

June 8, 2002

Dr. John Graham,
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235, 725 17th Street, NW.,
Washington, DC 20503

Dear Dr. Graham,

Thank you for the opportunity to serve as a peer reviewer of OIRA's Draft Report to Congress on the Costs and Benefits of Federal Regulation. In order to provide full disclosure of any potential biases or conflicts of interest, I have provided a statement of my activities in Appendix A. I have written articles critical of agency regulations in the past, but I do not believe that this academic work or my other activities compromise my ability to serve as a rigorous external reviewer of OIRA's Report.

OIRA's Report contains a wide range of intriguing facts and figures on both the domestic and international trends in regulation. The Report reflects a great deal of creativity, energy, and an eagerness to investigate a broad range of options and methods of regulatory analysis. These qualities are important and provide helpful information to Congress, stakeholders, and other readers. For these accomplishments, all too often missing in agency activities, OIRA is to be congratulated.

In spite of its breadth and imagination, however, the technical analyses and quantitative aggregations in the draft Report are generally of poor quality and in my view do not meet the standards for publication in the peer reviewed journals with which I am familiar. Since OIRA is clearly capable of producing work of higher quality, it is possible that the agency has decided, perhaps wisely, to devote minimal resources to the congressionally required Annual Report. As a peer reviewer, however, I assume that Congress intended the Report to be of high quality (else why require peer review) and expects from OIRA a Report that provides a clear, accessible, and probing account of agency regulations in the United States. OIRA's draft Report, in my view, currently disappoints this congressional demand in ways that are repairable and, once corrected would dramatically improve the report's usefulness.

The areas in which the Draft Report could be improved fall into four general categories detailed below.

I. Accuracy

Several of the critical cost/benefit tables in the Report are inaccurate or incomplete in significant and misleading ways. Since these tables are of particular interest to Congress, these cumulative errors seem important and warrant revisions in the final report.

- a. *Tables 5, 6, and 11 purport to aggregate all regulations issued over a specified time period, when in truth these tables aggregate only a portion, possibly less than 50%, of the regulations considered significant. Many rules are not included in OIRA's monetized tables because the agencies were unable to quantify any of the costs or benefits (see b below). OIRA should revise and expand the titles and captions on these tables to clarify these substantial limitations to the aggregated figures. At the bottom of Table 11, in small font, OIRA does provide a "note" that acknowledges that the regulations summarized in that table are only those for which quantification was possible, but this note should be incorporated into the caption and still does not give the reader a sense of the significance of the number of rules summarized relative to the larger rulemaking universe.*
- b. *Tables 5, 6, and 14 misleadingly assigns total dollar figures to the benefits and costs of rules when in some rulemakings the agency explicitly indicated that it was only able to quantify some of the benefits and costs. Because OIRA lists only those costs and benefits that agencies were able to quantify, the aggregations are incomplete and the numbers are misleading. Somewhat similarly, in Table 13, OIRA lists the benefits of paperwork requirements as 0 even though it states that "[a]t present, it is not feasible to estimate the value of annual societal benefits of the information the government collects from the public." Report at 15038, col. 2. This means that benefits are "unquantified," not 0. Since Congress directed OIRA to provide an accounting of quantitative and qualitative costs and benefits in section 624 of the Treasury and General Government Appropriations Act, 2001, OIRA may not have the option of ignoring these nonquantified, yet potentially significant costs and benefits in its accounting statements. The only qualitative listing of costs and benefits is provided in Table 7. Unfortunately, in Table 7 the qualitative costs and benefits usually do not fall under the columns headed "costs" or "benefits" but under the "other information" column. OIRA should either list the nonquantified costs and benefits for the rules it aggregates under the appropriate headings or note the percentage of rules that include these added qualified costs or benefits. OIRA should also provide notations on Tables 5, 6, and 14 to indicate that the monetized figures are only a portion of the total costs and benefits for those rulemakings.*
- c. *Standard methods for both economic analysis and risk assessment condemn the use of point estimates. OIRA either repeats the agencies' mistakes or exacerbates them with its use of point estimates in Tables 5 and 6 and accompanying narrative discussions. This failure to provide upper and lower*

bounds on each estimate makes the resulting information inaccurate. OIRA should discourage this practice.

- d. *OIRA completely neglects the important goal of equitable distribution of risks in the regulatory programs it analyzes, especially the targeting of risks that fall disproportionately on sensitive groups or groups in highly polluted areas.* Without attention to the distribution of regulatory benefits (as well as burdens), OIRA's effort to provide a "Regulatory Right-to-Know" report seems to miss much of what many of the regulatory programs are about. This seems particularly worrisome in light of the Executive Order 12898 on environmental justice and Executive Order 13045 on risks to children, both of which seem to apply to OMB. OIRA should at least acknowledge the equitable goals of many regulatory programs and discuss how these goals relate to its cost-benefit approach to regulatory analysis.
- e. *In Section 624(a)(2), Congress directs the agency to consider the "impacts" (not costs) of its regulation on small businesses, state, local, and tribal governments. In its discussion of some of the most significant rules that impact these groups, however, OIRA considers only the costs of regulation.* In its summary of both the EPA's Guidelines for MSW Landfills and the EPA's NPDES Rules for Revision of Storm Water Discharge requirements discussed in Appendix C, OIRA considers only the costs and not the benefits that flow to local governments from these rulemakings.¹ Report at 15039. This assessment therefore appears incomplete under OIRA's mandate and inconsistent with other sections. In its discussion of the impacts of regulations on wages, for example, OIRA provides a helpful discussion of why calculating the impacts of regulations on wages, especially at the aggregate level, is technically impracticable and ultimately misleading since it might neglect the benefits. A similar explanation might be appropriate for OIRA's analysis of impacts on small businesses, state, local, and tribal governments.

II. Reproducibility of Analysis

In its accounting of the costs and benefits of regulation, OIRA does not provide readers with the needed citations to the original data, description of their methods, or provide the steps for reproducing their tables. As a result, OIRA's accountings cannot be reproduced or validated. Since the primary congressional goal for the Report appears to be enhancing transparency and the quality of regulatory oversight, OIRA's failures of explanation and citation impair the value of the report. These failures also deviate from the standard practice for economic and regulatory analysis, which requires researchers to explain their methods to ensure reproducibility of their results.

¹ For a third rule, EPA's MWC Guidelines, OIRA's identifies benefits solely in terms of metric measurements of emission reductions for specific pollutants. This characterization of benefits is not easily translated into health benefits by congressional and public readers. Report at 15039, col. 1. This discussion should also be revised to provide a more accessible characterization of benefits.

a. *OIRA provides a number of tables (5, 6, 11, 14) that provide the costs and benefits in aggregated form, but OIRA often fails to provide the sources of the data or the methods of aggregation in the body of the report, in an appendix, or even in footnotes.* OIRA provides some assistance in Appendix D, but not enough to make the estimates reproducible. Specific concerns are detailed below.

- (i) *Valuation of nonmonetized costs and benefits:* OIRA states that it uses monetary values for reducing risks “supported by the relevant academic literature.” Report at 15041, col. 2. The discussion that follows with headings such as “injury” “change in fuel consumption”, etc. provide some elaboration, but do these categories make up the complete universe of benefits and costs that OIRA was forced to monetize? Even if they do, many of OIRA’s explanations are difficult to understand or review. For example, the discussion on valuing “injury” is too technical and difficult to follow; it isn’t clear how a 1996 study constitutes a “recent” estimate for the monetized extent of damage from oil spills; and it isn’t clear why the benefits of air pollution reductions can be valued by the ton, since that seems to assume additive synergies and a linear relationship to harm, while neglecting ecosystem harm. OIRA’s cautionary statement concerning monetizing the benefits of air pollution reductions at page 15042, col. 1 of the Report -- “The extent of these problems and the degree of uncertainty depends on the divergence between the policy situation being studied and the basic scenario providing the benefits transfer estimate” -- is too cryptic to provide the necessary disclaimers. OIRA should clarify these discussions of monetary valuations.
- (ii) *Annualizing costs and benefits:* OIRA annualizes a number of the agency costs and benefits over a period of years in Table 14, and by reference in Tables 5 and 6. Shouldn’t OIRA provide its discount rate and any other relevant calculations or methods? It would seem that more explanation is needed than currently provided in the Draft Report at page 15041, col. 1 and 15042, cols. 2 and 3.
- (iii) *Miscellaneous:* (1) OIRA should correct the mistakes in describing the origins of Table 11 (there is no Table 1 in Chapter 11). Report at 15037, at col. 3. (2) For some aggregated figures (e.g., “efficiency costs of economic regulation of \$80 billion” with zero benefit (Report at 15037, col. 2) OIRA should cite specifically to the “previous reports” upon which these figures are based. (3) The data and calculations for Table 12 are apparently detailed in another OIRA report entitled “Information Collection Budgets.”

OIRA should provide a web link or citation and indicate whether it provides explanations for these figures. (4) Finally, in several places where OIRA actively solicits comments on its proposals and documents, it doesn't provide titles or citations to the documents upon which it seeks comments.²

- b. *OIRA often discloses activities, and occasionally invites comments, without explaining the underlying criteria or documents upon which OIRA is acting.* Yet without explaining how OIRA is proceeding, it is difficult if not impossible for Congress or onlookers to assess the quality or wisdom of OIRA's activities, much less to offer meaningful comments. For example, OIRA does not explain the criteria it uses for sending return letters. Report at 15018-19. OIRA does not explain the criteria it uses for deciding when to send prompt letters. Id. at 15020. And OIRA does not explain the criteria it uses for categorizing certain existing rules as high priority for review. Report at 15022. Even though OIRA provides "preliminary information" about the 23 high priority nominations for the review of existing rules in Appendix B, this information does not explain: a) the nature of OIRA's and commentors' problems with the rules; b) why agencies did or did not act on the nominations; and c) whether the agency actions that were taken were in accordance with or the result of OIRA's recommendation. OIRA cannot dedicate the time and space to answering all of these questions, but without addressing some of these questions, or citing to documents that shed light on them, the information OIRA does provide at page 15037 is essentially meaningless for most readers.

111. Balanced and Complete Explanations of Activities and Methods

OIRA has embarked on some creative programs and approaches, but sometimes OIRA presents these innovations as exclusively positive and fails to acknowledge (or invite) criticism on legal or analytic vulnerabilities. The Report therefore lacks balanced treatment of the literature on some issues. In the Final Report, OIRA should shore up these incomplete discussions.

a. OIRA's Methodological Decisions

- (i) *Monetization:* Central to the Report is OIRA's implicit decision to monetize costs and benefits, a decision that does not appear to be the only or arguably

² For example, OIRA solicits "suggestions of analytical issues needing refinement . . . to improve OIRA's analytic guidance document" but does not provide the title, cite, or method of accessing this document. Report at 15015, col. 1. OIRA dedicates considerable space to describing its method of reviewing agency regulations, Report at 15019, cols. 1 and 2, but does not consistently provide readers with the needed citations and links. For example, OIRA states that it recommends that agencies adopt the basic informational quality and dissemination standards that Congress adopted in the Safe Drinking Water Act, but it provides no indication of what this entails.

the best approach for accounting for the costs and benefits of regulation. Neither Congress' mandate in section 624(a)(1); Executive Order 12866; nor the academic literature require or even recommend monetization. A strong case can be made, moreover, that monetization reduces the accessibility and transparency of the costs and benefits rather than improves them because of the varied and controversial assumptions that accompany the methods of monetization.³ Table 7 does provide some nonmonetized costs and benefits for two rules -- the DOL "Safety Standards for Steel Erection" and DOT "Advanced Airbags" rules -- at pages 15026-27. OIRA should consider a table comprised of exclusively these nonmonetized (including qualitative lists) to compare with the monetized aggregations, or should at least explain why it refrains from providing the costs and benefits in a nonmonetized form regardless of individual agency practices.⁴

- (ii) *Methodology for Monetization:* OIRA solicits comments on "particular analytic issues" relevant to its monetization methodologies. Report at 15021, cols 2 and 3. Since OIRA's preferred approach on each of these issues is likely to be quite controversial, OIRA should provide some context for unfamiliar readers so these readers can appreciate their significance and assess the availability of alternative approaches. As a more practical matter, at id., OIRA should also clarify what its "process" of refinement is, the types of "additional analytical issues" that might be up for grabs (or at least citations to the guidances being reformed); whether there will be additional opportunities to participate in this exercise; and its relevance to the Cost-Benefit Report directed by Congress.

b) OIRA projects

- (i) *Legal Authority.* Historically, there have been concerns about the extent to which OMB acts outside the bounds of its authority. See, e.g., Robert V. Percival, *Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget*, 17 *Env'tl. L. Rep. (ELI)* 10017 (1987). Since Congress has also shown concern in recent years about rogue agencies acting without legal authority, OIRA should be careful to provide Congress and interested readers with a basis for its legal authority. This is occasionally missing in the Report, but can be corrected simply by adding citations. (1) In its discussion of its authority to review existing regulations, OIRA should cite to the "unique statutory authority" that makes this activity possible. Report at 15022, col. 2. (2) It is not clear where OIRA's authority to conduct "prompt" letters comes from, and OIRA seems to acknowledge this at page 15020, col. 2 of the Report, concluding that the authority is not important because the

³ OIRA does cite to one of its previous discussions of these difficulties in a footnote, Report at 15023 n. 10, but again doesn't explain why it proceeds with monetization in the face of these uncertainties.

⁴ As mentioned earlier in this letter, though, OIRA should not endorse the use of point estimates in quantifying risks since it does not constitute good statistical practices.

letters do not mandate action. Since these prompt letters seem capable of having a significant impact on the agencies, however, OIRA might need to be more candid about its need for formal legal authorization if OIRA continues to dedicate its resources in this fashion. (3) In the final Report, OIRA describes its role as a “collaborator” with OSTP and how it provides assistance to USTR and the State Department. OIRA should provide at least a brief explanation of its authority for these undertakings, as well as what it views to be the limits of its authority for these and other reform activities.

(ii) *Cost-Benefit of OIRA Projects.* OIRA, in order to exemplify quality regulatory analysis, should also be more circumspect about the pros and cons of its own activities. It never alludes to the need for cost benefit accountings on its own initiatives, including its sweeping guidelines on data quality or efforts to guide agencies in regulatory analysis.⁵ More specific suggestions are detailed below.

(a) *Prompt Letters and Review of Existing Regulations:* While the prompt letters and review of existing regulations are a fresh, innovative approach, it is not clear that they are also a good idea. Soliciting nominations for regulatory changes, for example, are likely to be skewed since only those with considerable resources and expertise can, as a practical matter, participate effectively in this technical effort. OIRA recognizes this implicitly by acknowledging that it “will be taking several aggressive steps to broaden participation by [public interest] advocacy groups in coming years.” Report at 15022, col. 3. But OIRA should discuss in more concrete terms the possibility and ramifications of a skewed process for nominating existing rules for review and suggesting prompt letters since it has adverse ramifications for OIRA’s current initiatives, as well as for the guidance reform that OIRA has initiated. It is also not clear whether OIRA is in the best position, even with the assistance of new staff and paid public advocates, to identify the best reform projects for individual agencies. A more collaborative approach, for example, would start with the

⁵ For example, in the regulatory response to the terrorist attacks of 9/11, OIRA never mentions the costs, benefits, effectiveness, or intrusiveness of the 41 regulations, nor does it invite comments on the prudence of these and other possible regulations. Report at 15015-17. This seems inconsistent with the purpose and tenor of the remaining Report. OIRA may thus want to consider relegating this descriptive account of regulatory developments to an appendix. It is also not clear from the Report (or elsewhere) why the “affected public” needs a “new opportunity” for “challeng[ing] agencies when poor quality information is disseminated.” Report at 15014, col. 3, item no. 4. Is there evidence that there is a widespread occurrence of the dissemination of poor quality information by the agencies and are aggressive mechanisms for filing complaints and seeking appeals against the agencies the best solution among alternatives? It isn’t clear from this report that OIRA considered these questions in determining how aggressively to implement the Data Quality Act requirements. See also Report at 15021, cols. 1 and 2.

individual agency’s own assessment of which regulatory programs are capable of improvement. OIRA’s approach seems to assume that the agencies will resist efforts at reform and that the embarrassment of outside letters are needed to prod agencies into action. Perhaps OIRA is correct on this, but it should be even more candid in the Report about its assumptions and the dangers associated with its approach.

- (b) *Problematic Guidances*: Similar concerns arise with regard to OIRA’s reform proposal to review problematic agency guidances. Guidances can be misused, but in instances where agencies are not required to promulgate regulations, the alternative may be no explicit policy upon which parties can rely. In order to provide meaningful feedback on this proposed reform, both Congress and commentators should have a much clearer picture of what OIRA considers a “good” guidance and a “problematic” guidance.⁶ OIRA’s paragraph discussing examples of problematic guidances, Report at 15034,5, col. 1, is far too general and could easily include all guidance documents. OIRA should also be more candid about the difficulties associated with reviewing these guidances, since they apparently involve second-guessing an agency’s “competing demands”; “available resources”, and so forth. *Id.* at cols. 2 and 3. It is also unclear why OIRA bypasses the possibility of imposing added process requirements on guidance documents and instead seems to recommend that all “problematic” guidance documents be converted into informal rulemakings.
- (c) *Peer Review*: OIRA advocates enhanced peer review of agency analyses, including its own analyses. Report at 15019, col. 2. For such a seemingly major proposal, OIRA’s explanation and analysis of the costs and benefits for this initiative are essentially nonexistent. Nowhere in OIRA’s Report is there a suggestion of a significant problem with agency technical analysis, although there are repeated references to reforms of this undocumented problem. Even if there is a problem, OIRA does not discuss whether peer review is the most cost-effective way to **fix** it given the resources and time that this added

⁶ At the very least, OIRA needs to condense the literature cited in n.22 at 15034 to provide a clearer picture of what a “problematic” guidance is and how it differs from those guidances it concedes are productive and cost-effective only one paragraph earlier.

⁷ One could argue, for example, that the public and affected parties can comment, and indeed do so regularly, on guidance documents; guidances permit flexibility as implementation reveals unintended consequences and other surprises; and it is unclear why “significant” guidances cannot be submitted for interagency review. Moreover, the case for peer review, as noted above, still needs to be made, especially on a cost-benefit basis.

layer of review would add.⁸ Finally, given its suggestion that this peer review initiative is nearing the final stages of implementation, there should be well-defined processes for selecting peer reviewers and ensuring their objectivity.⁹ Without these and other protections, peer review could be transformed from a method of improving the quality of agency technical analysis to an illicit method of shifting power to unaccountable “experts” under the guise of science.

- (d) *Unfunded Mandates Consultation*: OIRA suggests that for the consultation process under the Unfunded Mandates Reform Act “clearly more still needs to be done to ensure that this consulting takes place in all instances where it is needed.” The Report in the prior two paragraphs does not provide readers with any sense that there is in fact a problem, however. OIRA might want to point readers to prior reports or at least suggest where the problems lie. Report at 15039, col.3.
- (e) *Disclosure*: OIRA has implemented a number of laudable improvements in the transparency of its communications, which are detailed in the Report at 15017-18, col 3 and col 1. It is not clear whether telephone calls are logged in. It is also not clear whether “letters” include telefaxed documents. If OIRA’s reforms include these communications, they should be listed.

IV. Coherence and Meaningful Opportunities to Comment

The Report covers a broad range of issues and would benefit from tighter organization to enhance the accessibility of the information. In its current form, some Congressmen might be confused about why the main requirement – an accounting of the costs, benefits, and impacts of agency regulations – are relegated in large part to an appendix, while much of the Report is dedicated to OIRA’s policies, the 911 regulations, regulatory developments in developed countries, and a number of innovations only a few of which OIRA identifies as section 624(a)(3) recommendations for reform. Information is a good thing, but there are costs to processing information, and the costs of processing the Report in its current reform are high.¹⁰ Perhaps the 911 regulations, the OECD

⁸ It also seems unrealistic to tout the NAS’ unprecedented involvement in the arsenic drinking water standard as a “good illustration” of the kind of peer review agencies can realistically acquire or expect. Report at 15019, col. 2.

⁹ The closest reference to standards for peer review seems to be a “September 20, 2001, memorandum to the President’s Management Council.” Report at 15023, col. 1. This is likely on OIRA’s web site, but readers should be provided with a link.

¹⁰ OIRA seems implicitly to discount this facet of making government more accessible. For example, in the Report at 15018, col. 2, OIRA suggests that it hopes that its openness will transform debates over process into debates over substance. Unfortunately, openness is only one of the ingredients: making issues accessible and clear is also necessary to this transformation.

developments, and other issues which are interesting but peripheral to OIRA's mandate should be relegated to appendices, while the cost benefit and impact discussions should take front and center stage.

The breadth of the Report might also impair the quality of public input, especially on the substance of the report. Commentors are invited not only to comment on the accounting of costs and benefits in the Report, but to provide nominations for review of existing rules, Report at 15022, col. 3; recommendations for prompt letters, id. at 15020, col 3; input on precedent-setting analytical decisions regarding cost-benefit methodology, id. at 15021, col 1; comments on agency compliance with the Unfunded Mandates Reform, id. at 15023, cols. 1 and 2; and agency practice regarding guidance documents, id. at 15035, cols. 2 and 3. It isn't clear whether some of these solicitations for comment are the only opportunity for public comment. (Hopefully, for example, OIRA's solicitation of comments on its analytical refinements, id. at 15021, will not be the only opportunity for public input). This is a lot to expect from commentors, and also from the OMB staff in processing this information while still producing a quality Cost-Benefit Report to Congress. In the future OIRA might consider reducing the scope of the Report and the issues upon which the public is invited to comment.

I hope this review of OIRA's Draft Report has been useful. If you have any questions about the review, please do not hesitate to contact me.

Best regards,

Wendy E. Wagner
Joe A. Worsham Centennial Professor
(512) 232-1477

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APPENDIX A: Disclosures Relevant to Peer Review for Wendy E. Wagner

Funding: I have not received grants, wages, or other financial benefits (other than reimbursement for travel to conferences or meetings) from any interest groups or industries over at least the last decade. I recently received a research grant from the Texas Natural Resource Conservation Commission (the equivalent of the State Environmental Protection Agency) to conduct a study on the legal authorities available to control air toxins.

Affiliations: I am an officer or board or committee member of the following professional and academic organizations: American Bar Association, Section of Administrative and Regulatory Law; Center for Progressive Regulation; Columbia Center for Science, Policy, and Outcomes; National Conference of Lawyers and Scientists (a joint committee of the AAAS and ABA); and Society for Risk Analysis.

Employment: My sole employment over the past ten years has been as an academic at the following schools (either as a permanent or visiting faculty member): Case Western Reserve University School of Law and School of Management; Columbia University School of Law; University of Texas School of Law; and Vanderbilt University School of Law.

Research Projects: My faculty page and resume are posted on the University of Texas School of Law website at <http://www.utexas.edu/law/faculty/wagner/> My resume contains a list of all of my publications, presentations, and activities.

Involvement in OIRA's ~~Draft~~ Cost-Benefit Report: I have had no involvement in the preparation of OIRA's Draft Report. Prior to the invitation to serve as a peer reviewer, I compiled articles to send to OIRA that provide sophisticated critiques of cost-benefit analysis, regulatory reform, risk assessment, environmental justice, and information production by the private sector. In a one and one-half page cover letter that I co-authored with a colleague from the University of Indiana-Bloomington School of Law, John Applegate, we suggest that OIRA should consider some of these critiques and analyses and update its discussions and approaches in the Report accordingly. We sent the letter and accompanying twenty-five articles during the public comment process several weeks after I agreed to serve as a peer reviewer (thus OIRA was not aware of the contents of the comment letter). I do not believe that this general comment letter compromises my ability to serve as a reviewer of the OMB Draft Report: the letter reflects my research on the methods of regulatory analysis and was not motivated by the prospect of financial or personal gain.