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**TESTIMONY OF
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ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS
OF THE COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
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Mr. Chairman and Members of the Committee, I appreciate the opportunity to testify on OMB's latest draft report on the benefits and costs of Federal regulation. I am Dr. Richard Belzer, President of Regulatory Checkbook, a nonpartisan and nonprofit organization whose mission is advancing the use of high-quality, policy-neutral science and economics to inform regulatory decision making. I have over 15 years' experience performing and reviewing regulatory analyses, including a ten-year stint as a career economist in OMB's Office of Information and Regulatory Affairs.

I will briefly summarize now the three points made in greater depth in my written testimony.

First, estimates of costs and benefits contained in OMB's draft report are unreliable and probably misleading.

- Estimates reported for individual regulations are unreliable because the agencies that prepared them had incentives to underestimate costs and overestimate benefits. The draft report consists of agency estimates, not those of OMB.
- Estimates of the total benefits and costs of Federal regulation have little or no informational value. Aggregation only magnifies the biases embedded in agency estimates for individual regulations. The more regulations OMB includes, the more unreliable and misleading the totals become.
- Congress should create incentives for higher quality estimates to be produced and reported. Substantial progress must first be made to improve the reliability of estimates for individual rules. Only then will it be possible to derive useful estimates of the total benefits and costs regulatory programs.

Second, I see no evidence of a trend indicating that the quality of regulatory analysis is improving.

- Although the methods of benefit-cost analysis continue to improve, its fundamental principles do not change. The most troubling problem with agency analyses isn't that they don't follow "best practices." Rather, it is that agencies too often do not abide by these fundamental principles.
- OMB's 2003 regulatory impact analysis guidance differs little from previous editions issued in 1990, 1996 and 2000. Agencies generally did not adhere to the principles set forth in these earlier guidance documents, and it is safe to predict that they also will fail to adhere to the principles set forth in OMB's 2003 edition.
- OMB's draft report contains language that excuses a low standard of agency performance. OMB should not make excuses for substandard agency performance by mischaracterizing fundamental principles as best practices.

Third, if Congress wants regulatory analysis to be performed well, then it needs to help create an environment in which that can happen.

- Each agency has a monopoly over the production of regulatory analysis and controls the benefit and cost estimates reported to Congress. As in every other market, the key to improving quality is competition. Quality will not improve without it. The public comment process alone is not sufficient.
- Congress can help "make the market" for high-quality analysis by breaking up these monopolies and injecting competition. Most of the country's competent regulatory analysts work outside the government. They rarely contribute much because there is barely a market for their services. Create a market for high-quality analysis, and supply will respond to meet this demand.
- Give OMB the *authority*, and not just the *responsibility*, for providing Congress with reliable estimates of the benefits and costs of regulation. The Regulatory Right-to-Know Act doesn't give OMB any statutory authority to determine which estimates are most reliable. With a competitive supply of analyses and this authority, OMB would have all the tools it needs to make future reports for Congress and the public.

OMB professionals are well-equipped to do this. One can imagine OMB using what's called "final-offer arbitration" to choose amongst competing estimates. This procedure is

best known as the one used by Major League Baseball to decide whether the player's or the team's estimate of market value is most reasonable. For those who distrust OMB, final-offer arbitration has the advantage of denying OMB any authority to come up with its own estimates.

To sum up, OMB's draft report relies on agency analyses, and agency analyses are generally unreliable. Adding up dozens of individually unreliable estimates does not yield reliable estimates of the total impact of Federal regulation. Fundamental change is needed to improve this situation. Congress can foster competition and break up agency monopolies in the production of regulatory analysis. Second, Congress can really make OMB responsible by giving it the statutory authority to choose the best among competitors.

Thank you very much for the opportunity to testify today on this important subject. I would be happy to answer any questions you might have.



1. Estimates of Costs and Benefits In OMB's Draft Report Are Biased, Unreliable and Misleading

As it has said in every preceding report to Congress, OMB states at least a dozen times that the benefit and cost estimates contained therein belong to the agencies themselves, and not to OMB.¹ For independent agencies exempt from review under Executive order 12866, OMB obtained cost and benefit estimates from the General Accounting Office, which itself simply reported what these agencies provided.²

¹ See, e.g., "OMB used agency estimates where available" (p. 3); "OMB has not made any changes to monetized agency estimates other than converting them to annual equivalents" (p. 6); Table 4 title: "Summary of Agency Estimates for Final Rules" (pp. 10-19); Table 9 title: "Agency Estimates of Benefits and Costs of Major Rules" (pp. 41-49); "The adoption of a uniform format for annualizing agency estimates allows, at least for purposes of illustration, the aggregation of benefit and cost estimates across rules" (p. 32). Emphasis added in all cases. Note that OMB says its uniform format permits aggregation "at least for purposes of illustration" only.

² See, e.g.: "[OMB] also include[s] in this chapter a discussion of major rules issued by independent regulatory agencies, although OMB does not review these rules under Executive Order 12866. This discussion is based on data provided by these agencies to the

Former OIRA Administrator and OMB Director Dr. James Miller testified to this Subcommittee last year that “the major problem lies...in the unwillingness of the agencies to comply fully with OMB’s request for relevant information.”³ He noted that the problem was rooted in perverse incentives:

[N]ot all agencies have bothered to estimate benefits and costs of their proposed regulations, and those that do have not provided consistent estimates for their various activities... [M]ost of the deficiency arises from a lack of enthusiasm agencies have for meeting such requirements.⁴

As Dr. Miller explained, “the agencies have a bias to show high benefits and low costs of their work.” While it is true that opponents of regulation have incentives to overstate costs and understate benefits, “the final determinations are made by the agencies, [so] the agency bias tends to dominate—that is, to inflate estimates of benefits and deflate estimates of costs”.⁵

At only a few places in the draft report does OMB say that it doesn’t endorse these agency estimates. For example, on page 37 OMB states that it “has not made any changes to agency monetized estimates,” and that differences in agency estimation methods “remain embedded in the tables”. On page 38 OMB washes its organizational hands of the entire endeavor, saying that it has “relied in many instances on agency practices” so “citation of, or reliance on, agency data in this report should not be taken as an OMB endorsement.”⁶

General Accounting Office (GAO) under the Congressional Review Act” (p. 2, emphasis added).

³ “Statement of James C. Miller III Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform, U.S. House of Representatives, March 11, 2003,” p. 1.

⁴ Miller (2003), p. 2.

⁵ Miller (2003), pp. 2-3.

⁶ OMB needs to do more to deter readers from “citing” or “relying” on these data as representing OMB’s own views, which seems certain to happen. Given its lack of statutory authority to overrule agencies’ cost and benefit determinations, OMB’s only choice under its own information quality guidelines is to invoke the exception to the definition of “information” in Section V.5. This exception excludes material where the “presentation makes it clear that what is being offered is someone’s opinion [in this case, the opinions of

VAST AREAS OF FEDERAL REGULATION ARE MISSING

The coverage of the OMB report is limited in fundamental ways distinct from methodological constraints.⁷ The two most important of these reflect the limited scope of OMB's regulatory oversight. First, huge areas of formal regulation are missing from the report, such as regulations issued by independent commissions exempt from OMB review such as the Federal Communications Commission (FCC), the Securities Exchange Commission (SEC), the Federal Trade Commission (FTC), and several others.⁸ Also missing is the regulatory effect of regulation by litigation, whether through anti-trust (*e.g.*, *U.S. v. Microsoft*) or the application of novel regulatory interpretations of existing environmental rules (*e.g.*, "New Source Review").

federal agencies] rather than fact or the agency's [that is, OMB's] views." See *67 Fed. Reg.* 8460. A clear statement should be added at the outset, and repeated in the Executive Summary and as footnotes to every table, stating that the estimates in the report reflect the opinions of the agencies and not those of OMB.

⁷ The most obvious areas where methodological constraints apply involve homeland security and environmental and occupational health risk. Measuring the social benefits of efforts to deter terrorism is inherently difficult. In environmental and occupational health, estimates of risk are used as inputs into the value of risk reduction. The methods used to estimate these risks are purposefully biased in ways that exaggerate the scope and magnitude of baseline risk and the social benefits of regulatory intervention to reduce them.

⁸ For a number of years telecom regulation by the FCC may have been the hottest area of federal regulation measured in terms of the number of lobbyists and analysts making a living from it. OMB's report discloses nothing significant about telecom regulation. The SEC has promulgated major regulations regarding corporate governance in securities and accounting. OMB's report discloses no costs or benefits from these regulations. By next year the SEC is expected to have issued major new regulations concerning mutual funds. Next year's report to Congress is likely to include no estimates of costs and benefits for these actions. The FTC's "Do Not Call List" regulation may be one of the most popular in American history, but estimates of its costs and benefits are limited.

Second, there is a massive body of underground regulation that occurs through what OMB has called “problematic” guidance.⁹ These actions are not vetted by OMB nor are they generally subject to the due process requirements of the Administrative Procedure Act. The costs and benefits of problematic guidance are rarely, if ever, estimated. If an agency issues a nominally non-regulatory and draft opinion, such as a draft risk assessment for a chemical, the document often will lead to substantial real-world impacts that are neither estimated nor accounted for, and they will be missing from OMB’s annual accounting statement.

Replacing problematic guidance with regulation does not necessarily remedy the regulatory accounting problem. For example, if an agency replaces guidance with a rule, impacts will appear minor if the agency uses as its analytic baseline the state of the world *after* substantial compliance with the guidance has occurred. The analytically correct baseline is the state of the world prior to the guidance, but little or no information may be available that sheds light on these effects.

OMB has authority under Executive order 12866 to review these actions. All *regulatory actions* are potentially subject to OMB review, where that term of art means “any substantive action ... that promulgates or is expected to lead to the promulgation of a final rule or regulation.”¹⁰ OMB exercises this authority very rarely, however.

WHY AGGREGATION OF COST AND BENEFIT ESTIMATES MAKES THE REPORT WORSE

If errors were random, estimates of aggregate costs and benefits might be highly imprecise but they would be unbiased. However, there is both persuasive theory and consistent evidence that agency cost estimates are biased downward and agency benefit estimates are biased upward. When OMB aggregates dozens of downwardly biased cost estimates and upwardly biased benefit estimates, the total cost of federal regulation is understated by a lot and the total benefit of federal regulation is overstated by a lot.¹¹

⁹ OMB, “Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,” September 2003.

¹⁰ See 58 Fed. Reg. 51737-51738.

¹¹ It is widely believed that costs are easier to estimate than benefits, and that this asymmetric constraint leads to the underestimation of net social benefits. This belief is perpetuated by a fundamental misunderstanding of benefit-cost analysis. Properly understood, “cost” is not measured as dollars expended to comply. Rather, it is the value of

From its very first report OMB has warned Congress that aggregation yields information of limited value.¹² These warnings have not been heeded, and OMB has been persistently criticized for failing to accurately characterize the true consequences of regulation. The remedy many critics have sought is a more comprehensive report that includes more regulations. OMB has responded by providing exactly what these critics say they want.

benefits foregone resulting from the regulatory reallocation of resources. Benefits foregone are generally larger than expenditures by the sum of consumers' surplus obtained from the original resource allocation. Therefore, if benefits are difficult to estimate then costs are doubly so—the analyst must first estimate what resources must be reallocated, and then estimate the social benefits foregone due to regulatory reallocation. Whenever this is not done, cost estimates are downwardly biased.

This is not to say that benefits are always *easier* to estimate than costs. As noted earlier, the benefits of deterring terrorism (and a host of other low-probability high-consequence events) are especially difficult to estimate. On the other hand, if opponents of some of these measures (*e.g.*, actions taken under the USA Patriot Act, Pub. L. 107-56) are correct in that they infringe on civil rights and other vital intangible values, costs could well be more difficult to estimate than benefits.

¹² In its 1997 Report to Congress, OMB warned that aggregation provided little or no useful information:

[K]nowing the *total* costs and *total* benefits of all of the many and diverse regulations that the Federal government has issued provides little specific guidance for decisions on reforming regulatory programs.

[A]n excessive amount of resources should not be devoted to estimating the total costs and benefits of all Federal regulations. To the extent that the costs and benefits of specific regulatory programs can easily be combined, some indication of the importance of regulatory reform can be inferred by the magnitude of these estimates, but knowing the exact amounts of total costs and benefits, even if that were possible, adds little of value.

See OMB, “Chapter II. Estimates of the Total Annual Costs and Benefits of Federal Regulatory Programs,” Report to Congress on the Costs and Benefits of Federal Regulations, September 30, 1997.

While the critics' diagnosis is correct their prescription has been ill-advised. Making the report "more comprehensive" only makes aggregate estimates more misleading. The more regulations OMB includes, the more unreliable and misleading aggregate estimates become. Therefore, demanding that OMB to make its annual report to Congress more comprehensive is asking OMB to make it worse.

Congress could remedy this situation by reducing its emphasis on the aggregate costs and benefits of regulation and focus instead on securing reliable, unbiased and policy-neutral estimates for individual rulemakings. In section 3 I offer specific suggestions for how Congress can help make this happen.

2. The Problem of Unreliability in Regulatory Analysis Is Not Going Away

I see no reason to believe that agency regulatory analysis is going to improve. I was the principal author of the final draft of OMB's 1990 RIA Guidance, and I contributed to OMB's so-called "best practices" document issued in 1996. With rare exception, the 1996 document actually contains minimum standards for credible regulatory analysis. By incorrectly characterizing minimum standards as "best practices" OMB signaled to the agencies that it did not expect them to consistently adhere to minimum standards.¹³

¹³ In OMB's 1996 guidance titled "Economic Analysis of Federal Regulations Under Executive Order 12866," the phrase "best practices" appears only once in the body of the document in a technically complex section on the use of contingent valuation methods:

Principles and Methods for Valuing Goods That Are Not Traded Directly or Indirectly in Markets. Some types of goods, such as preserving environmental or cultural amenities apart from their use and direct enjoyment by people, are not traded directly or indirectly in markets. The practical obstacles to accurate measurement are similar to (but generally more severe than) those arising with respect to indirect benefits, principally because there are few or no related market transactions to provide data for willingness-to-pay estimates.

For many of these goods, particularly goods providing "nonuse" values, contingent-valuation methods may provide the only analytical approaches currently available for estimating values. The absence of observable and replicable behavior with respect to the good in question, combined with the complex and often unfamiliar nature of the goods being valued, argues for great care in the design and execution of surveys, rigorous

OMB's 2003 guidance does not commit this error, so one might reasonably have hoped that OMB now intends to enforce minimum performance standards. But OMB's draft Report to Congress contradicts this hope. On page 33 (Appendix A) and on page 3 (footnote 1), OMB says, "The guidance recommends what OMB considers to be 'best practice' in regulatory analysis, with a goal of strengthening the role of science, engineering, and economics in rulemaking." OMB fails to admit that this goal has been with us for a generation. Once again, minimum quality standards are being incorrectly characterized as "best practices". Once again, agencies are being told that they will not be expected to actually adhere to minimum standards.¹⁴

If Congress wants reliable estimates of the impacts of federal regulation, it needs to consider ways to help make that happen. Simply directing OMB to produce high-quality estimates will not work, and asking the General Accounting Office to do it is unlikely to be more effective. Note that OMB relies on GAO estimates for the costs and benefits of regulations issued by independent agencies exempt from OMB review. GAO, in turn, simply accepts at face value what the independent agencies say.

3. Congress Should Help Create the Incentives for High Quality Regulatory Analysis to be Produced

To be fair to OMB, it has very few "carrots" or "sticks" to motivate agencies to improve the quality of their regulatory analyses. OMB's only real stick is to rely on its Executive authority to "return to the agency for further consideration" draft regulations that do not adequately comply with the regulatory policy and principles set forth in Executive order 12866, including applicable guidance on the conduct of regulatory analysis. Many analysts, including myself when I worked in OIRA, longed for a day in which a high quality

analysis of the results, and a full characterization of the uncertainties in the estimates to meet best practices in the use of this method (emphasis added).

See §III.B.4. Most of the 1996 document consisted of minimum standards for performance, such as understanding market failure and other rationales for regulatory intervention; correctly distinguishing costs from benefits, distinguishing both from transfer payments, and estimating them from appropriate baselines; and discounting future effects (including discounting both future benefits and future costs by the same discount rate).

¹⁴ Worse, compliance apparently depends on voluntary adherence to the guidelines: "OMB expects that as more agencies adopt our recommended best practices, the costs and benefits we present in future reports will become more comparable across agencies and programs." This appears to be the triumph of hope over more than 20 years' experience.

standard was consistently and apolitically enforced by using this stick as frequently as necessary.

It appears that the “return letter” is an extremely popular tool until one has to take the responsibility for exercising it. In 2001 the Administration signaled that, contrary to what it considered the overly tolerant approach of its predecessor, it intended to insist on high-quality regulatory analysis. Moreover, the Administration promised it would not shy away from exercising its authority to return draft regulations if they were supported by inadequate or substandard analysis.¹⁵ By my count, OMB returned 16 draft regulations from July 1 through December 31, 2001. But OMB returned only five draft regulations in all of 2002 and just two more regulations in all of 2003. Yet there is no evidence of a quantum leap in the quality of agency analysis since 2001.

Let’s also be clear that if OMB were to return for further consideration every draft regulation whose analysis failed to meet the minimum standards set forth in Circular A-4, very few regulations would ever be published. And it would cause a firestorm.

¹⁵ “[W]e have sent clear signals to agencies that we care about regulatory analysis, QUALITY regulatory analysis. We are using both the carrot and the stick. The carrot we have offered is more deferential OMB review of proposals that agencies have voluntarily subjected to independent peer review. Administrator Whitman's recent decision on arsenic, whether you like it or not, was supported by just that type of review. The Bush Administration recognizes that we should consider and account for the consensus views of the leadership of the scientific community, regardless of whether it leads to a pro- or anti-regulation result. The stick has been a revival of the dreaded ‘return letter’. In the last three years of the Clinton Administration, there were exactly zero return letters sent to agencies for poor quality analysis. I have signed more than a dozen such return letters in the last six months and they are available for scrutiny on OMB's web site. Recently we have witnessed some agencies simply withdrawing rules rather than face a public return letter. Knowing that we care, agencies are beginning to invite OMB into the early stages of regulatory deliberations, where our analytical approach can have a much bigger impact” (emphasis added). See John D. Graham, “Presidential Management of the Regulatory State,” Speech to Weidenbaum Center Forum, “Executive Regulatory Review: Surveying the Record, Marking It Work,” National Press Club, Washington, DC, December 17, 2001, online at http://www.whitehouse.gov/omb/inforeg/graham_speech121701.html.

CAN PEER REVIEW HELP?

Some would argue that peer review of agency regulatory analyses is the key to improving quality. In fact, OMB has proposed a government-wide program of peer review for highly influential information,¹⁶ and regulatory analysis is the category of information that would be most seriously affected. That's because regulatory analyses are almost never peer reviewed except by OMB career analysts. At the same time, I have grave doubts concerning whether agency-sponsored peer review would ever be adequately independent,¹⁷ or genuinely effective in improving quality as long as agencies retain the discretion to adopt or reject the advice they receive.¹⁸ Furthermore, there is a serious risk that some agencies would use peer review to hamstring the career analysts at OMB. That would be a huge step backwards. Peer review has an important role to play, but it is a mistake to think that by itself it will be sufficient.¹⁹

¹⁶ Office of Management and Budget, "Proposed Bulletin on Peer Review and Information Quality", 68 *Fed. Reg.* 54023-54029.

¹⁷ Independence is inherently problematic when the sponsor of peer review selects the reviewers and writes the Charge. An agency can delegate these tasks to a contractor (including the National Academies of Science), but contractors that do not please their clients tend not to be rehired. If agency regulatory analyses are subjected to external and independent peer review, OMB ought to have a substantial role in selecting the reviewers and writing the Charge, for no agency or office of the Executive branch is as independent from the agencies as OMB.

¹⁸ Congress could require agencies to adhere to the technical recommendations of peer review panels that review regulatory analysis. Adhering to these recommendations would not compromise an agency's decision making discretion. Also, Congress could give OMB statutory authority to determine whether agency adherence has been sufficient.

¹⁹ This is precisely what happened in 1997 prior to the transmittal by the Environmental Protection Agency's first retrospective Report to Congress on the benefits and costs of the Clean Air Act (*Benefits and Costs of the Clean Air Act, 1970-1990*, also called the "812 Retrospective"). This report had been extensively peer reviewed by a committee of the EPA's Science Advisory Board, which after several requests for significant changes finally gave up. When career economists from OMB and other federal agencies identified fatal analytic flaws that egregiously exaggerated estimated benefits—some of which had been noted by the SAB—EPA refused to correct errors on the ground that the SAB had already approved the report and there was a judicial deadline mandating transmittal. The

WHAT ABOUT A REGULATORY BUDGET?

In his testimony last year Dr. Miller said, “OMB should be given a stronger role in policing this bias by replacing agency reports of benefits and costs with more objective estimates...”²⁰ Whereas Dr. Miller would implement this through a regulatory budget, I am less sanguine about the likely effectiveness of such an approach. Nothing in the concept of regulatory budgeting overcomes the perverse incentives agencies have to understate costs.

In my judgment, a regulatory budget would exacerbate these perverse incentives. As it stands now, an agency’s incentive to understate costs is largely driven by the fact that high costs (irrespective of the magnitude of benefits) generate bad public and Congressional relations. But an enforced regulatory budget would limit what regulations an agency could issue. In principle, once an agency’s budget is reached it would be done for the fiscal year just

resulting impasse led to an historic event—the administration declined to support EPA’s estimates:

A final, brief interagency review, pursuant to Circular A-19, was organized in August 1997 by the Office of Management and Budget and conducted following the completion of the extensive expert panel peer review by the SAB Council. During the course of the final interagency discussions, it became clear that several agencies held different views pertaining to several key assumptions in this study as well as to the best techniques to apply in the context of environmental program benefit-cost analyses, including the present study. The concerns include: (1) the extent to which air quality would have deteriorated from 1970 to 1990 in the absence of the Clean Air Act, (2) the methods used to estimate the number of premature deaths and illnesses avoided due to the CAA, (3) the methods used to estimate the value that individuals place on avoiding those risks, and (4) the methods used to value non-health related benefits. However, due to the court deadline the resulting concerns were not resolved during this final, brief interagency re-view. Therefore, this report reflects the findings of EPA and not necessarily other agencies in the Administration. Interagency discussion of some of these issues will continue in the context of the future prospective section 812 studies and potential regulatory actions (emphasis added).

See *812 Retrospective*, p. ES-2.

²⁰ Miller (2003), p. 3.

as if it had spent its budget appropriations. Excess fiscal spending is controlled by the Anti-Deficiency Act, and additional budget dollars cannot simply be conjured up. It is difficult to imagine how to craft, much less enforce, an Anti-Deficiency Act for regulatory costs.

Agencies would respond to a regulatory budget much like they do to the Information Collection Budget—by reducing their estimates as necessary to make them fit under the allowable ceiling, not by reducing the paperwork burdens they impose.

IMPROVING QUALITY BY INJECTING COMPETITION

A better approach is for Congress to create incentives for the preparation of high quality analyses to be produced. As in every other market, competition is the key to improving quality. When it comes to regulatory analysis, each federal agency has monopoly power over what information is finalized and disseminated. As every freshman economics student learns, monopolies do not foster quality. Whether they work for industry or advocacy groups, outside experts can submit public comments to their hearts' content, but as Dr. Miller testified last year, the final determinations are made by the agencies. These final agency determinations are what OMB submits in its Reports to Congress, but at least in part that's because OMB doesn't have competitive information from alternative sources.

Congress could help “make the market” for high-quality regulatory analyses. by breaking up these agency monopolies and injecting in each one a therapeutic dose of competition. Federal agencies may have monopolies to decide how much social benefits and costs to report, but they do not have a corner on expertise. Indeed, there are many competent professionals outside the government who are exquisitely well-trained to perform regulatory analysis. Open the door to competition by creating a market for high-quality, policy-neutral, and independent regulatory analysis and they will respond. The agencies also will respond—first by trying to undermine the legitimacy of their competitors, and once that fails getting to work, by improving the quality of their own work to avoid being driven out of the regulatory analysis business.

The Regulatory Right-to-Know Act gives OMB the responsibility for informing Congress concerning the benefits and costs of federal regulation, but it doesn't give OMB any statutory authority to determine whose estimates are most reliable. Subjecting the agencies to the perils of competition requires Congress to remedy this asymmetry by giving OMB the *statutory authority*, and not just the *reporting responsibility*, to make these determinations. If for whatever reason you do not have sufficient trust in OMB's judgment,

ask the General Accounting Office to evaluate the same information and reach its own conclusions. Even OMB can benefit from some competition.²¹

“Final-offer arbitration” (FOA) is probably the best available tool for OMB (or GAO) to use in determining which competing analysis is best. A restricted form of FOA is used by Major League Baseball to decide whether the player’s or the team’s estimate of market value is most reasonable.²² Unlike other forms of arbitration, in FOA the arbitrator cannot negotiate amongst contending parties or devise face-saving compromises intended to ensure that everybody “wins”. Because arbitrators can easily and quickly discard extreme or flamboyant positions, FOA discourages competing parties from exaggerating the strengths of their own case and the weaknesses of others’.

For Congress, FOA would reduce the gaps among competing regulatory analyses and narrow the range of uncertainty concerning the likely benefits and costs of individual regulatory actions. Once a large fraction of regulations issued under a given regulatory program have been subjected to the FOA process, Congress can realistically develop greater confidence that estimates of programmatic benefits and costs are reliable.

With a minor amount of training in FOA methods, OMB career analysts would be well-equipped to choose from an array of competing estimates which one best adheres to the fundamental principles of benefit-cost analysis and Circular A-4. For those who for whatever reason distrust OMB, FOA also has the advantage of requiring OMB to choose from the estimates provided and denying OMB any authority to come up with its own, unsubstantiated figures.

²¹ Some may argue that third parties should not prepare regulatory analyses because it is an inherently governmental function. This is true only if one believes that the purpose of regulatory analysis is not to inform decision making or the public, but to provide the legal or public justification for decisions that have already been made.

²² A key to the success of FOA in Major League Baseball is an agreement by both sides to respect the outcome. In political environments such as Federal regulation, this would likely be more difficult.