



September 18, 2023

VIA ELECTRONIC SUBMISSION

Hon. Richard Revesz
Administrator
Office of Information and Regulatory Affairs
White House Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

RE: Request for Comments on Proposed Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis (Docket No. OMB- 2022-0016).

Dear Administrator Revesz:

The American Road & Transportation Builders Association (ARTBA) respectfully submits the following comments on the White House Office of Management and Budget (OMB)'s draft guidance entitled, "Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis." ARTBA appreciates OMB's intent to account for all the costs and benefits of regulatory actions. Regulatory transparency is important to ARTBA members. While OMB's proposal attempts to provide more procedural structure, it requires significantly more time for public comment. The guidance is overly broad, technically complex, and allows for too much uncertainty in regulatory decisions. It will not assist in offering increased data transparency to regulated entities including ARTBA members. ARTBA therefore recommends that OMB make significant modifications to the guidance and extend the public comment period. Our specific comments are outlined below.

Background

ARTBA is comprised of nearly 8,000 members representing all facets of the transportation construction industry (e.g., contractors, consultants, state Departments of Transportation, materials suppliers and more). Our members comply with hundreds of regulatory actions while delivering safe and reliable transportation infrastructure to our nation. Regulatory impact analyses are important to our members who use them to calculate regulatory compliance costs. These estimates are crucial for budgeting and bidding on road construction development projects.



This proposed guidance provides a prescriptive set of methods for incorporating “ecosystem services” into regulatory cost-benefit analysis. OMB defines this as environmental factors that contribute to human welfare (e.g., outdoor recreation, visually pleasing outdoor settings for mental health, and other welfare effects deriving from natural assets). The guidance asks federal agencies to attempt to quantify the human welfare impacts of regulations on these environmental factors and to consider the relative effects of alternatives. OMB specifically uses roadbuilding as an example in the guidance. In the example, a roadway is being built through a forest. Using OMB’s guidance, an agency would need to weigh the costs and benefits to human welfare of building the roadway including from (1) changes in access to parts of forests in need of management, (2) the ability to manage forests for fire risk, and (3) potential access to recreational activities, outdoor areas, etc.¹ As a more specific example, the guidance asks agencies to assess the net human welfare impact of altering wildlife viewing opportunities by potentially disrupting animals’ migratory paths.² OMB acknowledges that some of these impacts are not quantifiable, and instead allows agencies to assign qualitative weights to the factors based on professional judgment.³

OMB states that the guidance does not impose requirements on federal agencies, but that agencies should consult with OMB if their own internal rule-writing guidance conflicts.⁴ Furthermore, OMB intends that this document be read in tandem with Circular A-4 which is the principle guiding document by which federal agencies conduct their rulemaking analyses.⁵ Earlier this summer OMB issued a proposal to modify portions of Circular A-4; to-date that proposal has not been finalized.⁶

ARTBA’s Comments on the Proposed Rule

I. The proposal gives agencies broad discretion to employ favorable assumptions to achieve a particular regulatory outcome.

OMB’s proposal states that agencies should ensure the scope of their analysis is “sufficiently broad.”⁷ The guidance requires conducting an exhaustive analysis of complex economic outcomes (e.g., estimating direct and indirect effects, accounting for distributional impacts,

¹ This example is described on page 21 of the draft guidance document. See Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis, 88 Fed. Reg. 50912 (August 2, 2023). Full text available at <https://www.whitehouse.gov/wp-content/uploads/2023/08/DraftESGuidance.pdf>.

² *Id.* at passim.

³ *Id.*

⁴ *Id.*

⁵ OMB, Circular A-4, Regulatory Analysis (Sept. 17, 2003), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

⁶ OMB, Circular A-4 Regulatory Analysis (April 6, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf>.

⁷ *Supra* note 1 at 18.



monetizing human welfare impacts, etc.). The guidance states that if an agency cannot monetize or quantify the human welfare impacts, they can provide a “qualitative” assessment instead. This means that if the agency cannot assign a dollar/numeric value to a particular factor- such as the human welfare impact of changes to a visually pleasing outdoor setting- they can determine subjectively how this factor should be weighted. ARTBA is concerned that this would give agencies broad discretion to use controversial assumptions to achieve a particular outcome. Members would not be able to estimate compliance costs on their own because the agency would have the ability to assign values that need not be grounded in tangible data. This can lead to inconsistent applications, unreliable analyses, and a breakdown of government transparency in rulemaking.

As a practical matter many roadbuilding projects are not new developments, they are critical repairs and improvements to existing infrastructure. These projects are necessary to ensure the safety and security of our nation’s roadways. Each project undergoes multiple layers of regulatory review. Any given project complies with hundreds of federal and state regulations. It is therefore imperative that members be able to quantify and understand the impact a new rule may have on the overall project cost. By requiring agencies to consider abstract concepts that are unquantifiable, and allowing them to assign their own weights, OMB is all but ensuring that ARTBA members will have no way of knowing how much to budget for future rulemakings. OMB should therefore scale back the scope of its guidance.

II. The proposal is too technically complex to achieve its intended purpose.

As mentioned above, the scope of the proposed guidance is overly broad and relies on agencies making many assumptions and subjective decisions. This contributes to uncertainty and makes these analyses controversial. The guidance describes many technical complexities associated with estimating both quantifiable and non-quantifiable impacts. The level of analysis prescribed in the guidance would require a high level of sophistication and technical expertise, and an extraordinary amount of time and resources. With the high degree of uncertainty associated with estimating many ecosystem services and the discretion required by this guidance, ARTBA is concerned that the variance in analysis outcomes would be unacceptably high if conducted by independent groups of qualified professionals. That is, if a sample of technical experts was asked to perform these analyses independently, a wide range of recommendations could be supported based on choices made in the analysis. Regulated entities would therefore struggle to anticipate and reproduce analysis outcomes. There would be no consistency. ARTBA recommends that OMB seek members of the public with technical expertise to peer-review this draft guidance to ensure that these types of analyses can be conducted in a consistent way. ARTBA is also extremely concerned that this proposal would only lead to even more regulatory delays, which could significantly increase the cost of delivering projects. Given that federal agencies already struggle to accomplish necessary tasks due to resource constraints, adding



another layer of complex analysis and reporting would only exacerbate these issues. These types of regulatory delays also undercut the historic investment being made in our nation's infrastructure through the Infrastructure Investment and Jobs Act. Regulatory agency analyses should not be the bottleneck that impedes this funding being put to use. ARTBA therefore recommends that OMB seek recommendations from an independent, professional peer review, and modify the guidance to minimize concerns regarding consistency and replicability.

III. OMB should not issue new proposals before withdrawing or finalizing its revisions to Circular A-4.

The purpose and spirit of OMB's Circular A-4 is to instill transparency in federal agency rulemaking.⁸ By producing a cost-benefit analysis of a regulation, agencies provide the full picture to the public, including ARTBA members. The goal of the analysis is that members can understand what the rule is trying to do, what the purported benefits are, and what costs they will incur to comply. ARTBA and members can then analyze this data for themselves and provide substantive public comments or additional suggested alternatives that meet the agency's objective for the rule. Earlier this summer, OMB issued a proposal to modify Circular A-4, making it easier for agencies to overstate benefits of rules while understating costs.⁹ This proposal received several substantive comments urging OMB to withdraw the suggested modifications. OMB has not issued a final version of this guidance, yet the agency purports to rely on it in this latest document. OMB should not rely on proposed guidance and should either withdraw the proposal or significantly modify and finalize it based on the public comments received. This will ensure that the public understands what OMB is using for a baseline when proposing these additional requirements under this new guidance.

Conclusion

As stated above, ARTBA supports efforts to provide transparency in the federal rulemaking process. Regulatory impact analysis can assist ARTBA members in budgeting and planning for roadbuilding projects. OMB's latest proposal, however, misses the mark. Rather than giving members of the public increased awareness of the impacts of the rule, this guidance will unnecessarily complicate and obfuscate these analyses. This will result in regulatory delays, inconsistent and uncertain data, and ultimately costs to the regulated community. ARTBA therefore respectfully requests that OMB scale back the scope of the guidance, extend the comment period to allow for more robust analysis of the impacts, and seek a thorough peer-review of the proposal.

⁸ *Supra* note 5.

⁹ *Supra* note 6.



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If you have any questions or require additional information, please contact vice president and counsel for regulatory affairs, Prianka Sharma by email at psharma@artba.org or senior economist Joshua Hurwitz by email at jhurwitz@artba.org.

Sincerely,

/s/

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