



June 20, 2023

Administrator Richard Revesz  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
Executive Office of the President  
1600 Pennsylvania Ave NW  
Washington, DC 20500

*Submitted via Regulations.gov*

RE: OMB-2022-0014

Dear Administrator Revesz:

I appreciate this opportunity to provide comments on the proposed Circular A-4, "Regulatory Analysis."<sup>1</sup> The focus of my comments is on the proposed change connected to ancillary benefits.

The preamble characterizes this proposed change as terminological:

In addition, a terminological change from discussion of "ancillary benefits and countervailing risks" to "additional benefits and costs" has been proposed to clarify that categories of effects such as "ancillary" or "indirect" are not meaningfully different for analytical purposes from categories of effects that are "primary" or "direct."<sup>2</sup>

However, this change is not merely terminological. It is a substantive change. There is a fundamental difference between direct and ancillary benefits that requires them to be analyzed differently: direct benefits are related to the purpose of the underlying statutory provision, whereas ancillary benefits are unrelated. This distinction must be maintained to properly implement the underlying statute authorizing any rule.

Regulatory analysis must not be disconnected from the underlying statute that provides the authority for the regulation. When an agency is promulgating a rule, it must ensure that the rule

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<sup>1</sup> Proposed update to Circular A-4, April 6, 2023, <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf> (accessed June 20, 2023); See also Office of Management and Budget, "Request for Comments on Proposed OMB Circular No. A-4, 'Regulatory Analysis'," 88 Fed. Reg. 20915, <https://www.federalregister.gov/documents/2023/04/07/2023-07364/request-for-comments-on-proposed-omb-circular-no-a-4-regulatory-analysis> (accessed June 20, 2023).

<sup>2</sup> "Preamble: Proposed OMB Circular No. A-4, 'Regulatory Analysis'," <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4Preamble.pdf> (accessed June 20, 2023).

is consistent with the plain language of the applicable statutory provision. This starts with promulgating a rule that is implementing what Congress wants the agency to implement.

If a statutory provision directs, for example, the Environmental Protection Agency (EPA) to issue regulations to address hazardous air pollutant (HAP) emissions, then it would be unreasonable for the agency to issue a rule using that statutory section (Section 112 of the Clean Air Act) to achieve some other unrelated objective. It would be even worse if the agency is unable to adequately show that it has sufficient benefits to justify the rule based on the purpose of Section 112.

Yet, this is precisely the type of abuse that has been happening for many years at the EPA.<sup>3</sup> The agency has promulgated rules under specific statutory sections while being unable to point to any quantified benefits for fulfilling the purpose of those sections. The ancillary benefits have frequently served as the sole source of quantified benefits or the vast majority of these benefits. In fact, the EPA has not identified a single dollar of quantified benefits connected to HAPs in its current proposed Mercury and Air Toxic Standards (MATS) rule.<sup>4</sup>

If the EPA can engage in this practice, then it can simply regulate whatever air pollutants it wants so long as it can point to a statutory section authorizing any air regulation. This is not conjecture, because as explained, this is precisely what has been happening. It is an easy way for an agency to do an end-run around the law.

The EPA itself finalized a rule in 2020 that properly recognized the importance of distinguishing between direct benefits and ancillary benefits.<sup>5</sup> The rule, which was rescinded by the Biden administration,<sup>6</sup> would have helped to promote transparency by showing benefits pertaining to “the CAA provision or provisions under which the significant regulation is promulgated.”<sup>7</sup> In 2020, the EPA also sought to address the co-benefits abuse in the MATS context,<sup>8</sup> but that rulemaking was also rescinded by the Biden administration.<sup>9</sup>

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<sup>3</sup> See e.g. Anne E. Smith, "An Evaluation of the PM2.5 Health Benefits Estimates in Regulatory Impact Analyses for Recent Air Regulations," NERA Economic Consulting (December 2011), [https://www.nera.com/content/dam/nera/publications/archive2/PUB\\_RIA\\_Critique\\_Final\\_Report\\_1211.pdf](https://www.nera.com/content/dam/nera/publications/archive2/PUB_RIA_Critique_Final_Report_1211.pdf) (accessed June 20, 2023).

<sup>4</sup> EPA web page entitled “Proposed Rule - National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review,” <https://www.epa.gov/stationary-sources-air-pollution/proposed-rule-national-emission-standards-hazardous-air-pollutants> (accessed June 20, 2023).

<sup>5</sup> Environmental Protection Agency, “Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process,” Final Rule, 85 Fed. Reg. 84130 (2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-23/pdf/2020-27368.pdf> (accessed June 20, 2023).

<sup>6</sup> EPA web page entitled “Rescission of the 2020 Benefit-Cost Rule,” <https://www.epa.gov/air-and-radiation/rescission-2020-benefit-cost-rule> (accessed June 20, 2023).

<sup>7</sup> Ibid.

<sup>8</sup> EPA web page entitled “Final Revised Supplemental Finding and Results of the Residual Risk and Technology Review,” <https://www.epa.gov/mats/final-revised-supplemental-finding-and-results-residual-risk-and-technology-review> (accessed June 20, 2023).

<sup>9</sup> EPA web page entitled “Final Revocation of the 2020 Reconsideration, and Affirmation of the Appropriate and Necessary Supplemental Finding,” <https://www.epa.gov/stationary-sources-air-pollution/final-revocation-2020-reconsideration-and-affirmation-appropriate> (accessed June 20, 2023).

Beyond the legal issues, the distinction between direct and indirect benefits is required as a matter of sound regulatory practice. When the benefits of a rule are overwhelmingly or exclusively indirect in nature (and therefore unrelated to the purpose of the statutory section), then the rule's real purpose is to address whatever is leading to these indirect benefits.

For example, in the Clean Air Act context, if a rule's benefits are exclusively derived from the indirect benefits of criteria pollutant reductions, then the rule is functionally—i.e., in reality—a criteria pollutant rule. An agency should therefore conduct a regulatory analysis evaluating whether the rule provides the best alternative to achieving the alleged criteria pollutant benefits.

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I strongly urge OMB to maintain terminology that properly distinguishes between benefits that are direct and therefore connected to the purpose of the applicable statutory provision, and those that are indirect and therefore not connected to the statutory purpose. This is critical to ensure agencies are acting in accordance with their statutory authority and the will of Congress.

Sincerely,

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