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Comments on OMB's Interim Guidance Implementing Section 2 of Executive Order 13,771 Reducing Regulation and Controlling Regulatory Costs

Jeffrey Lubbers

Comments on OMB's Interim Guidance Implementing Section 2 of Executive Order 13,771 "Reducing Regulation and Controlling Regulatory Costs"

By Jeffrey S. Lubbers[*]

Ed. Note: The following is an abridged version of comments submitted to the Office of Management and Budget (OMB) in response to its request for comments on Section 2 of its Interim Guidance on Executive Order 13,771. The comments are largely directed at the guidance, not the E.O. itself. OMB subsequently published comments that it received on the Interim Guidance. See *www.regulations.gov (Docket ID OMB-2017-0002).*

Thank you for requesting comments. My first comment is that I hope that OMB will publish all comments received on this memorandum along with its responses. The rest of my comments are directed to the Q & A in the Memorandum:

A. Coverage

1. I support the limitation of application of E.O. 13,771's requirements only to significant regulatory actions and to exclude "transfer rules." I also support your approach of asking independent agencies to participate voluntarily, but you should provide a definition of "independent agencies."

2. The Executive Order's coverage of "guidance/interpretive documents," which you say should be handled on a case-by-case basis, seems problematic. First, I have never understood how true guidance documents (which by definition are not supposed to be binding on regulated parties) can even have measurable costs.

More importantly, the last thing that regulated parties would want is to cut off the flow of guidance documents. If the Executive Order applies to guidance documents, then an agency could not issue them without eliminating two "existing regulatory actions" of equivalent cost. This would surely chill the issuance of guidance. And even assuming the agency could measure the cost of a new guidance document, presumably they would naturally tend to want to eliminate other guidance documents to meet the 2 for 1 test. Would that mean they no longer believe in the policies reflected in the eliminated guidance documents? Or simply that they have de-published them? This seems exceedingly complicated and subject to subjective scoring. So I would urge the Director to categorically eliminate non-binding guidance documents from this process. If you are unwilling to do that, you should at least provide some helpful examples of how you have determined the costs of "significant guidance documents" in your reviews under E.O. 12,866.

3. As for what constitutes an offsetting "deregulatory action," you suggest that agencies can count "burden reduction through the repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements," but that "[a]gencies should also confirm that they will continue to achieve their regulatory objectives after the deregulatory action is undertaken." That makes sense on a micro-level—reducing reporting requirements should not be done if it will undermine the effectiveness of the underlying regulation. But shouldn't this be true on a macro level as well? Should an agency ever repeal a regulation if doing so will prevent the agency from achieving its statutory objectives?

B. Accounting Questions

1. You say that costs should be measured as "the opportunity cost to society" and that OMB Circular A-4 defines this concept. But after looking at that Circular, it is apparent that the Circular contains many pages trying to explain how to assess costs. Your guidance should provide agencies with a more simplified way of estimating costs in a good faith way. You also later say that, "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 adds yet another layer of complexity.

2. You also suggest that, "Purely deregulatory actions that confer only savings to all affected parties generally will not trigger the requirement under Section 2(a) for the agency to identify two existing regulatory actions to be repealed. However, if such deregulatory actions impose costs on individuals or entities, agencies will need to offset those costs." This is confusing. Most actions, whether regulatory or deregulatory in intent, will benefit some third parties and have an adverse effect on others. For example, an action that eliminates a requirement that factories install scrubbers on their smokestacks will clearly benefit some factories, but it will adversely affect those factories that have already installed them, not

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to mention the companies that make and sell scrubbers. So would those latter "costs" have to be offset?

3. You say that "future energy cost savings for rules that require the adoption of more energy efficient technologies [cannot] be counted against the compliance costs of a regulatory action." But why not? If an energy efficient technology produces future cost savings, why shouldn't that offset whatever short-term costs are accrued? This answer seems to illustrate the overall main shortcoming of the Executive Order—namely that it does not account for the benefits of regulations at all. Why does the Executive Order focus so strongly on "cost savings" yet ignore benefits—which are often the same as "cost savings"?

4. You say that generally agencies cannot use previously estimated costs from an original Regulatory Impact Analysis in determining the cost savings generated by an eliminated regulatory action. Instead, agencies will have to use "the most current information available on projected cost savings (e.g., new information on the cost of operating compliance technologies)… to the extent feasible." Given that this task will surely require intensive factual investigation, I recommend that you clarify that the agency's resource limitations have a bearing on the "extent" to which intensive factual investigation would be "feasible." It will also likely require numerous clearances under the Paperwork Reduction Act for surveys of affected regulated entities, so you perhaps should exempt such surveys from the Act. Given all these difficulties, it might be better to allow agencies to make a good faith estimate of these estimated cost savings, using whatever data they can readily obtain.

C. Process and Waiver Questions

1. In the first Q & A under this section, you provide some needed flexibility by saying: "Emergencies addressing critical health, safety, or financial matters, or for some other compelling reason, may qualify for a waiver …." But the way that is worded, it sounds like there must be an emergency for a waiver, no matter what the other compelling reason might be. I would re-word it as follows: "Waivers may be requested for emergencies addressing critical health, safety, or financial matters, or for some other compelling reason."

[T]he requirement of 'two' seems unnecessary and nonsensical.

2. You say: "Agencies may proceed with significant regulatory actions that need to be finalized in order to comply with an imminent statutory or judicial deadline even if they are not able to identify offsetting regulatory actions by the time of issuance…. In all cases, however, agencies should identify additional regulatory actions to be repealed in order to offset the cost of the new significant regulatory action, even if such action is required by law."

I would interpret the E.O.'s phrase "unless otherwise required by law" to allow agencies to issue rules that are mandated by Congress or a court without having to follow the 2 for 1 rule. Why should an agency have to eliminate other regulations just because they are following the dictates of Congress or the courts? In fact, that requirement will probably lead to foot-dragging on the part of the agency in carrying out Congress's will.

3. You say that "regulatory and deregulatory actions [can] be bundled in the same regulatory action," but that "the agency must clearly identify the specific provisions that are counted within the regulatory and deregulatory portion of the rules, and the costs and cost savings associated with each. The net cost impact (the difference between costs imposed and cost savings) of such rules will generally determine whether they are regulatory actions that need to be offset."

It's unclear from this whether, if an agency did do this bundling, the agency would still have to identify two existing rules to repeal. It would seem like the answer should be no, if the bundled rule had no net costs.

4. The previous comment illustrates another confusing aspect of this Executive Order. Many of the answers you give in the Q & A indicate that the key thing for the agency to do is offset the costs of any new rule by eliminating costs in two other existing rules. But in the previous answer you seem to indicate that a bundled rule could achieve that without designating two existing rules for repeal. In fact, the number "two" seems totally artificial. If the agency needed to identify four existing rules in order to achieve the offset, could it do so? What if they found one existing rule that exactly offset the new rule, would they still have to designate another rule for repeal? Indeed, the requirement of "two" seems unnecessary and nonsensical.

5. The next issue is how this is done within the notice-and-comment process mandated by the APA. The Executive Order rightly makes clear that "[a]ny agency eliminating existing costs … shall do so in accordance with the [APA] and other applicable law." The guidance tries to address how this should be done. It says:

> For many significant regulatory actions, the most appropriate place [to identify the two rules targeted for repeal] is in the preamble of the

rule being issued for notice and comment or promulgated. To the extent feasible, regulatory actions should be eliminated before or on the same schedule as the new regulatory action they offset. In cases where finalizing an offsetting regulation is not possible, agencies should provide a plan for finalizing the offsetting regulation. The most appropriate place for such a plan is the preamble of the rule being issued.

But this will result in a notice-and-comment procedure that is foreordained. What would the purpose be for the comment period? If the public comments show that the targeted rules' benefits are greater than the costs and that there is no good reason for rescinding them, then the agency would be bound (by case law interpreting the APA) to not rescind those rules. What then? Would the agency have to try rescinding two other existing rules? And so on? Moreover, there is a significant risk that, if the agency did rescind these rules, the rescission would be challenged and the agency would not be able to defend the rescission or to say with any credibility that it considered the comments with an open mind. Would this lead to agencies proposing to eliminate, say, ten rules in the hopes that they might end up with two rescissions that could be defended?

Update

On April 5, 2017 OMB released updated guidance on E.O. 13,771. Among other things, the supplemental guidance document (1) outlines significant details regarding how costs should be calculated; (2) explains how cost savings should be measured for purposes of complying with the two-for-one requirement; and (3) provides additional guidance on which regulatory actions might be exempted from the requirement.

6. You say that savings can be transferred within an agency. I assume this also means within a Department. If so, you should make that clear.

7. What about joint regulations—those that are issued by more than one agency? How would that work? In the issuance phase, would both agencies have to identify two regulations to repeal, or could they both identify one?

The REINS Act: Constitutional, But a Bad Idea

By Jonathan R. Siegel[*]

Congress is considering a revolutionary change to the federal rulemaking process. The Regulations from the Executive in Need of Scrutiny (REINS) Act, which passed the House of Representatives in January, would provide that when any federal agency promulgates a "major rule" (as statutorily defined), the rule would be ineffective unless Congress passes a joint resolution approving the rule. The REINS Act would reverse the procedure of the current Congressional Review Act (CRA). Currently, the CRA provides that when a federal agency promulgates a major rule, Congress may pass a "joint resolution of disapproval" blocking the rule, but if Congress fails to do so, the rule takes effect.

Although it's getting a lot of play right now, the CRA rarely has any impact. It allows Congress to block a rule only by passing a disapproval statute, and the President can veto the statute. Moreover, the President usually would veto such a statute, because the President would usually support a major rule coming from an executive agency. The CRA has so far had an impact only in the unusual periods (such as right now) when a new administration takes over and Congress uses the CRA to block rules from the previous administration.

The REINS Act, by contrast, would give Congress enormously increased power over rulemaking, because it would require every major rule to win affirmative approval from Congress. In times of divided government, when at least one house of Congress is controlled by a political party different from that of the President, no major rule could become effective without support from at least some members of both parties. Given the strong divisions between the parties, the REINS Act could powerfully impact federal rulemaking, perhaps even grinding it to a halt.

With such a monumental change on the table, it is only natural to ask

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