



Institute for  
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

February 20, 2020

**VIA ELECTRONIC SUBMISSION**

Executive Office of the President

**Attn:** Office of Management and Budget

**Re:** Marginal Excess Tax Burden as a Potential Cost Under E.O. 13771

**Docket ID:** OMB-2017-0002-0055

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> respectfully submits the following comments to the Office of Management and Budget (“OMB”) regarding its request for input on the possibility of including an estimate of the social cost of taxation, known as marginal excess tax burden (“METB”), in regulatory-cost accounting for transfer rules under Executive Order 13,771. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through scholarship in the fields of administrative law, economics, and public policy.

We write to make the following observations:

- OMB claims that “government spending must eventually be funded by taxes, and such taxation causes social costs.”<sup>2</sup> But it is not necessarily the case that any increase in government spending now will result in higher tax rates later. A recent comparative welfare analysis of 133 government programs found, for example, that many “direct investments in the health and education of low-income children . . . actually pay for themselves in the long run,” because beneficiary “[c]hildren pay back the initial costs as adults through additional tax revenue and reduced transfer payments.”<sup>3</sup> Thus, it would be unreasonable to assume, for Executive Order 13,771 purposes, that every rule that increases spending will also impose costs in the form of METB.
- Even if regulation-driven increases in government spending do ultimately need to be funded through increased taxation, such taxes are extremely unlikely to be levied immediately. Thus, any deadweight loss estimated to result from such taxation must be discounted to reflect its present value.

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

<sup>2</sup> OMB, Marginal Excess Tax Burden as a Potential Cost Under E.O. 13771, at 1, *available at* [https://www.reginfo.gov/public/pdf/eo13771/EO13771\\_marginal\\_excess\\_tax\\_burden.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO13771_marginal_excess_tax_burden.pdf).

<sup>3</sup> Nathaniel Hendren & Ben Sprung-Keyser, *A Unified Welfare Analysis of Government Policies*, Quarterly Journal of Economics (forthcoming), at 4, *available at* [https://scholar.harvard.edu/files/hendren/files/welfare\\_vnber.pdf](https://scholar.harvard.edu/files/hendren/files/welfare_vnber.pdf).

- The size of the deadweight loss associated with any future taxation will depend on the nature of the tax imposed.<sup>4</sup> Indeed, some potential taxes, such as a Pigouvian tax on greenhouse gas emissions, could eliminate rather than create deadweight loss. Thus, it would be unreasonable to assume a uniform METB for all transfer rules.
- OMB’s implementing guidance for Executive Order 13,771 appropriately provides that “costs should be estimated using the methods and concepts appearing in OMB Circular A-4,” and also that “only those impacts that have been traditionally estimated as costs when taking a regulatory action should be counted as cost savings when taking an EO 13771 deregulatory action.”<sup>5</sup> METB is not mentioned in Circular A-4, and regulatory impact analyses of transfer rules conducted in accordance with Circular A-4 have not traditionally included estimates of METB in their discussions of regulatory costs. Furthermore, while METB *is* discussed in a *different* OMB circular—Circular A-94—that discussion appears in the document’s section titled “Special Guidance for Public Investment,” not its section titled “Special Guidance for Regulatory Impact Analysis.”<sup>6</sup> Accordingly, the use of Circular A-94’s 25% METB scaling factor in Executive Order 13,771 analyses would be inappropriate.
- If OMB sought to *revise* Circular A-4 to include instructions for quantifying METB as a cost of government spending, rationality would demand that it also include instructions for quantifying the benefits of that spending. Such benefits include any welfare gains achieved by redistributing income to those with a higher marginal utility of consumption.<sup>7</sup> They also include any welfare gains resulting from the use of government spending to mitigate market failures—through, for example, the subsidization of goods with positive externalities. These gains may outweigh METB, rendering the spending net beneficial. Furthermore, any revision to Circular A-4 would require a thorough vetting process, including public comment, peer review, and interagency review.<sup>8</sup>

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<sup>4</sup> See, e.g., Emmanuel Saez et al., *The Elasticity of Taxable Income with Respect to Marginal Tax Rates: A Critical Review*, 50 *Journal of Economic Literature* 3, 42 (2012), available at

<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jel.50.1.3> (estimating that “the marginal excess burden per dollar of federal income tax revenue raised is \$ 0.195 for an across-the-board proportional tax increase, and \$ 0.339 for a tax increase focused on the top 1 percent of income earners”).

<sup>5</sup> OMB, Guidance Implementing Executive Order 13771, at 9 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

<sup>6</sup> OMB, Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, at 13 (1992), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf>.

<sup>7</sup> See Bas Jacobs, *The Marginal Cost of Public Funds Is One at the Optimal Tax System*, 25 *International Tax & Public Finance* 883, 885 (2018), available at [https://ideas.repec.org/a/kap/itaxpf/v25y2018i4d10.1007\\_s10797-017-9481-0.html](https://ideas.repec.org/a/kap/itaxpf/v25y2018i4d10.1007_s10797-017-9481-0.html) (“The marginal cost of public funds for distortionary taxes can either be larger or smaller than one depending on whether the marginal distributional gains are smaller or larger than the excess burden of the distortionary tax.”).

<sup>8</sup> See OMB, Circular A-4, Regulatory Analysis, at 1 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>

(“In developing this Circular, OMB first developed a draft that was subject to public comment, interagency review, and peer review.”).

- A similar vetting process would be needed for OMB's proposal to use METB estimates as a means of quantifying deadweight loss associated with employer-to-worker transfers caused by regulations that affect labor markets.<sup>9</sup> Application of METB in this context would be a highly significant and controversial break from past practices, and OMB cites no literature to support the new approach.

Respectfully,

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<sup>9</sup> OMB, Marginal Excess Tax Burden as a Potential Cost Under E.O. 13771, at 3.