June 6, 2023

Hon. Richard L. Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Administrator Revesz:

President Biden's Executive Order 14094, "Modernizing Regulatory Review," charged the Director of the Office of Management and Budget (OMB), through the administrator of the Office of Information and Regulatory Affairs (OIRA), with revising OMB Circular No. A-4, "Regulatory Analysis," within a year.[1] We write to express our opposition to the proposed revisions, which are seemingly designed to fast-track progressive policies that do not have a majority of votes in Congress necessary for passage into law.[2] The proposed changes sacrifice OIRA's traditional objective calculation of regulatory costs and benefits to further the administration's left-wing priorities on "social welfare," "racial justice," "environmental stewardship," and "equity" as listed in President Biden's Memorandum on Modernizing Regulatory Review.[3]

First, we are concerned with proposed changes to the regulatory analysis process that make rigorous review less likely. For example, the changes to Section 3(f)(1) of Executive Order 12866 upwardly revise the cost threshold of a "significant regulatory action" that is subject to additional scrutiny from $100 million to $200 million, adjusted for changes to gross domestic product.[4] Regulations not deemed "significant" often already escape rigorous review, so doubling this threshold and then allowing it to be increased at a rate that is faster than inflation would only worsen this reality. Additionally, revisions to the same section require formal authorization from the OIRA administrator to decide when to conduct a centralized regulatory review under Section 3(f)(4) without giving agencies clear and meaningful guidance about when OIRA will make that decision. The result will be a perpetual tug-of-war with the agencies over whether OIRA will review various rules, weakening objective decision-making and the integrity of agencies' own cost-benefit analyses.

[1] Exec. Order No. 14094, 88 F.R. 21879 (April 6, 2023).
[2] For example, the proposed revisions to Circular No. A-4 would enable agencies to utilize ancillary benefits in their cost-benefit analyses, which would in turn enable agencies to justify regulations based on issues and benefits beyond what Congress intended in enacting the statutory program. *See* Proposed OMB Circular No. A-4, "Regulatory Analysis," 40-41 (April 6, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.
[3] Presidential Memorandum, *Modernizing Regulatory Review* (January 20, 2021) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.
[4] Exec. Order No. 14094, 88 F.R. 21879 (April 6, 2023). The threshold would then be adjusted every three years to keep pace with increases in gross domestic product.

We are also troubled by proposed changes to Circular No. A-4 that would inflate the supposed benefits of regulations as an excuse to justify the cost of the administration's left-wing priorities. In particular, many of these changes are designed to overestimate damages due to the "social cost of carbon."[5] One of the ways the proposed changes would do this is by encouraging agencies to broaden their geographic scope of analysis to include the effects of regulations on noncitizens residing abroad. This proposed circular specifically states, "all such important effects should be included, regardless of whether they result directly from a regulation's domestic applicability, or indirectly from a regulation's impact on foreign entities." While the harms of a regulation are more likely to be directly felt by Americans, which would already be accounted for in agencies' cost-benefit analysis, the benefits could theoretically extend across continents. Indeed, the Interagency Working Group's *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* from 2010 admitted that adopting a global SCC represented "a departure from past practices."[6]

Although agencies have previously privileged the ten-year window in their cost-benefit analysis, the proposed changes further encourage agencies to expand the time frame of their analysis to "a period before and after the date of compliance that is long enough to encompass all the important benefits and costs likely to result from the regulation," meaning a non-specified point in time that could be hundreds of years into the future. The assumptions needed for such long-term assessments become more uncertain with time, which the Biden administration notes in its long-term budget projections,[7] making both costs and benefits highly speculative the farther out the year is into the future. In addition, costs tend to be incurred in the present, while benefits accumulate in the future, so the result will be more benefits of the regulation being accounted for. As an example, the changes to the geographic and temporal scope of analysis could make a proposed environmental regulation cost-justified that would theoretically lessen the potential for flooding in Somalia in the year 2060.

Another way the changes inflate the benefits of a regulation, particularly more uncertain benefits decades into the future, is by adjusting the discount rate to 1.7 percent and recommending subsequently lower rates in later years from the current range of 3 percent to 7 percent.[8] A discount rate determines the current value of costs and benefits in the future.[9] Lower discount rates would give future benefits greater weight, making them more likely to outweigh the costs of a regulation. This is particularly true for environmental and public health regulations. For example, a left-wing environmental think tank has noted how sensitive the "social cost of carbon" is to the discount rate and that lowering it to this degree would more than double the environmental benefits in a cost estimate.[10] On the other end of the range,

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[5] Proposed OMB Circular No. A-4, "Regulatory Analysis," 88 FR 20915 (April 7, 2023).
[6] Interagency Working Group on Social Cost of Carbon, United States Government, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (February 2010), https://www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf
[7] Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2024, Chapter 3: Long-Term Budget Outlook. (March 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/ap_3_long_term_fy2024.pdf.
[8] Preamble: Proposed OMB Circular No. A-4, "Regulatory Analysis," 28-30 (April 6, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4Preamble.pdf.
[9] James Broughel, *The Social Discount Rate: A Primer for Policymakers*, Mercatus Center (June 30, 2020), https://www.mercatus.org/research/policy-briefs/social-discount-rate-primer-policymakers.
[10] Brian C. Prest, William Pizer, and Richard G. Newell, *Improving Discounting in the Social Cost of Carbon*, Resources for the Future (October 21, 2021), https://www.resources.org/archives/improving-discounting-in-the-social-cost-of-carbon/.

an estimation of the social cost of carbon using a discount rate of 7 percent dropped by more than 80 percent compared to the 3 percent calculation in one model and went negative in another.[11] Although the document cites the 30-year average of the 10-year Treasury rate from 2003 to 2022 as the basis for the change, many economists have argued that rates were kept artificially low for years. It is impossible to know what the natural rate of interest would have been without the Federal Reserve's easy-money policies over this time frame. The 10-year Treasury rate has also been rising and has exceeded 1.7 percent since early 2021, so using a discount rate that is already outdated—without a system for it to be updated—is inappropriate.[12]

In an additional attempt to further inflate perceived benefits, the revisions to the circular encourage agencies to change the assessment of "ancillary" benefits and costs to just additional benefits and costs. For context, an "ancillary" benefit is a benefit that is typically unrelated to Congress's main goal in enacting the statutory program under which the agency issues regulations. Treating ancillary benefits just like direct benefits would impede agencies from using the course of action that best reflects the concerns of Congress in enacting such statutes—and would also impede the ability of the American people to assess whether agencies' regulations adhere to congressional intent. For example, OIRA lists reduced refinery emissions as an ancillary benefit from more stringent fuel economy standards for light trucks, making clear the type of regulations the administration plans to promulgate under these changes.

Finally, the changes attempt to bake "equity" into the regulatory process through the use of distributional analysis. Distributional analysis is traditionally used to recognize that regulations can impact groups of people differently and that people also value things differently. In a blatant attempt to assign a partisan agenda to this process, these changes state that "regulations can play a key role in promoting distributional *fairness and advancing equity*" (emphasis added). One way the changes advance equity in distributional analysis is by telling agencies that they may choose to apply different weights to benefits and costs accruing to different groups. They also note that "distributional analysis by gender should define gender categories according to OMB guidance" to make sure agencies only use the approved gender terminology.[13] While economists often make use of distributional analysis, it is completely inappropriate to use it in a way that stokes divisiveness and favors certain Americans over others.

In sum, these changes will likely result in justifying the cost of a proposed regulation that would otherwise fail under the current framework in an attempt to greenlight the administration's "whole of government" climate change agenda. For the reasons described above, OIRA should decline to finalize these changes. In addition, we request that you provide written answers to the following questions no later than June 20, 2023:

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[11] David Kreutzer, *Discounting Climate Costs*, The Heritage Foundation (June 16, 2016), https://www.heritage.org/environment/report/discounting-climate-costs

[12] U.S. Department of the Treasury, Interest Rate Statistics. https://home.treasury.gov/policy-issues/financing-the-government/interest-rate-statistics.

[13] The Office of Management and Budget, *Interagency Technical Working Group on Sexual Orientation and Gender Identity Items in the Household Pulse Survey: Report and Recommendations* (April 30, 2021), https://omb.report/icr/202106-0607-003/doc/112605500.

1. When considering the change to upwardly revise the cost threshold of a "significant regulatory action," did you determine how many fewer rules would be subject to centralized review?

2. Considering the current broad application of section 3(f)(4) of Executive Order 12866, do you believe the revisions are appropriate or necessary, specifically the requirement for authorization from the administrator of OIRA in each case?

3. Do you believe the revisions to section 3(f)(4) will reduce the number of regulations that OIRA deems appropriate for centralized review?

4. Do you anticipate the changes to the geographic and temporal scope of analysis will increase the benefits accounted for in an agency's analysis, particularly for environmental rules?

5. Why did you not include a system for the lowered discount rate of 1.7 percent to be regularly adjusted moving forward to ensure it does soon become outdated?

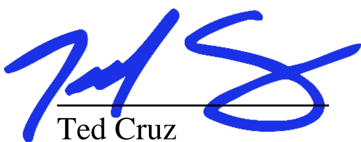
6. When lowering the discount rate to 1.7 percent, OMB also proposes a schedule of rates that gradually drops even lower than 1.7 percent decades into the future.[14] Do you anticipate that this proposed schedule of rates will further increase the benefits accounted for in an agency's analysis, particularly for environmental rules, despite costs and benefits that far into the future being highly speculative?

7. How does OIRA intend to promote "distributional fairness" and advance "equity," which the proposed changes to Circular A-4 state are common needs for regulation?

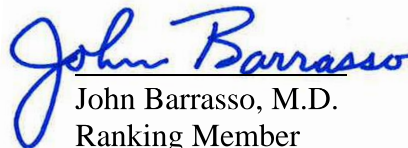
8. Do you anticipate that the proposed changes to regulatory review will increase the amount of expected damages due to the "social cost of carbon," making more environmental rules cost-justified?

We look forward to your prompt attention to this matter.

Sincerely,



Ted Cruz
Ranking Member
U.S. Senate Committee on Commerce, Science, and Transportation

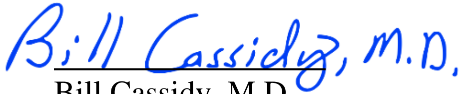


John Barrasso, M.D.
Ranking Member
U.S. Senate Committee on Energy and Natural Resources

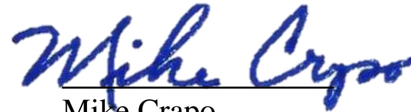
[14] Preamble: Proposed OMB Circular No. A-4, "Regulatory Analysis," 28-30 (April 6, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4Preamble.pdf

Mike Braun
Ranking Member
U.S. Senate Special Committee on Aging

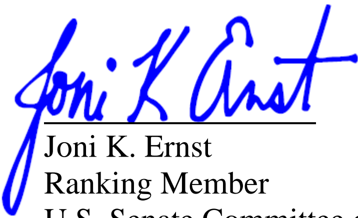
Shelley Moore Capito
Ranking Member
U.S. Senate Committee on Environment and Public Works



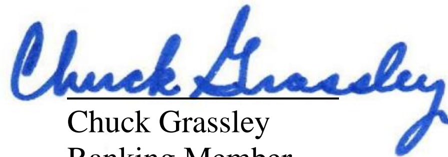
Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health, Education, Labor and Pensions



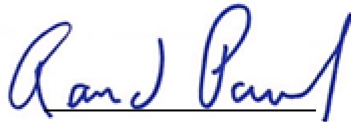
Mike Crapo
Ranking Member
U.S. Senate Committee on Finance



Joni K. Ernst
Ranking Member
U.S. Senate Committee on Small Business and Entrepreneurship



Chuck Grassley
Ranking Member
U.S. Senate Committee on the Budget



Rand Paul, M.D.
Ranking Member
U.S. Senate Committee on Homeland Security and Governmental Affairs