

**Before the Office of Management and Budget
Response to Proposed OMB Circular No. A-4
Docket ID OMB-2022-0014**

**Written Comments from the American Economic Liberties Project
Request for Comments on Proposed OMB Circular No. A-4, “Regulatory
Analysis”**

RIN 3084-AB74

June 16, 2023

We submit this comment in response to the Office of Management and Budget’s (“OMB”) proposed revision of Circular A-4, meant to carry out the goals outlined in Executive Order 12866 and related authorities. The American Economic Liberties Project (“Economic Liberties”) is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States. As such, Economic Liberties submits these written comments with respect to the proposed revisions as they pertain to questions of competition and market power. In short, Economic Liberties applauds OMB’s expanded consideration of market power and the problems that it causes for regulatory analysis and the economy more broadly. However, the proposed revisions do not fully account for the distortions that elevated market power has fostered in today’s highly concentrated economy, nor do they provide sufficiently clear guidance for regulators to assess and design regulatory policies relative to the problems created

by market power. Competition is one of the Biden administration's top priority areas for reform and executive action,¹ and as such, we urge the OMB to further develop the proposed version of Circular A-4 to reflect both the contemporary understanding of market power and its place as a priority for regulatory action in the Biden administration. Considerations of market power, especially in light of the current monopoly crisis pervading many sectors of our economy, must be a central concern when crafting regulations.

I. Introduction

At a general level, Economic Liberties supports the reforms proposed by the Biden Administration to Circular A-4 from its 2003 iteration (henceforth "2003 A-4"). This revision and series of updates are an important step forward for American economic policy, and the OMB's Proposed Circular A-4 (henceforth "Proposed A-4") itself will create a better regulatory framework. The 2003 A-4 reflected a deeply flawed use of regulatory cost-benefit analysis to support federal agency rulemaking under EO 12866. For instance, agencies have been required to analyze regulatory costs and benefits using discount rates that bias policy choices and undermine effective governance. By understating the very real benefits that new regulatory protections provide to the public, simply because those benefits accrue in the future rather than immediately, agencies have been placing more weight on short-term compliance costs to large corporations, and less weight on long-term benefits to the

¹ Executive Order on Promoting Competition in the American Economy, July 9, 2021, *available at*: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

workers, smaller firms, the public and other stakeholders. The higher the discount rate, the more regulatory cost-benefit analysis puts a thumb on the scale against strong and simple regulations that protect the public and in favor of weak regulations that are corporate-friendly. To be clear, this in practice meant that legal rights – guaranteed by the statutes from which regulations derive their authority – were being watered down by being balanced against the costs of compliance for the companies that were otherwise violating them.

Accordingly, Economic Liberties supports many of the most important updates: (a) directing agencies to use a 1.7% discount rate rather than the current and outdated 3% discount rate, (b) removing the requirement that agencies analyze costs and benefits using an alternative 7% discount rate, (c) requiring agencies to place more emphasis on the distributional consequences of regulations, and (d) redefining the threshold for “economically significant” regulations subject to OIRA regulatory review under section 3(f)(1) of EO 12866, from \$100 million to \$200 million. These will allow regulators to make a far more clear-eyed and realistic assessment of the long-term benefits of different regulatory options, and not constrain regulatory review of unrealistic assumptions that predispose the government to inaction.

We also applaud the Proposed A-4 for taking many steps forward in addressing and identifying the problems presented by market power. The Proposed A-4 incorporates concerns about buyer or “monopsony” power, eliminates much of the language assuming that market forces or technology are likely to self-correct the

problems caused by market power, and identifies many causes of market power beyond government regulations, which had been the primary focus in the 2003 A-4.

However, the conceptual framework of the Proposed A-4 still rests on flawed assumptions about competition, market power, market structure, and the likely benefits and costs that correspond to each of them. In this comment, we propose a general change in the general framing of market power in the A-4 Circular, as well as a series of more specific adjustments, edits, and changes which would lead to more practical, accurate, and beneficial regulatory decisions in this area.

This comment is structured as follows. Section II outlines the general relationship between market power and public regulation, highlighting many of the most important variables and dynamics that regulators must keep in mind. Section III briefly discusses the Proposed A-4's discussion of market power as presenting a need for regulation, arguing that this section should be more developed and specific in practical terms. Section IV discusses a series of concrete effects that market power can have with respect to the predicted effects of regulation, and how the Proposed A-4 should be revised to incorporate these considerations. Section V discusses compliance and enforcement with reference to large and powerful firms in particular, arguing that regulatory analysis should favor bright-line rules as more cost-effective and efficient than incentive-based "nudges." Throughout this comment, to emphasize the need for more specific and practically applicable guidance to be included in a revised version of the A-4 Circular, we use a series of examples of contemporary

market power, which are either caused by or could be addressed by well-designed regulation.

II. Regulation and the Problem of Market Power

Market power is among the greatest economic policy challenges of our time and represents a significant barrier to economic performance, equality, and resilience, both at the macro and micro level. Market power has increased dramatically in the past 40 years, since approximately the time that antitrust enforcement was significantly weakened in the Reagan administration, and the government began more extensively incorporating explicit cost-benefit analysis into its regulatory decision-making process. Since 1980, average markups in the American economy rose from 21% above marginal cost in 1980 to 61% in 2020.² 75% of industries have become more concentrated since the 1990s.³ Profits have increasingly become concentrated in a narrower and narrower set of firms.⁴ Whereas aspects of the United States' regulatory system have served to obstruct market competition and protect powerful incumbents, there is evidence European markets have become more competitive through continent-wide market-making.⁵

² De Loecker, J., Eeckhout, J. and Unger, G., 2020. The rise of market power and the macroeconomic implications. *The Quarterly Journal of Economics*, 135(2), pp.561-644.
<https://doi.org/10.1093/qje/qjz041>.

³ Gustavo Grullon, Yelena Larkin, Roni Michaely, "Are US Industries Becoming More Concentrated?" *Review of Finance*, Volume 23, Issue 4, July 2019, Pages 697–743,
<https://doi.org/10.1093/rof/rfz007>.

⁴ Autor, D., Dorn, D., Katz, L.F., Patterson, C. and Van Reenen, J., 2020. The fall of the labor share and the rise of superstar firms. *The Quarterly Journal of Economics*, 135(2), pp. 645-709:
<https://doi.org/10.1093/qje/qjaa004>.

⁵ Philippon, Thomas. 2019. *The Great Reversal How America Gave Up on Free Markets*. Cambridge, MA: Harvard University Press.

Not just an abstract change in aggregate economic indicators, the increase in market power has been costly in concrete terms. The rise of concentration in specific industries has been linked to a lower labor share of income.⁶ The level of investment made by the largest American firms has arguably decreased as a result of decline in competition.⁷ The significant increase in income inequality over the past generation is also likely driven in part by market power, as most income inequality has been shown to stem from differences in average pay between profitable and less profitable firms, rather than by stratification of incomes by skill levels.⁸ Furthermore, the list of harms in individual sectors is far greater: medical supply shortages, increasing healthcare prices from hospital consolidation, military spending and the consolidation of defense contractors, the monopolization of online advertising markets, airline consolidation and the unreliability of service, the baby formula shortage, and many, many others.

⁶ Barkai, S., 2020. Declining labor and capital shares. *The Journal of Finance*, 75(5), pp.2421-2463: <https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12909>; Autor, D., Dorn, D., Katz, L.F., Patterson, C. and Van Reenen, J., 2020. The fall of the labor share and the rise of superstar firms. *The Quarterly Journal of Economics*, 135(2), pp. 645-709: <https://doi.org/10.1093/qje/qjaa004>.

⁷ Gutiérrez, G. and Philippon, T., 2018, May. Ownership, concentration, and investment. In *AEA Papers and Proceedings* (Vol. 108, pp. 432-37), <https://doi.org/10.1257/pandp.20181010>.

⁸ Barth, E., Bryson, A., Davis, J.C. and Freeman, R., 2016. It's where you work: Increases in the dispersion of earnings across establishments and individuals in the United States. *Journal of Labor Economics*, 34(S2), pp. S67-S97. https://www.journals.uchicago.edu/doi/full/10.1086/684045?casa_token=xjZOq81vS3wAAAAA%3Ay668MHZiWkvnlcLJA06W0ojuedF22pRaFegK4ap43CuemQEho7A3Dok-A_u63EDNIImCKXmzV8IsI; Song, J., Price, D.J., Guvenen, F., Bloom, N. and Von Wachter, T., 2019. Firming up inequality. *The Quarterly journal of economics*, 134(1), pp.1-50. <https://doi.org/10.1093/qje/qjy025>; Furman, J. and Orszag, P., 2018. A Firm-Level Perspective on the Role of Rents in the Rise in Inequality. In *Toward a Just Society* (pp. 19-47). New York, NY: Columbia University Press. <https://www.degruyter.com/document/doi/10.7312/guzm18672-003/html>.

In contrast to this nearly ubiquitous problem, the Revised A-4, like the 2003 A-4, reads as though market power is an abstract, theoretical problem, to be addressed in the rare circumstance where the marginal revenue curve for an oligopoly firm does not reach an equilibrium price at its social optimal level. And as such, it often implicitly assumes that market power is rare. For example, the Proposed A-4 both tends to avoid direct engagement with concrete circumstances of harmful market power, and it makes policy statements implicitly framed around the premise that competitive markets are the norm:

“In light of both economic theory and actual experience, it is particularly difficult to demonstrate positive net benefits for any of the following types of regulations:

- price controls *in well-functioning competitive markets*;
- production or sales quotas *in well-functioning competitive markets*;⁹

Nowhere does the Proposed A-4 note what qualifies as a well-functioning or competitive market, but the tone throughout appears to be that most markets meet both criteria.

The empirical reality is that – to the degree competition and market power are viewed as the most salient features of a market – most markets exist somewhere on a spectrum between perfect competition and pure monopoly. Very few markets exist at either of these extremes, with very rare exceptions such as agricultural commodities or electric utilities, both of which are, for that very reason, regulated in a variety of ways. Furthermore, the weight of the evidence would indicate that markets today are

⁹ Proposed A-4, page 27.

systematically tilted towards monopoly, indicating that it is backwards to presume any given market is well-functioning and competitive. **The regulatory guidance set forth by Circular A-4 should clearly reflect that most markets exist on such a spectrum, and direct regulatory analysis to investigate the degree of market power in nearly all cases, rather than make an implicit, default assumption of competitive markets.**¹⁰

III. Market Power as a Motivation for Regulation

Given the range of ways that market power and concentration can harm economic performance, deprive workers of better pay or working conditions, stymie the implementation of statutory mandates, undermine democratic norms, and distort regulatory intent, both the 2003 A-4 and the Revised A-4 highlight market power as a central motivation for regulation itself. The proposed A-4 reads:

“Common needs for regulation include, but are not limited to: correcting market failure, which may implicate externalities, common property resources, public goods, club goods, market power, and imperfect or asymmetric information.”¹¹

Section B of the 2003 A-4, while narrower in scope, frames the problem similarly. While it is true that market power presents significant problems for economic prosperity, innovation, democracy, and equity, this framing also assumes market power not as a general problem to be addressed proactively in areas of economic,

¹⁰ It should also be noted that not all forms of competition or all forms of market power are made equal, and the implicit presumption that “well-functioning competitive markets” efficiently, equitably, and effectively allocate resources is an empirical question that regulators must research and monitor rather than simply assume.

¹¹ Proposed A-4, page 15.

environmental, military, and labor policy where appropriate. Rather, as discussed above, it is framed as a comparatively rare exception to “well-functioning competitive markets” which presumably exist in an “unregulated” state of nature, meaning the guidance effectively discounts its importance when deciding what regulations are necessary and what form they should take.

Accordingly, past versions of the document discounted market power as a meaningful challenge. The 2003 A-4’s only substantive examples or points on the need for regulation to address market power were:

- a) “Government action can be a source of market power”,
- b) “The government may choose to validate a monopoly...if a market can be served at lowest cost only when production is limited to a single producer”, and
- c) “Technological advances often affect economies of scale” and thus can “transform what was once considered a natural monopoly into a market where competition can flourish.”¹²

In short, despite recognizing the problem, the 2003 A-4 implied that public regulation is the primary source of market power, that private monopolies can be a positive outcome, regulators should take comfort in the hope that technological change will unwind problematic sources of market power without necessitating any policy action.

The Proposed A-4 updates this section to make several improvements, but it retains key shortcomings. In terms of improvements, the proposed revision incorporates additional harms that stem from market power – buyer power, reductions in quality, changed terms of service, worse working conditions – and includes more

¹² 2003 A-4, Section B.2.

general sources of harm that stem from market power – barriers to entry, resource scarcity, intellectual property protections, control over commercial platforms, and others.¹³ These are important points for regulatory analysis to consider.

What neither version of the A-4 Circular does, however, is provide guidance for agencies with respect to the key point of the section: exactly how and in what way the existence of market power might compel federal regulation. The section reads broadly as a statement about market power as a hypothetical issue that might occur abstractly in different markets. An ambitious federal employee might be able to use this guidance to theoretically link market power to the problems they see in their area of regulation. However, with market power described in such abstract terms, federal bureaucrats will not necessarily know what criteria to use when deciding when or if market power is a problem, or what steps to go through in that review. The A-4 Circular should guide regulators to assess markets they are regulating, or which are adjacent to the policy goal they are pursuing, for potential problems stemming from market power. **Some of the key questions that should be presented for regulators to ask are:**

- **Under what conditions should a disparity in bargaining power compel regulation?**
- **What sorts of regulatory procedures might lead to more or less market power?**
- **What criteria should agencies use to determine if market power is undermining their statutory mandates?**
- **To what extent does firm size or power diminish the intended effect of public regulations?**

¹³ Proposed A-4, Section 5(a)(ii).

In asking these questions, the Proposed A-4 should provide guidance for regulators for the sorts of routine assessments to make. For example, **regulators should examine the degree of concentration in the relevant markets using the standard methods, such as the Hirschman-Herfindahl Index (HHI), and the 4- and 8-firm concentration ratios as defined by, for example, the US Census Bureau’s six-figure NAICS codes. A finding of an HHI above 1500 be considered sufficient to require further analysis and regulatory remedies for likely market power problems.** To be clear, however, such a finding is not necessary to indicate that market power may be presenting problems, as concentration is one among several ways that a given firm can control segments of a market.

This lack of specific guidance is all the more problematic because, with respect to the other forms of market failure and the other listed reasons for regulation, the Proposed A-4 does provide some level of guidance. Section 5(a)(i), on externalities, notes that “[r]egulatory benefits and costs should reflect relevant positive and negative externalities and the extent to which they interact with the regulation being analyzed, regardless of the form those externalities take.”¹⁴ Section 5(a)(iii), on asymmetric information, states:

“absent government regulation, imperfect or asymmetric information continues to substantially affect important sectors of the economy, such as the agricultural, insurance, consumer credit, healthcare, and real

¹⁴ Proposed A-4, page 17.

estate markets. Imperfect information ... should be given consideration when performing such modeling as part of a regulatory analysis.”¹⁵

Section 5(a)(iv), on behavioral biases, reads:

“You should carefully consider the degree to which the evidence available to you indicates that behavior reflects rational preferences and the degree to which it indicates that such behavior is the product of a behavioral bias. When you have gathered evidence that the latter is the case—for example, studies demonstrating private undervaluation or overvaluation of relevant consumer products—that evidence will likely provide a key input in your quantification of regulatory benefits.”¹⁶

These are, to varying degrees, specific guidance that both directs agencies to take action and explains how those concerns should be taken into account.

By comparison, Section 59(a)(ii), the section on market power, reads primarily like an abstract description of what market power is and is not, without any stated need for action or criteria for when action is preferred or required.

We suggest that the Proposed A-4 be revised to include more specific guidance that directs agencies to address market power where it interferes in the legislative mandate that agencies have been tasked to carry out. For example:

- **Where there is a statutory competition mandate, the A-4 Circular should provide guidance that regulations and procedures should be made to carry out that mandate, including by assessing the costs of market power.**
 - o For example, the Department of Transportation, among several other agencies, is granted authority to govern unfair methods of competition in the airline industry, to reduce undesirable industry concentration,

¹⁵ Proposed A-4, page 18.

¹⁶ Proposed A-4, page 19.

and to ensure that any combinations are in the public interest.¹⁷ Given that some of these authorities are now being used,¹⁸ agencies like the DOT should be directed to ensure that their regulatory and procedures accurately reflect the costs of market power as they pertain to their direct competition mandate.

- **Where there is a statutory mandate to control costs, the A-4 Circular should provide clear guidance that regulators are obligated to assess any potential sources of market power that could lead to higher prices that contradict that mandate.**
 - o For example, the Medicare program has been reformed with different forms of billing procedures, all with the aim of controlling the ever-growing costs of healthcare in the U.S. In 1965, the system used a “retrospective cost-based reimbursement.” In 1982, the program adopted a cost-plus system, and then in 1982, the program was moved to a prospective payment system (PPS), with the Department of Health and Human Services being given responsibility for setting hospital payment rates under this system.¹⁹

Without going into too much detail, one of the greatest drivers of healthcare prices, particularly at the hospital level, is hospitals using their monopoly positions in regional markets to hike prices, particularly following mergers.²⁰ Despite its aim of cost control, HHS regulations regarding implementation of the PPS and updating the relevant reimbursement rates, nor guidance about how those rates are updated, make any mention of market power, consolidation, or their possible effects on pricing.²¹ It is this sort of regulation where market power

¹⁷ See, for example, 49 U.S. Code § 40101; 49 U.S. Code § 41105.

¹⁸ The Department of Transportation this spring joined the Department of Justice in action to block JetBlue’s acquisition of Spirit Airlines, making use of its Title 49 authority to block certificate transfers. Department of Transportation Newsroom, “USDOT Statement on the Justice Department’s Lawsuit to Block the Proposed JetBlue-Spirit Merger,” March 7, 2023, <https://www.transportation.gov/briefing-room/usdot-statement-justice-departments-lawsuit-block-proposed-jetblue-spirit-merger>.

¹⁹ Health and Human Services Office of Inspector General, “Medicare Hospital Prospective Payment System: How DRG Rates are Calculated and Updated,” August 2001, <https://oig.hhs.gov/oei/reports/oei-09-00-00200.pdf>.

²⁰ Sara Sirota, “The Harms of Hospital Mergers and How to Stop Them,” American Economic Liberties Project, April 2023, http://www.economicliberties.us/wp-content/uploads/2023/04/Hospital_QuickTake-0421-002.pdf.

²¹ 42 CFR Part 412, available at <https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-B/part-412?toc=1>.

should be of central concern, to ensure that the reimbursement rate estimates are not distorted by inflated prices of monopoly providers.

- **Where there is a statutory mandate to ensure fairness or equity, the A-4 Circular should provide clear guidance that regulations should establish procedures to assess inequities stemming from or exacerbated by market power.**
 - o For example, the Consumer Financial Protection Bureau, among other financial regulators, has a number of statutory mandates to ensure equitable treatment of consumers regardless of race, gender, ethnicity, age, and other protected classes, when seeking access to credit and other financial services.²² As larger, more consolidated banks tend to disinvest from less profitable retail branches which tend to be systematically in majority-minority census tracts, equity has been substantially harmed by the rise of consolidation and market power in retail banking. Merger-induced branch closures push predominantly minority communities into reliance on alternative, predatory financial services like payday lenders. The A-4 should direct agencies with similar equity mandates to examine the effects of market power on their statutory mandate and develop appropriate regulatory solutions.

- **Where there is a statutory mandate to ensure economic resilience, the A-4 Circular should provide guidance that regulators should assess the costs of concentrated and brittle supply chains stemming from market power and a lack of competition.**
 - o For example, the 2022 CHIPS Act includes a plethora of statements explaining that the Act is meant to ensure the resilience of the semiconductor supply chain,²³ and that the Secretary of Commerce should disperse the funds in accordance with that goal. In practice, putting this into effect requires recognizing the realities of market power in the markets for semiconductor chips. Fabrication of the most advanced logic chips is predominantly consolidated in a single foreign company (Taiwan Semiconductor Manufacturing Company),²⁴ and manufacturing of the capital equipment for those chips is a literal

²² For example, the Equal Credit Opportunity Act (ECOA) makes credit discrimination illegal based on sex, age, race, color, national origin, religion, marital status, and other factors.

²³ CHIPS Act of 2022, H.R. 4346, *available at*: <https://www.commerce.senate.gov/services/files/CFC99CC6-CE84-4B1A-8BBF-8D2E84BD7965>

²⁴ Counterpoint Research, “Global Semiconductor Foundry Revenue Share: Q1 2023,” May 11, 2023, <https://www.counterpointresearch.com/global-semiconductor-foundry-market-share/>.

monopoly in a different foreign firm, Netherlands-based ASML.²⁵ Furthermore, the market power held by established American chip designers, and their own hesitation to invest in direct fabrication, led to the broken supply chains and shortages during Covid.

In short, the Proposed A-4 should be revised to draw the direct line between resilience-based legislative mandates and an obligation to address the problems presented by market power in designing and implementing the relevant regulations. In this case, for example, that might take the form of adding requirements to CHIPS funding recipients to use multiple suppliers, to prohibit any mergers and acquisitions in order to avoid further consolidation, or to direct CHIPS funding towards firms seeking to enter new markets and present a competitive check on incumbents.

- **Where there is a statutory mandate to protect workers, the Proposed A-4 should clarify further regulatory obligations where market power interferes with implementation.**
 - o For example, the Occupational Safety and Health Administration (OSHA) created the Bloodborne Pathogens Standard (29 CFR § 1910.1030) to require healthcare providers to use safer medical devices that would minimize the potential for accidental contamination from devices such as syringes. However, a large number of medical providers get their medical supplies through powerful buyers called group purchasing organizations (GPOs), which negotiate fixed, long-term contracts for bundled products, often coercing hospitals into buying certain supplies in large quantities. In effect, given some indicative evidence that the rate of sharps injuries has not fallen much since the regulation was put in place,²⁶ one may conclude that many hospitals have not been complying with the regulation. When pushed by a medical provider struggling to comply under the pressure of a GPO contract, OSHA has commented that hospitals are still obligated to use the safest equipment even when bound by a GPO contract.²⁷ However, the regulations ignore that the market power of GPOs prevents hospitals

²⁵ Mehul Reuben Das, “The semiconductor monopoly: How one Dutch company has a stranglehold over the global chip industry,” Firstpost, January 23, 2023, <https://www.firstpost.com/world/asml-holdings-dutch-company-that-has-monopoly-over-global-semiconductor-industry-12030422.html>.

²⁶ Massachusetts Department of Public Health, “Overview of Sharps Injuries among Hospital Workers in Massachusetts,” August 2017, <https://www.mass.gov/doc/overview-of-sharps-injuries-among-hospital-workers-in-massachusetts-2002-2014-0/download>.

²⁷ Director of OSHA Enforcement Standards Richard Fairfax letter to Tarumo Medical Corporation, November 21, 2022, <https://www.osha.gov/laws-regs/standardinterpretations/2002-11-21>.

from doing so, even though it one of the main barriers to implementation.²⁸

- **Where there is a statutory mandate to ensure national security, the Proposed A-4 should specify an obligation to examine the potential costs of market power to that goal.**
 - o For example, the Department of Defense's primary responsibilities are to ensure the nation's safety and national security, but in the economic realm, DOD also acts as a major buyer of military and dual-use goods and technologies and thus depends on contractors and suppliers for necessary equipment. Concentration and market power among suppliers undermine the nation's national security goals by reducing the ready availability of weaponry, output of necessary equipment, and military innovation through a lack of competition. The Proposed A-4 should be updated to ensure that such regulations incorporate mechanisms to address these problems.
- **Lastly, as a general matter, the A-4 Circular should be revised to note that there are many other possible or actual legislative goals with which market power could interfere, and that regulatory analysts should be given guidance to review the possible effects of market power on those outcomes.**

For the problem of market power to be taken seriously in regulatory analysis, the Proposed A-4 should be revised to draw the clear connection between, on one hand, the problems that are created by market power and, on the other hand, the regulatory authority and legislative mandate with which agencies have been tasked. Without such guidance, individual agencies, which are often not staffed with antitrust or competition experts, will be left to guess as to where and under what conditions market power needs to be taken seriously in regulatory analysis.

²⁸ Occupational Safety and Health Administration, 1910.1030 - Bloodborne pathogens, <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030>.

IV. Market Power and Cost-Benefit Analysis

While market power motivates the need for public regulation, the bulk of the A-4 Circular is dedicated to the task of actually conducting cost-benefit analysis. However, as with the sections detailing the need for regulation, the Proposed A-4 cost benefit analysis sections make mostly vague and general statements about market power, despite it being one of the key determinants of prices, and therefore, of costs. While the Proposed A-4 does state that market power's effects should be examined, it does not include specifics about the sorts of problems market power might cause, how regulations might alleviate or exacerbate the problems of market power, or how to practically incorporate these concerns into cost-benefit analyses.²⁹

Furthermore, the one concrete example given of problematic market power in this section – noting that “licensing or permitting requirements intended to increase safety may act as a barrier to entry, allowing incumbent firms to charge higher-than-competitive prices”³⁰ – reads as if from a Cato Institute pamphlet. **This example should be stricken from the Proposed A-4.** The sources of market power are many – network effects, barriers to entry, intellectual property, capital costs, exclusive dealing, etc. – but licensing and credentialing requirements on forms of skilled labor or for safety purposes are far from the most important market power issues facing the American

²⁹ The core of the section reads, “The presence of market power may affect your benefit and cost estimates. You generally should account for the presence of market power—and changes in market power induced by your regulation—when it is material to the effects of the regulation under consideration.” Proposed A-4, page 56. It does not, however, say how market power would affect those estimates or in what way it would be material to regulatory effects.

³⁰ Proposed A-4, page 56.

economy today. As we discuss below, regulations can and have had the effect of bolstering incumbents' market positions, but having the A-4 Circular focus on such examples will give agencies a misleading sense of the primary problems they should be seeking to solve.

1. Market Power and Estimating Costs and Benefits

In terms of assessing the likely effects of regulation, the Proposed A-4 recognizes that market power can distort both the actual effects of regulation and the government's estimates of those effects. However, it still begins with a baseline assumption that markets are competitive:

“Market prices provide rich data for estimating benefits and costs based on [willingness-to-pay] or [willingness-to-accept] if the goods and services affected by the regulation are traded in well-functioning competitive markets.”³¹

The Proposed A-4 recognizes that markets can be distorted to the point where market prices do not serve as useful approximations for costs and benefits, but curiously does not include market power – one of the most pervasive distortions of price – among those distortions:

“Estimating benefits and costs is more difficult when markets are distorted (due to market failure, failure of public institutions, or behavioral biases), market prices are difficult to measure, or markets do not exist and allocation is via some other mechanism, such as household production. In these cases, estimating the value of the benefit or cost that you are interested in requires developing appropriate proxies.”³²

³¹ Proposed A-4, page 29.

³² Proposed A-4, pages 29-30. The proposed A-4 repeats these assumptions multiple times. For example, on page 32, “Economists ordinarily consider market prices as the most accurate measure of the marginal value of goods and services to society. This is most likely to be the case for goods and services exchanged in competitive markets with no externalities or other market failure. When goods or services are not exchanged in well-functioning markets or there are spillover benefits or costs,

Market power should be included in the list of market distortions included in the above parenthetical, and the Proposed A-4 should specify that evidence of those price distortions will be evident in the form of markups, profits, or cost overruns. It is a hallmark of market power for powerful firms to distort the actual costs of goods or services, and cost-benefit analysis should not take the marked-up prices of concentrated industries as a given.

2. Technology and Market Power

There are likewise places where the Proposed A-4 promotes unsubstantiated justifications for regulatory inaction in the face of market power. For example, in the main discussion of market power in Section 5(a)(ii), the Proposed A-4 reads:

“Nevertheless, you should keep in mind that technological advances often affect economies of scale. This can, in turn, transform what was once considered a natural monopoly into a market where competition can flourish. Alternatively, technological advances can transform what was once considered a competitive market into a monopolistic or monopsonistic one. Please see the section “Benefits and Costs Arising from Regulations’ Interactions with Market Power” for further discussion of related analytic issues.”³³

This statement, while an improvement over the 2003 A-4, does not provide meaningful guidance to regulatory agencies, other than to indecisively note that technology can influence market power. However, we cannot predict the direction of technological change, and we almost assuredly cannot predict whether technological change will lessen or increase market power, deconcentrate or further consolidate

then market prices generally do not reflect the marginal social value of goods and services. Goods whose market prices may not reflect their social value include those whose production or consumption results in substantial positive or negative external effects, transfer payments, etc.”

³³ Proposed A-4, page 17.

markets, or dislodge incumbents as opposed to further entrench their market positions. Technology's effect on market power and concentration is most often entirely indeterminate on its own, and the mediating effect of regulation plays a key role in shaping the deployment of technology. The **Proposed A-4 should be revised to recognize that and that the way that technology is embedded and implemented affects economies of scale at least as much as the technical details. As such, technology should not be framed as a possible solution for which regulators can wait before acting.**

3. Market Power and Equitable Effects for Small and Large Firms

Economic Liberties applauds some aspects of the proposed A-4's considerations of how regulation may unfairly place burdens on firms of different sizes:

“The balance of benefits and costs can shift depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for regulatory compliance. This can potentially lead small firms to exit, resulting in reduced competition in some markets. On the other hand, it is not necessarily efficient to place a heavier burden on one segment of a regulated industry solely because it can better afford the higher cost. This has the potential to load costs on the most productive firms, costs that may be disproportionate to the marginal harms those firms' actions cause.”³⁴

This is broadly the correct position to take, namely in recognizing that many regulations, and compliance with them, represent a significant fixed costs that is marginal for large firms, but which can be prohibitively expensive for smaller firms.

³⁴ Proposed A-4, page 24.

There are legislative requirements through the 1980 Regulatory Flexibility Act (RFA), which requires agencies to fit their regulatory requirements to the scale of the businesses or entities involved, and the 1996 Small Business Regulatory Enforcement Fairness Act (SBREFA), which added more specific requirements for agencies to reduce the disproportionate costs of regulation on small businesses. The basic legislative mandate expressed throughout is that while compliance with federal rules can represent a fixed cost, agencies should adjust regulations to ensure a level playing field for all businesses.

However, available evidence indicates that, in sum, regulatory review and analysis have not lived up to these principles. Recent research by Shikhar Singla estimates that 31-37% of the increase in markups and concentration since the mid-1990s is the result of additional significant regulations that predominantly burdened smaller firms and incentivized greater concentration.³⁵ There is a reality of political economy that regulators should be aware of, in that Singla shows that in the process of regulatory design, large firms predominantly commented *in favor* of regulation, but only when the regulations in question disproportionately harm or eliminate their smaller competitors.³⁶

³⁵ Singla, S., 2023. Regulatory costs and market power, *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4368609.

³⁶ Bertrand, M., Bombardini, M., Fisman, R., Hackinen, B. and Trebbi, F., 2021. Hall of mirrors: Corporate philanthropy and strategic advocacy. *The Quarterly Journal of Economics*, 136(4), pp.2413-2465.

For this reason, **the Proposed A-4 should be revised to reflect that historically many regulations have disproportionately harmed smaller firms, and extra scrutiny should be taken to ensure they do not.** At the same time, **the qualifying language – that “it is not necessarily efficient to place a heavier burden on one segment of a regulated industry solely because it can better afford the higher cost. This has the potential to load costs on the most productive firms, costs that may be disproportionate to the marginal harms those firms’ actions cause” – should be stricken entirely.** This qualifier suggests that the fixed costs of regulation, which in empirical terms have fallen on smaller firms, might be an unfair burden to place on the larger firms that benefit from those regulations by putting smaller competitors at a disadvantage.

4. Market Power and the Propensity to Invest

The 2003 A-4 and the Proposed A-4 make a series of assumptions about relative propensities to invest and the expected benefits of investment that should be incorporated into regulatory analysis. The Proposed A-4 reads:

“Regulations that displace or induce capital investments at a point in time may affect present and future consumption differently than regulations that increase or decrease consumption at a point in time. This arises because the return on capital need not equal the social rate of time preference, as taxes on capital, other economic distortions, and missing markets can create a sustained divergence between these rates of return and among rates of return to different capital. Such distortions may include, for example, returns to capital investments stemming from unpriced social externalities, risk premia, and market power. This divergence can persist despite the tendency for capital to flow to where it can earn the highest rate of return.”³⁷

³⁷ Proposed A-4, page 78.

However, this entirely ignores that regulatory choices both (a) have effects on private sector investment that operate through the creation or mitigation of market power, and (b) make predictions about the sorts of investments that private sector firms will make, premised on assumptions that those firms operate in competitive or noncompetitive markets.

Economic literature has long recognized that monopoly power can and often does reduce a company's incentives to invest: restricting output to raise prices correspondingly means that less investment is needed to produce that output, research and development investments can create new products or services that would displace rather than supplement the monopoly incumbent's earnings, monopoly power reduces the relative benefits of further innovation,³⁸ and with market power, there is less competitive pressure to stay ahead of competitors through investments in new processes, products, or technologies.³⁹

Beyond the theoretical literature, there is also empirical literature indicating that a reduction in investment stemming from market power is, in fact, what has occurred in a great number of American markets in the past generation. Research has indicated that large firms contribute less to aggregate corporate investment than

³⁸ Arrow, K.J., 1962. *Economic welfare and the allocation of resources for invention* (pp. 219-236). Macmillan Education UK, page 620, ("preinvention monopoly power acts as a strong disincentive to further innovation."), available at: <https://www.nber.org/system/files/chapters/c2144/c2144.pdf>; Abel, A.B. and Eberly, J.C., 1993. A unified model of investment under uncertainty. NBER Working Paper, available at: <https://www.jstor.org/stable/2117777>.

³⁹ Aghion, P., Bechtold, S., Cassar, L. and Herz, H., 2018. The causal effects of competition on innovation: Experimental evidence. *The Journal of Law, Economics, and Organization*, 34(2), pp.162-195, <https://academic.oup.com/jleo/article/34/2/162/4919662>.

they did in the past,⁴⁰ that the general levels of corporate investment are low precisely because of a lack of competition,⁴¹ and that the industries with the most market power and highest profits have a markedly low marginal propensity to invest.⁴²

The Proposed A-4 should be revised to note a reduced marginal propensity to invest as a likely cost stemming from market power. While we do not take a position on what particular number or ratio a regulatory review should use as an assumption, we do suggest that the Proposed A-4 be revised to reflect that we can expect less private investment in the presence of market power. Accordingly, regulations that increase market power or firm size in any non-negligible way should have these costs counted against them.

5. Market Power and Bottlenecks

By consolidating particular segments of a supply chain into the hands of one or two firms, or even one or two single facilities, market power can also create dangerous bottlenecks that increase the risks of dangerous shortages or interruptions of service, whether those services are provided directly by the public or administered indirectly through private markets.

⁴⁰ Gutiérrez, G. and Philippon, T., 2020. *Some facts about dominant firms* (No. w27985). National Bureau of Economic Research, available at: https://www.nber.org/system/files/working_papers/w27985/w27985.pdf.

⁴¹ Gutiérrez, G. and Philippon, T., 2016. *Investment-less growth: An empirical investigation* (No. w22897). National Bureau of Economic Research, available at: <https://www.brookings.edu/wp-content/uploads/2018/02/gutierreztextfa17bpea.pdf>.

⁴² Herman Mark Schwartz, “Corporate Profit Strategies and U.S. Economic Stagnation,” *American Affairs*, Fall 2020, <https://americanaffairsjournal.org/2020/08/corporate-profit-strategies-and-u-s-economic-stagnation/>.

For example, the Child Nutrition Act of 1966 established the Women, Infants, and Children program of supplemental assistance, particularly for baby formula. The policy design of this program, however, established that each state was to conduct a single-supplier competitive bidding system.⁴³ Because the WIC program accounted for an overwhelming majority of the baby formula sold in a given state, winning the WIC contract for a state also meant that a manufacturer would effectively receive all of the retail shelf space to sell baby formula to non-WIC consumers. Partly as a result of these state-level monopolies induced by the WIC program's bidding process, the market for baby formula consolidated to just a few firms, with Abbott Laboratories carrying the contract for 34 states.⁴⁴ Thus, when an Abbott facility closed in the summer of 2022 due to a dangerous contamination, this concentration of production meant that there were no competing manufacturers to step in, and the nation experienced significant shortages, forced to rely on emergency imports from abroad.

This sort of cost – the risks brought on by depending on a brittle, narrow group of suppliers or service providers – should be included as a component of cost-benefit analysis. Current methods tend to assume costs and benefits when programs and markets are functioning in normal times, ignoring the large downside risks from less resilient markets and systems, and entirely ignore the role of market power in exacerbating those risks. And particularly in cases like this,

⁴³ This is in both USDA regulations and the authorizing statute. See PL 111–296 - Child Nutrition Act of 1966; 7 CFR Part 246 - Part 246.

⁴⁴ Samanth Subramanian, “America’s addiction to monopolies caused the baby food shortage,” Quartz, May 18, 2022, <https://qz.com/elizabeth-holmes-does-not-deserve-our-pity-1850496329>.

where the policy itself was the primary driver of the market power, it is even more essential to incorporate such costs.

V. Compliance and Enforcement in the Presence of Market Power

The final section of our comment focuses on a different concerning aspect of the Proposed A-4, in particular a series of assumptions around enforcement and compliance. The Proposed A-4 suggests that, when possible, market-oriented incentives and “nudges” should be the preferred mechanism through which regulation should take effect. On the question of “nudges,” the proposed A-4 states:

“Market-oriented approaches that use economic incentives should be explored when permissible and appropriate. These alternatives include fees, penalties, subsidies, marketable permits or offsets, changes in liability or property rights (including policies that alter the incentives of insurers and insured parties), and required bonds, insurance, or warranties.”⁴⁵

This view of “nudges” generally implies that most regulations should be designed to manipulate minor psychological effects or economic incentives that influence citizens and market participants to reach optimal outcomes.⁴⁶

Unsaid but implicit in this statement is that government regulation should *not* take effect through clear enforcement of bright-line rules. This is all the more ironic given that the proposed A-4 still tends to assume a 100% compliance rate, ignoring the costs of regulatory rules not even attaining their goals as a result of non-compliance, which a nudge-based approach would likely exacerbate.

⁴⁵ Proposed A-4, page 25.

⁴⁶ Thaler, R.H. and Sunstein, C.R., 2009. *Nudge: Improving decisions about health, wealth, and happiness*. Penguin.

Several points mitigate against this view of regulation. First, the preference for incentive-based, light-touch nudges within policy and academic circles in recent decades is primarily the result of methodological shifts in favor of experimental research designs in behavioral economics and other social sciences. Particularly beginning in economics, policy research has shifted to assess the effects of policies through experimental methods, either where researchers randomized assignment to a policy treatment or through use of a natural experiment. This approach to economic research makes estimating the effects of small, marginal policy changes very easy: cash transfers, small investment subsidies, informational treatments, and policies that are easy to randomize between one group or another. In practice, however, many of the estimated policy effects from this research are not stable when replications are attempted,⁴⁷ are very small in practical terms,⁴⁸ or entirely ignore certain categories of problems.

Second, there is little to no accumulated evidence that nudges or behavioral interventions are the most effective approach to policy, or even *an* effective approach to policy, particularly relative to broader institutional reforms. While the methods involved are still popular in various social sciences, they have led to a series of disasters when attempted in policy, whether in the United Kingdom's disastrous

⁴⁷ Osman, M., McLachlan, S., Fenton, N., Neil, M., Löfstedt, R. and Meder, B., 2020. Learning from behavioural changes that fail. *Trends in Cognitive Sciences*, 24(12), pp.969-980.

⁴⁸ Recent meta-analysis of the policy results from two “nudge” units in the American government indicates that the effect sizes are a fraction of what is typically reported in academic publications. DellaVigna, S. and Linos, E., 2022. RCTs to scale: Comprehensive evidence from two nudge units. *Econometrica*, 90(1), pp. 81-116.

response to COVID-19 based on a nudge-based intervention,⁴⁹ or a wide range of other interventions regarding tax, healthcare, nutrition, and others.⁵⁰

Third, insofar as the A-4 Circular adopts a preference for nudge-based regulation, the result will be a regulatory apparatus that tends to place responsibility and blame on individuals, ignoring the role of power, institutions, and governance.⁵¹ Focusing on individual-level interventions for regulations will shift more of the responsibility for workplace safety compliance to workers themselves, hold consumers more responsible for their buying decisions, hold patients primarily responsible for their health outcomes, and hold users responsible for being careful about their own data privacy. This despite the laws governing workplace safety putting the obligation on the employer, consumer protection laws obligating sellers, a variety of regulations placing responsibility for health on doctors and health systems, and privacy rules obligating companies that store data, not the people from whom they collected data.

Fourth, this nudge-based approach to policy is even more concerning in its interaction with political power and politics. The nudge approach provides a ready

⁴⁹ Robert Hutton, “Keep Calm and Wash Your Hands: Britain’s Strategy to Beat Virus,” Bloomberg, March 11, 2020, <https://www.bloomberg.com/news/articles/2020-03-11/keep-calm-and-wash-your-hands-britain-s-strategy-to-beat-virus?leadSource=uverify%20wall>.

⁵⁰ Osman et al., “Learning from Behavioural Changes That Fail,” [https://www.cell.com/trends/cognitive-sciences/fulltext/S1364-6613\(20\)30224-2](https://www.cell.com/trends/cognitive-sciences/fulltext/S1364-6613(20)30224-2).

⁵¹ Chater, N. and Loewenstein, G., 2022. The i-frame and the s-frame: How focusing on individual-level solutions has led behavioral public policy astray. *Behavioral and Brain Sciences*, pp.1-60, <https://www.cambridge.org/core/journals/behavioral-and-brain-sciences/article/abs/iframe-and-the-sframe-how-focusing-on-individuallevel-solutions-has-led-behavioral-public-policy-astray/A799C9C57F388A712BE5A8D34D5229A1>.

excuse for regulators, politicians, and other policymakers to opt for weak, ineffective, or insufficient policies when faced down by powerful private interests.⁵² In the face of politically powerful interests with significant market power – Amazon, Google, UnitedHealth Group, Raytheon, Corteva, and many others – the nudge-based approach will be almost entirely ineffective. Policy is not going to successfully nudge Raytheon to provide cheaper equipment to the DOD, Amazon into ensuring better safety in its warehouses, or Google into keeping different user datasets separate.

Policies constitute a set of institutions that shape the entire environment in which companies, consumers, and citizens act, rather than just being one marginal causal effect on individuals. Powerful companies do not make their pricing, production, and investment decisions based primarily on a series of minor policy nudges that governments present to them. Rather, they adopt corporate strategies to pursue the most successful or profitable outcomes, based on an assessment of their competitive position, institutional constraints, and what the law will tolerate. Those broad effects are not easily estimated via econometric methods of causal inference, but they are substantively the most important.

There are concrete examples where compliance with federal regulations is directly undermined by concentration and market power, and where the nudge-based approach would be entirely ineffective. The USDA has continued to award

⁵² Sonia Sodha, “Nudge theory is a poor substitute for hard science in matters of life or death,” The Guardian, April 26, 2020, <https://www.theguardian.com/commentisfree/2020/apr/26/nudge-theory-is-a-poor-substitute-for-science-in-matters-of-life-or-death-coronavirus>.

government contracts to Brazilian meatpacking giant JBS,⁵³ despite the company having been subject to \$3.4 billion in fines in the past 6 years, as well as criminal charges for many of its executives.⁵⁴ In citing why the company was not disbarred from federal contracts, Secretary of Agriculture Vilsack noted “the high degree of fragility in the market, including the circumstances surrounding food price inflation,” highlighted concentration and market power as the key problems.⁵⁵ In an industry where rampant legal and regulatory violations are common, including at JBS, the USDA was put in the awkward position of having to choose between following the law, on one hand, and ensuring that federal contracts received competitive bids from a variety of companies, on the other, precisely because the meatpacking industry was so concentrated that no other suppliers could fulfill the USDA’s needs. Regulatory failures abound in the path to this situation in meatpacking, but there is no step along the way where nudge-based policy would have been helpful.

Particularly in the context of regulating powerful companies with significant market power, **we urge the OMB to revise the Proposed A-4 to emphasize the importance of bright-line, easily administrable rules over incentive-based “nudges” that will place primary responsibility and focus on individual choices.** Such rules are harder for powerful private interests to game, more difficult

⁵³ Secretary Vilsack letter to Representative Maloney, November 2, 2022, <https://www.politico.com/f/?id=00000185-8812-de44-a7bf-e817657f0000>.

⁵⁴ Senators Warren and Raskin letter to Secretary Vilsack, April 19, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.04.19%20Letter%20to%20USDA%20re%20JBS.pdf>.

⁵⁵ Vilsack to Maloney letter, <https://www.politico.com/f/?id=00000185-8812-de44-a7bf-e817657f0000>.

for lobbying efforts to stymie through technicalities, and are the most effective way of deterring violations by powerful actors.

VI. Conclusion

In closing, we repeat that we applaud OMB for making many important updates to the federal system of regulatory analysis and for incorporating more concerns about market power into that guidance. However, we urge the OMB to make the guidance regarding market power more specific and actionable – regarding both when regulatory action is needed and how to assess the effects of market power – and to shift its compliance and enforcement focus to favor bright-line rules over incentive-based “nudges.”