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Public Interest Comment¹ on

The Office of Management and Budget's Document

Marginal Excess Tax Burden as a Potential Cost under EO 13771

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Office of Management and Budget's document on including marginal excess tax burden as a potential cost under Executive Order 13771 does not represent the views of any particular affected party or special interest, but it is designed to evaluate the effect of OMB's proposal on overall consumer welfare.

Introduction

Executive Order (EO) 13771 of January 30, 2017 imposed new regulatory procedures on executive branch agencies by directing them to (1) eliminate two existing rules for each new rule issued and (2) offset costs imposed by new rules through compliance with an incremental regulatory budget.³ To implement Section 2 of the order, the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) published interim guidance on February 2,

¹ This comment reflects the views of the author and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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³ Executive Order 13771 of January 30, 2017, "Reducing Regulation and Controlling Regulatory Costs," 82 FR 9339, <https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf>.

2017.⁴ OIRA accepted comments on the interim guidance until February 10, 2017.⁵ After considering the comments received, OIRA published guidance on April 6, 2017 that supplemented and superseded the interim guidance.⁶

OIRA tracks the administration’s regulatory reform efforts and compiles the results from each fiscal year (FY) in an annual report. Along with the FY 2017 report, OIRA published accounting methods for calculating regulatory costs and cost savings.⁷ These accounting methods were revised for the two subsequent reports in FY 2018⁸ and FY 2019.⁹ With the release of the Regulatory Reform Results for FY 2019, OMB requested “feedback on potentially capturing, in future-year EO 13771 accounting, part or all of the real resource burden associated with regulations that have government budget impacts.”¹⁰ In particular, OMB is interested in feedback on incorporating “marginal excess tax burden” (METB) as a potential cost under EO 13771. The request for comment was also published on Regulations.gov with a submission deadline of February 20, 2020.¹¹

This public interest comment responds to OMB’s request for comment in two ways. First, I focus on the general implementation of EO 13771 accounting because it has significant implications for properly addressing the METB issue. Second, I offer comments on three of the topics specifically outlined by OMB.

⁴ OMB, “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled ‘Reducing Regulation and Controlling Regulatory Costs’,” February 2, 2017,

https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/eo_interim_guidance_reducing_regulations_controlling_regulatory_costs.pdf.

⁵ OIRA included an email address in the interim guidance for providing comments and subsequently posted its notice and the comments received on regulations.gov at Docket ID: OMB-2017-0002.

⁶ OMB, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’,” M-17-21, April 5, 2017,

<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

⁷ OIRA, “Accounting Methods for Calculating Costs under Executive Order 13771,” web archived February 10, 2020:

https://web.archive.org/web/20200210194652/https://www.reginfo.gov/public/pdf/eo13771/FINAL_AM_12072017.pdf.

⁸ OIRA, “Accounting Methods under Executive Order 13771,” web archived January 10, 2019:

https://web.archive.org/web/20190110043900/https://www.reginfo.gov/public/pdf/eo13771/EO13771_accounting_methods.pdf.

⁹ OIRA, “Accounting Methods under Executive Order 13771,” web archived February 10, 2020:

https://web.archive.org/web/20200210215549/https://www.reginfo.gov/public/pdf/eo13771/EO13771_accounting_methods.pdf.

¹⁰ OIRA, Regulatory Reform Results for Fiscal Year 2019, web archived February 10, 2020:

<https://web.archive.org/web/20200210220112/https://www.reginfo.gov/public/do/eAgendaEO13771>.

¹¹ Docket ID: OMB-2017-0002, <https://www.regulations.gov/docket?D=OMB-2017-0002>.

General Comments on EO 13771 Accounting

According to OMB guidance, the implementation of EO 13771 is intended to be applied consistent with the requirements of EO 12866 and the guidelines of Circular A-4.¹² Thus, when considering a more expansive analysis of costs under EO 13771, OMB should first look to the provisions of Circular A-4. In general, OMB should consider how conducting better EO 12866 analysis would produce more comprehensive accounting under EO 13771.

EO 12866 requires each agency to “identify the problem that it intends to address” and “assess the significance of that problem.”¹³ In light of that principle, if an important category of costs (or benefits) are being omitted from regulatory impact analysis (RIA), OMB should consider rectifying the source of the inadequate analysis rather than simply changing the implementation of EO 13771. In essence, OMB should first focus on incorporating METB into agency RIAs before adding those costs into EO 13771 accounting practices. As OMB discussed in the request for comment,¹⁴ “Circular A-94 represents the agency’s clearest public statement on the METB issue” but that “[t]he directive to include METB in supplementary analysis is not extensively explained in Circular A-94.”¹⁵ Determining how to clarify the directives on METB introduced in Circular A-94 would be a useful starting point for OMB.

Relatedly, how agencies translate the costs from a regulatory action’s RIA into the costs reported for EO 13771 should be clearly evident in the rulemaking’s preamble and supporting analyses. OMB should revise its guidance implementing EO 13771 and/or the accounting methods under EO 13771 to direct agencies on how to convert their EO 12866 analysis into an analysis for EO 13771.¹⁶ When no RIA exists for an EO 13771 action, OMB should direct agencies to conduct an analysis of the action’s costs using analytical methods consistent with EO 12866.¹⁷ As a result, the assessed costs (or cost savings) across both significant and non-significant actions will be produced in a methodologically consistent manner.

¹² See, e.g., OMB Guidance 2017, M-17-21: Q13, Q21, Q22, Q26, Q27, and Q32.

¹³ Executive Order 12866 of September 30, 1993, “Regulatory Planning and Review,” 58 FR 51735, <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

¹⁴ OMB-2017-0002-0055, “Marginal Excess Tax Burden as a Potential Cost under EO 13771,” posted December 6, 2019, <https://www.regulations.gov/document?D=OMB-2017-0002-0055>.

¹⁵ OMB-2017-0002-0055, footnote 1.

¹⁶ See, recommendations 5 and 7 in the PDF article attached to this docket. Also available online at: Bridget C.E. Dooling, Mark Febrizio, and Daniel R. Pérez, “[Accounting for regulatory reform under Executive Order 13771](#),” Brookings Institution, *Series on Regulatory Process and Perspective*, November 7, 2019.

¹⁷ While all E.O. 13771 regulatory actions are significant and must be accompanied by an RIA under EO 12866, some EO 13771 deregulatory actions are not designated as significant and thus might not be submitted with an RIA. In those instances, agencies should conduct an analysis of the effects considered under EO 13771 using analytical methods consistent with EO 12866. In other words, even if an agency does not conduct a complete RIA for a non-significant deregulatory action, any costs or cost savings claimed by the agency for that action should be calculated in a manner consistent with an economic analysis under EO 12866.

Finally, OMB should locate all guidance documents pertinent to EO 13771 in one centralized place. Preferably, this location would be clearly accessible from OIRA's Regulatory Reform Status Report on Reginfo.gov.¹⁸ Systematizing relevant guidance documents would facilitate compliance by agency staff and enhance public understanding of the implementation of EO 13771.

Responses to Specific Topics

In the request for comment, OMB welcomed input on relevant topics and included a list of eight questions to guide the commenting process.¹⁹ Below, I offer answers to three of those specific questions.

Q1: Of the range of available METB scaling factors (25% per Circular A-94, 50% per the 2019 Economic Report of the President, etc.), which estimate should be highlighted as primary? Does one rule of thumb suffice across regulations and agencies? Should the same METB scaling factor be applied for impacts experienced by federal, state and local governments?^[OMB footnote 4] How might context, such as deficit spending vs. balanced budgets, affect the choice of an METB estimate?

These questions underscore the need for a thorough revision of how to handle METB estimates in agency economic analysis. Other than periodically updating discount rates in Appendix C, OMB last revised Circular A-94 in 1992.²⁰ OMB should evaluate whether more comprehensive application of the concepts in Circular A-94 to analyses under EO 12866 and EO 13771 is warranted.

Q4: Should OMB supplement our guidance for standardizing EO 13771 accounting, particularly on time horizons (currently required to be perpetual), to help extrapolate from the shorter time periods often used for budget spending analysis?

Yes, OMB should supplement the guidance for standardizing EO 13771 accounting. Clarifying best practices on time horizons in EO 13771 analysis is especially crucial. As colleagues and I have demonstrated elsewhere, the assumptions an agency makes about the long-term cost pattern of a rule have key implications for estimating present value costs.²¹ I recommend that OMB take steps to ensure that agencies implement EO 13771 in a transparent manner:

¹⁸ Currently accessible at: <https://www.reginfo.gov/public/do/eAgendaEO13771>.

¹⁹ See, OMB-2017-0002-0055, pp. 2-3.

²⁰ See, "Discount Rates for Cost-Effectiveness Analysis of Federal Programs," 84 FR 70574, <https://www.federalregister.gov/documents/2019/12/23/2019-27575/discount-rates-for-cost-effectiveness-analysis-of-federal-programs>.

²¹ Dooling, Febrizio, and Pérez, pp. 14-15 (attached to this docket).

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.²²

Even without including new provisions on METB estimates, the accounting methods deserve an update to increase the transparency and accountability of the application of EO 13771. As I argued elsewhere (along with my co-authors), updating the accounting methods would communicate OMB's experience with different types of rules and clarify best practices on using a perpetual time horizon:

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.²³

²² Dooling, Febrizio, and Pérez, p. 19 (attached to this docket).

²³ Dooling, Febrizio, and Pérez, p. 20 (attached to this docket).

Q5: Should accounting changes (if any) be phased in, with METB immediately included for rules both proposed and finalized after any revision of the EO 13771 implementation guidance and omitted for rules previously proposed (but finalized relatively soon after guidance revision)?^[OMB footnote 8]

As OMB mentions in the request for comment, the implementation of Circular A-4 was phased in after it was issued in September 2003.²⁴ Providing a similar phase-in period would be wise to ensure buy-in among agencies and facilitate the correct application of the new guidelines.²⁵ Further, OMB may consider various methods to encourage agencies to implement the new guidelines early.

Conclusion

OMB's document soliciting comments on integrating METB as a potential cost under EO 13771 presents an occasion to review the accounting for EO 13771 more broadly. Below, I summarize my recommendations in this public interest comment:

1. OMB should first focus on incorporating METB into agency RIAs before including those costs in the accounting methods under EO 13771. Clarifying the application of Circular A-94 to the METB issue would be a useful starting point.
2. OMB should revise its guidance implementing EO 13771 and the accounting methods under EO 13771 to direct agencies on how to translate their EO 12866 analysis into EO 13771 analysis. Optimally, each EO 13771 action's costs (or cost savings) should be clearly presented in the promulgating agency's preamble and supporting analyses.
3. OMB should locate all guidance documents pertinent to EO 13771 in one centralized place that is clearly accessible from the Regulatory Reform Status Report on Reginfo.gov.
4. OMB should direct agencies to clearly show how they translate an EO 12866 analysis over a finite time horizon into an EO 13771 analysis over a perpetual time horizon. OMB should ensure that the results are publicly published.
5. If OMB changes the accounting methods to include METB as a cost under EO 13771, OMB should provide a phase-in period to facilitate compliance and proper application by agencies.

²⁴ OMB-2017-0002-0055, footnote 8.

²⁵ For example, the 2018 memorandum of agreement (MOA) between the U.S. Department of the Treasury and OMB illustrates the importance of negotiation and buy-in when implementing substantial changes to an agency's analytical obligations: *see*, Bridget C.E. Dooling, "Expanding OIRA Review to IRS," GW Regulatory Studies Center Working Paper, May 28, 2019, <https://regulatorystudies.columbian.gwu.edu/expanding-oira-review-irs>.