# OMB's Problematic Circular A-4 Rewrite
## How Congress and OMB can "Futureproof Regulatory Review"

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To the Executive Office of the President, Office of Management and Budget,

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**OUTLINE**

- Discard the pro-regulatory bias of the federal government
- Restore regulatory streamlining prior to Circular A-4 rewrite
- Restore the $100 million threshold for regulation deemed "significant"
- Comply with existing law on regulatory oversight first
- Grapple with political failure
- Replace "net benefit" analysis with cost "budgeting"
- Restore an aggregate regulatory cost estimate
- Reckon with "harm of regulation"
- Restore the "presumption against economic regulation"
- Pay attention to co-costs, not solely co-benefits
- Recognize differential effects of rules on businesses
- Reaffirm federalism, here and abroad
- Address federal monopoly power
- Incorporate guidance document disclosure protocols
- OMB should not encourage regulating beyond statutory authority
- Enough with nudges
- In summary

The administrative state is, as Steven F. Hayward put it, constitutes an "independent 'fourth branch' of government' that fits nowhere within the scheme of the Constitution as understood by its authors."[2] The preparation of cost-benefit analyses for the rules and regulations that fourth branch issues are in part governed by a White House Office and Management and Budget (OMB) guidance document dubbed "Circular A-4." Joe Biden's April 6, 2023 Executive Order 14,094[3] on "Modernizing Regulatory Review" has triggered a rewrite of the document (Draft Circular[4]). Before Congress stands aside for a Biden administration reformat of regulatory governance that weakens OMB's watchdog character, fundamental correctives are necessary

[1] Fred L. Smith Jr. Fellow in Regulatory Studies at the Competitive Enterprise Institute
[2] Steven F. Hayward, "The Threat to Liberty: The Administrative State and the End of Constitutional Government," *Claremont Review of Books*, Winter 2016-17, https://claremontreviewofbooks.com/the-threat-to-liberty/.
[3] https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf.
[4] https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf. See also the preamble: https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4Preamble.pdf. ; the FAQ:

The new Draft Circular suppresses OMB's legacy overseer role, enlisting it instead in pursuit of "net benefits" as progressives see them. OMB had been the lone brake on the entire pro-regulatory rest of the administrative state. As such, the act of filing formal comments to "improve" this obscure yet influential process risks inadvertently legitimizing an exercise that cannot be fundamentally changed as restoration of the prior regime of stronger oversight seems not on the table. The imperative of the moment is not a Circular A-4 rewrite but withdrawal and rethinking of the document.

OMB's philosophy was ostensibly different three years ago when it oversaw the "one-in, two-out" regulatory program. Biden's "Modernizing Regulatory Review"[5] memorandum issued on day one of his administration sees deregulation as such as harmful, cautioning agencies and OMB against policies with "harmful anti-regulatory or deregulatory effects." No room exists in the new Draft for the counter-viewpoint that the progressive agenda as such is non-beneficial to American citizens. The Draft Circular narrows the scope of what gets questioned and supervised, and legitimizes expansions of federal oversight.

Any useful Circular A-4 rewrite must broaden Washington's cramped reckoning of the burdens and encumbrances of coercive regulation. Reasons include.

- Costs of most individual regulations and interventions are often ignored or unquantified;
- Aggregate costs of regulation are always ignored and unquantified;
- Most regulatory costs *cannot* be quantified (which calls for congressional rule approval);
- The administrative state not only assumes credit for benefits and well-being that are fundamentally the fruits of voluntary pursuits of mankind, but impedes benefits; and
- The administrative state's vaunted expertise is more fallible and limited than outside expertise; tends to block superior competitive disciplines and risk management; and tends to not yield to evolving institutions of liberty. The Draft Circular would worsen this lock-in.

Previously, it might have bene possible to have a good faith rewrite or update exercise. Unfortunately, today's OMB is too pro-regulatory and compromised to perform critical regulatory review and oversight. The OMB leadership supports recent interventionist legislation and deficit spending that will in turn seed downstream regulation. These include "Inflation Reduction Act" economic and social interventions[6] and the conditioning "CHIPS and Science Act" subsidies on provision of federally approved child care and compulsory unionization.

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https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOImplementation.pdf; and blog: https://www.whitehouse.gov/omb/briefing-room/2023/04/06/strengthening-our-regulatory-system-for-the-21st-century/. In additions to Circular A-4 itself, "Regulatory Impact Analysis: A Primer" https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf and "Agency Checklist: Regulatory Impact Analysis" will likely get rewrites or replacements as well.

[5] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/; https://cei.org/blog/a-look-at-modernizing-regulatory-review/.

[6] For example, U.S. Department of Agriculture, "USDA Seeking Public Comment on a New Provision to Provide Assistance to Agricultural Producers Who Have Experienced Discrimination," October 13, 2022, https://www.usda.gov/media/press-releases/2022/10/13/usda-seeking-public-comment-new-provision-provide-assistance?utm_campaign=public-comment&utm_medium=email&utm_source=govdelivery.

The recommendations presented below need to happen before a Circular A-4 rewrite occurs, or be built into one. Given the unlikelihood of their adoption, this recommendation's aim is primarily at legislators who can exercise some oversight.

**Discard the pro-regulatory bias of the federal government**

In the Draft Circular, the nomenclature of "cost-benefit analysis" remains, but actual cost-benefit analysis is being overwhelmed with the elevation of unquantifiable aims as benefits-in-themselves, answering the question of whether or not to regulate in the affirmative. Congress and OMB must reject these premises, and delay a rewrite of Circular A-4 until pro-regulatory bias is thoroughly addressed.

**Restore regulatory streamlining prior to Circular A-4 rewrite**

Abrupt reversals of previous streamlining were effectuated by executive order and other directives.[7] The same OMB championing "one-in, two-out" during the Trump administration[8] abandoned it under Biden.[9] A sample of oversight and disclosure norms and protections to restore before contemplating a new Circular A-4 includes:

- Restore regulated parties' protections removed by Biden's revocation orders.
- Reinstate requirements for appointees to sign-off on rules[10]
- Improve civil service (the same ones carrying out C-4 directives) accountability to the public
- Restore "Deregulatory" rules' designations now erased from the Unified Agenda.[11]
- Restore one-stop "portals" for agency sub-regulatory guidance document disclosure
- Restore agencies' now-revoked rules that had formalized procedures for guidance document preparation, issuance and disclosure[12]
- Restore and make permanent COVID-era economic regulatory relief procedures.

These and other protections[13] should be restored prior to a Circular A-4 rewrite.

**Restore the $100 million threshold for regulation deemed "significant"**

The universe of "significant regulatory actions" deemed by Joe Biden to warrant review was decreased by his Executive Order 14,094, and is reaffirmed in the Draft Circular. Instead of a

[7] Biden's Repudiation of Trump's Regulatory Streamlining Agenda: An Inventory - Competitive Enterprise Institute (cei.org); https://cei.org/blog/edward-scissorhands-and-federal-regulatory-disclosure/

[8] Clyde Wayne Crews Jr., *Ten Thousand Commandments 2021: An Annual Snapshot of the Federal Regulatory State*, June 30, 2021, Available at SSRN: https://ssrn.com/abstract=3877388 or http://dx.doi.org/10.2139/ssrn.3877388.

[9] https://cei.org/studies/ten-thousand-commandments-2022/.

[10] Todd Gaziano and Angela C. Erickson, "Who Gets to Make the Rules? Washington May Finally Get It Right," Wall Street Journal, January 24, 2021, https://www.wsj.com/articles/who-gets-to-make-the-rules-washington-may-finally-get-it-right-11611526655.

[11] https://cei.org/blog/in-blow-to-disclosure-unified-agenda-of-federal-regulations-database-removes-deregulatory-designation/

[12] Crews, "Stomping FROGs: An Updated Inventory of Biden's Elimination of Trump-Era Final Rules on Guidance Document Procedures," Competitive Enterprise Institute, July 26, 2022, https://cei.org/blog/stomping-frogs-an-updated-inventory-of-bidens-elimination-of-trump-era-final-rules-on-guidance-document-procedures/.

[13] Crews, "Edward Scissorhands and Federal Regulatory Disclosure," Competitive Enterprise Institute, March 22, 2022, https://cei.org/blog/edward-scissorhands-and-federal-regulatory-disclosure/.

$100 million rule being deemed "significant" and warranting extra scrutiny, the threshold rises to $200 million annually, subject to further upward ratcheting by OIRA as GDP changes.

Before this change, some regulatory actions not deemed significant were already escaping critical review. Significant actions by the traditional $100 million undertaken by Biden that affect small business and state and local governments appear to be rising, and are of greater concern now in the wake of costly and interventionist new laws like the American Rescue Plan and the Infrastructure and Inflation laws, whose complicated decrees will be translated into future rulemakings such as further crackdowns on gas stoves and cars.

OMB should not be counting fewer significant rules but assessing more of the allegedly "nonsignificant" ones.

**Comply with existing law on regulatory oversight first**

Administrative state non-compliance with already existing regulatory oversight procedures is a grave concern. Compliance with prior laws—the Regulatory Right-to-Know Act, the Congressional Review Act and even E.O. 12,866 with the cost-benefit analysis framework elaborated upon by Circular A-4—is not necessarily well observed by the current government. Even the *Information Collection Budget*, created by the Paperwork Reduction Act, has disappeared from the scene. More can be done to comply with the Regulatory Flexibility Act, which can help small businesses.[14]

Biden's reduction of "significant" regulation reviewed comes at a time when the OMB has failed to issue its perpetually tardy "annual" *Report to Congress* on costs and benefits of "significant" and "major" rules since fiscal year 2019. While these reports were late in the Trump administration also, the public did get year-end status reports on Trump's one-in, two out E.O. 13771 directive. Overall, about 40 percent of major rules feature some form of quantitative cost estimate. Looking beyond the officially self-designated "major" rules, the proportion of all rules with any reviewed cost analysis averages l*ess* than one percent.[15]

Required by the Regulatory Right-to-Know Act, the cost-benefit roundup was also to be accompanied by an aggregate regulatory cost assessment that has been ignored almost since its inception. [16] Even the deficient 10-year lookback OMB adopted instead vanished from the most recent editions of the *Report to Congress*. Despite the presence of hundreds of agencies, the belated OMB *Report to Congress* covers rules from a handful of departments like DoL, DoT, EPA, USDA, Energy, DoJ, HHS, HUD and DHS.

Gaps go well beyond rigged cost-benefit accounting. Even today, rules from independent agencies like the Federal Communications Commission or the financial regulatory bodies so active in today's "ESG" (environmental, social, governance) pursuits are absent from the

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[14] https://www.ernst.senate.gov/news/press-releases/ernst-gives-small-businesses-a-voice-in-rulemaking-process.
[15] https://cei.org/opeds_articles/trump-white-house-quietly-releases-overdue-regulatory-cost-benefit-reports/.
[16] https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/OMB/inforeg/2002_report_to_congress.pdf.

"calculations." Meanwhile the Unfunded Mandates Reform Act, surveyed in the *Report to Congress*, exempts a significant amount of regulatory intervention from critical analysis.[17]

On the basis of such limited information, regulation, the primary way government acts apart from spending, is alleged to not only have no net costs whatsoever, but rather to be *net-beneficial*—by a body not following existing law on its tabulation. Congress should instruct OMB to revisit Circular A-4 only after demonstrated compliance with more important existing law.

**Grapple with political failure**

"Market failure" gets mentioned 18 times, and "failure of private markets" twice in the Draft. "Failure of public institutions" gets airtime, but primarily in the context of "warrant[ing] new agency action"—not rollback.

Advancing technologies continually reduce the saliency of arguments that markets "fail" and the case for much legacy regulation has long since vanished. Rather, America does not perform the most basic undertakings—such as growing sugar or producing milk[18]—without massive government interventions whose indirect costs remain unacknowledged. Despite the decades-long presence of Circular A-4, the disregard of market pricing in farm subsidy programs, moral hazard in federal flood insurance, and the continued presence of the very Government Sponsored Enterprises culpable in the financial meltdown do not rate attention. That such political failures are not showcased and broadcast widely exemplifies the futility of the current rewrite exercise.

The overriding problem is not market failure, but "the failure to have markets," as CEI founder Fred L. Smith Jr. notes.[19] Examples include +the outlawing of competition in communications and electricity sectors in favor of decades-long government-granted monopoly and exclusive franchises, now being replicated in Biden's EV subsidies that drip with market socialism. As CEI's Smith notes, large-scale resources like airsheds and watersheds in the hands of government at the dawn of the Progressive Era remain politically controlled.

> "[T]he genius of the Progressives in the late 19th century was to preempt or push large sectors of the emerging future (the environment, schools, electromagnetic spectrum, infrastructure, welfare, the medical world) into the political world."[20]

More consequential than the Draft Circular's debates over the likes of appropriate discount rates (indeed what imaginary discount rate should one apply to an imaginary regulatory cost figure?) is removal of resources and their wealth-creating potential from future generations. Circular A-4 is mute on this overarching cost of intervention.

A refreshing bit of The Draft Circular preamble acknowledged that "analysis of a regulation's anticipated effects can reveal that what was previously assumed to be a need for regulation is not

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[17] Federal Mandates: Few Rules Trigger Unfunded Mandates Reform Act, Testimony of Denise M. Fantone, United States Government Accountability Office, February 15, 2011, http://www.gao.gov/assets/130/125488.pdf.

present.” The, however, was countered immediately by the observation that an “iterative process” could “identify additional needs for regulation not previously considered.” (Preamble, pp. 5-6) Discouraging also is the removal of the 2003 Circular’s explicit "Presumption Against Economic Regulation." (p. 6) and the favorable view of baking in political failure in the form of "incentivizing adoption of new technology," distortions which will later get blamed on markets.

A similar doubling down on the tradition of picking losers rather than winners appears in the remark that "Regulations may also yield cost savings (e.g., energy savings associated with new technologies)” (p. 6) in touting federally computed “cost-effectiveness ratios.” While it may be helpful to "document all of the alternatives that were assessed in a list or table and note which were selected for emphasis in the main analysis," (p. 22) the chasm reappears when OMB’s own example is none other than that of agencies’ assessing alternatives for federal refrigerator and freezer “efficiency” standards that do not save whole-of-lifecycle costs or conserve resources, and ought not exist at all. New mistakes are being made with the administration’s energy-poverty-inducing decarbonization policies that range from white-elephant charging stations and misleading claims about solar and wind resilience and net-zero feasibility and inherent wisdom,[21] none of which the current OMB rewriting Circular A-4 seeks to challenge and reverse.

The Draft’s discussion (and vision) in the section on "Showing Whether Regulation at the Federal Level Is the Best Way to Solve the Problem" should vastly expand to add discourse on political failure and how prior Administrative State actions have rendered the nation and citizens incalculably less wealthy by reducing the pool of available alternatives and shrinking the general and specific production possibilities frontiers, inflicting net societal costs on the present generation and baking them in for progeny. Otherwise, the Draft’s affirmation of the pre-existing Administrative State political failures will render new innovations captive at birth to ill-advised regulatory institutions, but blame “market failure” when things go wrong.

It is the case, as the Circular notes, that “externalities can arise from high transaction costs or poorly defined/costly to enforce property rights that prevent people from reaching efficient outcomes through market transactions." But it is government itself that too often impedes the creation of defined and divisible private property rights, and Circular A-4 shows little recognition of how those impediments persist still today

**Replace “net benefit” analysis with cost “budgeting”**

Quoting E.O, 12866, the Draft Circular (p. 2) reaffirms current policy that: **“**Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).”

The emphasis on maximizing net benefits is longstanding, with one result being that Circular A-4 leaves out much of the universe of regulatory costs.[22] Under Biden's approach, Circular A-4 will not only omit more, but effectively redefine many regulatory costs as benefits and rationalize central planning anew. The cost-benefit analysis applicable to a private entity internalizing both benefits and coats is less appropriate where those bearing benefits and costs are not the same individuals.

Given its invocation of net benefits, it is OMB that should be on board with aggregate regulatory budget constraint. Unknowable costs can only be internalized by a democratically accountable Congress that grapples with tradeoffs among goods and bads, and answers to voters. Experimenting with regulatory cost budgeting rather than entrenching a net-benefit regime that will lead to some as-yet-unreckoned-with double-counting of benefits is one superior approach.

**Restore an aggregate regulatory cost estimate**

A congressional insistence that OMB's resume its preparation of an aggregate, not partial, regulatory cost assessment is important, not because costs can be objectively calculated, but because they cannot be, and Congress needs to answer for underlying burdens and effects.

The 2003 Circular A-4 (p. 37) advised that agencies "should include these effects in your analysis and provide estimates of their monetary values when they are significant":

- Private-sector compliance costs and savings;
- Government administrative costs and savings;
- Gains or losses in consumers' or producers' surpluses;
- Discomfort or inconvenience costs and benefits; and
- Gains or losses of time in work, leisure and/or commuting/travel settings."

The Circular rightly asserts that, "With regard to measuring costs, you should be sure to include all the relevant costs to society, whether public or private, when feasible" (pp. 5-6). The primary debate over aggregate regulatory assessments, historically, was over bottom-up vs. top-down approaches[23]—not over the need for preparation of an aggregate appraisal as such. This is inappropriately neglected in the Draft Circular. With the vast informational resources at the federal government's disposal that it can effortlessly summon or contract for, more is doable, and necessary before an A-4 rewrite should be allowed to proceed.

**Reckon with "harm of regulation"**

The administrative state can undermine actual regulation and inflict unexpected or unfathomed net costs, from impeding access to resources, aggravating energy poverty with higher fuel costs, inducing less resilient and purposely non-redundant infrastructures, fostering global food insecurity with ethanol policy, inducing dependency on the part of able-bodied adults, and so on. Even gas stoves are targeted following denials that they would be. Reckonings and

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[22] https://www.forbes.com/sites/waynecrews/2020/08/25/what-comes-after-trillion-coming-to-terms-with-the-impenetrable-costs-of-government-intervention/?sh=20c20f2132fe.

[23] Maeve P. Carey, "Methods of Estimating the Total Cost of Federal Regulations, Congressional Research Service, January 21, 2016, https://sgp.fas.org/crs/misc/R44348.pdf.

accompanying metrics acknowledging the harms of regulation are necessary in a future Circular A-4 guidance.

**Restore the "presumption against economic regulation"**
OMB historically defined economic regulation as that which "restricts the price or quantity of a product or service that firms produce and/or restrict whether firms can enter or exit specific industries."[24] But such regulation is broader: alleged fine-tuning of the macro economy; control of the money supply; direct government management or resources, sectors or industries; corporate breakups and merger conditions and more were not captured in 2003's Circular A-4, let alone the modern draft.

The now-absent "Presumption Against Economic Regulation" phrasing of the 2003 Circular (p. 7) needs restoration and strengthening. No stable equilibrium prices and quantities are attainable by regulation that can properly allocate resources; yet deliberate economic manipulation in defiance of that is prominent today in the wake of post-COVID legislation, without hint of dissent from "watchdog" OMB.

While the "Presumption Against" is gone, OMB does contain "A Note Regarding Certain Types of Economic Regulation" (p. 26-27) where it continues to recognize the folly of:

- price controls in well-functioning competitive markets;
- production or sales quotas in well-functioning competitive markets;
- mandatory uniform quality standards for goods or services, if the potential problem can be adequately dealt with through voluntary standards or by disclosing information of the hazard to buyers or users;
- controls on entry into employment or production, except (a) where needed to protect health and safety (e.g., Federal Aviation Administration tests for commercial pilots) or (b) to manage the use of common property resources (e.g., fisheries, airwaves, Federal lands, and offshore areas).

The acknowledgement of certain hazards of economic regulation is welcome, but note the last bullet; even these "exceptions" protect government control of major swaths of resources and the economy. Markets are deferred to when OMB regards them as "well-functioning," but there is a certain blindness and inconsistency in seeing agencies as a better functioning alternative. Those blinders should be removed before going forward.

**Pay attention to co-costs, not solely co-benefits**
Government science used to coerce rather than just inform is not exempt from error,[25] which is more of a concern than ordinary scientific disputes. Self-perpetuating administrative state formulations of recent pedigree add urgency, such as "co-benefits." Social costs and benefits (particularly social costs of carbon) occupy the landscape now, a process consisting of changes such as the EPA "factoring in speculation about how regulatory inaction would affect everything

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[24] For example, *Draft Report to Congress*, 2002, p. 15024, footnote 16.
[25] https://www.wsj.com/articles/how-bad-is-the-governments-science-1523915765.

from rising sea levels to pediatric asthma."[26] Social cost of carbon was introduced first in relatively trivial regulations and later escalated.

There is a goading for regulation found throughout the Draft. One example:

> "Your analysis should look beyond the obvious benefits and costs of your regulation and consider any important additional benefits, costs, or transfers, when feasible. An additional benefit is a favorable impact (financial, health, safety, environmental, or other consequence) of the regulation that is typically unrelated to the main purpose of the regulation (e.g., reduced refinery emissions due to more stringent fuel economy standards for light trucks), while an additional cost is an adverse impact (financial, health, safety, environmental, or other consequence) that occurs due to a regulation and is not already accounted for in the direct cost of the regulation. These sorts of effects sometimes are referred to by other names: for example, indirect or ancillary benefits and costs, co-benefits, or countervailing risks." (p. 39)

Co-benefits? Definitely. Co-costs? Not so much. Similar framing emerges in the emphasis on "Non-use" values "such as preserving environmental or cultural amenities." Non-use values "arise where an individual places value on a resource, good, or service even though the individual will not use the resource, now or in the future" (p. 33). Congress should assure that discussions of co-benefits are matched by equally ambitious narratives exploring co-costs of rules.

**Recognize differential effects of rules on businesses**

Innovation and wealth creation do not advance at same rate in regulated and less-regulated firms, and Circular A-4 even explicitly instructs agencies to "consider assessing different requirements for large and small firms" (p. 24). Over-regulation can crowd startups into less-regulated areas at the expense of vitality in others, as entrepreneur and investor John Chisholm has noted: "There are hundreds of thousands of start-ups in mobile apps but relatively few in pharmaceuticals, aviation, construction, consumer banking, and medical devices."[27]

It is not coincidental that the sectors most subject to Biden's "competition policy" are already hyper-regulated. The presence of regulation can result in the picking of an unworthy winner when a disruptive firm emerges that does not fit the mold, and is in turn thwarted. There are complex differential effects on incumbents with hands tied relative to newcomers. An unfortunate effect is that some targets become less regulation-averse than those who came before,[28] as witnessed today in governance of privacy, artificial intelligence, digital currencies, and in ESG pursuits, to name a few prominent examples. Congress has a number of regulatory reform bills in play that should have considerable bearing on thinking through the Draft's treatment of small and large firms.

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[26] https://www.wsj.com/articles/cost-benefit-reform-at-the-epa-1528326402.

[27] Chisholm, Unleash Your Inner Company, Greenleaf: Austin, p. 320.

[28] Megan McArdle, "Here's Why Silicon Valley Loves Big Government," Bloomberg, September 8, 2017, https://www.bloomberg.com/opinion/articles/2017-09-08/here-s-why-silicon-valley-loves-big-government#xj4y7vzkg.

**Reaffirm federalism, here and abroad**

The Draft Circular notes, in defending federal action, that "producers may experience lower costs in the presence of Federal regulation, as opposed to a patchwork of State regulations when firms operate or conduct commerce across multiple jurisdictions" (p. 21). Similarly on the international state, the Draft maintains that "Efforts to align or harmonize U.S. and international regulations may require a strong Federal regulatory role" (p. 21-22). Congress should assure that the rewrite process prioritizes deregulating downward rather than regulating upward.

Right now, that is not the approach: "… the importance of international regulatory cooperation has grown since Circular A-4 was originally issued" (Preamble, p. 2). This can get slippery, as there appears to be a tendency to assess global effects on the likes of social costs of carbon, but perhaps ignore them on policies like ethanol promotion that arguably wipe out net benefits of the entire regulatory enterprise.

As an offset at the domestic level, regulatory guidance provided in the Office of Management and Budget's Circular A-4 does retain an appeal to the advantages of leaving matters up to individual states (p, 6). However, as Steven Hayward has noted, "A chief feature of the Administrative State is its relentless centralization, but with a reciprocal effect: its mandates, regulations, distorting funding mechanisms, and elitist professionalism have corrupted our political culture all the way back down to local government."[29] Federalism needs stronger reaffirmation in the Circular A-4 regime.

**Address federal monopoly power**

"The presence of market power may affect your benefit and cost estimates," the Draft proclaims (p. 55). "You generally should account for the presence of market power—and changes in market power induced by your regulation—when it is material to the effects of the regulation under consideration."

While ramping up "antitrust" against the private economy, Washington is expanding its own economic dominance over numerous sectors.[30] The federal government has boasted of being the "largest purchaser on earth"[31] and of deploying its spending, procurement and contracting powers to achieve its recent "whole-of-government" ends. We find ourselves in the midst of unprecedented legislation costing in the trillions, and the pushing of public-private partnerships (PPPs)[32] with potentially extensive but unacknowledged regulatory (and inflationary) effect.[33] When government "merges" with the private sector in such fashion, its actions tend to become unrecognizable as the regulatory interventions they truly are, and are, as it happens, largely undetectable in the Federal Register and A-4 machinery.

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[29] https://claremontreviewofbooks.com/the-threat-to-liberty/.

[30] https://cei.org/blog/joe-biden-and-merrick-garland-promise-new-regulation-in-agriculture-and-other-sectors/.

[31] https://cei.org/blog/bidens-state-of-the-union-trillions-down-on-big-government-mistakes/.

[32] https://www.forbes.com/sites/waynecrews/2022/05/10/congress-is-causing-rising-regulatory-burdens-that-needs-fixing/?sh=15947392715a.

[33] https://www.forbes.com/sites/waynecrews/2022/06/01/inflation-and-bidens-whole-of-government-price-hike/?sh=2b14e0a4c6b9.

Identifying the proportion of sectors that are government-controlled relative to private-sector shareholder controlled would be an important upgrade to a future Circular A-4 and processes. There needs to be greater clarity of government's own monopolistic power.

**Incorporate guidance document disclosure protocols**

The emphasis on a smaller set of major rules embodied in the new $200 million Circular A-4 threshold can cause policymakers to also overlook consequential guidance documents, notices, bulletins, circulars, interpretations and other kinds of sub-regulatory decrees. Guidance Documents are not noted in the Draft Circular except to defend their use. But we lack good information on the extent of that use.

The 2018 congressional report *Shining Light on Regulatory Dark Matter* report induced agencies to cough up about 13,000, but depicted an utter chaos that no official has their arms around.[34] During the Trump administration, portals were established that, despite their revocation by Biden, leave behind the ability to directly or indirectly point to at least 107,000 guidance documents.[35] Circular A-4 should reaffirm the importance of and maximize guidance disclosure, such as by reinstating portals unilaterally.

Also, the OMB seems to regard guidance as binding rather than non-binding: "Attention should also be given to analysis that isolates meaningful changes relative to any sub-regulatory action (e.g., agency guidance) in a supplementary analysis. This dual-baseline approach allows for assessment relative to both a previous regulation and any subsequent guidance" (p. 13). Congress should reaffirm the non-binding nature of guidance to OMB as well as direct it to commit to implementing a mappable disclosure process.

**OMB should not encourage regulating beyond statutory authority**

The itch to go around statutory authority is scratched in the Draft Circular Preamble (p. 6). "Proposed revisions would also clarify that even when a regulation is implementing or interpreting a statutory requirement, an agency should conduct reasonable inquiries to identify other needs for federal regulatory action"; and (Draft Circular, p. 23), "When a statute establishes a specific regulatory requirement or requires an agency to periodically consider updating a regulation, it is generally helpful for the agency to also consider whether to add discretionary provisions (such as increasing stringency above the minimum set by statute or by existing regulations)."

Even more: "If legal or other constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Orders 12866 and 13563, you may consider identifying these constraints and estimating their opportunity cost (and effects more generally). Such information may be useful to Congress under the Regulatory Right-to-Know Act or in considering statutory reforms."

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[34] https://www.law.uh.edu/faculty/thester/courses/Statutory2018/Shining%20Light%20on%20Regulatory%20Dark%20Matter.pdf

[35] https://cei.org/blog/federal-agency-guidance-document-inventory-tops-107000-entries/.

Yes, the otherwise-ignored Right-to-Know Act is suddenly invoked when the prospect of expanding government arises. Congress should not allow this to proceed until regulators stick to the powers explicitly delegated.

**Enough with nudges**
"Nudges" have evolved a new rationale or basis for intervention not seen in 2003, reacting to what regulators perceive as peoples' irrationality.

"Because of limited capacity to process information, even when adequate information is available, people can make systematic mistakes; limited attention, focus, and time can lead to the use of heuristics (rules of thumb)" (p. 18). "People also exhibit various decision-making biases, such as those stemming from framing effects, anchoring effects, loss aversion, present bias, unrealistic optimism, and a preference for the status quo. Another sort of decision-making bias stems from challenges in decision-making, such as imperfect self-control. When individuals exhibit imperfect self-control, they make a decision that increases short-term well-being by less than it decreases future well-being" (p. 19).

The OMB admits this is a departure from normal economics and even many basic assumptions underlying its own enshrinement of net-benefit analysis. "Unlike most of the types of market or public institution failure discussed above, accounting for behavioral biases—which may produce internalities (understood as harms that people impose on their future selves)—requires a departure from an assumption that typically underlies regulatory analyses conducted in accordance with this Circular: that individuals optimize their own lifetime well-being subject to budget and other relevant constraints"

Behavioral biases are not cause for regulating above and beyond. People can learn and fix their own mistakes. What cannot be fixed is the baking in of the inappropriate behavioral biases of the Administrative State. Congress should ensure that the "choice architects" (p. 25) are ejected from the final draft of Circular A-4.

**In summary**
Proposed changes to the conduct of Administrative State like those embodied in the Circular A-4 rewrite accentuate a conflict of visions over the size and scope of government and its role in society; over separation of powers; over executive over-reach; and over the fundamental relation of individual to the state.

Many of the changes proposed in the Draft Circular are highly problematic. Some of the proposals are good ones, but the changes on the whole are united in their affirmation of a more powerful central regulatory apparatus, disregard for measurement and disclosure, minimal concern for political failure, and indifference to the duty to extend institutions such as property rights into the governance of complex emerging frontier sectors.

The Draft Circular A-4 represents a deterioration from the already inadequate 2003 version. Rather than seeing regulation as a costly last resort, the pursuit of centralized planning, the displacement of the private sector, and politicized net benefits are seen as good things. This is

not “Modernizing Regulatory Review,” it is effectively doing away with much of it, and as such should be rejected.