



November 7, 2008

Data Quality Coordinator
Assistant Director for Administration,
Office of Management and Budget
Washington, D.C. 20503,

Submitted by email to correction@omb.eop.gov

Petition for Correction under OMB's Information Quality Guidelines

Please see the attached public comment delivered this day to the Office of Management and Budget concerning its draft 2008 Report to Congress on the benefits and costs of federal regulation, and process it as a formal Petition for Correction under OMB's Information Quality Guidelines.

Pursuant to these guidelines, OMB must respond within 60 days or in the final 2008 Report to Congress.

Sincerely,

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

Richard B. Belzer, Ph.D.
President
Belzer@RegulatoryCheckbook.org

Enclosure



November 7, 2008

The Honorable Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

RE: 2007 Draft Report to Congress on the Benefits and Costs of Federal Regulations

OIRA_BC_RPT@omb.eop.gov

Dear Administrator Dudley:

I am writing to provide public comments on the Office of Management and Budget's 2008 draft report to Congress on the benefits and costs of federal regulation (Office of Management and Budget 2008, p. 8). In addition, I am formally styling this public comment as a Petition for Correction of influential information in accordance with OMB's government-wide and OMB-specific information quality guidelines (Office of Management and Budget 2002a, 2002b).

I. EXECUTIVE SUMMARY

The information contained in the draft Report is covered by information quality guidelines, and it is not eligible for exemption on the ground that it has been distributed for peer review. The following section explains briefly why the draft Report violates OMB's information quality information guidelines, in accordance with OMB's specific requirements for the submission of Petitions for Correction. Subsequent sections elaborate on this explanation in greater detail.

II. INFORMATION QUALITY

OMB published both government-wide and OMB-specific information quality guidelines in 2002. These documents have consistent definitions for relevant terms including *information*,¹ *influential*,² *objectivity*,³ and *utility*.⁴ The contents of this draft report clearly meet the definition of *information* and are not exempt⁵ and meet the definition of *influential*. However, based on an undisclosed internal review of influential information warranting peer review,⁶ OMB apparently forgot that this Report to Congress clearly consists of

¹ “‘Information,’ for purposes of these guidelines ... means any communication or representation of facts or data, in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms” (Office of Management and Budget 2002b, p. 8).

² “‘Influential,’ when used in the phrase ‘influential scientific, financial, or statistical information,’ refers to disseminated information that OMB determines will have a clear and substantial impact on important public policies or important private sector decisions” (Office of Management and Budget 2002b, p. 8). For the information in the draft Report to be *not influential*, OMB must determine – and inform Congress -- that the annual reports required by law are superfluous exercises that waste scarce resources and thus should be abandoned.

³ “‘Objectivity’ is a measure of whether disseminated information is accurate, reliable, and unbiased and whether that information is presented in an accurate, clear, complete, and unbiased manner” (Office of Management and Budget 2002b, p. 8).

⁴ *Utility* is not defined in the OMB-specific information quality guidelines. It is defined in OMB’s government-wide guidelines: “‘Utility’ refers to the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the agency disseminates to the public, the agency needs to consider the uses of the information not only from the perspective of the agency but also from the perspective of the public. As a result, when transparency of information is relevant for assessing the information’s usefulness from the public’s perspective, the agency must take care to ensure that transparency has been addressed in its review of the information” (Office of Management and Budget 2002a).

⁵ Information is exempt if, inter alia, it is “originated by, and attributed to, non-OMB sources, provided OMB does not expressly rely upon it” (Office of Management and Budget 2002b, p. 8). The draft report consists almost entirely of information from non-OMB sources on which OMB expressly (and almost exclusively) relies. There are five other exemptions from the definition of *information*, but none apply to the contents of the draft report.

⁶ On its web site, OMB states: “Based on the review conducted, OMB has not identified any upcoming influential scientific information (including highly influential scientific assessments) within the definitions promulgated by OMB’s Bulletin M-05-03, Final Informa-

*scientific information*⁷ that is *influential*.⁸ OMB might argue that the statutory requirement to obtain peer review for this draft report trumps its own peer review guidelines, but a better understanding is that OMB is obligated to apply its own peer review guidelines while implementing the law. It has not done so.⁹

A. STATEMENT THAT THE COMMUNICATION IS A PETITION FOR CORRECTION UNDER THE OMB INFORMATION QUALITY GUIDELINES

This public comment is styled as a Petition for Correction of influential information that violates OMB's government-wide or OMB-specific information quality guidelines. In accordance with OMB's procedures, a duplicate copy has been submitted to the Data Quality Coordinator, addressed to the Assistant Director for Administration, Office of Management and Budget, Washington, D.C. 20503, at the prescribed email address.

tion Quality Bulletin on Peer Review [i.e., Bolten (2004)]. Therefore OMB currently has no agenda of forthcoming influential scientific disseminations to post on its website in accordance with the Bulletin. If such documents are identified, they will be posted for public review." See http://www.whitehouse.gov/omb/inforeg/info_quality/information_quality.html.

⁷ "For the purposes of the peer review Bulletin, the term 'scientific information' means factual inputs, data, models, analyses, technical information, or scientific assessments related to such disciplines as the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences." See Bolten (2004, pp. 10-11).

⁸ "The term 'influential scientific information' means scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions" (Bolten 2004, p. 11).

⁹ Section II of OMB's peer review guidelines (Bolten 2004) includes several important procedural elements that OMB has declined to follow. The guidelines direct agencies to conduct peer review prior to dissemination; OMB has instead sought peer review simultaneously. The guidelines exempt from the definition of *dissemination* information distributed solely for peer review provided that a specific disclaimer is included; OMB did not attach this disclaimer to the draft report, thus denying OMB the exemption. The guidelines require adherence to both scientific and process integrity, but OMB's peer review lacks even rudimentary process integrity: there is no public evidence that it even has a defined process, much less has a record of "adherence to defined procedures."

B. IDENTIFICATION OF THE OMB INFORMATION OR OMB INFORMATION DISSEMINATION; PRODUCT, AND THE SPECIFIC THEREOF, THAT IS THE SUBJECT OF THE PETITION

The subject of this Petition is OMB's 2008 draft report to Congress on the benefits and costs of federal regulation, which was announced in the *Federal Register* on September 24, 2008 (Office of Management and Budget 2008). To be temporarily exempt from coverage, OMB's own peer review guidelines require the following explicit disclaimer be included:

“THIS INFORMATION IS DISTRIBUTED SOLELY FOR THE PURPOSE OF PRE-DISSEMINATION PEER REVIEW UNDER APPLICABLE INFORMATION QUALITY GUIDELINES. IT HAS NOT BEEN FORMALLY DISSEMINATED BY [THE AGENCY]. IT DOES NOT REPRESENT AND SHOULD NOT BE CONSTRUED TO REPRESENT ANY AGENCY DETERMINATION OR POLICY” (Bolten 2004, p. 10).

OMB also requires that this disclaimer appear on every page of a document containing influential information that is “highly relevant”:

In cases where the information is highly relevant to specific policy or regulatory deliberations, this disclaimer shall appear on each page of a draft report. Agencies also shall discourage state, local, international and private organizations from using information in draft reports that are undergoing peer review (Bolten 2004, p. 10).

The draft report to Congress has no disclaimer at all. Therefore, it is not entitled to the exemption from applicable information quality guidelines normally available to draft documents distributed solely for peer review.

C. A SPECIFIC DESCRIPTION OF HOW THE INFORMATION DOES NOT COMPLY WITH THESE OMB GUIDELINES OR GOVERNMENT-WIDE GUIDELINES AND HOW THEY ARE AFFECTED BY THE INFORMATION

1. Defects in substantive and presentational objectivity for the regulation-specific information provided (Appendix A and Table 1-5)

The draft Report consists of information on benefits, costs, and other impacts resulting from a small number of “major” final regulations. These es-

timates, which in every case belong to the agency that promulgated the final regulation, are presented as factual and with a stated or clearly implied OMB endorsement. However, the Report contains no supporting evidence that these estimates are substantively or presentationally objective, and they do not meet minimum standards for transparency and reproducibility.¹⁰

Even in the highly unlikely event that OMB could revise the Report to show that the estimates themselves met the substantive objectivity standard, the draft Report is not presentationally objective as written. Estimates are neither “presented in an accurate, clear, complete, and unbiased manner” nor “presented within a proper context.”¹¹ Examples of contextual information not included by OMB include, but are not limited to: (1) justification for the reported precision, which is as great as six significant figures;¹² (2) measures of uncertainty;¹³ (3) the quantitative effects of key assumptions that underlie each value or range;¹⁴ and (4) competing estimates prepared by OMB or third parties.¹⁵

¹⁰ OMB acknowledges that many major rules lack quantified effects, then assumes them away in its discussions – another generic class of information quality defects.

¹¹ *Substantive objectivity* is defined by OMB as “accurate, reliable, and unbiased.” *Presentational objectivity* is defined by OMB as “includ[ing] whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner,” and “presented within a proper context.” See OMB (2002a, p. 8459).

¹² The implied precision in OMB’s reported benefit and cost figures is \pm \$500,000.

¹³ Most figures are reported as single values, some are reported as ranges. OMB does not disclose which uncertainties are captured in the reported ranges and which have been ignored, and nowhere explains or justifies the presumption of certainty inherent in either single values or ranges.

¹⁴ “Where appropriate, data should have full, accurate, transparent documentation, and error sources affecting data quality should be identified and disclosed to users.” See (Office of Management and Budget 2002a, p. 8459). The draft Report briefly discusses several crucial assumptions underlying the benefit estimates for major air quality rules in general, but it does reveal the quantitative effects these assumptions have on the reported estimates. See OMB (2008, pp. 6-7). No similar information about uncertainty, much less quantitative detail, accompanies any of the other estimates.

¹⁵ OMB presents only agency estimates in the draft Report. Rival estimates are not even acknowledged, and their critical contributions to presentational objectivity are ignored.

2. *Defects in substantive and presentational objectivity for the aggregate information provided (Section II, Appendix B and Tables 1-1 through 1-4, 1-6)*

OMB gives no credible basis for its estimates of aggregate benefits and costs assembled by summing values obtained using different procedures. The only rules these aggregates obey are the associative and commutative laws of arithmetic (i.e., the order in which they are added does not matter). Early Reports to Congress in this series made clear that aggregation was analytically unjustifiable. Ten years later, it appears that OMB has settled into a pattern of ignoring its own advice and grossly understating the analytical illegitimacy of aggregation.¹⁶ OMB's fatigued attitude is self-evident; in this and each of the past four final Reports, OMB has noted problem, asserted that it "discusses" the issue in the Report, failed to actually do so, and provided aggregate estimates anyway that OMB then discusses as if they are valid. Now that the information quality paradigm is six years old, it is no longer credible for OMB to continue in this manner.

OMB's catch-all defense for this subterfuge is its publication in 2003 of the latest in a series of guidance documents concerning the proper conduct of Regulatory Impact Analysis:

In part to address this issue, the 2003 Report included OMB's new regulatory analysis guidance, OMB Circular A-4 that took effect on January 1, 2004 for proposed rules and January 1, 2005 for final rules. The guidance recommends what OMB defines as "best practices" in regulatory analysis, with a goal of strengthening the role of science, engineering, and economics in rulemaking. The overall goal of this guidance is a more competent and credible regulatory process and a more consistent regu-

¹⁶ "OMB discusses, in this report and in previous reports, the difficulty of estimating and aggregating the benefits and costs 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" (Office of Management and Budget 2008, p. 3, Footnote 7 [emphasis added]). It is a gross understatement to say these estimates are "not strictly comparable" when they are not weakly comparable, either. This same gross understatement can be found in the past four final Reports published (Office of Management and Budget 2004a, 2005, 2006, 2007); a slightly different version is found in previous Reports.

latory environment. OMB expects that as more agencies adopt our recommended best practices, the benefits and costs we present in future reports will become more comparable across agencies and programs. OMB is working with the agencies to ensure that their impact analyses follow the new guidance (Office of Management and Budget 2008, p. 3, Footnote 7).

This boilerplate text also can be found in four prior OMB's final Reports to Congress (Office of Management and Budget 2004b, 2005, 2006, 2007). In none of them, nor in the 2008 draft Report, does OMB provide any evidence whatsoever suggesting that agencies' adherence to (or OMB's enforcement of) Circular A-4 has improved over previous RIA guidance documents (Office of Management and Budget 1990, 1996, 2000). It is passing strange for OMB, of all organizations, to assume that the mere publication of guidance actually changes the behavior of regulated entities.

OMB acknowledges that the estimates in the draft Report belong to the agencies,¹⁷ and at one place OMB attempts to deny that it endorses them.¹⁸ This denial is unpersuasive given the number of times that OMB makes statements that explicitly or implicitly convey endorsement.¹⁹ Only the most sophisticated (or cynical) readers would believe these scattered denials and ignore the rest of the text.

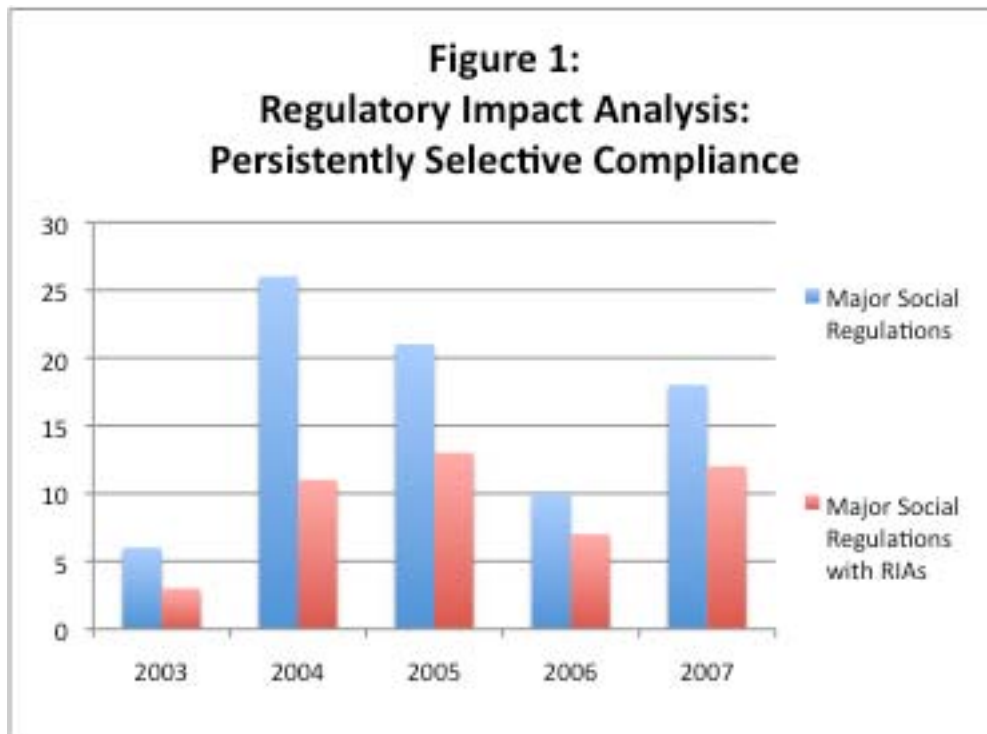
3. Defects in substantive and presentational objectivity because of selection bias

OMB acknowledges that the quantitative estimates of benefits and costs it reports are incomplete. That means they are neither substantively nor presentationally objective. But even if each reported estimate were complete and perfectly accurate, the draft Report would not be substantively or

¹⁷ "The estimates of the benefits and costs of Federal regulations over the period October 1, 1997 to September 30, 2007 are based on agency analyses conducted prior to issuance of the regulation and subjected to public notice and comments and OMB review under Executive Order 12866" (Office of Management and Budget 2008, p. 4).

¹⁸ "While we have relied in many instances on agency practices in monetizing benefits and costs, our citation of, or reliance on, agency data in this Report should not be taken as an OMB endorsement of all the varied methodologies used to derive benefit and cost estimates" (Office of Management and Budget 2008, p. 6).

¹⁹ A list of such statements is provided below beginning on page 13.



presentationally objective. First, many major rules lack quantitative estimates of benefits and costs. Any inferences drawn from incomplete reporting is per se misleading. Second, OMB has systematically given little attention to economic regulations. This has happened despite a 30-year policy spanning five presidents opposing economic regulation except in extraordinary circumstances. Third, OMB systematically disregards benefit and cost estimates prepared by third parties. The spirit of competition, which animates the discussion of regulatory policy in Executive Order 12,866 and OMB Circular A-4, is missing in action in the draft Report.

a. Agencies' Selective Compliance with or OMB's Selective Enforcement of the Regulatory Impact Analysis Requirement

The draft Report indicates that OMB continues to be unable or unwilling to enforce the requirement, contained in Executive Order 12,866, that major rules be accompanied with Regulatory Impact Analyses (RIAs). Figure 1 shows that this problem has persisted for years. Some departments and agencies are choosing to be insubordinate, and OMB is persistently tolerating their insubordination.

Without enforcing the RIA requirement, it is almost impossible for OMB to fulfill its statutory duty to provide an accounting statement that has utility for Congress or the public. OMB could comply with the law by soliciting, reviewing, and utilizing third-party analyses. Ever since congressional reporting began in 1997, however, OMB has consistently refused to do so.

b. Misclassification of “Major” Rules as “Non-Major”

The accuracy, reliability and unbiasedness of the draft Report also depends on whether OMB and the agencies have classified final rules correctly. In addition to being held hostage to the information quality defects discussed in the previous two sections, plus the absence of RIAs for 30% to 60% of all major rules that it reviewed, OMB’s estimates of benefits and costs also depend on the absence of material misclassification. That is, the set of major rules summarized for FY 2007 (39 rules, Section I) and earlier years (1,231 rules since 1981) must be exhaustive; there cannot be major rules that escaped classification as “major.” OMB’s approach to regulatory accounting (and centralized review more generally) requires that it have been successful in identifying the dominant upper tail of the distribution such that there are no final rules that should have been classified as “major” but were not.

Experienced analysts of federal regulatory practice know that misclassification is endemic. Agencies have strong incentives to break major regulations into multiple parts to avoid the burden (and discipline) of preparing an RIA. Once a agency has been permitted to misclassify at the proposed rule stage, OMB declines to force reclassification because doing so reflects poorly on the effectiveness of its own oversight and is sure to cause delays for which OMB, not the culpable agency, will be held politically responsible.²⁰

c. OMB’s Selection Bias Against Accounting for Economic Regulations

OMB devotes most of its resources to the review of *social regulation*, and the remainder to regulations implementing federal budgetary programs.

²⁰ OIRA also has very limited staff resources for reviewing RIAs. A decision to reclassify significantly increases their workload.

Few resources are devoted to *economic regulation*.²¹ Ironically, OMB historically has cast a much more critical eye on economic regulation, concluding that virtually never is it justified. OMB Circular A-4 contains extensive discussions about the mechanics of regulatory analysis for social regulation, and a boilerplate subsection titled “The Presumption Against Economic Regulation” (Office of Management and Budget 2003a, pp. 6-7). The draft Report reinforces this message (Office of Management and Budget 2008, p. 31), as did previous Reports to Congress.²² This may be the only substantive regulatory policy that has held constant since the Carter administration.

For these reasons it is highly ironic that OMB allows agencies to evade centralized review and scrutiny of their major economic regulations, often by the trick of simple misclassification as non-major. Exhibit A is a 2007 final rule promulgated by the U.S. Patent and Trademark Office (PTO) that radically altered intellectual property rights supposed to be guaranteed by statute, solely for the administrative convenience of PTO.²³ This rule arbitrarily restricted the number of claims that inventors could include in their applications and denied them the right, guaranteed by law, to contest erroneous governmental decisions. PTO knew that this rule would entail tens of billions of dollars in annual costs – indeed, PTO *intended* for this to occur in order to reduce its workload and meet its Program Assessment Review Tool (PART)

²¹ In the draft Report, OMB defines *economic regulation* as “rules designed to set prices or conditions of entry for specific sectors” that “can result in increases in income (narrowly defined) for workers in the industries targeted by the regulation, but decreases in broader measures of income based on utility or overall welfare, especially for workers in general” (Office of Management and Budget 2006, p. 27; 2008, p. 27). OMB defines *social regulation* as “rules designed to improve health, safety, and the environment” that “create[] benefits for workers, consumers, and the public” (p. 26).

²² See, e.g., OMB (2004a, p. 42; 2005, p. 33; 2006, p. 27; 2007, p. 33), and especially OMB (2003b, pp. 123-124).

²³ U.S. Patent and Trademark Office, “Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications; Final Rule,” 72 Fed. Reg. 46716 (Aug. 21, 2007). Under federal patent law, the government’s role is limited to maximizing the value of intellectual property and operating a value-neutral process for the awarding of intellectual property rights.

management goals.²⁴ OMB allowed PTO to misclassify the rule, and despite having been made aware of its likely costs,²⁵ waved it through the review process without requiring even rudimentary economic analysis.²⁶

That this particular rule never aroused any internal interest at OMB shows that OMB has developed a serious blind spot in its review procedures such that economic regulations attract little attention. This has spillover effects on OMB's regulatory accounting. Of the 39 major final rules for FY 2007 OMB accounts for in the draft Report, 18 were social regulations, four concerned homeland security, and 21 implemented various provisions of federal budgetary programs. OMB's list includes zero economic regulations – a pattern that has now persisted for a decade.²⁷

²⁴ Two of PTO's management goals involve reducing "patent pendency," the average time it takes the Office to complete a First Office Action on the Merits and total time to complete action. See <http://www.whitehouse.gov/omb/expectmore/detail/10000046.2003.html>. PTO's recent rulemakings, including the one listed in footnote 23, attempt to solve the pendency problem by reducing the number of applications submitted. In other words, PTO is trying to accomplish its management goals by firing its customers.

²⁵ See <http://www.whitehouse.gov/omb/oir/0651/meetings/619.html>.

²⁶ The final rule was subsequently overturned in federal District Court as an illegal exercise of legislative rulemaking not authorized by statute. See *Tafas v. Dudas*, 541 F.Supp.2d 805 (E.D. Va. 2008). The case is on appeal, so it should be considered a "live" rule for regulatory accounting purposes. Moreover, in the draft Report OMB includes estimates of benefits and costs for the EPA's "Clean Air Interstate Rule" that subsequently was overturned in court and not appealed (Office of Management and Budget 2008, p. 4). It is certain that OMB never considered exempting the CAIR rule from OMB review or the Regulatory Impact Analysis requirement in Executive Order 12,866.

²⁷ For FY 2006, OMB reported 10 major social regulations, 18 major budgetary regulations, and zero economic regulations (Office of Management and Budget 2007, p. 7). For FY 2005, OMB reported 21 major social regulations, 24 major budgetary regulations, and zero economic regulations (Office of Management and Budget 2006, p. 6). For FY 2004, OMB reported 26 major social regulations, 19 major budgetary regulations, and zero economic regulations (Office of Management and Budget 2005, p. 11). For 2003, OMB reported 6 major social regulations, 25 major budgetary regulations, and zero economic regulations (Office of Management and Budget 2003b, p. 6). For FYs 1999-2001, OMB reported 46 major social regulations, 72 major budgetary regulations, and zero economic regulations (Office of Management and Budget 2002c, p. 36).

4. *Defects in substantive and presentational objectivity because of exemptions from mandatory regulatory analysis*

Independent agencies remain outside the domain of Executive Order 12,866 review and the discipline of its Regulatory Impact Analysis requirement. The draft Report illustrates why this is a problem. Table 1-7 lists just 10 major rules issued by independent agencies, a preposterously low figure. As it has done for many years, OMB relies on independent agency reporting to the Government Accountability Office (GAO) rather than utilize its statutory authority to compel reporting directly to OMB.

OMB notes that adherence to normal, good-government analytic practices is sparse among the independent agencies, which speaks volumes about the lack of public accountability inherent in the independent agency model. OMB also denies any responsibility for the quality of these regulatory analyses:

As Table 1-7 indicates, one of the rules monetized benefits and costs; two rules monetized benefits and two monetized costs. OMB does not know whether the rigor and extent of the analyses conducted by these agencies are similar to those of the analyses performed by agencies subject to Executive Order 12866, since OMB does not review rules from these agencies (Office of Management and Budget 2008, p. 16, emphasis added).

Of course, this only reinforces OMB's responsibility under information quality for all the estimates in the draft Report that pertain to Executive branch rulemaking. In each case, OMB either reviewed the analysis containing the estimate, and was therefore able to prevent error, or it allowed the department or agency not to comply with Executive Order 12,866.

The practical consequence of the independent agency exclusion is that OMB review misses vast tracts of federal regulation. Independent agencies have become hubs of regulatory activity, in recent years most notably rules implementing Sarbanes-Oxley (Pub. L. 107-204, 116 Stat. 745), about which the draft Report is strangely silent. A lay reader of the draft Report interested in the *benefits and costs of federal regulation* – the nominal title of the draft Report – would not learn just how selective are its contents, and how misleading are its conclusions.

D. ALL SUPPORTING EVIDENCE WHICH THE PETITIONER BELIEVES PROVIDES A PERSUASIVE CASE AND ALL SUPPORTING DOCUMENTATION NECESSARY TO RESOLVE THE COMPLAINT

The draft Report is self-indicting. It is neither transparent nor reproducible, its contents are neither substantively nor presentationally objective, and it lacks utility for Congress and the public as an accounting of the benefits and costs of federal regulation. The absence of utility is particularly self-evident given the amount of text that is reproduced verbatim (or nearly so) from past Reports to Congress.

The remainder of this section presumes that additional evidence must be brought forward to satisfy the requirement in OMB's information quality guidelines that "all supporting evidence" be provided in a Petition for Correction.²⁸

1. Examples of statements conveying OMB endorsement of a reported estimate

Irrespective of their source, OMB is responsible for every estimate or statement "prepared by an outside party in a manner that reasonably suggests that [OMB] agrees with the information" (Office of Management and Budget 2002a, p. 8454). This applies to every quantitative estimate in the draft Report that is not accompanied by a co-located disclaimer. It is unreasonable to expect the public to believe that OMB would knowingly report false quantitative estimates. In the absence of a clear, persuasive and persistent disclaimer, readers are justifiably entitled to believe that each of these statements is accurate, reliable, and unbiased.

The draft Report contains many statements that explicitly or implicitly imply OMB endorsement of the reported estimates of benefits and costs. For example, the Executive Summary contains the following purportedly factual statements, each of which presumes that underlying estimates are accurate, reliable, and unbiased (Office of Management and Budget 2008, p. iii). Note that OMB gives as many as four significant digits (an implied level of accu-

²⁸ It is assumed that OMB does not literally mean "all" evidence, for such an evidentiary standard is by definition impossible to meet and would render the correction petition process a nullity.

racy) with aggregate uncertainty spanning as little as \pm \$50 million (\pm 0.5% where numbers are comparative rather than absolute):

- “The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 1997 to September 30, 2007 range from \$122 billion to \$656 billion, while the estimated annual costs range from \$46 billion to \$54 billion.”
- “During the past year, agencies quantified and monetized benefits and costs for 12 “major” final rules. These rules added \$28.6 billion to \$184.1 billion in annual benefits compared to \$9.4 billion to \$10.6 billion in annual costs.”
- “Six additional major final rules adopted last year did not have quantified and monetized estimates of both benefits and costs. The Department of Homeland Security implemented four of these rules, at an estimated annual cost of \$1.1 billion to \$2.7 billion.”
- “The average annual costs of regulations issued over the last seven years is about 24% less than the annual average costs over the previous 20 years.”
- “Over the last 27 years, the major regulations reviewed by OMB have added at least \$139 billion to the overall yearly costs of regulations on the public.”
- “The estimated benefits of major regulations issued from 1992 to 2007 exceed the estimated costs by more than four fold.”

The Executive Summary contains no material caveats or disclaimers that would lead a reader to doubt the accuracy, reliability, or unbiasedness of the figures. Vague, weakly stated disclaimers do appear buried in the text, however.

OMB makes similar claims to accuracy, reliability and unbiasedness throughout the body of the Report. Table 1-1 consists of a summary of benefits and costs by agency for “Major Federal Rules, October 1, 1997 to September 30, 2007.” Missing from the table are the following minimal caveats that are crucial for presentational objectivity:

- All estimates come from the agencies responsible for the regulations, and these estimates were never publicly validated to ensure that they were accurate, reliable, and unbiased.
- Only estimates of benefits and costs quantified by the promulgating agencies are included; quantitative estimates derived by OMB, other government agencies, or third parties are excluded, thus virtually ensuring that the estimates reported are inaccurate, unreliable or biased.
- Estimates of aggregate benefits and costs are reported by OMB as if they are accurate, reliable and unbiased, even though estimates for the constituent parts are almost certain to be inaccurate, unreliable or biased.²⁹
- Estimates of quantified aggregate benefits and costs are reported as if they are accurate within \pm \$500,000 and correct with up to six significant figures of precision, but neither OMB nor anyone else actually believes this is true.

In short, the information in Table 1-1 is not substantively or presentationally objective. Table 1-1 also lacks transparency and it not capable of being reproduced given the limited information disclosed by OMB. Influential information that fails all of these tests cannot have utility for its intended purposes, which are informing the public and the Congress about the benefits and costs of federal regulations.

Similar defects plague Table 1-2, and each of the caveats listed above apply here as well but are not provided by OMB. The text also contains the following claim that is not accompanied by any evidence indicating that it is accurate, reliable, and unbiased:

²⁹ OMB implicitly endorses EPA's estimates of the benefits and costs of regulating fine particulate matter: "The majority of the large estimated benefits of EPA rules are attributable to the reduction in public exposure to a single air pollutant: fine particulate matter. Thus, 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" (Office of Management and Budget 2008, p. 6). OMB's warning concerns extrapolating conclusions to all EPA air rules from the benefits and costs of the fine PM rule, not about the accuracy, reliability or unbiasedness of EPA's estimates of benefits and costs for the fine PM rule itself. Thus, OMB is responsible for the estimates of benefits and costs for the fine PM rule.

“Based on the information contained in this and the previous ten Reports, the total benefits and costs 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 sum of the benefits and costs reported in Table 1-1” (Office of Management and Budget 2008, p. 5).

The text following this statement tries to distance OMB from it, but the caveats are vague, weakly-stated, overly technical for most readers, and likely to be ignored.

1. Examples of technically false statements in the draft Report

Several places in the draft Report OMB makes statements that are demonstrably false.

- “As Table 1-2 indicates, the degree of uncertainty in benefit estimates for clean air rules is large” (Office of Management and Budget 2008, p. 6).

The inference is likely to be correct, but Table 1-2 indicates no such thing. Estimates are reported with up to six significant figures and an implied accuracy of $\pm \$500,000$. This conveys a very high degree of certainty. Presumably, OMB is referring to the *span* of the reported ranges, but these gaps also are relatively small – a factor of about seven-fold. Uncertainty about causality alone – i.e., whether very low exposures to fine PM actually cause premature mortality – means that the true lower-bound benefits estimate approaches zero. Thus, the actual uncertainty (as opposed to the very limited uncertainty captured in the reported range) approaches infinity.

- “While no definitive studies have yet established any of several potential biological mechanisms for [mortality] effects [from fine PM], the weight of the available epidemiological evidence supports an assumption of causality” (Office of Management and Budget 2008, p. 6).

This statement conflates science and opinion, in particular, the opinions of researchers who are intellectually and financially invested in the assumption of causality, and thus inherently conflicted and non-independent.³⁰

- “The analyses assume that all fine particles, regardless of their chemical composition, are equally potent in causing premature mortality. This is an important assumption, because fine particles formed from power plant SO₂ and NO_x emissions are chemically different from fine particles emitted directly from both mobile sources and other industrial facilities, but no clear scientific grounds exist for supporting differential effects by particle type” (Office of Management and Budget 2008, p. 6).

This statement presumes that the scientifically correct (i.e., policy-neutral) null hypothesis is that particles with different chemical composition have the same biological effects. The assumption is scientifically arbitrary and it imposes a burden of proof on the alternative hypothesis that is not policy-neutral. Hence, the statement is inherently biased.

- “These [39] major rules represent approximately 13 percent of the 296 final rules reviewed by OMB, and approximately one percent of the 3,552 final rules published in the Federal Register during this period. OMB believes, however, that the benefits and costs of major rules capture the majority of the total benefits and costs of all rules subject to OMB review” (Office of Management and Budget 2008, p. 7).

In addition to heroically presuming that each of the 39 major rules were accurately analyzed and estimated by the promulgating agency, this statement also presumes that neither OMB nor the agencies subject to OMB misclassified any of the other 3,513 final rules. The likelihood of systematic misclassification is so high as to be virtually certain, however. Agencies have strong incentives to avoid the visibility, expense, and more intensive OMB scrutiny and congressional oversight associated with major rule classification.

³⁰ Several experts whose judgment EPA relied upon were themselves authors of the studies EPA used. Thus, they were asked to evaluate their own work – an elementary and easily avoidable intellectual and financial conflict of interest.

None of the 39 major rules reviewed by OMB during FY 2007 concerned economic regulation, however. OMB appears to have become so focused on scrutinizing social regulations (especially those proposed by the Environmental Protection Agency) that it no longer can even recognize major economic regulations when agencies propose them. Because of this lack of interest, major economic regulations completely escape OMB oversight process, and of course, they are nowhere to be found in the draft Report.

2. *The draft Report contains only vague, weakly-stated disclaimers*

Scouring the draft report yields a few places where OMB tries to distance itself from the estimates reported. These disclaimers are vague, weakly-stated, and bereft of any material information concerning the magnitude of inaccuracy, unreliability, or bias that remains.

a. Disclaimers related to benefits estimated for air quality regulations

The draft Report provides its most extensive and durable caveat concerning the benefit estimates for selected air quality regulations (Office of Management and Budget 2008, pp. 6-7). Identical (or nearly so) language can be found in previous Reports to Congress in this series, and over time it has become more prominent by virtue of having migrated from a footnote to the text (see, e.g., Office of Management and Budget 2002c, p. 114, Footnote 57; 2003b, p. 8, Footnote 9; 2004a, pp. 10-11; 2005, p. 10; Office of Management and Budget 2006, p. 5; 2007, pp. 6-7). Still, the quantitative significance of this disclaimer is clear in none of the past reports or the current draft. OMB owes the Congress and the public quantitative clarity concerning the significance of these caveats.

b. Other disclaimers

Three other disclaimers can be found in the text that show OMB trying to distance itself from its own work. Disclaimer #1 subtly warns readers not to take OMB's aggregate estimates of benefits and costs seriously:

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 dif-

ferent 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 (Office of Management and Budget 2008, pp. 5-6).

Early in the series of Reports to Congress, OMB was much more direct. For example, the first report in 1997 stated that reliable aggregate estimates could not be produced because different analyses are not comparable:

The studies that have attempted to tote up the total costs and benefits of Federal regulations have basically added together a diverse set of individual studies. Unfortunately, these individual studies vary in quality, methodology, and type of regulatory costs included. Thus we have an apples and oranges problem, or, more aptly, an apples, oranges, kiwis, grapefruit, etc., problem (Office of Management and Budget 1997, Section II.1.b).

The same comparability problem applies to Regulatory Impact Analyses, a point OMB also made in 1997.³¹ Of course, if each RIA is itself unbiased, then the resulting aggregate values also would be unbiased, albeit more uncertain. But if each RIA is biased, and biased in different but unknown (or undisclosed) magnitudes, then the resulting aggregates can be unbiased only by accident.³²

Disclaimer #2 concerns how to interpret uncertainty in aggregates when only ranges are reported and uncertainty is compounded by systematic bias:

In addition, the ranges of benefits and costs presented in Tables 1-2 need to be treated with some caution. To the extent that the reasons for uncertainty differ across individual rules, aggregating high- and low-end estimates can result in totals that are extremely unlikely. In the case of the EPA rules reported here,

³¹ See OMB (1997, Section III.2).

³² One of the caveats raised by OMB with respect to EPA air quality rules is that benefits estimates are *systematically* biased. The more such estimates are added together, the more biased the resulting aggregate becomes.

however, a substantial portion of the uncertainty is similar across several rules: this is the uncertainty in the reduction of premature deaths associated with reduction in particulate matter and the monetary value of reducing mortality risk” (Office of Management and Budget 2008, p. 6).

OMB means that lower- and upper-ends of ranges are not necessarily correlated. That is, uncertainties or biases affecting benefit estimates are different from those affecting cost estimates, and in particular, estimates of benefits may be systematically biased upward and estimates of costs may be systematically biased downward.³³ In short, OMB’s aggregate estimates are not accurate, reliable, or unbiased, but few readers can be expected to divine that result from the obtuse caveat.

Disclaimer #3 consists of a subtle acknowledgement that smart people have proposed complete or partial solutions to many of the problems concerning EPA’s benefit estimates for air quality regulations:

In response to recommendations from a committee of the National Research Council/National Academy of Sciences, EPA is working with OMB to improve methods to quantify the degree of technical uncertainty in benefits estimates (Office of Management and Budget 2008, p. 7).

The National Research Council report in question was published six years ago (National Research Council 2002), and OMB has published this same boilerplate promise in four previous Reports to Congress (Office of Management and Budget 2004a, p. 11; 2005, p. 10; 2006, p. 5; 2007, p. 7). There is no evidence in the draft Report suggesting that EPA is any closer to implementing the NRC’s remedies and considerable evidence that the Agency does not intend to do so.³⁴

³³ All estimates belong to promulgating agencies, which have weak incentives to avoid bias and strong incentives to upwardly bias estimates of net benefits.

³⁴ The National Association of Manufacturers (NAM) submitted a Request for Correction concerning the scientific content of EPA’s 2007 revision of the primary National Ambient Air Quality Standard for ozone. EPA’s lack of responsiveness to the National Academy of Sciences was one of the issues raised (National Association of Manufacturers 2007, pp. 46-47). In its response, EPA claimed that NAM’s complaint was invalid because the Academy’s report concerns “EPA’s regulatory impact analyses which are required under E.O. 120266

E. THE SPECIFIC CORRECTIVE ACTION SOUGHT, INCLUDING (IF APPLICABLE) TEMPORARY CORRECTIVE ACTION PENDING FULL RESOLUTION OF THE COMPLAINT.

There are some actions OMB can take now to improve the quality of its 2008 Report to Congress. Other actions require a fundamental change in OMB's approach to the accounting task. If OMB were to commit now to incorporate specific changes in future reports, those reports could be vastly improved and OMB staff enthusiasm for regulatory accounting would almost certainly improve.³⁵ As an alternative, OMB could recommend to Congress that the law requiring these annual reports be repealed. After all, the law does ask OMB for "recommendations for reform," and in many other contexts OMB is not shy about noting when government programs and regulations have outlived their usefulness and deserve to be terminated.

1. Changes OMB can make now

The most important change OMB needs to make now is to make sure that the estimates of benefits and costs in every table, graph, and chart, and the text accompanying them, are "presented in an accurate, clear, complete, and unbiased manner" and "presented within a proper context." To the extent that the estimates themselves are inaccurate, unreliable, or biased (OMB's definition of substantive objectivity), and that there is practicable way for OMB to correct them, then OMB must say so.

This may require OMB to simply delete the tables purporting to report aggregate estimates. While it is true that the law asks OMB to report aggregate estimates, it should not be read to require OMB to report estimates that are nonsensical.

OMB must scour the draft Report to identify every purported statement of fact for which it is not prepared to accept full responsibility, and either remove the statement entirely or clearly attribute it to the agency primarily responsible for it. Several such statements are included above. OMB's information quality guidelines exempt it from responsibility for information

[sic] and not EPA's health risk assessments" (U.S. Environmental Protection Agency 2008, p. 87). How EPA could produce an unbiased RIA using biased inputs is not clear.

³⁵ A lack of enthusiasm can be inferred from the practice of recycling text from year to year, with no evident improvement in quality.

obtained from a third party (such as a federal agency) as long as it clearly identifies the source and includes a disclaimer sufficient enough to persuade a reasonable reader that OMB is denying endorsement.

2. Changes in OMB's approach that would make future regulatory accounting reports useful

The main problem with OMB's annual Reports to Congress is not that they incorporate agency estimates of benefits and costs and that these estimates fail to adhere to applicable information quality standards, though these problems are real enough and have proved to be highly resistant to reform. The real problem is that these estimates are the *only* ones OMB includes. OMB ignores all third-party estimates in the literature and does nothing to stimulate the production and dissemination of more and higher-quality estimates.

This problem can be remedied by publicly opening the doors allowing anyone to submit a competing estimate that, in whole or in part, might be superior to what the agencies produce. OMB has noted in each Report to Congress that estimates were not available at all for many of major rules -- one-third of the major rules for FY 2007 alone, and for hardly any major rules promulgated by independent agencies.

Why not enrich the next Report to Congress with estimates prepared by third parties? It could be argued that doing so might obligate OMB to review them for adherence to applicable information quality standards, but OMB cannot certify that agency estimates meet these standards, either. The law requires OMB to seek peer review of its draft annual Reports, and when there are competing estimates it could ask peer reviewers to opine on which of the estimates is most objective.

Providing a mechanism for third-party analyses would give the agencies badly needed competition. As OMB well knows, monopoly power results in the production of too little product at too high a price. The principle is clearly stated in OMB Circular A-4:

Firms exercise market power when they reduce output below what would be offered in a competitive industry in order to obtain higher prices. They may exercise market power collectively or unilaterally. Government action can be a source of market power, such as when regulatory actions exclude low-cost imports. Generally, regulations that increase market power for se-

lected entities should be avoided (Office of Management and Budget 2003a, pp. 4-5).

Replace “firms” with “federal agencies” and the text applies without any other modification to the problem of generating high-quality regulatory analysis.

An effective way to implement this change is to announce in the final Report to Congress a procedure for third parties to submit alternative estimates to OMB. It is critical, of course, that OMB commit to include these alternative estimates in next year’s draft Report and allow the public to comment on them. OMB must include them again in the final Report, no doubt informed by the public comments it would receive.

A look back at several past years of Reports to Congress shows that the public no longer takes these reports seriously.³⁶ This change alone could reverse that decline.

Sincerely,



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³⁶ Over the past five years, the number of public comments has shown a steadily decline: 2003 (363); 2004 (46); 2005 (15); 2006 (6); 2007 (4). At this rate of decline, it is possible that this public comment will be the only one OMB receives.

See http://www.whitehouse.gov/omb/infoereg/regpol-reports_congress.html.

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