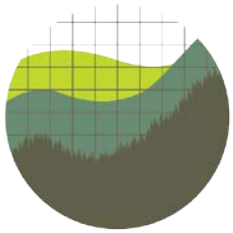

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

February 10, 2017

Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs ("OIRA")

Re: Comments on Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs"

The Institute for Policy Integrity at New York University School of Law[1] is a nonpartisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity respectfully submits these comments on OIRA's interim guidance implementing Executive Order 13,771.[2]

As the Order readily acknowledges, it "shall be implemented consistent with applicable law."[3] Applicable law includes not only agencies' many individual statutory obligations, but also the Administrative Procedure Act. The Order should further be implemented consistent with other ongoing executive orders on regulatory review, including Executive Orders 12,866 and 13,563.[4] These various authorities together enshrine fundamental principles of rational decisionmaking, which should continue to guide OIRA as it implements this newest Order.

Rationality requires regulations to be efficient, fair, and developed through an unbiased process that relies on the best available information. As the Supreme Court famously articulated in 1983, an agency cannot base a regulatory decision on factors that Congress did not intend for it to consider, nor can it ignore relevant factors or contradict the evidence before the agency.[5] Typically both regulatory costs and benefits are relevant factors that deserve appropriate attention and weight; as Justice Scalia recently summarized, "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."[6] Justice Scalia further understood that "'cost' includes more than the expense of complying with regulation" and extends to "any disadvantage," including "harms that regulation might do to human health or the environment."[7] Indeed, OIRA has long recognized that the principles of rational decisionmaking apply equally to

[1] No part of this document purports to present New York University School of Law's views, if any.
[2] OIRA, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (Feb. 3, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/03/interim-guidance-implementing-section-2-executive-order-january-30-2017.
[3] Exec. Order No. 13,771 § 5(b), 82 Fed. Reg. 9339 (Feb. 3, 2017).
[4] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).
[5] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (defining "arbitrary and capricious" under the Administrative Procedure Act).
[6] Michigan v. Envtl. Prot. Agency, 135 S. Ct. 2699, 2707 (2015) (emphasis original); *see also* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1198 (9th Cir. 2008) (warning agencies not to "put a thumb on the scale by undervaluing the benefits and overvaluing the costs").
[7] *Michigan*, 135 S. Ct. at 2707.

deregulation and its attendant social costs.[8] To paraphrase Justice Scalia, it would not be rational, much less prudent, to take deregulatory action that causes billions of dollars in health or environmental costs in return for a few dollars in financial benefits.[9]

Since the Reagan administration, executive orders on regulatory review have consistently focused on "maximizing the aggregate net benefits to society."[10] Because these orders have long required agencies—to the extent permitted by statute—to issue regulations only if benefits justify the costs,[11] overall the rules currently in the Code of Federal Regulations were net beneficial when they were adopted.[12] Though some regulations may have grown outdated, less effective, or unnecessary over time, many regulations now on the books continue to generate annual net benefits.

Within the framework of this latest Executive Order, OIRA should continue to adhere to these long-established principles for rational rulemaking. OIRA should further facilitate implementation of the Order in a way that does not overly burden agencies' abilities to carry out statutory obligations and objectives. To those ends:

- Focusing the Order's requirements on "significant" regulatory actions is consistent with the Order's language and intent. It avoids burdening agencies with the unworkable application of the Order to the many non-significant regulations that agencies routinely issue that have limited costs, are net beneficial, and are essential to the orderly functioning of our economy and society. **Indeed, OIRA should focus the Order primarily on "economically significant" actions to even better promote workability while achieving the Order's objectives.** At the same time, OIRA should clarify that repeals or modifications to non-significant regulations can generate cost offsets.
- OIRA appropriately recognizes that, notwithstanding the Order's requirements, agencies must still act when "required by law," and agencies should confirm that any deregulatory action taken will not undermine their statutorily mandated regulatory objectives. **OIRA should emphasize at the outset of the guidance that agencies must "continue to achieve their regulatory objectives after the deregulatory action is undertaken."[13]**
- To the extent that any regulations must be repealed or modified to satisfy the Order, **agencies should prioritize outdated, ineffective, and unnecessary regulations.**

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[8] Office of Mgmt. & Budget, Executive Office of the President, OMB Circular A-4, Regulatory Analysis (2003) (hereinafter Circular A-4) ("This requirement applies to rulemakings that rescind or modify existing rules as well as to rulemakings that establish new requirements.").

[9] *Michigan*, 135 S. Ct. at 2707 ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

[10] Exec. Order No. 12,291 § 2(e), 46 Fed. Reg. 13,193 (Feb. 17, 1981); *cf id.* § 2(c); *see also* Exec. Order No. 12,866, *supra* note 4, at § 1(a) ("[A]gencies should select those approaches that maximize net benefits . . . ."); Exec. Order No. 13,563, *supra* note 4, at § 1(b)(3) (same).

[11] *See* Exec. Order No. 12,291, *supra* note 10, at § 2(b) ("Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society."); Exec. Order No. 12,866, *supra* note 4, § 1(b)(6) (requiring agencies to "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"); Exec. Order No. 13,563, *supra* note 4, at § 1(b)(1) (requiring agencies to "adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)").

[12] For example, the annual net benefits of major federal regulation during the Obama administration were at least $250 billion, and the previous two administrations issued regulations with similar or somewhat lower net benefits. *See* Office of Mgmt. & Budget, Exit Memo (Jan. 5, 2017), *available at* https://obamawhitehouse.archives.gov/administration/cabinet/exit-memos/office-management-and-budget.

[13] OIRA, *supra* note 2, at 3; *see also id.* at 6.

Agencies should identify candidates for repeal or modification based on changed economic, technological, or legal circumstances, as well as updated data on costs and benefits. **OIRA should encourage agencies to develop plans for retrospective review**, to facilitate calculating the actual costs of regulation and identifying candidates for cost-saving modifications.

- **Like the costs of regulations blocked under the Congressional Review Act, the costs of judicially vacated regulations should count as offsets.**
- **Agencies should retain discretion to incorporate energy efficiency–related cost savings into their regulatory cost assessments.**

Though this interim guidance is focused on implementing Section 2 of the Executive Order, which applies only to fiscal year 2017, OIRA will soon need to issue guidance on implementing Section 3 for fiscal years 2018 and beyond. **OIRA should call for public comments in advance of proposing any guidance on implementing Section 3.** Additionally, following the principles of rationality and consistent with Executive Order 12,866, **OIRA should, for future years, set the total allowable regulatory budget by reference to net costs—that is, costs net of reasonable estimates of regulatory benefits, including difficult-to-quantify benefits.**

A report attached to these comments contains the bipartisan, consensus recommendations from a roundtable of former OIRA administrators (six from Republican administrations, two from Democratic administrations), which Policy Integrity convened in September 2016.[14] The report reflects strong bipartisan support for the continued use of cost-benefit analysis as the driving force for regulatory review.

I. OIRA's interpretation of the scope of the Executive Order to apply only to significant regulatory actions issued by executive agencies is consistent with the Executive Order

OIRA interprets the scope of the Executive Order in two notable ways. First, OIRA interprets the Executive Order to apply to executive, but not independent, agencies.[15] Second, OIRA interprets the Executive Order to apply only to significant regulatory actions.[16] Both of OIRA's interpretations follow from a straightforward reading of the Executive Order.

With respect to the limitation to executive agencies, the Executive Order defines the word "agency" as referring to "an *executive* department or agency."[17] All requirements throughout the Executive Order apply to these previously defined agencies. Nowhere does the Executive Order mention its

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[14] *See* Jason A. Schwartz & Caroline Cecot, Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders (2016), at 8-9, *available at* http://policyintegrity.org/publications/detail/strengthening-regulatory-review. Other recommendations contained in the report should not be considered for the purposes of this guidance but should guide OIRA at the time that it considers expanding the use of cost-benefit analysis.

[15] OIRA, *supra* note 2, at 3.

[16] *Id.* at 2. "Significant regulatory action" is any regulatory action that may "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in [Executive Order 12,866]." Exec. Order No. 12,866, *supra* note 4, at § 3(f).

[17] Exec. Order No. 13,771, *supra* note 3, at § 2(a) (referring to "an *executive* department or agency (agency)") (emphasis added).

applicability to independent agencies. In fact, when acknowledging its legal limitations, the Order again refers only to "an executive department or agency," implicitly limiting its scope to such agencies.[18]

In addition, the Order appears to contemplate a limitation to significant regulatory actions. For example, Section 3 of the Order explains that agencies must identify, *in the Regulatory Plan required under Executive Order 12,866*, offsetting regulations for each regulation that they plan to issue.[19] The Regulatory Plan, in turn, applies to only significant actions.[20]

Furthermore, the Order grants the Director of the Office of Management and Budget authority to exempt any category of regulations.[21] Like the other exemptions specifically detailed (namely, regulations on national security and agency organization), presumably the Director is given this discretion to avoid applying the Order in unworkable ways that will not serve the goal of "prudently managed" regulatory costs.[22]

Applying both the two-for-one requirement and the full cost offset requirement to all non-significant regulations would prove unworkable and would not advance the goal of prudent management. Agencies issue thousands of non-significant regulations each year, many of which are required by law, have limited costs and net benefits, and serve the interests of regulated entities by affording them clarity and certainty. Today's issue of the *Federal Register*, for example, includes several non-objectionable regulations, many of which regulated entities would almost certainly support, such as: a Coast Guard proposal to create new anchorages in Puget Sound to enhance safety for maritime traffic; five Federal Aviation Administration airworthiness directives to address aircraft inspections and safety and three other actions to clarify airspace and approach procedures; a Fish and Wildlife Service proposal to allow subsistence harvest of migratory birds in Alaska (an allowance which, like many hunting and fishing allowances, needs to be reviewed annually); and a National Oceanic and Atmospheric Administration final regulation revising the yellowtail fishing year and lifting some requirements in order to optimize yields for fishers and decrease the regulatory burden of compliance.[23] In fact, in 2015, while agencies issued the fewest number of regulations since at least 1976, they still needed to finalize more than 3,400 regulations[24] to ensure the orderly functioning of our economy and to meet their statutory obligations.

Requiring agencies to identify two regulations to repeal or modify for each of those necessary final regulations and to collect the "most current information available on . . . actual cost"[25] would entail additional surveys of regulated entities to estimate their costs. That would prove to be enormously burdensome for both regulated entities and agencies, and would unnecessarily slow down the very

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[18] *Compare id.* § 5(a) ("Nothing in this order shall be construed to impair or otherwise affect . . . the authority granted by law to an executive department or agency, or the head thereof."), *with* Exec. Order No. 12,866, *supra* note 4, at § 9 (clarifying that the order, which imposes requirements on executive and independent agencies, "shall [not] be construed as displacing *the agencies'* authority or responsibilities, as authorized by law" (emphasis added)).

[19] *Id.* § 3.

[20] *See* Exec. Order No. 12,866, *supra* note 4, at § 4(c) ("As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter.").

[21] *See* Exec. Order No. 13,771, *supra* note 3, at § 4(c).

[22] *Id.* § 1.

[23] *See Federal Register* (Feb. 10, 2017), https://www.federalregister.gov/documents/current (accessed Feb. 10, 2017).

[24] MAEVE P. CAREY, CONGRESSIONAL RESEARCH SERVICE, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 6 tbl.1 (2016).

[25] OIRA, *supra* note 2, at 4.

regulations that many regulated entities depend on for certainty, financial planning, and the orderly functioning of our economy.

By comparison, there were only 415 *significant* regulations issued during 2015 (also a low point since at least 1994),[26] and over the last 22 years, through both Republican and Democratic administrations, there have been on average less than 100 "*economically* significant" regulations per year.[27] Limiting the Order's application to significant or to economically significant regulations will not only be much more workable and much less burdensome for both regulated entities and agencies, but also allow agencies to focus their attentions on the regulations with greatest costs.

For these reasons, OIRA should focus the Order's application on "economically significant" regulations as defined under section 3(f)(1) of Executive Order 12,866—*i.e.*, those regulations that "[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[28] Limiting the scope to economically significant regulations is consistent with the Executive Order. The Order focuses on direct expenditures,[29] so it makes sense to focus the review on regulations that are more costly, rather than regulations that are only "significant" because they raise novel legal issues or alter budgetary impacts.

At the same time, OIRA should clarify that meaningful burden reductions from repeals or modifications of non-significant regulations can count toward offsetting costs. This approach would incentivize agencies to prioritize the most inefficient regulations for repeal or modification, regardless of whether those regulations were classified as "significant" when they were originally issued.

II. OIRA properly recognizes that the Executive Order's requirements cannot override an agency's obligations to issue or retain regulations required by statute or judicial order

OIRA properly acknowledges that agencies may face statutory mandates that require them to move forward with regulations, despite the Executive Order's requirements. In particular, the draft guidance notes that "[a]gencies 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."[30] In offering this guidance, OIRA relies on language in the Executive Order, which requires the total incremental cost of all new regulations for fiscal year 2017 to be no greater than zero "unless otherwise required by law."[31] Other sections of the Executive Order likewise acknowledge that the Order's scope is limited by existing law.[32]

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[26] CAREY, *supra* note 24, at 10 tbl.3.
[27] *Id.* at 12 tbl.4 (emphasis added).
[28] Exec. Order No. 12,866, *supra* note 4, at § 3(f)(1).
[29] Exec. Order No. 13,771, *supra* note 3, at § 1 ("In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.").
[30] OIRA, *supra* note 2, at 5.
[31] Exec. Order No. 13,771, *supra* note 3, at § 2(b).
[32] *See, e.g.*, *id.* § 2(c) ("Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law."); *id.* § 2(a) ("Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." (emphasis added)); *id.* § 3(c) ("Unless otherwise required by law, no regulation

An Executive Order cannot overrule statutes that have been passed by Congress; nor can it contravene court orders.[33] If a statute or a judicial order requires an agency to issue a regulation by a deadline, it is neither rational nor legal to delay the issuance of that regulation based on the Executive Order's requirements.[34]

Likewise, OIRA properly recognizes that, in the process of deciding which regulations to repeal under the Executive Order, agencies cannot and should not abrogate their statutory responsibilities. In describing the actions agencies should take "to 'identify' existing regulatory actions to be repealed," OIRA instructs that "[a]gencies should confirm that they will continue to achieve their regulatory objectives (such as health or environmental protection)."[35] In issuing this guidance, OIRA correctly interpreted the legal limitations of the Order: agencies must carry out their statutory obligations. To the extent that this principle is ambiguous in the draft guidance,[36] OIRA should clarify that it applies across all sections of the Executive Order. In particular, OIRA should consider emphasizing this principle at the outset of the guidance, rather than placing it later in the guidance in response to a question focused not on agencies' legal requirements but on whether paperwork reductions and other revisions short of full repeal qualify as cost savings.

III. To the extent that any regulatory actions must be repealed or modified, agencies should prioritize outdated, ineffective, or unnecessary regulatory actions

OIRA identifies one of the Executive Order's goals as "provid[ing] a mechanism for agencies to identify and repeal outdated, ineffective, or unnecessary regulatory actions."[37] OIRA also recognizes that, legally, agencies must be able to "continue to achieve their regulatory objectives," such as protecting the health and safety of the American public.[38] Both purposes can be furthered if OIRA encourages agencies to *prioritize* repealing or modifying outdated, ineffective, or unnecessary regulatory actions when implementing the Executive Order. Agencies can identify such regulatory actions using processes already in place for retrospective review of existing regulatory programs.[39]

By engaging in retrospective review, agencies acknowledge that existing regulations might no longer serve society's best interests. New technological innovations or emerging scientific understandings can cause a regulation's actual costs and benefits to differ greatly from the agency's estimate of the impact at the time the agency issued the regulation. It may be the case that a more

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shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda . . . ." (emphasis added)).

[33] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the [executive] order must stem either from an act of Congress or from the Constitution itself."); *id.* at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."); Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 168 (4th Cir. 1981) (invalidating the "application of [an] Executive Order to plaintiffs" because the Executive Order "is not reasonably within the contemplation of any statutory grant of authority").

[34] Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986) (holding that "OMB has no authority to use its regulatory review" process under an executive order "to delay promulgation of [agency] regulations . . . beyond the date of a statutory deadline").

[35] OIRA, *supra* note 2, at 6; *see also id.* at 3.

[36] *See, e.g.*, *id.* at 5 (referring specifically to Section 2(b) of the Executive Order).

[37] *Id.* at 7.

[38] *Id.* at 6.

[39] Policy Integrity submitted extensive comments to agencies such as the Department of the Interior, the Environmental Protection Agency, and the Department of Energy on how best to implement retrospective review. *See, e.g.*, Policy Integrity, Comments to the Department of the Interior on Reducing Regulatory Burdens (Mar. 28, 2011), *available at* http://policyintegrity.org/documents/Policy_Integrity_Comments_on_DOI_Retrospective_Review.pdf.

or less stringent regulation might actually better maximize net benefits; a regulation based on antiquated technology may now seem either too lax or obsolete; other government actions and external events may render a regulation either redundant or overly narrow in scope. Retrospective review provides an opportunity for agencies to consider modifying, expanding, or eliminating existing regulations based on changed economic, technological, or legal circumstances, as well as updated data on costs and benefits. This review process would also help agencies identify the "outdated, ineffective, or unnecessary" regulatory actions that the Executive Order seeks to eliminate.

Because the goals of retrospective review and the Executive Order are not inconsistent, the Order can be viewed as creating another incentive for agencies to approach retrospective review seriously. To facilitate calculating the actual costs of regulation and identifying candidates for cost-saving modifications, OIRA should require agencies to develop prospective plans for periodically assessing the regulations they issue. In particular, each proposal for a new "economically significant" regulation should be accompanied by a timeline for future retrospective reviews and a protocol that defines the goals, metrics, and milestones against which the regulation's success will be evaluated. OIRA should examine agencies' prospective plans for retrospective review, which would be contained in the preambles of new economically significant regulations, as part of its standard oversight of new regulatory actions. More information on requiring prospective plans for retrospective review can be found in the report attached to these comments that contains the bipartisan, consensus recommendations from a roundtable of former OIRA administrators (six from Republican administrations, two from Democratic administrations).[40]

At a minimum, OIRA should encourage agencies to use retrospective review to prioritize repealing or modifying outdated, ineffective, or unnecessary regulatory actions.[41] OIRA should also clarify in the guidance that any regulatory revision with a meaningful burden reduction will generate cost offsets, including revisions short of repeal and revisions to non-significant regulations.

IV. The costs of judicially vacated regulations should count as offsets

The guidance sensibly notes that regulations blocked under the Congressional Review Act will generate cost offsets for purposes of Section 2 of the Executive Order.[42] OIRA should extend similar treatment to regulations that are judicially vacated after January 20, 2017.[43] In either case, the costs associated with the regulation are no longer being imposed on society.

Giving offset credit for judicially vacated regulations is especially important for nondiscretionary regulations issued pursuant to a statutory mandate. In these instances, the agency will be statutorily obligated to promulgate a replacement for the vacated regulation. Thus, if offsets are not offered for the vacated regulation, OIRA will end up double counting the costs of fulfilling a single statutory mandate.

V. Agencies should retain discretion to incorporate energy efficiency–related cost savings into their regulatory cost assessments

The guidance states that, "under OIRA's reporting conventions for benefit-cost analysis," agencies should not use energy efficiency–related cost savings to reduce the costs attributed to new

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[40] *See* Schwartz & Cecot, *supra* note 14.

[41] In furtherance of these prioritization efforts, OIRA should also actively encourage inter-agency data sharing and offset trading. Allowing broad inter-agency trading will increase the likelihood that agencies can meet their regulatory budgets by repealing ineffective or duplicative regulations.

[42] OIRA, *supra* note 2, at 3.

[43] *See id.* (requesting comments on this issue).

regulations (or, presumably, to increase the cost offsets generated by repealed regulations).[44] But the Office of Management and Budget's Circular A-4 appears to grant agencies discretion to either subtract energy savings from the costs attributed to regulatory action or add them to the benefits attributed to that action.[45] There is no logical reason to change this policy under the Executive Order. Barring agencies from taking into account energy efficiency–related cost savings will result in misleadingly large estimates of the incremental costs of some new regulations, as well as misleadingly large estimates of the cost savings associated with some regulatory repeals.

Consider a firm that, in the absence of regulation, would purchase Equipment 1. Now imagine a regulation that, for safety purposes, requires the firm to instead purchase the more expensive Equipment 2. The incremental cost of that regulation is not the full price of Equipment 2. Instead, the issuing agency must take into account that the firm no longer needs to buy Equipment 1. Thus, the regulation's incremental cost is the difference in price between Equipment 1 and Equipment 2.

The same logic applies to energy efficiency–related cost savings. Suppose that Equipment 2, instead of obviating the need for Equipment 1, reduces the firm's overall electricity demand. To calculate the incremental cost of the regulation, the agency should now subtract from the price of Equipment 2 the price of the electricity that the firm will no longer need to purchase as a result of installing Equipment 2. There is no analytically defensible reason, in this hypothetical, for treating the price of Equipment 1 differently than the price of energy.

As this example illustrates, accurately calculating the incremental cost that a regulation imposes on regulated entities (and their customers) will sometimes require consideration of energy efficiency–related cost savings. Accordingly, agencies should retain discretion to consider such savings when appropriate.

VI. After fiscal year 2017, OIRA should encourage agencies to issue net beneficial regulations and retrospectively review their existing regulations

OIRA's interim guidance clarifies the requirements for fiscal year 2017 contained in Section 2 of the Executive Order.[46] Section 3 of the Order, which applies to fiscal year 2018 and beyond, directs the Director of the Office of Management and Budget to set a new regulatory budget for each agency and provide separate guidance on the implementation of the section.[47] OIRA should call for public comments in advance of proposing any guidance on implementing Section 3.

In general, OIRA should, for future years, set the total allowable regulatory budget by reference to *net* costs (costs minus benefits). Pursuant to Section 3, OIRA should clarify that total allowable incremental regulatory costs are calculated by subtracting reasonable estimates of regulatory benefits, including difficult-to-quantify benefits, from estimated total compliance costs. Such an approach would be consistent with approaches outlined in executive orders issued since the Reagan administration.[48]

OIRA should also clarify that, for future years, cost offsets should be generated only by repealing outdated, ineffective, unnecessary, or otherwise *net costly* regulations—that is, regulations that

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[44] *Id.* at 3.
[45] *See* Circular A-4, *supra* note 8, at 38 ("As a general matter, any direct costs that are averted as a result of a regulatory action should be monetized wherever possible and either added to the benefits or subtracted from the costs of that alternative.").
[46] *See* OIRA, *supra* note 2, at 1.
[47] Exec. Order No. 13,771, *supra* note 3, at § 3.
[48] *See* Exec. Order No. 12,291, *supra* note 10; Exec. Order No. 12,866, *supra* note 4; Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (expanding review to guidance documents); Exec. Order No. 13,563, *supra* note 4.

impose more costs on society than they are worth. As discussed earlier, OIRA should require agencies to develop prospective plans for periodically assessing the regulations they issue in order to facilitate the identification of net costly regulations in future years.[49]

Thank you for considering these comments. We urge OIRA to make all the comments it receives publicly available in accordance with the Office of Management and Budget's own bulletin to agencies on preparing guidance and its past practice.[50]

Respectfully submitted,

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Attached: Strengthening Regulatory Review—Recommendations for the Trump Administration from Former OIRA Leaders (2016)[51]

[49] For more information on this kind of requirement, see Schwartz & Cecot, *supra* note 14.
[50] *See* Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices (2007), at 21 (requiring agencies to invite public comments on draft guidance documents and to prepare and post a response-to-comments document), *available at* https://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2007/m07-07.pdf. In fact, the Office of Management and Budget under President George W. Bush followed these procedures when it prepared the Bulletin itself, by first proposing a draft Bulletin for public comment and then publicly posting the comments received on the draft. *See id.* at 1; Comments on Proposed Bulletin on Good Guidance Practices, *available at* https://georgewbush-whitehouse.archives.gov/omb/inforeg/good_guid/c-index.html. As another example, the Office of Management and Budget under President Obama published comments received on Executive Order 12,866. *See* Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, *available at* https://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp.
[51] *See* Schwartz & Cecot, *supra* note 14, *available at* http://policyintegrity.org/publications/detail/strengthening-regulatory-review.