CONRAD LAW & POLICY COUNSEL
1615 L STREET, N.W., SUITE 650
WASHINGTON, DC 20036-5668
202-822-1970
202-822-1971 (FAX)
JAMIE@CONRADCOUNSEL.COM
WWW.CONRADCOUNSEL.COM

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Office of Information & Regulatory Affairs
Office of Management & Budget
Attn: Darcel D. Gayle
NEOB, Room 10202
725 17th St., NW
Washington, DC 20503

Re: **OMB's Draft 2010 Report to Congress on the Benefits and Costs of Federal Regulations; Docket ID OMB-2010-0008**

Dear Sir or Madam:

Following are comments on Chapters Two and Three of OMB's Draft 2010 Report. These comments are informed by 25 continuous years of practice in the area of federal regulation. In summary, OMB's recommendations would, generally speaking, enhance the interested public's participation in the federal regulatory process and, as a result, increase the quality and net benefits of that process. OMB could make its recommendations even more effective by taking these additional steps:

- In Chapter Two:
  - Expressly adopt the recommendation of the Bipartisan Policy Commission that agencies clearly distinguish between science and policy questions; and
  - State that OMB will work with agencies to reduce their use of proprietary models or software.

- In Chapter Three:
  - Explicitly reference the Information Quality Act's predissemination review process; and
  - Separately discuss (i) government disclosure of information and (ii) government-mandated disclosure by private entities.

These points, and some additional recommendations, are explained below.

I. Chapter Two: Recommendations for Reform

I commend OMB for its recommendations to advance the President's Memorandum on Transparency and Open Government. While the report couches these recommendations as means "to help meet some analytical challenges," the benefits of the proposed reforms would actually be much broader and more direct, as they would enhance the overall effectiveness and fairness of the federal regulatory process. These recommendations would improve not only rulemaking – the narrow definition of that process – but the universe of ways that federal agencies attempt to implement their statutory authorities.

As explained below, I support and offer additional suggestions on the recommendations regarding (i) participation and collaboration in the regulatory process and (ii) providing summaries of the central judgments underlying rules.

A. Promoting Participation and Collaboration in the Regulatory Process

The draft report correctly recognizes that "[r]egulations and their supporting justifications should be based on the open exchange of information and perspectives among public officials, experts in relevant disciplines, and the public as a whole."[1] I strongly endorse the two steps that OMB recommends that agencies follow to promote this interaction.

1. *Publishing information relevant to rulemaking, including underlying data, online and in downloadable format*

While the Administrative Procedure Act does not expressly refer to a "rulemaking record," courts long ago left "no doubt" that such a requirement is an "implicit" requirement of the Act.[2] One of the central purposes of the rulemaking record is to provide the public with an understanding of the facts, methodologies and opinions on which the agency is basing its proposed rule, so that the public can support, criticize, improve on or supplement them. As the American Bar Association's *Guide to Federal Agency Rulemaking* explains: "The existence of a public rulemaking record is a critical factor in making public participation in the rulemaking meaningful."[3]

It is self-evidently true, however, that the public cannot comment on this record unless it has access to it. Putting the *Federal Register* online was a beginning, but until the complete record for a rulemaking is dependably and timely put online as

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[1] *Draft 2010 Report* at 40.
[2] Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977).
[3] Jeffery S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 320-21(4th ed. 2006).

well, the United States will not be engaged in electronic rulemaking – we will still have a paper, docket-room based system with some electronic enhancements.

Unfortunately, we are still in that stage. Federal agencies have not yet reached the point where they routinely place all materials underlying a rule online. Indeed, sometimes it is a challenge getting them to put those materials in the paper docket. OMB's recommendation is a welcome call to agencies to fulfill the promise of electronic rulemaking and to realize the full benefits of public engagement in rulemaking. The final 2010 Report should retain it. The Report should also note that OMB has reinforced this recommendation in its recent Memorandum re Disclosure and Simplification as Regulatory Tools. The Memorandum establishes as "Principle One" for full disclosure that "[d]isclosed information should be as accessible as possible. For that reason, the Internet should ordinarily be used as a means of disclosing information, to the extent feasible and consistent with law."[4]

My endorsement of this recommendation does have one qualifier. OMB generically states that the public release of underlying analyses and documents should be "subject to valid . . . confidentiality . . . or other restrictions." I certainly agree that members of the public should not be required to waive any intellectual property rights in information whenever they submit it to the federal government in connection with a rulemaking. Trade secret and confidential business information protections are Congressionally-recognized mechanisms to ensure that private innovation and effort are rewarded and incentivized, rather than expropriated, by the federal government. On the other hand, I have seen repeated cases where an agency's rule is premised in part on the results of a model or software that is proprietary, so that members of the public cannot evaluate its appropriateness and accuracy or attempt to validate it. In cases where the government needs to purchase such models or software in order to accomplish its regulatory tasks, it should work with their vendors so that the latter are adequately rewarded for their work without depriving the public of its rights to participate in the regulatory process.

2. *Giving the public a comment period of "not less than 60 days," where feasible, for proposed regulatory actions*[,] *regulatory analyses and supporting documents*

I similarly endorse this recommendation – if it can be considered a "recommendation" to remind an agency of its obligations under E.O. 12866. Comment periods of less than 60 days are generally inadequate to comment on a rule involving any degree of complexity or substantial underlying materials. This is

[4] Memorandum for the Heads of Executive Departments and Agencies re Disclosure and Simplification as Regulatory Tools (June 18, 2010), at 6.

particularly a problem for membership organizations, which need time for their members to review the materials and confer among themselves.

Potentially more innovative – but equally important – is OMB's recommendation that agencies "generally provide a similar period for public comment on [the agencies'] regulatory analyses and supporting documents."[5] A chronic shortcoming in the current regulatory process is agencies' delay in releasing such underlying materials for comment. Frequently, a notice of proposed rulemaking is published on day *X*, but supporting analyses do not find their way to the docket or agency websites until many days or weeks later. Members of the public can review a *Federal Register* notice, but where the real basis for an agency's proposed action is elsewhere, there is little the public can do until that underlying information becomes available. A comment period is an empty letter or charade when much of the time "available" for the preparation of comments is, in fact, not being afforded for the review of what can be central documents.

B. Publishing Summaries of Proposed and Final Rules' Central Supporting Judgments

I also support the draft 2010 Report's recommendation that regulatory analyses include "a prominent and accessible summary – written in a 'plain language' manner designed to be understandable to the public – that outlines the central judgments that support regulations, including the key findings of the analysis (such as central assumptions and uncertainties)."[6] Preparing such a summary will help agencies confront and articulate plainly the factors that truly motivate regulatory actions. As things stand now, it is too easy for agencies to obscure or conceal these factors with lengthy, abstruse discussions. Clearer and simpler explanations will also facilitate public understanding and comment.

I urge OMB to take this recommendation a step further and recommend that agencies' summaries clearly distinguish between scientific and policy considerations, and specifically articulate the policy assumptions or choices that guide the proposed action. This was a key recommendation of a prestigious blue-ribbon panel convened by the Bipartisan Policy Commission (BPC):

> RECOMMENDATION ONE: The Administration needs to promulgate guidelines (through executive orders or other instruments) to ensure that when federal agencies are developing regulatory policies, they explicitly differentiate, to the extent possible, between questions that involve scientific

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[5] *Draft 2010 Report* at 40.
[6] *Id*.

> judgments and questions that involve judgments about economics, ethics and other matters of policy.[7]

In explaining the need for this distinction, the BPC Report explained that "some disputes over the 'politicization' of science actually arise over differences about policy choices that science can inform, but not determine. . . . [P]olicy debate would be clarified and enhanced if a systematic effort were made to distinguish between questions that can be resolved through scientific judgments and those that involve judgments about values and other matters of policy when regulatory issues comprise both. This transparency would both help force values debates into the open and could limit spurious claims about, and attacks on, science."[8] To address this widely-recognized but chronic "science charade" problem,[9] the BPC Report urged the Administration "to devise regulatory processes that, in as many situations as possible, could help clarify for both officials and the general public which aspects of disputes are truly about scientific results and which concern policy. That distinction also needs to be spelled out in regulatory documents."[10]

OMB's final 2010 Report should implement this recommendation.

II. Chapter Three: Update on the Implementation of Information Quality Initiatives

I appreciate that OMB's 2010 Report (and the recent 2009 Report) have continued the practice of their predecessors of discussing the status of implementation of the Information Quality Act, including both the OMB and agency IQA guidelines and OMB's Peer Review Bulletin. The IQA and the guidelines under it serve a vital function in assuring the quality of information disseminated by federal agencies, a function that they will serve even more effectively now that the D.C. Circuit has established the precedent that the court has jurisdiction over an affected person's appeal of an agency's constructive denial of the person's correction request.[11] The Peer Review Bulletin similarly ensures that agencies conduct peer reviews of influential significant scientific information that they disseminate, and do so consistently and credibly. I have two specific observations about this chapter.

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[7] Bipartisan Policy Commission, SCIENCE FOR POLICY PROJECT 4 (2009), available at http://www.bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20fnl.pdf.
[8] *Id*.
[9] *See* Wendy Wagner, *The Science Charade in Toxic Risk Reduction*, 95 COLUM. L. REV. 1613 (1995).
[10] *BPC Report* at 4.
[11] See *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010).

A. The Value of Retaining the Report's Consolidated IQA Statistics

I am concerned about the draft Report's request for comments on the value of having a single, government-wide IQA website, which it says "could replace the need for this chapter in our annual report."[12] Such a portal may be useful, but only if it linked to, rather than replaced, the individual agency IQA webpages. But this new website should not supersede OMB's annual report unless the new website also contains the same statistical summaries contained in the report. These summaries are not available any other way and would be very burdensome to generate. They provide authoritative, government-wide data that is indispensible to anyone interested in the implementation of this important statute. Eliminating them would reduce transparency about that process.

B. Promoting Predissemination Review and Information Stewardship

As government agencies in the 1990s dramatically increased their use of information disclosure as a tool for effectuating policy goals, thoughtful observers of the process began to emphasize the concept of "information stewardship." This concept holds that it is irresponsible for an entity, particularly one with a public trust obligation, to broadcast data without regard to its likely (much less actual) effect. Such an entity has a responsibility, before disseminating information, to seek to appreciate how that information will be understood by the public or specific audiences, and to shape its dissemination so as to limit unintended or unnecessary ill effects of that dissemination.

OMB's IQA guidelines embody this concept: Section III.2 declares that "[a]gencies shall treat information quality as integral to every step of an agency's development of information, including creation, collection, maintenance, and dissemination," and thus requires, "[a]s a matter of good and effective agency information resources management, [that] agencies . . . develop a process for reviewing the quality (including the objectivity, utility, and integrity) of information before it is disseminated."[13] This predissemination review process is part of every agency's IQA guidelines, but both OMB and agencies have largely neglected it.

I was thus pleasantly surprised to see the emphasis on information stewardship and predissemination review contained in OMB's new Memorandum on Disclosure and Simplification as Regulatory Tools. The section on "Disclosure as a Regulatory Tool" contains a great deal of helpful direction; e.g.:

- "Well-designed disclosure policies are preceded by a careful analysis of their

[12] *Draft 2010 Report* at 58.
[13] 67 Fed. Reg. 8459 (Oct. 22, 2002).

likely effects."[14]

- 'To the extent feasible, agencies should test, in advance, the likely effects of summary disclosure, and should also monitor the effects of such disclosure over time."[15]

The final version of the 2010 Report should reiterate this discussion, but it should also tie it explicitly to the IQA's predissemination requirements.

The IQA addresses only circumstances where government discloses information itself; it does not address circumstances where government *requires regulated parties* to disclose information, typically about their products or activities. Obviously, the considerations just discussed apply with special force in the latter case, as regulated entities can incur compliance costs not relevant where government is doing the disclosing. It is thus much more important for agencies to "test [alternative methods] before imposing a disclosure requirement" and to actively "determine whether the desired effect is being achieved."[16] Also, reputational losses can be much greater where the information is coming from the entity itself, rather than the government. Unlike the IQA guidelines, the Memorandum *does* discuss both cases, but its discussion does not clearly distinguish between the two. The final 2010 Report presents an opportunity for OMB to clarify the differences between the two cases, and to explain how the case of required disclosure greatly increases the need for agencies to understand the costs and effects of that disclosure both before and after requiring it.

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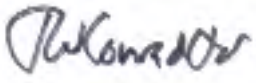
Thank you for the opportunity to provide these comments. If you have any questions about them or would like any additional information, please feel free to contact me at 202-822-1970 or Jamie@conradcounsel.com.

Sincerely,



James W. Conrad, Jr.

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[14] *Disclosure and Simplification Memo* at 3.
[15] *Id.* at 5.
[16] *Id*.