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Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled “Reducing Regulation and Controlling Regulatory Costs”

MEMORANDUM FOR: REGULATORY POLICY OFFICERS AT EXECUTIVE
DEPARTMENTS AND AGENCIES AND MANAGING

AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES
AND COMMISSIONS

FROM: Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs

SUBJECT: Interim Guidance Implementing Section 2 of the Executive Order
of January 30, 2017, Titled “Reducing Regulation and
Controlling Regulatory Costs”

I. General Requirements

This interim guidance, in the form of Questions and Answers (Q&As), addresses the requirements in Section 2, “Regulatory Cap for Fiscal Year 2017,” of the Executive Order of January 30, 2017, titled “Reducing Regulation and Controlling Regulatory Costs” (EO). Specifically, the guidance explains, for purposes of implementing Section 2 in Fiscal Year 2017, the following requirements:

1. “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notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.”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(a).
2. “For fiscal year 2017, . . . the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the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(b).
3. “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.” Sec. 2(c).

In general, executive departments and agencies (“agencies”) may comply with those requirements by issuing two “deregulatory” actions (described below) for each new significant regulatory action that imposes costs. The savings of the two deregulatory actions are to fully offset the costs of the new significant regulatory action.

In addition, beginning immediately, agencies planning to issue one or more significant regulatory action on or before September 30, 2017, should for each such significant regulatory action:

1. A reasonable period of time before the agency issues that action, identify two existing regulatory actions the agency plans to eliminate or propose for elimination on or before September 30, 2017; and
2. Fully offset the total incremental cost of such new significant regulatory action as of September 30, 2017.

Please consult with your Office of Information and Regulatory Affairs (OIRA) Desk Officer if you have any particular questions regarding the applicability or interpretation of the EO not addressed in these Q&As. The Office of Management and Budget (OMB) plans to issue further guidance regarding the application of EO for Fiscal Years 2018 and beyond soon. In addition, OMB may revise these Q&As.

Comments on this interim guidance should be provided to reducingregulation@omb.eop.gov by February 10, 2017.

II. Coverage

Q: Which new regulations are covered?

A: The EO's requirements for Fiscal Year 2017 apply only to those significant regulatory actions, as defined in Section 3(f) of Executive Order 12866, an agency issues between noon on January 20 and September 30, 2017. This includes significant final regulations for which agencies issued a Notice of Proposed Rulemaking before noon on January 20, 2017. Significant guidance documents may also be covered (see below).

Please continue to follow the standard significance determination process outlined in Executive Order 12866. Regulations that affect only other Federal agencies (and not the public); that are issued with respect to a military, national security, or foreign affairs function of the United States; and that are related to agency organization, management, or personnel are not subject to Section 2's requirements.

Q: What about rules that implement Federal spending programs?

A: In general, Federal spending rules that primarily cause income transfers from taxpayers to program beneficiaries (e.g., rules associated with Pell grants and Medicare spending) are considered “transfer rules” and are not covered by this EO. However, in cases where these rules impose requirements on non-Federal entities, such as reporting or recordkeeping, agencies would need to account for these costs. Please consult with your OIRA Desk Officer on these rules. See OMB Circular A-4 for a discussion of the distinction between transfers and costs generally.

Q: Do Section 2’s requirements apply to significant regulatory actions of independent agencies?

A: No, the requirements of Section 2 apply only to those agencies required to submit significant regulatory actions to OIRA for review under EO 12866. Nevertheless, we encourage independent regulatory agencies to identify existing regulations that, if repealed or revised, would achieve cost savings that would fully offset the costs of new significant regulatory actions.

Q: Are new guidance/interpretive documents covered?

A: New significant guidance or interpretive documents will be addressed on a case-by-case basis. Consult with your OIRA Desk Officer before issuing new significant guidance or regulatory interpretations. Agencies should continue to adhere to OMB’s 2007 Memorandum on Good Guidance Practices. As always, agencies should ensure that such documents are the appropriate vehicle for the particular policy goal, and that it is clear that compliance with any agency guidance is voluntary. Any cost savings claimed for guidance or other documents must be specific and verifiable.

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

A: Any existing regulatory action that imposes costs and the repeal or revision of which will produce verifiable savings may qualify. Meaningful burden reduction through the repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements may also qualify. Agencies should also confirm that they will continue to achieve their regulatory objectives after the deregulatory action is undertaken. Please consult with your OIRA Desk Officer regarding information collections or other actions you believe should qualify as deregulatory actions under Section

Q: Do regulatory actions issued before January 20 that are vacated or remanded by a court after that date qualify for savings?

A: Generally no, based on the presumption that a court determined these regulatory actions were issued, at least in part, with insufficient legal basis. There may be individual cases, however, where we would consider counting such savings, and specifically request comment on this topic. As one example, the agency may be directed by a court, under remand, to modify a rule through full notice and comment rulemaking, in order address particular issues.

Q: Do regulatory actions overturned by subsequently enacted laws qualify for savings?

A: Generally yes. We will consider Acts of Congress that overturn final regulatory actions, such as disapprovals of rules under the Congressional Review Act, to operate in a similar manner as agency deregulatory actions for the purposes of the requirements of Section 2 of the EO.

III. Accounting Questions

Q: How should costs be measured?

A: Costs should be measured as the opportunity cost to society. OMB Circular A-4 defines this concept.

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

A: OMB will address deregulatory actions that continue to allow agencies to meet regulatory goals on a case-by-case basis. 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.

Q: 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?

A: In most circumstances, such effects would not be counted as offsets to costs according to OIRA's reporting conventions for benefit-cost analysis.

Q: What about costs that occur over different time periods?

A: All costs estimates should be annualized in accordance with OMB Circular A-4. While timing issues will be handled on a case-by-case basis, in general, the start and end points for the annualization of costs should be directly comparable across the new and corresponding repealed regulatory actions.

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

A: In general, no. While the original RIA may have information that will be useful in calculating cost savings, the most current information available on projected cost savings (e.g., new information on the cost of operating compliance technologies) must be included to the extent feasible. Agencies are also strongly encouraged to use program evaluations and similar techniques to determine the actual cost and other effects of eliminating regulatory actions.

Q: What costs of existing regulatory actions should be counted as cost savings from a deregulatory action?

A: All costs that would have occurred after the effective date of the repeal of the existing regulatory action should be the basis for the cost savings estimate. This means, for example, that agencies should not count sunk costs.

Q: How should costs that duplicate those in another regulatory action be addressed?

A: In general, costs should be counted only once, in the regulatory action that imposes the legally binding requirement resulting in those costs. Exceptions should be discussed on a case-by-case basis with your OIRA Desk Officer.

Q: How should agencies treat unquantified costs and cost savings?

A: These will be handled on a case-by-case basis. As a general matter, the weight assigned to unquantified effects will depend on their significance and degree of certainty. See OMB Circular A-4 for more information on unquantified costs.

IV. Process and Waiver Questions

Q: Which significant regulatory actions might qualify for individual waivers?

A: Emergencies addressing critical health, safety, or financial matters, or for some other compelling reason, may qualify for a waiver from some or all of the requirements of Section 2. Please submit requests for a waiver assessment to your OIRA Desk Officer prior to submitting the rule for OMB review under EO 12866.

Note that Section 2(b) of EO applies “unless otherwise required by law.” 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 the unlikely case where your agency believes other regulatory actions, which are not needed to comply with an imminent statutory or judicial deadline, are required by law, please consult with your OIRA Desk Officer. 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.

Q: Can regulatory and deregulatory actions be bundled in the same regulatory action?

A: Yes, under certain circumstances. In practice, many regulatory actions can both impose new requirements and remove or streamline existing requirements on the same regulated entities and within the same regulatory program. In this case, 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. Agencies, however, should avoid artificially bundling provisions that are not logically connected in a single regulatory action.

Q: What must agencies do to “identify” existing regulatory actions to be repealed?

A: At a minimum, the agency should identify all of the associated regulatory actions to be repealed, along with cost saving estimates, no later than the date of issuance of the corresponding new significant regulatory action. Agencies should confirm that they will continue to achieve their regulatory objectives (such as health or environmental protection). All of the regulatory actions slated for repeal but not yet finalized also must be included in the Unified Regulatory Agenda.

Q: Do deregulatory actions have to be finalized before new regulatory actions can be finalized?

A: Per Section 2(a), each agency must identify two existing regulatory actions to be repealed. For many significant regulatory actions, the most appropriate place for such an identification 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. The plan should include a commitment to include the offsetting regulation in the next addition of the Unified Regulatory Agenda, with dates for any required regulatory actions and estimates of the associated cost savings.

Q: How does this EO interact with other EOs and guidance addressing regulatory activities?

A: All requirements under other EOs and implementing guidance (e.g., EO 12866 and OMB Circular A-4) remain applicable.

Q: Can savings be transferred within an agency?

A: Yes. The requirements of this EO apply agency-wide. Regulatory savings by a component in one agency can be used to offset a regulatory burden by a different component in that same agency.

Q: Can savings be transferred from other agencies?

A: Agencies that are not able to generate sufficient savings to account for new regulatory actions they must issue may submit a written request to the Director of OMB to transfer savings from another agency before they submit a regulatory action for review that does not contain the needed offset. However, if the Director does not concur with this request, the Agency must identify adequate offsets absent a waiver.

Q: How does the regulatory cost cap in Section 2 of the EO affect the consideration of regulatory benefits or other requirements under EO 12866?

A: The regulatory cost cap has no effect on the requirements of EO 12866 or the consideration of regulatory benefits in making regulatory decisions. The goal of the

requirement to eliminate two existing regulatory actions for each new significant regulatory action is to provide a mechanism for agencies to identify and repeal outdated, ineffective, or unnecessary regulatory actions. Similar to fiscal spending caps, the goal of the regulatory cost cap is to provide a mechanism for the prudent management and control of regulatory costs imposed on society by agencies attempting to achieve regulatory benefits.



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