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Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10202
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ATTN: Mabel Echols

Subject: OMB Watch's comments on the *Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations.*

The White House Office of Management and Budget's Office of Information and Regulatory Affairs released on March 9 its *Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations.* The Office of Management and Budget (OMB) has subjected the Draft Report to a public comment period before issuing the final report.

OMB Watch is pleased to submit its comments. These comments are organized in two parts. The first part addresses the Draft Report itself. The second part addresses OMB's request for "recommendations for improving the transparency, accountability, and effectiveness of the regulatory process."

OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in1983 to remove the veil of secrecy from the White House Office of Management and Budget, OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public.

PART IA: COMMENTS ON THE REPORT, AGGREGATED COSTS AND BENEFITS

OMB Watch recognizes the annual report of aggregated costs and benefits of regulations is a statutorily mandated transmission. However, OMB Watch would like to reiterate its opposition to the need for the report and the overall idea of aggregating the costs and benefits of federal regulations. Aggregation is economically unsound, distorts the virtue of strong federal regulations, and does not provide practical utility for public policy.

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Economically unsound

Monetizing certain costs and benefits of regulations is a difficult, sometimes impossible task. Many benefits of regulations are intangible or invaluable, and therefore may not be able to be monetized or even quantified. Although the Regulatory Right-to-Know Act requires OMB tally nonquantifiable costs and benefits, the Draft Report fails to meet that requirement. Instead, OMB continues a dangerous trend of using monetized costs and benefits in drawing specious analytical conclusions.

Relying on an inaccurate analysis

Determining costs and benefits is too inaccurate a process. The calculation of benefits of a regulation requires two separate analyses: an assessment of the risk posed by the harm in question, and a monetization of the potential benefits. Both factors are difficult to calculate: many benefits resist monetization; and risk assessments can be hindered either through incomplete datasets or a large degree of indeterminable factors.

In order to estimate the health effects of a regulation, for example, agencies generally must rely on laboratory data on other species or on human experience with much higher levels of exposure. To extrapolate from these data the potential benefits of a regulation requires a large degree of estimation, and agencies often come up with wide ranging results on the potential health benefits.

The estimate of costs and benefits is a static analysis. The outcome of regulation may include benefits that inherently cannot be quantified, such as biological diversity, civil liberties, or national security. Some benefits may be quantified but not monetized, such as lives saved. Since assigning a value to such benefits is so difficult, a combined assessment of the cost and benefits of all federal regulations will produce an unreliable product. By viewing valuation through such an economic lens, benefits of regulation are likely to be underestimated.

OMB acknowledges this difficulty in the Draft Report and recognizes agencies do not look solely at quantifiable factors: "Many of these major rules [in the report] have important non-quantified benefits and costs that may have been a key factor in an agency's decision to promulgate a rulemaking."[1]

Failing to account for nonquantifiable effects

The Regulatory Right-to-Know Act requires "an estimate of the total annual costs and benefits (**including quantifiable and nonquantifiable effects**) of Federal rules and paperwork." [Emphasis added.] This Report ignores the requirement to estimate nonquantifiable effects. By doing so, OMB does not accurately portray the effects of federal regulations in this draft report.

OMB fails to account for nonquantifiable effects by applying restrictive conditions. Chapter I Part A of the Draft Report identifies two criteria rules must have met in order to be included in OMB's aggregation: 1) "each rule generated costs or benefits of at least $100 million in any one year" and 2) "a substantial portion of its costs and benefits were quantified and monetized by the agency or, in some cases, monetized by OMB."

[1] White House Office of Management and Budget Office of Information and Regulatory Affairs, *Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations*, 8. Available at: http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_draft_cb_report.pdf. (Hereinafter "*Draft Report*")

Application of these criteria excludes many important regulations with substantial benefit to society. The Draft Report includes an aggregation of only 91 rules due to the application of these criteria. However, OIRA has reviewed in the given time period 881 rules meeting the Draft Report's economic significance criterion, according to RegInfo.gov. Therefore, because of the "substantial portion" criterion mentioned above, OMB has excluded 790 rules, or 90 percent, from the Draft Report.

The Draft Report includes an appendix containing ten major rules which OMB reviewed in FY 2006 and whose costs and benefits were not monetized to the satisfaction of OMB. One rule in the appendix provides an example of a rule with considerable quantifiable and nonquantifiable benefits which was nonetheless excluded by application of these criteria. In 2006, the Transportation Security Administration promulgated a rule concerning air cargo security. Appendix A in the Draft Report states, "The goal of this regulation is to protect our society from acts of terrorism involving the use of aircraft." The benefits listed for the rule state simply "Homeland Security." No one can question the value of sensible air security regulations to protect the public from unanticipated terrorist attacks of unimaginable scope, yet OMB does not include such rules in its aggregation of the costs and benefits of federal regulations.

Continuing to support the misguided idea of net benefits

Year after year, OMB has manufactured a causal relationship between net benefits of regulations and macroeconomic performance. Once again, in this report, OMB encourages readers to interpret comparisons between aggregate costs and aggregate benefits as meaningful both for a given year and as a trend.[2] This association is economically unsound. Furthermore, the economic conclusions OMB draws based upon aggregate costs and benefits is an analytical leap not mandated by Congressional statute.[3]

"Net benefits" is a simplified approach, forcing all costs and benefits to be reduced to monetary valuations, or else disregarded. The simplicity – the reduction of the overall costs and benefits to society to one number – is the main flaw of the net benefits measure. In order to create this one number, costs and benefits must all be reduced to monetary valuations; everything that is not or can not be monetized is disregarded.

As a result, the net benefits measure exacerbates the aforementioned problems of cost-benefit analysis by producing one figure to sum up incomplete data and mask flawed assumptions. In his peer review of the 2005 Draft Report, Richard W. Parker, a professor at the University of Connecticut School of Law, also noted the problems that arise when costs and benefits are reduced to monetary valuations.[4] He explained that the analysis lacks any indication of which benefits are monetized or which key assumptions are adopted. Furthermore, he restated the problem that arises when a variable is impossible to quantify and the net benefits approach omits it: benefit estimates are skewed.

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[2] *Draft Report*, 36.

[3] The Regulatory Right to Know Act (31 U.S.C. § 1105) requires OMB to provide annual costs and benefits "in the aggregate" and to do so "to the extent feasible." However, there is no statutory rationale for using aggregations to draw any economic conclusions.

[4] Richard W. Parker, *Comments on the 2005 Draft Report to Congress*, 2. Available at: http://www.whitehouse.gov/omb/inforeg/2005_cb/5_Parker.pdf.

Not only does the approach lead to over-simplified results, but a net benefits analysis raises ethical and moral considerations. Net benefits are not the same as *benefits created* and as a result aggregate benefits are ignored. When the only benefits that matter are those that outweigh costs, economic efficiency becomes the sole objective, disregarding necessary health, safety and environmental protections. A net benefits approach possesses the same problematic assumptions as a cost-benefit analysis, but to a more extreme degree because only quantified benefits that outweigh costs are considered worthwhile.

As OMB Watch has shown in this section of its comments, quantifying, monetizing and aggregating costs and benefits of regulations does not adequately indicate the value of public health and safety standards. In Chapter II, the Draft Report states, "The best measure of the overall value of regulation is net benefits; that is, benefits to society minus costs to society."[5] OMB should delete this sentence from the final report. The sentence focuses too much on the monetized values of regulations. That is the wrong message to send to Congress and the American people.

Heading in the wrong direction
Despite the aforementioned acknowledgement of the ways in which aggregating costs and benefits is unsound, OMB seems to be moving toward an even greater emphasis on this practice.

Chapter I Part A of the Draft Report states, "Based on the information contained in this and the previous nine Reports, the total costs and benefits of all Federal rules now in effect (major and non-major, including those adopted more than ten years ago) may be significantly larger" than the sums presented in the Report. OMB Watch agrees with that claim. However, instead of acknowledging the futility of fully quantifying the costs and benefits of all federal regulations, the Draft Report goes on to state, "More research is necessary to provide a stronger analytic foundation for comprehensive estimates of total costs and benefits by agency and program."

OMB Watch disagrees with this opinion. Further research will only serve to continue to waste agency resources in the pursuit of an unusable product. Any analytic foundation supporting the aggregation of costs and benefits will be easily erodible.

No Practical Utility
Since aggregating the costs and benefits of regulations produces unsound results, the resulting figures do not provide practical utility to decision makers. Even if OMB corrected the aforementioned deficiencies by more fully including nonquantifiable or non-monetizable benefits, the results of aggregating would be meaningless.

Treating agencies as a monolith
Congress passed the Regulatory Right-to-Know Act with provisions concerning regulatory reporting. In mandating a government-wide aggregation of the costs and benefits of regulations, the requirements of the Act incorrectly assume federal agencies to be monolithic in nature. The Draft Report attempts to assess the activities of the federal government as a whole. Yet the

[5] *Draft Report*, 33.

federal government does not exist in any obvious or unitary manifestation. Therefore, metrics associated with such an abstract creation are equally abstract in their meaning and application.

Comparing apples and oranges
In reality, each federal agency operates individually and with unique processes and goals. Any aggregation of costs and benefits is like an aggregation of apples and oranges: If a person throws all these apples and oranges in a bushel, but knows only the total number of pieces of fruit, the person cannot draw any meaningful conclusions as to the characteristics of the bushel such as market value or nutritional content.

In the Draft Report, OMB acknowledges the difficulty of comparing and compiling data from different agencies: "OMB discusses, in this report and in previous reports, the difficulty of estimating and aggregating the costs and benefits of different regulations over long time periods and across many agencies using different methodologies. Any aggregation involves the assemblage of benefit and cost estimates that are not strictly comparable."[6]

The Draft Report also includes an example from a federal agency of just how meaningless an aggregation of costs and benefits can be. The aggregated benefits presented in the 2007 Draft Report are significantly larger than in the 2006 report due to the finalization of the U.S. Environmental Protection Agency's National Ambient Air Quality Standard (NAAQS) on Particulate Matter, according to the Draft Report. For the same reason, the aggregated benefits for EPA appear large as compared to other agencies.

In Chapter I Part A, the Report includes a statement to qualify the benefits of the new NAAQS standard: "the favorable benefit-cost results for EPA regulation should not be generalized to all types of EPA rules or even to all types of clean-air rules."[7]

If one environmental regulation is not indicative of another environmental regulation, even one similar in subject, how can a combination of wide-ranging regulations provide any meaningful insight to decision makers pursuing statutes and rulemakings on an individual basis?

In sum, language from the draft report itself provides the most effective argument for the futility of this report:

> 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. Any comparison or aggregation across rules should also consider a number of factors that our presentation does not address. 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. While we have relied in many instances on agency practices in monetizing costs and benefits, our citation of, or reliance

[6] *Draft Report*, note 4, at 6.
[7] *Draft Report*, 9.

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.[8]

PART IB: COMMENTS ON THE REPORT, DATA QUALITY ACT

Overview

In 2001, Congress passed provisions entitled the Information Quality Act (IQA), otherwise known as the Data Quality Act, requiring the establishment of guidelines to ensure that information used by government agencies is of high quality. While promoting data quality may sound reasonable, many government officials, public interest groups, academics and others expressed concern that these particular policies could be misused to delay, derail and dilute federal safeguards and rules.

The Draft Report includes a section on the "Update on the Implementation of the Information Quality Act" which provides an update on agency operations under information quality guidelines during FY 2006. The Draft Report provides an update on the number of IQA challenges submitted to agencies based on the reports submitted to OMB from individual agencies.

Unfortunately, the Draft Report is an inadequate analysis of the status and implementation of IQA. Even though the update is included within a report entitled *Costs and Benefits,* no analysis is given of the costs or benefits of IQA. It fails to give measurements or findings regarding the implementation of IQA, if agency information quality guidelines are improving agency data quality practices, or if there are improvements in the information being disseminated by government agencies.

The most egregious exclusions include: the scope of OMB oversight and authority; the burden agencies bear in implementing the IQA; what percentage of the challenges are substantive; and average agency response times to IQA challenges and appeals. The omission of these basic measurements and issues leaves Congress and the public with an incomplete picture of the current status of agency operations under IQA.

The template OMB created for reports from agencies is inadequate. OMB does not ask agencies to send information on the resources devoted to IQA activities or the impact IQA has on other agency activities such as rulemakings and information dissemination. Such information is essential to Congress in evaluating the law's implementation.

Regardless of the merits of OMB's Draft Report to Congress, it is clear that this law has had a significant impact on government operations. For instance, an IQA challenge delayed the release of the National Toxicology Program's highly important Report on Carcinogens for over a year. As a result, government agencies and public health officials were denied access to the latest information on the most dangerous toxic chemicals. It is surprising that Congress has not thoroughly investigated IQA – not even during development of the law – on a policy with such far-reaching impact.

[8] *Draft Report,* 8.

In light of OMB's Draft Report, it is now time for congressional oversight, which needs to include congressional hearings on whether the law is serving its purpose of improving data quality and if it needs modification.

Data Quality Act Background

IQA was added as an appropriations rider to the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554; H.R. 5658). There were no hearings on the rider – which was added by Rep. Jo Ann Emerson (R-MO) and Sen. Richard Shelby (R-AL) – and no debate on the floor, providing little information about the congressional intent behind the legislative language.

The short rider directed OMB to issue "policy and procedural guidance to Federal agencies" subject to the Paperwork Reduction Act (44 U.S.C chapter 35) requiring that they issue their own data quality guidelines "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated." Agencies were also to include "administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines."

OMB exceeded its vague congressional mandate in setting these requirements, as they are overly strict and complex standards of information quality. In doing so, OMB created an extremely high burden of proof for dissemination and, ultimately, regulatory action. In fact, several business groups categorized these guidelines as the best opportunity to challenge regulatory protections since passage of the Administrative Procedure Act in the 1940s. According to William Kovacs of the U.S. Chamber of Commerce, "This is the biggest sleeper there is in the regulatory arena and will have an impact so far beyond anything people can imagine."

Agency Annual Reports

Under the IQA, agencies must periodically report to the director of OMB on the number of IQA requests received and how the complaints were resolved. OMB mandated submission of the first status reports by January 1, 2004.

OMB provided agencies with details of the annual reports in an October 4, 2002 Memorandum for the President's Management Council, noting "the descriptions you provide to OMB should be designed to help us (and the public) understand the substance of the issues the agency has resolved through the administrative correction processes and the effectiveness of the administrative correction processes in resolving the concerns of the complainants." OMB establishes the expectation that the reports will enable both government officials and the general public to analyze and evaluate implementation of the IQA within the various agencies.

OMB released another memorandum in October 2003 providing agencies with a report template, which almost all reporting agencies use. It supposedly fulfills the requirements mentioned above. However, this template does not provide information useful in determining the effectiveness of agencies' correction processes or if the guidelines are being properly

administered. While this does produce core data for individual requests received, it fails to collect valuable information about each agency's overall data quality programs. Quantifiable indicators offer more useful reference points – the number of staff that worked on data quality requests, total staff hours, total program costs, and budget allocation for the program. By totaling such metrics, OMB could gauge the IQA's impact throughout government and compare the difference in burden between agencies.

The report template should also ask for an estimate of benefits, if any, yielded from information changes triggered by data quality petitions. Additionally, including space in the template for agency timelines of challenges would help track the pace of submissions
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Within a larger scope, the OMB annual report template does not provide information about the IQA's overall impact on agency activities. That is, whether this program adversely affects agencies' abilities to disseminate information, if it stalls rulemakings, or has any other unintended impacts on agencies' primary missions. OMB Watch has heard from several agencies that it takes a great deal of time and resources to respond to IQA requests. OMB does not provide the information necessary to determine whether this is correct. Providing narrow, request-specific summaries does not adequately address these larger impacts. If the aforementioned suggestions had been in the reports, OMB, Congress and the public could better analyze how data quality programs operated in Fiscal Year 2006.

OMB's Information Quality Act Report

OMB's update on the implementation of IQA is incomplete and fails to give Congress or the public an understanding of agency operations. The update should serve the purpose of giving Congress the needed information in order to make revisions to the law and conduct oversight. As a result, OMB Watch can only hope that OMB makes the necessary additions to the Draft Report or if OMB fails to do so, that Congress follows up on OMB's shortcomings and requests the information itself.

Merely providing the overall aggregate totals of IQA requests, responses and appeals provides little insight into the current status of the program. OMB Watch recommends that OMB calculate and report on the following.

Recommendations

OMB should provide a section on recommendations for improvements in data quality procedures. One problem that OMB Watch has noticed is that a great deal of time and resources are devoted answering frivolous IQA challenges. OMB should provide recommendations for revising agency information quality guidelines in order to avoid having to thoroughly respond to such challenges or provide recommendations on how such challenges should be responded to without necessarily revising agency information quality guidelines.

Average Response Times

OMB fails to include basic information on agency response times to IQA challenges. This would help assess whether or not agencies have the adequate resources to promptly respond to IQA challenges. If the response times are significantly longer than the required response time, then

this is a signal that either additional resources should be provided to government agencies, that the required response times need to be more realistic, or that better procedures should be in place to reduce the number of frivolous IQA challenges which impede agency practices.

Substantive Challenges
OMB should perform an analysis on the percentage of substantive challenges. Merely reporting the total number of challenges at government agencies is not a good measurement of how IQA is being used. A challenge that is merely requesting the correction of a spelling mistake is of a different magnitude than a challenge which questions the veracity of a scientific study. Doing such rudimentary analysis would go a long way in answering the question of how IQA is being used.

Duplicative Procedures
OMB Watch believes that IQA should serve as a gap-filling measure to provide a data quality procedure for agency practices which are not already covered by some form of data quality process. Many agency information quality guidelines note that this is the purpose of the IQA process. In this vein, we believe that OMB should report on the number and percentage of IQA challenges of information that is already covered by information quality processes.

Compliance
OMB lists the agencies that are in compliance with the transparency requirement to post all information quality correspondence. OMB Watch supports this requirement and believes that it improves public and Congress' understanding of the data quality process. OMB, though, fails to state whether all agencies are in compliance with this requirement or if there are agencies that have yet to comply. If the latter, OMB should also state what is being done to ensure their compliance.

Benefits of IQA
OMB should give an analysis of whether or not there has been an improvement in data quality as a result of IQA. There are no documented reports of data quality problems before IQA, and OMB Watch believes that IQA has not served a purpose since it was signed into law in 2000. OMB should at least make the case that IQA is useful and attempt to provide some data to support this claim. Is it increasing data quality processes at government agencies? Is the information released by government agencies improving?

Costs of IQA
OMB should report on the costs of IQA in terms of agency resources and time. OMB should report on the number of government employees at each agency that answer IQA challenges, the seniority of such employees, and the time they spend in answering requests. Moreover, OMB should report an estimate of the financial resources devoted to IQA processes (e.g., responding to IQA challenges, managing requests, etc.). OMB should also allow for agencies to respond to problems with the IQA process. If there have been delays in agency practices or if regulations have been inappropriately affected, agencies should report on such delays and problems, and OMB should relay this information to the general public and to Congress.

PART II: RECOMMENDATIONS ON THE REGULATORY PROCESS

OMB Watch appreciates the opportunity to provide recommendations for improved accountability and transparency in the regulatory process. Our comments focus on improving transparency in the regulatory process – specifically, in the White House review of regulatory actions. OMB Watch believes there is much room for improvement related to the regulatory review process of the Office of Information and Regulatory Affairs (OIRA).

Pre-Rulemaking Review

Executive Order 12866, Regulatory Planning and Review, and its subsequent amendments[9] allow OIRA to play an active role during the pre-rulemaking stage when agencies are formulating annual plans for regulatory activities. Even more than the official rules, OIRA unofficially encourages agencies to discuss regulatory ideas at the earliest stages. By having OIRA involved in agencies' planning processes, OIRA can quash or alter any contemplated regulation before it is proposed for the Regulatory Plan.

The communications between OIRA and the agencies are not disclosed, thus it is difficult to measure the extent to which OIRA exerts influence over the drafting of the proposed regulation that is finally submitted to OIRA. A Government Accountability Office report concludes that OIRA, by its own admission and by its involvement in the pre-rulemaking stage, has significant influence over the proposed regulations agencies submit for review.[10]

Knowing that OIRA exerts this influence, it is critically important to document fully the pre-rulemaking communications between OIRA and the agencies, or at least, the outcome of these communications. Despite OIRA's involvement in shaping the content and direction of agency rulemaking, it is not covered by the basic statutory framework for the rulemaking process – the Administrative Procedure Act (APA). Because OIRA is not covered by the APA, its activities are neither public nor accountable.

This has become all the more necessary because of the changed role of OIRA during the Bush administration. As former OIRA administrator Sally Katzen testified earlier this year before the House Science and Technology Committee subcommittee on Investigations and Oversight, the intent of E.O. 12866 was to have OIRA be a "counselor" to the agencies:

> Executive Order 12866 retained centralized review of rulemakings, but also reaffirmed the primacy of the agencies to which Congress had delegated the authority to regulate. (Preamble) Among other things, Executive Order 12866 limited OIRA review to "significant regulations" – those with a likely substantial effect on the economy, on the environment, on public health or safety, etc. or those raising novel policy issues (Section

[9] Executive Order 13258 of Feb. 26, 2002 and Executive Order 13422 of Jan. 18, 2007 amended parts of Executive Order 12866 of Sept. 30, 1993.

[10] General Accounting Office, *OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews.* September 2003. Available at www.gao.gov/cgi-bin/getrpt?GAO-03-929. GAO changed its name to Government Accountability Office in 2004.

6(b)(1))– leaving to the agencies the responsibility for carrying out the principles of the Executive Order on the vast majority (roughly 85%) of their regulations.[11]

Instead of being a "counselor", OIRA has become a "gatekeeper" over agencies' proposed regulations. Before agencies submit proposed regulations to OIRA, the regulatory outcome has already been determined and yet OIRA does not have the technical or scientific expertise in many instances with which to judge the substance of agency rules. This power is exerted in several ways:

- In 2002, OMB issued its Data Quality Act Guidelines[12] which created new categories of information hierarchy. "Influential information" now requires a higher level of scrutiny than "information". OMB required agencies to issue guidelines, subject to OMB approval, establishing mechanisms to allow entities to challenge the accuracy of agency information and to report to OMB on the number and nature of these challenges.

- In 2003, OMB issued its Proposed Draft Peer Review Standards for Regulatory Science[13] which were widely criticized as too restrictive and too favorable to regulated industries. Furthermore, the draft standards provided another layer of OMB review of scientific and technical studies used in the pre-rulemaking process. The Final Bulletin, issued December 2003, was an improvement over the draft but still left OMB in the position of overseeing peer reviews, selecting industry representatives for the panels, and requiring public comment on peer review conclusions which delays the rulemaking process even further.

- In 2004, OMB issued Circular A-4[14] which describes in detail how agencies must conduct their Regulatory Impact Analysis (RIA), the basic cost-benefit analysis that must be provided for all economically significant proposed regulations. The RIA is the primary mechanism for justifying regulations and is the first point of review by OIRA desk officers.

- In January 2007, OMB issued its Final Bulletin for Agency Good Guidance Practices.[15] Upon taking effect in July, the Bulletin will subject significant guidance documents – which may serve as precursors to agency rulemakings – to OIRA review.

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[11] Sally Katzen, *Testimony of Sally Katzen Adjunct Professor and Public Interest/Public Service Fellow University of Michigan Law School*. House Committee on Science and Technology, Subcommittee on Investigation & Oversight, Amending Executive Order 12866: Good Governance or Regulatory Usurpation?: February 13, 2007, 4. Available at: http://democrats.science.house.gov/Media//File/Commdocs/hearings/2007/oversight/13feb/katzen_testimony.pdf.

[12] Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.* February 22, 2002. Available at: http://www.defendingscience.org/public_health_regulations/upload/Office-of-Management-and-Budget-Information-Quality-Act-Guidelines-2002.pdf.

[13] Office of Management and Budget. *Final Information Quality Bulletin for Peer Review.* December 16, 2004. Available at: http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf.

[14] Office of Management and Budget, *Circular A-4, Regulatory Analysis*. September 17, 2003. Available at: http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf.

[15] Office of Management and Budget, *The Final Bulletin for Agency Good Guidance Practices.* January 18, 2007. Available at: http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf.

- In January 2007, along with the Good Guidance Practices Bulletin, President Bush amended Executive Order 12866.[16] In addition to complementing the requirements of the Bulletin, the changes place an added emphasis on identifying market failures before regulating. The changes also mandate the installation of a presidential appointee to manage each agency's regulatory agenda from within.

Each document provides OIRA a tool with which it can limit agency discretion in the pre-rulemaking stage. However, none of these documents has included necessary transparency provisions which would allow the public to see how OIRA is exerting its influence.

Recommendations for Transparency in the Pre-rulemaking Process
OMB should develop a plan for disclosing to the public OIRA's involvement in the pre-rulemaking process. The public has a right to know about the influence of the White House in agency proceedings. OIRA should disclose all communications, written and oral, to agencies regarding rules that have not yet been published as proposed rules. OIRA should also clearly indicate direct edits or additions it has made to the drafts of those rules.

OMB should also address the transparency deficiencies associated with the various guidelines, bulletins and circulars just mentioned. OMB should focus less time on dictating standard practices to agencies and more time ensuring a transparent pre-rulemaking process.

OMB's policies should include transparency provisions:

- OMB Watch detailed its recommendations for improved transparency related to the Data Quality Act on pages 8-9 of these comments in the section entitled, "OMB's Information Quality Act Report."

- OMB is a political office working directly for the administration, not an unbiased scientific office, yet it has placed itself in the role of supervisor for implementing scientific peer review. It is unclear when and how OMB exerts its peer review authority. OMB should take steps to better inform the public of the decisions it makes in regard to agency peer reviews. Better yet, OMB should abdicate its authority and grant oversight responsibilities to an objective scientific body, such as the National Academy of Sciences or an interagency review panel.[17]

- OMB Watch would like to reiterate its adamant opposition to the White House's decision to subsume agency guidance documents into the centralized review process. However, if these reviews are to occur, OMB Watch believes review of guidance documents should at least be subject to the same transparency requirements as agency regulatory actions. Current transparency requirements for regulatory review should apply to guidance

[16] Executive Order 13422, *Further Amendment to Executive Order 12866 on Regulatory Planning and Review*. January 18, 2007. Available at: http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-293.pdf
[17] OMB Watch made this recommendation in its comments on the revised peer review bulletin. Those comments are available at: http://www.ombwatch.org/info/dataquality/CommentsRevisedPR-OMBW.pdf.

review. Furthermore, OMB Watch's recommendations for transparency requirements for regulatory review should apply to guidance documents where applicable. These recommendations will be discussed later in these comments.

- As OMB Watch Executive Director Gary D. Bass testified before the House Science and Technology Committee subcommittee on Investigations and Oversight, there are a number of opportunities for improved transparency related agency regulatory policy officers.[18] Dr. Bass presented several recommendations related to the RPO. Those recommendations are attached to these comments as Appendix A.

Rulemaking Review and Public Comment

Currently, the public can first learn about an agency's intentions to regulate through the semi-annual Unified Agenda which is published in the *Federal Register*. It is notoriously inaccurate in its reporting of agency regulatory work and timing of an agency's activities. Nonetheless, it is an important document that should be improved.

In reality, the public first learns of a specific agency regulatory activity from a website operated by OIRA when OIRA logs agency regulatory submissions for review. The website is meager, however. The public cannot search for a rule; instead, there is a long list of rules sorted by departments.

OIRA Review

OIRA has 90 calendar days to review a proposed regulation after submission, but this can be extended. Desk officers review the RIA developed according to OMB's Circular A-4. OIRA requires review only of significant regulations but has the authority to review those deemed non-significant as well. Although OIRA and the agency often communicate extensively during pre-rulemaking, OIRA has used "return letters" and "prompt letters" to indicate to an agency areas in which the proposed regulation has deficiencies, or to urge an agency to take regulatory – or deregulatory – action.

According to Section 8 of the E.O., during the review period, an agency is not permitted to publish the proposed rule in the *Federal Register* until the OIRA administrator notifies the agency that OIRA has completed or waived its review or the applicable time limits for review have expired.

Section 6, Centralized Review of Regulations, describes the disclosure requirements OIRA must follow during and after the review period. These requirements include, among other things: disclosure of "substantive communications" among OIRA, agencies and non-governmental entities; disclosure of rules under OIRA review; and disclosure of communications between OIRA and agencies during the review process.

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[18] Gary D. Bass, *Testimony of Gary D. Bass, Ph.D. Executive Director, OMB Watch*. House Committee on Science and Technology, Subcommittee on Investigation & Oversight, Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part II: April 26, 2007, 4. Available at: http://www.ombwatch.org/regs/PDFs/Bass_testimony.pdf

While OIRA publishes some of this information on its website or Reginfo.gov, much of the information is not available to the public, but is only available, if requested, in its docket room. In October 2001, OIRA Administrator John Graham issued a memorandum clarifying OIRA procedures for disclosure and acknowledges OIRA's intent to add more information in compliance with the E-government plans of the administration.[19]

There are many areas, however, that are not covered by the disclosure policies. For example:

- **Rules not under review are not covered by its disclosure policy**. "Rules are not under review prior to the start of informal OIRA review or after OIRA has notified the agency that review is concluded; legislative discussions are not covered." Thus, informal OIRA pre-rulemaking activities are not public.

- **Meetings with parties outside of government about rules not under review are not covered**. Regarding meetings with outside parties, "any meeting" to discuss the substance of an individual rule is covered, but "Meetings to discuss rules not under review, or meetings to discuss broad regulatory topics (e.g., analytic methodology or legislation)" are not covered. Moreover, even for those meetings that are disclosed, the disclosed information is inconsistent. The disclosure sometimes omits participants' affiliations, or rules or topics discussed.

- **Correspondences about rules not under review are not covered**. "Correspondence received while a rule is not under review" is not covered by the disclosure policy.

- **Internal communications are not disclosed**. "Outside parties", for purposes of disclosure, are "persons not employed by the executive branch". So communications with Congress and the public are disclosed, but not inter- and intra-departmental communications.

- **Substantive communications are not defined**. "Substantive communications" are not defined while "non-substantive discussions" are defined only by providing examples like "status of review, review procedures". What kinds of communications are classified as substantive, and how does the public know these policies are being followed?

These kinds of loopholes abound throughout the Graham memo. Limiting disclosure to information and communications generated during the 90 or so days the rule is under OIRA review ignores the years involved in developing rules under the current process. There is extensive communication within and among agencies, agencies and OIRA, agencies and the regulated communities, OIRA and the regulated communities, etc. None of these communications are shared publicly as part of OIRA's disclosure policies. The opportunities for influence to be exerted in multiple directions are extensive.

[19] John D. Graham, OIRA Administrator, *Memorandum for OIRA Staff: OIRA Disclosure.* October 18, 2001. Available at http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html.

In addition, these disclosure requirements are far too limited in light of publication of agencies' regulatory plans in the Unified Agenda. Proposed regulations don't just appear one day as submissions to OIRA. Limiting disclosure to the 90 day period of OIRA's review is like shining a flashlight on an item when electricity is available.

Notice-and-Comment Period

The publication of a proposed rule in the *Federal Register* triggers the public participation phase of the rulemaking process. The notice-and-comment requirements under Section 553 of the APA outline this public process and have been subject of criticism and litigation for years.

The traditional view of section 553 procedure as a process for educating the agency has, however, been gradually replaced, in practice if not in theory, by the belief that informal rulemaking procedure should provide interested persons an opportunity to 'challenge the factual assumptions on which [the agency] is proceeding and to show in what respect such assumptions are erroneous.' In other words, the public must be informed of the data and assumptions on which the agency's proposal is based.[20]

Anyone who has tried to comment on or review the comments of others during this period knows that the information available to the public is inconsistent. Information from agencies is incomplete or not available, opportunities to comment on some rules open for comment don't exist on electronic dockets, and the opportunity to see who has commented and what those comments address is too often non-existent.

Recommendations for Transparency in the Review and Public Comment Process

Dr. Bass's testimony in front of the House Science and Technology Committee subcommittee on Investigations and Oversight also included recommendations for transparency improvements related to the centralized review and public comment process. Those recommendations are attached to these comments as Appendix B.

Sincerely,

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Director of Regulatory Policy
OMB Watch

[20] Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking.* (Chicago: ABA Publishing, 2006.) p.298-9.

APPENDIX A

The contents of this appendix represent OMB Watch's recommendations for transparency improvements related to agency regulatory policy officers. These recommendations were first presented by OMB Watch Executive Director Gary D. Bass on April 26, 2007 in testimony before the House Science and Technology Committee subcommittee on Investigations and Oversight.[21]

One serious concern with the advent of a politically appointed RPO in each agency is that the interests of the RPO may become more closely aligned with those of OIRA and the White House than with those of the agency in which the RPO works, with public sentiment and need, or with scientific consensus on an issue. If the RPO now has the ability to initiate regulations, then the point at which agency personnel reach a decision to recommend regulatory action, and make that recommendation to the RPO needs to be clearly defined. We recommend the following:

1) That each agency clearly identify the RPO, provide a description of that person's role in regulatory matters, and how the public can contact that person. The information should be conspicuously available on agency websites.

2) That each agency be required to disclose with its regulatory plan, those proposed regulatory activities that the RPO has decided the agency will not pursue. The plan and the ideas and proposed regulatory activities discarded or delayed should be published in the Unified Agenda published semi-annually in the *Federal Register* along with justification for the delays or decisions not to undertake the activities.

3) That the public should have the right to obtain from the RPO clarification of items in the plan in addition to the items rejected or delayed.

4) That each agency provide formal documentation of ideas generated by agency personnel regarding activities that may lead to regulatory actions. This documentation requires:

a) A clear definition of when a regulatory action commences. For example, a regulatory action commences at the point at which an agency employee or contractor transmits a recommending document to the RPO or starts a formal communication on the matter.

b) Within a very short period, for example, 30 days, the RPO publishes a written response to recommending actions with justification for declining, agreeing, or other actions regarding the recommendation. The public must be assured that the RPO's decision to stop a rule from being developed is not a triumph of politics over responsible government.

c) Placing all documents in the agency rulemaking record for activities that move to the proposed rulemaking stage and creating a new public docket, available through the Internet, of all other actions (i.e., those not pursued).

[21] Available at: http://www.ombwatch.org/regs/PDFs/Bass_testimony.pdf.

5) That agencies submit an annual report to Congress on activities that have been delayed, withdrawn, or rejected by the RPO and the justifications for such actions.

6) That all intra-agency communications, written and oral, between the RPO and the agency personnel responsible for developing the proposed regulation be documented and included in the agency's rulemaking record.

7) That all inter-agency communications, written and oral, be documented and included in the agency's rulemaking record.

APPENDIX B

The contents of this appendix represent OMB Watch's recommendations for transparency improvements related to OIRA's centralized review of agency regulatory actions as well as improvements for the APA-required public comment period. These recommendations were first presented by OMB Watch Executive Director Gary D. Bass on April 26, 2007 in testimony before the House Science and Technology Committee subcommittee on Investigations and Oversight.[22]

This section covers the role of OIRA and other reviewing entities such as the Small Business Administration (SBA).

1) That "substantive" communications be defined and not left to individual discretion.

2) That all substantive communications, written and oral, between the agency and the reviewing entities be documented and included in the agency's rulemaking record.

3) That all substantive communications between parties outside of government, and excluding communications with the President, and any party involved in the rulemaking process (agency or reviewing entity) be documented and included in the agency's rulemaking record. This disclosure covers materials submitted by the outside parties, and documentation of oral and written communications.

4) That OMB establish a government-wide regulatory tracking system. As part of the implementation of the E-Government Act of 2002, agencies should develop a regulatory tracking system by which the public can follow a regulation through each step of the rulemaking. Currently, there is an e-rulemaking approach being refined on Regulations.gov. Each agency should provide a clear process by which regulations can be tracked through this system with appropriate links to the information contained in the rulemaking record.

5) That OIRA's website be searchable, with information consistent for each record, and with identification numbers that link records clearly to the regulatory actions with which they are associated.

6) That meeting logs, made available through OIRA's website, be complete and include the purpose of the meeting, generally what was discussed, the participants and their affiliations, a brief description of materials circulated, and any conclusions or outcomes that resulted from the meeting.

If OIRA and other reviewing entities like the SBA continue to have significant impact on the substance of agency rulemaking, then the APA informal rulemaking process should apply to these reviewing entities. It is unfair to the agencies who are sued as a result of rulemaking actions to bear the full burden of litigation when they do not have full responsibility for the substantive rulemaking outcome. If the APA needs to be amended to cover these reviewing entities, then we urge Congress to take appropriate action.

[22] Available at: http://www.ombwatch.org/regs/PDFs/Bass_testimony.pdf.

We realize the burden of this transparency proposal falls primarily on the agencies. But until and unless the reviewing entities which influence the substantive outcome of regulatory activities are subjected to the same APA rules, the agencies must be the repository for the full rulemaking record.

Subjecting agency guidance documents to the same APA-like review process requires the same level of transparency, record development, and information access we are recommending for rulemaking. After all, OMB's justification for subsuming agency guidance into the review process is that agencies are using guidance to avoid the rulemaking process. Therefore, the transparency principles should apply to review of guidance documents as well.

Post notice-and-comment communications may be helpful to agency and the reviewing entities. The decision to limit or accept these communications should be left to the agencies. But the same principles apply if agencies decide to allow communications at this point: the communications and identification of the parties should become part of the record. Similarly, OIRA's and other entities communications with parties after the notice-and-comment period should become part of the agency's rulemaking record.

These principles of open and transparent decision making should apply to a second notice-and-comment period if deemed necessary.

In addition to helping to restore trust in government by providing transparency, the ability to evaluate regulatory outcomes is greatly enhanced by having the substantive basis of decisions available to the public. Congress, the President, other government agencies responsible for providing information to these branches, state decision makers and policy staffs, researchers, and other segments of the public can access, analyze, and share information. The technological advances that have occurred make this transparency far easier than was possible in past decades. As the federal government moves to increased transparency in its interaction with the public, our political dialog is enhanced by providing more information, and using that information to achieve increased government effectiveness and efficiency.