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Office of Management and Budget
NEOB Room 10201
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FILED BY ELECTRONIC MAIL
TO OIRA_BC_RPT@omb.eop.gov

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

Dear Sir/Madam:

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

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

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

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These comments concern the Office of Management and Budget's (OMB) Draft 2007 Report to Congress on the Costs and Benefits of Federal Regulations (2007 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 1996 to 2006) 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) presents a distorted and one-sided account of the implementation of the Information Quality Act.

Our 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. It has no basis in economic theory, and it provides no information as to whether federal regulations are efficient or "smart." Moreover, 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) OMB's accounting of the aggregate costs and benefits of federal regulation is grossly incomplete. It categorically omits two major categories of regulation: transfer rules and homeland security regulations. Accordingly, it cannot generate any meaningful conclusions about federal regulation in general.

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 review of the implementation of the Information Quality Act ignores key criticisms of the Act that CPR and others have repeatedly voiced. Rather than ensuring the use of high quality information and scientific data by agencies, the Act is being abused by industry to delay and derail important environmental, health, and safety measures. OMB's trumpeting of this administration's purported efforts to improve the quality of the science used by agencies rings particularly hollow in light of widespread criticism the Bush II administration has undergone for politicizing science and suppressing scientific information.

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

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 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—is misguided.[1] 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 obfuscate the real issues and to create opportunities for OMB to promote an ends-driven, political agenda in the guise of neutral science.

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,[2] 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.

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

[1] *See* Draft Report at 27, 32 (using term "smarter regulation" to refer to regulations consistent with OMB's regulatory "reform" agenda, including its requirement for the use of cost-benefit analysis).
[2] As the next section explores, this is a very big "if."

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 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.[3]

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." OMB Circular A-4 at 10.[4] But OMB does not consistently hold agencies to that standard—particularly not when doing so would point toward a more stringent regulation.[5] And OMB's annual report to Congress abandons the economic-based version of CBA in favor of the simplistic benefits-exceed-costs test. Accordingly, it tells us virtually nothing about the actual efficiency or "smartness" of regulations. 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 a house of cards—estimates of regulatory costs and benefits that are wildly uncertain and endlessly contestable.

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[3] *See* David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. Colo. L. Rev. 335, 380 (2006). To the extent that OMB endorses agency use of this simplistic, benefits-exceed-costs test, it belies its assertion that cost-benefit analysis can both limit and prompt regulation. *See* Draft Report at 32 (Cost-benefit analysis "may cause rules that are more stringent, less stringent, or just better designed to be more cost-effective.").

[4] *See also* Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (Section 1: directing agencies to choose regulatory approaches that "maximize net benefits").

[5] *See* Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part II*, 34 ELR 10485, 10487 (2004); Driesen, *supra* note 3.

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 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.[6] 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 stresses the importance of these narrative explanations of quantitative results,[7] as do the European Union's guidelines on regulatory impact assessment.[8] 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.[9] Thus, on page two of the Report, OMB announces that the annual benefits of federal regulation are from "$99 billion to $484 billion" and the annual costs are "$40 billion to $46 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. Furthermore, these gaps and uncertainties are far more likely to skew the numbers toward lower rather than higher net benefits.

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[6] 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 our member scholars and other prominent academics have argued that there is no theoretical justification for using any discount rate at all for ecological benefits and other benefits implicating future generations. *See, e.g.,* Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39, 40-41 (1999) (arguing that discounting should be abandoned for measuring future lives saved); Richard Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 955–86 (1999). Indeed, use of a discount rate in such circumstances can yield absurd results. Applying a discount rate of five percent to the prevention of a billion deaths 500 years from now, for example, yields the conclusion that such a measure is less beneficial than the prevention of one death today.

Nonetheless, despite this wide-spread discrediting and condemnation of the practice of discounting benefits and despite our extensive comments criticizing OMB's use of discounting in response to previous draft reports (Letter from CPR to Lorraine Hunt, 5/20/04 at 13-14), OMB once again blithely announces in the Draft 2007 Report its continued practice of using a 7% discount rate across the board, without acknowledging the considerable controversy surrounding this practice. (Report at 6 n. 5 & 58 (Appenix A))

[7] *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.")

[8] *See* European Commission, *Impact Assessment Guidelines* (June 15, 2005), available at: http://ec.europa.er/governance/impact/key_en.htm.

[9] *See* Richard Parker, *Grading the Government*, 70 U. Chi. L. Rev. 1345, 1348–49, 1404–06 (2003).

Perhaps the biggest factor leading to the undercounting of benefits is the fact that many regulatory benefits are simply unquantifiable.[10] Indeed, of the ten major environmental, health, and safety regulations reviewed by OMB this past year, at least seven involved significant non-monetizable benefits or costs.[11] Indeed, for three of the regulations, so little quantification could be accomplished that OMB was forced to omit them from the accounting entirely. For those regulations that were included, however, the non-monetizable benefits were simply jettisoned from the analysis. If they were mentioned at all, the brief reference was buried in an obscure chart in an Appendix to the Report.

Another factor leading to the undercounting of net benefits is the over-counting of regulatory costs. There is considerable evidence that agencies routinely over-estimate the costs of regulatory compliance *ex ante*.[12] 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. OMB's accounting of the costs and benefits of federal regulation, in other words, is built on a house of cards. Two years ago, we used EPA's recently promulgated regulation of arsenic in drinking water as an illustrative example of the hopeless indeterminacy of CBA. 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*. 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.

Last year, we 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

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[10] *See* Draft Report at 7, n. 8 ("In many instances, agencies were unable to quantify all benefits and costs.").

[11] *See* Draft Report at 60-64 (Table A-1); EPA, Office of Water, Economic Analysis for the Final Stage 2 Disinfectants and Disinfection Byproducts Rule, ES-11 (Dec. 2005), available at: http://www.epa.gov/safewater/disinfection/stage2/pdfs/analysis_stage2_ecconomic_main.pdf.

[12] *See* Frank Ackerman, *The Unbearable Lightness of Regulatory Costs*, Global Development and Environment Institute, Working Paper No. 06-02 (Feb. 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.whitehouse.gov/omb/inforeg/2004_cb_final.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.

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

Indeed, one could make the same point with virtually any of the analyses that form the basis for OMB's accounting. In this year's crop of new regulations, the National Highway Traffic Safety Administration's rule setting new fuel efficiency standards for light trucks stands out as one that received considerable attention from the media and accordingly was presumably subject to relatively careful review by the agency. OMB's accounting shows the benefits of this rule modestly exceeding the costs. For 2008, for example, benefits are estimated at $782 million to $968 million and costs at $ 536 to $557 million. Fuel efficiency is, of course, a particularly salient political issue right now because of the widespread consensus and concern about global warming. There is broad and growing agreement that fuel efficiency standards—especially those for light trucks and SUVs—must be increased substantially in order to reduce the large contribution to the accumulation of greenhouse gases in the atmosphere made by U.S. motor vehicle emissions. Imagine our surprise then, when, upon looking up the underlying cost-benefit analysis, we discovered the following admission, buried on page 252 of the 316-page document:

> The agency continues to view the value of reducing emissions of carbon dioxide and other greenhouse gases as too uncertain to support their explicit valuation and inclusion amount the savings in environmental externalities from reducing gas production and use.[13]

In plain English: The benefits estimate does not include global warming impacts because they are too difficult to quantify. 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 don't have to visit a gas station because the increased efficiency of their engine allows them to go farther on a tank of gas.[14]

Here is a rule that implicates what is arguably the most profound and pressing public policy issue of our time and omits it from the analysis. 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 CBA has any relevance at all for public policy making. OMB's report, however, provides no hint of this striking omission from the cost-benefit estimate for the NHTSA rule. Although OMB promises to convey information about omitted, unquantifiable benefits on a rule-by-rule basis for those patient enough to dig to the table buried in Appendix A,[15] even the table is silent on this point, providing no clue that significant benefits

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[13] 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.

[14] *Id.* at VIII-66 to VIII-69.

[15] *See* Draft Report at 7 n. 8 ("In many instances, agencies were unable to quantify all benefits and costs. We have

might be missing from the estimate. Devoid of caveats, these numbers are reported and incorporated into OMB's aggregation as though they meaningfully reflect the social impacts of the rule.

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 CBAs 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. In order to learn something about the efficiency of the rule, NHTSA would have had to comply with OMB's directive "to measur[e] incremental benefits and costs of successively more stringent regulatory alternatives [in order to] identify the alternative that maximizes net benefits." (OMB Circular A-4 at 10.) 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.[16] 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.[17] In short, even had it used a more meaningful estimate of benefits, NHTSA's analysis would not have been able to determine whether the rule was efficient in an economic sense.

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

OMB's accounting of the aggregate costs and benefits of major federal regulations is also grossly incomplete because it categorically excludes certain important types of regulation from the accounting entirely. For the last fiscal year, for example, OMB included only 7 of the 28 federal regulations that it categorized as "major." (Draft Report at 10) As in prior years, OMB has chosen to categorically exclude "Transfer Rules" and Homeland Security Rules.[18] Indeed, because so many important categories of regulation are excluded, it is not at all clear whether the accounting provides any meaningful information at all.

A. Homeland Security Regulations Get a Free Ride.

Homeland security regulations are again categorically excluded from OMB's accounting of overall costs and benefits because, OMB informs us, "[t]he benefits of improved security are very difficult to quantify and monetize." (Draft Report at 10)[19] The exclusion of this major

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conveyed the essence of these unquantified effects on a rule-by-rule basis in the columns titled "Other Information" in Appendix A.").

[16] The 2007 standard is 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 fours years, reaching a high of 24 mpg for model year 2011. *See id*. at 17566, 17645 (Table 15).

[17] *See* NHTSA RIA, *supra* note 13, at IX-7.

[18] At the same time that OMB leaves huge categories of regulation out of its analysis, it also includes at least one regulation—OSHA's 2000 ergonomics rule—that shouldn't be counted because it never went into effect. *See* Report at 33-34, 35 n. 51.

[19] We agree that prevention of terrorism, like environmental protection and many other important social aims, is not

category of regulation obviously raises questions about the capacity for OMB's aggregate figures to generate meaningful generalizations about the success or "efficiency" of the federal regulatory program as a whole. It also highlights the way in which OMB provides selective treatment to regulation depending on its goals or content. Homeland security regulations apparently get a free ride from OMB. That is, OMB does not require the Department of Homeland Security justify its regulations with cost-benefit analysis because OMB accepts that the benefits of such regulations are simply too difficult to monetize. Yet, as the foregoing discussion of the NHTSA rule demonstrates, the benefits of many environmental regulations can also be exceedingly difficult to meaningfully monetize. And OMB's inclusion of such rules in its aggregate accounting despite these difficulties can create a false impression that such regulations are inefficient.

B. "Transfer Rules" Are Arbitrarily Excluded.

In the Draft 2007 Report, OMB also follows its prior practice of failing to include in its aggregate accounting what it calls regulations that "implemented federal budgetary programs," or rules that transfer money from the federal government to private parties. (Draft Report at 10) Eighteen of the 28 major federal rules reviewed by OMB over the past year fell into that category. OMB provides no real explanation for why it excludes these rules, even though they are covered by Executive Order 12866. It merely asserts cryptically that it need not analyze the costs and benefits of these transfer rules because its Report is "focused on regulations that impose costs primarily through private sector mandates." (Draft Report at 10)

This distinction between transfer rules and other kinds of rules is specious. The transfer rules listed in Table 1-6 of the Report include many very expensive government programs. (Draft Report at 14-16) The money spent on these programs is not available for other purposes. The expenditures associated with these programs are therefore opportunity costs in the classic sense. In its guidelines for cost-benefit analysis, OMB makes clear that a basic purpose of conducting cost-benefit analysis is to assess the opportunity costs of federal government programs. (Circular A-4 at 17-19.) In addition, these guidelines explicitly require agencies to analyze the distributional effects of transfer payments. (Circular A-4 at 11.) OMB's complete failure to identify, much less analyze, the opportunity costs and distributional consequences of the agency transfer rules in Table 5 flouts OMB's own official policy statements.

If OMB's concern is really the efficiency of government, there is no reason the agency should not be equally concerned about spending programs as it is about regulations that impose restrictions on private parties. If, on the other hand, OMB's real concern is a politically motivated agenda aimed at removing regulatory burdens on the private sector, its approach is perhaps understandable.

III. 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

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capable of being incorporated into the narrow and rigid framework of cost-benefit analysis, and have commented extensively to that effect previously. *See* Letter from CPR to Lorraine Hunt, 4/3/03 at 16-18.

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, are borne by employees. (Draft Report at 19-20) The only citation OMB gives for this broad claim is a single quotation from one textbook in modern labor economics. (Draft Report at 26, n. 24) 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." (Draft Report at 26-27 (emphasis added)) 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 CBA is a neutral tool that is neither anti-regulatory nor pro-regulatory but simply distinguishes good regulation from bad regulation. Nonetheless, it has again included in this year's Draft Report a gratuitous and blatantly ideological section that purports to draw a link between government regulation of all kinds and depressed wages and slow economic growth. (Draft Report at 27-32) Since we commented extensively on a very similarly worded section of the report three years ago, we will not rehash old arguments here, but simply refer the reader to our previous comments. (Letter from CPR to Lorraine Hunt, 5/20/04 at 2-6.)

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[20] and confirms the "Porter hypothesis" that regulation can improve economic competitiveness.[21] Furthermore, 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.[22]

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 activity, the Bush II administration has improved the efficiency of regulation over the past four years.

OMB presents two charts. One shows the costs of major rules from 1981 to 2006, and the second shows the costs and benefits of major rules from 1992 to 2006. (Draft Report at 35-36) From these charts, OMB extracts several conclusions, which it apparently views as important enough to highlight in the executive summary. One is that "[t]he average yearly cost of the major regulations issued during the Bush (43) Administration is about 47 percent less than over the previous 20 years." The second is that "[t]he average yearly benefit of the major regulations issued during the Bush (43) Administration is more than double the yearly average for the previous eight years." (Draft Report at 2, 34, 35) Both assertions are highly misleading.

First, to attempt to draw any meaningful conclusion about regulatory legitimacy or efficiency by looking only at costs flies in the face of the economic theory on which 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 or desirability of a regulation. It doesn't 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 "better" or "smarter" (Draft Report at 32), unless one's real agenda is the dismantling of the regulatory state rather than economic efficiency.

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[20] *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).

[21] M. Porter & C. van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. Economic Perspectives 97 (1995); Ebru Alpay et al., *Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing*, 84 American J. Agricultural Economics 887 (Nov. 2002).

[22] *See* Frank Ackerman, *The Unbearable Lightness of Regulatory Costs,* Global Development and Environment Institute, Working Paper No. 06-02 (Feb., 2006).

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.[23]

The second assertion—that the average yearly benefit of regulation under the Bush II administration has doubled over the previous eight years of the Clinton administration—is also highly misleading. Just as information on the costs of regulation provides no useful information in the absence of information about the benefits (not to mention the marginal costs and benefits), so information about benefits only provides no information in the absence of information about costs.

To be fair, while the statement in the executive summary is phrased solely in terms of benefits, Figure 2-2 does provide information on costs as well and does indicate dramatically high net benefits in the last three years of the Bush II administration, particularly in 2004 and 2005. But, as OMB acknowledges, the high average yearly net benefit for the Bush years is primarily due to three rules promulgated during those years, which yielded unusually high projections of net benefits: EPA's non-road diesel engine rule, which generated an estimated $27.3 billion in net benefits in 2004, EPA's Clean Air Interstate Rule, which generated an estimated $10 billion to $150 billion in net benefits in 2005, and EPA's new ambient air quality standard for particulate matter, which generated an estimated $1 to $37 billion in net benefits in 2006. (Draft Report at 2, 12, 35) If one were to remove those three outliers from the data, even a visual inspection of the graph makes clear that the average yearly net benefits of regulation during the Bush II years would be drastically reduced.

Additionally, OMB uses some accounting slight-of-hand in order to attribute these regulatory gains to the Bush II administration rather than the Clinton administration. The two biggest benefits-producers of the three—the non-road diesel engine rule and the Clean air interstate rule—were triggered in part by the Clinton EPA's 1997 revision of the NAAQS for ozone and fine PM. In the Report, OMB explains that, in order to avoid "double-counting," it omitted from its aggregate accounting the estimated $10 billion to $100 billion per year in net benefits that EPA attributed to the 1997 NAAQS revision and chose instead to include the costs and benefits of various rules promulgated subsequently by the Bush II EPA to implement the Clinton-era NAAQS (like the non-road diesel engine rule and the Clean Air Interstate Rule). (Draft Report at 34) In sum, faced with a choice whether to attribute a particular set of regulatory benefits to the Clinton administration or the Bush II administration, OMB—perhaps predictably—chose to give the credit to the Bush II administration. But this year, OMB took this effort even a step further, abandoning all pretense of consistency by counting the benefits of the new NAAQS for PM now rather than waiting for the promulgation of implementing regulations that may well not occur until the next administration.

[23] The Report's gratuitous reference to the "net decrease in compliance costs" that occurred during the first two years of the Reagan administration similarly creates a false impression that Reagan somehow streamlined regulation or made it more efficient. (See Draft Report at 33) In fact, these data provide absolutely no useful information about the relative efficiency of regulation during the Reagan presidency.

In another cheap trick, OMB includes $4.8 billion in costs for 2000 (the last year of the Clinton administration) for a rule that never went into effect so that it can credit the Bush II administration with the $4.8 billion that was supposedly "saved" when Congress repealed the rule in 2001. 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 2001. Instead of taking the logical approach of simply leaving this rule out of the analysis entirely, OMB takes the self-serving approach of crediting the $4.8 billion in "costs" (that were never incurred) to the Clinton administration and the subsequent $4.8 billion cost "saving" to the Bush II administration.[24] (See Report at 33, 35 n. 51)

The irony in giving the Bush II administration credit for increases in the net benefits of regulation that are primarily due to the promulgation of three rules under the Clean Air Act is considerable. As OMB itself has acknowledged, the Clean Air Act has consistently been the source of the highest quantifiable benefits estimates in the federal regulatory lexicon. Yet, the Bush II administration has been widely credited with gutting the Clean Air Act. Conveniently, those regulatory actions have managed to fly under the cost-benefit radar screen. When one of the most visible and controversial of the Bush II administration's clean air rollbacks was issued, for example—the rule relaxing the eligibility requirements for New Source Review—OMB simply declined to require a cost-benefit analysis at all.[25]

IV. OMB's Update on the Implementation of the Information Quality Act Ignores Key Criticisms of the Act

In Chapter III of the Report, OMB provides an update on the implementation of the Information Quality Act indicating the status of correction requests, appeal requests, and agency responses to these requests. (Draft Report at 37-42) While CPR supports efforts to ensure that data and information disseminated to the public are of high quality, it has identified a number of problems with OMB's implementation of the Act.[26] In July 2005, for example, CPR found that the "IQA provides a resource-intensive review, one that is heavily tilted toward use (and misuse) by regulated industry."[27] OMB's bland recital of statistics does not respond to this and other CPR objections to the Act.

OMB's update also ignores the criticism raised by CPR and others that misuse of the IQA by parties seeking to escape liability for public health hazards has left people exposed to immediate threats to their health. For example, the Devil's Swamp Superfund site, which was the subject of a poorly grounded and legally inappropriate IQA challenge, has yet to be included as a final listing on the National Priorities List, despite the fact that the site involves the ongoing contamination of fish caught and eaten by subsistence fishermen in the area.[28]

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[24] 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* Draft Report at 35 n. 51.

[25] *See* Heinzerling & Steinzor, *supra* note 5, at 10488.

[26] *See* CPR, Perspective: Data Quality, available at http://www.progressiveregulation.org/perspectives/dataQuality.cfm.

[27] *See* Sidney Shapiro, *The Case Against the IQA*, THE ENVIRONMENTAL FORUM, July/August 2005, at 26.

28 *See* Devil's Swamp Site Description, available at http://www.epa.gov/earth1r6/6sf/pdffiles/0600652.pdf (update June 2007). For a description of the hazards presented by the site and the reasons why this IQA challenge is unfounded, see CPR, Information Quality Act in Action: *Cleanup of Superfund Site Delayed by IQA Challenge; Devil's Swamp-Area Residents Pay with their Health,* available at http://www.progressivereform.org/devil_swamp.cfm.

OMB also provides statistics on its "peer review" requirements. In a new book published by Cambridge Press, Dr. David Michael establishes that OMB's peer review requirements invite the same type of manipulation that CPR found regarding the IQA:

> Over the last few decades, polluters and manufacturers of other dangerous materials have increasingly adopted strategies of manufacturing uncertainty in the face of proposed government action. …
>
> New mandates for peer review in regulatory science appear to be an additional component in the strategy that enables producers of hazardous products and pollution to delay formal regulation …. [T]he newly implemented federal peer review requirements, while less onerous than those originally proposed [by OMB], will provide new and convenient opportunities for special interests to promote an antiregulatory agenda.[29]

OMB's discussion of its efforts to promote the quality of information has an air of unreality to it. While OMB claims to be improving the quality of information the government disseminates under the IQA, the Bush II Administration has engaged in a wholesale campaign to politicize the scientific information it generates and receives. The administration's efforts to politicize science are documented in recent books and reports.[30] Indeed, the situation has become so alarming that sixty of the nation's most eminent scientists have signed a declaration objecting to the politicization of science in the Bush II administration.[31] If OMB were truly concerning about agencies not distorting information, it would address the many instances of distortion, concealment, and suppression of information that have occurred during this administration.

Thank you for your attention to these comments.

Sincerely,

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[29] David Michaels, *Politicizing Peer Review: The Scientific Perspective*, in RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH 237 (Wendy Wagner & Rena Steinzor eds. (2006).

[30] For an overview of the politicization of science in the Bush administration, see SETH SHULMAN, UNDERMINING SCIENCE: SUPPRESSION AND DISTORTION IN THE BUSH ADMINISTRATION (2006); CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (2005);
Union of Concerned Scientists, Scientific Integrity in Policymaking: An Investigation into the Bush Administration's Misuse of Science (February 2004); available at http://www.americanprogress.org/kf/ucsintegrity.pdf; Special Investigations Division, Minority Staff of the Committee on Government Reform, US House of Representatives, Politics and Science in the Bush Administration: prepared for Rep. Henry A. Waxman (August 2003), available at http://oversight.house.gov/features/politics_and_science/pdfs/pdf_politics_and_science_rep.pdf.

[31] Union of Concerned Scientists, Restoring Scientific Integrity in Policy Making, (Feb. 18, 2004), available at http://www.ucsusa.org/scientific_integrity/interference/scientists-signon-statement.html.