

June 6, 2023

Submitted via [www.regulations.gov](http://www.regulations.gov)

Richard L. Revesz  
Administrator  
White House Office of Information & Regulatory Affairs  
U.S. Office of Management & Budget

**RE: Proposed Revisions to Circular A-4, Regulatory Analysis (Docket No. OMB-2022-0014), and Circular A-94, Federal Spending (Docket No. OMB-2023-0011)**

Dear Administrator Revesz:

On behalf of the National Women’s Law Center (NWLC) and the eight undersigned gender justice organizations, we submit these comments in strong support of the Office of Information and Regulatory Affairs’ (OIRA’s) recent proposed revisions to Circular A-4<sup>1</sup> and Circular A-94<sup>2</sup> (collectively referred to herein as “the Circulars”).

Since 1972, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC and our partners advocate for improvement and enforcement of our nation’s employment and civil rights laws, with a particular focus on the needs of LGBTQI+ people, women of color, and women with low incomes and their families. Due to ongoing discrimination and structural barriers to full participation in our economy, these communities frequently have been overlooked or deliberately excluded in the federal regulatory process—and policymakers have failed to consider how a regulatory action’s impact may vary based on the gender, race, and/or income of affected individuals, among other factors. Too often, this failure has resulted in regulatory analyses that do not account for costs borne by women, people of color, and LGBTQI+ people—who already experience elevated rates of poverty and economic insecurity—and privilege benefits that accrue to wealthy corporations.

Bringing modern economic analysis to OIRA’s review of proposed regulations and spending, as the revised Circulars will do, is essential to reflect the realities of how costs and benefits are experienced in the real world by the communities our organizations serve. As the primary source of instruction for agencies conducting regulatory impact analyses, the updated Circular A-4 will ensure that policy makers are relying on relevant factors and accurate data in rulemaking—and the key methodological changes incorporated into Circular A-4 are mirrored in Circular A-94, which guides cost-benefit analysis of federal spending programs. Of particular importance in the revisions to the Circulars are the recognition of a broader range of factors that may justify regulatory action; the renewed focus on distributional effects in rulemaking, with the incorporation of income weighting into cost-benefit analysis; and the modernization of the discount rate used by OIRA. We discuss each in turn below.

### **I. Bases for regulatory action and decision-making**

The revised Circulars reflect a more comprehensive understanding of how the U.S. economy works and the reasons that federal regulatory action may be necessary. As Circular A-4 explains, even if

---

<sup>1</sup> See Request for Comments on Proposed OMB Circular No. A-4, “Regulatory Analysis,” 88 Fed. Reg. 20,915 (Apr. 7, 2023), and Circular A-4, Draft for Public Review (Apr. 6, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf> [hereinafter “Draft Circular A-4”].

<sup>2</sup> See Public Comment on Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, 88 Fed. Reg. 20,913 (Apr. 7, 2023), and Circular A-94, Draft for Public Review (Apr. 7, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/CircularA94.pdf> [hereinafter “Draft Circular A-94”].

regulation is expressly called for or clearly required to implement a statute, “that does not end the inquiry with respect to identifying needs.”<sup>3</sup> Agencies should also “conduct reasonable inquiries to identify any relevant needs for regulatory action . . . because identifying relevant needs may inform the analysis of important categories of benefits, costs, and transfers, or the analysis of distributional effects.”<sup>4</sup> Importantly, Circular A-4 expressly includes “correcting market failure,” “promoting distributional fairness and advancing equity,” and “protecting civil rights and civil liberties or advancing democratic values” as among the common bases for federal regulation.<sup>5</sup>

In addition, Circular A-4 explicitly recognizes that many important potential impacts of a regulation—such as improvements in quality of life—can be difficult or impossible to quantify or monetize. And it recognizes, too, that “[wh]en it is not possible to monetize all of the important benefits and costs, the alternative with the greatest monetized net benefits will not necessarily be the alternative that generates the greatest social welfare”—and therefore “monetized net benefits” should not be the sole basis upon which agencies decide which course of action to pursue.

Circular A-4 also appropriately encourages agencies to “seek out the opinions of those who will be affected by the regulation” throughout the design and execution of its regulatory analysis. The experiences of directly impacted individuals and groups have too often been ignored in federal rulemaking. In a recent example, the Department of Education during the Trump administration issued Title IX regulations that utterly failed to consider the perspectives and experiences of student survivors of sexual harassment or the harm that they would experience as a result of the rule, which was designed to make it harder for students to report harassment; allowed schools to ignore reports and further push harassment under the rug; and unfairly tilted investigations in favor of respondents, to the direct detriment of survivors.<sup>6</sup> If students and survivors’ experiences had actually been considered and reflected at the outset, this outcome could have been avoided.<sup>7</sup>

The revised Circulars expressly recognize that federal regulation can have far-reaching purposes and effects; that federal agencies should explain and account for non-quantifiable effects—and consult with directly impacted individuals and communities—when choosing a regulatory course of action; and that the best course will not always be the one that a mathematical formula suggests has the greatest benefits in monetary terms. Taken together, these principles represent an important and welcome shift in OIRA’s guidance regarding how agencies should approach the regulatory process. And the more specific directives that follow—regarding distributional analysis and discount rates—will help agencies understand more concretely how to assess the impact of proposed actions in an equitable and meaningful way.

## **II. Income weighting and analysis of distributional effects**

We strongly support OIRA’s strengthened directive for agencies to consider distributional effects in conducting their cost-benefit analyses. From the very origins of the United States, policy choices made by lawmakers and parallel patterns of private discrimination have reinforced power structures dominated by the largely white, male, and wealthy elites who built them—pushing women, Indigenous people and people of color, disabled people, LGBTQI+ individuals, and many others to the margins. The benefits and costs of federal action virtually never fall evenly across populations—

---

<sup>3</sup> Draft Circular A-4, *supra* note 1, at 16.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 15-16.

<sup>6</sup> See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 28, 2018), and NWLC comments re: ED Docket No. ED-2018-OCR-0064 (Jan. 30, 2019), <https://nwlc.org/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

<sup>7</sup> The deeply flawed cost-benefit analysis presented in the 2018 Title IX NPRM also would have greatly benefited from OIRA’s proposed recommendations regarding distributional analysis and weighting of costs and benefits discussed *infra*. See NWLC comments re: ED Docket No. ED-2018-OCR-0064, *supra* note 6, at 54-57.

and left unexamined, costs are likely to be borne disproportionately by the same groups whom historically have been denied the power to influence federal policy. Conducting distributional analysis of proposed federal regulations and spending is thus critically important to ensure that in the real world, these actions are not benefiting those who least need assistance and costing those who can least afford to pay.

The revised Circulars expand and update guidance for the longstanding requirement that agencies analyze the expected distributional effects of their regulatory actions—i.e., that they consider the impacts of regulations and potential alternatives on particular groups based on income, wealth, race, gender, region, and/or other relevant characteristics. While the 2003 Circular A-4 directs agencies to “provide a separate description of ... how both the benefits and costs are distributed among sub-populations of particular concern ... so that decision-makers can properly consider them along with the effects on economic efficiency,”<sup>8</sup> federal agencies have rarely adhered to this requirement in a meaningful way.<sup>9</sup> For example, in one study of 189 regulatory impact analyses published between October 2003 and January 2021, researchers found only two that quantified net benefits for a particular socioeconomic or demographic group, and only 18 percent that referenced equity at all.<sup>10</sup>

When agencies fail to do a distributional analysis, they fail to provide critically important information to policymakers and the public. An analysis of only aggregate or average effects inherently conceals variation across the population, because the costs and benefits of regulations (and other policies) rarely accrue equally across the income spectrum or among different demographic groups. For example, in 2017, the Trump administration proposed multiple delays to the so-called “fiduciary rule,”<sup>11</sup> which the Obama administration intended to reduce conflicts of interest in financial markets by generally requiring financial advisers to serve in the best interest of their clients. The Trump administration’s Department of Labor (DOL) justified these delays by conducting a regulatory impact analysis that argued the costs of delay to investors were justified by the benefits in reduced compliance burdens. This is a dubious argument on its face that the practices recommended in the revised Circulars would have undermined further: Had the DOL analysis disaggregated the costs and benefits of delaying the fiduciary rule by income or wealth, it would have been obvious that benefits accrued largely to wealthy corporate interests, while the costs were borne by ordinary investors with no way to ensure that they could trust their financial advisers.

Omitting distributional analysis is also problematic because the approach to cost-benefit analysis prescribed in the current Circulars is already weighted against people with lower wealth and/or income. Agencies traditionally calculate costs and benefits using so-called “willingness-to-pay” and “revealed preference” models that quantify how much value individuals place on avoiding certain

---

<sup>8</sup> Office of Management & Budget, Circular A-4 (Sept. 17, 2003), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf).

<sup>9</sup> See, e.g., Richard L. Revesz & Samantha Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV. LAW 53 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3927277](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927277); David S. Mitchell, *Proposed Update to Federal Cost-Benefit Analysis Guidelines Correctly Focuses on Accounting for Inequality in Regulations*, WASH. CTR. FOR EQUITABLE GROWTH (May 2023), <https://equitablegrowth.org/wp-content/uploads/2023/05/052323-CBA-ib-1.pdf>.

<sup>10</sup> Caroline Cecot & Robert W. Hahn, *Incorporating Equity and Justice Concerns in Regulation*, REG. & GOV. (2022), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/rego.12508> (observing that among the limited references to equity in regulatory analyses, most were made by the U.S. Environmental Protection Agency).

<sup>11</sup> See Definition of the Term “Fiduciary”; Conflict of Interest Rule-Retirement Investment Advice; Best Interest Contract Exemption (Prohibited Transaction Exemption 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Prohibited Transaction Exemption 2016-02); Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, 82 Fed. Reg. 16,902 (Apr. 7, 2017); 8-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016-01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24), 82 Fed. Reg. 56,545 (Nov. 29, 2017).

costs or acquiring certain benefits—but the underlying assumptions of these models privilege those who are able to place higher dollar figures on costs and benefits simply because they have more money overall to spend. They ignore the widely accepted concept in economics of “diminishing marginal utility of income,” which recognizes the evident truth that the gain or loss of one dollar means something very different to someone working for minimum wage than it does to the CEO who runs their company.<sup>12</sup>

Current cost-benefit analyses treat both amounts at face value, which makes it easier for agencies to argue, for example, that the cost of having restaurant employers track the amount of time that tipped employees spend on customer-facing work outweighs the benefit of ensuring that tipped workers—who are overwhelmingly women, disproportionately women of color, and disproportionately low-income—are paid more than \$2.13 per hour when they have no opportunity to earn tips (as DOL argued in a proposed rule issued during the Trump administration).<sup>13</sup>

Fortunately, the Circulars take steps to correct this analytical failure by encouraging agencies to consider weighting costs and benefits in a way that recognizes how the same dollar is valued differently based on the circumstances of the person to whom it belongs. OIRA provides a suggested number (1.4) as a “reasonable estimate of the income elasticity of marginal utility” to help guide this weighting. This number means that, for example, \$100 to an individual making \$210,000 annually is only as valuable as \$21.48 is to a worker making \$70,000 per year.<sup>14</sup> The revised Circulars make clear that federal agencies can use this weight to discount costs and benefits that accrue to people with high incomes and amplify the costs and benefits that go to those with lower incomes.

In addition, the Circulars permit federal agencies, for the first time, to include economic transfers in their cost-benefit analyses as both a benefit to the transferee and a cost to the transferer. Though such transfers cancel out when calculating a net benefit, they can be very relevant in a distributional analysis. For example, increasing the number of workers eligible for overtime pay is a transfer from employers to employees, but represents a real benefit to workers in their daily lives; not counting higher wages as benefits in DOL rulemaking around overtime thus produces an incomplete picture of the rule’s impact.<sup>15</sup> Similarly, it is highly misleading to characterize billions in cuts to the Supplemental Nutrition Assistance Program (SNAP) as merely a “transfer” to the federal government from people losing benefits that they depended on to feed their families (as the Trump administration did in a 2019 SNAP rulemaking).<sup>16</sup> Steps like income weighing and including transfers in cost-benefit calculations will make it easier for both agencies and the public to understand the true benefits and costs that a regulatory action will likely have in the real world.

Analyzing differential impacts of regulatory action based on income and wealth is an important step that the new Circulars appropriately encourage—but income is not the only characteristic that agencies should consider in a distributional analysis. The individual and structural discrimination that women, people of color, LGBTQI+ people, and disabled people experience in our economy and our society will in many instances justify examining the specific impact of proposed regulations on some

---

<sup>12</sup> See generally Mitchell, *supra* note 9.

<sup>13</sup> See, e.g., Tip Regulations Under the Fair Labor Standards Act (FLSA), 84 Fed. Reg. 53,956 (Oct. 8, 2019); NWLC comments re: RIN 1235-AA21 (Dec. 10, 2019), <https://www.regulations.gov/comment/WHD-2019-0004-0448>. This rulemaking represented on of multiple attempts by the Department of Labor during the Trump administration to ignore (or even deliberately conceal) the likely transfer of income from tipped workers to employers under proposed regulations. See NWLC comments re RIN 1235-AA21 at 7.

<sup>14</sup> See Mitchell, *supra* note 9, at 14.

<sup>15</sup> See generally, e.g., NWLC comments re: RIN 1235-AA20 (May 21, 2019), <https://www.regulations.gov/comment/WHD-2019-0001-59308>.

<sup>16</sup> See Revision of Categorical Eligibility in SNAP Regulatory Impact Analysis (July 14, 2019); <https://www.regulations.gov/document/FNS-2018-0037-0002>; NWLC comment re: RIN 0584-AE62 (Sept. 23, 2019), <https://www.regulations.gov/comment/FNS-2018-0037-17689>.

or all of these groups. People who benefit from an increase in the salary threshold for overtime pay or are harmed by cuts to SNAP benefits as referenced above, for example, are not only individuals with lower incomes but are also disproportionately women and people of color.<sup>17</sup>

The updated Circular A-4 thus appropriately identifies race and ethnicity, sex, gender, geography, wealth, disability, sexual orientation, religion, national origin, age or birth cohort, family composition, and veteran status as categories that can be considered as part of a distributional analysis,<sup>18</sup> consistent with President Biden’s directive that regulatory review practices be modernized so as to “appropriately benefit and ... not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”<sup>19</sup> OIRA clarifies, too, that any evaluation of the distributional effects of a regulation must be considered in the context of “inequitable conditions that exist in the baseline,”<sup>20</sup> which will help ensure that agencies do not assume that maintaining the status quo is an outcome without negative impacts for specified groups. And importantly, OIRA makes clear that an agency may choose “a regulatory alternative with lower monetized net benefits over another with higher monetized net benefits because of the difference in how those net benefits are distributed.”<sup>21</sup> That is, under the updated Circulars, an agency may conclude, for example, that a regulation primarily benefiting low-paid workers—who are disproportionately women of color—is a better course of action than an alternative that provides an even greater monetary benefit to wealthy corporations.

In finalizing the Circulars, it would be beneficial for OIRA to further clarify how agencies should conduct weighted distributional analysis by, for example, providing more precision around how to calculate income and wealth, how to define an economic unit (i.e., household vs. individual), and which income bands to use. OIRA should also consider providing additional guidance on how agencies should determine which socioeconomic and/or demographic groups to focus on in a particular distributional analysis. And to ensure that any distributional analysis is easy to view and understand, agencies should be required to include a round-up of their distributional findings in the executive summary and accounting statement provided at the top of each regulatory impact analysis.

### III. Discount rates

Finally, we support OIRA’s proposal to modernize the use of discount rates. Policymaking in the 21<sup>st</sup> century should fully and accurately account for longer term benefits and costs of regulatory decisions, especially since many important policies that require immediate investments can reap long-term benefits. Access to high-quality early childhood education, for example, can affect earning potential over the course of a person’s life.<sup>22</sup> Investing in preventative health care, like regular cancer screenings and dental checkups, may lead to lower long-term health care costs.<sup>23</sup> Ensuring access to stable and affordable housing can have enduring positive effects on job, health, and education stability.<sup>24</sup> And all of these

---

<sup>17</sup> See generally, e.g., NWLC comments re: RIN 1235-AA20, *supra* note 15; NWLC comment re: RIN 0584-AE62, *supra* note 16; *By the Numbers: Data on Key Programs for the Well-Being of Women, LGBTQ+ People, and Their Families*, NWLC (May 2023), [https://nwlc.org/wp-content/uploads/2023/05/2023\\_NWLC\\_ByTheNumbers\\_Brief-1.pdf](https://nwlc.org/wp-content/uploads/2023/05/2023_NWLC_ByTheNumbers_Brief-1.pdf).

<sup>18</sup> Draft Circular A-4, *supra* note 1, at 63; see also Draft Circular A-94, *supra* note 2, at 15.

<sup>19</sup> Presidential Memorandum, Modernizing Regulatory Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>.

<sup>20</sup> Draft Circular A-4, *supra* note 1, at 61-62.

<sup>21</sup> Draft Circular A-4, *supra* note 1, at 64.

<sup>22</sup> See, e.g., Lynn A. Karoly et al., *Early Childhood Interventions: Proven Results, Future Promise*, RAND (2005), [https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG341.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG341.pdf).

<sup>23</sup> See, e.g., THE HEALTHCARE IMPERATIVE: LOWERING COSTS AND IMPROVING OUTCOMES (Pierre L Yong, Robert S Saunders & LeighAnne Olsen eds., 2010), <https://www.ncbi.nlm.nih.gov/books/NBK53920/>.

<sup>24</sup> See, e.g., Veronica Gaitan, *How Housing Can Determine Educational, Health, and Economic Outcomes*, URBAN INST. (Sept. 19, 2018), <https://housingmatters.urban.org/articles/how-housing-can-determine-educational-health-and-economic-outcomes>.

benefits are likely to be of particular importance to women, people of color, people with disabilities, and others who face systemic barriers to the care and resources they need to thrive.

To date, however, these potential outcomes have not been appropriately considered in the existing review process, which requires federal regulators to discount future consequences in their cost-benefit analysis. As a result, federal agencies may undervalue policies that impose present day costs even if they have substantial longer-term benefits. But OIRA's proposal will finally empower federal regulators to put a higher value on the longer-term benefits and costs of federal regulations, so that the regulatory process will take into account how they play out over many years for the communities we represent.

\* \* \*

For far too long, large corporations and wealthy individuals have held an outsized influence in the federal rulemaking process, in part because the outdated regulatory process overemphasizes their concerns. The revisions OIRA proposes will help agencies make federal rulemaking more equitable and responsive to the needs of women, people of color, LBGTQI+ people, individuals with disabilities, and others who have too often been ignored or sidelined in the regulatory process. Better data that accounts for all of us will lead to better decision-making, and more effective and responsible rulemaking that can improve the lives of people throughout the United States.

Thank you for considering these comments. Please do not hesitate to reach out to Julie Vogtman ([jvogtman@nwlc.org](mailto:jvogtman@nwlc.org)), Director of Job Quality & Senior Counsel at the National Women's Law Center, with any questions.

Sincerely,

National Women's Law Center

A Better Balance

American Association of University Women

End Rape On Campus

Equal Rights Advocates

Institute for Women's Policy Research

Know Your IX

National Partnership for Women & Families

Women Employed