



November 5, 2009

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Re: **Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations**

Dear Sir/Madam:

These comments are submitted by Professor Amy Sinden¹, a Member of the Board of Directors of the Center for Progressive Reform (CPR); Professor Rena Steinzor², President of CPR; and Mr. James Goodwin, a CPR Policy Analyst.

CPR is an organization of academics specializing in the legal, economic, and scientific issues that surround federal regulation. CPR works to advance the public's understanding of the issues addressed by the country's regulatory laws. In particular, CPR seeks to educate the public and policymakers about 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.

These comments concern the OMB's Draft 2009 Report to Congress on the Benefits and Costs of Federal Regulations (2009 Report or Report).

Our conclusions about the Report can be summarized as follows:

- 1) Despite the change in presidential administration, this year's Report is similar in format and content to those of the last eight years. The task of aggregating cost-benefit analyses is fundamentally

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counterproductive. In particular, we respectfully disagree that the aggregate estimates presented in the Report provide “indispensable information.”

- 2) We encourage the Obama Administration to consider ways to re-imagine OIRA’s role as one that is focused on providing positive and constructive assistance to regulatory agencies so that they are able to carry out their statutory missions. We offer specific recommendations on tasks that OIRA can take on as part of this role, including ways that OIRA can change the 2009 Report so that its format and content reflect and reinforce this role.

I. THIS YEAR’S REPORT CONTINUES THE DISAPPOINTING TREND OF FOCUSING TOO GREATLY ON THE COUNTERPRODUCTIVE TASK OF AGGREGATING COST-BENEFIT ANALYSES

The authors of this year’s Report have repeated the model of previous reports by undertaking the counterproductive task of aggregating the costs and benefits of regulations from the previous year and from the previous ten years. We understand that the Regulatory Right-to-Know Act of 2001³ requires OMB to produce an annual “report containing . . . an estimate of the total annual costs and benefits (including quantifiable and nonquantifiable effects) of Federal rules . . . in the aggregate.” However, this task can be achieved with substantially less effort and with less opportunity for misrepresentation than the current approach. In particular, this task can be fulfilled through a simple presentation such as the one provided in the Executive Summary of this year’s Report. Unfortunately, this year’s Report adheres closely to the format and content of the Reports from the previous eight years, providing detailed, elaborate, but nevertheless flawed analyses of the aggregate cost and benefits of past regulations that go well beyond the requirements of existing law (*e.g.*, the 10-year look-back at major federal regulations reviewed by OMB to examine their quantified and monetized costs and benefits).

We respectfully disagree that the aggregate estimates presented in the Report provide “indispensable information.” As in the past, the cost-benefit analyses catalogued in this year’s Report are based on incomplete and unreliable information, and controversial monetization techniques. (Indeed, we were particularly disappointed to see that this year’s report continued the controversial practice of using a 7 percent discount rate in calculating future benefits. See Appendix to CPR Comments at page 14, note 20.) Because such uncertainties and gaps are inevitable and inescapable, 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, as do the European Union’s guidelines on regulatory impact assessment.⁴ The monetary estimates of costs and benefits cannot be properly understood in the absence of these caveats; indeed, in the absence of those caveats, the monetary estimates are not just incomplete, but misleading.

³ Pub. L. No. 106-554, § 624 (2001).

⁴ See Circular A-4 at 3; European Commission, *Impact Assessment Guidelines* (June 15, 2005), available at http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf.

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. Thus, in the Report's executive summary, OMB announces that the annual benefits of federal regulation "range from \$126 billion to \$663 billion" and the annual costs "range from \$51 billion to \$60 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 the commitment to transparency that OMB made in Circular A-4. Furthermore, these gaps and uncertainties are far more likely to skew the numbers toward lower rather than higher net benefits.

In short, these inescapable shortcomings prevent aggregate estimates of regulatory cost and benefit estimates from providing any useful information about the overall performance of the U.S. regulatory system and how it affects our society.

Every year for the last seven years, we or other CPR Member Scholars have explained in greater detail the shortcomings of cost-benefit analysis in general and of the exercise of aggregating these cost-benefit analyses in particular. We have provided a summary of these previous discussions in Appendix A to these comments. We also invite you to review our past comments for a fuller discussion of these issues (<http://www.progressivereform.org/OMBCongress.cfm>).

II. OIRA'S ROLE SHOULD BE RE-IMAGINED AS ONE FOCUSED ON PROVIDING POSITIVE AND CONSTRUCTIVE ASSISTANCE TO REGULATORY AGENCIES

Rather than expending its limited resources on analyzing aggregate estimates of cost-benefit analyses, OIRA should re-imagine its role in the U.S. regulatory system as one that is focused on supporting regulatory agencies. Presently, key regulatory agencies charged with protecting public health, safety, and the environment are in desperate shape, unable to fulfill the statutory missions that Congress has laid out for them. As a result of these deficiencies, people and the environment continue to be exposed to unjustifiable risks. In the past, OIRA has often played a role in exacerbating agency paralysis and dysfunction. Because of its unique institutional position in the U.S. regulatory system, however, OIRA also has the potential to provide positive and constructive assistance to these agencies, enabling them to fulfill their missions in an effective and timely manner. We will describe various tasks that OIRA can undertake that would be consistent with this new role.

A. Cataloguing Agencies' Regulatory Priorities, As Identified by the Agencies Themselves

This year's Report seeks public input regarding the "identification of regulatory gaps and of potential regulations that could promote important social goals."⁵ While this gesture is useful, a better approach would be for OIRA to periodically seek input from the regulatory agencies themselves in order to identify regulatory gaps and priorities. In particular, mindful that many of the regulatory agencies have been unable to produce needed regulations in anything resembling a timely way, OIRA should ask each agency to identify and list actions the agency needs to take but has been unable to complete. It might also be useful for OIRA to have the agencies document the reasons that they have been unable to complete these actions, such as inadequate resources, inadequate legal authority, or even political interference. Given their expertise and experience, agencies are clearly

⁵ Draft Report at iv.

the best sources of information regarding the identification of regulatory gaps. Equally as important, since Congress has specifically charged the various regulatory agencies with the task of carrying out regulatory programs, they also have the unique and unquestioned statutory authority to identify regulatory gaps and priorities.

It is important that OIRA take great care in soliciting this information from the agencies to ensure that it reflect the agencies' own independent views. If OIRA somehow influences an agency's response—intentionally or unintentionally—the value of the information it receives will be significantly diminished. Nevertheless, OIRA's position as a centralized conduit among the different regulatory agencies makes it institutionally well suited to seek out and compile these agencies' views on regulatory matters.

OIRA could also explore other creative ways of identifying and documenting important regulatory gaps in the annual Reports. For example, OIRA could seek to catalogue all the petitions for rulemaking that each regulatory agency has denied in the past year.

Though the regulatory agencies will always be the most important source of information regarding regulatory gaps and priorities, we nevertheless believe that input from the general public remains important as well. Accordingly, we offer the following ideas regarding regulatory gaps that need to be filled:

- OSHA Regulations. If any of the health and safety agencies needs to be revitalized it is the Occupational Safety and Health Administration (OSHA). Its regulations are years, even decades, behind the health and safety dangers in the workplace, and its enforcement of its standards is feeble at best. For example, in the last 10 years, OSHA has managed to promulgate comprehensive regulations for only two chemicals used in the workplace. This slow rate of progress is astounding given that OSHA has legally enforceable exposure limitations for fewer than 200 of the approximately 3,000 chemicals that the Environmental Protection Agency (EPA) characterizes as “high production volume” chemicals (*i.e.*, chemicals for which more than a million pounds are circulated in commerce annually). Similarly, OSHA standards for cranes and derricks have not been updated for close to 40 years, even though a proposed rule for updating these standards, which has the support of both industry and labor, has been in existence since 2004. In short, OSHA needs to begin working immediately on completing high priority regulations concerning new safety standards (*i.e.*, those that prevent physical injuries) and new health standards (*i.e.*, those that prevent exposures to toxic substances). Specifically, we recommend that OSHA strengthen its process safety management rule, which establishes various standards for preventing accidental releases of any substances defined by OSHA and EPA as “highly hazardous chemicals” that might result from their use, storage, manufacture, handling, or on-site movement at a place of employment. An October 2002 report by the Chemical Safety and Hazard Identification Board (CSHIB) recommending changes in the regulation precipitated a petition from labor unions in June 2003 to amend the weak standards to include many more chemicals and to increase the stringency of its requirements governing how reactive chemicals were stored, handled, and released.⁶ OSHA has yet

⁶ See *Panel Faults OSHA Over Chemical Safety*, N.Y. TIMES, Feb. 6, 2004, at A10.

to respond to strengthen these regulations, however. The agency should begin strengthening these rules immediately.

- Perchlorate. EPA should move forward immediately with regulations for perchlorate under the Safe Drinking Water Act. The National Research Council has already developed a safe level for exposure to perchlorate in 2005. Accordingly, EPA should reverse the Bush Administration's "midnight" regulation refusing to regulate perchlorate, and begin working on a perchlorate regulation based on the National Research Council's safe exposure level threshold.
- Ozone. EPA should act quickly to promulgate a new rule for controlling emissions of nitrogen oxides (NO_x), which are precursors to ground-level ozone. Ground-level ozone creates smog, causes lung damage, and aggravates health problems for those with asthma and other respiratory problems. The Bush Administration promulgated a controversial regulation, the Clean Air Interstate Rule (CAIR), that sought to control NO_x through the use of a cap-and-trade program. A federal court struck CAIR down last year, finding that the Clean Air Act did not give EPA the legal authority to regulate NO_x using a cap-and-trade program.⁷ The court has allowed the program to remain in place until EPA can promulgate a new regulation for controlling NO_x. EPA should work quickly to do this, so that it can institute a stronger regulatory program for controlling NO_x that would avoid creating pollution hotspots that tend to disproportionately afflict poor and minority communities.
- Mercury Air Pollution. In 1990, Congress directed EPA to regulate mercury emissions from power plants according to a maximum achievable control technology (MACT) standard.⁸ Almost 30 years later, mercury air pollution remains unregulated. Last year, the Court of Appeals for the D.C. Circuit struck down the Bush Administration's Clean Air Mercury Rule, finding in essence that it was so weak that it violated the 1990 Clean Air Act Amendments.⁹ This ruling put EPA back at square one for developing a new rule for regulating mercury air pollution. Given the massive amount of delay that has already occurred, and given the large threat to human health and the environment that this pollution poses, EPA should work as quickly as possible to promulgate a MACT standard for controlling emissions of mercury air pollution.
- NEPA Regulations Addressing Climate Change. The White House Council on Environmental Quality (CEQ), the agency charged with implementing the National Environmental Policy Environmental Act (NEPA), should issue proposed and final regulations providing guidance to agencies on incorporating climate change impacts and vulnerabilities into the NEPA process. NEPA requires federal agencies to consider the environmental implications of their decisions as part of the regular planning process for their proposed actions. Federal agencies make decisions every day that exacerbate the causes and consequences of climate change, but they only sporadically and inconsistently account for these impacts in their regular NEPA analyses. New regulations from CEQ are necessary to ensure that the incorporation of climate change considerations into NEPA is implemented in a thoughtful, consistent, and effective manner.

⁷ North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008).

⁸ 42 U.S.C. §7412(n) (2009).

⁹ New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008).

- Clean Water Act Definition of “Fill.” The Supreme Court recently ruled in the case of *Coeur Alaska v. SE Alaska Conservation Council*¹⁰ that EPA and the U.S. Army Corps of Engineers could interpret the Clean Water Act to exempt water pollution sources from pollution control requirements if the pollution was accompanied by fill material. The Court reached this decision by deferring to an internal EPA memorandum written in May 2004 by Diane Regas, then the Director of the EPA’s Office of Wetlands, Oceans and Watersheds. EPA should disavow this memorandum and initiate a rulemaking changing the definition of “fill” under the Clean Water Act. In particular, this definition should be changed to specify that “fill” cannot contain anything more than *de minimis* amounts of pollutants; otherwise it constitutes “water pollution,” and thus falls under EPA’s regulatory jurisdiction (as opposed to the U.S. Army Corps of Engineers’ jurisdiction) pursuant to the Clean Water Act.
- Imported Food and Toys. Both the FDA and the Consumer Products Safety Commission (CPSC) should explore different ways to use their legal authority to control the risks posed by imported foods and toys. The dangers of imported foods and toys have become well documented in the mainstream media recently. The problem is only getting worse: More and more food and toys are being imported to the U.S. from countries with little or no regulatory systems set up to protect consumers. To be sure, the inability of FDA and CPSC to address imported foods and toys stems largely from inadequate resources and legal authority—issues that President Obama and Congress will need address. In the meantime, agencies should explore ways to work within these constraints to tackle the problem of imported foods and toys.
- TMDLs. EPA should finish revising its regulations implementing the “total maximum daily load” (TMDL) provisions of the Clean Water Act as quickly as possible. The use of TMDLs are now more important than ever to address the biggest challenges to clean water, such as nonpoint sources. The current regulations, however, are insufficient to spur the states into establishing TMDLs for the water bodies within their jurisdictions. These regulations will need to be strengthened if TMDLs are to play an effective role in combating pollutants from nonpoint and other challenging sources.
- Continuous Emissions Monitoring for Air Pollutants. EPA should issue new regulations requiring the installation and operation of continuous emission monitoring (CEM), with automatic data reporting to EPA and state authorities, for *at least* sulfur dioxide (SO₂), NO_x, fine particulate matter, lead, mercury and carbon dioxide, at *all* stationary sources of air pollutants that must obtain Title V Clean Air Act permits. At present, CEM is only required as to SO₂ and NO_x for the limited set of air pollution sources which are covered by the Acid Rain Program. Extending this requirement to cover more pollutants at more sources will help EPA and state authorities to enforce Clean Air regulations. It will also help EPA and Congress to develop new or revise existing regulations and statutes to better address the causes of air pollution.
- Continuous Emissions Monitoring for Water Pollutants. EPA should issue new regulations requiring the installation and operation of CEM, with automatic data reporting to EPA and state authorities, for regulated pollutant parameters for *all* point

¹⁰ No. 07-984, slip. op. (U.S. June 22, 2009), available at <http://www.supremecourt.us/opinions/08pdf/07-984.pdf>.

sources of water pollution that must obtain NPDES permits under the Clean Water Act. Again, applying this requirement to cover these water pollutants at all sources will help EPA and state authorities to enforce Clean Water regulations. It will also help EPA and Congress to develop new or revise existing regulations and statutes to better address the causes of water pollution.

- MSHA Electronic Tracking Systems. MSHA should promulgate regulations requiring mine operators to use electronic tracking systems, which are used to locate miners who are lost after mining accidents. In 2006, Congress passed the Mine Improvement and New Emergency Response (MINER) Act¹¹ requiring MSHA to promulgate several regulations specifically aimed at addressing the regulatory failures that had caused three devastating mine accidents earlier that year by specific deadlines. So far, MSHA has not promulgated one of the required regulations, which would require electronic tracking systems, despite the availability of several promising technologies. Because these systems can help prevent deaths in the event of mining accidents, MSHA should promulgate a rule requiring these systems as quickly as possible.
- Definition of “Unnecessary or Undue Degradation” of federal lands and resources. The Department of the Interior should abandon the Bush Administration’s regulatory definition of “unnecessary or undue degradation” and reinstate the regulatory definition developed by former Secretary of the Interior, Bruce Babbitt. This regulatory definition serves a crucial cornerstone in the protection of federal lands and resources, since the Federal Land Policy and Management Act of 1976 charges the Bureau of Land Management (BLM) to prevent unnecessary or undue degradation when deciding whether to allow resource extraction activities on public lands. The Babbitt rule defined “unnecessary or undue degradation” in terms of compliance with a list of general prescriptive environmental performance standards. One of the most important of these standards allowed BLM to deny a proposed resource extraction activity if it would “result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated.” The current regulatory definition eliminates the “substantial irreparable harm” standard, while downplaying the significance of the remaining general performance standards in favor of a more site-specific evaluation process. The Babbitt definition should be reinstated because it more effectively fulfills the Federal Land Policy and Management Act’s mandate of protecting federal lands and resources.
- National Forests Diversity Regulation. The U.S. Forest Service should reinstate the 1982 regulation that sought to protect ecological diversity in U.S. National Forests by requiring viable populations of native and non-native desired species. This regulation was revised in 2000 and again in 2005 to do away with the relatively concrete viability requirement in favor of a more discretionary sustainability requirement. This discretionary sustainability requirement, however, is too weak, and must be abandoned in order to protect ecological diversity in the U.S. National Forest system.

¹¹ Pub. L. No. 109-236 (2006).

- Bottled Water. According to a recent report issued by the Government Accountability Office (GAO)¹², regulation of *bottled water* is generally weaker than regulation of tap water. The two types of water are regulated under different agencies: EPA regulates tap water under the Safe Drinking Water Act (SDWA) while the Food and Drug Administration (FDA) regulates bottled water as a food product under the Federal Food, Drug, and Cosmetic Act (FFDCA). A majority of consumers cite health and safety as the primary reason for purchasing bottled water, but with the lack of strict enforcement and regulation by the FDA, their faith in bottled water is misplaced. FDA should strengthen the regulations for bottled water to ensure that its safety is equal to that of tap water.

OIRA has a variety of means for publicizing its catalogue of regulatory gaps and priorities as identified by agencies and the public. For example, it could include the results in its Report to Congress on the Benefits and Costs of Federal Regulations.

B. Cataloguing Agencies' Inter-Agency Coordination Priorities, As Identified by the Agencies Themselves

OIRA should also seek input from regulatory agencies regarding the regulatory priorities for which they need coordination with other agencies that OIRA could help facilitate. As they develop their regulatory agendas, agencies will be able to anticipate and identify areas where their future regulatory actions may conflict or overlap with the regulatory actions of other agencies, thereby resulting in a senseless waste of limited government resources. Such coordination would be particularly helpful in the area of scientific information-gathering, since it would enable agencies to avoid undertaking duplicative scientific studies to support their respective regulatory actions.

Again, it is important that OIRA take great care in soliciting this information from the agencies to ensure that it reflect the agencies' own independent views. Moreover, if OIRA does play an active role in actually helping agencies to coordinate their regulatory activities, then it should restrict its role to that of an impartial facilitator. The regulatory agencies involved should always retain independent control over the coordination process. Furthermore, in those cases where coordination is necessary because one agency is proposing a regulation that will impose compliance obligations on another regulatory agency, the views of the proposing agency should be given primacy, with the views of the other agency treated like those of any other regulated entity.

Here too, OIRA has a variety of means for publicizing the catalogue of inter-agency coordination priorities that it solicits from the various regulatory agencies, including presenting them in its annual Report to Congress on the Benefits and Costs of Federal Regulations.

C. Assisting Agencies to Develop 'Trued-Up' Budgets

OIRA should work with agencies to ensure that they have the resources they need to carry out their regulatory missions. The primary reason that regulatory agencies cannot fulfill their statutory missions is that their financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has occurred even as the problems these agencies face become

¹² U.S. GOV'T ACCOUNTABILITY OFFICE, BOTTLED WATER: FDA SAFETY AND CONSUMER PROTECTIONS ARE OFTEN LESS STRINGENT THAN COMPARABLE EPA PROTECTIONS FOR TAP WATER, GAO-09-610 (June 2009), available at http://energycommerce.house.gov/Press_111/20090708/gaobottledwater.pdf.

more complex, thus forcing them to do more with less. For example, the Consumer Product Safety Commission (CPSC) is charged with the mammoth duty of ensuring the safety of every consumer product except automobiles, aircraft, boats, drugs, firearms, food, and tobacco—nearly 15,000 product categories in all. At its greatest level, in Fiscal Year 1981, the CPSC’s resource levels included 891 full-time equivalents (FTEs) worth of personnel and a budget of \$41 million. Today, the CPSC has only 400 FTEs of personnel and a budget of only \$63 million. Despite the reductions in resources, the challenges that the CPSC faces have never been greater. The population of people buying and using consumer products has grown over 34 percent since 1981. In addition, a growing number of consumer products sold in the United States, including 80 percent of all toys, are manufactured in China and other developing countries, which have no effective safety regulation. Yet, the CPSC has a total of 15 inspectors available nationwide to inspect such imports.

One way that OIRA could help agencies get the resources they need is to use the Program Assessment Rating Tool (PART), a program that OMB uses to assess and improve the performance of agency programs. Using PART, OIRA could analyze each program that an agency implements to determine what resources for the agency needs to carry out the program effectively. OIRA could also use PART to determine what resources agencies will need to implement any new programs that Congress mandates for them, as well as any resources agencies will need to ensure that their regulatory programs are able to meet new and emerging challenges. Ideally, using PART in this fashion would help agencies to develop “trued-up budgets”—that is, budgets that account for all the resources an agency actually needs to carry out its mission. These trued-up budgets could then be compared to the agencies’ actual budgets to help reveal the magnitude and nature of the resource shortfalls they face.

Once OIRA has helped agencies to develop trued-up budgets, it can then serve as an advocate for these agencies, helping them to explain to the President and Congress the agencies’ greatest budgetary needs and priorities. Through this supportive role, OIRA can work with regulatory agencies to ensure that they have sufficient resources and personnel to carry out their regulatory missions.

D. Assisting Agencies to Obtain Enhanced Legal Authority to Ensure That People and the Environment Remain Adequately Protected Against New and Emerging Risks

OIRA should also work with the regulatory agencies to identify those areas where they need enhanced legal authority to address new and emerging issues relevant to their statutory missions. The statutes under which many health, safety, and environmental agencies operate have not been reviewed or updated in two decades. In the interim, shortcomings in those statutes have been revealed as new public health, safety, and environmental threats have emerged. OIRA could help regulatory agencies to identify what updates are needed and can act as an advocate on behalf of the agencies, helping them present critical information to Congress and the President. OIRA could ask each of the regulatory agencies to provide it with a list of areas in which the agency requires enhanced legal authority and present this information in a new section of its annual Report to Congress on the Benefits and Costs of Federal Regulations.

E. Producing Retrospective Studies of Cost Estimates

In practice, the *ex ante* regulatory costs estimates used in cost-benefit analysis are systematically over-stated, leading to inappropriately weak health, safety, and environmental

regulations.¹³ Consider the National Highway Traffic Safety Administration's (NHTSA) experience with airbags. When the agency was considering issuing a rule requiring automobile manufacturers to install airbags in cars, the industry balked, insisting that the cost for a single, driver-side airbag would be an exorbitant \$1,000. Usually agencies have neither the resources nor capacity to check industry cost estimates like these, but this time, agency experts actually tested industry's claim. They took apart an airbag, identified all its parts, and researched what each part would cost if it was purchased in the open market by a car company. The experts then put the airbag back together, calculated the time, and multiplied that by industry wage standards. When they added up the individual costs of the components, the labor costs to assemble the bag, and a reasonable profit, the estimated cost of constructing an airbag was only \$300. This time the agency caught the error. But had NHTSA taken industry's cost estimate at face value, as most agencies usually do, it would have been off by a factor of three.

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

One way to assess the inaccuracy in *ex ante* cost estimates is to conduct retrospective studies of regulatory costs. Unfortunately, it is often quite difficult to arrive at accurate retrospective assessments of the resources that regulated entities have devoted to compliance with particular regulatory interventions.¹⁴ This is due primarily to practical limitations on empirical analysis of relatively subtle behaviors of companies operating in complex and rapidly evolving competitive

¹³ 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. POL'Y ANALYSIS & MGMT. 297 (2000); H. Hodges, *Falling Prices: Costs of Complying with Environmental Regulations Almost Always Less Than Advertised*, Econ. Pol'y Inst. (1997); U.S. Congress, Office of Tech. Assessment, *Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health—An Appraisal of OSHA's Analytic Approach*, U.S. Gov't 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>; Dallas Burtraw, et al., *Costs and Benefits of Reducing Air Pollutants Related to Acid Rain*, 16 CONTEMP. ECON. POL'Y 379 (1998).

¹⁴ A thoroughgoing effort by the U.S. General Accounting Office to assess retrospectively the cost of government regulation on 15 specific companies concluded that "measuring the incremental impact – direct costs, indirect costs, and benefits – of federal regulations on individual companies is an extremely problematical endeavor." U.S. GEN. ACCOUNTING OFFICE, REGULATORY BURDEN: MEASUREMENT CHALLENGES AND CONCERNS RAISED BY SELECTED COMPANIES 55 (GAO/GGD-97-2, 1996).

environments. It is also attributable, however, to the fact that no important economic actor has an incentive to find out how much regulations actually did cost once the strategic battle over the proposed regulation has ended and the companies and the agency have moved on to other things.

OIRA, however, is uniquely positioned to overcome these various methodological challenges in order to conduct accurate retrospective studies of cost estimates. Staffed with economists, OIRA has the expertise to conduct these studies in a sophisticated way. Furthermore, as a bureau within OMB, OIRA is institutionally designed to work with regulatory agencies and gather from them the necessary data for conducting these studies. Once the studies have been completed, regulatory agencies can use their results of to inform and improve their future regulatory decisionmaking.

F. Documenting the Costs of Regulatory Delay in Future Reports to Congress on the Costs and Benefits of Federal Regulation

Each year dozens of workers are killed, thousands of children harmed, and millions of dollars wasted because of unjustifiable delays in federal regulatory action. The costs of regulatory delay accrue every time the federal protector agencies—those created by Congress to protect health, safety, and the environment—fail to take timely action to prevent the kind of serious and pressing threats Congress intended for them to address.

Despite its significance, the problem of regulatory delay and the costs it generates has been virtually ignored in the debate over the general wisdom of the U.S. regulatory system over the last 30-plus years. It is nevertheless crucial to cast a spotlight on these often-ignored costs. Without a clear understanding of how regulatory delay affects real people and the environment, it is impossible to obtain a complete picture of the invaluable role that the U.S. regulatory system plays in our society. Without this clear understanding, it is also impossible to have an open and honest discussion over what needs to be done to reinvigorate these agencies so that they can go about the business of protecting people and the environment.¹⁵

OIRA can play an instrumental role in drawing greater attention to the costs that result from regulatory delay by documenting these costs in future versions of its Reports to Congress on the Benefits and Costs of Federal Regulations. Past Reports, including this year's Report, have helped reinforce the perception that regulatory delay is cost-free by documenting and aggregating the costs and benefits of regulatory action, while ignoring the costs of delayed regulatory action. OIRA can correct this misperception about the value of regulation by expanding these Reports to include a description of the costs of delayed regulatory action.

¹⁵ Catherine O'Neill, Amy Sinden, Rena Steinzor, James Goodwin, & Ling-Yee Huang, *The Hidden Human and Environmental Costs of Regulatory Delay* (Ctr. for Progressive Reform, White Paper #907, Oct. 2009), available at http://www.progressivereform.org/articles/CostofDelay_907.pdf.

Thank you for your attention to these comments.

Sincerely,

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Appendix to CPR Comments on 2009 Draft CBA Report

OMB'S AGGREGATION OF REGULATORY COSTS AND BENEFITS IS MISGUIDED AND MISLEADING.

We respectfully disagree that the practice of aggregating *ex ante* projections of costs and benefits of federal regulations provides “indispensable information” about the effects of such regulation. The estimates of costs and benefits for each rule are based on such flawed and uncertain information that it is impossible to compare or aggregate cost-benefit analyses in any meaningful way. Indeed, in the process of aggregating these cost-benefit analyses, crucial information about each of the rules—information that cannot be reduced to a number and dollar value—is inevitably lost, even though this information may provide the real benchmark by which to judge the quality of these rules. The simple measurement of whether these rules’ benefits outweigh their costs does not demonstrate whether or not our regulatory system has been “efficient” or “optimal.” If anything, this simplified version of cost-benefit analysis leads to systematic under-regulation that leaves people and the environment insufficiently protected against unreasonable risk. In short, the practice of aggregating regulatory costs and benefits is at best unhelpful and at worse harmful to Americans and to the environment upon which we depend.

A. The Enterprise of Aggregating the Purported Costs and Benefits of All Federal Regulations is Fundamentally Misguided and has no Basis in Economics.

The entire premise of this report—the notion that the aggregation of *ex ante* projections of the costs and benefits of all federal regulations can provide “indispensable information” about the effects of such regulation—is misguided. It is 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, it serves only to distract attention from the real issue—namely, whether or not regulatory agencies are fulfilling their statutory missions in as effective and timely manner as possible.

If in a perfect world we could accurately measure and express in dollar terms all of the costs and all of the benefits to society as a whole of various regulatory alternatives,¹⁶ then, under basic principles of welfare economics, we could use that information to determine which regulations would produce economically “efficient” results. That is, we could determine which regulations would maximize overall social welfare.

If, for example, we were designing a regulation to limit the amount of mercury emitted by electric power plants, we would estimate the costs and benefits that would accrue to society as a whole from incrementally more stringent levels of regulation. (The change in the level of costs or benefits produced by each incremental change in the stringency of the regulation is called a “marginal cost” or a “marginal benefit.”) Assuming (as is usually the case) that at low levels of stringency the marginal benefits of pollution control outweighed the costs but that as the stringency of regulation increased the marginal costs gradually increased while the marginal benefits gradually decreased, then the optimal (or economically efficient) level of regulation would be that level at which marginal costs were just equal to marginal benefits. That would also be the level at which the net benefits of regulation were maximized.

¹⁶ As the next section explores, this is a very big “if.”

Thus, a cost-benefit analysis, as understood by an economist, considers 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 picks the option that produces the highest possible net benefits. So the criteria for an economically efficient regulation—that marginal benefits equal marginal costs and net benefits are therefore maximized—are very different from a criterion that simply requires the total benefits of a regulation to exceed its total costs. The latter criterion tells us very little about the efficiency of a regulation. While it is probably true that a regulation that produces more total costs than total benefits is inefficient, the converse is not true. Just because a regulation produces total benefits in excess of total costs does not mean that it is efficient.

Many grossly inefficient regulations produce overall benefits in excess of costs. Imagine for example that the efficient level of mercury regulation would reduce national emissions from 48 to 15 tons per year, and that such a regulation would cost society \$5 billion and produce \$45 billion in social benefits. This regulation would pass either version of the cost-benefit test—it maximizes net benefits *and* total benefits exceed total costs. But while this is the only level of mercury regulation that meets the economists' cost-benefit test, many other alternatives could meet the simple benefits-exceed-costs criterion. In our example it is easy to imagine, for example, that a regulation that reduced national mercury emissions by just one ton—from 48 to 47 tons per year—would still produce benefits that significantly outweighed the costs and thus would pass the simple benefits-exceed-costs test with flying colors. But such a regulation would not be at all efficient. In order to be efficient, the regulation would have to be much tougher: It would have to cut emissions down to the 15 tons-per-year level.

Thus, the simple benefits-exceed-costs criterion is a poor proxy for actual economic efficiency. Moreover, it is systematically biased toward striking down regulations that are too stringent and allowing regulations that are too lenient. This is because a regulation for which total costs exceed total benefits is usually one that is too stringent. A regulation that errs in the other direction, on the other hand—one that is too lenient—will likely produce positive net benefits, just less of them than an efficient regulation would have produced. Accordingly, a lenient regulation will be upheld under the simple benefits-exceed-costs test, even when under an efficiency test, it ought to be made more stringent. In this way, as Prof. David Driesen has shown, the simple version of cost-benefit analysis operates as a one-way ratchet—always pushing regulation toward less stringency, but never in the opposite direction.¹⁷

OMB purports to ground its policies in economic theory, and indeed, it explicitly adopts the more sophisticated economics-based version of cost-benefit analysis in its guidelines to agencies. Thus, Circular A-4 instructs agencies “to measur[e] incremental benefits and costs of successively more stringent regulatory alternatives [in order to] identify the alternative that maximizes net benefits.”¹⁸ But OMB does not consistently hold agencies to that standard—particularly not when doing so would point toward a more stringent regulation.¹⁹ And OMB's annual report to Congress abandons the economic-based version of cost-benefit analysis in favor of the simplistic benefits-exceed-costs test. Accordingly, it tells us virtually nothing about the actual efficiency of regulations.

¹⁷ See David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 380 (2006).

¹⁸ OMB Circular A-4 at 10. See also Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (Section 1: directing agencies to choose regulatory approaches that “maximize net benefits”).

¹⁹ See Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part II*, 34 ELR 10485, 10487 (2004); Driesen, *supra* note 17.

Indeed, it could easily be that the overall benefits of regulation outweigh the overall costs, and yet regulations on the whole are far less stringent than they should be if they were set at economically efficient levels. (It is less likely that they err in the direction of too much stringency if total benefits exceed total costs.)

All of this, of course, assumes that the estimates of costs and benefits that form the basis of the Report bear some relationship to reality to begin with. In fact, as the next sections will show, OMB's accounting of the overall costs and benefits of federal regulation is built on estimates of regulatory costs and benefits that are almost certainly inaccurate, and thus untrustworthy.

B. 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 uncertainty 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.²⁰ 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,²¹ as do the European Union's guidelines on regulatory impact assessment.²² 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

²⁰ 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 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 announces in the 2009 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 4 n. 6, 53 (Appendix A).

²¹ *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 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.")

²² *See* European Commission, *Impact Assessment Guidelines* (June 15, 2005), available at http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf.

worst can be dangerously misleading.²³ Thus, in the Report's executive summary, OMB announces that the annual benefits of federal regulation "range from \$126 billion to \$663 billion" and the annual costs "range from \$51 billion to \$60 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 the commitment to transparency that OMB made in Circular A-4. 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."²⁴ In fact, for 9 of the 24 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. (They could not provide any quantified estimate of costs for 2 of the rules.)²⁵ Undoubtedly, there were other rules for which the benefits estimates reported by OMB were incomplete. OMB directs the reader to Table A-1 (part of an appendix to the report) for a narrative description of these "unquantified effects on a rule-by-rule basis,"²⁶ and in the earlier years of these reports, Table A-1 has indeed provided that information. In more recent years though, the explanations in the fifth column of the Table A-1 (labeled "Other Information") contain little or no mention of unquantified benefits.

Another factor leading to the undercounting of net benefits is the systematic over-counting of regulatory costs. There is considerable evidence that agencies routinely over-estimate the costs of regulatory compliance *ex ante*.²⁷ 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.

C. 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.

²³ See Richard Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1348-49, 1404-06 (2003).

²⁴ See Draft Report at 5 n. 9.

²⁵ See *id.* at 54-60 (Table A-1).

²⁶ See *id.* at 5 n. 9.

²⁷ 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. POL'Y ANALYSIS & MGMT. 297 (2000); H. Hodges, *Falling Prices: Costs of Complying with Environmental Regulations Almost Always Less Than Advertised* (Econ. Pol'y Inst., 1997); U.S. Congress, Office of Tech. Assessment, *Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health—An Appraisal of OSHA's Analytic Approach*, U.S. Gov't 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>.

Three years ago, Professor Sinden used the Environmental Protection Agency’s (EPA) 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—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 indeterminacy and contestability of the numbers upon which agency cost-benefit analyses are built.

Two years ago, 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.²⁸ (The analysis did, however, go on to calculate—down to the penny—the monetary value of the five minutes drivers would save each time they did not have to visit a gas station because the increased efficiency of their engine allowed them to go farther on a tank of gas.)²⁹ 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 met this obligation for those patient enough to dig to the table buried in Appendix A.³⁰ But for the NHTSA rule, even the Appendix was silent on this point, providing no clue that significant benefits might be missing from the estimate.³¹

²⁸ See U.S. Department of Transportation, National Highway Traffic Safety Administration, *Final Regulatory Impact Analysis, Corporate Average Fuel Economy and CAFE 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.

²⁹ *Id.* at VIII-66 to VIII-69.

³⁰ See Draft Report at 5 n. 9 (“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.”).

³¹ 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 *Average Fuel Economy Standards for Light Trucks, Model Years 2008-2011*, 71 Fed. Reg. 17566, 17568 (Apr. 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 28, at IX-7.

Among the cost-benefit analyses included in last year's Report to Congress, EPA's cost-benefit analysis of its Mobile Sources Air Toxics (MSAT) Rule demonstrated 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.³² This was not because the agency believed those effects to be insignificant. EPA acknowledged that it “expect[ed] 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 would produce significant health benefits, including reductions in cancer, asthma, reproductive and developmental effects, anemia, and the still unspecified premature mortality risk associated with ozone exposure.³³ Nonetheless, 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.³⁴

The underlying deficiencies described above are inherent to the exercise of cost-benefit analysis, and thus are not limited to those included in Reports to Congress on the Benefits and Costs of Federal Regulation issued during the previous administration. Indeed, virtually every one of the cost-benefit analyses included in this year's Report involved untrustworthy estimates of regulatory costs and benefits. For example, EPA candidly acknowledged that the cost-benefit analysis for its rule controlling air pollution from locomotive and smaller marine compression ignition engines did not account for all of the benefits that the rule would achieve by reducing particulate matter, ozone, and toxic air pollution.³⁵ Other cost-benefit analyses from this year's Report relied on questionable methods for attempting to put a monetary value on important health benefits. For example, in its rule on controlling air pollution from various types of spark ignited engines, EPA employed a “cost of illness” approach for measuring such health benefits as avoided hospital admissions. This approach assumes that the full “value” of avoiding a hospital admission is equal to the direct costs that one incurs as a result of a hospital admission. EPA, however, candidly acknowledges that the “cost of illness” approach greatly understates the value of these types of benefits by not accounting for the value of things such as avoided pain and

³² U.S. Env'tl. Prot. Agency, Office of Transp. & 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 HAP RIA], available at <http://epa.gov/OTAQ/regs/toxics/fr-ria-sections.htm>.

³³ Control of Hazardous Air Pollutants From Mobile Sources, 71 Fed. Reg. 15804, 15907, 15909 (Mar. 29, 2006).

³⁴ Unfortunately, table A-1 in last year's report, which was supposed to provide a narrative description of “unquantified effects on a rule-by-rule basis,” made no mention of these deficiencies. If anything, the entry in the “Other Information” column seemed 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. See Draft 2008 Report at 70. In order to discover that benzene, as well as all other air toxics, were in fact excluded from the analysis, one had to sift through either the hefty 807-page Regulatory Impact Analysis or the 160-page *Federal Register* notice for the final MSAT Rule.

³⁵ U.S. Env'tl. Prot. Agency, Office of Transp. & Air Quality, *Regulatory Impact Analysis for Final Rule: Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression Ignition Engines Less than 30 Liters Per Cylinder* 6-5 (May 2008) [hereinafter EPA, LOCOMOTIVE RIA], available at <http://www.epa.gov/oms/regs/nonroad/420r08001a.pdf> (“[T]he full complement of human health and welfare effects associated with PM [particulate matter], ozone and air toxics remain unquantified because of current limitations in methods or available data”).

suffering.³⁶ Thus, by overlooking entire benefits categories and by employing monetization techniques that greatly undervalue regulatory benefits, these and other cost-benefit analyses included in this year's Report present a greatly distorted view of the value of the regulations that agencies have promulgated in the past year. As in previous year's reports, however, table A-1 makes no mention of these deficiencies in the cost-benefit analyses that were aggregated in this year's report.³⁷

SUMMARY

Because of its many flaws, the practice of aggregating *ex ante* projections of regulatory costs and benefits is counterproductive and potentially even harmful. We understand that OMB is required by the Regulatory Right-to-Know Act of 2001 to assemble an annual report in which it aggregates these regulatory costs and benefits. However, we are also aware that regulatory agencies are in desperate shape right now; they are beset by so many challenges that they cannot properly fulfill their statutory missions. OMB is uniquely well positioned to help revitalize these agencies. Accordingly, OMB should focus its energies on helping agencies to fulfill their crucial missions of protecting people and the environment.

³⁶ U.S. Env'tl. Prot. Agency, Office of Transp. & Air Quality, *Regulatory Impact Analysis for Final Rule: Control of Emissions of Air Pollution from Marine SI and Small SI Engines, Vessels, and Equipment* 8-28 (Sept. 2008) [hereinafter EPA, SI ENGINE RIA], available at <http://www.epa.gov/OMS/regs/nonroad/marinesi-equi/pld/420r08014.pdf> ("These cost-of-illness (COI) estimates generally understate the true value of reducing the risk of a health effect, because they reflect the direct expenditures related to treatment, but not the value of avoided pain and suffering" (internal citation omitted)).

³⁷ Draft Report at 54-60.