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# Accounting for regulatory reform under Executive Order 13771: Explainer and recommendations to improve accuracy and accountability


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# Introduction

Executive Order (EO) 13771, known as the "regulatory two-for-one" EO, imposed new constraints on executive branch regulatory agencies, directing them to: (1) to cut two existing rules for each new rule issued and (2) offset any costs imposed by new rules while operating under a regulatory cost cap. The Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and Budget (OMB), is responsible for implementing this EO and reporting on its progress. OMB has issued Regulatory Reform Reports for fiscal year (FY) 2017 and FY 2018.[1] The fiscal year for 2019 ended recently on September 30, 2019. While we await the latest report, this article explains OMB's current accounting methodology, gleaned from OMB's guidance and other public documents, and highlights challenges of reporting agency performance in implementing EO 13771. It also contains our recommendations to improve the accuracy and accountability of both OMB's annual reporting and individual agency actions.

Table 1 summarizes OIRA's reported results to date.[2]

**Table 1: Annual Results from OIRA Regulatory Reform Reports**

| Fiscal Year | Final Deregulatory Actions | Final Regulatory Actions | Present Value Costs ($ millions) | Applicable Cost Cap ($ millions) |
|---|---|---|---|---|
| 2017 | 67 | 3 | -8,148.3 | 0 |
| 2018 | 176 (all)<br>57 (sig) | 14 | -23,432.1 | -9,808.6 |
| 2019 | — | — | — | -17,904.8 |

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1. The Regulatory Reform Reports for 2017 and 2018 consist of two documents per fiscal year: (1) a detailed list of the completed actions that qualify from the relevant fiscal year, grouped by agency; and (2) a final accounting of the number of deregulatory and regulatory actions, and their associated cumulative cost savings, grouped by agency and reported in total.

2. Figures are taken directly from OIRA's reports and do not account for judicial review of regulatory and deregulatory actions. Data from the NYU Institute for Policy Integrity and the Brookings Institution indicate that many deregulatory actions have fared unsuccessfully in court or their implementation has otherwise been delayed by legal action. OIRA's reported numbers have not been updated to account for cost savings that did not materialize due to these or other issues.

The FY 2017 report was met with some skepticism, in part because of how it calculated its finding that executive regulatory agencies under the Trump administration[3] finalized 22 deregulatory actions for every one regulatory action, saving an estimated $8.1 billion in regulatory costs. To compute ratios the FY 2017 report compared total deregulatory actions to total significant regulatory actions. As others have noted, more types of actions count as deregulatory than as regulatory and not all actions are of comparable magnitude. While OIRA's guidance implementing EO 13771 was fairly transparent about these definitional choices, and there are some good reasons for them, these choices nevertheless undercut the meaningfulness of the ratio. We discuss this more below.

OIRA made some improvements in its FY 2018 report. It presented ratios in two ways. The first way captures all deregulatory actions and all significant regulatory actions; defining "deregulatory" and "regulatory" the same way as in the FY 2017 report. The second way narrows the counts to those deregulatory and regulatory actions that were "significant" under EO 12866. This narrower approach is closer to an apples-to-apples comparison, which is more useful when trying to weigh the deregulatory and regulatory actions against each other. OIRA also added information to show which specific actions were "significant" under EO 12866, making the inputs into the counts more transparent. Nevertheless, these changes have not immunized these counts from continued criticism.

Scholars also critique the administration's approach to reporting cost savings from implementation of EO 13771—namely for the choice to estimate the cost savings produced by deregulatory actions without also assessing the foregone benefits. This reporting choice, however, flows from EO 13771 itself, which only requires agencies to eliminate regulatory costs to offset the costs of new regulations. Regulatory impact analyses of individual regulations continue to assess both benefits and costs, as EO 12866 requires. EO 12866 also directs agencies to base all actions on a determination that their benefits justify their costs.[4]

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3. Fiscal Year 2017 began on October 1, 2016, so a portion of that fiscal year was in the Obama administration. The FY 2017 report captured agency activity from President Trump's inauguration (i.e., January 20, 2017) forward.

4. OIRA's guidance says: "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."

For the purposes of this article, we limit ourselves to analysis and recommendations for implementing EO 13771 based on its current provisions.

Our article proceeds as follows. Part I details the OIRA guidance to agencies on what "counts" as an EO 13771 regulatory or deregulatory action. Part II describes OIRA's accounting methodology for estimating agency cost savings. Part III elaborates on analytical concerns that flow from the administration's current approach for estimating "counts" and "cost savings" and offers several recommendations for improving the content of agency actions and OIRA's annual reporting on EO 13771.

## What "counts as a regulatory or deregulatory action?

To meet the requirements of EO 13771, which requires agencies to offset each new regulatory action with two deregulatory actions, OIRA needed to define what would qualify as "regulatory" and "deregulatory" actions for purposes of implementing the order. These definitions cover actions taken by the executive branch and those that originated in the courts or the legislature, as explained below. OIRA issued interim guidance implementing Section 2 of the order in February 2017 and then supplemented and superseded that document with guidance in April 2017.

### EO 13771 regulatory actions

On the "regulatory" side, an action counts if it is either (1) "A significant regulatory action as defined in Section 3(f) of EO 12866 that has been finalized and that imposes total costs greater than zero," or (2) 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." As used here, "significant" refers to the subset of regulatory actions for which OIRA conducts centralized oversight; agencies are required to submit the text of their "significant" regulatory action along with their regulatory analysis (e.g., assessment of its potential benefits and costs) to OIRA for review before publishing it in the *Federal Register*.

### EO 13771 deregulatory actions

On the "deregulatory" side, an action counts if it "has been finalized and has total costs less than zero." The definition is "not limited to those [actions] defined as significant under EO

12866 or OMB's Final Bulletin on Good Guidance Practices." Rather, OIRA guidance lists "a wide range of categories of [deregulatory] actions, including, but not limited to: [i]nformal, formal, and negotiated rulemaking; [g]uidance and interpretative documents; [s]ome actions related to international regulatory cooperation; and [i]nformation collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements." It also notes that "[s]ignificant proposed rules issued before noon on January 20, 2017, that are formally withdrawn by notice in the *Federal Register* and removed from the *Unified Agenda of Regulatory and Deregulatory Actions* may qualify as repeal actions."[5] It then asks agencies to "consult with OIRA regarding other actions [the] agency believes should qualify as an EO 13771 deregulatory action."

## Contrasting regulatory and deregulatory actions

Tables 2 and 3 depict the types of actions that count as regulatory and deregulatory under EO 13771, based on current OIRA guidance. Table 2 shows actions initiated by the executive branch (e.g., actions related to notice-and-comment rulemaking), and highlights that similar actions are treated differently for accounting purposes. As we discuss below, these differences create incentives for agencies, some of which are beneficial, and some of which are not.

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5. The guidance notes that withdrawn NPRMs do not count towards cost savings estimates.

## Table 2: EO 13771 Actions Initiated by the Executive Branch

| Action | Regulatory | Deregulatory |
|---|---|---|
| Pre-Rule Actions (e.g., requests for information, advanced notices of proposed rulemaking) | No | No |
| Proposed Rules | No | No |
| Withdrawal of Significant Proposed Rules published before noon on Jan. 20, 2017 | No | Yes[6] |
| Significant Final Rules | Yes, if total costs greater than zero | Yes, if total costs less than zero |
| Non-significant Final Rules | No | Yes, if total costs less than zero |
| Federal spending regulatory actions[7] | Yes, if changes to non-transfer provisions generate costs | Yes, if changes to non-transfer provisions generate cost-savings |
| Effective Date Delays for Published Final Rules | Yes | Yes; each delay of same rule counts |
| Significant Guidance Documents[8] | Yes, if final and total costs greater than zero | Yes, if final and total costs less than zero |
| Non-significant Guidance Documents | No | Yes, if final and total costs less than zero |
| Interpretive Documents | No, unless it otherwise meets criteria as a regulatory action | Yes |
| Non-regulatory paperwork change[9] | No | Yes, if it "repeals or streamlines" |

. . .

6. This would count as a deregulatory action but would not qualify for cost savings.

7. These are "transfer rules" that, for example, cause income transfers between taxpayers and program beneficiaries.

8. There is debate among legal scholars about how to distinguish between guidance documents and interpretive documents. We take no position on this issue and merely restate categories and distinctions that OIRA has used in its guidance.

9. *E.g.*, discretionary reporting, recordkeeping, or disclosure changes.

| | | |
|---|---|---|
| Other | No | Maybe; consult with OIRA |
| Actions by Independent Agencies | N/A | N/A |

As shown in Table 2, more types of activities count as deregulatory actions than as regulatory actions. This—combined with the "two-for-one" policy—provides incentives for agencies to undertake deregulatory actions, including smaller, beneficial activities that otherwise might be left out. For example, if an agency makes a discretionary change to a paperwork requirement that reduces burden (i.e., a change that does not require regulatory change), that can count as a "deregulatory action." Paperwork costs are meaningful. Allowing paperwork reductions to count as deregulatory actions creates an incentive for agencies to decrease burdens that are otherwise outside the scope of EO 13771.

As a second example, if an agency withdraws a proposed rule that was published prior to the start of the Trump administration, the withdrawal is deregulatory. Elsewhere, one of us called this a "counterintuitive definitional choice, because proposed rules, by definition, are not yet in effect and therefore do not impose regulatory costs or confer any associated benefits." But, as noted, proposed rules do not generally expire once they have been published:

> This means that proposed rules can dangle for years with parties uncertain about when or whether the agency will finalize them … Overall, there are not strong incentives to encourage an agency to formally withdraw a proposed rule. And some policy issues are so complex that they can legitimately take years for agencies to resolve. Meanwhile, the public is left wondering about the status of the rule. Regulatory uncertainty is often cited by regulated entities as something that hinders investment, so there are pro-innovation reasons for an agency to resolve uncertainty where it is able to do so. Therefore, allowing agencies to claim a deregulatory credit for withdrawing a proposed rule encourages an agency to withdraw actions it does not plan to finalize any time soon. And, under OIRA's accounting rules, a re-issued proposed rule in the future would not "count" as a regulatory action until it is finalized, so the agency does not lose any ground as a result of the withdrawals.

By contrast, one definitional choice creates a problematic incentive. Agencies can count a regulatory delay, i.e., a delay of a rule that has been published but not yet gone into effect,

as a deregulatory action. This is a reasonable decision, because delaying a rule's compliance costs by 6 months may mean that 6 months of compliance costs are not borne by regulated parties. But, if an agency issues a string of delays, they can count each one as a deregulatory action. This creates an incentive for agencies to engage in repeated delays rather than one single delay. Repeated delays might save compliance costs but they also impose monitoring costs on regulated and interested parties that face ongoing uncertainty. As noted below, we recommend that OIRA change this policy.

Overall, although choices like these lead to apples-to-oranges results in the total counts of regulatory and deregulatory actions, what is clear is that they provide incentives for agencies to engage in behavior defined as deregulatory. Also, more similar definitions of regulatory and deregulatory would make the "two-for-one" requirement more stringent because agencies would have to find count and cost offsets for more of their regulatory actions. These are implications of the definitional differences that critics have largely overlooked.

Agencies can also receive deregulatory credits for actions that begin outside of agencies (e.g., actions stemming from legislative acts or judicial decisions). These are shown in Table 3.

### Table 3: EO 13771 Actions Initiated by Legislative or Judicial Branches

| Action | Regulatory | Deregulatory |
|---|---|---|
| Rules disapproved by Congress (e.g., the Congressional Review Act) | Unknown | Yes |
| Actions vacated or remanded by a court | No | Yes, if regulatory action was issued before noon on Jan. 20, 2017 |

That OIRA's guidance gives credit for actions initiated by Congress and the courts is an acknowledgment that regulatory and deregulatory policy in the U.S. is subject to the authority of all three branches of government. Early in the Trump administration, Congress disapproved several Obama administration actions under the Congressional Review Act. OIRA counted these as "deregulatory" in its annual reports. If Congress were to roll back a deregulatory action, would that count as regulatory? The circumstance has not yet occurred, so it is unknown.

Also, the courts have enjoined and otherwise blocked several deregulatory actions of the Trump administration. OIRA's FY 2017 and FY 2018 reports did not count these court decisions, which reversed deregulatory actions, as "regulatory." Future Regulatory Reform

Reports may shed more light on these and other issues. Nonetheless, as currently worded, OIRA's guidance provides insight into the variety of actions for which agencies receive deregulatory credits, and the extent to which the executive branch relies on other branches of government to achieve deregulatory effects.

## How do the cost savings estimates work?

In addition to counting the number of regulatory or deregulatory actions, EO 13771 requires agencies to offset costs imposed when issuing new rules covered by the order. EO 13771 required no net increase in costs for FY 2017 and gave the OMB Director discretion to set regulatory caps in subsequent years. The regulatory cap may permit additional costs or require agencies to generate cost savings.

To facilitate its annual reporting, OIRA has issued several documents to explain how it would calculate costs and cost savings under EO 13771. This section synthesizes these materials and describes the policy provisions and analytical choices that drive these calculations, and it offers some of examples of how cost savings are estimated in practice.

### Scope, banking, and trading

As OIRA's guidance explains, "[t]he incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions." Therefore, *only* actions subject to EO 13771 contribute to the costs or cost savings calculated for an agency each fiscal year. Other actions (e.g., regulatory actions that are not significant) do not.

Additionally, the requirements of EO 13771 apply "agency-wide"—i.e., within HHS, deregulatory actions issued by the Centers for Medicare and Medicaid Services (CMS) could offset regulatory actions by the Food and Drug Administration (FDA). OIRA allows agencies to "bank" and "transfer" both deregulatory counts and cost savings "for use in the same or a subsequent fiscal year" to satisfy EO 13771's requirements. For instance, an agency issuing two EO 13771 deregulatory actions can "bank" the counts and associated cost savings to satisfy the requirement to offset a future EO 13771 regulatory action. Agencies can also transfer counts and cost savings to other agencies—pending approval by the Director of OMB.

## Discounting, present value, and annualization

OIRA reports the present value of cost and cost savings.[10] That means the figures represent the total value, at a specific point in time, of the entire future stream of cost savings. To compare present and future values, future values are discounted to the present value using an interest rate, or "discount rate." Discounting is a common practice in benefit-cost analysis to compare the streams of benefits and costs in the future, and OMB Circular A-4 offers a detailed explanation of its best practices. For EO 13771, OIRA directs agencies to adjust dollars to a 2016 base year to account for inflation and to use both 7 percent and 3 percent discount rates to convert the stream of cost savings into its present value equivalent (as of 2016). OIRA's Regulatory Reform Reports only include final accounting figures calculated using a 7 percent discount rate, although such a choice should not bias the relative cost savings across agencies.

OIRA's Regulatory Reform Reports do not display the annual stream of cost savings across fiscal years. Where the reports refer to "annualized" figures, those figures are converted from the present value estimates—through a process called amortization—into equal annual amounts that have the same discounted present value as the actual, more variable, stream of cost savings. In other words, annualized figures may be different from the year-to-year stream of cost savings because they do not indicate when the actual cost savings of the actions will be realized.

## Perpetual time horizon

According to its *Accounting Methods*, OIRA "worked with agencies to apply the same analytical assumptions to all covered actions" and settled on using a perpetual time horizon to calculate cost savings. On first glance, this is a somewhat surprising choice because it "reflects a general presumption, for the purposes of this accounting, that regulatory and deregulatory actions are permanent and that the impacts of regulations continue in perpetuity." In reality, the future is uncertain, and regulations will likely change from their current state.

One benefit of this approach, however, is that—if applied consistently—it gives a principled way to make apples-to-apples comparisons of costs and cost savings, both among rules and across time. To account for actions measuring impacts over different time periods, a perpetual time horizon fits every action to the same timeframe, while still retaining the unique

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10. Costs and cost savings are calculated the same way in OIRA's reports. Because OIRA's Regulatory Reform Reports document net cost reductions, we generally refer to "cost savings" for the sake of brevity.

features of each rule. Otherwise, attempting to calculate net regulatory costs could produce inaccurate results in present value and annualized terms. First, without a time horizon that accounts for all rules, such an approach risks understating present value costs by arbitrarily choosing a shorter range that excludes the long-term costs of certain rules.

Second, without fitting costs into a consistent time horizon, we cannot directly compare annualized values, as explained by the following example. Consider three rules that have the same present value but different timeframes. Amortizing the same present value figure over different time horizons produces different annualized values. For instance, amortizing $300 million at a 7 percent discount rate over 30 years produces an annualized value of $24.2 million. With a 20-year time horizon, the annualized value is $28.3 million, and over 10 years it is $42.7 million. However, the aggregate annualized value of all three rules would not equal $95.2 million per year for 30 years. In short, even assuming the same present value and discount rate, annualized values are sensitive to the time horizon used. As a result, adding together annualized values that have been calculated over different timeframes to produce an aggregate annualized number would result in inaccurate accounting.

## Applying a perpetual time horizon

A perpetual time horizon is intended to make cost figures comparable when regulatory and deregulatory actions have different effects across different periods of time. Three examples show the adaptability of this method.[11] First, a rule might create a new grant program that will operate for five years. Second, a rule on power plant emissions could be expected to occur over a 30-year period, with substantial up-front costs and minimal ongoing costs. Third, a safety rule might require significant capital investment every 10 years. An analyst must reconcile the time horizons and cost patterns of all three rules to accurately calculate the net costs and generate comparable annualized estimates. For each of these rules, the Regulatory Reform Reports would assess the rule's unique pattern of costs (assuming they persist perpetually, as described below), calculate the present value of those costs, and then amortize the present value costs in equal increments over an infinite time horizon.

For the grant rule, which effectively sunsets after five years, the cost pattern is relatively simple—discounted cost savings reach zero in year six. For the power plant emissions rule, the costs reach a steady pattern (e.g., falls to $10 million in year six and remains at that

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11. A presentation made the 2019 Society for Benefit-Cost Analysis conference greatly informed our explanations in this section. "Implementing an Accounting Framework to Measure Outcomes for a New Policy Directive: Challenges and Lessons Learned," Session 7.E: Overcoming Challenges in Regulatory Impact Analysis, https://www.benefitcostanalysis.org/2019-annual-conference-session-7#7.E.

level thereafter), continually getting smaller and eventually approaching zero once discounting is applied. For the safety rule, there is a repeating cost pattern (e.g., the equipment needs to be replaced every 10 years), and the discounted cost savings also grow smaller and converge toward zero over a longer timeframe. For each rule, an agency would then add up the present values of each cost pattern (i.e., cumulative present value) and split it into equal increments over an infinite time horizon (i.e., amortization) to depict each present value in annualized terms.

Based on current guidance, OIRA assesses an agency's compliance with its annual cost cap in present value terms.

## Estimating cost savings in practice

The examples above show that the method offers flexibility to suit the different effects of each rule, while allowing OIRA to combine the cost amounts in a principled way. Upon our review of a handful of agency rules, we found that agencies are generally applying this method consistently, although more transparency is needed to be able to verify the results.

For example, the Food and Drug Administration's (FDA) regulatory impact analysis of a final rule extending compliance dates for food labeling requirements is consistent with the *Accounting Methods* for a delayed rule. The agency assessed the expected pattern of cost savings in perpetuity, calculated the present value of the cost savings, and annualized the cost savings over an infinite time horizon. Because no cost savings occur after the first year, estimating the present value over both a 20-year time horizon and an infinite time horizon produces the same result, $1 billion, for present value cost savings. These assumptions are documented in the agency's analysis.

Other rules are documented less clearly. The Environmental Protection Agency's (EPA) regulatory impact analysis for the Affordable Clean Energy (ACE) rule appears to use a repeating cost pattern by assuming a 15-year timeframe is representative of the rule's perpetual costs, but this methodological choice has to be inferred from the analysis. The agency conducted its analysis of costs for EO 13771 using projected compliance costs between 2023 and 2037. Thus, the annualized value over the 15-year time period is equivalent to the annualized value over the perpetual time horizon—$110 million at a 7 percent discount rate—according to Tables 6-1, 6-2, and 6-3 in EPA's analysis. The cumulative present value for EO 13771 ($1.5 billion at 7 percent) was calculated by annualizing costs over the 15-year timeframe and then extending that annualized value in perpetuity.

EPA's analysis is consistent with our understanding of the *Accounting Methods* for a rule with a repeating cost pattern. To reach its conclusion for compliance with EO 13771, EPA

must have made the assumption that the 15-year "illustrative policy scenario" is representative of the long-term pattern of compliance costs. Since fixed costs effectively become variable costs over an infinite time horizon, the agency could reasonably argue that the capital costs are recurring. However, this reasoning should be explicitly stated by the agency, especially when the present value estimates differ from the agency's assessment of benefits and costs under EO 12866.

Alternatively, if the agency assumed that the compliance costs of the ACE rule reach a steady state value of $25 million, the present value costs would be substantially lower. As illustrated in the hypothetical scenario in Table 4, once discounted compliance costs converge toward zero, present value costs approach $1.136 billion ($79 million annualized) using a 7 percent discount rate.[12]

### Table 4: Analytical Assumptions Matter

| Example | Chosen Time Horizon | Annualized over Chosen Time Horizon ($ millions) | PV over Infinite Time Horizon ($ millions) | Difference in PV relative to RIA ($ millions) |
|---|---|---|---|---|
| Final ACE Rule RIA | 15 years | 110 | 1,500 | 0 |
| Hypothetical: Steady State Cost Pattern | Perpetual | 79 | 1,136 | -364 |

This example shows that the transparency of an agency's estimation of present value costs is critical. When using the annualized value for a representative window to calculate the cumulative present value, the results are sensitive to the agency's analytical assumptions. In this case, the assumptions EPA makes about the long-term cost pattern of the ACE rule appear to create a difference of more than $350 million in present value costs. Transparently documenting how an agency applies a perpetual time horizon to each rule would clarify the key assumptions required to generate cost savings estimates under EO 13771.

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12. Authors' calculations using the data provided in EPA's final regulatory impact analysis. Dataset and calculations available upon request.

## Analytical concerns and recommendations

The discussion above shows that OIRA had to make analytical choices to organize its reporting under EO 13771. It adjusted some of these choices after the first year of implementation and might show some additional changes in the upcoming FY 2019 report. We offer the following recommendations to further improve OIRA's Regulatory Reform Report by increasing its transparency and the accuracy with which it tracks regulatory agency efforts to comply with the requirements of EO 13771 and also to improve the analysis contained in individual agency actions.

### 1. Continue to report significant regulatory and deregulatory actions

OIRA might continue to report all actions that are defined as regulatory and deregulatory actions under EO 13771. It should also continue to report metrics on significant regulatory and significant deregulatory actions—particularly for ratios—when reporting agency performance implementing EO 13771. This is helpful for two reasons.

First, as one of us has noted elsewhere, regulatory actions are extremely heterogeneous—running the spectrum from small, routine regulations to those likely to have hundreds of millions or even billions of dollars in benefits and costs. Designations such as "significant" or "economically significant" narrow analyses of regulatory output to focus on substantive regulations. Using them facilitates a more meaningful comparison of rules.

Second, as noted above, more agency actions count as "deregulatory" actions than "regulatory." Although these definitional differences create incentives to encourage smaller deregulatory actions, this imbalance limits the meaningfulness of the comparison between deregulatory and regulatory actions. Although OIRA might continue to report all regulatory and deregulatory actions as those terms are defined in the context of EO 13771, a comparison of significant actions better depicts how agencies are performing with respect to their larger actions. In short, it ameliorates the apples-to-oranges problem, which, as one scholar put it, allowed agencies to get credit for "removing 22 Peter Rabbit books from the regulators' shelves for every one War and Peace."

*Recommendation*: OIRA should continue to report the ratio of significant regulatory actions to significant deregulatory actions, in addition to other reporting on the number of actions.

## 2. Reconsider allowing agencies to count multiple effective date delays

The FY 2017 and FY 2018 Regulatory Reform Reports demonstrate that agencies get deregulatory credit for repeated delays of the same regulation's effective date. For instance, all four of the significant deregulatory actions credited to the Department of Education (ED) for FY 2018 are effective date delays, and two of these are separate delays of the same regulation (i.e., the Borrower Defense rule). Treating these delays as additional "counts" creates incentives to delay rules in an iterative way, which can lead to unnecessary confusion.

At the beginning of the Trump administration, agencies delayed the effective date of a large number of rules. That number has been in decline more recently, so this issue might largely be moot. If agencies continue, though, to extend effective dates, OIRA should not give them deregulatory credit in the form of "counts"—although it would still be appropriate to credit the agency with any incremental cost savings generated by delayed compliance.

*Recommendation*: OIRA should prevent agencies from receiving multiple deregulatory "counts" for effective date delays of the same rule.

## 3. Disclose "other" actions

Another important factor affecting the accuracy of the Regulatory Reform Report is the degree to which rules are correctly categorized under the appropriate EO 13771 designation. The designation (e.g., deregulatory, regulatory, other) affects accounting for both counts and costs. OIRA's guidance states that agencies should designate their rules as "other" only when "either the available information is too preliminary to determine EO 13771 status or other circumstances preclude a preliminary…designation." Even a single incorrectly designated rule can have substantive impacts on an agency's final accounting and, therefore, its performance under EO 13771.

The Regulatory Reform Reports for FY 2017 and FY 2018 did not offer a list of actions categorized as "other" for purposes of EO 13771. This moves them into something of a blind spot because that information is not readily obtained elsewhere. It might be contained in the agency preambles of the final rules, but for actions that are not rules, this information is generally not available. And, while the designation might be added to the *Unified Agenda*, that information might not be correct, and again it does not cover

all actions. An annual accounting from OIRA could ensure that the information is displayed correctly and alongside other relevant information.

*Recommendation*: OIRA should list the actions it designated as "other" for EO 13771 purposes in its annual Regulatory Reform Report.

## 4. Confer EO 13771 designations in a consistent manner

Relatedly, OIRA should be scrupulous with the application of its definitions for regulatory and deregulatory actions. Failure to do so risks incoherence in the accounting. A final rule issued this year highlights the importance of consistency.

When USDA issued its final rule to establish a National Bioengineered Food Disclosure Standard, the preamble estimated "that the costs of the NBFDS would range from $569 million to $3.9 billion for the first year, with ongoing annual costs of between $51 million and $117 million." On that basis, the final rule appears to be regulatory. In the preamble of the final rule, however, USDA argues that the action is deregulatory. The distinction has practical consequences. If the rule is "regulatory" that would require the agency to eliminate two existing rules and offset approximately $3.4 billion in present value costs from the rule.

We will not know how OIRA treats this economically significant rule until its FY 2019 report is issued. If OIRA concurs with USDA and lists this as a deregulatory action and credits the agency with cost savings, then agencies might successfully argue that any regulatory action that preempts future state-level regulation (e.g., a federal privacy rule preempting state-level rules) is deregulatory—even if it imposes substantial costs on society. We find this troublesome and encourage OIRA to apply its definitions consistently, even when state preemption is involved.

*Recommendation*: OIRA should confer its deregulatory and regulatory designations in a consistent manner that does not create incoherence across agency actions.

## 5. Improve transparency on individual actions

Every individual EO 13771 action should publicly disclose the costs or costs savings attributable to that action. For rules, this should be in the *Federal Register* notice. For other actions, it should be included in the materials that are made available to the public about the action. This will help the public provide comments on the agencies' estimates. It will also facilitate verification on the back end when OIRA reports the totals, which is currently not possible for most actions.

Some agencies include moderately detailed information in, for example, their final rule's preamble in a section labeled "EO 13771." It is rarely enough detail, however, for the public to independently derive the numbers in the Regulatory Reform Reports. And, for actions that are not rules, e.g., guidance documents, detailed estimates almost never accompany the action.

Furthermore, agencies should document the methodological assumptions and analytical choices used for estimating the cost savings of EO 13771 actions. For economically significant actions, agencies often conduct a benefit-cost analysis over the rule's finite timeframe (e.g., 20 years) for compliance with EO 12866 and provide another analysis over an infinite timeframe for compliance with EO 13771. Agencies should clearly show how they translate the EO 12866 analysis into a perpetual time horizon. For actions without a benefit-cost analysis, agencies should provide the analysis of costs and cost savings under EO 13771, including methodological choices, and publish the results. This analysis is presumably already being completed if it gets folded into OIRA's annual reports. Disclosing this analysis will permit other agencies, researchers, and the public to evaluate methodological consistency and verify results.

*Recommendation*: Agencies should provide enough detail in their regulatory and deregulatory actions to recreate the cost and cost savings estimates, including key methodological assumptions like the long-term cost pattern of each rule.

## 6. Improve transparency on OIRA's report for individual actions

Relatedly, the individual costs or cost savings attributable to each action subject to EO 13771 should also be reported in OIRA's Regulatory Reform Reports. In the FY 2017 and FY 2018 Regulatory Reform Reports, OIRA provided agency totals rather than individual rule costs & cost savings. Because individual agency actions do not provide enough information for the public to derive these estimates, there is no way to independently derive OIRA's totals.

OIRA presumably builds its agency-wide figures using estimates from each action, so this information should already exist. Disclosing the costs or cost savings for each action would allow others to verify the totals in the annual reports.

*Recommendation*: OIRA should disclose the cost or cost savings estimates for each regulatory and deregulatory action, in addition to providing agency totals.

## 7. Update the "accounting methods"

OIRA's *Accounting Methods* were drafted in the early days of EO 13771 implementation. OIRA should update this document to reflect its experience with these definitions and methods. At a minimum, OIRA should provide more detail on the methodology, including clearer presentation of its formulas and examples of how the methodology applies to different types of rules.

A good place to start would be supplementing the *Accounting Methods* with a detailed discussion of different examples. The *Accounting Methods* acknowledges that temporary delays of final rules are treated differently than actions that have ongoing effects, but it does not offer guidance on how agencies should assess those effects. With more experience implementing EO 13771, OIRA might now be in a position to offer more detailed guidance.[13] In addition, the *Accounting Methods* could explain that a withdrawal of a proposed rule does not produce cost savings because none of the projected costs and benefits are yet in effect, and it could also explain how agencies should analyze the final rule that follows an interim final rule. In essence, expanded documentation should provide various examples of how OIRA's chosen analytical approach adapts to different contexts.

Expanded documentation is also important for encouraging and verifying agencies' compliance with best practices. As discussed earlier, agencies must make crucial assumptions when applying a perpetual time horizon to EO 13771 actions, and these decisions can have large effects on the size of estimated cost savings. Supplementary guidance that provides clear direction on important methodological choices would assist agencies with conducting EO 13771 analyses in a consistent manner and equip researchers to evaluate and assess those analyses.

*Recommendation*: OIRA should update its accounting methods documentation in light of its experience with different types of rules and clarify best practices on using a perpetual time horizon.

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13. For a delay, our understanding is that the cost savings would generally be calculated as the difference between the stream of costs for the original time horizon and the discounted value of the delayed stream of costs. This is similar to how the Food and Drug Administration (FDA) calculated the cost savings in its RIA for a final rule on food labeling (p. 11).

## 8. Provide transparency into regulatory cost caps

Not much is known about how the annual regulatory cost caps are set. OIRA published a table in its FY 2017 and FY 2018 Regulatory Reform Reports showing the caps applicable to the following fiscal year. The caps are presented with a level of precision that suggests they are built by summing estimates for individual actions, but those actions are not disclosed and neither are their individual costs and cost savings. Additionally, there is no way to discern whether cost caps for subsequent fiscal years take into account an agency's past performance in producing cost savings or whether they are generated using a blank slate. While there are likely reasonable limits on how much information should be disclosed, more granular information about the contents of the caps, combined with the forward-looking regulatory data in the *Unified Agenda*, could provide the public with considerable insight into the magnitude of the actions the administration expects to take place over the coming fiscal year.

Such a disclosure would not bind the administration to its plans, just like the contents of the *Unified Agenda* are generally viewed as plans rather than commitments. Both the regulatory caps and the requirement to include forthcoming actions in the *Unified Agenda* can be waived by the OMB Director, so this disclosure would not limit agency discretion.

*Recommendation*: OIRA should provide more granular information on the regulatory cost caps to inform the public of those actions that the administration expects to issue over the coming fiscal year.

## 9. Include information on agency banking and transfers

OIRA allows agencies to bank and transfer deregulatory counts and cost savings, but the FY 2017 and 2018 Regulatory Reform Reports do not provide an accounting of either. Although these disaggregated data would not change the administration's reported topline numbers, they would be helpful in estimating individual agency performance in complying with the requirements of EO 13771—particularly across fiscal years. Additionally, this would clarify whether agencies have, to date, availed themselves of the ability to transfer regulatory savings to other agencies.

*Recommendation*: OIRA reporting should include data on agency banking of deregulatory action counts and transfers of cost savings to other agencies.

## 10. Facilitate open data and independent research

Reports are currently provided in PDF format only. They should also be available as a spreadsheet (preferably .xlsx format) to facilitate research and analysis. OIRA should include all the report results in one spreadsheet, or a single Excel workbook with multiple tabs.

The data could also be restructured to facilitate independent research because their current format is unfavorable to data analysis. The *Completed Actions* PDF for FY 2018 has two columns: one for each action's unique identifier and a second for the title of the rulemaking. The actions are sorted by agency; an asterisk indicates a significant action; and shading implies a regulatory action (versus no shading for a deregulatory action). The *Final Accounting* PDF for FY 2018 has a column for agency, number of deregulatory actions, number of regulatory actions, and present value cost savings.

In its current format, the documentation is incompatible with systematic study of the data reported each year. For instance, denoting an action's regulatory or deregulatory status with shading would not be machine-readable for data processing or compatible with statistical software. Similarly, indicating significance through an asterisk in the same column as the unique identifier, as the FY 2018 report does, corrupts the Regulation Identifier Number (RIN).

To improve the documentation of these important factors, a combined spreadsheet should include columns for agency, significance, and regulatory/deregulatory action status. Furthermore, as noted above, itemized cost savings per each deregulatory or regulatory action should be reported, summing to the total agency figures. While it may be appropriate to report topline figures by agency in an accompanying PDF version, the spreadsheet should include the itemized numbers for each action. Table 3 illustrates an example of how a combined spreadsheet could be arranged to facilitate independent research and analysis.

**Table 5: Example Spreadsheet for Combined Results[14]**

| RIN | Rule Title | Agency | Significance | Action Type | Itemized Costs | Agency Total |
|---|---|---|---|---|---|---|
| 0579-AC60 | NEPA Implementing Procedures | USDA | 1 | Deregulatory | -500.0 | -397.7 |
| 0579-AD99 | Animal Welfare... | USDA | 0 | Deregulatory | -50.0 | -397.7 |
| 0560-AI39 | Crops, Trees, Bushes, and Vines Assistance... | USDA | 1 | Regulatory | 152.3 | -397.7 |
| 0610-AA69 | Updates to PWEDA Regulations | Commerce | 1 | Deregulatory | -814.4 | -814.4 |

*Recommendation*: OIRA should facilitate independent research and analysis by making the data in the Regulatory Reform Reports available as a spreadsheet and integrating the *Completed Actions* and *Final Accounting* document into a single spreadsheet or workbook.

## Conclusion

Executive Order 13771 outlined a broad vision of additional constraints on agency rulemaking but largely left it to OMB and OIRA to fill in the details. Guidance issued by OIRA currently instructs agencies on how to implement EO 13771, and its annual Regulatory Reform Reports are the primary source of data on agency performance in meeting the order's requirements. This article describes EO 13771 as currently implemented and offers recommendations for improving the accuracy and accountability of both OMB's annual reporting and individual agency actions.

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14. Itemized costs are included for illustration only and are not intended to accurately characterize the estimated effects of the rules listed as examples. We used examples from the FY 2018 *Completed Actions* document.

# Summary of recommendations

As explained above, we recommend that OIRA:

1. Continue to report the ratio of significant regulatory actions to significant deregulatory actions, in addition to other reporting on the number of actions.
2. Prevent agencies from receiving multiple deregulatory "counts" for effective date delays of the same rule.
3. List the actions it designated as "other" for EO 13771 purposes in its annual Regulatory Reform Report.
4. Confer its deregulatory and regulatory designations in a consistent manner that does not create incoherence across agency actions.
5. Work with agencies to ensure they provide enough detail in their regulatory and deregulatory actions to recreate the cost and cost savings estimates, including key methodological assumptions like the long-term cost pattern of each rule.
6. Disclose the cost or cost savings estimates for each regulatory and deregulatory action, in addition to providing agency totals.
7. Update its accounting methods documentation in light of its experience with different types of rules and clarify best practices on using a perpetual time horizon.
8. Provide more granular information on the regulatory cost caps to inform the public of those actions that the administration expects to issue over the coming fiscal year.
9. Include data on agency banking of deregulatory action counts and transfers of cost savings to other agencies.
10. Facilitate independent analysis by making the data in the Regulatory Reform Reports available as a spreadsheet and integrating the *Completed Actions* and *Final Accounting* documents into a single spreadsheet or workbook.

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