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Administrator Richard Revesz
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC, 20503

SUBMITTED ELECTRONICALLY VIA REGULATIONS.GOV

Re: Request for Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis," 88 FR 20915-01 (April 7, 2023)

Dear Administrator Revesz:

The Commonwealth of Virginia, the State of Alabama, the State of Arkansas, the State of Florida, the State of Georgia, the State of Idaho, the State of Indiana, the State of Iowa, the State of Kansas, the Commonwealth of Kentucky, the State of Louisiana, the State of Mississippi, the State of Missouri, the State of Montana, the State of Nebraska, the State of New Hampshire, the State of North Dakota, the State of Ohio, the State of Oklahoma, the State of South Carolina, the State of South Dakota, the State of Tennessee, the State of Texas, the State of Utah, the State of West Virginia, and the State of Wyoming submit these comments concerning the Office of Management and Budget's (OMB) proposed rewrite[1] of Circular A-4, "Regulatory Analysis."[2] Although the States have concerns about other revisions in the draft, this comment focuses on a select number of issues that are especially within the States' realm of expertise and with which the States have recent experience. As a general matter, we are concerned that the Administration is attempting to manipulate the regulatory process by, among other things, adjusting the discount rate and adjusting the time horizon of regulatory analysis so that the putative benefits of regulation

[1] The draft revised version of Circular A-4 is referred to herein as "Draft A-4." See Office of Management and Budget, Draft Circular A-4 for Review (Apr. 6, 2023), *available at* https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.
[2] The current, operative version of Circular A-4 is referred to herein as "Current A-4." See Office of Management and Budget, Circular A-4 (Sept. 17, 2003), *available at* https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

always outweigh the costs. Allowing agencies to shroud their arbitrary and capricious actions in partisan cost-benefit analyses serves only to insulate regulatory outcomes from judicial challenge. As the chief legal officers of our respective States, all of whom are party to legal challenges against regulatory actions taken by this Administration, we cannot sit idly by while the Administration attempts to sidestep the rights guaranteed by the federal Administrative Procedure Act (APA).

We write to share our concerns on six main points. First, the States take issue with revisions that downplay the importance of federalism and the role of States in effective and efficient regulation. Second, the proposal improperly shifts the focus from the effect regulations have on Americans to global effects. Third, the draft proposes using a single discount rate combined with "shadow pricing" rather than maintaining the traditional approach of using 3% and 7% discount rates (essentially corresponding to the discount rate for consumption and for private investment), which would allow regulators to game the cost-benefit analysis in favor of regulation. Fourth, the draft does not clarify how agencies should determine the temporal scope for conducting cost-benefit analyses, which is especially concerning given some agencies' attempts to forecast economic growth three centuries in the future. Fifth, the draft improperly focuses on equity and behavioral biases as bases for regulation. Sixth, the proposed revisions are the product of prejudgment given this Administration's crusade against supposed "anti-regulatory" checks on administrative action like the current version of Circular A-4.

Cost-benefit analysis should provide an accurate portrayal of the effects that proposed regulations will have on those who are affected by them. The proposed draft Circular A-4 makes several changes that, if implemented, would decrease the utility of cost-benefit analysis while increasing the power and flexibility of federal regulators. The federal government's chief guidance on cost-benefit analysis should not be reworked to allow this Administration more power to micromanage the lives of Americans.

I. The proposed revisions fail to recognize the importance of federalism

For decades, spanning multiple presidential administrations, the federal government has recognized that a "division of governmental responsibilities between the national government and the States [] was intended by the Framers of the Constitution" and has sought to ensure that "the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies."[3] Although the operative version of Circular A-4 emphasizes the "substantial" advantages of leaving regulatory issues to States and makes mandatory the consideration of the possibility of regulation at the State level as an alternative to federal regulation, Current A-4 at 6, the proposed revisions flip the federalist balance on its head. They instead highlight numerous purported "disadvantages" of State regulation and order agencies to look for ways to *reduce* regulation at the State and local level. Draft A-4 at 21. These changes fail to account for States' status as coequal sovereigns with the federal government, the substantial experience that States have with regulation (especially in areas of traditional State concern), and the substantial advantages of tailoring regulations to serve the needs and interests of local populations rather than imposing national solutions from Washington.

[3] Exec. Order No. 13,132 (Aug. 4, 1999), *available at* https://www.gpo.gov/fdsys/pkg/FR-1999-08-10/pdf/99-20729.pdf.

Indeed, the current version of Circular A-4 properly recognizes that "[t]he advantages of leaving regulatory issues to State and local authorities can be substantial," including the capacity to reflect differences in public values and preferences by region, the ability of States to serve as "a testing ground for experimentation with alternative regulatory policies," and the reality that States, unlike the federal government, can "learn from another's experience." Current A-4 at 6. Because of these significant advantages, the operative version of Circular A-4 directs agencies to "consider other means of dealing with [an issue] before turning to Federal regulation," including "the possibility of regulation at the State or local level." *Ibid.*

The proposed revisions, however, signal a sharp departure from the decades-long consensus, instead encouraging agencies to displace the role of State regulation. Where the current version of Circular A-4 focused solely on the many advantages to regulation at the State level, the proposed revisions list several purported "disadvantages," such as competition between States leading to "activities conducted in one State [that] impose externalities on the residents of other States" and "a patchwork of State regulations" leading to a "fragmented regulatory system" and higher costs. Draft A-4 at 21. Because of these supposed disadvantages, the draft directs agencies to "consider the possibility of reducing as well as expanding State and local regulation." *Ibid.* Whereas the current version of Circular A-4 *requires* consideration of the possibility of State-level regulation, the proposed revisions would not only make such consideration optional, but also encourage agencies to affirmatively look for opportunities to *reduce* State regulation.

In fact, the proposed revisions appear to relish a less central role for State and local governments in regulation. The draft acknowledges that "[m]ore localized problems, including those that are common to many areas, may be better addressed locally," but it conditions that on whether the federal government believes that State and local governments are "effectively acting to address" the problem. Draft A-4 at 21. Indeed, the draft brazenly asserts that "the fact that State, local, territorial, or Tribal authorities are empowered to address an issue does not mean that they are likely to do so effectively, universally, or at all," concluding that "[i]f State, local, territorial, or Tribal governments are failing to appropriately address a problem, analysis may indicate that Federal action is the best approach." *Ibid*. The proposed revisions appear to be priming the pump for federal agencies to encroach on traditional areas of State concern, under the pretenses that State governments are not "effectively" addressing the issues at hand. All these changes taken together raise serious concerns that this Administration believes it is appropriate to run roughshod over State and local governments where it disagrees about whether certain regulations are "effective." Due regard for federalism and the States' coequal sovereignty should counsel against federal second-guessing of States' decisions on whether, and how, to address a "localized problem[]."

This shift in emphasis away from respect for federalism is borne out in other areas of the proposed revisions. For example, the Draft A-4 no longer requires identifying "the portions of benefits, costs, and transfers received" by State, local, and tribal governments, stating only that agencies "may need" to identify these factors. Compare Current A-4 at 46 ("You *need* to identity the portions of benefits, costs, and transfers received by State, local, and tribal governments." (emphasis added)), with Draft A-4 at 90 ("You *may* need to identify in your analysis the portions of benefits, costs, and transfers received or otherwise experienced by State, local, and Tribal governments." (emphasis added)). Although the proposed revisions recognize that these analyses

are required by some statutory provisions, see Draft A-4 at 90 n.187, the implication is that agencies should feel free to disregard federalism concerns unless Congress has explicitly ordered the agency to consider them. This turns federalism on its head. The federal government should always consider federalism costs and benefits in ensuring that agency action does not violate the coequal sovereignty of the States, and the draft should be revised to make clear that this analysis is mandatory.

Our "federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). Indeed, "both the Federal Government and the States wield sovereign powers." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). This "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991). Among these advantages, federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society"; "allows for more innovation and experimentation in government"; and "makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458. The current version of Circular A-4 appropriately took these advantages into consideration. The proposed revisions would demote States from joint sovereigns to administrative subdivisions of the central government. In that sense, the revisions in Draft A-4 are a betrayal of the Founders' vision.

II. Cost-benefit analysis should not use extraterritorial effects on noncitizens to justify additional regulations on Americans

OMB's decision to decrease the emphasis on federalism and the role and importance of States in effective regulation is not the only shift in the proposed revisions. The proposed draft also reverses the current requirement in Circular A-4 that cost-benefit analyses focus primarily on the effect of regulations on Americans. It replaces that longstanding position with a new emphasis on global perspectives for regulatory issues with effects outside U.S. borders. The draft's revised discussion of the globalist scope of cost-benefit analysis illustrates the federal government's confusion about its role and responsibilities. But the Constitution could not be clearer on the government's fundamental purpose: serving the American people. Regulations promulgated by agencies of the United States government should be concerned primarily with United States citizens and residents, not least of which because they will be the ones footing the bill.

For the last several presidential administrations, Circular A-4 has enshrined the position that the interests of American citizens and residents should be placed front and center in any cost-benefit analysis. Circular A-4 directs agencies in unequivocal terms: "Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States." Current A-4 at 15. It of course also recognized that regulations could have "effects beyond the borders of the United States," but it directed agencies to "report[] separately" those extraterritorial effects. *Ibid.* In short, the current version of Circular A-4 requires focusing on domestic effects; to the extent extraterritorial effects are relevant, they can be evaluated, but such evaluation must be reported separately. The Circular thus properly maintains the focus on the extent to which Americans benefit or are harmed by regulations.

The proposed revisions are a complete volte-face. The draft now allows the "primary analysis" for a regulation to focus on the "global effects of the regulation." Draft A-4 at 10. In those circumstances, it allows—but does not require—a "separate supplementary analysis of the effects experienced by U.S. citizens and residents." *Ibid*. But this separate supplementary analysis setting out the costs and benefits to Americans is not appropriate, according to the proposed revisions, where the agency "determine[s] that such effects cannot be separated in a practical and reasonably accurate manner, or that the separate presentation of such effects would likely be misleading or confusing." *Ibid*. It is unclear what would be misleading or confusing about agencies continuing to follow the standard practice used in Circular A-4 across numerous administrations.

This push toward extraterritorial effects analysis is troubling for at least two reasons. First, many statutes refer only to domestic (as opposed to international) concerns when detailing factors to consider in promulgating rules, see, *e.g.*, *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1209 (5th Cir. 1991) (noting that "[i]nternational concerns are conspicuously absent from" the Toxic Substances and Control Act); 42 U.S.C. § 7401(b)(1) (Clean Air Act identifying its purpose as being "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population"),[4] presumably because Congress has accurately recognized that American law should be concerned with effects on *Americans*. As explained by an expert in one of the many suits by State attorneys general to protect the American people from this Administration's regulatory overreach, "Lumping non-domestic benefits together with domestic benefits when conducting cost-benefit analysis for a regulation that will apply only to domestic entities can result in policies that do not serve the economic interests of the economic community that would bear the cost, or perhaps even their altruistic preferences." Ex. A at ¶ 66.[5] If this Administration insists on regulating Americans based on the benefits to noncitizens living abroad, it should do so explicitly and set out those benefits separately from the costs to Americans. See *ibid.* ("For this reason, the decision of how much weight to give to benefits outside of U.S. borders should be treated as a significant policy decision that should be made completely transparent in the presentation of benefits that are to be compared to policy costs."). Failing to separate the domestic costs and benefits from foreign costs and benefits can lead to estimates amounting to "a strong policy judgment that regulatory requirements directing U.S. spending . . . should be driven far more heavily by potential benefits outside of our country's borders than by potential benefits that are projected to occur inside our country." *Id.* ¶ 75. This would run afoul of Congress's intent in numerous statutes. At minimum, this Administration should be transparent that it intends to impose enormous regulatory burdens on Americans to benefit people outside of our country.

[4] See also 42 U.S.C. § 6295(o)(2)(B)(i) (Energy Policy and Conservation Act directs the Executive "to consider the need for *national* energy and water conservation" (emphasis added)); 42 U.S.C. § 4331(b)(2) (National Environment Policy Act directs agencies to "assure for all *Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings" (emphasis added)); 30 U.S.C. § 187 (Mineral Leasing Act directs the Executive to consider the "public welfare" of the United States in conducting oil and gas lease sales); 43 U.S.C. § 1332(3) (Outer Continental Shelf Lands Act directs the Executive to make the Outer Continental Shelf "available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other *national* needs" (emphasis added)).

[5] Exhibit A is an expert declaration from Anne E. Smith filed in *Louisiana v. Biden*, No. 2:21-cv-01074 (W.D. La.), a case about the Social Cost of Carbon.

Second, OMB's decision to change the emphasis from the effect on Americans to global effects will also likely raise significant legal issues if it tries to use those analyses to justify new regulations. There is a presumption that federal law does not apply extraterritorially. See, *e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016) ("It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." (quotations omitted)). Congress can direct agencies to consider international effects, but when it has declined to do so in a statute, an agency should not assume the authority to do so on its own. Indeed, where statutes speak in terms of the national effects or preclude the consideration of global effects, analyses of extraterritorial effects will also likely result in regulations that are arbitrary and capricious. See *Louisiana v. Biden*, 585 F. Supp. 3d 840, 867 (W.D. La. 2022), *rev'd on other grounds by Louisiana v. Biden*, 64 F.4th 674 (5th Cir. 2023). Further, were an agency to follow the draft's advice to focus on international effects without separately considering domestic effects, those regulations would likely violate the major-questions doctrine. "In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari) (citing *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218 (1994); Stephen A. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986)). Such substantial changes in the regulatory approach would likely significantly broaden the administrative state's reach. When agencies have pushed the boundaries of their authority, the courts have an important role in policing those violations by the federal government. These changes would likely be no different.

III. The proposed use of a substantially lower discount rate raises serious concerns

Yet another change from the current version of Circular A-4 comes in the form of OMB's proposal to substantially lower the discount rate and shift to "shadow pricing" when it comes to analyzing effects on investment. As the Current A-4 explains, "[b]enefits and costs do not always take place in the same time period," and, when they do not, "it is incorrect simply to add all of the expected net benefits or costs without taking account of when the[y] actually occur." Current A-4 at 31. Put simply, "[b]enefits or costs that occur sooner are generally more valuable." *Id.* at 32. To reflect this reality, the current version of Circular A-4 provides that "a discount factor should be used to adjust the estimated benefits and costs for differences in timing": "[t]he further in the future the benefits and costs are expected to occur, the more they should be discounted." *Ibid.* "When, and only when, the estimated benefits and costs have been discounted, they can be added to determine the overall value of net benefits." *Ibid.*

For decades, Circular A-4 has required agencies to choose between one of two discount rates when evaluating the benefits and costs of regulation. For analysis of impacts on individual households, where regulation "primarily and directly affects private consumption," agencies use a 3 percent discount rate; for analysis of impacts on capital investment, to "approximate[] the opportunity cost of capital," agencies use a 7 percent discount rate. Current A-4 at 33–34. These

discount rates were pegged to tangible metrics: the "real rate of return on long-term government debt" and "the average before-tax rate of return to private capital in the U.S. economy," respectively. *Id.* at 33. The proposed revisions eschew the bipartite discount rates, opting instead for (in the vast majority of cases) a single 1.7% discount rate. See Draft A-4 at 75–76. Although the draft notes that it calculated the 1.7% discount rate by using essentially the same methodology as OMB did to calculate the 3% rate in 2003, the revisions are doubly inappropriate: first, OMB fails to recognize that the 1.7% number is driven by the historically low interest rates and extraordinary monetary-policy interventions by the central bank since 2008, and, second, dropping the higher discount rate pegged to the opportunity cost of capital is a clear ploy to push agencies toward that single, artificially-low discount rate. If the Administration is bent on having only a single discount rate, a longer time horizon for calculating the discount rate would be appropriate to accurately capture the discount rate that is likely to exist going forward.

It is clear why this Administration wants a single, lower discount rate: a low discount rate gives greater value to effects that occur in the more distant future, such as putative long-term health or environmental effects. This approach to the discount rate fits with the Administration's general mission to use cost-benefit analysis to justify progressive regulations, especially progressive environmental regulations. For instance, as the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG) admits, the discount rate "has a large influence on the present value of future damages."[6] Indeed, it is widely acknowledged that discount rates play a significant role in cost-benefit analysis. That is especially so when an agency forecasts centuries into the future, as IWG does in climate regulation. The Congressional Research Service discussed the effect such an analysis can have in the context of regulations concerning greenhouse gas emissions:

> The fact that many impacts of climate change will occur in the distant future requires consideration of society's willingness to pay in the near term to reduce emissions that would cause future damages, mostly to future generations. To take time into account, economists discount future values to a calculated "present value." . . . **The choice of discount rate can significantly increase or decrease values of the [social cost of carbon].** A low discount rate would give greater value today to future impacts than would a higher discount rate. High discount rates can reduce the value today of future climate change impacts to a small fraction of their undiscounted values. A high discount rate would recommend applying fewer of today's resources to addressing climate change impacts in the future.[7]

It should come as no surprise, then, that IWG concluded that the use of the 7 percent discount rate to discount the future benefits of reducing greenhouse gas emissions "inappropriately underestimates the impacts of climate change for the purposes of estimating" the social costs of greenhouse gases. Dep't of Energy, Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 88 Fed. Reg. 6,818, 6,866 (Jan. 31, 2023).

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[6] IWG, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990, at 17, *available at* https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[7] CRS, *Attaching a Price to GHG Emissions with a Carbon Tax or Fee* (Mar. 22, 2019), at 7, *available at* https://sgp.fas.org/crs/misc/R45625.pdf (emphasis added).

Here, the proposed revisions attempt to solve the problem that IWG could not: the draft proposes only one, low discount rate, combined with "shadow pricing" to bury the sensitivity of the analysis to the discount rate. The current version of Circular A-4 correctly points out that "shadow pricing"—"handling temporal differences between benefits and costs [by] adjust[ing] all the benefits and costs to reflect their value in equivalent units of consumption and to discount them at the rate consumers and savers would normally use in discounting future consumption benefits"—is "not well established for the United States." Current A-4 at 33. The proposed revisions come to the opposite conclusion: encouraging agencies to use the "shadow pricing" method going forward. See Draft at 78-81. This is improper: policymakers are likely to find it useful to have a more robust analysis of the foreign capital flows that agencies believe will offset any decreased domestic investment, including from where capital might flow, where the investments would occur, and any conditions that other countries have faced in accepting foreign capital.

IV. OMB should clarify what standard—if any—it expects agencies to use in determining the temporal scope of cost-benefit analysis

The revised discussion of the temporal scope is also troubling because it encourages agencies to analyze completely speculative benefits and costs over a purposefully undefined period of time. The draft revisions state that the time frame for agency analysis "should include a period before and after the date of compliance that is long enough to encompass all the important benefits and costs likely to result from the regulation." Draft A-4 at 11. More specifically, the draft directs agencies that they "should not, for example, select an ending point after which the relative size of benefits or costs is likely to change in a way that could change the sign of the estimated net benefits, change the relative ranking of regulatory alternatives, or otherwise have effects relevant to the public or policymakers." *Id.* at 74. This seems to provide little guidance in practice, allowing instead for a malleable standard that can achieve any desired results.

The greenhouse gas emissions regulations are a good example of this results-driven analysis. Depending on the discount rate and the length of the temporal scope of the analysis, the "average social cost of carbon" could be both positive or negative. Because the cost of complying with regulations generally occurs more immediately, this rule appears to bias cost-benefit analyses in favor of regulation by simply directing the agencies to continue projecting the (uncertain) benefits out in time until the benefits finally justify the costs.

OMB must address this imprecision. This Administration has also shown an appetite for trying to analyze the effects of regulations out nearly three hundred years—longer than the republic has even existed. As expert declarations provided by States challenging regulations relying on those forecasts have shown, these analyses suffer from numerous flaws. When it comes to the temporal scope of regulations, one expert compared these projects to efforts in the 1740s to predict today's markets. See Ex. A. at ¶ 64. Such "socioeconomic projections . . . are inherently unreliable because modelers are forced to rely on experience of recent history and present knowledge to predict economic results as much as 280 years in the future." *Ibid*. These choices benefit the Administration in that they bury complex policy choices behind a veneer of scientific exactitude

that cannot withstand even the slightest scrutiny. OMB should substantially revise the draft to clarify the limitations on agencies' abilities to predict regulatory effects centuries in the future.

V. The draft improperly focuses on equity and behavioral bias as grounds for federal regulatory action

Next, the draft proposes new bases for federal regulatory action. Two are especially troubling and merit discussion here; neither fit within the general principles on which regulations are promulgated. See Executive Order 12866 § 1(a) ("Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public 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.").[8]

First, consistent with this Administration's fixation with the amorphous and dangerously underdefined notion of "equity," "advancing equity" now purportedly serves as a standalone reason for federal regulation. See Draft A-4 at 15–16, 19. That focus misunderstands the role of federal agencies. The current version of Circular A-4 recognizes that "Congress establishes some regulatory programs to redistribute resources to select groups." Circular A-4 at 5. "Congress" is the key word in that phrase. The operative version of Circular A-4 properly recognizes that it is *Congress's* role to establish remedial regulatory programs, subject of course to the limitations on such programs imposed by the Constitution. The Executive Branch and its agencies, by contrast, do not enjoy a freestanding power to unbounded and undefined "equity" to micromanage Americans' everyday lives. According to the draft, however, regulations that are geared toward "promoting distributional fairness and advancing equity" "are *sometimes* issued pursuant to statutes that reflect congressional determinations that advancing these goals serves a compelling public need." Draft A-4 at 19. The use of "sometimes" to describe when such regulations are issued supposes that, at other times, the Executive Branch enjoys the power to promote distributional fairness and advance equity irrespective of what Congress has said. The federal government cannot arrogate to itself the power to choose winners and losers on the basis of "equity" and bury that power in a formulaic treatment of cost-benefit analysis.

Second, the draft argues that "addressing behavioral biases" is its own affirmative basis for regulatory action rather than a factor that should be considered when designing regulations. Draft A-4 at 15-16. Yet the draft admits that "accounting for behavioral biases . . . 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." *Id.* at 19. Numerous biases exist, so invoking such biases to revise valuations within a cost-benefit analysis could be used to justify essentially any regulation. That problem is compounded because the draft does not identify any objective way to separate supposed "bias" from the true valuation, nor does it claim that such an objective method of analysis exists.[9] In short, the justification for regulation—that the federal government knows what is good for people better

[8] Exec. Order No. 12,866 (Sept. 30, 1993), *available at* https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

[9] See Revising Regulatory Review: Expert Insights on the Biden Administration's Guidelines for Regulatory Analysis (May 9, 2023), *available at* https://regulatorystudies.columbian.gwu.edu/revising-regulatory-review-expert-insights-biden-administrations-guidelines-regulatory-analysis (comments by Prof. Howard Beales).

than they do—is deeply paternalistic and should be deeply suspect as a legitimate ground for government intervention. Given these shortcomings, the draft should be revised to make clear that behavioral biases are not themselves a basis for federal intervention without congressional authorization.

VI. The proposed revisions are the product of prejudgment

Since President Biden's first day in office, his agenda has been clear: unlawfully expanding federal regulation. On Inauguration Day in 2021, President Biden signed an executive order that revoked what he called "harmful policies and directives that threaten to frustrate the Federal Government's ability . . . to use appropriate regulatory tools" and implemented actions to "equip[]" executive departments and agencies "with the flexibility to use robust regulatory action to address national priorities."[10] That same day, he also issued a memorandum entitled "Modernizing Regulatory Review" in which he directed Circular A-4 to be revised to ensure that the regulatory review process "does not have harmful anti-regulatory or deregulatory effects."[11] These revisions to Circular A-4 are the culmination of the multi-year effort to rid the federal government of a supposed "anti-regulatory" bias.

But regulatory action that is the product of prejudgment is unlawful under the APA and the Due Process Clause of the United States Constitution. See *Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015); U.S. Const. amend. V. The APA "is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). Interested parties must be presented with an opportunity to "influence the rule making process in a meaningful way." *Ibid.* If OMB's revisions to Circular A-4 were set in stone as of the first day of the Biden Administration, that would be a serious issue under the APA.

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The current version of Circular A-4 aptly states: "A good analysis is transparent. It should be possible for a qualified third party reading the report to see clearly how you arrived at your estimates and conclusions. For transparency's sake, you should state in your report what assumptions were used, such as the time horizon for the analysis and 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." Current A-4 at 3. The proposed revisions would throw all that transparency out the window, opting instead for disregarding the importance of the States in our constitutional system, conflating domestic effects and extraterritorial effects of regulation, muddying the discount rates and time horizons used in cost-benefit analyses, and justifying it all based on a preference for distributional "equity" untethered from the commands of Congress. In

[10] Exec. Order No. 13,992 (Jan. 20, 2021), *available at* https://www.federalregister.gov/documents/2021/01/25/2021-01767/revocation-of-certain-executive-orders-concerning-federal-regulation.

[11] White House, *Modernizing Regulatory Review* (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/.

an age of overregulation, we need fewer and smarter regulations, not more and worse. The proposed revisions to Circular A-4 should be either rescinded or substantially revised.

Thank you for your consideration of these concerns. We appreciate the opportunity to comment on your proposed revisions to Circular A-4.

Sincerely,

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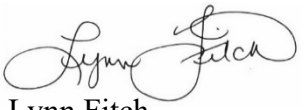

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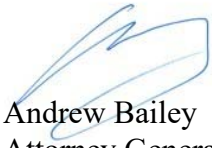

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Dave Yost
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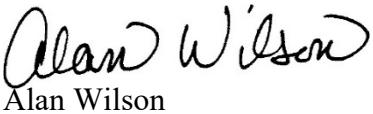

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