



November 7, 2008

**Board of Directors**

John Applegate  
Robert Glicksman  
Thomas McGarity  
Amy Sinden  
Sidney Shapiro  
Rena Steinzor  
Robert Verchick

**Advisory Council**

Patricia Bauman  
Frances Beinecke  
W. Thompson Comerford,  
Jr.  
Robert Kuttner  
John Podesta  
James E. Tierney  
Henry Waxman

**FILED BY ELECTRONIC MAIL  
TO OIRA\_BC\_RPT@omb.eop.gov**

Darcel D. Gayle  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
NEOB, Room 10202  
725 17th Street N.W.  
Washington, D.C. 20503

**Re: Draft 2008 Report to Congress on the Benefits and Costs of Federal  
Regulations**

Dear Sir/Madam:

These comments are submitted by Amy Sinden and James Goodwin

Amy Sinden is an associate Professor of Law at the Temple University Beasley School of Law in Philadelphia. She has taught, lectured, and written in the areas of regulatory design, cost-benefit analysis, environmental law, natural resources law, human rights, and climate change. Professor Sinden is also a member of the board of directors of the Center for Progressive Reform (CPR or Center). James Goodwin is a Policy Analyst with CPR, where he works as a member of the Government Accountability issue group.

CPR is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR's mission is to advance the public's understanding of the issues addressed by the country's regulatory laws.

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

values. We reject the idea that government's only function is to increase the economic efficiency of private markets.

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

Along with other CPR Member Scholars, Professor Sinden has submitted comments on the Office of Management Budget's (OMB) past Draft Reports to Congress on the Benefits and Costs of Federal Regulations.

These comments concern the OMB's Draft 2008 Report to Congress on the Benefits and Costs of Federal Regulations (2008 Draft Report, Draft Report, or Report).

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

- 1) provides a speculative and misleading accounting of the aggregate costs and benefits of major federal regulations over the past ten years (from October 1, 1997, to September 31, 2007) as well as a specific accounting of the costs and benefits of individual rules promulgated during the past year;
- 2) repeats last year's unsupported and highly speculative attempt to draw a connection between increased levels of regulation (generically defined) and depressed wages and slow economic growth;
- 3) repeats last year's self-serving effort to identify a supposed "trend" in federal regulatory activity toward lower regulatory costs and higher net benefits during the Bush II administration without attempting to place these claims in the broader context of the statutory mandates left unfulfilled;
- 4) introduces OMB's new proposed guidance to agencies for incorporating international trade effects into their cost-benefit analyses of proposed rules.

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

- 1) The enterprise of attempting to aggregate the purported costs and benefits of all federal regulation is fundamentally misguided and misleading. The process of aggregation necessarily obscures crucial information about the considerable uncertainties, assumptions, and data gaps underlying agency estimates of the costs and benefits of regulations.
- 2) The individual cost and benefit estimates on which OMB's aggregate accounting is built are simply not trustworthy. The problem is that, at least in the context of environmental, health and safety regulation, the numbers produced by cost-benefit analysis are built on so many layers of assumption and uncertainty that they are ultimately endlessly contestable and manipulable.

- 3) OMB's specious attempts to draw a connection between high levels of regulation and slow economic growth and its related attempts to claim credit for the Bush II administration for reducing levels of environmental, health, and safety regulation display a pervasive and politically driven anti-regulatory bias.
- 4) OMB's proposed guidance to agencies on considering the effect of proposed regulation on international trade and investment is fundamentally misguided in that it does not explain whether and how it would account for the inherent costs associated with international trade. If trade interference is counted as a regulatory cost in regulatory impact analyses, this could make the already hyper-technical enterprise of cost-benefit analysis even more complicated, and it could also tilt cost-benefit analysis even further in favor of weaker regulations.

## **I. OMB's Aggregation of Regulatory Costs and Benefits is Misguided and Misleading.**

### **A. In the Process of Aggregation, Crucial Information is Lost.**

Cost-benefit analysis attempts to distill a large and complicated body of information into a few numbers. The information on which the analysis is based is always full of holes and imperfections. Data are never complete. Scientific conclusions are never certain. And the process of converting intangible environmental values into monetary terms is fraught with unsolvable theoretical conundrums.<sup>1</sup> Accordingly, a properly developed cost-benefit analysis is always peppered with caveats and conditions that explain the uncertainties underlying the numbers, including which benefits could not be quantified, what assumptions were made to reach the numeric results, how changing those assumptions would effect the outcome, and what baseline the costs and benefits were measured against. Indeed, OMB's own guidance on conducting cost-benefit analyses, Circular A-4, stresses the importance of these narrative explanations of quantitative results,<sup>2</sup> as do the European Union's guidelines on regulatory impact

---

<sup>1</sup> Prominent among these theoretical conundrums is the problem of discounting. Although discounting based on inflation and interest rates makes sense for purely monetary costs, there is considerable debate and controversy over OMB's practice of applying a discount rate to benefits of environmental health and safety regulation, like the value of human life, prevention of harms to future generations, and the prevention of ecological harms. Several of CPR's Member Scholars and other prominent academics have argued that there is no theoretical justification for using any discount rate at all for ecological benefits and other benefits implicating future generations. *See, e.g.,* Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39, 40-41 (1999) (arguing that discounting should be abandoned for measuring future lives saved); *see also* Richard Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 955-86 (1999). Indeed, use of a discount rate in such circumstances can yield absurd results. Applying a discount rate of five percent to the prevention of a billion deaths 500 years from now, for example, yields the conclusion that such a measure is less beneficial than the prevention of one death today.

Nonetheless, despite this wide-spread discrediting and condemnation of the practice of discounting benefits and despite Professor Sinden's extensive comments criticizing OMB's use of discounting in response to previous draft reports, *see, e.g.,* Letter from CPR to Lorraine Hunt, 5/20/04 at 13-14, OMB once again blithely announces in the Draft 2008 Report its continued practice of using a seven percent discount rate across the board, without acknowledging the considerable controversy surrounding this practice. Draft Report at 3 n. 5, 61 (Appendix A).

<sup>2</sup> *See* Circular A-4 at 3 ("A complete regulatory analysis includes a discussion of non-quantified as well as quantified benefits and costs. . . . A good analysis is transparent. . . . For transparency's sake, you should state in

assessment.<sup>3</sup> The monetary estimates of costs and benefits cannot be properly understood in the absence of these caveats.

The process of aggregation, however, must of necessity exclude all of this important narrative information. The result is a set of naked sums that at best provides no useful information and at worst can be dangerously misleading.<sup>4</sup> Thus, in the Report's executive summary, OMB announces that the annual benefits of federal regulation "range from \$122 billion to \$656 billion" and the annual costs "range from \$46 billion to \$54 billion." The seeming precision of these numbers creates a false illusion of scientific accuracy and objectivity, which belies the vast gaps and uncertainties that lie beneath the numbers and violates OMB's purported commitment to transparency.<sup>5</sup> Furthermore, these gaps and uncertainties are far more likely to skew the numbers toward lower rather than higher net benefits.

Perhaps the biggest factor leading to the undercounting of benefits is the fact that many regulatory benefits are simply unquantifiable. Indeed, OMB acknowledges that "[i]n many instances, agencies were unable to quantify all benefits and costs."<sup>6</sup> In fact, for 7 of the 18 major environmental, health, and safety regulations reviewed by OMB this past year, the agencies were unable to provide a quantified estimate of any of the benefits at all. (In 2 others, they could not provide any quantified estimate of costs.)<sup>7</sup> Undoubtedly, there were other rules for which the benefits estimates reported by OMB were grossly incomplete. OMB directs the reader to Table A-1 (buried in an appendix to the report) for a narrative description of these "unquantified effects on a rule-by-rule basis,"<sup>8</sup> and in previous years, Table A-1 has indeed provided that information. This year, however, none of the explanations in the fifth column of the Table A-1 (labeled "Other Information") contain any mention of unquantified benefits. With respect to at least one rule, this is *not* because the agency's analysis successfully quantified all aspects of the rule's benefits. As we explain in the next section, EPA's cost-benefit analysis of its Mobile Source Air Toxics Rule actually left *all* of the health benefits associated with reductions in air toxics unquantified.<sup>9</sup> But one searches in vain through OMB's report to Congress to find any acknowledgement of that fact.

---

your report what assumptions were used, such as the time horizon for the analysis the discount rates applied to future benefits and costs. It is usually necessary to provide a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensitive to plausible changes in the main assumptions and numeric inputs.")

<sup>3</sup> See European Commission, *Impact Assessment Guidelines* (June 15, 2005), available at [http://ec.europa.eu/governance/impact/docs/SEC2005\\_791\\_IA%20guidelines\\_annexes.pdf](http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf).

<sup>4</sup> See Richard Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1348-49, 1404-06 (2003).

<sup>5</sup> One important gap arises from the fact that OMB has again chosen to categorically exclude homeland security rules from its accounting of overall costs and benefits. This is because, OMB informs us, "[t]he benefits of improved security are very difficult to quantify and monetize." Draft Report at 7. The exclusion of this major category of regulation obviously raises questions about the capacity for OMB's aggregate figures to generate meaningful generalizations about the success or "efficiency" of the federal regulatory program as a whole. It also highlights the way in which OMB provides selective treatment to regulation depending on its goals or content. OMB does not require the Department of Homeland Security justify its regulations with cost-benefit analysis because OMB accepts that the benefits of such regulations are simply too difficult to monetize. Yet, as the discussion below in Part I.B demonstrates, the benefits of many environmental regulations can also be exceedingly difficult to meaningfully monetize.

<sup>6</sup> See Draft Report at 4 n. 8.

<sup>7</sup> See *id.* at 63-75 (Table A-1).

<sup>8</sup> See *id.* at 4 n. 8.

<sup>9</sup> See *infra* text accompanying notes 16-20.

Another factor leading to the undercounting of net benefits is the systematic overcounting of regulatory costs. There is considerable evidence that agencies routinely overestimate the costs of regulatory compliance *ex ante*.<sup>10</sup> This is not surprising in light of the fact that agencies are usually heavily dependent on regulated industries themselves for information on compliance costs and those industries have an incentive to exaggerate the potential costs of regulation in hopes of pushing agencies toward less stringent rules.

## **B. The Underlying Estimates of the Costs and Benefits of Each Rule are not Trustworthy.**

Ultimately, the individual cost and benefit estimates on which OMB's aggregate accounting is built are simply not trustworthy. The problem is that, at least in the context of environmental, health and safety regulation, the numbers produced by cost-benefit analysis are built on so many layers of assumption and uncertainty that they are ultimately endlessly contestable and manipulable. OMB's accounting of the costs and benefits of federal regulation, in other words, is built on a house of cards.

Three years ago, Professor Sinden used EPA's recently promulgated regulation of arsenic in drinking water as an illustrative example of the hopeless indeterminacy of cost-benefit analysis. EPA estimated the costs of that rule at around \$210 million, but a study by Professor Cass Sunstein concluded that reasonable people making reasonable assumptions could peg the benefits of the rule as low as \$13 million or as high as \$3.4 billion.<sup>11</sup> Accordingly, EPA's (and OMB's) estimate of the benefits as between \$140 and \$200 million presented a false picture that failed to capture the magnitude of the uncertainty behind EPA's numbers.

Two years ago, Professor Sinden used EPA's cost-benefit analysis of the Mercury Rule as a cautionary tale to show how cost-benefit analysis can fluctuate wildly in the political winds. EPA's cost-benefit analysis for the mercury rule went from estimating net benefits in connection with the proposed rule of \$13 to 70 billion to estimating *negative* net benefits of \$850 million in connection with the only slightly less stringent final rule. The story of how EPA went about achieving such a dramatic about-face involved stunning leaps of logic worthy of Alice in Wonderland—like counting the fact that people with lower IQs tend to attend fewer years of school than those with higher IQs as a *benefit* of mercury poisoning—and the mysterious exclusion from the second analysis of large categories of benefits that had been quantified and included in the first analysis. But the point of the story was simply to illustrate again the wild

---

<sup>10</sup> See Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, 33 FORDHAM URB. L.J. 1071(2006); W. Harrington & R.D. Morgenstern, et al., *On the Accuracy of Regulatory Cost Estimates*, 19 J. POLICY ANALYSIS & MANAGEMENT 297 (2000); H. Hodges, *Falling Prices: Costs of Complying with Environmental Regulations Almost Always Less Than Advertised*, Economic Policy Institute (1997); U.S. Congress, Office of Technology Assessment, *Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health—An Appraisal of OSHA's Analytic Approach*, U.S. Government Printing Office OTA-ENV-635, available at <http://www.fas.org/ota/reports/9531.pdf>; Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2042- 44 (2002) (collecting studies); Ruth Ruttenberg, *Not Too Costly After All: An Examination of the Inflated Cost Estimates of Health, Safety, and Environmental Protections*, (Public Citizen White Paper, Feb. 2004), available at <http://www.citizen.org/documents/ACF187.pdf>.

<sup>11</sup> CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT 175, 177 (2002).

indeterminacy and contestability of the numbers upon which agency cost-benefit analyses are built.

In last year's crop of new regulations, the National Highway Traffic Safety Administration's (NHTSA) rule setting new fuel efficiency standards for light trucks stood out as one that received considerable attention from the media and accordingly was presumably subject to relatively careful review by the agency. Indeed, fuel efficiency has been a particularly salient political issue because of widespread consensus and concern about global warming. Nevertheless, the benefits estimate for the fuel efficiency rule did not include global warming impacts, because NHTSA deemed them too difficult to quantify—an admission that is buried on page 252 of the 316-page cost-benefit analysis report.<sup>12</sup> (The analysis does, however, go on to calculate—down to the penny—the monetary value of the five minutes drivers will save each time they do not have to visit a gas station because the increased efficiency of their engine allows them to go farther on a tank of gas.)<sup>13</sup> If cost-benefit analysis cannot incorporate the issue that constitutes one of the most important reasons for promulgating a rule in the first place, one has to wonder if cost-benefit analysis has any relevance at all for public policy-making. Equally troubling was the fact that OMB's 2007 Report to Congress provided no hint of this striking omission from the cost-benefit estimate for the NHTSA rule. Although OMB promised that year (as it does again this year) to convey information about omitted, unquantifiable benefits on a rule-by-rule basis, it only meets this obligation for those patient enough to dig to the table buried in Appendix A.<sup>14</sup> For persons patient enough to dig through the Appendix, it turns out that the table is silent on this point, providing no clue that significant benefits might be missing from the estimate.<sup>15</sup>

---

<sup>12</sup> See U.S. Department of Transportation, National Highway Traffic Safety Administration, *Final Regulatory Impact Analysis, Corporate Average Fuel Economy and CAFÉ Reform for MY 2008-2011 Light Trucks VIII-64 to VIII-65* (March 2006)[hereinafter NHTSA RIA], available at [http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Rulemaking/Rules/Associated%20Files/2006\\_FRIAPublic.pdf](http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Rulemaking/Rules/Associated%20Files/2006_FRIAPublic.pdf).

<sup>13</sup> *Id.* at VIII-66 to VIII-69.

<sup>14</sup> See Draft Report at 4 n. 8 (“In many instances, agencies were unable to quantify all benefits and costs. We have conveyed the essence of these unquantified effects on a rule-by-rule basis in the columns titled ‘Other Information’ in Appendix A.”).

<sup>15</sup> Moreover, even if NHTSA's benefits estimate had provided some reasonable approximation of the true social benefits of its rule, the method NHTSA used to conduct its analysis would have provided little useful information about the desirability of the rule. NHTSA's cost-benefit analysis—like virtually all of the cost-benefit analyses produced by federal agencies and approved by OMB—failed to analyze the efficiency of the rule in a manner consistent with the fundamental principles of economic theory to which OMB purports to subscribe. Instead, NHTSA analyzed a set of only three alternatives, which varied some in their administrative details but all of which accomplished roughly the same increase in average fuel efficiency—a modest increase of less than two miles per gallon over a four year period. (The 2007 standard was 22.2 miles per gallon (mpg). See Department of Transportation, National Highway Traffic Safety Administration, *Final Rule: Average Fuel Economy Standards for Light Trucks, Model Years 2008-2011*, 71 Fed. Reg. 17,566, 17,568 (April 6, 2006). The new rule raised the standard each year for the next four years, reaching a high of 24 mpg for model year 2011. See *id.* at 17566, 17645 (Table 15)). It justified this increase by concluding that the benefits exceeded the costs, but failed to consider whether more stringent options would have produced even higher net benefits. See NHTSA RIA, *supra* note 12, at IX-7.

This shortcoming in NHTSA's cost-benefit analysis illustrates a more general problem with OMB's *Reports to Congress on the Benefits and Costs of Federal Regulation*. In past comments, Professor Sinden has criticized the central premise of these reports—the notion that by aggregating *ex ante* projections of the costs and benefits of all federal regulations, one can produce meaningful information about the “smartness” or efficiency of such regulation—as misguided. Rather than repeat this argument here, we will direct the reader to these past

Among this year's final regulations, EPA's cost-benefit analysis of its Mobile Sources Air Toxics (MSAT) Rule demonstrates once again the futility of trying to express the benefits of environmental regulations in quantified, monetized terms. This rule—aimed specifically at the reduction of air toxics—produced a cost-benefit analysis that literally left the effects of air toxics out of its benefits estimate entirely.<sup>16</sup> This was not because the agency believed those effects to be insignificant. EPA acknowledged that it “expect[s] to see significant reductions in mobile source air toxics” as well as reductions in volatile organic compounds as a result of this rule, and that those reductions will produce significant health benefits, including the reductions in cancer, asthma, reproductive and developmental effects, anemia, and the still unspecified premature mortality risk associated with ozone exposure.<sup>17</sup> The agency candidly admitted the shortcomings of its cost-benefit analysis in the preamble to the final rule:

Perhaps the most significant limitation of this analysis is our inability to quantify a number of potentially significant benefit categories associated with improvements in air quality that would result from the proposed standards. Most notably, we are unable to estimate the benefits from reduced air toxics exposures because the available tools and methods to assess mobile source air toxics risk at the national scale are not adequate for extrapolation to incidence estimations or benefits assessment. We also do not quantify ozone benefits due to the magnitude of, and uncertainty associated with, the modeled changes in ambient ozone associated with the [rule].<sup>18</sup>

Instead, the benefits analysis for the MSAT Rule was limited exclusively to consideration of *some* of the health benefits of reducing particulate matter (a non-toxic air pollutant) that arise as *co-benefits* to controlling air toxics from mobile sources.

OMB's draft Report to Congress does not even hint that the cost-benefit analysis for the MSAT Rule contains such gaping holes. Table A-1 in this year's report, which is supposed to

---

comments. *See, e.g.*, Letter from CPR to Mabel Echols, 6/11/07 at 3-4. It is sufficient to state here that these reports are based on a fundamental misunderstanding of the economic theory in which OMB purports to ground its cost-benefit mandate. Rather than illuminating the issues surrounding federal regulatory design, they serve only to obfuscate the real issues and to create opportunities for OMB to promote an ends-driven, political agenda in the guise of neutral science. In contrast, cost-benefit analyses, as understood by an economist, should consider the marginal costs and benefits of a series of regulatory options and picks the one for which marginal costs equal marginal benefits. Or, said another way, the cost-benefit analyst seeks to pick the regulatory option that produces the highest possible net benefits. As with the NHTSA rule, OMB's annual reports focus exclusively on total costs and total benefits. Unlike a comparison between marginal costs and marginal benefits, as is demanded by a meaningful economic analysis, exclusive consideration of total costs and total benefits reveals nothing about the efficiency or “smartness” of federal regulations.

To make matters worse, this simple benefits-exceed-costs criterion is also systematically biased toward striking down regulations that are too stringent and allowing regulations that are too lenient. *See* David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 380 (2006).

<sup>16</sup> U.S. Environmental Protection Agency, Office of Transportation and Air Quality, *Regulatory Impact Analysis for Final Rule: Control of Hazardous Air Pollutants from Mobile Sources* 12-6 to 12-7 (Feb. 2007) (Table 12.1-2) [hereinafter EPA RIA], available at <http://epa.gov/OTAQ/regs/toxics/fr-ria-sections.htm>.

<sup>17</sup> Control of Hazardous Air Pollutants From Mobile Sources, 71 Fed. Reg. 15804, 15907, 15909 (Mar. 29, 2006).

<sup>18</sup> *Id.* at 15,910.

provide a narrative description of “unquantified effects on a rule-by-rule basis,”<sup>19</sup> makes no mention of these deficiencies. If anything, the entry in the “Other Information” column seems misleadingly to suggest that the benefits estimate actually included the health benefits associated with reductions in one of the most dangerous air toxics targeted by the Rule, benzene.<sup>20</sup> In order to discover that benzene, as well as all other air toxics, were in fact excluded from the analysis, one must sift through either the hefty 807-page Regulatory Impact Analysis or the 160-page *Federal Register* notice for the final MSAT Rule.

### **C. OMB Should Abandon Its Proposal to Develop ‘Regulatory Scorecards.’**

OMB has asked for comment on its proposal “to develop ‘scorecards’ to evaluate the extent to which agencies’ regulatory analyses comply with OMB guidance.”<sup>21</sup> We urge OMB to abandon this ill-founded idea. In the same way that OMB’s aggregation of the costs and benefits of federal regulation in its annual report to Congress is dangerously inaccurate and misleading, OMB’s idea that agency compliance with guidelines for performing cost-benefit analyses can be distilled down to a series of “scorecards” promises only to over-simplify a set of complex and nuanced information in a way that is likely to mislead the public and distort agency incentives. Just one example serves to illustrate the point. OMB proposes that one of the scorecard criteria would be to determine whether “the analysis quantif[ies] and monetize[s] benefits and costs of [the] proposed action.”<sup>22</sup> If OMB’s Draft Report is any guide, one can assume that if this criterion were applied to EPA’s cost-benefit analysis of its MSAT rule, the scorecard’s “yes” box would be checked with respect to this criterion. Because EPA did in fact quantify and monetize (some of) the benefits of the rule, the hopeless inadequacy of that estimate would be hidden from view and removed from concern. OMB’s scorecard idea only promises to replicate and exacerbate the gross over-simplification that already renders cost-benefit analysis so meaningless and misleading.

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

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

### **A. OMB’s Comments on the Relationship between Regulation and Wages are Unsubstantiated and Irrelevant.**

Once again, OMB has included in this year’s report a brief section entitled “Impact on Wages.” With language lifted virtually verbatim from prior year’s reports, OMB takes the position that the costs of social regulation, in particular occupational health and safety standards,

---

<sup>19</sup> Draft Report at 4 n. 8.

<sup>20</sup> *See id.* at 70.

<sup>21</sup> *Id.* at 18-19.

<sup>22</sup> *Id.* at 18.



are borne by employees.<sup>23</sup> The only citation OMB gives for this broad claim is a single quotation from one textbook in modern labor economics.<sup>24</sup> Textbooks, of course, do not all agree with each other, and they do not represent peer-reviewed literature, the standard of proof that OMB requires in other areas. OMB cites no empirical evidence for its claim. Moreover, the Report focuses myopically on the assumed negative effect of regulation on wages in the regulated industry, and ignores entirely the possibility that regulation may increase revenues and wages in other sectors of the economy—in, for example, the industry that produces pollution control equipment.

OMB goes on to concede that in some cases workers might not be hurt by occupational health standards. They will likely be better off with such standards, OMB says, “if health benefits exceed their associated wage costs *and* such costs are not borne primarily by workers.”<sup>25</sup> In fact, however, the conjunction is misplaced; workers will be better off if *either* of the conditions cited by OMB is true. If health benefits that individual workers receive exceed the costs imposed on their wages by regulatory compliance, then even if workers bear the full cost of the regulation, they obtain a net benefit. Furthermore, if workers do not bear the costs of the rule, then they will be better off with a rule that protects their health than they would be without such a rule. (Of course, workers may also be better off if workplace rules protect their lives and health, even if some of the costs are ultimately imposed on the workers themselves.)

### **B. OMB’s Comments on the Relationship between Regulation and Economic Growth Are Misleading.**

OMB purports to take the position that cost-benefit analysis is a neutral tool that is neither antiregulatory nor pro-regulatory but simply distinguishes good regulation from bad regulation. Nonetheless, it has again included in this year’s Draft Report a gratuitous and blatantly ideological section that purports to draw a link between government regulation of all kinds and depressed wages and slow economic growth.<sup>26</sup> Since other CPR Member Scholars have commented extensively on a very similarly worded section of the report four years ago, we will not rehash old arguments here, but simply refer the reader to these previous comments.<sup>27</sup>

For the purposes of this year’s comments, it suffices to note that OMB’s lengthy discussion on this topic fails to even acknowledge the large literature that finds a positive correlation between levels of environmental regulation and per capita income<sup>28</sup> and confirms the “Porter hypothesis” that regulation can improve economic competitiveness.<sup>29</sup> Furthermore,

---

<sup>23</sup> Draft Report at 26-27.

<sup>24</sup> *Id.* at 26 n. 22.

<sup>25</sup> *Id.* at 26 (emphasis added).

<sup>26</sup> *Id.* at 26-32

<sup>27</sup> Letter from CPR to Lorraine Hunt, 5/20/04 at 2-6.

<sup>28</sup> See, e.g., Dasgupta, S., A. Mody, S. Roy and D. Wheeler, 1995, *Environmental Regulation And Development: A Cross-Country Empirical Analysis*, World Bank Policy Research Department Working Paper, No. 1448, March (examining data from 31 countries showing positive correlation between stringent air pollution regulations and per capita income), available at [http://www-wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000009265\\_3970311121743](http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000009265_3970311121743).

<sup>29</sup> M. Porter & C. van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. ECONOMIC PERSPECTIVES 97 (1995); Ebru Alpaya et al., *Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing*, 84 AMERICAN J. AGRICULTURAL ECONOMICS 887 (Nov. 2002).

OMB's efforts to find a link between regulation and slow economic growth are also at odds with the growing evidence that in many instances environmental regulation actually imposes costs that are too small to have any discernable economic impact.<sup>30</sup>

### **C. OMB's Attempt to Identify a Trend Toward More Efficient Regulation in the Bush II Administration is Specious.**

OMB's attempt to make a case against regulation in general as an enemy of economic growth sets the stage for the next section, in which OMB purports to identify "trends" in federal regulatory activity. In particular, OMB insinuates that by decreasing regulatory costs, the Bush II administration has improved the efficiency of regulation over the past seven years. OMB presents a chart showing the costs of major rules issued between 1981 and 2007.<sup>31</sup> From this chart, OMB extracts a conclusion, which it apparently views as important enough to highlight in the executive summary: "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."<sup>32</sup> This assertion is highly misleading.

First, as OMB acknowledges in a footnote,<sup>33</sup> most of this statistic is attributable to just one rule—the ergonomics rule—which probably should never have been included in the analysis to begin with. OSHA's ergonomics rule was issued by the agency in November 2000, but never went into effect, because Congress repealed it five months later in March of 2001. Instead of taking the logical approach of simply leaving this rule out of the analysis entirely, OMB took the self-serving approach of crediting the \$4.8 billion in "costs" (that were never incurred) to the Clinton administration in 2000 and the subsequent \$4.8 billion cost "savings" to the Bush II administration in 2001.<sup>34</sup> Without this accounting sleight-of-hand, OMB would only be able to say that Bush era regulations were 7% cheaper than those issued over the previous 20 years.<sup>35</sup>

But more importantly, regardless of whether OMB got the statistic right, the entire enterprise of attempting to draw any meaningful conclusion about regulatory legitimacy or efficiency by looking only at costs is illegitimate and intellectually bankrupt. It flies in the face of the economic theory on which cost-benefit analysis is supposedly grounded and to which OMB purports to subscribe. While OMB does not directly state that the decreasing trend in costs necessarily indicates an improvement in the efficiency of regulation under the Bush II administration, it is hard to imagine what other purpose is served by making this assertion and highlighting it in the executive summary. The placement of this analysis directly after the section arguing that regulation negatively impacts economic growth also contributes to this impression. According to the economic theory to which OMB purports to subscribe, one can only judge the efficiency of a regulation by looking at both marginal costs and marginal benefits and comparing them. Looking only at costs provides no useful information about the efficiency

---

<sup>30</sup> See Ackerman, *supra* note 10.

<sup>31</sup> Draft Report at 36.

<sup>32</sup> *Id.* at iii, 35.

<sup>33</sup> *Id.* at 35 n. 46.

<sup>34</sup> *Id.* at 34-35, 36 n. 47. OMB did not attribute any benefits to this rule, apparently on the basis of a retrospective study that indicated that the rule would not in fact have reduced muscular skeletal disorders, as it was intended to do. See *id.* at 36 n. 47.

<sup>35</sup> *Id.* at 35 n. 46.

or desirability of a regulation. It does not even permit a determination as to whether those costs are less than or greater than the benefits. Under principles of economic theory, the fact that costs have decreased does not indicate that regulation has become “smarter,”<sup>36</sup> unless one’s real agenda is the dismantling of the regulatory state rather than the promotion of economic efficiency.

Thus, if the costs of regulation have substantially decreased during the Bush II administration, that may mean either one of two things: (1) many inefficient regulations for which costs exceeded benefits have been foregone or repealed, thus increasing economic efficiency or (2) many efficient and desirable regulations that would have provided far more benefits to society than costs have been foregone, thus leading to less economic efficiency than would have been possible had more regulatory costs been incurred. To suggest that a decrease in regulatory costs standing alone indicates a “good result” or an increase in economic efficiency is intellectually incoherent.<sup>37</sup>

### **III. OMB’s Proposed Guidance on Measuring the International Trade Effects of Regulation is Fundamentally Misguided and Would Further Distort the Results of Cost-Benefit Analyses.**

Among the most disturbing innovations in this year’s report is the new section in which OMB describes its proposed guidance to agencies for incorporating international trade effects into their cost-benefit analyses of proposed rules.<sup>38</sup> According to OMB, regulations may interfere with international trade. “Since this aspect of regulation is presumptively harmful to overall economic welfare in each nation, the size of this harmful effect should be considered in regulatory analysis and compared, along with other regulatory costs, to the benefits generated by the regulation.”<sup>39</sup> Evidently, OMB believes that consideration of this “presumptive” economic harm will further enrich agencies’ quixotic attempts to “determine whether regulations maximize the net benefits to society.”<sup>40</sup> Instead, OMB’s proposed guidance will only waste valuable agency time and resources and further distort the already incoherent results produced by regulatory cost-benefit analysis.

First, OMB’s assumption that the impacts of domestic regulation on international trade can only produce costs to social welfare and never benefits is unfounded. Domestic regulation can just as easily have the effect of fostering international trade and resultant economic growth as “interfering with” or “shrinking” it.<sup>41</sup> Consider, for example, regulation in the United States imposing limits on carbon dioxide emissions. Such a regulation is likely to stimulate technological innovations in renewable energy technologies and in energy efficiency

---

<sup>36</sup> *Id.* at 32.

<sup>37</sup> The Report’s gratuitous reference to the “net decrease in compliance costs” that occurred during the early 1980s similarly creates a false impression that the Reagan administration somehow streamlined regulation or made it more efficient. *See id.* at 34. In fact, these data provide absolutely no useful information about the relative efficiency of regulation during the Reagan presidency.

<sup>38</sup> Draft Report at 108-10 (Appendix F).

<sup>39</sup> *Id.* at 109.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

advancements for which there is already high demand abroad, thus stimulating domestic economic growth.

Second, OMB's assumption that "trade itself presumptively increases the net benefits to each nation involved in the trading"<sup>42</sup> is invalid. Overall social benefits can be increased if both countries specialize in the production of the good in which they have an advantage and trade with each other to obtain the goods that they no longer produce. In this way, there can be an increase in total benefits if two countries engage in trade, just as there would be an increase in total benefits if two individuals engaged in trade.<sup>43</sup> But, as OMB itself acknowledges, this simplistic version only holds if there are no market failures.<sup>44</sup> If externalities distort incentives, trade can decrease welfare, as last year's recall of lead-tainted Chinese toys made all too clear. Furthermore, international trade invariably yields new costs for the participating countries, and, in some instances, these new costs may offset most or all of the economic benefits from trade.<sup>45</sup> To take one simple example, international trade produces greater transportation-related costs in the form of depleted natural resources (e.g. oil) and negative externalities (e.g. air pollution and greenhouse gas emissions), since goods must travel greater distances in order to reach the end user. To this extent, "interfering with and shrinking the level of international trade" may just as easily produce social benefits as harms.

In short, the trade-related impacts of domestic regulation on social welfare are exceedingly complex, and like other social welfare factors, probably impossible to calculate with any accuracy. If anything is certain, it is that those impacts are likely to include both social welfare costs as well as social welfare benefits. OMB's attempt to reduce these complex issues into a simplistic, one-size-fits-all, costs-only formula will only serve to add further distortion and bias to regulatory impact analysis. Accordingly, we urge OMB to abandon its effort to incorporate trade impacts into cost-benefit analysis.

Thank you for your attention to these comments.

Sincerely,

**Amy Sinden**, Member Scholar  
Center for Progressive Reform  
Associate Professor  
Temple University  
Beasley School of Law

**James Goodwin**, Policy Analyst  
Center for Progressive Reform

---

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., ADAM SMITH, *THE WEALTH OF NATIONS: BOOKS IV-V* (Andrew Skinner, ed., Penguin Books 1999) (1776); Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. Int'l Econ. L. 49, 49-56 (1998).

<sup>44</sup> Draft Report at 109.

<sup>45</sup> See, e.g., Herman E. Daly, *Problems with Free Trade: Neoclassical and Steady-state Perspectives*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY*, 147-158 (Durwood Zaelke, Paul Orbuch, and Robert F. Hausman, eds., 1993); Howard F. Chang, *An Economic Analysis Of Trade Measures To Protect The Global Environment*, 83 GEO. L.J. 2131 (1995).