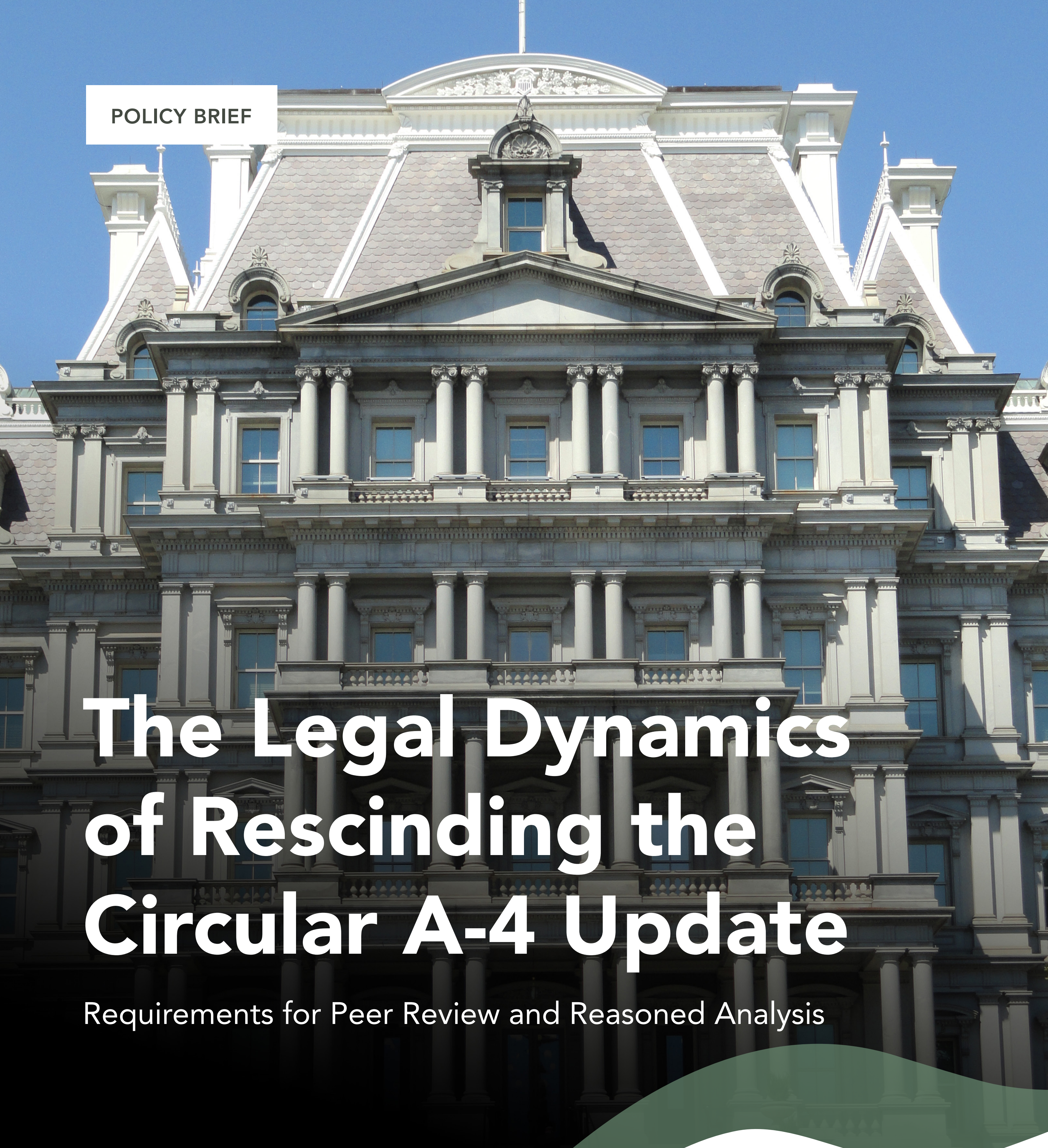

POLICY BRIEF

The Legal Dynamics of Rescinding the Circular A-4 Update

Requirements for Peer Review and Reasoned Analysis

Max Sarinsky
Jason A Schwartz

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Institute *for* Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

Institute for Policy Integrity New York University School of Law
Wilf Hall, 139 MacDougal Street
New York, New York 10012

Max Sarinsky is the regulatory policy director at the Institute for Policy Integrity at NYU School of Law, where Jason A. Schwartz is the legal director. The authors thank Andrew Stawasz for his research on this topic when he was a Policy Integrity legal fellow and Jack Jones for his review and feedback.

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Executive Summary

A government document known as Circular A-4 underlies many regulatory actions that affect the quality of our air and water, the safety of our food and workplaces, and many other areas touching Americans' lives. Issued by the White House Office of Management and Budget (OMB), Circular A-4 guides federal agencies on assessing the benefits and costs of significant rules, including deregulatory rules. Those economic analyses inform regulatory design and stringency, making Circular A-4 highly influential in federal regulation.

In 2023, OMB updated Circular A-4 for the first time in 20 years to reflect recent scientific and analytical advancements and more current economic data. Among other updates, the 2023 guidance modernized the discount rates used in regulatory analysis—that is, the rate at which future impacts are translated into their present values—to reflect recent economic data and scholarship. Less than two weeks into his term, in Executive Order 14,192, President Trump directed OMB to rescind the 2023 update to Circular A-4 and to reinstate the outdated 2003 version. This direction came as part of an executive order calling for ten new deregulatory rules for every new regulation, suggesting that the President sees the prior version of Circular A-4 as more conducive to deregulation.

But reinstating the prior Circular A-4 requires far more than a presidential directive. By statute, any update to OMB's guidance on benefit-cost analysis requires peer review. Given that requirement, properly rescinding Circular A-4 will be time-consuming and require expert scrutiny. Independent reviewers are likely to raise concerns with the rejection of recent analytical developments and updated data that peer reviewers largely supported when Circular A-4 was updated in 2023, which would likely complicate the President's directive to reinstate the old 2003 version.

Moreover, even if OMB rescinds the 2023 update, agency actions must still be based on reasonable analysis. Relying on outdated analytical practices from the 2003 Circular A-4 could very well fail that test—particularly if OMB fails to conduct meaningful peer review as required by law or if reviewers express disagreement with reinstating the older guidance.

Background on Circular A-4

Under Executive Order 12,866, signed by President Clinton in 1993, executive agencies must prepare "[a]n assessment, including the underlying analysis," of benefits and costs of any proposed or final regulation expected to have significant economic impacts.[1] Circular A-4 provides guidance to agencies on conducting that analysis.[2] As discussed further in the next section, OMB guidance to agencies on conducting benefit-cost analysis is required under a 2000 statute known as the Regulatory Right-to-Know Act.[3]

The 2003 version of Circular A-4 contained extensive guidance for agencies on conducting economic analysis, with topics ranging from identifying the need for regulatory action to defining the analytical baseline and applying proper discount rates. Most of the guidance in the 2003 Circular was fairly high-level, recommending general approaches rather than specific metrics. But some of its guidance was very specific; most notably, the 2003 Circular endorsed default annual discount rates of 3 percent and 7 percent.[4]

Some of those specific prescriptions have grown outdated over time with economic developments. Most notably, experts have repeatedly observed that economics and current financial data no longer support the use of such high discount rates. In 2017, the Council of Economic Advisers explained that "real interest rates around the world have come down since" the 2003 Circular, and that recent "evidence supports lowering these discount rates": specifically, that the so-called consumption-based rate should be lowered from 3 percent down to 2 percent or lower.[5]

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1 Exec. Order No. 12,866 § 6(a)(3)(C), 58 Fed. Reg. 51,735 (Oct. 4, 1993). Executive Order 12,866 required a detailed benefit-cost analysis for any regulation expected to "[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." *Id.* § 3(f)(1). In a 2023 executive order, that monetary threshold was increased to $200 million to keep pace with inflation. Exec. Order No. 14,094 § 1(b), 88 Fed. Reg. 21,879 (Apr. 11, 2023). President Trump withdrew the 2023 executive order in January 2025, reinstating the $100 million threshold. *See* Exec. Order 14,148 § 2(ddd), 90 Fed. Reg. 8237 (Jan. 28, 2025).

2 Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis (2003), https://perma.cc/KCL6-SPXC [hereinafter Prior Circular A-4]; Off. of Mgmt. & Budget, Circular A-4: Regulatory Analysis (2023), https://perma.cc/R4WD-AA4H [hereinafter Updated Circular A-4].

3 *See* Prior Circular A-4, *supra* note 2, at 1 (referring to the Regulatory Right-to-Know Act).

4 *Id.* at 33–34. Importantly, these were default rates and were never appropriate to apply in all circumstances. For example, OMB recognized since at least 2010 that when calculating the climate costs imposed by greenhouse gas emissions, which were measured in consumption-equivalent units, a discount rate based on the rate of return to capital (such as the 7 percent default rate) is not appropriate. *See* Off. of Mgmt. & Budget, *Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* at 22 (2015), https://perma.cc/J8CQ-LLV7 (explaining approach taken since 2010).

5 Council of Econ. Advisers, *Discounting for Public Policy: Theory and Recent Evidence on Merits of Updating the Discount Rate* at 1 (2017), https://perma.cc/46UQ-LYAQ.

Independent experts have also noted that recent evidence and scholarship supports lower discount rates of about 2 percent.[6]

The discount rates called for in the 2003 version of Circular A-4 also severely devalued long-term effects. For instance, a policy that would yield a $100 million benefit in 30 years (undiscounted) would be valued at only $13 million using a 7 percent discount rate and approximately $41 million at a 3 percent rate. At the 2 percent rate favored by modern economic literature and data, that same $100 million benefit in 30 years would instead be valued at over $55 million.

In 2023, OMB updated Circular A-4 to incorporate economic scholarship and data from the past 20 years. Much of the update reflected consistency in economic practices, and on the whole, the 2023 version of Circular A-4 largely resembled the 2003 version. But some sections were substantially revised.

Perhaps the most significant updates in the 2023 Circular pertain to discounting.[7] Most notably, the revised Circular used recent data to derive a default annual discount rate of 2 percent.[8] The Circular derived the 2 percent discount rate using the same fundamental methodology as the 2003 Circular had used to derive the 3 percent discount rate, just with newer data. Specifically, whereas the 2003 version derived its 3 percent discount rate by averaging real (i.e., inflation-adjusted) rates of return on 10-year Treasury notes from the 30 years beginning in 1973,[9] the 2023 update did the same for the 30 years beginning in 1993.[10] And whereas the 2003 Circular also recommended a 7 percent discount rate to approximate the opportunity cost of capital and (implicitly) systemic risk, that approach was no longer consistent with the best practices for accounting for capital effects in economic analyses because it falsely assumed that regulations would always impose costs to capital investment. Accordingly, the 2023 update adopted an analytically preferred method called the "shadow price of capital" that enables analysts to consider effects on capital separately while maintaining the 2 percent discount rate.[11]

In addition to modernizing the discount rate to account for recent scholarship and data, the updated Circular also reflected significant advancements in considering distributional impacts (including the distribution of costs), behavioral science, and other analytical issues.[12] The updated Circular also contained substantial new discussion of tools that agencies can use to

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6 *See, e.g.*, Peter H. Howard et al., *U.S. Benefit-Cost Analysis Requires Revision*, 380 Science 803 (2023).

7 *See* Updated Circular A-4, *supra* note 2, at 75–82.

8 *Id.* at 77.

9 Prior Circular A-4, *supra* note 2, at 33–34.

10 Updated Circular A-4, *supra* note 2, at 76–77. OMB concluded that it was appropriate to retain the 30-year lookback window for calculating the social rate of time preference, concluding that "monetary policy or recessions in the averaging window [do not] provide a substantial basis for doubting the 30-year average." Off. of Mgmt. & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* at 63 (Nov. 9, 2023), https://perma.cc/C258-7383 [hereinafter OMB Comment Response].

11 Updated Circular A-4, *supra* note 2, at 77–80 (recommending other approaches to account for effects on capital).

12 *See, e.g.*, Updated Circular A-4, *supra* note 2, at 61–67 (prescribing practices to account for distributional effects); *id.* at 17–18 (discussing consideration of behavioral biases).

better account for unmonetized costs and benefits, including economic methods to quantify non-market effects.[13]

Under both the updated and older versions of Circular A-4, agencies routinely calculate that most new regulations will deliver significant monetized net benefits to society.[14] Nevertheless, President Trump has now directed agencies to rescind ten existing regulations for every new regulation they issue.[15] In the same executive order, he directed OMB to revoke the 2023 update and reinstate the prior version of Circular A-4.[16] The executive order does not specify either a timeframe for this repeal or the process that OMB should follow.[17]

13 *E.g.*, *id.* at 44–48 (discussing methods for treating non-monetized benefits and costs).

14 *See, e.g.*, Off. of Mgmt. & Budget, *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act—Fiscal Year 2023: Appendix A* (2025), https://perma.cc/P6K3-KM2K.

15 Exec. Order 14,192 § 3(a), 90 Fed. Reg. ____ (Feb. 6, 2025).

16 *Id.* § 6(b).

17 *See id.*

I. Rescinding the Circular A-4 Update Requires Peer Review

Federal law requires OMB to subject Circular A-4 and its revisions to peer review. Accordingly, OMB must complete peer review if it wants to rescind the 2023 update and reinstate the 2003 version.

As noted above, OMB issued Circular A-4 pursuant to a 2000 statute known as the Regulatory Right-to-Know Act (the Act).[18] For each year starting in 2002, the Act requires OMB to submit an annual report to Congress estimating the benefits and costs of every major rule issued during the year and an aggregate estimate for all the year's rules.[19] To implement that requirement, the Act requires the OMB director to "issue guidelines to agencies to standardize [their] measure of costs and benefits."[20] And the Act provides that OMB "shall provide for independent and external peer review of the guidelines."[21]

Notably, OMB has always understood Circular A-4 to constitute the guidelines called for under the Act that must undergo peer review. Specifically, in the original 2003 version of the Circular, OMB noted that the Circular was issued under the Act and subject to both public comment and peer review.[22] OMB likewise ensured that the 2023 Circular A-4 update went through a thorough public comment and independent peer review process, this time releasing the full peer review report[23] and OMB's responses to both peer-review and public comments.[24] Although reviewers expressed a range of views and offered suggestions for improvement, they broadly expressed support for key revisions in the updated Circular[25] and recognized that an update was overdue.[26]

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18 Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 624, 114 Stat. 2763, 2763A-161 (2000) [hereinafter Regulatory Right to Know Act].

19 *Id.* § 624(a)(1).

20 *Id.* § 624(c)(1).

21 *Id.* § 624(d).

22 Prior Circular A-4, *supra* note 2, at 1.

23 ICF Int'l, *Individual Peer Reviewer Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis"* (Aug. 3, 2023), https://perma.cc/UWV4-QR46.

24 OMB Comment Response, *supra* note 10.

25 *See id.* at 2–3 (compiling comments). *See also, e.g.*, ICF Int'l, *supra* note 23, at 4 (Harvard University professor Joseph Aldy: "Overall, this is a quality guidance document that generally reflects well the state of knowledge in the academic literature and recognizes the relevant conditions and constraints that influence agency production of regulatory impact analyses."); *id.* at 80 (Yale University professor Kenneth Gillingham: "[T]he proposed guidance is a major step forward. I strongly support the spirit of the major changes[.]"); *id.* at 95 (University of California-Berkeley professor Christina Romer: "The proposed revision of OMB Circular A-4 is an ambitious and welcome step. It seeks to bring the latest evidence into the conduct of regulatory analysis by U.S. government agencies. The revised guidance is exceptionally well researched and documented, and provides numerous examples that both readers and analysts will find helpful. The new guidelines should help to improve and standardize regulatory analysis throughout the federal government.").

26 *E.g.*, *id.* at 29 (University of Pennsylvania professor Cary Coglianese: "In light of the importance of analysis

Many public commenters—including experts from the nation's top universities and a group of 102 economists that featured the 2024 Nobel Prize in Economics recipient Daron Acemoglu—also supported the proposed changes.[27]

Accordingly, both the Act's statutory text and OMB's consistent practice make clear that external peer review is required before updating Circular A-4. And that peer review cannot be cursory. In 2004, OMB issued an "Information Quality Bulletin for Peer Review," which establishes under the requirements of the Information Quality Act "government-wide guidance aimed at enhancing the practice of peer review of government science documents."[28] This Bulletin includes extensive requirements to ensure that agency peer review practices are not *pro forma* but rather "characterized by both scientific integrity and process integrity."[29] For example, the Bulletin requires agencies to select reviewers that are independent and expert in the subject matter,[30] and to "consider[] and address[] the reviewers' comments" and incorporate those comments "where relevant and valid."[31] Moreover, any required peer review must occur before the 2023 version of Circular A-4 is rescinded and replaced.[32] Given that President Trump has instructed the total readoption of the 2003 Circular without regard to recent developments and updated data, it is hard to imagine how OMB could ensure that it give serious consideration to reviewers' comments while also following his direction.

Nor would it suffice for OMB to argue that rescinding the 2023 Circular and replacing it with the 2003 version does not require further peer review because the 2003 version was peer-reviewed before its initial issuance. This approach would violate the best reading of the Act. Such a reading would suggest that OMB must consult expert peer reviewers to apply updated economic practices but may disregard those practices by reinstating an old version of the Circular without peer review. Enabling OMB to rescind Circular A-4 without peer review would also violate the presumption in many areas of administrative law that repealing a document requires the same process as publishing that document.[33]

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in informing and justifying regulatory decision-making, it is rather astonishing that Circular A-4 has not been updated in twenty years.").

27 Comment Letter from 102 Economists on the Proposed Revisions to Circular A-4 (June 20, 2023), https://www.regulations.gov/comment/OMB-2022-0014-3924. Another letter from 19 economists also noted that "the proposed revisions bring the Circular A-4 guidance more in line with the teachings and research of modern economics and represent a valuable revision to A-4." David Autor et al., Comment Letter on the Proposed Revisions to Circular A-4 (May 30, 2023), https://www.regulations.gov/comment/OMB-2022-0014-0021.

28 Joshua B. Bolten, *Memorandum re: Issuance of OMB's "Final Information Quality Bulletin for Peer Review"* at 1 (Dec. 16, 2004), https://perma.cc/CSB5-G8V5.

29 *Id.* at 13, 14–32 (detailing these guardrails).

30 *Id.* at 16–18.

31 *Id.* at 21.

32 *See id.* at 12 (requiring peer review to be done "prior to dissemination").

33 Under the Administrative Procedure Act, for example, agencies must engage in the same notice-and-comment process both to promulgate a rule and to rescind a rule. *See* 5 U.S.C. § 553 (setting the procedural requirements for rulemaking, including notice-and-comment); 5 U.S.C. § 551(5) (defining "rule making" as "agency process for formulating, amending, or repealing a rule").

Accordingly, OMB must engage in peer review to rescind the updated Circular A-4 and reinstate the 2003 version. Such a process would likely be time-consuming (for instance, it took OMB seven months in 2023 to go from its draft, through public comment and peer review, and to its final update) and may also complicate the President's directive to reinstate the 2003 version given that independent and expert reviewers are likely to raise concerns with reverting to outdated economic practices.

II. Even if OMB Rescinds the Circular A-4 Update, Agency Actions Relying on Outdated Economic Practices Are Legally Vulnerable

Even if OMB reinstates the 2003 version of Circular A-4, agencies have an independent obligation to rely on reasonable and evidence-based analysis in their decisionmaking. Using outdated economic practices from a superseded guidance document may violate that obligation, making agency rules that rely on the 2003 Circular vulnerable to being found arbitrary and capricious under the Administrative Procedure Act.

Under Executive Order 12,866, an agency should "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[34] Judicial caselaw holds that "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."[35] For instance, where an agency fails to "examine the relevant data" or "offer[s] an explanation for its decision that runs counter to the evidence," a court may find the resulting regulation arbitrary and capricious.[36] Moreover, when an agency deregulates, "a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy,"[37] and the agency "cannot simply disregard contrary or inconvenient" factual or analytical findings from its earlier rulemaking.[38]

Based on these standards, an agency's use of obsolete economic practices and stale data from the outdated 2003 version of Circular A-4 may constitute irrational and unlawful decisionmaking. In particular, agencies may be hard-pressed to justify a reversion to the 3 and 7 percent discount rates in the 2003 version of Circular A-4. Expert peer reviewers who reviewed the 2023 update widely supported discarding the 7 percent discount rate and lowering the discount rates overall.[39]

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34 Exec. Order No. 12,866 § 1(b)(6), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

35 Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (citations omitted).

36 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* City of Portland v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (suggesting that the court will not "tolerate rules based on arbitrary and capricious cost-benefit analyses").

37 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009).

38 *Id.* at 537 (Kennedy, J., concurring in part and concurring in the judgment).

39 *See, e.g.*, ICF Int'l, *supra* note 23, at 71 (Yale University professor Kenneth Gillingham: "In the proposed guidance, the 7% rate is discarded and deemed generally inappropriate for a social rate of discount . . . I agree with this

Moreover, as noted above, adjusting the consumption-based discount rate from 3 to 2 percent simply applies current data to the pre-existing methodology.[40] Agencies will likely struggle to provide a rational explanation for using old economic data when newer data is readily available, or for otherwise using outdated economic practices that now lack expert support. In particular, agencies will struggle to provide a reasoned justification if OMB fails to conduct robust peer review as the Act requires or if reviewers object to OMB reverting to that document's outdated economic practices.

If an agency fails to provide a reasoned justification for its analytical choices in a particular rule or other action, that can be challenged in any litigation arguing that the action is arbitrary and capricious under the Administrative Procedure Act. Whether an agency's choice to follow the 2003 version of Circular A-4 constitutes arbitrary-and-capricious decisionmaking will turn on the merits of each application. Such an analysis could consider the agency's proffered justification and the significance of its analytical choices to its regulatory approach. Insofar as it relates to the agency's assessment, a court could also consider OMB's record for withdrawing the updated Circular, including any peer review.

assessment and I believe it is supported by the literature."); *id.* at 81 (Resources for the Future president William A. Pizer endorsing the use of a 2 percent discount rate); *id.* at 97 (University of California-Berkeley professor Christina Romer recommending the use of discount rates "in the range of 2 to 3 percent"); *id.* at 105 (Vanderbilt University professor W. Kip Viscusi recommending rates of 2 and 3 percent).

40 Updated Circular A-4, *supra* note 2, at 76–77; *see also supra* notes 9–10 and accompanying text.

Conclusion

President Trump's direction to OMB to rescind the 2023 update to Circular A-4 and reinstate the 2003 version will likely be complicated and will raise legal vulnerabilities. Any update to Circular A-4 requires independent and external peer review, which if conducted properly will likely reveal disagreement from experts with OMB's reversion to outdated economic practices. And agency actions that rely on the prior version's outdated methods will be legally vulnerable, particularly if experts express substantial concerns with this approach and OMB disregards the concerns.

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Wilf Hall, 139 MacDougal Street, New York, New York 10012
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