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Public Interest Comment¹ on

The Office of Management and Budget's Interim Guidance Implementing

Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs"

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Office of Management and Budget's interim guidance implementing Executive Order 13771 does not represent the views of any particular affected party or special interest, but is designed to improve both regulatory processes and regulatory analysis.

Introduction

On January 31, President Trump signed Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," which instructs agencies to identify two regulations for removal for each new rule they propose and to limit incremental regulatory costs to \$0 in fiscal year (FY) 2017.³ In response to this Executive Order (EO), the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) issued an interim guidance document for executive branch agencies to clarify the scope and implementation of its provisions.

¹ This comment reflects the views of the authors, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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³ Section 3 of the order sets forth regulatory planning and budgeting practices for FY 2018 and beyond. Neither OMB's interim guidance nor this comment address that section.

OMB's interim guidance targets Section 2 of the EO, which includes the following requirements:

Sec 2(a) "Unless prohibited by law, whenever an executive department or agency... publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."

Sec 2(b) "For fiscal year 2017, [t]he heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget..."

Sec 2(c) "In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations."

The guidance, which is structured in a question-and-answer format, provides answers to 23 questions pertaining to EO 13771, listed below. Note that in the original guidance the questions are not numbered; we have added the numbering below, and our first recommendation is that OMB adopt it!

This comment offers some general observations and provides recommendations on questions 1, 2, 4, 5, 8, 9, 10, 12, 17, 19, 20, 21, and 22.

Interim Guidance Questions and Answers

1. Which new regulations are covered?
2. What about rules that implement Federal spending programs?
3. Do Section 2's requirements apply to significant regulatory actions of independent agencies?
4. Are new guidance/interpretive documents covered?
5. Which existing regulatory actions, if repealed or revised, would be considered deregulatory actions, and thus qualify for savings?
6. Do regulatory actions issued before January 20 that are vacated or remanded by a court after that date qualify for savings?
7. Do regulatory actions overturned by subsequently enacted laws qualify for savings?
8. How should costs be measured?
9. How should agencies account for deregulatory actions that do not outright repeal existing regulations but revise existing requirements to produce real cost savings?
10. Can effects such as future energy cost savings for rules that require the adoption of more energy efficient technologies be counted against the compliance costs of a regulatory action for purposes of Section 2(b) of the EO?
11. What about costs that occur over different time periods?
12. Can agencies use previously estimated costs from an original Regulatory Impact Analyses (RIA) in determining the cost savings generated by an eliminated regulatory action?
13. What costs of existing regulatory actions should be counted as cost savings from a deregulatory action?
14. How should costs that duplicate those in another regulatory action be addressed?
15. How should agencies treat unquantified costs and cost savings?
16. Which significant regulatory actions might qualify for individual waivers?
17. Can regulatory and deregulatory actions be bundled in the same regulatory action?
18. What must agencies do to "identify" existing regulatory actions to be repealed?
19. Do deregulatory actions have to be finalized before new regulatory actions can be finalized?
20. How does this EO interact with other EOs and guidance addressing regulatory activities?
21. Can savings be transferred within an agency?
22. Can savings be transferred from other agencies?
23. How does the regulatory cost cap in Section 2 of the EO affect the consideration of regulatory benefits or other requirements under EO 12866?

Importance of Existing Regulatory Institutions

Presidents for the last 40 years have called upon agencies to analyze the benefits and costs of new regulations before they are issued. Executive Order 12866 authorizes OIRA's review functions and directs agencies to regulate only when there is a "compelling public need, such as material failures of private markets..." It tells agencies "in deciding whether and how to regulate, [to] assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating," and to choose "approaches that maximize net benefits..., unless a statute requires another regulatory approach."⁴

It is important, as the interim guidance makes clear, that the requirements of EO 13771 do not supplant these longstanding requirements (Q&A 20 and 23). Analysis of the benefits and costs of regulations will be an important element in ensuring that agencies achieve regulatory objectives. Indeed, in recent decisions the Supreme Court has indicated that it would be unreasonable for agencies *not* to consider benefits and costs in making regulatory decisions. Such analysis, conducted to understand the impacts of existing regulations, will be valuable for identifying potential actions to achieve the requirements of sections 2(a) and 2(b) of the EO.

The EO imposes two new related but separate constraints on regulatory agencies. Section 2(a) requires a two-for-one offset denominated in rules, whereas section 2(b) requires a one-for-one offset denominated in dollars.⁵ These are conceptually related in that both tie new regulatory activity to offsetting deregulatory activity, but they are distinct and may require different guidance in some areas. These are noted in the specific questions below.

We suggest that the guidance make it clear that an assessment of the net benefits remains the best way to distinguish a good rule from a bad rule (one that does more harm than good), and for optimizing the level of a standard or otherwise fine-tuning the details of a regulation's content. In contrast, the two constraints in the EO 13771 are primarily intended to manage the agencies' resource allocation and priority setting. Previous presidents have directed regulatory agencies to examine existing regulations in search of candidates for rescission or revision; see, e.g., President Carter's E.O. 12044, President Reagan's E.O. 12291, and President Obama's E.O. 13563. Agencies' natural incentive is to focus on issuing new regulations, however; and their efforts in response to those earlier executive orders have been, at best, half-hearted.⁶ The key difference here is that E.O. 13771 includes two measures of output – the count of regulations and

⁴ EO 12866 Sec. 1(a)

⁵ Sec. 2(c) of EO 13771 adds a third constraint that may be binding on agencies (that costs savings for new rules must come from cost reductions associated with at least two existing rules) but does not appear to further the EO's goal.

⁶ Sofie E. Miller, "Learning from Experience: Retrospective Review of Regulations in 2014," the George Washington University Regulatory Studies Paper Working Paper, November 03, 2015. <https://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>

the cost of regulations – so that federal managers, and the public, will have an indication of whether priorities have actually changed and the retrospective reviews are accomplishing anything.

1. Which new regulations are covered?

OMB’s guidance limits EO 13771 to significant regulations issued by executive branch agencies, which narrows the scope of two-for-one to those rules projected to have the largest effects on the economy and on the law. Executive Order 12866 Sec. 3(f) defines significant regulatory actions as those that are likely to have an annual economic effect of \$100 million or more, create inconsistencies between regulatory agencies, alter the budgetary impacts of entitlements, or that raise novel legal or policy issues.⁷

Between 150 and 300 significant proposed rules are published per year,⁸ a much narrower scope than the 2,500 total proposed rules typically published in the same period.⁹ However, many of these 2,500 rules deal with relatively minor issues such as drawbridge openings and closures and fireworks displays, and manpower spent on their evaluation or analysis could be better used toward other reforms. Focusing only on significant rules, at least initially while OMB and regulatory agencies develop best practices to achieve the EO’s goals, concentrates scarce resources on those rules that are likely to have broad effects on the American public.

2. Are rules that implement spending programs covered?

The guidelines exempt spending rules that primarily cause income transfers from taxpayers to program beneficiaries. Often, especially in the health care area, regulations will have elements that affect government payments as well as elements that affect non-federal sector activities. It will be important for OIRA to work closely with agencies to ensure that these elements are not bundled in a way that avoids scrutiny of discretionary regulatory burdens under the requirements of this Order, simply because some portion of the costs are on-budget.

4. Are new guidance/interpretive documents covered?

OMB’s guidance indicates that significant new guidance and interpretive documents will be considered on a case-by-case basis, which is especially important because these documents can alter the regulatory landscape and change burdens for the regulated community, despite not being

⁷ Note that this definition does not limit coverage to the smaller subset of “economically significant” or “major” rules – those that meet the \$100 million threshold. Executive Order 12866, “Regulatory Planning and Review,” Sec. 3(f), September 30, 1993.

⁸ Search results from www.RegInfo.gov/public/do/eoAdvancedSearchMain

⁹ Search results from www.FederalRegister.gov

“regulations” as typically defined. Extending the president’s policy to guidance documents provides agencies and OMB with an important opportunity to assess their impacts.

In its 2007 bulletin on good guidance practices, OMB notes that “As the scope and complexity of regulatory programs have grown, agencies increasingly have relied on guidance documents to inform the public and to provide direction to their staffs.”¹⁰ This increase in guidance—sometimes issued in lieu of regulation—is a strong reason to consider significant guidance documents as part of the two-for-one plan and regulatory cap for FY 2017.

In addition, since most guidance is not issued using the rulemaking processes outlined in the Administrative Procedure Act (APA), revisiting existing guidance may be one way for agencies to identify low-hanging burden reductions to count toward FY 2017 regulatory offsets.

5. Which existing regulatory actions, if repealed or revised, would be considered deregulatory actions, and thus qualify for savings?

Guidance on this point may vary for Section 2(a) and Section 2(b) of the EO. The draft guidance statement that “any existing regulatory action that imposes costs and the repeal or revision of which will produce verifiable savings may qualify” could apply to both sections. However, “meaningful burden reduction through the repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements,” would likely only be relevant for Section 2(b), because Section 2(a) of the order appears to mandate that the two offsets be rules, rather than components of rules.

8. How should costs be measured?

OMB’s guidance appropriately instructs agencies to use “opportunity cost” to measure regulatory costs for offsets and new rules. Opportunity cost, which is defined in OMB Circular A-4, is a broad measure of social welfare that best captures the diverse impacts of federal regulation on the public.¹¹

Although administrative burdens may be the most straightforward measure of regulatory cost, and have been used successfully as a measure in Canada’s “one-for-one” policy, this measure does not capture the total regulatory burden on society. A focus on business compliance costs, as the U.K. does in its “one-in-three-out” policy, would be more comprehensive and meaningful than administrative burdens, but does not necessarily recognize the additional losses to consumer

¹⁰ Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” January 18, 2007.

¹¹ Office of Management and Budget, “Circular A-4: Regulatory Analysis,” September 17, 2003.

utility that result from regulation.¹² The most meaningful regulatory cost measure is total social cost—the “opportunity cost”—of regulations, opportunities foregone by society as a whole—workers, businesses, consumers, households, etc.¹³

9. How should agencies account for deregulatory actions that do not outright repeal existing regulations but revise existing requirements to produce real cost savings?

The statement in this response that deregulatory actions “will not trigger the requirement under Section 2(a) for the agency to identify two existing regulatory actions to be repealed” is confusing. Why wouldn’t “purely deregulatory actions that confer only savings to all affected parties generally” count as cost savings for Section 2(b) and possibly regulatory offsets under Section 2(a)?

10. Can effects such as future energy cost savings for rules that require the adoption of more energy efficient technologies be counted against the compliance costs of a regulatory action for purposes of Section 2(b) of the EO?

Cost savings from energy efficiency regulations, which agencies typically count as regulatory benefits in their regulatory impact analyses, should not be used to offset regulatory costs. Doing so would be inconsistent with the EO’s treatment of regulatory costs, and OMB is right to determine that “benefits” do not belong in a regulatory offset system.

Further, energy efficiency cost savings are based on a litany of incorrect assumptions about consumer choices and heterogeneity, and as such would be particularly bad candidates for inclusions as regulatory offsets.¹⁴ As we have explored elsewhere,¹⁵ the tendency of regulatory

¹² Marcus Peacock, “Implementing a Two-for-One Regulatory Requirement in the U.S.” The George Washington University Regulatory Studies Center Working Paper, December 7, 2016 at <https://regulatorystudies.columbian.gwu.edu/implementing-two-one-regulatory-requirement-us>

¹³ Susan E. Dudley & Sofie E. Miller, “[The Devil is in the Details of President Trump’s Regulatory Executive Order](#).” *The George Washington University Regulatory Studies Center*. February 1, 2017.

¹⁴ Sofie E. Miller & Brian F. Mannix, “One Standard to Rule Them All: The Disparate Impact of Energy Efficiency Regulations.” *Nudge Theory in Action: Behavioral Design in Policy and Markets*. Ed. Sherzod Abdulkadirov. Basingstoke, United Kingdom: Palgrave MacMillan, 2016.

See also: Sofie E. Miller, [Home Appliance Energy Efficiency Standards under the Department of Energy—Stakeholder Perspectives](#), *Testimony before the U.S. House Energy and Commerce Subcommittee on Energy and Power*, June 10, 2016.

¹⁵ Mannix, Brian, and Susan E. Dudley. 2015a. “The Limits of Irrationality as a Rationale for Regulation.” *Journal of Policy Analysis and Management* 34(3): 705-712. DOI: 10.1002/pam.21841, and “Please Don’t Regulate my

agencies to rely on these benefits to justify their rules is already questionable, and use of the estimated “cost savings” to offset additional regulatory burdens would be even more dubious.

11. What about costs that occur over different time periods?

The guidance states that “all costs estimates should be annualized...[and] in general, the start and end points for the annualization of costs should be directly comparable across the new and corresponding repealed regulatory actions.” This may be unnecessarily restrictive, and OMB could consider using present value cost estimates to ensure that new regulations are offset by comparable repeals. OMB should also consider allowing for banking of cost savings so that agency actions that reduce costs in one period can provide a credit for future regulatory actions that impose costs.

12. Can agencies use previously estimated costs from an original Regulatory Impact Analyses (RIA) in determining the cost savings generated by an eliminated regulatory action?

When estimating the incremental cost savings of regulations considered for repeal or revision (Sec. 2(b)), the guidance directs agencies to gather new information, rather than relying on analyses prepared before regulations are issued. It also encourages agencies to “use program evaluations and similar techniques to determine the actual cost and other effects of eliminating regulatory actions.” As noted above, although many presidents have instructed agencies to retrospectively review their regulations, EO 13771 provides agencies with very strong incentives for assessing the costs—and the benefits—of their existing rules. To comply, agencies should critically evaluate their own rules to identify those that return the smallest benefits at the highest cost.

Retrospective analysis offers an opportunity to measure actual impacts and examine the accuracy of *ex ante* predictions. Particularly for circumstances in which key analytical inputs have changed since a regulation was proposed (e.g. energy prices, market participants, innovations), using new data to evaluate the efficacy of past rules will provide a fresh perspective of actual regulatory impacts. *Ex ante* analysis is a crucial component of the regulatory process, but such analysis necessarily relies on assumptions about future prices, market conditions, behavior, interactions, etc. *Ex post* analysis can correct for instances in which these assumptions prove over time to be incorrect, and can also inform regulators’ analysis going forward to increase accuracy in *ex ante* projections.

Internalities.” *Journal of Policy Analysis and Management* 34(3): 715-718. DOI: 10.1002/pam.21847.
<http://onlinelibrary.wiley.com/doi/10.1002/pam.21841/full>

Planning for retrospective review can also provide agencies and regulated communities with the opportunity to learn from experimentation in regulatory design and compare outcomes across different regulatory programs to identify the most effective—and least burdensome—approaches.

17. Can regulatory and deregulatory actions be bundled in the same regulatory action?

This question and answer is mainly directed at compliance with Section 2(b). It correctly notes that a regulatory action can streamline certain existing costs, while imposing costs elsewhere. The incremental net effect will be counted toward the zero incremental cost cap requirement. However, the last sentence, stating that “the net cost impact (the different between costs imposed and cost savings) of such rules will generally determine whether they are regulatory actions that need to be offset,” appears to apply to Section 2(a). The next version of the guidance could make that clear.

19. Do deregulatory actions have to be finalized before new regulatory actions can be finalized?

This element of the interim guidance should probably be separated into two. One issue deals with when and how the two repealed regulations required by Sec. 2(a) are identified. The answer suggests that the preamble to any new regulation identify the two regulations to be repealed, but that information is not really relevant to the administrative record of the new regulation in question, unless the repealed and new rules are related. The most appropriate place to demonstrate compliance with the 2-for-1 requirement of Sec. 2(a) may be the Unified Regulatory Agenda. This is logical since Sec. 3 of the EO (not addressed in this guidance) directs OMB and the agencies to use the Agenda for planning and budgeting purposes in future fiscal years. It also allows agencies to plan over the course of the year, perhaps banking rules they repeal to be able to exchange them for future new rules (see more under question 22 below).

The second part of the response deals with the timing of repeals and states that “to the extent feasible, regulatory actions should be eliminated before or on the same schedule as the new regulatory action they offset.” Here, the guidance would benefit from the addition of a time period within which agencies are expected to complete these offsets. In general, deregulatory as well as regulatory actions will require agencies to follow the Administrative Procedure Act’s (APA) notice-and-comment procedures, which can be a relatively lengthy process.¹⁶ Detailing the expectation of a reasonable timeframe in which agencies should complete these rulemakings

¹⁶ Susan E. Dudley, “Regulatory Reset: How easy is it to undo regulation?” The George Washington University Regulatory Studies Center Commentary, November 30, 2016 at <https://regulatorystudies.columbian.gwu.edu/regulatory-reset-how-easy-it-undo-regulation>

could provide an additional incentive for agencies to avoid unnecessary delays in reducing regulatory costs. Several countries with experience in enacting similar regulatory reform measures—including Canada, the UK, and Australia—have found that it is important to require agencies to complete identified offsets within a given period of time.¹⁷

20. How does this EO interact with other EOs and guidance addressing regulatory activities?

Here, OMB advises that “all requirements under other EOs and implementing guidance (*e.g.*, EO 12866 and OMB Circular A-4) remain applicable.” As noted earlier, this is important. The requirements set forth in EO 12866, Circular A-4, and related guidance reflect the best practices for regulatory analysis and decision making, and implementation of EO 13771 should not alter or undermine those principles and practices. Indeed, application of these longstanding analytical approaches will help ensure the success of the new order, by focusing both new actions and repealed actions on achieving regulatory objectives as efficiently as possible.

21 & 22. Can cost savings be transferred between/within agencies?

Agencies could better ensure they continue to meet regulatory goals while successfully engaging in timely offsets of regulatory costs if OMB’s guidance expanded its description of trading offsets to include the concept of “banking” regulatory savings. Currently, the document states that OMB plans to allow the transfer of cost savings both 1) within different components of the same agency and 2) between different agencies—the latter requiring prior approval from the Director of OMB. Both of these options give regulators more flexibility in meeting the EO’s requirement to identify cost offsets for significant regulatory actions. However, OMB should also allow agencies to “bank” savings in the present that can be used towards future offsets traded with other agencies.

Such an approach produces distinct advantages. Banking savings would allow regulators more flexibility regarding their timing in identifying and finalizing deregulatory actions; evidence from other countries enacting similar regulatory reforms suggests that this also prevents agencies from “hoarding deregulatory ideas until they are needed.”¹⁸ Additionally, it clarifies how agencies would treat cost savings produced by actions outside of their own reform efforts. For instance, OMB plans to count as savings regulatory actions overturned by Congress (such as disapproval of rules under the Congressional Review Act). As a practical matter, agencies would bank these savings for later use—to offset either their own rules or trade with other agencies. In

¹⁷ Marcus Peacock, “Implementing a Two-for-One Regulatory Requirement in the U.S.” The George Washington University Regulatory Studies Center Working Paper, December 7, 2016 at <https://regulatorystudies.columbian.gwu.edu/implementing-two-one-regulatory-requirement-us>

¹⁸ Peacock, p. 7

short, it is evident that OMB recognizes the value in allowing agencies to trade cost savings, but an explicit description of how agencies could bank savings would introduce greater efficiency by: 1) lessening incentives for agencies to delay finalizing offsets of regulatory costs and 2) clarifying the process for treating offsets produced by Congress.

OIRA could serve as a banker, tracking not only the number of regulations issued and repealed in each period and their incremental costs, but recording “credits” (and possibly deficits) over time.

Final Thoughts

OIRA will likely update this guidance as it and regulatory agencies gain experience with implementing the EO 13771. Lessons from other countries that have instituted offset provisions will also provide insights. For example, the UK established an outside advisory board responsible for validating estimated costs and sought input from various sources to ensure the success of its one-in-three-out policy.¹⁹ OMB and regulatory agencies could consider the most effective ways to elicit public input into the process, including using crowd sourcing to solicit reform recommendations and engaging expert bodies such as the recently established Commission on Evidence Based Policy or professional associations such as the Society for Benefit-Cost Analysis and the American Evaluation Association.

OIRA should be commended both for developing this guidance within a few days of the issuance of EO 13771 and for seeking public comment on it. The EO represents a significant departure from past practice, which is bound to challenge existing institutions and lead to uncertainty in the short term. This guidance is a good interim step to clarifying the key questions surrounding the new regulatory offset policy. It clarifies that, while the two-for-one rule and incremental cost cap do impose additional constraints on regulatory activity going forward, they do not supplant longstanding requirements to examine regulatory benefits as well as costs and to “design... regulations in the most cost-effective manner to achieve the regulatory objective.” (EO 12866 Sec. (1)(b)(5))

¹⁹ Jitinder Kohli, “What President Trump Can Learn from the UK about Reducing Regulations,” *Forbes*. January 27, 2017. <http://www.forbes.com/sites/realspin/2017/01/27/what-president-trump-can-learn-about-reducing-regulations-from-the-uk/>