency estimates, and agencies have strong incentives to understate costs and overstate benefits. Few agency RIAs have been subjected to formal, independent peer review, and none have been peer reviewed with the objective of ensuring adherence to information quality standards.

public deserve to be objectively informed about the legitimate precision of each estimate, and how precision varies across estimates and agencies doing the estimating.

B. Inadequate and incorrect characterization of uncertainty

On January 9, 2006, OMB issued a proposed Bulletin on Risk Assessment (Office of Management and Budget, 2006) that included specific elements related to the characterization of variability and uncertainty. We have separately provided comments commending OMB for clarifying the principle, implied by its information quality guidelines, that the accurate and unbiased characterization of variability and uncertainty is part and parcel of adhering to the guidelines' objectivity standard (Regulatory Checklist, 2006). We also pointed out that OMB Circular A-4 already directs agencies to estimate risk distributions where it is feasible to do so.

Thus, OMB's established policy with respect to RIAs and its 2002 information quality guidelines both call for significant effort to be devoted to the characterization of uncertainty. The proposed risk assessment guidance only builds on these existing policies. It is essential that OMB lead by example, and apply these policies to its Reports to Congress on the benefits and costs of federal regulation. It is difficult to imagine how OMB could credibly direct federal agencies to conduct their risk and economic analyses at a quality level that it is unwilling to apply to itself.

So the question at hand is whether OMB's draft Report satisfies the analytic standards it has already set (or proposes to finalize) for other federal agencies. Unfortunately, the answer to that question is unambiguously "No."

Taking the highest level summary table as an example, the range of uncertainty in aggregate benefits reported in Table 1-1 is a factor of 4.7. The range of uncertainty in aggregate costs reported is a factor of 1.2. The Departments of Homeland Security (DHS), Housing and Urban Development (HUD), and Justice (DOJ) apparently have no uncertainty at all in their benefit estimates. DHS, HUD, and the Department of Energy (DOE) apparently have no uncertainty at all in their cost estimates.

Our Table I below summarizes how much uncertainty is contained in the ranges of aggregate estimates of benefits and costs reported by OMB, by federal agency. The maximum reported uncertainty in benefit estimates is the Environmental Protection Agency's 6.7, and the maximum reported uncertainty in cost estimates is the Department of Transportation's 2.1.

Table I: Uncertainty in Estimates of Total Annual Benefits and Costs Reported by OMB for Major Final Rules Issued October 1, 1995 to September 30, 2005 (\$2001 Millions)		
Agency	Uncertainty in Benefits Factor	Uncertainty in Costs Factor
Department of Agriculture	1.9	1.1
Department of Education	1.2	1.7
Department of Energy	1.0	1.0
Department of Health and Human Services	1.6	1.0
Department of Homeland Security (Coast Guard)	1.0	1.0
Department of Housing and Urban Development	1.0	1.0
Department of Justice	1.0	1.1
Department of Labor	3.0	1.0
Department of Transportation	1.7	2.1
Environmental Protection Agency	6.7	1.1
Total	4.8	1.2
Source: OMB, Draft 2006 Report to Congress, Table 1-1.		

Table II: Uncertainty in Estimates of Total Annual Benefits and Costs Reported by OMB for Major Federal Programs: October 1, 1995 to September 30, 2005 (\$2001 Millions)		
Agency	Uncertainty in Benefits Factor	Uncertainty in Costs Factor
Department of Energy		
Energy Efficiency and Renewable Energy	1.0	1.0
Department of Health and Human Services		
Food and Drug Administration	4.4	1.2
Center for Medicare and Medicaid Services	1.0	1.0
Department of Labor		
Occupational Safety and Health Administration	3.0	1.0
Department of Transportation		
National Highway Traffic Safety Administration	2.0	2.6
Environmental Protection Agency		
Office of Air	6.8	1.1
Office of Water	7.1	1.1

Source: OMB, Draft 2006 Report to Congress, Table 1-2.

Even if it is assumed that ranges are adequate ways to characterize uncertainty, these particular ranges are not credible. On the benefit side, many of the final rules reported in Table A-1 (and summarized in Table A-1) have underlying risk assessments with uncertainties spanning several orders of magnitude. Uncertainty in the valuation of avoided or prevented risks may be smaller, but valuation uncertainty still increases aggregate uncertainty. On the cost side, we are aware of no independent regulatory analyst who would attest that there is as little uncertainty in cost estimation as OMB Reports.

Similar problems afflict OMB’s Table 1-2 summarizing benefits and costs by selected regulatory program. Despite the fact that Table 1-2 covers 10 years of major final regulations, the ranges of uncertainties reported are utterly unbelievable. Table II above summarizes these uncertainties. The aggregate benefits and costs of six DOE energy efficiency rules and four Medicare/Medicaid rules, with billions of dollars in effects, are reported to have no uncertainty. In all cases, uncertainty in program benefits is reported to be less than a factor of 10, and in no case does uncertainty in program costs exceed a factor of 3.

OMB states that “the degree of uncertainty in benefit estimates for clean air rules is large” (p. 7). But the reported uncertainty is less than a

factor of 7 (and less than the 7.1-fold reported uncertainty for clean water rules). What underlies OMB's statement is probably not the 6.8-fold uncertainty reported in Table 1-2, but rather aspects of uncertainty that are present but not disclosed in EPA's benefit estimates. These uncertainties include:

- Uncertainty about whether the inhalation of fine particles at environmentally relevant concentrations causes premature death. (EPA assumes causation.)
- Uncertainty about the relative potency of chemically different particles. (EPA assumes that all particles are hazardous.)
- Uncertainty about the shape of the concentration-response function. (EPA assumes there is no threshold below which adverse health effects occur.)
- Uncertainty about future emissions. (EPA assumes that SO_x and NO_x emissions will rise above the permitted caps due to allowances previously banked under the Title IV Acid Rain Program.)
- Uncertainty about the value of avoiding small mortality risks. (EPA assumes that estimates obtained from healthy workers in labor market studies apply to the elderly and infirm.)

In some cases, these uncertainties are greater in magnitude than the amount of uncertainty reported by OMB. In many cases, had these uncertainties been accounted for, the lower value in the range of reported benefits would have been much lower.¹⁴

OMB mentions but downplays the significance of these uncertainties, and implies that improved estimates are just around the corner:

In response to recommendations from a committee of the National Research Council/National Academy of Sciences, EPA is working with OMB to improve methods to quantify the degree of technical uncertainty in benefits estimates (p. 7, footnote omitted).

This corner appears to have a large radius. OMB made identical statements in its 2004 and 2005 Reports to Congress (Office of Management and Budget, 2004, 2005b).

¹⁴ In contrast, reported cost estimates for clean air programs are virtually certain (uncertainty range = 1.1-fold). This seems highly implausible. For the Clean Air Interstate Rule, EPA reports only point estimates for costs, rounded to the nearest \$10 million, where cost is (as usual) defined as *expenditures* and not as opportunity cost. See p. 1-9, **U.S. Environmental Protection Agency**. "Regulatory Impact Analysis for the Final Clean Air Interstate Rule," U.S. Environmental Protection Agency, 2005, 421.

C. Compliance with OMB Circular A-4

Several times in the draft Report, OMB implies that agencies generally comply with the analytic requirements of Circular A-4, which became effective for final rules on January 1, 2005. The draft Report further implies that Circular A-4 launched a significant upgrade in the quality of regulatory analysis:

The 2006 Report will be the first Report that includes final rules subject to OMB Circular A-4. (p. 38)

The problem with this line of reasoning is that Circular A-4 is not appreciably different from guidelines OMB issued in 2000 (Office of Management and Budget, 2000) and reiterated in 2001 (Mitchell E. Daniels Jr., 2001). Both are very similar to RIA guidance documents issued by OMB in 1996 (Office of Management and Budget, 1996) and 1990 (Office of Management and Budget, 1990a). OMB's codification of RIA guidance as Circular A-4 may make it more durable,¹⁵ but the public should be properly informed that the *substance* of OMB's guidance on regulatory analysis has been remarkably stable for more than 15 years. (Office of Management and Budget, 1990a)

The quality of estimates of benefits and costs for regulations reported for the first time in this draft Report might be much improved from those of preceding years. The public would have greater confidence if OMB provided supporting evidence. However, the sentence following OMB's proud announcement of the "Circular A-4 Era" suggests that little has changed:

OMB will work with the agencies to ensure that their impact analyses follow the new guidance.

This implies, of course, that agencies often do not follow Circular A-4, or whichever of its many predecessors applied at the time the RIA was prepared.¹⁶

In 2005, OMB finalized government-wide guidelines on peer review (Office of Management and Budget, 2005a). In the peer review guidelines, OMB directed agencies to subject "influential" scientific information to peer review. OMB is statutorily required to obtain peer review of this draft Report to Congress before issuing it in final form. However, peer reviewers are not

¹⁵ Circulars are instructions issued by OMB to Federal agencies that are "expected to have a continuing effect of two years or more." See <http://www.whitehouse.gov/omb/circulars/index.html>.

¹⁶ All of the regulations summarized in Tables 1-1 through 1-6 were covered either by Circular A-4 or one of its predecessors. Legitimate differences in quality are limited to the few and subtle differences among these guidance documents.

asked to review agency compliance with Circular A-4 (or the applicable predecessor).

We respectfully suggest that now is the perfect time for OMB to sponsor an independent external peer review, *fully compliant with its own government-wide guidance*, to review agency compliance with Circular A-4 for the RIAs supporting final rules issued in 2005. Because OMB specifically exempted RIAs from its peer review guidance, it is likely that none of them have ever been subjected to external and independent peer review.¹⁷

D. OMB Ownership of Aggregate Estimates

An inexperienced reader of OMB's draft Report to Congress would be legitimately confused concerning perhaps the quintessential question about the estimates reported: Whose estimates are they, anyway? Depending on which section one reads, the estimates reported belong to the agencies themselves; they belong to OMB; or they are estimates that have been validated by some unspecified external authority. Clarity in both ownership and endorsement of the estimates is crucial for presentational objectivity.

Table A-1, the foundation for all other estimates in the draft Report, is correctly titled to show that it lists *agency* estimates of the benefits and costs of *their own* major final regulations. Because OMB's summary tables in Chapter 1 report 10-year running averages, the estimates in Table A-1 are just the latest installments to those running averages. But the tables in Chapter 1 drop the crucial caveat that the underlying estimates belong to the agencies. The same is true for the tables in Appendix C, which provide estimates of the benefits and costs of final regulations too old for inclusion in the 10-year running average. A reasonable (though probably incorrect) reading of the tables in Chapter 1 is that the estimates provided in the Report belong to OMB. This impression is reinforced by the many places in the Report where OMB makes declarative statements about benefit and cost estimates that are unclear about who is vouching for them. OMB could prevent much of this confusion if it avoided passive voice whenever possible.

¹⁷ OMB's stated basis for excluding RIAs from the peer review guidance is that they are already reviewed by OMB (p. 2674). This review is certainly external and independent of *the authoring agency*, but it is not external to or independent of the Executive branch. Moreover, it cannot be equivalent to genuine external and independent peer review. The most important way which OMB review departs from the peer review guidance is that OMB never publicly discloses its work products. Public disclosure (and to some extent, public participation) are integral elements of OMB's peer review guidance, but both are absent from OMB review. A special peer review of 2005-vintage RIAs would provide valuable insight concerning agency performance while preserving OMB's ability to keep its reviews confidential.

E. Objectivity

According to OMB's information quality guidelines, an agency is responsible for the quality of information it disseminates if a reasonable person would infer that the agency endorses the information it is disseminating. The draft Report includes a couple scattered disclaimers indicating that OMB's reporting of certain estimates should not be interpreted as implying endorsement. These disclaimers are helpful but insufficient to ensure that the public does not infer OMB endorsement.

We believe that OMB would prefer not to convey any hint of endorsement so as to ensure that it avoids responsibility under applicable information quality guidelines for ensuring the quality of the estimates in the Report. But if it is going to summarize agency estimates without endorsement, it does not want readers to misconstrue its Report as conveying such endorsement. Similarly, if OMB were to expand the Report to summarize estimates from others besides the agency issuing the regulation, it would want to avoid conveying any sense of endorsement of these third-party estimates. The remedies suggested in section III.D above with regard to informational ownership would help avoid this problem, but they probably will not be sufficient.

That's because OMB has no alternative but to acknowledge ownership of the aggregate estimates reported in Chapter 1. Even though they are *derived from* agency estimates, the aggregates were *prepared by* OMB and are *used by* OMB to draw certain inferences, such as comparisons of the Bush (43) administration with its predecessors.¹⁸ Thus, OMB cannot escape the obligation to ensure that Chapter 1 of the Report satisfies government-wide information quality guidelines, particularly for presentational and substantive objectivity.¹⁹

The approach OMB has taken is to liberally sprinkle the text with subtle disclaimers saying, if read carefully, that its aggregate estimates are unreliable and invalid:

- *Based on the information contained in this and previous Reports, the total costs and benefits of all Federal rules now in effect (major and non-major, including those adopted more than 10 years ago) may be*

¹⁸ See, e.g., the three bullets at the bottom of p. 1 and significant parts of Chapter 2.

¹⁹ The Executive Summary is particularly troublesome. It includes several declarative statements about aggregate benefits and costs, but nowhere does it say that these aggregates are merely summed agency estimates from individual regulations. Members of Congress and the public who peruse only the Executive Summary are highly likely to infer that the Report reflects the views of OMB and that OMB considers the estimates reported by the agencies to be valid and reliable. Silence by OMB on this point is equivalent to assent.

significantly larger than the sum of the costs and benefits reported in Table 1-1 (p. 6)

- In order for comparisons or aggregation to be meaningful, benefit and cost estimates *should correctly account for* all substantial effects of regulatory actions, not all of which may be reflected in the available data (p. 6).
- Any comparison or aggregation across rules *should also consider a number of factors that our presentation does not address* (p. 6).
- *To the extent that agencies have adopted different methodologies—for example, different monetized values for effects, different baselines in terms of the regulations and controls already in place, different rates of time preference, different treatments of uncertainty—these differences remain embedded in Tables 1-1 and 1-2* (p. 6).
- While we have relied in many instances on agency practices in monetizing costs and benefits, our citation of, or reliance on, agency data in this Report *should not be taken as an OMB endorsement* of all the varied methodologies used to derive benefit and cost estimates (p. 6).

In each previous Report to Congress, OMB raised entirely legitimate concerns that the aggregate estimates called for by law are not meaningful indicators of regulatory performance. That is, strict adherence to congressional reporting requirements yields summary information that has little value and misleads anyone who takes it seriously. Over time, OMB seems to be tiring of making this point and perhaps succumbing to the temptation to produce aggregate estimates just to be done with the exercise. However, now that OMB has separately issued government-wide information quality guidelines, it has a stronger need for defending the principle that the ability to apply of arithmetic operators does not ensure meaningful results.

We suggest that OMB craft comprehensive but succinct and transparent disclaimers specifically geared to each statutorily required reporting element. These disclaimers can be explicitly included as footnotes within the tables that summarize the relevant reporting element.²⁰ This way, applicable disclaimers become an integral part of the tabular data, and the chance that readers will misinterpret the tables should be significantly reduced. Also, readers would no longer have to hunt through the text of the Report to learn how much confidence they should (or shouldn't) attach to the values reported in each table.

²⁰ Federal statistical agencies do this routinely.

Summarizing our comments in this section, the draft Report contains numerous information quality deficiencies:

- It reports individual and aggregate estimates with excess precision
- It does not accurately characterize uncertainty
- It implies, without providing credible support, that agencies generally adhere to the principles in Circular A-4
- It is ambiguous about who owns and thus is vouching for the quality of the estimates
- It does not adhere to OMB's own standards for presentational and substantive objectivity

In short, OMB's draft Report does not present information about the benefits and costs of federal regulation in an "accurate, clear, complete, and unbiased manner" ((Office of Management and Budget, 2002b), §V.6.a), nor does it "ensur[e] accurate, reliable, and unbiased information" (§V.6.b). OMB can escape responsibility for agency estimates of individual final rules by being clearer about the provenance of the various estimates and, especially, inserting appropriate and reinforcing caveats and disclaimers. However, OMB is clearly responsible for the quality of aggregate estimates. It cannot assume away the problem by noting that the underlying data it relies upon may be problematic. Rather, it has to confront the inherent information quality limitations of the very things Congress directed it to report.

IV. OMB's RISK ASSESSMENT BULLETIN

As we indicated in section III.B above, OMB's proposed risk assessment guidance includes important provisions for characterizing variability and uncertainty. In our comments on that proposed guidance, we noted that effective adherence to provisions of Circular A-4 related to risk distributions imply the performance of variability and uncertainty analyses (Regulatory Checkbook, 2006). Thus, we concluded that several provisions in the proposed guidance were relatively minor clarifying amendments to Circular A-4 and ought to be codified there rather than in a separate guidance document.

We believe that OMB should follow its own proposed risk assessment guidance to finalize this Report. In particular, OMB should perform a more formal uncertainty analysis, at least of the aggregate estimates of benefits and costs. Other agencies would greatly benefit from OMB's example. First, it would provide a powerful illustration of what OMB is asking agencies to do. Second, it would enable OMB to lead by example, thereby countering the claim that OMB staff are skilled at ordering others to do what they themselves cannot perform. Third, it would overcome the perception that uncertainty analysis is hard, time-consuming and expensive.

A number of methods exist for performing uncertainty analysis, and some are more appropriate than others. For example, we believe that Monte Carlo analysis would be inappropriate in this case because it may require too much information that OMB does not have. A potentially more useful option is expert elicitation, but the choice of experts can be controversial and problems can arise with respect to strategic behavior.

We suggest that OMB utilize interval analysis and fuzzy arithmetic. These methods are designed for use where a great deal of information is not known, including in this case the likelihood that different estimates of benefits or costs within (or beyond) a range are true. Sophisticated but easy-to-use software is available,²¹ and OMB is known to have an extraordinary crew of professional statisticians who are quite capable of handling the technical task with input from desk officers, economists and other subject matter experts.

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²¹ One example is RAMAS Risk Calc, available from Applied Biomathematics, See <http://www.ramas.com/riskcalc.htm#fno>.

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