

June 19, 2023

**Public Interest Comment on the Office of Management and Budget’s Draft Circular A-4,  
“Regulatory Analysis”**

Docket ID OMB-2022-0014

We appreciate the opportunity to comment on the revised Circular A-4 as well as the significant effort undertaken by the Office of Information and Regulatory Affairs (OIRA) to update and improve upon its guidance to agencies in performing regulatory analysis. Our scholarship focuses on the regulatory process, including the role benefit-cost analysis currently plays, and could potentially play, in that process. This comment reflects our personal views and does not represent the positions of George Washington University and/or Rutgers University.

In suggesting improvements to how agencies go about producing regulatory impact analyses, it is instructive to consider the goals of performing analysis in the first place. While there may be more, the academic literature identifies at least three purposes that analysis can play in the regulatory process (see, e.g., Carrigan, Febrizio, and Shapiro 2020 for a summary of the associated scholarship). The first is to serve as a decision-making criterion, especially since benefit-cost analysis provides the user with a clear decision rule regarding whether to proceed with a regulatory policy (Pildes and Sunstein 1995). A second role that analysis can play is to increase transparency and allow interested parties to both monitor a regulator’s activities and engage in the rulemaking process (Hahn and Sunstein 2002). Finally, analysis can serve as an aid for an agency’s regulatory planning, allowing the agency to evaluate and compare potential regulatory approaches systematically while prioritizing regulatory needs (Adler and Posner 1999).

In general, the proposed updates to Circular A-4 appear to mainly focus on the first potential use for analysis in the regulatory process. The justification given by OIRA for the changes reinforces this impression. Indeed, the first sentence of the preamble reads, “Assessing benefits and costs of alternative regulatory options through analysis helps agency policymakers arrive at sound regulatory decisions.” And many of the updates and clarifications are certainly of value when considered from this perspective, especially given OIRA’s efforts to incorporate the substantial improvements in analytical approaches to performing benefit-cost analysis since Circular A-4 was first issued twenty years ago. Thus, the changes should allow agencies to generate more precise and accurate estimates of benefits and costs, thereby enabling the analysis to function more effectively as a tool to make regulatory decisions.

Of course, as it is used in practice, analysis generally does not function as a decision-making criterion in the regulatory process, especially because Executive Order (EO) 12866, reaffirmed by EO 14094, merely suggests that the benefits of the rule should “justify its costs” (Clinton 1993, Sec. 1(b)(6)).

Therefore, despite the attention given to analysis as a decision-making criterion, the direct impacts of the proposed changes on actual regulatory decision-making may be more limited than many expect.

Regardless, the proposed changes could have significant implications for the ability of agency analysis to fulfill either of its aforementioned other potential uses, namely as a tool to increase the transparency of regulatory decision-making as well as to improve the associated agency's process for making regulatory decisions. Here, we believe that changes to the proposed Circular A-4 could enhance the transparency of agency regulatory analysis and have important effects on how agencies consider regulatory alternatives. We focus on these suggestions below.

With respect to supporting transparency, the analyses accompanying rules are already long, complicated, and technical. As a result, the typical interested party does not have the training to comprehend the level of analytical rigor that characterizes current analyses (Wagner 2009). And their length often precludes even those with the ability to participate from doing so. This trend has become more pronounced over time, as agency analyses have gotten longer and more complex (Carrigan and Shapiro 2017).

Still, analysis and participation can be complements. Public participation can lead agencies to better understand the issues they are analyzing and, in doing so, improve their supporting documents, including any economic analysis, as well as the rules themselves. An analysis that is done well and explained clearly can help the public better understand how regulations affect them and, simultaneously, allow them to give more valuable input to encourage more thoughtful regulatory decisions by agencies (Shapiro 2018).

Unfortunately, an emphasis on applying more advanced analytical tools to produce more precise estimates of benefits and costs in revised Circular A-4 could easily lead to agency analyses that are even more complex and, hence, less transparent than they are now. Given that one of the goals of EO 14094 is to ensure the regulatory process is “designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities” (Biden 2023, Sec. 2(a)), this issue should be acknowledged and addressed.

For example, we sympathize and largely agree with the impetus behind emphasizing distributional analysis in the revised Circular A-4. In addition to their implications for economic efficiency, many regulations have distributional impacts and analyzing and providing information on these impacts could theoretically increase transparency associated with those regulatory decisions. However, asking agencies to produce a detailed distributional analysis is likely to have the unintended consequence of further lengthening analyses, making them even less accessible to the communities affected by regulatory decisions. As a result, great care should be given to ensuring agencies present their analysis of distributional impacts in a way that can be broadly understood.

Further, depending on whether “meaningful participation” (Biden 2023, Sec. 2(a)) means having knowledge of how the effects of a proposed rule may affect interested parties or whether it means actual participation in helping to shape the rule, the timing of when the analysis is made public is important. In the current environment, analysis is typically made public concurrent with the issuance of

a Notice of Proposed Rulemaking (NPRM), which is too late in the process to allow any participation based on it to help shape the rulemaking in fundamental ways (Carrigan and Shapiro 2021).

Similarly, the revised Circular A-4 can be expected to promote agency analyses that are less likely to function as a planning tool. Perhaps the key element that allows analysis to function in a planning role is the consideration of reasonable alternatives. While revised Circular A-4 does address the importance of considering alternatives, the heightened analytical focus on the preferred agency approach can mean less serious consideration of reasonable alternatives, particularly those that differ in marginal ways from the preferred approach, thereby undermining the role of analysis as a planning tool.

Section 6, titled “Alternative Regulatory Approaches,” in the proposed Circular A-4 suggests agencies should consider “different degrees of stringency” (p. 24) as alternative policy options. It does not, however, specify analyzing marginal differences in regulatory stringency. This leaves open the possibility that agencies could choose only alternative levels of stringency that significantly differ from their preferred option. Doing so does little to illuminate the policy choice at hand. As a result, OIRA should specify that different levels of stringency includes consideration of marginal differences.

Moreover, as is necessary for analysis to enhance transparency, to function as a planning tool for agencies, analysis must again be performed early in the process, not at the stage in which the agency has already decided on its preferred approach. As one potential solution, we recommend back-of-the-envelope analysis on a broader set of regulatory alternatives, performed earlier in the regulatory process (Carrigan and Shapiro 2017). In the context of the changes to Circular A-4, this means producing a public analysis well before the NPRM is issued, given that agencies may be resistant to making significant changes to rules at that point for a variety of reasons (Elliott 1992; Wagner, Barnes, and Peters 2011).

Such an analysis would present numerous regulatory alternatives and “rough” estimates of both their overall costs and benefits, as well as the possible impacts on particular populations. In fact, it may even be sufficient to note the direction and approximate magnitude of the differences between alternatives. To give an example, a reasonable back-of-the-envelope discussion might simply suggest something like, “Increasing the emissions threshold by 1ppm would decrease costs tenfold and increase the incidence of illness only marginally. However, most of the increase in illness would be in communities located near stationary sources.” Often, early analyses of the impacts of a possible regulation on small businesses are produced as part of the required Small Business Regulatory Enforcement Fairness Act (SBREFA) panels. These could serve as a model for an early back-of-the-envelope analysis that is of use to other regulatory stakeholders.

Ensuring that affected communities, both those bearing the costs and those reaping the benefits of regulatory changes, have the opportunity to see these analyses and provide feedback before a preferred option is chosen in an NPRM is critical (Carrigan and Shapiro 2021). In addition, making it more likely that agencies would faithfully perform back-of-the envelope analysis on a broader set of feasible alternatives, earlier in the process, means considering the incentives of the agencies. One general approach that could help in this regard would be to offer “carrots” for faithfully performing back-of-

the-envelope analysis, which might mean, for example, more limited or shorter subsequent OIRA review at the NPRM stage when high quality early-stage analysis is produced by the agency.

In revising Circular A-4, OIRA would do well to give some careful thought to how analysis is presented by agencies as well as when it is performed. To make analysis useful means making it more transparent by encouraging agencies to present their findings simply, particularly at early stages in the rulemaking process. Ideally, we would like to see agencies incentivized to produce an earlier and simpler analysis that is made publicly available. However, some small potential changes to the process could also begin to cultivate this mindset among agencies. These include encouraging or requiring agencies to:

1. Include an executive summary for each regulatory impact analysis that clearly lists the benefits and costs of the policy chosen and realistic alternatives;
2. Analyze alternatives that represent marginal differences in stringency and those that are realistic options, presented to the public early in the regulatory process;
3. Experiment with different modes of soliciting public input on their regulations before issuing NPRMs, which could mean participating in a pilot program or employing a SBREFA-like process to engage with other constituencies affected by the regulation, including regulatory beneficiaries;
4. Consider even alternatives they believe may be precluded by statute, including analyzing and soliciting public input on these options as well as discussing the agency's perspective on the legality of those alternative approaches in their NPRMs.

In sum, situating analysis to facilitate transparency and act as an input to regulatory agency decision-making, relative to simply supporting existing agency decisions, requires setting up agencies to perform that analysis well before the NPRM is released, to consider more reasonable alternatives, and to present the analysis in a way that is comprehensible to those that the rule will affect. Restructuring the regulatory process in these ways will position analysis to occupy a more useful place in that process, allowing it to fulfill its potential to inform the public and aid agency planning.

Sincerely,

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