

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

WILLIAM L. KOVACS  
SENIOR VICE PRESIDENT  
ENVIRONMENT, TECHNOLOGY &  
REGULATORY AFFAIRS

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062  
(202) 463-5457

June 8, 2012

Ms. Mabel Echols  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
NEOB, Room 10202  
725 17th Street, NW  
Washington, DC 20503

**Re: OMB Draft 2012 Report to Congress on the Benefits and Costs of  
Federal Regulations (Docket ID OMB-2010-0008)**

Dear Ms. Echols:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is very concerned about improving the federal regulatory system, including the process by which regulations are promulgated. We appreciate the invitation to comment on OMB's Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations (Report).

Sound regulatory policy can only be achieved if best practices for developing sound regulation are implemented. Unfortunately, agencies often ignore proper regulatory analysis and still do not follow principles that have been outlined for decades in executive orders and OMB guidance.<sup>1</sup> Congress delegates significant power to agencies, allowing them to make major policy decisions without any real accountability. The Regulatory Right-to-Know Act,<sup>2</sup> which requires this annual report to Congress, informs Congress and the public regarding the regulatory system. It is an important way for Congress and the public to have the necessary information to try and hold agencies accountable for their actions.

---

<sup>1</sup> See e.g. Executive Order 12866, Executive Order 13563, and OMB Circular A-4.

<sup>2</sup> 31 USC § 1105.

The statutory requirement for this report reflects Congressional recognition of the important role that OMB serves as the nexus of regulatory leadership for the Executive Branch. In that role, OMB has a responsibility to monitor agencies' compliance with relevant statutes and executive orders governing the regulatory process and to be proactive in providing agencies guidance, incentives, and resources for continuous improvement of the process.

For the Report to be effective, though, it needs to contain useful, accurate, and easy-to-understand information. It should serve as a "one-stop shop" on federal regulations, detailing both accomplishments and shortcomings of the regulatory system and providing strategic planning benchmarks for improvement. OMB should be commended for developing an informative Report, but it could be improved. Our comment focuses on the benefits and costs chapter of the Report, providing specific recommendations to strengthen the Report and to better inform the public about federal regulations. We also have provided a response to OMB's solicitation for public recommendations on regulation and employment effects.

## **I. The Benefits and Costs of Federal Regulations**

Cost-benefit analysis includes far more than the calculation of costs and benefits. As a general recommendation, the Report should reflect the importance of other aspects of regulatory analysis. OMB's Circular A-4 provides many of the details necessary for effective analysis, explaining:

A good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.<sup>3</sup>

The first element requires agencies to carefully consider what problem is being addressed and why there is a need for federal regulation action. The second element requires agencies to carefully weigh the different alternatives, including whether regulation is necessary at all. Finally, the last element is designed to assess both the costs and benefits of the regulatory action proposed *and* those that were not adopted.

The value of cost-benefit analysis comes from the first two elements as much

---

<sup>3</sup> OMB Circular A-4 at 2, [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

as the last element. Agencies need to take a step back and thoughtfully consider whether action is appropriate at all. They should use the analysis process to obtain sound data and science that will help inform their decision-making. Too often though, agencies view cost-benefit analysis as an obstacle instead of a valuable tool to develop regulatory policy.

Further, cost-benefit analysis serves an important role to promote accountability. It is extremely valuable for Congress and the public to examine agency analysis to understand the agency's thought process for issuing a regulation. In reviewing the chapter on cost and benefits, we have identified the following recommendations:

#### **A. OMB Should Explain Differences in Cost-Benefit Analysis Over Time and Across Agencies**

The Report contains comparisons of the costs and benefits of major regulations for a 10-year period. These comparisons though are often like comparing apples to oranges. As OMB wrote in footnote 10 of the report:

OMB discusses, in this Report and in previous Reports, the difficulty of estimating and aggregating the benefits and costs of different regulations over long periods of time and across many agencies using different methodologies. Any aggregation involves the assemblage of benefit and cost estimates that are not strictly comparable.<sup>4</sup>

When there are major differences in assumptions that can yield far different cost or benefit estimates, such as with discount rates, OMB should prominently identify and explain the different assumptions across time and across agencies, as well as the effect of those different assumptions. OMB should identify any other major methodological differences as well. To complement this effort, OMB should conduct a literature review outlining analyses by third parties detailing the differences.

#### **B. OMB Should Stress the Limitations of the Report**

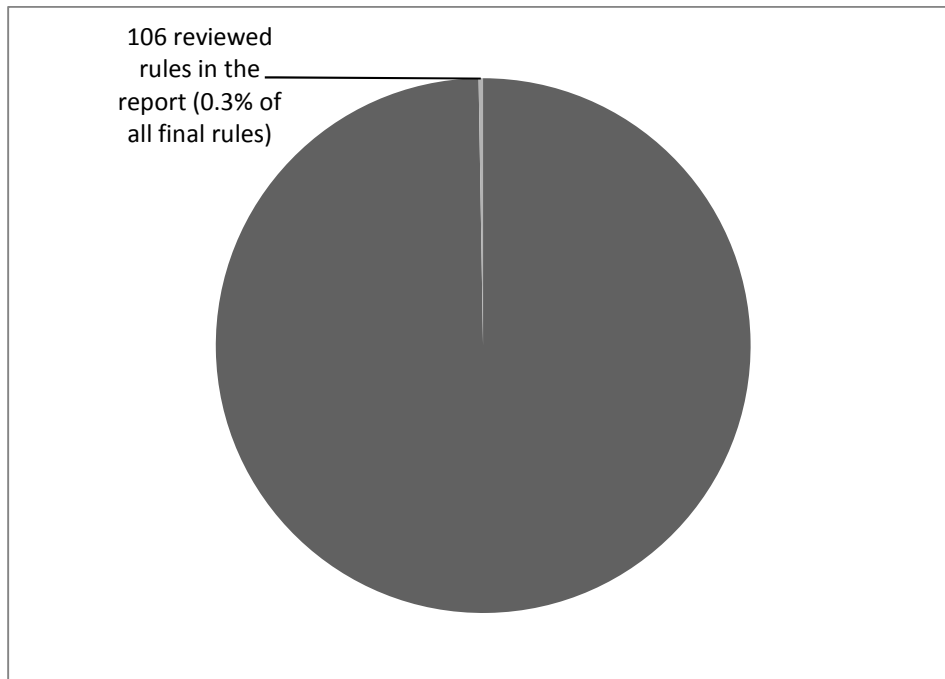
On page 10 of the report, OMB indicates that about 38,000 final rules were published in the *Federal Register* for the 10-year period of fiscal year 2002 to fiscal year

---

<sup>4</sup> "OMB Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," footnote 10 at 11.

2011. OMB only reviewed 3,262 of these rules, or about 9 percent. There were 531 major rules during this period, or about 1.4 percent of all final rules. For the Report, OMB only analyzed the costs and benefits of 106 rules over this 10-year period. This means that the Report reflects analysis of only about 0.3 percent (i.e. three-tenths of one percent) of all final rules (See Figure 1).

**Figure 1: Number of Rules OMB Reviewed for the Report Compared to All Final Rules\* (FY 2002-FY 2011)**



\* The Report states that there were *about* 38,000 final rules. For purposes of this figure, we assume 38,000 final rules.

This very small sample size needs to be stressed throughout the document, so that the limitations of the Report can be better understood. OMB should expand the Report to give a more complete picture of federal rules, regardless of whether it is expressly mandated by the Regulatory Right-to-Know Act. When OMB has cost estimates for rules, these costs should be identified by agency. For all major rules, cost estimates should be broken down by rule. There also are many rules that may not make the \$100 million threshold. Therefore, to capture some of these important rules, those rules reaching \$50 million should be identified. To make it easier for readers, there should be a chart that differentiates the 531 major rules by various threshold cost levels, such as \$100 million, \$250 million, \$500 million, and at \$1 billion.

Finally, OMB included 106 of the 531 major rules in the Report. These rules were included because in addition to costs or benefits reaching \$100 million, “a substantial portion of its [rules] benefits *and* costs were quantified and monetized by the agency or, in some cases, monetized by OMB.” [Emphasis added].<sup>5</sup> This means that about 80 percent of major rules were not included because agencies did not quantify both costs *and* benefits in a substantial way. As a result, a major portion of regulatory costs are not provided, resulting in an incomplete picture for Congress and the public. OMB should address this deficiency directly in the Report and discuss specific actions that it is taking to encourage agencies to make their analyses more thorough, evidence-based and monetized in terms of both costs and benefits.

### **C. OMB Should Improve Agency Analysis Through Greater Use of Return Letters**

OMB is in a position to play a critical oversight role over federal agencies and their rulemaking. One of the more prominent ways that OMB can play this oversight role is through return letters, which are letters returning rules back for reconsideration often due to inadequate analyses.<sup>6</sup> The number and trend of return letters should be disclosed in the Report.

In 2011 Congressional testimony, John Graham, former OIRA Administrator, discussed the importance of return letters. After explaining that he had issued about a dozen return letters within his first six months as Administrator, he observed:

An interesting pattern resulted: The agencies began to work with OIRA staff to improve rules rather than bypass or refuse OIRA. Indeed, my staff at OIRA taught me the following trick: you simply begin a meeting with a regulatory agency by distributing a draft return letter that will be released publicly if the agency does not improve the analysis or the rule. The longer I stayed at OIRA,

---

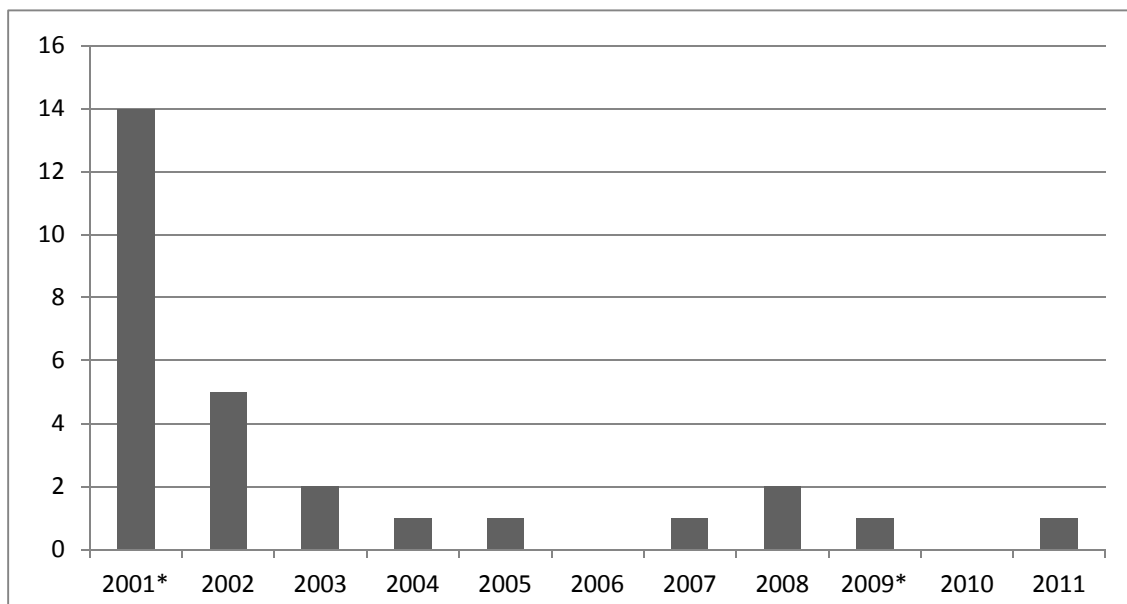
<sup>5</sup> *Id.* at 11.

<sup>6</sup> On the Reginfo.gov web site at <http://www.reginfo.gov/public/do/eoReturnLetters>, the return letter process is described in the following way: “During the course of OIRA's review of a draft regulation, the Administrator may decide to send a letter to the agency that returns the rule for reconsideration. Such a return may occur if the quality of the agency's analyses is inadequate, if the regulatory standards adopted are not justified by the analyses, if the rule is not consistent with the regulatory principles stated in EO 12866 or with the President's policies and priorities, or if the rule is not compatible with other Executive Orders or statutes. Such a return does not necessarily imply that either OIRA or OMB is opposed to the draft rule. Rather, the return letter explains why OIRA believes that the rulemaking would benefit from further consideration by the agency.”

the more I found that the will of OIRA was obeyed and the necessity of returning rules diminished.<sup>7</sup>

The number of return letters has gone down tremendously (as shown in Figure 2).<sup>8</sup> While it may be understandable for the number of return letters to decline within an Administration, as Graham explained, it is not clear why the number of return letters would not increase again with a new Administration. In his testimony, Graham expressed his concern about the general demise of the practice of using return letters.<sup>9</sup>

**Figure 2: Decline in the Use of Return Letters**



\* All return letters were issued during the Bush Administration

#### **D. OMB Should Evaluate Agency Compliance with Best Practices**

OMB has already developed “best practices” in OMB Circular A-4. Executive Orders 13563 and 12866 also help to provide guidance on best practices. Using the practices outlined in these documents can serve as a useful approach to evaluating

<sup>7</sup> Testimony of John D. Graham Prepared for the OMB-OIRA Oversight Hearing, United States House Committee on Oversight and Government Reform, September 14, 2011 at <http://democrats.oversight.house.gov/images/stories/grahamtestimony.pdf>.

<sup>8</sup> The data is based on the return letters listed on Reginfo.gov’s return letter page at <http://www.reginfo.gov/public/do/eoReturnLetters>.

<sup>9</sup> *Supra* note 7.

agency compliance with best practices. A checklist could be developed asking best practices questions, such as those listed in Figure 3.

<b>Figure 3: Sample Questions on Best Practices</b>	
<input checked="" type="checkbox"/>	Did the agency “explain how the actions required by the rule are linked to the expected benefits?” <sup>10</sup>
<input checked="" type="checkbox"/>	Is the analysis transparent? Is it “possible for a qualified third party reading the report to see clearly how [the agency] arrived at [the agency’s] estimates and conclusions?” <sup>11</sup>
<input checked="" type="checkbox"/>	Does the analysis provide “specific references to all sources of data, appendices with documentation of models (where necessary), and the results of formal sensitivity and other uncertainty analyses?” <sup>12</sup>
<input checked="" type="checkbox"/>	Did the agency “base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation?” <sup>13</sup>
<input checked="" type="checkbox"/>	Did the agency “promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well being of the American people?” <sup>14</sup>
<input checked="" type="checkbox"/>	Did the “agency avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies?” <sup>15</sup>
<input checked="" type="checkbox"/>	Did the “agency tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations?” <sup>16</sup>
<input checked="" type="checkbox"/>	Did the agency “identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem?” <sup>17</sup>
<input checked="" type="checkbox"/>	Did the agency meet “a particularly demanding burden of proof” when imposing many types of economic regulations?” <sup>18</sup>
<input checked="" type="checkbox"/>	Did the agency consider alternative regulatory approaches, including different compliance dates, levels of stringency, and market-oriented approaches?” <sup>19</sup>
<input checked="" type="checkbox"/>	Did the agency properly use key cost-benefit analysis principles such as opportunity costs and discount rates?” <sup>20</sup>

<sup>10</sup> OMB Circular A-4 at 2

<sup>11</sup> OMB Circular A-4 at 3

<sup>12</sup> *Id.*

<sup>13</sup> Executive 12866 at <http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>.

<sup>14</sup> OMB Circular A-4 at 3-4, citing Executive Order 12866.

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> OMB Circular A-4 at 4.

<sup>18</sup> OMB Circular A-4 at 6-7. According to the Guidance, there is a “particularly demanding burden of proof” for certain types of regulations.

<sup>19</sup> OMB Circular A-4 at 7-8.

<sup>20</sup> *See e.g.* OMB Circular A-4.

By answering the types of questions in Figure 3, OMB could formulate a rating system that informs Congress and the public on how well each agency is doing when it comes to conducting proper regulatory analysis. Grades could be issued for each agency, and explanations could be given as to the strengths and weaknesses of each agency's practices. Such a system, if transparent and consistently applied, could provide Congress an invaluable oversight tool. One possible model is a 2010 report by the Mercatus Center, entitled "The Quality and Use of Regulatory Analysis in 2008."<sup>21</sup>

### **E. OMB Should Make Regulatory Impact Analyses More Easily Available**

One of the most important goals of regulatory analysis is to inform third parties how agencies reached their conclusions. A primary purpose of the Report is to be an informative document regarding federal regulations. Yet, it is difficult for the public to access the regulatory analysis conducted by agencies.

In Table A-1 of the Report, there is a summary of 54 major rules from October 1, 2010 through September 30, 2011. For each rule, there is mention of how to access the regulatory impact analysis (RIA) associated with the rule. Out of the 54 rules, only 16 summaries, or about 30 percent, direct readers to a specific web address to access an RIA. Eight summaries inform readers the RIA is available upon request, without providing contact information, and 28 summaries inform readers that the RIA is included in the preamble, without information on how to access the preamble. There are two summaries with no RIA information.

The Report should have web addresses for all RIA's--Congress and the public should not be expected to submit a request to an agency for information that should be easily accessible for the public.

### **F. OMB Should Expand the Discussion of EPA's Improper Use of Fine Particulate Matter Co-Benefits and Clarify the Problem of Relying on Co-Benefits**

OMB correctly highlights concerns regarding the extent to which regulatory benefits included in the monetized cost-benefit analysis derive from the

---

<sup>21</sup> "The Quality and Use of Regulatory Analysis in 2008," Jerry Ellig and Patrick McLaughlin, Mercatus Center, June 22, 2010, at <http://mercatus.org/publication/quality-and-use-regulatory-analysis-2008>.



Environmental Protection Agency (EPA) air quality regulations. OMB also notes the predominance of benefits from fine particulate matter (PM<sub>2.5</sub>) reductions as the largest source of EPA air regulation benefits and discusses some of the scientific uncertainty issues surrounding the calculation of benefits associated with fine particulate matter reduction.

The discussion of this issue in the report could be greatly improved by including an explicit recognition of the serious error that EPA introduced into the cost-benefit calculus by relying on fine particulate matter “co-benefits” in its regulatory impact analyses of standards designed specifically to address hazards other than fine particulate matter. Simply put, fine particulate matter has previously been regulated by EPA to control the pollutant to the level necessary to provide full protection of human health, and EPA misleads the public when the agency claims as benefits for its regulation of other target substances the coincidental further reductions in fine particulate matter concentrations that may occur in association with control of the target substance.

The misrepresentation of benefits is particularly egregious when, as has become common in recent rulemakings, the supposed co-benefits associated with fine particulate matter reductions comprise the overwhelming majority of all benefits from the subject regulation. For example, in EPA’s recently finalized Mercury Air Toxic Standards regulation, over 90 percent of the claimed health benefits are derived from fine particulate matter reductions, and without the inclusion of the PM<sub>2.5</sub> co-benefits, the cost of the regulation (estimated at \$9.6 billion per year by EPA) would exceed its benefits.

The concern regarding misuse of co-benefits in regulatory impact analysis calculations goes to the heart of the principles of honesty, accuracy and transparency that underlie OMB’s responsibility to manage the regulatory process. EPA has made misleading public statements intended to garner public support for its rulemaking decisions by its reliance on the erroneous co-benefits concept. For example, in its public information fact sheet for the Mercury Air Toxics Standard, EPA stated that its rule “will save thousands of lives and prevent more than 100,000 heart and asthma attacks each year,”<sup>22</sup> falsely implying that such savings of lives and preventions of heart and asthma attacks were directly related to the mercury hazard targeted by the rule.

---

<sup>22</sup> EPA, “Benefits and Costs of Cleaning Up Toxic Air Pollution from Power Plants,” at <http://www.epa.gov/mats/pdfs/20111221MATSimplacts.pdf>.

In fact, the claimed savings and preventions derive only from supposed coincidental reductions in fine particulate matter that would presumably occur and are in no way related to the reduction in exposure to mercury or the other hazardous air pollutants targeted by the regulation. Fine particulate matter has previously been regulated by EPA to reduce its presence in the atmosphere to a level sufficient to eliminate all potential harm to human health plus a margin for error (this is the requirement of the Clean Air Act on which EPA's prior setting of its fine particulate matter standard was based). Therefore it is logically inconsistent for EPA to claim that further reductions coincident with compliance with other hazard abatement requirements would have any positive effect on human health.

Dr. Anne E. Smith, a noted economist, stated in recent testimony to the U.S. House Energy and Commerce's Subcommittee on Energy and Power, "Allowing such co-benefits to dominate RIAs detracts from RIAs' most valuable practical role, which is to help guide us toward regulations that provide cost-effective, minimally-complex management of societal resources."<sup>23</sup> Dr. Smith reviewed 57 individual Clean Air Act regulation RIAs published by EPA following its initial promulgation of fine particulate matter national ambient air quality standards, and she found a pattern of increasing reliance by EPA on supposed fine particulate matter co-benefits to justify almost all of its non-PM regulations.

Dr. Smith's study shows conclusively that EPA's use of fine particulate matter co-benefits amounts to improper double counting of benefits and that the EPA practice violates the theoretical foundations of economic cost-benefit analysis. OMB should include in its discussion on pages 15-16 of its draft report and in the appended evidentiary citations specific reference to the seminal work of Dr. Anne E. Smith, "An Evaluation of the PM<sub>2.5</sub> Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations."<sup>24</sup>

## **G. OMB Should Strictly Scrutinize Private Benefits**

---

<sup>23</sup> Testimony of Anne E. Smith Prepared for the House Energy and Commerce Committee's Subcommittee on Energy and Power, Hearing entitled "What EPA's Utility MACT Rule Will Cost U.S. Consumers," February 8, 2012, at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/20120208/HHRG-112-IF03-WState-ASmith-20120208.pdf>.

<sup>24</sup> "An Evaluation of the PM<sub>2.5</sub> Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations." Anne Smith, NERA Economic Consulting, 2011 at [http://www.nera.com/67\\_7587.htm](http://www.nera.com/67_7587.htm).

There has been a growing reliance on private benefits in the government's cost-benefit analysis,<sup>25</sup> and these benefits are playing a predominant role with some rules. As explained in a recent article in *The Economist*:

Ted Gayer of the Brookings Institution notes that private benefits such as reduced fuel consumption and shorter refuelling times account for 90% of the \$388 billion in lifetime benefits claimed for last year's new fuel-economy standards for cars and light trucks. They also account for 92% and 70% of the benefits of new energy-efficiency standards for washing machines and refrigerators respectively.<sup>26</sup>

If an agency alleges a market failure justifying the identification of private benefits, then they should carefully address issues such as:

- **Consumer Preference:** Why should other consumer preferences, such as quality and safety, be ignored in favor of the government's preferences, such as fuel efficiency?
- **Opportunity Cost:** Private benefits generally are justified because the consumer is allegedly making a poor financial choice due to inadequate information. However, consumers may be giving up more money by not taking an alternative action. Based on receiving a higher rate of return, a consumer may be better off spending money in a different manner than in the manner preferred by the government.
- **Cash Flow:** Some individuals may not have the available money to buy, for example, an expensive refrigerator even if they could save money over time. A less expensive refrigerator may be all that is feasible given available resources.

Agencies should rarely identify private benefits connected to rules and OMB should review such claims skeptically. If an individual would receive a private benefit by taking a specific action, such as purchasing a fuel-efficient car, the individual might do so without the government interfering and imposing its own preferences on the individual. In such a case, it would not be appropriate to count that private benefit in a regulatory impact analysis.

---

<sup>25</sup> "The Rule of More," *The Economist*, February 18, 2012, at <http://www.economist.com/node/21547772>.

<sup>26</sup> *Id.*

OMB should detail in the Report any market failures used to justify private benefits and also how agencies have addressed the numerous reasons why individuals may have legitimate reasons to take action contrary to the government's preferred action.

## **II. Response to OMB's Solicitation of Public Recommendations on Regulation and Employment Effects**

On pages 35-36 and pages 80-81, OMB has provided a useful discussion on the interrelationship between employment and regulation. In particular, the literature review on pages 80-81 makes the case for quantifying adverse employment effects.

Consideration of employment effects of regulations entails more than simplistic tabulations of jobs that may be created or destroyed in consequence of a regulatory action. Compliance with new regulatory requirements cause dislocations and adjustments of the labor market that impose real costs on workers and employers regardless of the long-run net effect on job counts. Dislocated workers may experience the costs of searching for new jobs, costs of geographic relocation, and costs of retraining. During unemployment, affected workers lose potential earnings, and even when re-employed, loss of experience based human capital associated with their prior employer is not transferrable to the new position. Dislocated workers also may experience economic losses associated with loss of non-pecuniary compensation, including health and retirement savings benefits.

Beyond pecuniary costs, regulation-related worker dislocation may negatively impact the physical, mental and emotional health of affected workers and their family members. The direct costs borne by dislocated workers themselves may be multiplied through indirect impacts on their communities. Even if the costs of worker dislocation are transitory, they are properly included in the stream of social costs over the analytical time horizon of cost-benefit analysis.

Consideration of the worker dislocation costs imposed by government regulatory policy decisions is an important part of the regulatory analysis process even if these or other costs have no impact on the regulatory decision itself, because, for example, the level of protection selected is required without allowance for cost. The government needs to know these costs in order to plan effectively for the allocation of public resources for retraining, unemployment compensation, and other assistance to redistribute the adverse impacts equitably.

Finally, there are numerous statutes that already require agencies to consider the employment effects of regulations. OMB should list these statutes in the Report and point out whether agencies are complying with the statutes.<sup>27</sup>

### **III. Conclusion**

When flawed data and analysis go into formulating regulations, the logical result will be flawed regulations. There are many sound principles that have been promoted by Administrations of both parties. However, these principles are rendered meaningless when they are not followed by agencies. Through this Report, OMB has the opportunity to provide valuable information to the public and promote agency accountability.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Kovacs". The signature is written in a cursive style with a light blue background behind it.

William L. Kovacs

---

<sup>27</sup> See e.g. the Clean Air Act (42 U.S.C. § 7621), Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971), Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).