



January 22, 2018

VIA ELECTRONIC SUBMISSION

Attn: Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance

Re: DOD-2017-OS-0059 - Review of Existing DoD Regulations

The Institute for Policy Integrity (Policy Integrity) at New York University School of Law¹ respectfully submits the following comments to the Department of Defense (DOD) regarding its obligation pursuant to Executive Order 13,777, to evaluate existing regulations and identify some for repeal, replacement, or modification.² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Executive Order 13,777 directs agencies to identify regulations that “impose costs that exceed benefits” and prioritize “outdated, unnecessary, or ineffective” regulations for repeal, replacement, and modification.³ It requires agencies to seek input on identifying such regulations from interested persons.⁴ Policy Integrity submits these comments to ensure that DOD stays focused on its mandate to identify outdated, unnecessary, ineffective, or net costly regulations for repeal, replacement, or modification and does not instead prioritize recently promulgated and overwhelmingly cost-benefit justified rules identified by industry commenters. Policy Integrity offers four main comments:

- First, retrospective review should prioritize reanalysis of regulations for which actual costs and benefits diverge significantly from predicted costs and benefits because of changing economic circumstances, new technological innovations, or emerging scientific understandings. **Prioritizing retrospective review based purely on the volume of opposition from regulated entities—without consideration of regulatory benefits—is an irrational and inefficient approach.**
- Second, to the extent that other stakeholders suggest repealing rules by attacking cost-benefit methodologies, **DOD should reaffirm that benefit estimates used in recent regulatory impact analyses, including the value of mortality risk**

¹ This document does not purport to present New York University School of Law’s views, if any.

² Exec. Order No. 13,777, 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017).

³ *Id.* § 3(d),(f).

⁴ *Id.* § 3(e).

reduction and the social cost of greenhouse gases, remain the best available estimates.

- Third, DOD should use this as an opportunity to **establish a process to review the performance of any future economically significant rules.**
- Fourth, to the extent that other stakeholders argue for the repeal of regulations by alleging large negative impacts on employment, Policy Integrity urges reliance on well-accepted economic theory and strong evidence: **Regulations have little effect on aggregate employment or unemployment rates.**

Below, we explain each comment in turn.

I. Retrospective review should prioritize reanalysis of regulations for which actual costs and benefits diverge significantly from predicted costs and benefits because of changed circumstances—and should not rehash recent debates over massively cost-benefit justified rules.

Retrospective review is an opportunity to recalibrate regulations to improve efficiency and effectiveness. DOD must approach the review of existing regulations with a plan for identifying appropriate candidates for such modification.

Every President since Carter has sought to identify and address inefficient existing regulations through a process of retrospective review of regulatory costs and benefits. President Trump’s Executive Order 13,777 follows this tradition by directing agencies to identify regulations for repeal, replacement, and modification that are “outdated, unnecessary, or ineffective” or that “impose costs that exceed benefits.”⁵ Executive Order 13,777 embraces past methodologies for identifying such regulations, reaffirming President Obama’s Executive Order 13,563,⁶ which called on agencies to develop plans “to promote retrospective analysis of rules that are outmoded, ineffective, insufficient, or excessively burdensome” and “to modify, streamline, expand, or repeal them in accordance with what has been learned.”⁷ It also reaffirms President Clinton’s Executive Order 12,866, particularly its call for agencies “to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances.”⁸ Thus, the procedures underlying retrospective review pursuant to Executive Order 13,777 should be consistent with those underlying past efforts.

In other words, agencies should identify net costly or otherwise outdated rules by determining whether, in light of changed circumstances, the actual benefits of the implemented rules no longer justify the actual costs, or the rules as implemented do not maximize net benefits. To prioritize such regulations for modification, DOD must not get diverted by comments from stakeholders complaining about recently promulgated and overwhelmingly cost-benefit justified rules. Retrospective review should strive to enhance net benefits, not just to decrease compliance costs.

⁵ *Id.* § 3(d),(f).

⁶ *Id.* § 2(iii).

⁷ Exec. Order No. 13,563 § 6(b), 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁸ Exec. Order No. 12,866 § 5, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

1. *Retrospective review should prioritize reanalysis of older regulations for which actual costs and benefits diverge significantly from predicted costs and benefits.*

Retrospective review is an opportunity to go back and fix some regulations that have become “outdated, unnecessary, or ineffective” due to changed economic circumstances, new technological innovations, or emerging scientific understandings. When promulgating new rules, agencies make estimates about what the rules’ future costs and benefits will likely be. These *ex ante* estimates typically reflect the best available data, scientific models, and economic tools. Nevertheless, *ex ante* estimates are still estimates made in the face of uncertainty. Changing economic conditions, new technological innovations, or emerging scientific understandings can cause a rule’s actual costs and benefits to diverge greatly from the agency’s *ex ante* estimates. Consequently, after a rule takes effect, *ex post* calculations of actual costs and benefits may reveal that the rule was poorly calibrated. A rational approach to retrospective review would identify such rules and initiate a process to modify them.

New rules are typically not good candidates for retrospective review because, in most cases, regulated entities have not yet fully implemented and adapted to the rules. For such rules, there have been no economic, technological, scientific, or other changed circumstances that shed light on the true costs and benefits of the rules. The cost-benefit analyses conducted before the rules were issued continue to reflect society’s best estimates of the costs and benefits of these rules. There is nothing yet to fix; there is only industries’ unwillingness to make changes necessary to implement and adapt to the rules. Eliminating such rules under the guise of “retrospective review” would be premature and irrational.

In fact, agencies should be careful not to review existing rules so early as to reduce the ability or incentive for industry to adapt. Adaptation, learning, and innovation by industry in the early years of implementation have often brought down compliance costs.⁹ Moreover, these rules are often overwhelmingly cost-benefit justified. Thus, older rules are better candidates for review because technological or other relevant changed circumstances are more likely to have occurred since the rules were issued.

2. *DOD must not rely exclusively on the volume of complaints it receives from stakeholders to prioritize rules for review.*

Although eliminating new rules under the guise of “retrospective review” would be premature and irrational, many stakeholders are likely to encourage DOD to do exactly that. When the Department of Commerce recently sought input from manufacturers on existing regulations, for example, the agency received many comments recommending repeal of recently issued and overwhelming cost-benefit justified rules, at least one of which targeted a DOD rule.¹⁰ Many targeted rules had not yet been fully implemented, making them particularly poor candidates for retrospective review for the reasons

⁹ See Winston Harrington, Richard D. Morgenstern, & Peter Nelson, On the Accuracy of Regulatory Cost Estimates, Resources for the Future Discussion Paper #99-18 (1999); see also OFFICE OF MGMT. & BUDGET, OMB CIRCULAR NO. A-4, REGULATORY ANALYSIS (2003) [hereinafter CIRCULAR NO. A-4].

¹⁰ See Department of Commerce, Public Comments on Impact of Federal Regulations on Domestic Manufacturing, available at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=DOC-2017-0001>.

discussed previously. The commenters tended to offer no new information on costs or benefits in their comments to the Department of Commerce; the majority of comments simply rehashed the same arguments and facts presented to and considered by agencies during the initial notice-and-comment rulemaking process.

We suspect that DOD will receive similar kinds of requests from stakeholders. Of course, public comments, including from regulated entities, should play a role in informing regulatory review. But it would waste significant resources if the retrospective review process simply provided another opportunity to rehash prior arguments. Therefore, DOD should resist the urge to review rules solely as a result of intensive lobbying by regulated entities. A high volume of repetitive comments resulting from such lobbying should not by itself weigh in favor of conducting a retrospective review.

Instead, agencies should prioritize rules for reconsideration based on evidence of changed costs or benefits. Public comments are most useful to the extent they offer evidence of circumstances that have changed since the rules were originally promulgated. The agency must remember that the goal of Executive Order 13,777 is not the elimination of cost-benefit justified rules. Moreover, regardless of the goal of the Order, DOD cannot abandon its statutory obligation to provide the military forces needed to deter war and protect the security of our country. DOD must keep its objectives—the goals of Executive Order 13,777 and its statutory obligations—in mind as it critically reviews requests from regulated entities.

3. *Retrospective review should include a thorough and balanced review of identified rules' actual impacts, including both costs and benefits.*

As discussed above, DOD should identify rules that are ripe for retrospective review based on changed costs and benefits over time. Once it identifies promising candidates for the review, the review should include a thorough and balanced assessment of a rule's actual impacts, including both costs and benefits and distributional consequences.

Agencies should aim to follow the same best practices in their retrospective analyses as they do when conducting a regulatory impact analysis during the notice-and-comment process.¹¹ These practices include such factors as choosing an appropriate baseline¹² and identifying the proper scope of the analysis.¹³ One of the persistent difficulties in prospective cost-benefit analysis is ensuring that evaluations sufficiently address the unquantified impacts of regulation.¹⁴ Some unquantified benefits and costs may be particularly amenable to retrospective analysis, as they may be easier to identify and measure after implementation of the regulation.

¹¹ CIRCULAR NO. A-4, *supra* note 9, at 14-42.

¹² *Id.* at 15; *see also* Thomas O. McGarity & Ruth Ruttenberg, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Counting the Cost of Health, Safety and Environmental Regulation*, 80 TEX. L. REV. 1997, 2039 (2002).

¹³ CIRCULAR NO. A-4, *supra* note 9, at 15.

¹⁴ *Id.* at 27 (“You should carry out a careful evaluation of non-quantified benefits and costs.”).

II. Benefit estimates used in recent regulatory impact analyses, including the value of mortality risk reduction and the social cost of greenhouse gases, remain the best available estimates.

As we said in our comments to DOD's constituent, the Army Corps of Engineers,¹⁵ DOD should identify rules that are ripe for retrospective review based on changed costs and benefits over time, where estimates of costs and benefits reflect the best available scientific evidence. DOD and its constituents should not be diverted by comments arguing for a lower value of statistical life, a lower or no social cost of greenhouse gases, or other changes to cost-benefit methodology that are not supported by best available evidence.

In particular, if any agency considers repeals of energy-efficiency rules or of other rules with greenhouse gas effects, then it should continue to use existing best estimates of the social cost of greenhouse gases in regulatory analyses. Although Executive Order 13,783 withdrew the technical documents prepared by the Interagency Working Group on the Social Cost of Greenhouse Gases,¹⁶ leaving agencies without specific guidance for how to incorporate the social cost of greenhouse gases, the estimates developed by the Interagency Working Group continue to reflect the best available data and methodological choices consistent with Circular A-4, as required by the new Executive Order.¹⁷ As discussed more thoroughly in joint comments recently submitted to the Army Corps of Engineers by Policy Integrity, Environmental Defense Fund, Natural Resources Defense Council, and Union of Concerned Scientists (appended to these comments and available online¹⁸), a central estimate of about \$40 per ton or higher for the value of year 2015 carbon dioxide emissions continues to reflect the best available, peer-reviewed scientific and economic data, models, methodological choices, and literature. No new scientific or economic evidence supports a central estimate lower than \$40, a discount rate higher than 3 percent, a different treatment of uncertainty, a shorter time horizon, or ignoring the significant costs and benefits to U.S. citizens accruing from effects beyond our geographic borders. It would be irrational and inconsistent with Circular A-4 to prioritize rules for review based on attacks on the estimates of the social cost of greenhouse gases, the value of mortality risk reduction, or other well-established values used in cost-benefit analysis.

¹⁵ Institute for Policy Integrity, "Comments on COE-2017-0004 - Review of Existing Rules," (Oct. 12, 2017). Available at: http://policyintegrity.org/documents/2017-10-12_Policy_Integrity_Comments_-_USACE.pdf

¹⁶ Exec. Order. No. 13,783 § 5(b), 82 Fed. Reg. 16,093, 16,095 (Mar. 28, 2017).

¹⁷ *Id.* § 5(c).

¹⁸ See Environmental Defense Fund, Policy Integrity, Natural Resources Defense Council, and Union of Concerned Scientists, "Comments on the Use of the Social Cost of Greenhouse Gases in the Draft Environmental Impact Statement for the Proposed Missouri River Recovery Management Plan," http://policyintegrity.org/documents/Joint_Comments_to_Army_Corps_on_SCC_in_EIS.pdf.

III. Going forward, DOD should create a plan to review the performance of each significant rule¹⁹ it promulgates.

Executive Order 13,777 cites existing initiatives on regulatory reform, including Executive Order 13,563,²⁰ which states in that a well-functioning regulatory system “must measure, and seek to improve, the actual results of regulatory requirements.”²¹ Accordingly, rather than waiting until years after a rule has taken effect and circumstances are already changing to look back at the rule’s effectiveness, agencies should look ahead when drafting each new rule toward addressing uncertain costs and benefits over time. DOD—and all other agencies—should include, in the preamble for each new “economically significant”²² regulation, a prospective plan to collect sufficient information on the rule’s performance under previously defined metrics of success to permit an informed assessment of the rule’s effectiveness and design over time.

In particular, for each new economically significant rule, agencies should set a timeline for future retrospective reviews and define the goals, metrics, and milestones against which the rule’s success will be evaluated. Agencies should also be rigorous in identifying sources of uncertainty in their new regulatory actions. Agencies should then develop plans to collect information on the rule’s performance under the metrics—ideally, the actual, *ex post* costs and benefits of the rule (both quantitative and qualitative)—to permit an informed assessment of the rule’s effectiveness and design. After an agency conducts its retrospective review at the pre-determined time, it should issue a reasoned statement on whether the retrospective review warrants any regulatory changes.

These guidelines for retrospective review will place new burdens on agencies’ resources. However, the information generated from such retrospective reviews would have the potential to facilitate future regulatory analyses by informing *ex ante* predictions of costs and benefits of other rules, thereby making it easier for agencies to address uncertainty. In fact, this recommendation is one of six consensus recommendations from a roundtable of former OIRA administrators (six from Republican administrations, two from Democratic administrations) convened by Policy Integrity in August 2016.²³

IV. Regulations have little effect on aggregate employment or unemployment rates.

If commenters submit DOD rules as costly due to alleged “job-killing” effects, note that well-accepted economic theory and strong evidence indicate otherwise. Policy Integrity submits

¹⁹ “Significance” is defined by Executive Order 12,866 § 3(f), and “economically significant” is usually understood to refer to that definition’s first clause: “Any regulatory action that is likely to . . . [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.”

²⁰ Exec. Order No. 13,777, *supra* note 2, at §2(a).

²¹ Exec. Order No. 13,563, *supra* note 7, at §1(a).

²² *Supra* note 19.

²³ See Jason A. Schwartz & Caroline Cecot, *Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders* (2016), *available at* <http://policyintegrity.org/publications/detail/strengthening-regulatory-review>.

the following findings, detailed in an issue brief (appended to these comments and available online²⁴):

- (1) Regulations have little effect on aggregate employment or unemployment rates.
- (2) While regulatory or deregulatory action may temporarily create labor demand or lead to temporary layoffs, such actions do not typically affect long-term job growth across all sectors and regions.
- (3) Job analysis models can easily be manipulated to predict either job losses or gains, and therefore should not be relied upon to prioritize regulatory targets for retrospective review.
- (4) Blocking or repealing regulations solely based on job effects without consideration of broader benefits and costs is bad economics, bad policy, and bad law.
- (5) Regulations are poor tools for addressing the negative impacts from jobs shifting from one sector to another.

Respectfully,

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Attached:

- (1) Policy Integrity, “Does Environmental Regulation Kill or Create Jobs?” (2017), http://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf.
- (2) Policy Integrity, “Comments on COE-2017-0004 - Review of Existing Rules,” (Oct. 12, 2017), http://policyintegrity.org/documents/2017-10-12_Policy_Integrity_Comments_-_USACE.pdf

²⁴ See Policy Integrity, “Does Environmental Regulation Kill or Create Jobs?” (2017), http://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf.