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**FILED BY ELECTRONIC MAIL
TO OIRA_BC_RPT@omb.eop.gov**

Re: Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations

Dear Sir/Madam:

These comments are submitted by the Center for Progressive Reform (CPR or the Center), an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR's mission is to advance the public's understanding of the issues addressed by the country's regulatory laws.

The Center is committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment. One component of the Center's mission is to circulate academic papers, studies, and other analyses that promote public policy based on the multiple social values that motivated the enactment of our nation's health, safety and environmental laws. The Center seeks to inform the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values. We reject the idea that government's only function is to increase the economic efficiency of private markets.

The Center also seeks to provoke debate on how the government's authority and resources may best be used to preserve collective values and to hold accountable those who ignore or trivialize them. The Center seeks to inform the public about ideas to expand and strengthen public decision-making by facilitating the participation of groups representing the public interest that must struggle with limited information and access to technical expertise.

These comments concern the Office of Management and Budget's (OMB) Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations (2005 Draft Report, Draft Report, or Report).

The Draft Report raises issues primarily in five broad areas; briefly, the Report:

- 1) purports to provide an accounting of the aggregate costs and benefits of major federal regulations over the past ten years (from 1994 to 2004) as well as a specific accounting of the costs and benefits of individual rules promulgated during the past year;
- 2) repeats last year's blatantly ideological attempt to draw a connection between increased levels of regulation (generically defined) and depressed wages and slow economic growth;
- 3) purports to identify a "trend" in federal regulatory activity toward lower regulatory costs and higher net benefits during the Bush II administration;
- 4) requests comments on "look-back studies" that attempt to compare ex ante estimates of the costs and benefits of regulations with ex post data on actual costs and benefits, and provides an (incomplete) catalogue of such studies;
- 5) Reviews implementation of the Information Quality Act and defends the Act against criticism.

Our specific conclusions about the Draft Report can be summarized as follows:

- 1) OMB's accountings of the costs and benefits of regulation and its conclusions about purported trends in regulation are highly misleading and provide a false pretense of accuracy and objectivity.
- 2) OMB's specious attempts to draw a connection between high levels of regulation and slow economic growth and its related attempts to congratulate the Bush II administration for reducing levels of environmental, health, and safety regulation display a pervasive and politically driven anti-regulatory bias.
- 3) OMB is right to suggest that "look-back studies," which compare ex post estimates of actual levels of regulatory costs and benefits to ex ante projections, are an important tool for assessing regulatory policy. OMB's literature review, however, paints a misleading picture of the ongoing academic debate on this issue. In fact, there is considerable evidence that agencies routinely over-estimate the costs of regulatory compliance ex ante.

This evidence casts further doubt on broad assessments of regulatory costs and benefits like those contained in the Draft 2005 Report

- 4) OMB's support for the Information Quality Act is misplaced. The Act is (predictably) being abused by industry to delay and derail important environmental, health, and safety measures and should be repealed.

I. OMB's Accountings of Costs and Benefits are Highly Misleading.

The centerpiece of OMB's Report to Congress is an overall accounting of the aggregate costs and benefits of major federal regulations over the past ten years and a more specific accounting of the costs and benefits of individual regulations promulgated during the past fiscal year (October 1, 2003 to September 30, 2004). These accountings are highly misleading and non-transparent, obscuring important information about the assumptions and value choices underlying the data behind a false veil of seemingly scientific accuracy and objectivity, and excluding important categories of regulation from the analysis entirely.

A. OMB's Analysis Obscures the Considerable Uncertainty Underlying its Numbers and Discounts Important Non-quantifiable Regulatory Benefits.

OMB acknowledges that some costs and benefits are simply not quantifiable (Draft Report at 6, n. 2), and that even when costs and benefits are quantified, the uncertainties underlying such estimates are considerable. (Draft Report at 10.) But by expressing costs and benefits in dollar terms, OMB obscures the considerable uncertainties and the controversial assumptions and approximations underlying those numbers. Sometimes, OMB expresses costs or benefits as a single number, often calculated out to one or two decimal points. The seeming precision of such a number creates a false illusion of scientific accuracy and objectivity, which belies the vast uncertainties that plague any attempt to calculate costs and benefits in dollar terms.¹ But even when OMB expresses values in terms of ranges, those ranges fail to capture the full extent of the uncertainties underlying the estimate. Indeed, OMB admits as much, acknowledging that "the wide range of benefits estimates for [clean air rules on controlling particulates] does not capture the full extent of the scientific uncertainty." (Draft Report at 10.)

1. Gross Uncertainties: The Arsenic Example

An example serves to illustrate the point. The Draft 2005 Report cites the costs and benefits of EPA's rule setting limits for arsenic in drinking water as calculated by EPA (with OMB's oversight). (Draft Report at 27.) The costs were estimated at \$206 million per year and the benefits at \$140 to \$198 million per year (in 1999 dollars). This particular cost-benefit analysis (CBA) is unique in that we have the benefit of a careful

¹ See, e.g., Draft Report at 21 (pinpointing benefits of increased fish populations from EPA's cooling water intake structure rule for existing power plants at \$82.9 million).

and painstaking review of the analysis undertaken by a prominent and respected regulatory scholar. Cass Sunstein examined the data underlying the arsenic CBA and reviewed the assumptions made at each step of the analysis. His study demonstrates that the range of values provided by EPA/OMB fails utterly to capture the full extent of the uncertainties underlying the estimate of benefits. Indeed, Sunstein came to the astonishing conclusion that reasonable people employing reasonable assumptions at each step of the analysis could come up with estimates that would peg the benefits of the rule as low as \$13 million or as high as \$3.4 billion.²

If the margin of error for the benefits estimation is really that large, then EPA/OMB's cost-benefit analysis of the arsenic rule is entirely misleading. The EPA/OMB analysis paints a picture of a regulation that may be inefficient, producing a drag on the economy, or is at best a close case. In fact, however, it is just as likely that the arsenic rule presents a terrific regulatory bargain, delivering billions of dollars in health and safety benefits at a price tag of only a couple of hundred thousand dollars.³

Furthermore, EPA/OMB's overly narrow estimate of the range of benefits produced by the arsenic rule creates the impression that cost-benefit analysis can in fact provide meaningful information that may usefully guide the regulatory decision making process. In fact, however, if Sunstein's conclusion is correct, cost-benefit analysis of the arsenic rule provides no useful guidance for regulatory decision making at all. Even assuming that a cost-benefit standard is the appropriate measure of regulatory legitimacy, CBA cannot tell us whether the arsenic rule is a bad idea because the costs far outweigh the benefits or a good idea because the benefits far outweigh the costs.

While we do not have the benefit of Professor Sunstein's careful attention to the other rules discussed in the Report, it is not unreasonable to assume that similar uncertainties lurk behind many of the other accountings of costs and benefits as well. Indeed, as noted above, OMB acknowledges that the ranges it offers do not always capture the full extent of the uncertainties underlying its estimates of costs and benefits. (Draft Report at 10.)

2. The Uncertainties of the Dose-Response Curve

The indeterminacy of CBA stems in part from gaps and uncertainties in scientific knowledge and in part from intractable theoretical conundrums inherent in the CBA enterprise. An example of the former that frequently arises in the context of regulation affecting human health is the shape of the dose-response curve when extrapolated to low levels of exposure. This is one of the uncertainties that OMB acknowledges is not reflected in its range of values for the benefits of EPA's clean air rules. (Draft Report at

² See CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 175, 177 (2002).

³ EPA/OMB's dollar estimate of benefits also obscures the fact that there were many benefits of the rule that the agencies were simply unable to quantify. OMB makes only brief mention of these non-quantifiable benefits in the Draft Report, stating only that "EPA was unable to monetize other benefits, including reductions in skin and kidney cancers." (Draft Report at 27.) And, of course, they cannot be reflected in OMB's aggregate estimate of regulatory costs and benefits.

10.) That is, what shape should an extrapolated dose-response curve take at low dose levels? This is not a question that science can answer. It is a policy choice.⁴ But it is a choice that can have a dramatic impact on the number ultimately produced. With respect to the arsenic rule, for example, Professor Sunstein concluded that the assumption made with respect to the shape of the extrapolated dose-response curve could mean a difference in the estimated number of deaths prevented annually from 24 to 112 per year.⁵ Assuming a \$6.1 million value of life, this could mean the difference between \$146 million and \$683 million in benefits.

The dose-response curve is, of course, just one of many aspects of scientific uncertainty that plague efforts to quantify the health benefits of regulation. When combined, these many layers of scientific uncertainty increase the margin of error by orders of magnitude. Moreover, these sources of indeterminacy are compounded by a host of intractable theoretical conundrums inherent in the CBA enterprise that make the calculation of a single uncontested number impossible.⁶

3. The Uncertainties of Discounting

Prominent among these theoretical conundrums is the problem of discounting. Although discounting based on inflation and interest rates makes sense for purely monetary costs, there is considerable debate and controversy over OMB's practice of applying a discount rate to various benefits of environmental health and safety regulation, like the value of human life, prevention of harms to future generations, and the prevention of ecological harms. Indeed, several of our member scholars and other prominent academics have argued that there is no theoretical justification for using any discount rate at all for ecological benefits and other benefits implicating future generations.⁷ Indeed, use of a discount rate in such circumstances can yield absurd results. Applying a discount rate of five percent to the prevention of a billion deaths 500 years from now, for example, yields the conclusion that such a measure is less beneficial than the prevention of one death today.

Nonetheless, despite this wide-spread discrediting and condemnation of the practice of discounting benefits and despite our extensive comments criticizing OMB's use of discounting in last year's comments to the 2004 Draft Report (Letter from CPR to

⁴ See SUNSTEIN, RISK AND REASON at 172. See also Wendy E. Wagner, *the Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1618-27 (1995).

⁵ See SUNSTEIN, RISK AND REASON at 172-73.

⁶ These include the endowment effect, the problem of wealth effects, the endogeneity of preferences and the problem of discount rates. For a more detailed discussion of these issues, see Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 Iowa L. Rev. – (2005)[forthcoming].

⁷ See, e.g., Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39, 40-41 (1999) (arguing that discounting should be abandoned for measuring future lives saved); Richard Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 955-86 (1999).

Lorraine Hunt, 5/20/04 at 13-14), OMB blithely announces in the Draft 2005 Report its continued practice of using a 7% discount rate across the board, without any acknowledgment of the considerable controversy surrounding this practice. (Report at 7, n. 5 & 59.)

4. The Uncertainties of the Value of Life

Another intractable source of uncertainty that plagues attempts to monetize the benefits of environmental, health, and safety regulation is the valuation of human life. We commented extensively on this issue last year, criticizing in particular OMB's use of a range of estimates for the value of human life from \$1 million to \$10 million. (Letter from CPR to Lorraine Hunt, 5/20/04 at 14.) This year, OMB's response to those comments has apparently been to bury the issue. Although OMB reports that where agencies quantified but did not monetize estimates of fatality risk, it used "standard assumptions" to monetize them, one searches the Draft 2005 Report in vain for any information on what specific value of life was used in these calculations. (Draft Report at 6, 62.) This omission is particularly striking in light of the considerable controversy that has surrounded previous OMB practices regarding the valuation of statistical life⁸ and in light of OMB's own trumpeting of the importance of transparency.

5. The Uncertainties of Ecological Benefits

The myriad sources of uncertainty and indeterminacy in cost-benefit analysis become particularly acute when the regulation at issue involves ecological benefits. These benefits go well beyond the price of commodities we extract from ecosystems, such as timber or fresh water. In addition to providing unquantifiable recreational and aesthetic value, ecosystems provide innumerable services that are vital to life on the planet, including our own. They assimilate waste, recycle nutrients, purify water, control water flow, prevent erosion, and regulate the climate. The processes by which ecosystems perform these functions are extraordinarily complex, however. Any attempt to place a dollar figure on these services is problematic, at best. Although a few recent attempts have been made to broadly estimate the dollar value of ecosystem services,⁹ these estimates are uncertain and imprecise. Any attempt to produce a similar estimate for localized ecosystem impacts would undoubtedly be subject to at least as much, if not more, skepticism and dispute. Indeed, few, if any, efforts to estimate the dollar value of ecosystem services at the local level have ever been made.

Even assuming an accurate scientific understanding of the benefits that some particular ecosystem process provides, an attempt to predict the impact that any particular

⁸ See, e.g., John Tierney, *Life: The Cost-Benefit Analysis*, N. Y. TIMES, May 18, 2003, § 4, at 14 (criticizing OMB's "senior death discount").

⁹ A widely cited study published in the journal *Nature* in 1997 estimated the aggregate value of global ecosystem services at between \$16 trillion and \$54 trillion per year. See Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253 (1997). This is roughly equal to, or possibly triple, the global GNP, which is estimated at \$18 trillion. See James Salzman, *Valuing Ecosystem Services*, 24 ECOL. L. Q. 887, 891 (1997).

disturbance may cause on ecosystem functioning introduces yet another layer of profound uncertainty into the analysis. The science of ecology is far from being able to provide detailed and accurate descriptions and predictions of ecosystem functioning. Although decades ago the science of ecology held out the promise that mathematical models would one day describe ecosystem functioning with Newtonian precision, in recent decades it has become increasingly clear that ecosystems are mind-numbingly complex and chaotic.¹⁰ Because ecosystem functioning is profoundly complicated, predicting how any particular perturbation will affect an ecosystem may often be impossible.

The vast uncertainties associated with estimating ecological benefits are particularly evident with respect to two of last year's regulations discussed in the Draft Report: 1) EPA's Effluent Guidelines and Standards for Meat and Poultry Products Point Source Category, and 2) EPA's Rule Establishing the Location, Design, Construction, and Capacity Standards for Cooling Water Intake Structures at Large Existing Power Plants. (Draft Report at 20-21.) For both of these rules, OMB reports monetized costs that far outweigh the monetized benefits. Under the cost-benefit standard espoused by OMB, these numbers would seem to indicate that these are "inefficient" rules that should be repealed. But one needs to read the fine print to discover that the numbers don't tell the whole story.

The benefits of the effluent guidelines for meat and poultry plants are listed as \$0-\$10 million, as compared with costs of \$41-\$56 million. But under "other information," the chart tells us that "[t]he estimate may not fully capture the benefits from reductions in pathogens, oil and grease, and nutrients due to limitations in water quality modeling. In addition the benefits from reduced eutrophication due to reductions in nutrient discharges may not be fully captured in monetized estimates." (Draft Report at 20.) Similarly, the benefits of the cooling water intake rule are reported at \$82.9 million, as compared to costs of \$389.2 million. But the "other information" column tells us that this estimate does "not include ecological and other non-use benefits." (Draft Report at 21.)

These caveats indicate that substantial benefits are missing from the numerical estimate and that the impression created by the numbers themselves (that these are "inefficient" rules) may in fact be false. But, as is frequently the case with the qualitative aspects of cost-benefit analysis, these caveats fade easily into the background, overshadowed by the numbers. With respect to the cooling water intake rule, this effect is exacerbated because the benefits are expressed as a single number (calculated out to a decimal point) rather than a range, thus creating a false impression of pinpoint accuracy and obscuring the fact that the numerical estimate is grossly incomplete.

Unless one reads the lengthy chart on pages 12 to 22 with care, there is only one obscure footnote in the Draft Report that may alert a reader to the fact that not all costs and benefits are quantifiable. (Draft Report at 6, n. 2.) Otherwise, the Draft Report

¹⁰ See DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* 9 (1990); A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 *LOY. L.A. L. REV.* 1121, 1129 (1994).

creates the impression that the numbers reported fully capture the costs and benefits of the regulations cited. And, of course, it is only the incomplete numbers themselves, purged of all caveats, that are folded into the aggregate, ten-year accounting.

B. OMB's Accounting of Aggregate Costs and Benefits Leaves Out Major Categories of Regulation.

OMB's accounting of the aggregate costs and benefits of major federal regulations is grossly incomplete. For the last fiscal year, for example, OMB included only 11 of the 45 federal regulations that it categorized as "major." (Draft Report at 6.) "Transfer Rules" and Homeland Security Rules were categorically excluded. Because so many important categories of regulation are excluded from the analysis, it is not at all clear whether it provides any meaningful information at all.

1. Homeland Security Regulations Get a Free Ride.

Homeland security regulations are categorically excluded from OMB's accounting of overall costs and benefits because "the benefits of improved security are very difficult to quantify and monetize." (Draft Report at 6.)¹¹ The exclusion of this major category of regulation obviously raises questions about the capacity for OMB's aggregate figures to generate meaningful generalizations about the success or "efficiency" of the federal regulatory program as a whole. It also highlights the way in which OMB provides selective treatment to regulation depending on its goals or content. Homeland security regulations apparently get a free ride from OMB. That is, OMB does not require the Department of Homeland Security justify its regulations with cost-benefit analysis because OMB accepts that the benefits of such regulations are simply too difficult to monetize.

This treatment contrasts sharply with the treatment OMB accords regulations that produce ecological benefits, even though those benefits are also, by OMB's own admission, extremely difficult and often impossible to monetize. Nonetheless, OMB continues to subject ecological regulations to quantified cost-benefit analysis and – where even a grossly incomplete quantification can be derived – to include them in its aggregate estimate of overall regulatory costs and benefits. This is particularly insidious because, cost-benefit analysis often creates the misimpression that the costs of such ecological regulations outweigh their benefits.

2. "Transfer Rules" Are Arbitrarily Excluded.

As it has done in past years, in the Draft 2005 Report OMB again fails to include in its aggregate assessment of the costs and benefits of federal regulation what it calls "regulations implementing federal budgetary programs," or rules that transfer money from the federal government to private parties. Nineteen of the 45 major federal rules

¹¹ We agree that prevention of terrorism, like many other important social aims, is not capable of being incorporated into the narrow and rigid framework of cost-benefit analysis, and have commented extensively to that effect previously. See Letter from CPR to Lorraine Hunt, 4/3/03 at 16-18.

reviewed by OMB over the past year fell into that category. But OMB contends that it need not analyze the costs and benefits of these transfer rules because “transfers are not social costs or benefits. If included, these rules would add equal amounts to benefits and costs.” (Draft Report at 6.)

As we explained in more detail in last year’s comments, this distinction between transfer rules and other kinds of rules is specious. (Letter from CPR to Lorraine Hunt, 5/20/04 at 16-18.) The transfer rules listed in Table 1-5 of the Report include many very expensive government programs. (Draft Report at 23-24.) The money spent on these programs is not available for other purposes. The expenditures associated with these programs are therefore opportunity costs in the classic sense. In its guidelines for cost-benefit analysis, OMB makes clear that a basic purpose of conducting cost-benefit analysis is to assess the opportunity costs of federal government programs. (Circular A-4 at 17-19.) In addition, these guidelines explicitly require agencies to analyze the distributional effects of transfer payments. (Circular A-4 at 11.) OMB’s complete failure to identify, much less analyze, the opportunity costs and distributional consequences of the agency transfer rules in Table 5 flouts OMB’s own official policy statements.

II. OMB’s Draft Report Evidences a Pervasive Anti-Regulatory Bias.

OMB’s specious attempts to draw a connection between high levels of regulation and slow economic growth and its related attempts to congratulate the Bush II administration for reducing levels of environmental, health, and safety regulation display a pervasive and politically driven anti-regulatory bias.

A. The Claimed Link Between Regulation and Slow Economic Growth

OMB purports to take the position that CBA is a neutral tool that is neither anti-regulatory nor pro-regulatory but simply distinguishes good regulation from bad regulation. Nonetheless, it has again included in this year’s Draft Report a gratuitous and blatantly ideological section that purports to draw a link between government regulation of all kinds and depressed wages and slow economic growth. (Draft Report at 28-34.) We pointed out in last year’s comments why this analysis is flawed and misleading. Since OMB has done little to change this section, pulling much of it verbatim from last year’s report, we will not rehash those arguments here, but rather simply refer the reader back to last year’s comments. (Letter from CPR to Lorraine Hunt, 5/20/04 at 2-6.)

For our purposes here, it suffices to note that OMB draws broad conclusions about government regulation in general – including environmental, health, and safety regulation – from reports that examined a narrowly defined type of “regulatory burden.” It is perhaps no surprise that the World Bank found that countries that impose heavier regulatory burdens on industry in the form of lengthy procedures and high costs to register a business or enforce a contract experienced lower levels of economic growth. (Draft Report at 31-32.) But this finding has no bearing on whether environmental, health, and safety regulations – which are often necessary in order to promote economic

efficiency by correcting market failures¹² – promote or impede economic growth. There is, in fact, little or no evidence that such regulations impede economic growth in this country, where regulatory costs average less than one percent of the total value of manufactured goods.¹³ Indeed, the whole point of the cost-benefit approach to regulation (to which OMB purports to subscribe) is supposed to be that regulation is neither all good nor all bad. Rather, according to economic theory, regulation that meets a cost-benefit test will promote economic efficiency while regulation that fails such a test will impede efficiency. OMB’s attempt to draw generic conclusions about the negative effect of regulation in general on economic growth belies its claimed adherence to cost-benefit analysis as a purportedly neutral and scientific method.

B. OMB’s Specious Attempt to Identify a Trend Toward More Efficient Regulation in the Bush II Administration

OMB’s attempt to make a case against regulation in general as an enemy of economic growth sets the stage for the next section, in which OMB purports to identify “trends” in federal regulatory activity. In particular, OMB insinuates that by decreasing regulatory activity, the Bush II Administration has improved the efficiency of regulation over the past four years.

OMB presents three charts. One shows the costs of major rules from 1981 to 2004, the second shows the benefits of major rules from 1992 to 2004, and the third shows the net benefits of major rules from 1992 to 2004. (Draft Report at 35-39.) From these charts, OMB extracts several conclusions, which it apparently views as important enough to highlight in the executive summary. One is that “[t]he average yearly cost of the major regulations issued during the Bush (43) Administration is about 70% less than over the previous 20 years.” The second is that “[t]he average yearly net benefits of the major regulations issued during the Bush (43) Administration is over double the yearly average for the previous eight years.” (Draft Report at 3, 37, 38.) Both assertions are highly misleading.

First, to attempt to draw any meaningful conclusion about regulatory legitimacy or efficiency by looking only at costs flies in the face of the economic theory on which CBA is supposedly grounded.¹⁴ While OMB does not directly say that the decreasing trend in costs necessarily indicates an improvement in the efficiency of regulation under

¹² See Draft Report at 33 (“[E]conomic theory . . . predicts that economic growth is enhanced by regulatory policies that promote competitive markets, secure property rights, and *intervene to correct market failures*.”)(emphasis added).

¹³ See Sidney A. Shapiro, Testimony Before the Subcommittee on Regulatory Affairs, Committee on Government Reform, U.S. House of Representatives, Hearing on “Impact of Regulations on U.S. Manufacturing” 5 (April 12, 2005), available at: http://www.progressivereform.org/articles/Shapiro_test_041205.pdf (citing KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 98 (2004)).

¹⁴ Substantial questions have been raised about whether CBA can in fact be legitimately or coherently grounded in economic theory. See Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165 (1999).

the Bush II administration, it is hard to imagine what other purpose is served by making this assertion and highlighting it in the executive summary. The placement of this analysis directly after the section arguing that regulation negatively impacts economic growth also contributes to this impression.¹⁵ According to the economic theory to which OMB purports to subscribe, one can only judge the efficiency of a regulation by looking at both costs and benefits and comparing them. Looking only at costs gives us no useful information about the efficiency or desirability of a regulation because it doesn't allow us to determine whether those costs are less than or greater than the benefits. Under principles of economic theory, the fact that costs have decreased does not indicate that regulation has become "better" (unless your real agenda is the dismantling of the regulatory state rather than economic efficiency).

Thus, if the costs of regulation have substantially decreased during the Bush II administration, that may mean either one of two things: 1) many inefficient regulations for which costs exceeded benefits have been foregone or repealed, thus increasing economic efficiency or 2) many efficient and desirable regulations that would have provided far more benefits to society than costs have been foregone, thus leading to less economic efficiency than would have been possible had more regulatory costs been incurred. To suggest that a decrease in regulatory costs standing alone indicates a "good result" or an increase in economic efficiency is intellectually incoherent.

The second assertion – that the average net benefit of regulation under the Bush II administration has doubled over the previous eight years of the Clinton administration – is also highly misleading. First, as OMB acknowledges, the high average yearly net benefit for the Bush years is primarily due to two rules promulgated last year which yielded unusually high estimates of net benefits: EPA's non-road diesel engine rule, which generated \$27.3 billion in net benefits, and EPA's hazardous air pollutant standard for boilers and process heaters, which generated \$16 billion in net benefits. (Draft Report at 8.) If one were to remove those two outliers from the data, even a visual inspection of the graph makes clear that the average yearly net benefits of regulation would be substantially smaller during the Bush II years than during the Clinton years.¹⁶ (Draft Report at 39.)

¹⁵ It is also not at all clear that OMB's accounting of costs encompasses all regulation. In another apparent lapse of its commitment to transparency, OMB fails to explain exactly which regulations are included in this data. Presumably transfer rules are excluded here as they are from the cost-benefit analysis (see above), but it is not clear whether homeland security regulations, which were also excluded from the cost-benefit analysis, are included here or not. *See* Draft Report at 38 (indicating that rules with cost estimates but no quantified benefits estimates were included in the costs table).

¹⁶ OMB was also clearly quite selective in choosing to compare the past four years of the Bush II administration with the full eight years of the Clinton Administration. A comparison of the Bush II years with the last four years of the Clinton administration would have yielded higher net benefits during the Clinton years. (Draft Report at 39.)

III. OMB's Literature Review of Look-Back Studies Ignores Much of the Evidence Indicating that Agencies Routinely Over-Estimate the Costs of Regulatory Compliance Ex Ante.

Chapter II of OMB's Draft 2005 Report catalogues a series of look-back studies that have attempted to compare ex ante estimates of the costs and benefits of regulations to ex post data. With one exception, all the studies cited by OMB find that benefits were under-estimated ex ante and that costs were sometimes over-estimated and sometimes under-estimated. (Draft Report at 40-44.)¹⁷ This paints a very misleading picture of the relevant literature and the ongoing academic debate on this issue. In fact, there is considerable evidence that agencies routinely over-estimate the costs of regulatory compliance ex ante. OMB appears to have overlooked a number of studies that reach that conclusion.¹⁸

The tendency of agencies to overestimate compliance costs ex ante is not at all surprising in light of the strategic environment in which such predictions are generated. In preparing regulatory impact assessments for proposed rules, agencies are heavily dependent upon regulated entities for information about compliance costs. Knowing that the agencies are less likely to impose regulatory options with high price tags (or to support them during the review process), the regulatees have every incentive to err on the high side. Beneficiary groups can complain about the magnitude of cost projections, but they rarely have the wherewithal to second-guess regulatee-generated estimates. The only entities with both the economic incentive to exert a leavening influence and the information and expertise necessary to back it up are the occasional independent vendors of the safety and environmental cleanup technologies. These entities are themselves frequently only subsidiaries of the larger regulated entities or in any event cannot risk alienating their potential customers by demonstrating the excessiveness of their cost projections in a public forum. Hence, the unsurprising conclusion that the regulatory process routinely yields ex ante cost projections that are likely to be biased upward.

This evidence of inflated cost estimates has important implications for OMB. First, it casts further doubt on broad assessments of regulatory costs and benefits like those contained in the Draft 2005 Report. Second, it suggests that a great deal of work

¹⁷ The one exception is a study of the acid rain trading program, for which the ex ante estimates of costs were notoriously over-estimated. Dallas Burtraw, et al., *Costs and Benefits of Reducing Air Pollutants Related to Acid Rain*, 16 Contemporary Economic Policy 379 (1998). The Draft Report also lists a series of studies by the National Highway Traffic Safety Administration (NHTSA) that do not appear to be on point. (Draft Report at 42-43.) These studies appear to estimate the benefits of various NHTSA rules, but it is not at all clear from the summaries whether the estimates are ex ante or ex post. In any event, they do not appear to *compare* ex ante estimates to ex post estimates, which is the point of the look-back studies. We suggest that OMB either devote more effort to explaining the relevance of these studies or delete them from the final report entirely.

¹⁸ See Thomas O. McGarity & Ruth Ruttenger, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 Tex. L. Rev. 1997, 2042-44 (2002)(collecting studies); Ruth Ruttenger, *Not Too Costly After All: An Examination of the Inflated Cost Estimates of Health, Safety, and Environmental Protections*, (Public Citizen White Paper, Feb. 2004), available at: <http://www.citizen.org/documents/ACF187.pdf>.

must done on quantifying the costs of regulation before cost estimates prepared by regulatory agencies may appropriately be used in to impose constraints on federal regulation.

CPR agrees with OMB that a great deal more retrospective empirical work is needed. Indeed, a great deal more work in this area is required before agency cost projections are worthy of respect. Unfortunately, it is usually extremely difficult and frequently quite impossible to arrive at accurate retrospective assessments of the resources that regulated entities have devoted to compliance with particular regulatory interventions.¹⁹ This is due primarily to practical limitations on empirical analysis of relatively subtle behaviors of companies operating in complex and rapidly evolving competitive environments. It is also attributable, however, to the fact that no important economic actor has an incentive to find out how much regulations actually did cost once the strategic battle over the proposed regulation has ended and the companies and the agency have moved on to other things. These difficulties suggest that it may be necessary to design the capacity to undertake retrospective evaluations into regulations at the time that agency's promulgate them.

III. The Information Quality Act Should be Repealed.

As we have already made clear elsewhere, it is CPR's position that the Information Quality Act should be repealed. We have attached to these comments (and incorporate herein) a recent CPR report, "The Case Against the Information Quality Act," which more fully explains and documents the shortcomings and dangers of the Act.

Masquerading as a good-government measure designed to ensure the quality of information disseminated by federal agencies, the Act is in practice an all-encompassing, overarching deregulatory directive that threatens to disrupt longstanding health and safety programs. Disgruntled industries have used the Act as an end-run around well-established procedures for promulgating rules to improve air quality, clean up toxic waste sites, and protect children and wildlife from pesticide residues.

OMB acknowledges the fact that the vast majority of substantive petitions under the Act have been filed by industry, but tries to brush off these statistics with the feeble contention that "one would expect that private-sector groups most affected by disseminations would be active users of the correction request process." (Draft Report at 52.) This statement displays an appalling insensitivity to the profound and well-recognized collective action problems that plague regulatory decision making.²⁰

¹⁹ A thoroughgoing effort by the U.S. General Accounting Office to assess retrospectively the cost of government regulation on 15 specific companies concluded that "measuring the incremental impact – direct costs, indirect costs, and benefits – of federal regulations on individual companies is an extremely problematical endeavor." U.S. General Accounting Office, *Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies* (GAO/GGD-97-2, 1996) at 55.

²⁰ See Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1684–85 (1975).

Regulated industries frequently wield far more influence over agency decision making than the members of the public who benefit from environmental, health, and safety regulation – not because regulated industries are more “affected” by agency action, but because the kinds of effects they experience (economic harms that impact a small concentrated group) tend to promote the formation of political pressure groups. In contrast, formidable collective action problems often prevent the many members of the public who reap the benefits of such regulation from exercising influence over agency decision making commensurate with their interests. Rather than ignoring this dynamic, OMB should be working to ensure that the regulatory system is structured so as to counteract it. The Information Quality Act simply exacerbates this age-old problem.

Thank you for your attention to these comments.

Sincerely,

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