

# Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets

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CSAS Working Paper 22-16

Harvard Journal of Law & Public Policy Per Curiam No. 25 (2022)

Regulatory Budgeting and Executive Order 13771

September 15, 2022



Antonin Scalia Law School  
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## ***Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets***

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### ABSTRACT

*Regulatory budgets have been explored in the academic literature and employed around the world for decades, but the U.S. Federal Government did not establish a regulatory budget until January 30, 2017, with the signing of Executive Order 13,771. The budget set in place by that order achieved its central goal: Federal departments and agencies reporting to the president imposed, on net, no new regulatory costs during the entire four-year period they operated on a regulatory budget. According to the Office of Information and Regulatory Affairs, federal departments and agencies actually achieved a net regulatory cost savings of \$198.6 billion over those four years.*

*This commentary, based on the author's experience helping to develop and implement that budget, offers perspective on the design and structure of the first U.S. federal regulatory budget. It responds to several criticisms, and it offers lessons and recommendations for future regulatory budgeting efforts.*

### INTRODUCTION

The idea of using a regulatory budget to manage the development of regulations has been widely discussed for decades, and regulatory budgets have been employed in countries, states,

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<sup>1</sup> The author served as chief of staff and counselor for the Office of Information and Regulatory Affairs (OIRA) from April 2017 to March 2019, as a member of the President's Beachhead Team at OIRA from February to April 2017, and as a core member of the Regulatory Reform Team on the Presidential Transition Team from December 2016 to January 2017. In these roles, he helped to develop and implement the first U.S. federal regulatory budget, and therefore offers these reflections and recommendations based on that experience. The author is grateful to James Broughel, Caroline Cecot, Bridget Dooling, Susan Dudley, Kristin Hickman, Laura Jones, Donald Kenkel, Patrick McLaughlin, Casey Mulligan, James Owens, Neomi Rao, Jeffrey Rosen, and Adam White for their valuable perspectives and comments on an early draft of this paper. Of course, none of these distinguished individuals should be understood to agree with any claim or recommendation in this commentary.

and provinces throughout the world for many years.<sup>2</sup> In January 2017, the United States federal government joined the fray with the introduction of the nation's first regulatory budget to manage the flow and stock of federal regulations. That budget was established by Executive Order 13,771 (the Order), signed by President Donald J. Trump, and expounded upon by M-17-21, an implementing guidance document from the Office of Information and Regulatory Affairs (OIRA) within the U.S. Office of Management and Budget (OMB).<sup>3</sup> The Order had two core features: a zero-dollar cost cap and a requirement to eliminate two existing regulations for each new regulation.

I served as a core member of the Regulatory Reform Team on the Presidential Transition Team from December 2016 to January 2017, as a member of the so-called Beachhead Team at OIRA from February to April 2017, and as chief of staff and counselor at OIRA from April 2017 to March 2019. Those roles afforded me the opportunity to work on the development and implementation of the nation's first federal regulatory budget. In my view, that budget – rightly understood – was enormously successful. It immediately and consistently achieved its central goal of limiting the net cost of new regulations to zero dollars or less.<sup>4</sup> Still, both supporters and critics have tended to focus on the “one-in-two-out” feature of the budget, rather than the budget itself. Indeed, for purposes of the public debate, the “Two-for-one!” mechanism has subsumed the regulatory budget. Consequently, the design and effectiveness of the nation's first regulatory budget are apparently not well understood.

This commentary endeavors to provide an historical account of the budget's design, operation, and effect. It also responds to several criticisms and offers lessons and

<sup>2</sup> The other papers published in this symposium discuss at length the intellectual heritage and prior practical experience with regulatory budgets. See generally James Lankford, *For a Regulatory Budget: Successful Policies Should Be Made Permanent*, 45.1 HARV. J. LAW & PUB. POL'Y 1, 2 (2022); James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, 45.1 HARV. J. LAW & PUB. POL'Y 1, 11 (2022); Laura Jones & Patrick A. McLaughlin, *Measurement Options for Regulatory Budgeting*, 45.1 HARV. J. LAW & PUB. POL'Y 1, 45 (2022); Andrea Renda, *Regulatory Budgeting: Inhibiting or Promoting Better Policies?*, 45.1 HARV. J. LAW & PUB. POL'Y 1, 72 (2022); Anthony P. Campau, *Regulatory Budgeting in the U.S. Federal Government: A First-Hand Account of the Initial Experience and Recommendations for Future Regulatory Budgets*, 45.1 HARV. J. LAW & PUB. POL'Y 1, 101 (2022); see also Christopher C. DeMuth, *Constraining Regulatory Costs Part Two: The Regulatory Budget*, 4 AEI J. ON GOV'T & SOC'Y 29, 32 (1980); see also Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 836, 836-860 (2014); see also Jeff Rosen, *Putting Regulators on a Budget*, NAT'L AFFS., Spring 2016.

<sup>3</sup> Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” (2017).

<sup>4</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS, [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf) [https://perma.cc/335L-6HZQ]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2018.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf) [https://perma.cc/7JS6-GN5J]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2019, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2019.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf) [https://perma.cc/N76R-8N2Y]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2020.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf) [https://perma.cc/6MZ6-BBFY].

recommendations for the design and implementation of future regulatory budgets. My goal is not to respond to every challenge nor wade into the debate over any particular regulation or area of policy. I wish simply to inform and advance the dialogue over regulatory budgets and offer experience-based recommendations for consideration in the development and implementation of future regulatory budgets.

With that in mind, the remainder of this commentary takes the aforementioned topics in turn: (II) The Design and Structure of the First U.S. Federal Regulatory Budget; (III) The Mechanisms of Implementation; (IV) A Brief Response to Several Criticisms; and (V) Recommendations for Future U.S. Federal Regulatory Budgets.

## I. THE DESIGN AND STRUCTURE OF THE FIRST U.S. FEDERAL REGULATORY BUDGET

The primary organizing mechanism for the first U.S. federal regulatory budget was Executive Order 13,771.<sup>5</sup> The Order was perhaps best known by the rhetorical catchphrases, “one-in-two-out” or “two-for-one,” but it was much more than a requirement to eliminate two existing regulations each time a new regulation was promulgated. The Order consisted of two primary elements, one major and one minor. The minor requirement was that each new regulation had to be offset by the elimination of two existing regulations. The major requirement was that each new dollar of regulatory cost was to be offset by the elimination of one existing dollar of regulatory cost. That major requirement was, in fact, the regulatory budget, yet its operation and effectiveness have largely been lost in the “two-for-one” noise. This discussion of the design and structure of the first U.S. federal regulatory budget proceeds in four parts: (A) The One-In-Two-Out Feature of Executive Order 13,771; (B) The Regulatory Cost Allowance Feature of Executive Order 13,771; (C) Additional Useful Features of Executive Order 13,771; and (D) The Implementing Guidance for Executive Order 13,771.

### A. *The One-In-Two-Out Feature of Executive Order 13,771*

Much of the public attention on Executive Order 13,771 has focused on the “two-for-one” requirement found in Section 2 of the Order.<sup>6</sup> Even President Trump’s remarks about the regulatory budget tended to emphasize this feature.<sup>7</sup> For that reason, this provision of the Order is worth close inspection: “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.”<sup>8</sup> There are two key features of this directive.

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<sup>5</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

<sup>6</sup> See, e.g., Glenn Kessler, *Has the Trump administration repealed 22 regulations for each new one?*, WASH. POST (Aug. 3, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/08/03/has-the-trump-administration-repealed-22-regulations-for-each-new-one/> [https://perma.cc/LY5P-D4XR] (asserting that deregulatory claims were overstated); see also Cary Coglianese, Opinion, *Let’s Be Real About Trump’s First Year in Regulation*, REGUL. REV. (Jan. 29, 2018), <https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/> [https://perma.cc/LK9V-DH5B] (arguing that most regulatory actions were significant while most ostensibly offsetting deregulatory actions were not significant).

<sup>7</sup> See, e.g., President Donald J. Trump, Address at the World Economic Forum in Davos, Switzerland (Jan. 26, 2018).

<sup>8</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(a) (Jan. 30, 2017).

First, and most importantly, it was flexible. It did not require that deregulatory actions be proposed in the Federal Register at the same time regulatory actions are proposed in the Federal Register. It did not require that regulatory comment periods run in tandem. It did not even require that deregulatory actions be finalized and in effect at the same time or in the same year regulatory actions are finalized and in effect. It did not require that the rules be similar in scope and impact. For example, borrowing the parlance of Executive Order 12,866 – the longstanding, bipartisan foundation for regulatory analysis and review in the Executive Branch – it did not indicate that “economically significant” regulations must be offset by the elimination of two existing “economically significant” regulations.<sup>9</sup> Nor did it require that regulations identified as significant for other reasons be offset by regulations of similar significance. It did not indicate whether a regulation at one sub-agency may be offset by the elimination of two rules at a different sub-agency. Into a realm of government marked by complexity and specificity, the Order spoke directionally and succinctly. Even the all-important “Definition” section did little to clarify how this requirement would or ought to be implemented.

Rather than provide lengthy detail about the nature of the requirement, the Order empowered the Director of the Office of Management and Budget (OMB) to set the terms of engagement. Section (2)(d) of the Order instructed:

The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.<sup>10</sup>

Clearly, the Order gave the OMB Director tremendous latitude to define the contours of the regulatory budget. It also gave him primary management responsibility for most aspects of the program.<sup>11</sup> Ultimately, the foreshadowed guidance from OMB’s Office of Information and Regulatory Affairs (OIRA) provided much of the operational mechanics for the Order – a topic that shall be visited shortly.

A second noteworthy feature of the “one-in-two-out” component of the regulatory budget was its location within the Order’s schema. Rather than devoting one or more stand-alone sections to the topic, the Order placed the requirement within Section 2, the heading for which was, “Regulatory Cap for Fiscal Year 2017.”<sup>12</sup> In other words, the much-discussed “one-in-two-out” program was in fact a subcomponent of the overarching regulatory cost cap program, not the other way around. Indeed, most of Section 2 was not focused on the tabulation or mechanics

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<sup>9</sup> Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> [<https://perma.cc/UDL7-WK9Z>].

<sup>10</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(d) (Jan. 30, 2017).

<sup>11</sup> *See, e.g., id.* § 3(b) and (e).

<sup>12</sup> *Id.* § 2.

of regulatory “ins” and “outs,” but on the cost accounting mechanism associated with the budget. This paper now takes that topic in turn.

*B. The Regulatory Cost Allowance Feature of Executive Order 13,771*

The second key feature of the regulatory reform program established by Executive Order 13,771 was the regulatory cost allowance. It generally appears this feature has received less attention than the “one-in-two-out” requirement, but it is no less important.<sup>13</sup> Indeed, it is the heart of the Order and its regulatory budget. Overall, its effect was to constrain the amount of new regulatory costs that may be imposed across the Executive Branch.

It achieved that goal not only by providing flexibility on the structure and terms of engagement, but by clearly bounding the exercise:

For fiscal year 2017, which is in progress, 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[.]<sup>14</sup>

Beyond 2017, the Order indicated,

[T]he Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency’s total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.<sup>15</sup>

In short, the Order set an Executive Branch-wide cost allowance of zero dollars for FY 2017 and empowered the OMB Director to set cost caps for each agency in the ensuing years. While the Order required the OMB Director to provide guidance to the agencies on how to implement the requirement,<sup>16</sup> the requirement’s most significant feature was provided clearly in the Order itself: No net new regulatory costs in 2017 and no net new regulatory costs beyond a dollar amount to be determined by OMB for fiscal years 2018 and beyond. As will be discussed, this was the core requirement of the regulatory budget.

*C. Additional Useful Features of Executive Order 13,771*

The two core features of Executive Order 13,771 have been described, but there are especially helpful complementary features of the Order that are worth brief review.

The first and perhaps most important such feature was the instruction,

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<sup>13</sup> See, e.g., Glenn Kessler, *Has the Trump administration repealed 22 regulations for each new one?*, WASH. POST, Aug. 3, 2018, <https://www.washingtonpost.com/news/fact-checker/wp/2018/08/03/has-the-trump-administration-repealed-22-regulations-for-each-new-one/> [https://perma.cc/LY5P-D4XR] (asserting that deregulatory claims were overstated); see also Cary Coglianese, *Let’s Be Real About Trump’s First Year in Regulation*, REGUL. REV., Jan. 29, 2018 (arguing that most regulatory actions were significant while most ostensibly offsetting deregulatory actions were not significant).

<sup>14</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(b) (Feb. 3, 2017).

<sup>15</sup> *Id.* § 3(d).

<sup>16</sup> *Id.* § 2(d), 3(e).

Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.<sup>17</sup>

This requirement made several important contributions to the regulatory budget, and in some cases to the broader regulatory development process. First, it intensified the obligation to plan, coordinate, and conduct preliminary analysis of potential regulatory actions. It also provided the public with more information about regulatory actions under development at federal agencies, whether primarily regulatory or deregulatory in nature. Increased planning, coordination, analysis, and transparency are basic good regulatory practices advanced by this simple step.

More specifically for the budget, it imposed the substantial immediate and continuous burden of priority setting on the agencies, rather than on OIRA or other offices within the White House. Imposing that requirement on the agencies was consistent with the general approach to developing regulatory agendas, but it had renewed significance in the context of the regulatory budget, where agencies had to assess the likely net effects of their entire portfolio of planned regulatory actions. It also reinforced the Director's ability to oversee the implementation of the Order's core requirements by providing early visibility into whether future regulations would require or provide offsets, and the extent to which those offsets may be measured. All of that was helpful information for budgetary planning and management purposes.

Second, Section 3 of the Order articulated a process for making Annual Regulatory Cost Submissions to OMB. This reporting process allowed OIRA and the White House to monitor and enforce compliance with the regulatory budget. It also informed OIRA's decisions about regulatory cost allowances beyond Fiscal Year 2017, when the cap across the Executive Branch was zero dollars, on net.<sup>18</sup>

Third, the Order's definition of "regulation" or "rule" was very useful for managing the regulatory budget. That definition read,

For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

- (a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;
- (b) regulations related to agency organization, management, or personnel; or
- (c) any other category of regulations exempted by the Director.<sup>19</sup>

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<sup>17</sup> *Id.* § 3(c); *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, COMPLIANCE WITH SECTION 3(C) OF EXECUTIVE ORDER 13771, REDUCING REGULATION AND CONTROLLING REGULATORY COSTS (2018).

<sup>18</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 3(d) (Feb. 3, 2017).

<sup>19</sup> *Id.* § 4.

That definition closely paralleled the definition found in Executive Order 12,866.<sup>20</sup> It was sweeping in its construction, allowing OIRA to review and ensure 13,771 compliance on a wide range of regulatory activity, not merely those identified as such by the agencies. In practice, that often meant designating less formal regulatory activity like guidance documents as regulations subject to the regulatory budget. Still, the definition in the Order did not delineate between regulations that were primarily regulatory and primarily deregulatory, leaving room for OIRA to define its own scope of review through follow-on guidance.

*D. The Implementing Guidance for Executive Order 13,771*

Executive Order 13,771 required OMB to provide guidance on how to implement the regulatory budget.<sup>21</sup> OIRA provided interim guidance on February 2, 2017, and final guidance on April 5, 2017.<sup>22</sup> Both the interim and final guidance provided an extraordinary amount of additional detail and granularity for understanding the operation of the regulatory budget. That detail included definitions, exceptions, flexibilities, and other features that facilitated implementation.

One important core feature of the guidance was the provision of definitions for what constituted regulatory and deregulatory actions. The guidance defined an “EO 13771 regulatory action” as a significant regulatory action under Section 3(f) of Executive Order 12,866 or, “A significant guidance document (*e.g.*, significant interpretive guidance) reviewed by OIRA under the procedures of EO 12866 that has been finalized and that imposes total costs greater than zero.”<sup>23</sup> It then used the longstanding Final Bulletin for Agency Good Guidance Practices to define significant guidance for the purposes of the Order.<sup>24</sup> In so doing, the guidance clarified that for the regulatory budget, OIRA would monitor not just the issuance of new regulations but also new significant guidance. The goal was to prevent guidance documents from becoming a mechanism for side stepping the requirements of Executive Order 13,771, as well as longstanding good regulatory practices such as those discussed in the Good Guidance Bulletin and Executive Order 12,866. This measure underscored OIRA’s important role in reviewing significant guidance documents, not just for purposes of the regulatory budget, but more generally for a wide range of regulatory actions that ought to be reviewed by OIRA pursuant to 12,866 and the Good Guidance Bulletin.

In defining an “EO 13771 deregulatory action,” the guidance clarified that such actions are “not limited to those defined as significant under EO 12866 or OMB’s Final Bulletin on Good Guidance Practices.” It also indicated that deregulatory actions could be issued in a variety of forms, including guidance, interpretive documents, and information collections, and provided that, “Significant proposed rules issued before noon on January 20, 2017, that are formally

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<sup>20</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51735 § 3(d) (Oct. 4, 1993).

<sup>21</sup> Exec. Order No. 13,771, 82 Fed. Reg. 9339 § 2(d) (Feb. 3, 2017).

<sup>22</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, INTERIM GUIDANCE IMPLEMENTING SECTION 2 OF THE EXECUTIVE ORDER OF JANUARY 30, 2017, TITLED, “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” (2017); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” (2017).

<sup>23</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” 3 (2017).

<sup>24</sup> *Id.*

withdrawn by notice in the Federal Register and removed from the Unified Agenda of Regulatory and Deregulatory Actions may qualify as repeal actions, but do not qualify for cost savings.”<sup>25</sup> This broad definition was provided in an effort to encourage agencies to think expansively about regulatory reforms they might undertake, even if they may not in each case receive credit toward their regulatory cost-savings goals. Many of those deregulatory actions did not provide quantifiable savings because they were based on the revocation of quasi-regulatory guidance documents that likewise did not include quantified costs, benefits, or economic transfer effects. However, in the judgement of OIRA’s professional staff, they were bona fide deregulatory actions that satisfied the terms of OIRA’s implementing guidance for the budget.

In like manner, the guidance explained that regulatory actions associated with international regulatory cooperation agreements and new market-enabling regulations might both constitute deregulatory actions for purposes of the regulatory budget.<sup>26</sup> While perhaps not obviously deregulatory on their face, those types of actions can play an important role in opening markets, creating opportunities for economic growth and producing regulatory benefits that outweigh or are justified by any regulatory costs they may impose. In the case of international regulatory cooperation, new or revised regulations can help to reduce cross-border regulatory friction that provides little or no public benefit but can add real costs to production and ordinary market activity. By developing or revising such rules, agencies could reduce real-world costs without sacrificing regulatory benefits. In the case of market-enabling regulations, new technologies and other innovative market solutions that could not have been introduced in commerce suddenly could be given an opportunity to be tested and flourish. The guidance for the Order sought to encourage those types of regulatory activities in a deregulatory environment where some might have feared they would be regarded as purely regulatory, thus requiring offsets. Indeed, the Administration issued numerous market-enabling rules that qualified as deregulatory actions, such as those that facilitated more frequent commercial space launches.<sup>27</sup>

Importantly, the guidance also clarified that Executive Order 13,771 had *no* effect on the long-standing requirement to consider economic benefits when promulgating new regulatory and deregulatory actions. The Order did *not* change the requirements of Executive Order 12,866, “which remain[ed] the primary governing EO regarding regulatory review and planning.”<sup>28</sup> In particular, the Order had no effect on the consideration of benefits in informing any regulatory decisions. As explored more thoroughly *infra*, when implementing the regulatory budget, agencies were required to continue assessing both costs *and* benefits and comply with all other long-standing requirements and best practices pertaining to the regulatory development process, including but not limited to those in EO 12,866 and OMB Circular A-4.<sup>29</sup>

This portion of the guidance was extremely important because it underscored that the longstanding good regulatory practice of considering both economic costs *and* benefits, as well as economic transfer effects, was very much still in effect. Indeed, it was required by Executive

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<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 7, 10.

<sup>27</sup> *See, e.g.*, 85 Fed. Reg. 79566 (Dec. 10, 2020).

<sup>28</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” 2 (2017).

<sup>29</sup> *See, e.g., id.* at 2, 13.

Order 12,866. Any time a new regulatory or deregulatory action was proposed and finalized under Executive Order 12,866, and thus was reviewed by OIRA, it was required to pass the longstanding cost-benefit test of 12,866. If a deregulatory action sought to overturn an existing rule that provided considerable net benefits, that deregulatory action was required to explain and justify its effect on the benefits calculation. This feature of the guidance is important not just because it promotes an accounting of benefits, but also because it helps to explain how the regulatory budget interacted with essential, well-established regulatory process requirements and conventions. By design, the regulatory budget supplemented, but did not supplant, the longstanding set of good-government procedures and practices at the core of the regulatory development process. Indeed, to function, the budget had to be layered on top of existing procedural architecture and substantive requirements. Explanation of the interaction between the new and the established rules of the road permeates the regulatory budget's guidance.

## II. THE MECHANISMS OF IMPLEMENTATION

The day-to-day implementation of Executive Order 13,771 was equal parts science and art. Some objectives were clear: Impose, on net, no new regulatory costs and eliminate two existing regulations for each new regulation. At the same time, the Order and its implementing guidance afforded agencies and OIRA a great deal of flexibility in whether and to what extent agencies delivered on those objectives. For its part, OIRA used that flexibility, existing and contemporaneously developed regulatory processes, and other coordination efforts to advance the implementation of Executive Order 13,771. This discussion of the mechanics and methods used to implement the first U.S. federal regulatory budget will cover seven key points: (A) An Overall Balanced Approach; (B) The Role of the Unified Agenda; (C) The Role of Annual Regulatory Cost Submissions to OMB; (D) The Role of Other Coordinating Mechanisms; (E) The Importance of Definitions; (F) The Importance of Regulatory Baselines; and (G) The Importance of Putting the Onus on Federal Agencies.

### A. *An Overall Balanced Approach*

For its part, OIRA attempted to take a balanced approach to implementing the regulatory budget. It was responsible for centrally managing much of the reform effort, but it did not require agencies to link planned regulatory and deregulatory actions. For example, OIRA did not require agencies to promulgate offsetting deregulatory actions when they submitted proposed regulatory actions to OIRA for review. Rather, as required by the Order, agencies generally indicated to OIRA that they intended to repeal existing regulations and regulatory costs in exchange for new regulations. That often happened in the context of Executive Order 12,866's significance determinations, which are routine intra-governmental conversations about the extent to which specific regulatory actions are likely to be significant for purposes of 12,866, and thus subject to OIRA review. Under the operating framework of the regulatory budget, those ordinary 12,866 conversations allowed OIRA to gather early information on planned actions and make initial determinations about whether rules would likely be regulatory or deregulatory in nature. Extensive discussions on the timing and substance of planned offsets often ensued, but they also did not prevent the promulgation of statutorily required or other necessary regulatory actions.

### B. The Role of the Unified Agenda

Academics and practitioners across the philosophical spectrum have long called on OIRA to improve the quality and utility of the Unified Agenda of Regulatory and Deregulatory Actions, both for public transparency and regulatory process management purposes.<sup>30</sup> Heeding that wise counsel, in 2017, OIRA endeavored to revitalize the Unified Agenda process and employ it for the purpose of managing the regulatory budget. That played out in a handful of ways.

First, during the course of the Spring Unified Agenda cycle – which is generally regarded as a semi-annual update to the full Fall Agenda that is published alongside narrative Regulatory Plans – agencies were directed to incorporate the regulatory budget’s concepts and requirements into their respective lists of planned regulatory actions.<sup>31</sup> That is, in addition to listing and describing each planned regulatory action, agencies were required to indicate whether those planned actions were likely to be regulatory or deregulatory and provide at least some initial analysis to OIRA in support of those designations.

In response to that instruction, agencies sent draft Unified Agenda entries to OIRA that generally did a good job of indicating whether planned actions were likely regulatory or deregulatory. However, the number of entries to be included on the public-facing Agenda shrank considerably while the number of entries to be included on a non-public-facing list of Agenda entries swelled considerably. Anecdotal evidence received by OIRA’s professional staff suggested one key reason for that development was that agencies still lacked the permanent political leadership to make decisions about the entries, which meant the professional staff of the agencies were doing their best to bring their respective agendas into compliance with the regulatory budget using the tools then available to them.

One such tool, which had previously been discovered by a scholar affiliated with the Administrative Conference of the United States (ACUS), allowed agencies and OIRA to maintain planned regulatory actions on a non-public Unified Agenda list known as the “pending list.”<sup>32</sup> According to that scholar, that non-public list appeared to contravene a key purpose of the Unified Agenda, which was to make transparent all planned regulatory actions of U.S. federal regulatory bodies.<sup>33</sup> In June of 2015, ACUS formally recommended that OIRA eliminate the “pending list” and return to making public all regulatory actions in the pipeline.<sup>34</sup> In the spring of 2017, under OMB Director Mick Mulvaney’s leadership, OIRA did just that. OIRA informed

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<sup>30</sup> See, e.g., ADMIN. CONF. OF THE U.S., RECOMMENDATION 88-9, PRESIDENTIAL REVIEW OF AGENCY RULEMAKING 4 (adopted Dec. 8, 1988); see also ADMIN. CONF. OF THE U.S., RECOMMENDATION 8 2013-2, BENEFIT-COST ANALYSIS AT INDEPENDENT REGULATORY AGENCIES (adopted June 13, 2013); see also Letter from the ABA’s section on Admin. Law and Regul. Practice to the Off. Info. & Regul. Affs. (2009); *Improving the Administrative Process: A Report to the President-Elect of the United States* (2016), 69 ADMIN. L. REV. 205 (2017).

<sup>31</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, SPRING 2017 DATA CALL FOR THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS (2017).

<sup>32</sup> Curtis W. Copeland, ADMIN. CONF. OF THE U.S. BLOG, *The Unified Agenda: Proposals for Reform* (March 10, 2015), <https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Report%20031015.pdf> [https://perma.cc/Q97C-HXS3].

<sup>33</sup> See, e.g., *id.* at 106.

<sup>34</sup> ADMIN. CONF. OF THE U.S., RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (adopted June 4, 2015), <https://www.acus.gov/recommendation/promoting-accuracy-and-transparency-unified-agenda> [https://perma.cc/8MPF-4JJZ].

agencies that the “pending list” of regulatory actions would be eliminated, which meant all regulatory actions in the government’s underlying database of regulations would be made public, irrespective of the degree to which they comported with the regulatory budget. The objectives were twofold: (1) ensure transparency in the regulatory process; and (2) hope that the added transparency would drive more internal agency discussion, deliberation, and ultimately entries that more fully complied with the regulatory budget.

That single act of transparency quickly transformed the Unified Agenda from a rote and listing bureaucratic exercise into a robust mechanism for regulatory planning and coordination. It provided the public with a clear picture of what was and was not being planned by federal regulators. Irrespective of the regulatory budget, it served an important public good, which was to make sure federal agencies were, to the fullest extent possible, regulating in a planned, systematic, transparent, and accountable manner. The move received plaudits from ACUS.<sup>35</sup> It also had the incidental benefit of forcing agencies to make decisions about regulatory actions that had, over time, been on or added to the so-called “pending list.” After additional rounds of what is commonly called “passback” between OIRA and the agencies, a Spring Unified Agenda was finally released that not only satisfied the requirements of the regulatory budget, but far exceeded them.<sup>36</sup> The additional measure of transparency forced much additional deliberation and discussion, rendering the first 2017 Agenda as something more of a Summer Agenda than a Spring Agenda. But the cost of delay was far exceeded by the benefits of enhanced public transparency and a more accurate inventory of planned regulatory and deregulatory actions that would later be accounted for in the regulatory budget.

Once the Unified Agenda became a more accurate and therefore useful management tool, OIRA added a regular discussion about how planned regulatory activity would or would not comport with the regulatory budget to the attendant semi-annual passback process. That discussion was important because OIRA had limited visibility into agencies’ compliance with the budget. The primary responsibility for regulating and deregulating belonged with the regulatory agencies themselves. They decided whether and how to regulate, and whether and how to offset the incremental costs associated with those new regulations. As already discussed, agencies did not link their new regulatory and deregulatory actions. OIRA intentionally provided agencies room to make decisions that would be evaluated holistically, not on a transaction-by-transaction basis. OIRA’s objective was to support and empower federal regulatory agencies to deliver on their own unique missions in a manner that was, to the fullest extent possible, consistent with the regulatory budget, much as a core part of OIRA’s general role is to help agencies deliver on their own unique missions in a manner that is, to the fullest extent possible, guided by rigorous analysis and coordinated with other regulatory stakeholders across the Executive Branch.

The enhanced Agenda passback process also facilitated discussions about planned regulatory activity between and among agencies, as well as with other White House offices. It was not

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<sup>35</sup>Todd Rubin, ADMIN. CONF. OF THE U.S. BLOG, *Unified Regulatory Agenda Change Accords with ACUS Recommendation* (Sept. 8, 2017), <https://www.acus.gov/newsroom/administrative-fix-blog/unified-regulatory-agenda-change-accords-acus-recommendation> [<https://perma.cc/YMP5-2AE6>].

<sup>36</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2017 (2017), [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf) [<https://perma.cc/QU89-27XL>].

uncommon for a Unified Agenda circulation or meeting on an agency's planned regulatory activity to lead to further conversations on a wide range of regulatory issues. Those conversations led to greater coordination, planning, and implementation of the regulatory budget.

*C. The Role of Annual Regulatory Cost Submissions to OMB*

Section 3(d) of Executive Order 13,771 required OMB to identify a "regulatory cost allowance for each agency for FY 2018."<sup>37</sup> In response, OIRA Administrator Neomi Rao issued a memorandum that established a new process for developing annual regulatory cost allowances that would become the regulatory budget for each fiscal year beyond FY 2017.<sup>38</sup> In brief, those steps were as follows: First, agencies were directed to "prepare a proposed total incremental cost allowance for FY 2018 to inform the [OMB] Director's determinations[.]"<sup>39</sup> Second, agencies were required to provide "an explanation of how the agency developed its proposed allowance and how that proposed allowance is consistent with the administration's regulatory policies and priorities[.]"<sup>40</sup> Third, OIRA said it "will review each agency's proposed FY 2018 cost allowance for consistency with the regulatory policies and priorities set forth in Executive Orders 13771 and 13777[.]"<sup>41</sup> And fourth, "OMB expects that each agency will propose a net reduction in total incremental regulatory costs for FY 2018."<sup>42</sup>

By that memorandum, OIRA once again made clear that, within the context of the regulatory budget, the onus for developing and setting regulatory priorities was primarily on the agencies. Agencies made the initial decisions about which regulatory and deregulatory actions to pursue. Agencies took the lead in developing and supporting proposed regulatory cost allowances. Overall, agencies first identified the best way to implement the regulatory budget while satisfying their other regulatory objectives and obligations. The process used to develop the FY 2018 cost allowances was repeated for the next two years, but in those later cases it was incorporated directly into the ordinary data call that commenced the Fall Unified Agenda.<sup>43</sup>

OIRA robustly analyzed and utilized the Annual Regulatory Cost Submissions from the agencies. Submission of the reports was often followed by a version of Agenda passback, as well as meetings between OIRA and senior agency leaders. Summaries of those meetings were often shared with White House principals and policy councils, who often played key roles in supporting and advancing the implementation of the regulatory budget.

After careful staff analysis of agency submissions, correspondent Unified Agenda entries, and any other information that may have been available, OIRA made determinations as to each agency's cost allowance and published those allowances near the start of each fiscal year, along

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<sup>37</sup> Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

<sup>38</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-31, FY 2018 REGULATORY COST ALLOWANCES (2017).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *E.g.*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, DATA CALL FOR THE FALL 2019 REGULATORY PLAN, FALL 2019 UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS, AND FY 2020 REGULATORY COST ALLOWANCES (2019).

with the release of the Fall Unified Agenda, the Regulatory Plan, and the annual review of how each agency performed with respect to its regulatory budget.<sup>44</sup>

This Regulatory Cost Submission process was new, but it was layered on top of existing mechanisms like the Unified Agenda and cost-benefit analysis. It recognized that the regulatory agencies had primary responsibility for their own rulemaking dockets, and thus were well positioned to develop and initially propose their own regulatory budgets. Those proposals were then informed by OIRA staff analysis of likely economic effects, as well as policy council preferences for how statutory discretion ought to be exercised.

#### *D. The Role of Other Coordinating Mechanisms*

Executive Order 13,777 required each agency to designate a Regulatory Reform Officer (“RRO”) to “oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carr[ied] out regulatory reforms, consistent with applicable law.”<sup>45</sup> Those regulatory reform “initiatives and policies” clearly included the regulatory budget outlined in Executive Order 13,771, but they also explicitly included the regulatory quality and review standards established by President Bill Clinton and the regulatory improvement and retrospective review standards established by President Barack Obama.<sup>46</sup> The objective was to ensure that an agency leader vigorously implemented the regulatory budget in a way that was consistent with longstanding good regulatory practices and other recent regulatory improvement efforts. The RROs played a lead role in managing the regulatory budget of each agency.

Relatedly, Executive Order 13,777 required each agency to establish a Regulatory Reform Task Force to “evaluate existing regulations [...] and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law.”<sup>47</sup> Those Task Forces reportedly conducted extensive internal reviews and largely set the regulatory reform agenda for their respective agencies.

Agency RROs, OIRA, the White House Counsel’s Office, and White House policy councils periodically met to discuss the implementation of the regulatory budget, best practices, lessons learned, and areas of potential focus for the future. OIRA also interacted regularly with the White House Counsel’s Office and policy councils on regulatory and deregulatory actions under development, and those offices provided considerable support in shoring up regulatory policy and implementing the regulatory budget.

#### *E. The Importance of Definitions*

The explicit inclusion of significant guidance in the definition of an “EO 13771 regulatory action” empowered OIRA to review more guidance documents, not just for purposes of the

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<sup>44</sup> See, e.g., OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: COST CAPS FISCAL YEAR 2018 (2018), [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_ALLOWANCES\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf) [https://perma.cc/5DMV-A4EH].

<sup>45</sup> Exec. Order. No. 13,777, 82 Fed. Reg. 12285 § 2 (March 31, 2017).

<sup>46</sup> *Id.* § 2(a)(i)–(iv).

<sup>47</sup> *Id.* § 3(d).

regulatory budget, but also ordinary 12,866 review.<sup>48</sup> Many of those guidance documents were ones OIRA would have liked to review under 12,866 but perhaps may not otherwise have been able to bring in for review because of their less formal nature.<sup>49</sup> But by explicitly indicating that significant guidance documents were included in the definition of a qualifying regulation for purposes of the regulatory budget, OIRA had more practical, political ability to demand and enforce the requirements of centralized regulatory review on significant guidance. Regardless of how the guidance documents were ultimately categorized and treated for purposes of 13,771, the benefits of coordination, transparency, and analysis were injected into those guidance documents and their attendant federal programs. In some cases, guidance documents were scuttled. In others, they were issued as rules or incorporated into related rulemakings, where most interagency participants agreed they belonged. Steps like these – ensuring regulatory obligations were created through the proper mechanisms – were good government accomplishments facilitated by 13,771, regardless of how the rules were ultimately categorized under the Order.

#### *F. The Importance of Regulatory Baselines*

One challenge for implementing Executive Order 13,771 was the perpetual fight over the baseline for analysis in regulatory and deregulatory actions. Identifying the correct baseline or baselines is essential because it is the starting point for ordinary analysis of impacts, and that analysis and the corresponding 13,771 designation and scoring could swing dramatically if the wrong baseline is selected. For example, during OIRA review, an agency may argue the proper baseline for a rule is a post-statutory baseline, which could mean all the economic effects of the rule are attributed to underlying legislation and not the agency's implementing regulation, possibly allowing the regulation to appear as though it would have little to no economic effect in the world. In those cases, OMB Circular A-4 generally encourages agencies to use both a pre-statutory and a post-statutory baseline to help identify the full range of effects and the measure of discretion afforded to and exercised by the agency.<sup>50</sup> After identifying that discretion, the agency can use the tools of analysis to make rational and consistent policy choices, and those choices could properly be evaluated as constituting regulatory or deregulatory actions for purposes of the regulatory budget. While seemingly obscure, this key component of analysis can give rise to many analytical complications and inaccuracies if it is not performed correctly. OIRA's economists and professional staff expertly managed these discussions, but they were a challenge to the consistent implantation of 13,771.

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<sup>48</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED "REDUCING REGULATION AND CONTROLLING REGULATORY COSTS" 3 (2017).

<sup>49</sup> Traditional regulations are typically coded with a Regulatory Identification Number, or RIN, which allows them to be included in the underlying database of regulatory actions under development, which is managed by OIRA. Some less traditional regulatory actions are coded with a ZRIN, which allows them to be included in the database, published in the Unified Agenda, and generally managed like a regulation. Most non-traditional regulatory actions, however, are issued in the form of guidance letters, circulars, question-and-answer documents, and the like, and consequently those actions are typically not coded with a RIN or ZRIN and included in the underlying regulatory database, the Agenda, and so on. OIRA's review authority is relatively easy to establish and enforce for actions that live within its database, over which it has a hard, mechanical control, but relatively more difficult to establish and enforce for actions that do not live within that database. Often, review of such non-traditional or quasi-regulatory actions comes down to advance notice and political muscle.

<sup>50</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2003), [https://obamawhitehouse.archives.gov/omb/circulars\\_a004\\_a-4/](https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/) [<https://perma.cc/94Z3-VZCA>].

### G. *The Importance of Putting the Onus on Agencies*

Executive Order 13,771 required OMB to set and enforce the parameters of the regulatory budget, but within those parameters the agencies did much of the work. In addition to their obviously primary role in conducting cost-benefit analyses and drafting regulatory and deregulatory actions, agencies also took the initial lead in identifying regulatory and deregulatory actions for repeal. The White House and OIRA specifically provided support and direction for those efforts in a variety of ways, but the primary responsibility was with the agencies. They populated the Unified Agenda with planned actions, made initial efforts to categorize rules as regulatory or deregulatory, developed and submitted Annual Regulatory Cost Submissions, tallied their results under 13,771, and more. This ensured that the professionals closest to each agency's regulatory programs were primarily responsible for understanding the status and possibilities for that agency's programs. Even if it wanted to take on these responsibilities, which it did not, OIRA was too small of an office to undertake those activities on behalf of all federal agencies reporting to the president. Agencies possessed both the expertise and bandwidth to lead on these core regulatory budgeting initiatives, and many reported the exercise of reviewing and updating their existing stock of regulatory actions was useful and positive for the agency, even if they ultimately did not result in many deregulatory actions.<sup>51</sup>

## III. A BRIEF RESPONSE TO SEVERAL CRITICISMS

This paper now addresses several criticisms of the Order's design and implementation. This is not an exhaustive list of critiques and responses but rather a brief answer to several objections concerning the regulatory budget's design and structure: (A) Not an Apples-to-Apples Analysis; (B) Awarding Credit for the Obama Administration's Reforms; (C) Awarding Credit for Delays and Withdrawn Proposals; (D) Awarding Credit for Congressional Review Act Deregulation; (E) Not Enough Transparency; and (F) Benefits Ignored.

### A. *Not an Apples-to-Apples Analysis*

In the fall of 2017, OIRA released its first status report on the regulatory budget. The report noted that, across the federal government, agencies imposed, on net, less than \$0 of new regulatory costs.<sup>52</sup> Indeed, they achieved a net regulatory cost savings of \$8.1 billion in present value terms.<sup>53</sup> In addition, the report noted that agencies completed 22 new deregulatory actions for each new regulatory action in FY2017.<sup>54</sup> Critics charged that many of the actions listed as "EO 13771 Deregulatory Actions" were not significant while most actions listed as "EO 13771

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<sup>51</sup> See generally Regulatory Reform Task Forces Check-In: Before the Subcomm. on Gov't Operations and the Subcomm. on Healthcare, Benefits, and Admin. Rules of the Comm. on Oversight And Gov't Reform H. R., 115th Cong. (October 24, 2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg30293/pdf/CHRG-115hhrg30293.pdf> [<https://perma.cc/F96J-R988>].

<sup>52</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2017, [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf) [<https://perma.cc/Y2BZ-9HR7>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Regulatory Actions” were significant under 12,866.<sup>55</sup> This critique was expected and understandable, but more penetrating than anticipated. The implementing guidance for Executive Order 13,771 very intentionally cast a wide net for qualifying deregulatory actions. However, it generally only allowed agencies to receive credit for an “out” in the “one-in-two-out” program for such deregulatory actions, not regulatory cost savings credit that would count for purposes of the regulatory cost allowance. The objective was to encourage agencies to undertake sensible regulatory reforms of all sizes, even if the reforms would not result in qualifying cost savings under the regulatory budget. OIRA’s guidance could easily have been written to provide offsetting credit only for significant deregulatory actions, and that may well have encouraged agencies to dig deeper and find more impactful regulations to reform or repeal. The expectation, however, was that the Order’s cost allowance mechanism would work to ensure that new regulatory costs would be fully offset, while its “two-for-one” mechanism would function somewhat separately to encourage agencies to reform a wider array of existing regulatory actions. In general, this approach appears to have worked. For FY 2017 – FY 2020, regardless of whether “ins” and “outs” were significant under Executive Order 12,866, under Executive Order 13,771, OIRA reported that agencies imposed, on net, no new regulatory costs and actually achieved a meaningful net reduction in regulatory costs.<sup>56</sup>

It is also worth noting that while the annual 13,771 accounting for FY2017 included deregulatory actions that were not significant, in many cases that was because the underlying regulatory actions being repealed or rewritten were not promulgated as regulations – never mind significant or economically significant regulations – in the Federal Register. That means those underlying actions generally included no benefit-cost analysis or other discussion of impacts that could be reconsidered. OIRA worked with agencies to assess economic effects for purposes of categorizing actions as regulatory or deregulatory, but absent hard, written, public-facing analysis, it refused to award credit toward cost-savings goals.

In any event, to respond to this understandable critique, in FY2018 OIRA issued an apples-to-apples comparison alongside its accounting that was consistent with the Order and its

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<sup>55</sup> See, e.g., Glenn Kessler, *Has the Trump administration repealed 22 regulations for each new one?* WASH. POST (Aug. 3, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/08/03/has-the-trump-administration-repealed-22-regulations-for-each-new-one/> [<https://perma.cc/S2CJ-WMTN>] (asserting that deregulatory claims were overstated); see also Cary Coglianese, *Let’s Be Real About Trump’s First Year in Regulation*, REGUL. REV. (Jan. 29, 2018), <https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation/> [<https://perma.cc/U52A-GU2S>] (arguing that most regulatory actions were significant while most ostensibly offsetting deregulatory actions were not significant).

<sup>56</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2017, [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf) [<https://perma.cc/EKJ3-PDXE>]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2018.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf) [<https://perma.cc/YVR7-XV7A>]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2019, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2019.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2019.pdf) [<https://perma.cc/JCA7-3ADC>]; OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2020.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf) [<https://perma.cc/B5K2-TSZN>].

implementing technical guidance from OIRA.<sup>57</sup> It reported agencies issued 12 deregulatory actions for every new regulatory action and four significant deregulatory actions for each new significant regulatory action.<sup>58</sup> The addition of an apples-to-apples comparison was a concession to those who argued some of the “outs” were a stretch. However, it was still believed that the rationale underpinning the technical guidance was sound and thus ought to be maintained. That is, the expansive definitions, exceptions, and flexibilities found in the guidance encouraged and rewarded a wide range of regulatory reforms for purposes of the “one-in-two-out” program, even if those reforms were unquantified and thus ineligible for credit in the cost-accounting system. Consequently, the substance of the guidance was not altered, but OIRA continued to provide an accounting of significant deregulatory actions to significant regulatory actions.

### *B. Awarding Credit for the Obama Administration’s Reforms*

Another critique was that numerous qualifying deregulatory actions were begun during the Obama Administration, yet the Trump Administration attempted to “take credit” for those regulatory reforms.<sup>59</sup> This criticism is understandable, but it misses the mark. First, agencies that received such credit generally had to take important additional steps to complete the actions begun during the Obama Administration, so they generally were not mere credit-grabbing actions. Second, and more importantly, OIRA could easily have refused to award such credit, but instead it sought to clarify that sensible reforms could and ought to be pursued across administrations. Not all regulatory and deregulatory actions under development need to be discarded simply because of a change in administration. That much should go without saying. Indeed, some regulatory actions from the prior Administration were finalized and accounted for under the regulatory budget.<sup>60</sup> Should OIRA have discouraged sensible regulatory reforms that were, in effect, bipartisan? To what end? If credit had only been awarded for deregulatory actions begun during the Trump Administration, several worthwhile, if comparatively small, bipartisan reforms likely would not have been finalized.

### *C. Awarding Credit for Delays and Withdrawn Proposals*

Some critics also challenged the awarding of credit for regulatory delays that were not fuller deregulatory actions, as well as the awarding of credit for withdrawing rules that had been proposed but not finalized by the prior administration.<sup>61</sup> That criticism has some purchase if one defines deregulation as the wholesale elimination or reformation of existing regulatory programs. Surely, that is a common and appropriate understanding of the term. Delays and proposal

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<sup>57</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2018.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf) [<https://perma.cc/YVR7-XV7A>].

<sup>58</sup> *Id.*

<sup>59</sup> See, e.g., Stuart Shapiro, *Deregulatory Realities and Illusions*, REGUL. REV. (Nov. 12, 2018), <https://www.theregreview.org/2018/11/12/shapiro-deregulatory-realities-illusions/> [<https://perma.cc/XD2X-D3YJ>].

<sup>60</sup> See, e.g., 82 Fed. Reg. 27154 (June 14, 2017); OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS, [https://www.reginfo.gov/public/pdf/eo13771/FINAL\\_TOPLINE\\_All\\_20171207.pdf](https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_All_20171207.pdf) [<https://perma.cc/335L-6HZQ>].

<sup>61</sup> See, e.g., Stuart Shapiro, *Deregulatory Realities and Illusions*, REGUL. REV. (Nov. 12, 2018), <https://www.theregreview.org/2018/11/12/shapiro-deregulatory-realities-illusions/> [<https://perma.cc/XD2X-D3YJ>].

withdrawals that received 13,771 credit certainly did not meet that standard. In the case of delays, however, they often had measurable and meaningful economic cost savings. For example, by delaying the implementation of rules such as the U.S. Department of Labor's Fiduciary Rule, regulated entities were able to delay expenditures on significant new compliance costs. Importantly, cost savings credit was only awarded to the extent such delays included public-facing analysis to support those determinations. While obviously not as impactful over the long run as wholesale deregulatory actions, some delays did notch meaningful real-world savings deserving of credit under the system as designed and implemented.

In the case of withdrawn proposals receiving partial credit, clearly those deregulatory actions did not have a measurable impact on the market because the underlying regulatory proposals had not yet been finalized and made effective. Accordingly, there was no analysis to demonstrate cost savings, and no regulatory budget credit could be awarded. Agencies were, however, permitted to receive credit for an "out" in the "one-in-two-out" system. The decision to award partial credit under 13,771 was, again, a function of an over-arching decision to incentive a wide range of regulatory reforms, no matter the size or immediacy of the impact. Had such withdrawals not received any credit under 13,771, the prior administration's unfinalized regulatory proposals may well have remained in proposal status for years, only to be finalized on an expedited timeline by a future administration.

Reasonable minds may differ, but it seemed like an acceptable accommodation to award partial credit for partial reforms like these. Without a quantification of cost savings, clearly no credit could be awarded for purposes of the regulatory budget. However, when savings could be demonstrated, such as in the case of delay actions that included meaningful analysis, then cost savings credit could be awarded. Awarding an "out" for purposes of the "one-in-two-out" program seemed like a reasonable way to provide some recognition of progress toward the broader goal, even if that progress could not easily be measured and therefore recognized in the regulatory budget.

#### *D. Awarding Credit for Congressional Review Act Deregulation*

Critics also challenged that OIRA should not have awarded credit for regulations that were repealed by Congress and the President through the Congressional Review Act.<sup>62</sup> This, too, is understandable, because these were not wholesale reforms developed and finalized by the agencies. However, these actions resulted in significant regulatory cost savings and did require meaningful engagement by the Administration. Indeed, as is generally the case with important legislative developments, there was extensive discussion and deliberation between Congress and the Executive Branch on regulations that were repealed under the authority of the Congressional Review Act. The President signed the resolutions, and agencies then had to take a series of technical steps to effectuate the repeal of those regulations. That all required substantially less work for the Executive Branch than drafting and finalizing wholesale deregulatory actions, to be

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<sup>62</sup> See, e.g., Cary Coglianese et al., *Deregulatory Deceptions: Reviewing the Trump Administration's Claims About Regulatory Reform*, PENN PROGRAM ON REGUL. RSCH. REP. (Nov. 1, 2020), <https://www.law.upenn.edu/live/files/11017-coglianese-sarin-shapiro-trump-deregulation-report-11012> [<https://perma.cc/BQ8F-LHFZ>] (advancing an alternative method for tabulating regulatory and deregulatory actions, challenging Trump Administration claims about regulatory reform, and arguing that regulatory reform provided little demonstrable economic lift).

very sure, but the decision to award credit should be understood in light of the overarching goal of incentivizing a wide range of reforms, whatever their size and formal categorization. Denying credit for these revocations would have eliminated from the tally actual cost savings that were achieved during the covered periods of each 13,771 report, and it arguably may have discouraged agencies from enthusiastically pursuing a broader array of reforms. Those decisions were also made at the very beginning of the administration, when the Executive Branch was looking to get off to a strong start on regulatory reform. Not awarding credit would have been understandable but would have risked diminishing the import of the cost savings achieved and the likelihood that agencies would have enthusiastically pursued reforms beyond wholesale deregulatory actions, proposed and finalized by the agencies.

#### *E. Not Enough Transparency*

Other recommendations for reforming the 13,771 accounting system included a series of transparency measures, most of which I endorse. Those recommendations include: providing more information about the costs and savings associated with each action in OIRA's Regulatory Reform Reports; providing more visibility into the development of regulatory cost allowances for each agency; sharing more information with the public about the banking of cost savings; and facilitating open data and independent research by making the format for delivering annual 13,771 reports more user-friendly.<sup>63</sup> These recommendations would advance the good regulatory practice of creating regulations that advance regulatory quality through greater transparency, objectivity, accountability, and predictability. Indeed, had such information been incorporated in OIRA's annual regulatory budget reports, many of the responses and explanations in this commentary would not be necessary.

The annual regulatory budget reports and charts provided a great deal of information, but they did not provide transaction-specific cost accounting, which meant observers were left to comb through the text of the individual rules to determine whether and to what extent they generated regulatory cost savings for purposes of the regulatory budget. That was a lot of work to ask of the public. It may have been difficult to construct, implement, and simultaneously provide comprehensive reporting on the first U.S. federal regulatory budget, but future federal regulatory budgets should endeavor to provide, whenever feasible, an even more detailed accounting for the public.

#### *F. Benefits Ignored*

One of the earliest and most persistent criticisms of the Order was the assertion that it looked only at the cost side of the ledger and ignored the benefits of regulation.<sup>64</sup> That critique is understandable and partially valid, but it does not accurately reflect the design or operation of the regulatory budget under 13,771. The regulatory budget was deeply integrated with the federal government's longstanding benefit-cost analysis standards, articulated in Executive

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<sup>63</sup> See, e.g., Dan Bosch, *The Legacy of the Regulatory Budget*, AM. ACTION F. (Feb. 17, 2021), <https://www.americanactionforum.org/insight/the-legacy-of-the-regulatory-budget/> [<https://perma.cc/B3RY-282N>].

<sup>64</sup> See, e.g., Cass R. Sunstein, *On Neglecting Regulatory Benefits*, 72 ADMIN. L. REV. 445 (2020) (arguing that Executive Order 13,771 improperly ignored regulatory benefits, and proposing alternative strategies for regulatory reform that seek to lower regulatory costs while maximizing regulatory benefits).

Order 12,866 and OMB Circular A-4. It did not replace or amend those standards, which it certainly could have done. Rather, it processed each significant regulatory and deregulatory action through ordinary 12,866 review at OIRA, which imposed all customary benefit-cost analysis standards on those rules. Clearly, as discussed *supra*, some non-significant 13,771 deregulatory actions did not undergo that review process, typically because the revoked or amended actions were guidance documents and other quasi-regulatory issuances that existed outside the federal government's underlying regulatory database. But, importantly, those deregulatory actions did not receive regulatory cost savings credit for purposes of the regulatory budget. After vetting by OIRA's professional staff, who refused to award credit for many purported deregulatory actions, some non-significant deregulatory actions were permitted to qualify for credit under the Order's "two-for-one" program, but they could not improve the agency's standing with respect to the regulatory budget unless they included supporting written analysis.

That basic structure ensured significant regulatory and deregulatory actions were all subject to benefit-cost analysis, while non-significant deregulatory actions received the same treatment that non-significant regulatory actions had long received: they were not generally subject to 12,866 review and therefore were not generally subject to formal benefit-cost analysis requirements. Regulatory benefits, costs, and transfer effects of underlying significant regulatory actions had to be addressed by agencies seeking to unwind those standards through deregulatory actions. But where agencies had previously issued guidance documents, letters, circulars, and the like without attempting to ground their policy choices in rigorous analysis of benefits, costs, and transfer effects, those who later sought to unwind the actions were similarly not required to provide a formal analysis of the benefits, costs, and transfer effects of their choices.

To better understand how benefit-cost analysis standards were incorporated into the regulatory budget, consider the following.

Executive Order 13,771 required, "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."<sup>65</sup> That is, the regulatory budget did not eliminate existing requirements, but supplemented them by directing agencies to pursue compliance with the budget to the extent permitted by other standing obligations.<sup>66</sup>

In case the language of the Order was insufficiently clear that the regulatory budget was to be implemented in a manner that comported with other executive orders and procedural requirements, including ordinary benefit-cost analysis standards, OIRA left no room for doubt in its implementing guidance. Included among the introductory General Requirements of the regulatory budget was this instruction:

Agencies should continue to comply with all applicable laws and requirements. In addition, EO 12866 remains the primary governing EO regarding regulatory planning and review. Accordingly, among other requirements, except where prohibited by law, agencies must continue to assess and consider both the benefits and costs of regulatory

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<sup>65</sup> Exec. Order No. 13771, 82 Fed. Reg. 9339 § 2(c) (Feb. 3, 2017).

<sup>66</sup> *E.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

actions, including deregulatory actions, when making regulatory decisions, and issue regulations only upon a reasoned determination that benefits justify costs.<sup>67</sup>

Later in the guidance, OIRA reiterated the important role of regulatory benefits in the implementation of the regulatory budget:

Q32. How does EO 13771 affect the consideration of regulatory benefits or other requirements under EO 12866?

A: EO 13771 does not change the requirements of EO 12866, which remains the primary governing EO regarding regulatory review and planning. In particular, EO 13771 has no effect on the consideration of benefits in informing any regulatory decisions. For all EO 13771 regulatory actions and EO 13771 deregulatory actions, except where prohibited by law, agencies must continue to assess and consider both benefits and costs and comply with all existing requirements and guidance, including but not limited to those in EO 12866 and OMB Circular A-4.<sup>68</sup>

In addition to Executive Order 13,771 and its implementing guidance, Executive Order 13,777, *Enforcing the Regulatory Reform Agenda*, was issued to help ensure the proper and robust implementation of the regulatory budget.<sup>69</sup> That Order required agencies to comply not just with 13,771, but also Executive Order 12,866 by President Clinton and Executive Order 13,563 by President Obama.<sup>70</sup> As discussed, 12,866 clearly articulates the important role of benefits in the regulatory development process. In like manner, Executive Order 13,563 emphasizes the need to carefully assess benefits, both quantitative and qualitative, when developing regulatory policy and implementing regulatory reforms. Because all significant deregulatory actions under Executive Order 13,771 were categorized as significant regulatory actions for purposes of Executive Order 12,866 review, those rules were required to satisfy the ordinary benefit-cost standards of 12,866 and the attendant requirements of OMB Circular A-4. These points were emphasized repeatedly by OIRA and other stakeholders throughout the implementation of the regulatory budget.

#### IV. RECOMMENDATIONS FOR FUTURE U.S. FEDERAL REGULATORY BUDGETS

The early experience with Executive Order 13,771 provided an excellent proving ground for one version of regulatory budgeting. A few lessons have already been explored in this paper, but the following are several key lessons learned and recommendations for future regulatory budget efforts: (A) Regulatory Budgets Work; (B) Contextualize Two-for-One Mechanisms; (C) Emphasize the Importance of Analysis, Including Analysis of Regulatory Benefits; (D) Build on Existing Procedural Mechanisms; and (E) Remember: Regulatory Process is Friend, Not Foe.

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<sup>67</sup> OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13771, TITLED “REDUCING REGULATION AND CONTROLLING REGULATORY COSTS” 2 (2017).

<sup>68</sup> *Id.* at 13.

<sup>69</sup> Exec. Order. No. 13,777, 82 Fed. Reg. 12285 (Feb. 24, 2017).

<sup>70</sup> *Id.* § 2(a)(i)–(iii).

### A. Regulatory Budgets Work

From FY 2017 through FY 2020, the U.S. federal government imposed, on net, no new regulatory costs. Further, federal agencies reporting to the president achieved a combined net regulatory cost savings of \$198.6 billion.<sup>71</sup> While observers have critiqued aspects of the “two-for-one” program, comparatively little criticism has been leveled against the accuracy and effectiveness of the regulatory cost accounting mechanism that is at the heart of the regulatory budget. Future regulatory budgets should place considerable emphasis on this core component of the regulatory budget.

In addition, the simplicity of the clear regulatory cost goal was, as a practical matter, very useful. It set a clear initial target for agency leadership and staff, the White House, and the public. It provided a clean and relatively fair starting point for the first fiscal year of the project. It set expectations early: the goal would not be to reduce the rate of growth in regulatory costs and declare victory but to eliminate the imposition of net new regulatory costs across the Executive Branch. It also provided a useful mechanism for comparing initial agency performance and anchoring future discussions about agency budgets.

Further, the zero-dollar cost allowance in the first fiscal year anchored discussions about cost allowances for the following years. Had a less clear and uniform target been used in the first year, discussions about targets for subsequent years would likely have been less ambitious. While there are many appropriate factors to consider when setting a regulatory budget, the experience of 13,771 suggests it is not bad to begin the reform effort with an expectation-setting target and then revise that target in later years as appropriate. One could imagine providing even more directional clarity, such as allowing the OMB Director to set future cost caps “not to exceed zero dollars” to the extent permitted by law. That might further anchor later budget discussions, but its absence from 13,771 did not appear to have a materially detrimental effect. Budgets below zero dollars were frequently set and achieved, and in other cases budgets exceeding zero dollars were determined to be necessary, suggesting that maintaining the flexibility to go in either direction may continue to be useful in the future.

### B. Contextualize Two-for-One Mechanisms

The two-for-one program as developed and implemented under Executive Order 13,771 was in many respects successful. It contributed to the larger goal of eliminating the imposition of new regulatory costs. In addition, by the terms of the Order and guidance, agencies generally succeeded in achieving their two-for-one objectives.<sup>72</sup>

That success, along with the more important success of the regulatory budget, has, however, largely been overshadowed by criticisms of the “two-for-one” program. Admittedly, that is likely

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<sup>71</sup> OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2020, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2020.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2020.pdf) [<https://perma.cc/6MZ6-BBFY>].

<sup>72</sup> See, e.g., OFF. INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REGULATORY REFORM UNDER EXECUTIVE ORDER 13771: FINAL ACCOUNTING FOR FISCAL YEAR 2018, [https://www.reginfo.gov/public/pdf/eo13771/EO\\_13771\\_Final\\_Accounting\\_for\\_Fiscal\\_Year\\_2018.pdf](https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Final_Accounting_for_Fiscal_Year_2018.pdf) [<https://perma.cc/7JS6-GN5J>].

at least partially due to the fact that the Administration often referred to Executive Order 13,771 as the “two-for-one” requirement, often not even mentioning the regulatory cost savings goal and success. The rhetorical appeal of eliminating two regulations for every new one was significant. Had it been properly contextualized and supplemented with a discussion of the impressive accomplishment of altogether halting the imposition of new regulatory costs, perhaps less ire would have been trained on the “two-for-one” accounting system. That system was thoroughly and painstakingly explained in advance in OMB’s guidance, so there should have been no surprises when the first 13,771 accounting report was released for FY2017, but given the intense focus from the Administration on the “ins” and “outs,” much of the guidance’s nuance and import was apparently lost on the public that was digesting the results and associated rhetoric.

To restate a point stressed throughout this paper, the “two-for-one” requirement was designed to aid the goal of achieving no net new regulatory costs, and possibly a net regulatory cost savings after the first year. That goal was met and exceeded for all four years of the Trump Administration. The two-for-one program was intentionally flexible and accommodating. That basic structure allowed the Order to work. It created a system that rewarded agencies for good behavior, even if only partially. It was not meant to subsume the regulatory cost cap, which was the core regulatory budget of the Order. Future efforts may absolutely benefit from using some version of a two-for-one program – indeed, it was a very useful organizing mechanism for Executive Order 13,771 – but they should consider either making it less accommodative and more intuitive or clearly explaining the existence, purpose, and context of any accommodations. Future efforts should also consider providing more transaction-specific cost accounting in annual reports so the public can more clearly see which rules are awarded both cost-savings and “out” credit, and which are only awarded “out” credit and therefore are not included in the core regulatory budget calculations.

### *C. Emphasize the Importance of Analysis, Including Analysis of Regulatory Benefits*

The U.S. federal government has long been committed to developing regulatory actions in a rational, analytically defensible manner. No matter the philosophical persuasion, this fundamental commitment has been integral to the development of regulatory policy. In nearly all conceivable events, that posture ought to be maintained. The regulatory budget, like other overlapping procedural requirements, ought to be understood as a complement or supplement to established norms. Specifically, it should not replace or diminish the essential role of regulatory decision-making grounded in rigorous analysis. Future administrations should consider making this point even clearer in the design and operation of the regulatory budget.

Executive Order 13,563 on retrospective review may provide something of a guide in this regard. Near the beginning it makes clear, “This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993.”<sup>73</sup> It then proceeds to discuss core requirements of 12,866, including the requirement that regulatory benefits must justify regulatory costs. Such a clear, up-front statement of principles is important not only to fend off critics, but also to ensure those responsible with implementation understand that rigorous analysis is

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<sup>73</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

essential to rational regulation and proper implementation of the regulatory budget. Future regulatory budgets may be well served not just to incorporate such standards by reference, but to restate them up front in plain terms.

*D. Build on Existing Procedural Mechanisms*

Much of the architecture for Executive Order 13,771 was layered on top of existing bureaucratic architecture, to positive effect. Rather than replacing that architecture – as was considered – the decision was made to supplement it. OIRA has competently managed a variety of regulatory processes for decades. Its requirements, principles, conventions, and norms are deeply entrenched in the federal regulatory process. Those processes include many useful features that administrations of any philosophical persuasion can use to their advantage, rather than discard and replace every few years. For example, in the case of Executive Order 13,771, the Administration leveraged the Unified Agenda platform and process to obtain information about planned adherence to the regulatory budget. The Unified Agenda is an Executive Branch-wide process that allows OIRA to play a leadership role in managing and coordinating the development of the regulatory pipeline, including to some extent at the historically independent agencies. By layering on top of it the 13,771-information-gathering exercise, OIRA was able to comprehensively, systematically, and relatively quickly undertake a major new and highly technical information gathering exercise of importance to the White House.

The Order also leveraged several features of the ordinary regulatory review process articulated in Executive Order 12,866. For example, the significance determination process allows OIRA to determine whether a rule is significant under the terms of 12,866, but it was also used to determine whether a rule was EO 13,771 regulatory or deregulatory. The 12,866 regulatory review process was also used to determine whether agencies were fairly representing and accurately substantiating that rules were either regulatory or deregulatory. In like manner, the information collection review processes of the Paperwork Reduction Act and the significance determination process of the Congressional Review provided additional mechanisms for evaluating and enforcing compliance. In each of these cases, existing capabilities and processes were used to implement the regulatory budget.

*E. Remember: Regulatory Process is Friend, Not Foe.*

Finally, it is important to understand up front that the regulatory process can be a regulatory reform-minded administration's friend and need not be its foe. The regulatory process is arcane and arduous, and some may not have the patience to navigate it carefully, and therefore successfully. The problem may be exacerbated when sights are set on swift and sure goals like "slashing red tape." However, regulatory and deregulatory objectives must be carried out in the context of regulatory process, not above it or beside it. Long-term regulatory reform successes cannot be traded in for quick regulatory budget points. After all, deregulatory actions – at least those that are significant – are in fact regulatory actions that must satisfy all the ordinary requirements of significant regulatory actions. That means existing significant regulations cannot be, in ministerial fashion, revoked, changed, or extensively delayed. They must be engaged, analyzed, and reformed or rolled back appropriately. This theme was emphasized throughout the implementation of Executive Order 13,771, but it should be stressed even more fully and

forcefully in the future. Expectations should leave room for analysis, collaboration, and review, and trainings should be provided to guide officials and staff through the process.

The regulatory process should not be regarded as a time-consuming, box-checking exercise. If trusted and engaged, it can provide significant value for the regulation being advanced. At the risk of stating the obvious, the centralized regulatory review process brings together talented career and political officials from offices and agencies across the Executive Branch to share their perspectives, determine lines of demarcation between sibling agencies and programs, discuss the likely and possible real-world effects of a planned action, and ensure that regulations are well considered, net beneficial, and tailored to achieve their stated objectives. The public notice and comment process provides the public an opportunity to weigh in on proposed regulatory actions, sharing information, arguments, and perspective that might advance or inform the rulemaking. Early rounds of engagement such as advanced notices of proposed rulemaking can further support these government efforts to obtain the best information and perspective possible when developing a regulatory program. All that activity helps to develop the record and public support necessary to implement and maintain regulatory reforms.

Similarly, the Unified Agenda, while perhaps appearing to be a mundane paper-pushing exercise, is actually an incredibly important and powerful mechanism for coordinating and making transparent the government's intention to regulate or deregulate in particular ways. The list of crucial but byzantine regulatory processes goes on, but one thing is true about nearly all of them: the one who attempts to shirk the process will very likely suffer unwelcome consequences down the road. That lesson has been painful for many enthusiastic reformers, but it is one that need not be painful in the future. The regulatory process has existed in largely the same form across multiple administrations for decades for good reason: it works. Regulatory reformers should not let any latent distrust of government get the better of them and prevent them from robustly and earnestly engaging staid regulatory processes. By embracing and supplementing them with unique new perspectives, reformers of all philosophical stripes can make significant progress toward their goals.