February 10, 2017

Via email to reducingregulation@omb.eop.gov

Dominic J. Mancini
Acting Administrator
Office of Information and Regulatory Affairs
725 17th Street, NW
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Re: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs"

Dear Acting Administrator Mancini:

President Donald Trump's disregard of his oath to faithfully execute the Office of the President and preserve the Constitution's separation of powers has wedged you between a rock and a hard place. The interim guidance the Office of Management and Budget (OMB) developed regarding the President's Executive Order on Reducing Regulation and Controlling Regulatory Costs fails to extricate your office or any other federal agency covered by the Executive Order from that tight spot. The only way out is in reverse. President Trump should revoke the Executive Order and you should revoke the interim guidance.

The comments below provide examples of the fatal flaws in the Executive Order and the interim guidance. Both the Order and the guidance are rooted in false assumptions and regressive attitudes that cut against American values. The fact is that regulations rarely slap costs on blameless actors. Instead, they prevent careless actors from cutting costs in ways that *harm innocent people*. So a regulation that limits air pollution from power plants is not really adding new costs to an industry's balance sheet; it is just *transferring back* to the power plants the costs they should never have externalized to begin with. It has never been right to inflict serious harm like asthma or heart disease on people just because it is profitable.

Implementing the Executive Order would force agencies to reintroduce major risks of harm into our society and unjustly shift the burden of the

underlying hazards from risk producers onto the shoulders of vulnerable communities. For example, regulations that protect our children from lead exposure have compliance costs – Congress recognized these costs as acceptable trade-offs for the benefits that these and other regulations produced. Deregulatory action encouraged by the Executive Order could reduce those costs for the companies that produce the hazard, but doing so would transfer the burden from the polluting companies to families, causing irreparable harm to the children left unprotected. At the same time, the Executive Order would produce an uneven playing field for businesses that believe in protecting consumers, the public, and our environment from harm. In short, President Trump's Executive Order does exactly the opposite of what a responsible government that works for the people and believes in a strong economy should be doing.

Before getting into the details, it is important to note the blatant inadequacy of the one-week public comment period provided for this action. If they are not revoked, the Executive Order and the interim guidance for implementing it will have profound effects on the entire federal regulatory apparatus, not to mention downstream impacts on states, tribes, businesses, and the public. As the President himself noted, the Order is the "most significant administrative action in the world of regulatory reform since President Reagan [sic] created the Office of Information and Regulatory Affairs (OIRA) in 1981." (Actually, it was President Carter who created OIRA.) Rushing the process for public participation in developing policies of such national importance is a mistake that will lead to confusion and mismanagement.

A Solution in Search of a Problem

By any reasonable measure, the regulatory system has been one of our country's most successful governing institutions. In the last 50 years, federal regulatory agencies have done a remarkable job protecting people and the environment from unreasonable risks. During the 1960s and '70s, rivers caught fire, cars exploded on rear impact, steel workers inhaled benzene as a condition of employment, and smog sent legions of urban and suburban children to the emergency room. But today, the most visible manifestations of these threats are under control. Millions of people have been spared early deaths and terrible injury as a result. Rates of environmental degradation have been slowed in many cases, and even reversed. In short, the United States is much better off because of regulations adopted over the past half century. The undeniable effect of this Order is to undo this progress and to halt future steps toward building on these past successes.[1]

Indeed, it is unlikely that many of these successes would have ever been achieved had this Executive Order been in place.

[1] For more about the important successes of the U.S. regulatory system, see http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

The Executive Order and interim guidance ignore the reality that regulatory lookback programs of all shapes and sizes already abound in our government.[2] The Regulatory Flexibility Act requires agencies to review every rule that has "a significant economic impact upon a substantial number of small entities" within 10 years after the final rule is published. Executive Order 12866 requires agencies to develop a program "under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated." Executive Order 13563 builds upon the Executive Order 12866 periodic review program and adds, among other things, time-consuming and resource-intensive procedures for carrying out the lookback program on an ongoing basis. Some regulatory lookback programs are baked right into the statutes that authorize the regulations. For example, the Clean Air Act directs the U.S. Environmental Protection Agency (EPA) to "complete a thorough review" of the agency's existing National Ambient Air Quality Standards (NAAQSs) and "to make such revisions…as may be appropriate" at least once every five years. In the end, these existing programs take a scalpel to accomplish, through careful analysis, what President Trump's Executive Order and the interim guidance might attack with an axe.

How Quickly It Unravels

Upon even cursory review of the details of the Executive Order and interim guidance, it quickly becomes clear that the proposed regulatory budget and "pay-go" requirements are unworkable.

Legal Problems

Carrying out the President's stated intent behind the order would violate numerous consumer protection, environmental, and public health laws. Public interest groups and a union whose members would be harmed if the Executive Order were implemented have helpfully laid out some of those legal infirmities in a lawsuit seeking an injunction against implementation.[3] Among them:

- The EPA may not consider implementation costs when establishing national ambient air quality standards for ozone, soot, and other criteria air pollutants;[4]
- The Mine Safety and Health Administration (MSHA) may not reduce the protections afforded to miners by an existing mandatory health or safety standard when it promulgates a new one;[5] and

[2] Examples here drawn from Rena Steinzor, "The Real 'Tsunami' in Federal Regulatory Policy," *REGBLOG*, http://www.regblog.org/2014/05/22/22-steinzor-the-real-tsunami-in-federal-regulatory-policy/ (May 22, 2014).
[3] http://www.citizen.org/documents/Complaint-Public-Citizen-NRDC-CWA-v-Donald-Trump.pdf
[4] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).
[5] 30 U.S.C. § 811(a)(9)

- The National Highway Traffic Safety Administration (NHTSA) must consider a variety of issues when creating new vehicle safety standards, but the cost savings associated with repealing other vehicle safety standards is not among them.[6]

If the Trump administration wants to alter these laws, it cannot do it by executive order. Congress will need to pass new legislation in the bright light of public scrutiny.

The Administrative Procedure Act, as the Executive Order notes, would be legally binding on any offsetting deregulatory actions that an agency might propose. It is unclear whether agencies would be able to articulate a legal and policy basis, as required by the Administrative Procedure Act, in support of the deregulatory actions. This Executive Order by definition does not amend existing laws and thus cannot provide such a basis. In the end, the Administrative Procedure Act, in conjunction with the authorizing statutes that supply the legal basis for agencies' existing regulations, may pose too high a legal bar for agencies to overcome in implementing the Order's regulatory "pay-go" requirements.[7]

Administrative Problems

Beyond these conflicts with existing law, which are fatal to implementation of the Executive Order, the interim guidance has major flaws.

The interim guidance fails to define the scope of the Executive Order in a comprehensible fashion. The application of the Order's requirements to all "significant" regulatory actions, as that concept is defined by Executive Order 12866, raises major concerns. In particular, many of the components of the Executive Order 12866 definition are exceedingly vague and, if read broadly, could cover nearly any regulatory action an agency might issue. For example, the "elastic clause" of the definition includes any rule that might "Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." Through the broad application of this clause alone, OMB could unilaterally determine that almost any regulatory action is "significant" and thus subject to the new onerous regulatory "pay-go" and budgeting requirements. The broad definition that the Order adopts risks sweeping in too many regulatory actions, threatening to unduly impede the important work agencies must perform.

The vague nature of the definition and its exceptions risks creating substantial regulatory uncertainty, and in particular uncertainty over the enforcement and implementation of agencies' statutory missions. For instance, would a climate-related rulemaking by the EPA be covered by the Executive Order? Or would it fall within the Executive Order's stated exemption for "regulations issued with respect to … national security?" After all, the

[6] 49 U.S.C. § 30111(a), (b).
[7] For more on the implementation problems of the Order's regulatory "pay-go" requirements, see http://progressivereform.org/articles/Regulatory_Pay-Go_1214.pdf and http://progressivereform.org/articles/VerchickTestimonyRegBudgetSenateBudComm120915.pdf.

Pentagon has identified global climate change as "an urgent and growing threat to our national security."[8]

Applying the Executive Order's onerous requirements to "significant guidance or interpretive documents" on a "case-by-case basis" also raises major concerns. Neither the Order nor the interim guidance explains how such case-by-case determinations will be made. Rather, by instructing agencies to consult with an OIRA Desk Officer, this guidance suggests, albeit ambiguously, that the Desk Officer has unilateral discretion over whether a guidance or interpretive document is deemed "significant" and whether the agency may or may not issue it. The failure to explain the criteria for such determinations obscures critical aspects of regulatory decision-making, thereby systematically defeating procedural transparency and the meaningful public accountability it would provide. Even if those failures were cured in later guidance from OMB, the basic model proposed here puts extraordinary power in the hands of Desk Officers, taking it away from agencies that have both the statutory authority and expertise to carry out the laws enacted by Congress.

The interim guidance also thoroughly fails to elucidate the basic procedures for important issues like the processes and standards by which waivers will be granted, and the processes and standards by which cross-agency trades will be approved and enforced.

The regulatory budget and "pay-go" requirements also appear to be unmanageable from an administrative standpoint. In essence, they transform every rulemaking action into at least three rulemaking actions (one for the new rule and at least two more for the elimination of the existing rules). As many administrative law scholars have described over the years, the rulemaking process is extremely time-consuming and resource-intensive. Nevertheless, President Trump's Executive Order would triple that burden, and it would do so while the administration and Congress are considering steep reductions in agencies' budgetary resources. It is unclear how agencies would be able to fulfill their responsibilities under this Order while at the same time fulfilling even the barest minimum of their statutory missions. Whether by accident or by design, the result of the Executive Order would be even more of the same "paralysis by analysis" that is already undermining our regulatory system, bringing to a halt the creation of health, safety, and economic safeguards needed and desired by consumers, businesses, communities, and the environment.

Conclusion: Rescind It

As experts in law and public policy, our best assessment of the Executive Order and the guidance documents reveals an unworkable concept. No amount of fiddling at the margins will transform them into a coherent design for guiding our complex regulatory system.

[8] Department of Defense Response to Congressional Inquiry on National Security Implications of Climate-Related Risks and a Changing Climate (July 23, 2015), *available at* http://archive.defense.gov/pubs/150724-congressional-report-on-national-implications-of-climate-change.pdf.

The goal of regulatory policy should not be concerned with the “quantity” of regulations but with the “quality” of regulations. No matter how hard one tries to spin it — and the President certainly has tried — it is fundamentally irrational and counterproductive to attempt to divorce the costs of regulation from the benefits. This Executive Order and the interim guidance, in an attempt to limit costs of regulation, will also ration benefits. They would do so without regard for the limits on rationing that Congress has created and sustained for decades. They are tools of Executive Branch overreach and should be rescinded.

Sincerely,

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