ONE FOR THE PRICE OF TWO: THE HIDDEN COSTS OF REGULATORY REFORM UNDER EXECUTIVE ORDER 13,771

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* This comment is dedicated to my husband, William, our two children, Natalie and John, my parents, Alice and Richard Warwick, and my brother, Michael Warwick, for their unwavering love and support. I would also like to thank the *Administrative Law Review* staff for their thoughtful guidance and mentorship, particularly Austin Egan who provided much valuable feedback along the way. Special thanks to Professor Mark Niles for advising me and overseeing this comment.

INTRODUCTION

Actions taken by President Donald J. Trump in the early weeks of his presidency threaten to significantly impact the administrative state by requiring agencies to engage in imprudent deregulation. While the calls for and rhetoric regarding regulatory reform are not new,[1] for the first time a new administration has imposed requirements on administrative agencies in a way that impedes their ability to implement regulations, leading to potentially dangerous consequences.[2] Executive Order 13,771[3] is the first presidential action since the inception of the Administrative Procedure Act (APA)[4] that requires agency deregulatory action as a mandatory condition for promulgating new regulations. Executive Order 13,771 specifically requires administrative agencies to eliminate two regulations for each new regulation proposed (i.e., two-for-one).[5] Executive Order 13,771 also requires agencies for the first time to work within a regulatory budget framework that focuses solely on net costs and does not measure nor account for benefits.[6]

The governing framework for administrative agency rulemaking is derived from the APA.[7] The APA gives administrative agencies broad discretion to promulgate regulations within the parameters of each agency's legal authority and establishes the minimum procedural requirements agencies must adhere to when exercising this rulemaking authority.[8] This authority is not, however, without bounds. Agencies can only regulate in accordance with the authority conferred upon them by Congress.[9] The reasons for, and

1. *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 181 (1986); *see also* Sidney Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation*, CTR. PROGRESSIVE REFORM 1 (2011) (responding to an onslaught led by the United States House of Representatives on the purported ills of federal regulations, which consisted of numerous congressional hearings and the introduction of several bills seeking to impede the regulatory process and devalue regulation).

2. *See, e.g.*, Rick Melberth et al., *The Dangers of Formulaic Deregulation*, REG. REV. (July 20, 2017), https://www.theregreview.org/2017/07/20/melberth-bass-lake-dangers-formulaic-deregulation.

3. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

4. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012).

5. Exec. Order No. 13,771, 82 Fed. Reg. at 9339.

6. *Id.*

7. 5 U.S.C. §§ 551–559, 701–706; JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 3 (5th ed. 2012).

8. 5 U.S.C. § 553(b).

9. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 258 (2006) (discussing whether *Chevron* deference applies to a particular rulemaking action, the Court noted that as a starting point the promulgated rule must be in alignment with the authority delegated by Congress).

the intended goals of, federal regulation are specific to each administrative agency's central purpose and the substantive area it governs in accordance with its enabling statutes.[10]

The broad regulatory authority vested in administrative agencies is understandably subject to scrutiny and criticism.[11] While a healthy amount of skepticism promotes agency accountability and regulatory responsibility,[12] the latest directive requiring deregulation is misguided and unlikely to achieve its purpose.[13] Mandating the elimination of two regulations for each new regulation issued will significantly impair administrative agencies in their efforts to promulgate regulations to solve emerging problems and to improve existing safeguards, as science may dictate.[14] Hampering agency rulemaking authority in this way is contrary to congressional intent as evidenced by the broad authority conferred upon agencies under the APA.

Two agencies—the Food and Drug Administration (FDA) and the Department of Transportation (DOT)—both with an interest in promoting public health, safety, and welfare, are highlighted throughout this comment to show the actual and potential impact of President Trump's deregulatory agenda on those interests. Part I discusses the importance of engaging in a cost-benefit analysis in the regulatory decisionmaking process, and contends that the two-for-one Executive Order threatens that kind of reasoned analysis

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10. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973) (upholding an agency's rulemaking action in part because it fell within the agency's central purpose as agreed by Congress).

11. *See Over-regulated America*, ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547789 (calling for simplicity in the way regulations are written due to the significant burdens imposed by regulations that are far too complex); *see also* Frank Newport, *Americans Leery of Too Much Gov't Regulation of Business*, GALLUP NEWS (Feb. 2, 2010), http://news.gallup.com/poll/125468/americans-leery-govt-regulation-business.aspx (citing polling data showing that the average American is generally concerned about the degree to which the government regulates businesses).

12. *See generally* Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1168–69 (1994) (agreeing, as part of a team of scholars gathered to discuss the National Performance Review's regulatory reform recommendations, that the group could recommend neutral procedural reforms with the common goal of producing better regulation).

13. *See* Caroline Cecot & Michael A. Livermore, *The One-In, Two-Out Executive Order is a Zero*, 166 U. PA. L. REV. 1, 1–2 (2017) (finding implausibility in the two-for-one Executive Order achieving its stated goals in any sensible fashion).

14. *See, e.g.*, Scott Slesinger & Robert Weissman, *Donald Trump's Unconstitutional Executive Order on Regulations*, REG. REV. (May 17, 2017), https://www.theregreview.org/2017/05/17/slesinger-weissman-unconstitutional-executive-order.

by moving to a cost-only focus. Part I also discusses newly established regulatory task forces and how the makeup of those task forces presents conflicts of interest, citing an example within DOT. Part II asserts that the two-for-one Executive Order is unlawful because it exceeds the authority vested in the President under the Constitution, and introduces a clearly arbitrary element upon which agencies must now rely in the regulatory process. Part II also discusses an FDA rulemaking action that has been negatively impacted by the two-for-one Executive Order and is now being held in abeyance. Part III explains why the two-for-one Executive Order is not a viable measure using a DOT safety regulation as a case study. Part III also includes a recommendation designed to promote regulatory responsibility and agency accountability. Specifically, agencies should be required to develop measures to retrospectively review all existing regulations, including renewed economic impact analyses where appropriate, and engage in a recurring review of regulations going forward on a cyclical basis.

I. FEDERAL RULEMAKING FACES UNPRECEDENTED CHALLENGES

A. Justifying the Need for Regulations Considering Both Costs and Benefits

Regulations are necessary to protect the health, safety, and welfare of individuals living in the United States, and administrative agencies are best suited to promulgate regulations at the federal level.[15] While regulations may impose large costs on businesses and industries,[16] those costs are necessary to achieve desired outcomes and are substantiated through the cost-benefit analysis required as part of the rulemaking process, at least since 1993.[17] President Clinton sought to address the concerns associated with costly regulation by focusing on Office of Management and Budget (OMB) oversight of significant regulatory actions in Executive Order 12,866.[18] The Clinton

15. *See* ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 71 (3d ed. 2016) (explaining that the legislative branch, at both the federal and state levels, is not poised to identify necessary and appropriate regulatory requirements considering the pace at which technology advances; rather, administrative agencies are best suited to perform the role of regulatory rulemaking).

16. *See, e.g.*, Jeff Rosen, *Putting Regulators on a Budget*, NAT'L AFF. J., Spring 2016, at 42, 45.

17. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). *See generally* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-4, REGULATORY ANALYSIS (2003) (guiding agencies through key considerations in the rulemaking process, including cost-benefit analysis).

18. Exec. Order No. 12,866, 58 Fed. Reg. at 51,735 (defining a "significant regulatory action" as one that has an annual economic impact of $100 million or more, one that raises novel legal policy issues, etc.).

Executive Order, for example, established regulatory principles requiring agencies to: (1) identify the problems and the significance of the problems they seek to address; (2) consider whether existing regulations impact those problems and whether amending existing regulations is prudent; (3) identify alternative approaches; and (4) develop regulations in the most cost-effective way possible to achieve desired goals.[19] In accordance with President Clinton's Executive Order, agencies are required to examine the costs and benefits associated with regulatory actions and are expected to make a rational conclusion that the cost of any regulatory action proposed is justified by the benefits it is expected to yield.[20] These regulatory principles have remained in effect under subsequent administrations, including the current Administration.[21] Thus, at least in theory, both costs and benefits remain key features of analysis as part of agency rulemaking.

The underlying premise of cost-benefit analysis is simple—it models what businesses do; one example is by measuring the cost of producing a particular product against the likelihood that consumers will purchase the product, resulting in a net profit.[22] Carried over into the governmental regulatory world, however, this seemingly simple premise is far more complex. As part of this analysis, regulators seek to determine the costs regulated entities will necessarily assume as a result of implementing a new regulation.[23] Next, and undisputedly more intricate, regulators must attempt to identify the benefits such regulations will yield, and attempt to quantify such benefits.[24]

Justifying the need for a regulation based on the benefits it will yield is an arduous task in part because various segments of society value benefits differently—what is important to one may not be important to another.[25] Further, when it is difficult to quantify the value of benefits monetarily, in some

19. *Id.*

20. *Id.*

21. Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (indicating that one of the duties of a regulatory reform officer is to oversee regulatory reform initiatives, including Executive Order 12,866 as it relates to regulatory planning and review).

22. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environment Protection*, 150 U. PA. L. REV. 1553, 1556 (2002) (explaining how governmental regulatory cost-benefit analysis mirrors the standard market functionality prevalent in the private sector).

23. *See id.* at 1557.

24. *See id.*

25. *See generally id.* at 1566–67 (noting a distinction in how benefits are valued depending on whether one is acting in his role as private consumer or a public citizen).

instances economists attempt to create artificial prices, for example, by polling individuals to determine what value they attach to certain benefits.[26] Another method economists use is to observe how consumers behave in various markets.[27] The valuation of benefits is thus subjective by nature and open to interpretation and criticism.[28] Nonetheless, critics cannot overlook the conundrum regulators face when tasked with promulgating regulations to protect the health, safety, and welfare of human life—the compliance costs of which may come with an obvious price tag—and the inherent difficulty of quantifying the benefits such regulations are expected to yield.[29]

Consider the FDA, for example, which is charged with promoting and protecting the public health.[30] To carry out its mission, the FDA is required to ensure that: (1) food is safe for public consumption; (2) drugs are safe and effective; (3) devices intended for human use are reasonably expected to be safe and effective; (4) cosmetics are safe and adequately labeled; and (5) the public is protected from electronic product radiation.[31] The FDA also has authority to regulate tobacco products in the interest of public health.[32] The FDA has the sometimes impractical task of quantifying the health-related value of its regulations—an example being a regulation promulgated in 2016 to: (1) define "tobacco product" for the purpose of being subject to FDA regulatory authority; (2) prohibit the sale of tobacco products to anyone under the age of eighteen; and (3) require the display of health warnings on certain tobacco products.[33] In this rulemaking effort, the FDA stated that the direct

26. *See id.* at 1557–58 (citing the contingent valuation methodology which functions as an opinion poll through which researchers seek to quantify the value of items that cannot be purchased in a store by asking a subset of the population how much they would be willing to pay to safeguard such items).

27. *See id.* (providing an example of how economists attempt to assess the monetary value workers place on human life in the employment context—the extent to which two jobs are similar except that one is more dangerous and higher paid, workers who take the higher pay along with the greater risk of death essentially assign a dollar value to human life by voluntarily accepting that risk).

28. *See id.* at 1568 (asserting that cost-benefit analysis is generalized in a way that represents societal values as a whole and lacks context that may prove to be important to individual valuations).

29. *See generally* LISA HEINZERLING & MARK TUSHNET, THE REGULATORY & ADMINISTRATIVE STATE 528 (2006).

30. 21 U.S.C. § 393(b) (2012).

31. *Id.*

32. *Id.* § 387(a).

33. Tobacco Products Subject to FDA Authority, 21 C.F.R. § 1100 (2017); Cigarettes, Smokeless Tobacco, and Covered Tobacco Products, 21 C.F.R. § 1140 (2017); Minimum Required Warning Statements, 21 C.F.R. § 1143 (2017).

benefits of the regulation were difficult to quantify, but in the FDA's view the benefits nonetheless justify the costs.[34] The FDA found this rule necessary to reduce illness and death associated with tobacco use.[35]

A controversial provision of the FDA's 2016 tobacco product rulemaking is the regulation of the sale of e-cigarettes, which some consumers believe is a healthier alternative to smoking tobacco cigarettes.[36] Critics of the FDA tobacco product rulemaking action have expressed concern that it would suppress the innovation of e-cigarette manufacturers, leaving consumers to resort to traditional tobacco cigarettes.[37] Conversely, the FDA's position is that regulating e-cigarettes will nonetheless benefit public health because scientific data shows that e-cigarettes have the potential to cause harm, and regulation is a necessary step to learning more about that potential harm.[38]

To justify its assertion, the FDA notes that even though a category of products like e-cigarettes may be considered a better alternative to traditional tobacco cigarettes, certain products within that broader category, such as those that are marketed to younger individuals or that contain higher levels of toxicants, may not be.[39] The FDA, relying on its expertise, asserts that regulations are necessary to ensure product consistency in the concentration of chemicals used in these products.[40] While the FDA perceives the regulation of e-cigarettes to yield societal benefits, many critics perceive such regulation

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34. Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28,974, 28,981 (May 10, 2016).

35. *Id.* at 28,975 (explaining that subjecting tobacco products to the Federal, Food, Drug, and Cosmetic Act will significantly benefit the public health).

36. *See, e.g.*, Dennis Thompson, *Are E-Cigarettes Safer Than Tobacco? New Study Fires Up Debate*, CBS NEWS (Feb. 6, 2017, 6:10 PM), https://www.cbsnews.com/news/are-e-cigarettes-safer-than-tobacco-new-study-fuels-debate (citing a study showing that the carcinogen and toxicant levels of those who use e-cigarettes and completely stop smoking tobacco cigarettes is substantially reduced in the long term, as compared to those who smoke tobacco products).

37. *See, e.g.*, Guy Bentley, *GOP Senator Challenges FDA On Crushing E-Cig Regulations*, DAILY CALLER (May 19, 2016, 5:15 PM), http://dailycaller.com/2016/05/19/gop-senator-challenges-fda-on-crushing-e-cig-regulations (quoting Senator Ron Johnson who expressed concern that the regulation of e-cigarettes would in effect harm the e-cigarette industry, resulting in less innovation and consumers resorting to smoking tobacco cigarettes).

38. Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. at 28,983.

39. *Id.* at 28,984.

40. *Id.*

will have a detrimental effect.[41] The valuation of benefits, whether monetized or theoretical, is not purely objective and can depend on one's personal beliefs and priorities. Regardless, while difficult to quantify, benefits are a critical component of the regulatory framework—it is the benefits that regulations yield which justifies rulemaking.[42]

B. Executive Order 13,771: Moving from Cost-Benefit to Cost-Only

President Trump issued Executive Order 13,771 with the stated purpose of being fiscally prudent and responsible in managing the regulatory compliance costs that require the expenditure of private funds as imposed by agencies through rulemaking.[43] President Trump's Executive Order provides that for every new regulation an agency issues, the agency must identify at least two existing regulations for elimination.[44] Further, the Executive Order establishes a regulatory budget—a concept focused on limiting the extent to which regulators can impose compliance costs on regulated entities, similar to budgetary limits on agencies to spend taxpayer dollars.[45] Initially, this regulatory budget required the cost of all new regulations finalized in fiscal year (FY) 2017 to be no more than zero, including the cost of any regulations repealed, unless otherwise required by law or as directed by the OMB Director.[46]

On April 5, 2017, the Office of Information and Regulatory Affairs (OIRA) issued implementing guidance to address the requirements imposed by the two-for-one Executive Order.[47] The implementing guidance explains that a regulatory action under the two-for-one Executive Order is a significant regulatory action that imposes costs in any amount.[48] Conversely, a

41. *See id.* at 28,983; *see also* Christopher Russell, *Unintended Consequences of the FDA's E-Cigarette Regulations*, THE HILL (Aug. 25, 2016, 10:00 AM), http://thehill.com/blogs/pundits-blog/healthcare/292542-unintended-consequences-of-the-fdas-e-cigarette-regulations (agreeing with the Food and Drug Administration's (FDA's) efforts to regulate in this area on principle but noting concern that the regulation will have a negative impact on the e-cigarette industry leading to less innovation and resulting in harmful consumer behavior).

42. *See, e.g.*, Slesinger & Weissman, *supra* note 14.

43. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

44. *Id.*

45. *See id.*; *see also* Rosen, *supra* note 16, at 50–52; Jeffrey A. Rosen & Brian Callanan, *The Regulatory Budget Revisited*, 66 ADMIN. L. REV. 835, 837 (2014).

46. Exec. Order No. 13,771, 82 Fed. Reg. at 9339.

47. *See generally* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, NO. M-17-21, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13,771, TITLED "REDUCING REGULATION & CONTROLLING REGULATORY COSTS" (2017).

48. *See generally id.*; *see also* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)

deregulatory action is one that imposes negative costs.[49] A deregulatory action need not be "significant" as defined by President Clinton's Executive Order 12,866.[50] By definition, both regulatory and deregulatory actions are cost-focused, with no mention of benefits.[51]

The implementing guidance offers little information regarding how benefits are to be accounted for under the two-for-one Executive Order, with the exception of one paragraph stating that agencies must still consider benefits for all regulatory and deregulatory actions.[52] This one reference to considering benefits in the implementing guidance is at odds with the two-for-one Executive Order, given that agencies are now required to work within a regulatory budget that considers costs only.[53] This attempt to dress the two-for-one Executive Order in language supportive of cost-benefit analysis is flatly incompatible with the reality agencies now face.

On September 7, 2017, the OIRA Administrator issued a memorandum directing agency heads to prepare a proposed cost allowance for FY 2018, along with an explanation of how it was developed and how it aligns with President Trump's regulatory policies and priorities.[54] Agencies are expected to develop proposals that will generate a net reduction in regulatory costs and send those proposals to OIRA for review.[55] Since agencies were required to balance out at net zero total incremental costs for FY 2017, as dictated by the two-for-one Executive Order, the requirement to *further* reduce regulatory budgets means that agencies will be required to eliminate regulations in FY 2018 to reduce regulatory costs.[56] The regulatory budget by itself forces agency deregulatory action—even in the absence of intent to issue a

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(defining "significant regulatory action").

49. *See generally* OFFICE OF MGMT. & BUDGET, *supra* note 47.

50. *Id.*; *see generally* Exec. Order No. 12,866, 58 Fed. Reg. at 51,735.

51. *See generally* OFFICE OF MGMT. & BUDGET, *supra* note 47.

52. *See id.* (responding to question 32, the guidance states that agencies must still rely on Executive Order 12,866 as the principal governing authority on regulatory review and planning, and that agencies are required to continue analyzing both costs and benefits in compliance with the requirements that predate Executive Order 13,771).

53. *See* Avi Garbow & Bryson Smith, *Regulatory Reform Agenda Opens Door for Public Input*, LAW360 (May 4, 2017, 12:13 PM), https://www.law360.com/articles/919239/regulatory-reform-agenda-opens-door-for-public-input (discussing the clash the implementing guidance creates on this issue).

54. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, NO. M-17-31, FY 2018 REGULATORY COST ALLOWANCES (2017).

55. *Id.*

56. *See* Charles S. Clark, *Agencies Told to Cut Regulatory Budgets in Fiscal 2018*, GOV'T EXEC. (Sept. 11, 2017, 2:43 PM), http://www.govexec.com/management/2017/09/agencies-told-cut-regulatory-budgets-fiscal-2018/140894.

significant regulatory action, agencies must still find regulations to repeal to meet budget demands.[57]

Proponents of deregulation would argue that there are simply too many regulations that result in high costs and regulatory burdens on regulated entities including businesses, universities, hospitals, labor unions, and nonprofit organizations.[58] The factual basis for their argument is heavily reliant on numbers.[59] However, legal scholars question the validity of such data, weakening the notion that these numbers are indicative of a systemic problem.[60] Moreover, these proponents of deregulation overlook the fact that, according to OMB, benefits far exceed costs.[61] OMB's 2015 report on costs and benefits of federal regulation, for example, reflects that the ratio of total benefits to total costs ranges from approximately 4:1 to 10:1.[62] Yet under the two-for-one Executive Order, agencies must ignore those benefits and focus solely on reducing the costs of regulations to meet regulatory budget demands.[63] Consideration of costs simply cannot be divorced from consideration of benefits.[64] Imposing a fixed budget or cap on agency rulemaking,

57. *See id.*

58. *See generally* Rosen, *supra* note 16, at 43–44.

59. *See id.* at 45 (highlighting 2342 new rules proposed by federal agencies in 2015 and growth of the Code of Federal Regulations by nearly 12,000 pages since 2009); *id.* at 46 (citing a study estimating the total annual cost of regulations in 2008 to be nearly $1.75 trillion). *But see* Lisa Heinzerling & Frank Ackerman, *The $1.75 Trillion Lie*, 1 MICH. J. ENVTL. & ADMIN. L. 127 (2012).

60. *See* Heinzerling & Ackerman, *supra* note 59, at 128–29 (critiquing NICHOLE V. CRAIN & W. MARK CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS iv (2010), a study developed for the Small Business Association's Office of Advocacy, "The latest and biggest phony number being circulated by the anti-regulatory crowd is the figure of $1.75 trillion—supposedly the amount we in the United States spend every year on federal regulations. . . . The Crain and Crain report is, as Obama regulatory czar Cass Sunstein put it in recent congressional testimony, 'deeply flawed.'").

61. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2015 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 20 (2015), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf.

62. *See id.* at 1–2 (noting that for the previous decade, the total benefits of federal regulations were estimated at $261 billion to $981 billion, while total costs were only estimated at $68 billion to $103 billion, using 2010 dollars).

63. *See generally* OFFICE OF MGMT. & BUDGET, *supra* note 54.

64. *See, e.g.*, Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 509 (1981) (holding, in the context of the Occupational Safety and Health Act, that Congress's definition of the role of costs and benefits in the enabling statute placed a higher weight on the benefit of worker health, and any standard that struck a different balance was inconsistent with the intent of

with no consideration of lost societal benefits, is a step too far.

C. Executive Order 13,777: Deregulation at the Direction of Partial Decisionmakers

On February 24, 2017, President Trump issued Executive Order 13,777, which requires agencies to create regulatory task forces generally comprised of a regulatory reform officer, the agency regulatory policy officer, and a representative from the agency's central policy office.[65] The stated goals of these task forces are not problematic in theory—the Executive Order requires these task forces to serve in a review and advisory capacity consistent with the principles of retrospective review of existing regulations as encouraged by former presidents.[66] These task forces are charged with reviewing existing regulations and making recommendations as to which should be repealed, replaced, or modified.[67] They are directed to look specifically at those regulations that impact the job market, are no longer relevant or effective, cost more than the benefits they provide, are inconsistent with regulatory reform priorities, and so forth.[68] The mission of these task forces seems, on the surface, laudatory.

President Trump's regulatory task forces become problematic and conflict-ridden when their membership is revealed.[69] For example, a regulatory team established under DOT includes a top lobbyist on behalf of American Airlines who formerly held executive positions with trade associations representing major airlines and aerospace and defense companies.[70] On March 14, 2017, DOT suspended action on a proposed rule that would have imposed a requirement on airlines to disclose additional information to the public regarding fees—a move that was applauded by a trade organization that represents some of the largest airlines.[71] Three months later, on June 26, 2017, a former Senior Vice President for Safety, Security, and Operations at

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Congress).

65. *See* Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

66. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

67. *See* Exec. Order No. 13,777, 82 Fed. Reg. at 12,285.

68. *See id.*

69. *See* Danielle Ivory & Robert Faturechi, *Secrecy and Suspicion Surround Trump's Deregulation Teams*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/business/trump-deregulation-teams-transportation-department.html.

70. *See id.*

71. *See* Transparency of Airline Ancillary Service Fees, 82 Fed. Reg. 13,572 (Mar. 14, 2017); Justin Sablich, *Trump's Moves on Airline Fees Prompt Transparency Questions*, N.Y. TIMES (Mar. 28, 2017), https://nytimes.com/2017/03/28/travel/donald-trump-impact-of-airline-fees-on-tourism.html.

that same trade organization was appointed as Deputy Administrator for the Federal Aviation Administration (FAA), a sub-agency of DOT.[72] Despite the strong public support for the proposed regulation which would make airline fees more transparent to consumers, DOT issued the indefinite suspension to give the new President's appointees an opportunity to review and consider the proposed action.[73] The regulation was ultimately withdrawn on December 14, 2017, with a brief and generic statement indicating that the action was not necessary and the withdrawal is in line with the two-for-one Executive Order.[74]

Regulatory task forces, led in part by those who formerly represented business entities which new regulations will likely impact, may have an initial priority of changing rulemaking actions that will financially impact the business interests they seek to protect.[75] Suspending and withdrawing new regulations is not in alignment with the Executive Order establishing these task forces, which directs them to find existing rules that are outdated or ineffective.[76] Having those who previously worked in a regulated industry move into the governmental regulatory sphere may have merit based on their subject-matter expertise. However, when these leaders immediately suspend and then withdraw new regulations it is reasonable to question their motives.[77] This potential bias is further pronounced when the new regulations that are put on hold are the ones that directly impact the private entities whose interests these experts most recently represented.[78] Four House members wrote to the Directors of OMB and OIRA expressing concern about the

72. *Daniel K. Elwell, Acting Administrator*, FED. AVIATION ADMIN. (July 21, 2017), https://www.faa.gov/about/key_officials/elwell.

73. Transparency of Airline Ancillary Service Fees, 82 Fed. Reg. at 58,778.

74. *Id.*

75. *See generally* Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html (discussing multiple Trump appointees' deep industry ties and potential conflicts of interest).

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

77. *See generally* Rebecca Feldhaus Adams, *DOT Suspends Proposed Rule Requiring Airlines to Show Baggage Fee at Booking*, NPR (Dec. 12, 2017, 6:01 AM), https://www.npr.org/2017/12/12/569960317/dot-suspends-proposed-rule-that-would-force-airlines-to-show-baggage-fee-at-book (citing Associated Press reports indicating that trade groups, including Airlines for America where Elwell previously held an executive position, supported the decision to withdraw the regulation because airlines should have the freedom to determine how to market and advertise their products).

78. *See generally* Paul Rose & Christopher J. Walker, *Dodd-Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 STAN. L. REV. ONLINE 9, 14–16 (2013) (discussing the concerns with agency capture and the revolving door phenomena where regulators plan to return to the

lack of transparency with the creation of these task forces.[79]

II. THE LEGAL AND PRACTICAL CHALLENGES OF EXECUTIVE ORDER 13,771

A. Two-for-One is Unlawful

The two-for-one Executive Order is unlawful for two reasons: (1) it violates separation of powers principles and is thus unconstitutional; and (2) it imposes arbitrary and capricious standards upon which agencies must rely in exercising rulemaking authority. The Executive Order's legality is being challenged in a lawsuit brought by Public Citizen, Inc., a national non-profit consumer advocacy organization, together with an environmental and public health organization and the Communication Workers of America, AFL-CIO.[80] The lawsuit, brought in the United States District Court for the District of Columbia, seeks declaratory and injunctive relief against President Trump, the Director of OMB, and various agency heads.[81] While the claims have merit, the plaintiffs' standing to bring these claims is being challenged.[82] The Government asserts that the plaintiffs merely have a generalized grievance with no showing of individualized injury.[83]

Despite the standing challenges *Public Citizen* faces, on the merits the plaintiffs are on solid ground. The two-for-one Executive Order is unconstitutional because it exceeds the powers conferred upon the President in Article II.[84] It is the role of Congress to make laws.[85] It was Congress's exercise of

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private regulated industry).

79. *See* Charles S. Clark, *Democratic Lawmakers Challenge Secrecy of Trump Deregulation Task Forces*, GOV'T EXEC. (Aug. 7, 2017), http://www.govexec.com/oversight/2017/08/democratic-lawmakers-challenge-secrecy-trump-deregulation-task-forces/140052.

80. First Amended Complaint for Declaratory Relief and Injunctive Relief, Pub. Citizen, Inc. v. Trump, (D.D.C. Apr. 21, 2017) (NO. 1:17-CV-00253-RDM), 2017 WL 4508646 (challenging the lawfulness of Executive Order 13,771).

81. *Id.*, ¶ 1.

82. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 4–9, Pub. Citizen, Inc. v. Trump, (D.D.C. July. 21, 2017), (No. 1:17-CV-00253-RDM), 2017 WL 4508646.

83. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 555, 560 (1992) (stating that in order to support standing and survive a motion for summary judgment, plaintiffs bear the burden of showing that they "'suffered an injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical'").

84. U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed," not that the President has the authority to make law).

85. U.S. CONST. art I, § 8.

legislative authority that resulted in the passage of the APA in 1946.[86] Nothing in the APA's procedural requirements establishes that agencies must eliminate two regulations for each new regulation issued, as the two-for-one Executive Order mandates.[87] Establishing such an onerous requirement was not contemplated in the APA and falls outside the presidential power.[88] Only Congress has the authority to add such a requirement via legislation.[89] In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[90] the Court reasoned that it was Congress's intent that agencies, and not the courts, have the discretion to determine when additional procedures should be followed.[91] This is in the same vein, except here the additional procedural requirements are being imposed by way of Executive Order of the President.[92]

The APA imposes an arbitrary and capricious standard for the courts to use when determining whether a rule is lawful.[93] Decisionmaking that is based on factors that Congress did not intend for the promulgating agency to consider is generally arbitrary and capricious, and is thus unlawful.[94] In applying the arbitrary and capricious test, courts look to three factors: (1) whether there is sufficient evidence in the record to support the factual conclusions on which the rule is based; (2) whether the policy conclusions underlying the rule are rational and reasonable; and (3) whether the agency has sufficiently set forth the factual basis for its policy conclusions.[95] These factors apply not only to new rulemaking actions, but also to deregulatory actions such as those that are now required to comply with the two-for-one Executive Order.[96] On its face, the two-for-one Executive Order directs regulatory agencies to rely on elements outside of what Congress intended, falling squarely within the meaning of arbitrary and capricious. In order to

86. *See generally* 5 U.S.C. §§ 551–559, 701–706 (2012).

87. *See generally id.*

88. U.S. CONST. art. II.

89. *See* 5 U.S.C. § 559 (stating that any attempt to supplant the Administrative Procedure Act (APA) must be explicit and must be attained by modifying the statute).

90. 435 U.S. 519 (1978).

91. *Id.* at 546 (holding that courts cannot establish additional procedures not provided for in the APA in reliance on separation of powers principles).

92. *See generally* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

93. 5 U.S.C. § 706(2)(A).

94. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

95. LUBBERS, *supra* note 7, at 425.

96. *See, e.g.*, *State Farm*, 463 U.S. at 30 (holding that an agency rescinding a regulation must provide a reasoned analysis and a satisfactory explanation based on examination of relevant data to support its action).

avoid arbitrary and capricious legal challenges, an agency promulgating a new regulation must be able to sufficiently describe why two regulations are no longer necessary and are now justifiably worthy of repeal.[97]

B. The Practical Impact of Executive Order 13,771 on Agencies and Society

The President does have the authority to advance his own regulatory agenda and to set the direction of administrative policymaking.[98] However, the two-for-one Executive Order is flawed because it violates established law and requires agencies to delay, weaken, or withhold regulations that implement safeguards to protect society in a variety of ways.[99] It effectively halts all proposed regulations that were not finalized before January 20, 2017, until two deregulatory offsets are identified.[100] This result strengthens the concern that the rulemaking process has become ossified.[101] Further, while courts have largely been identified as the primary contributors of ossification,[102] the two-for-one Executive Order shifts that critique to the White House.

An example of a rule that has come to a halt is the FDA's proposed rule, published on January 23, 2017, that would regulate a carcinogenic compound found in smokeless tobacco products.[103] The FDA proposed to take action to establish a limit of N-nitrosonornicotine (NNN) in finished smokeless tobacco products because NNN is a "potent carcinogenic" and significantly contributes to an increased risk of cancer among smokeless tobacco users.[104] With scientific evidence that the NNN compound was causing oral cancer among users of smokeless tobacco, the FDA determined that passage

97. *See generally id.*

98. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (explaining that the President is likely to take into account the general public when setting the direction of administrative policymaking because he is elected by the general public).

99. *See* Scott Slesinger & Robert Weissman, *Ordering Agencies to Violate the Law*, REG. REV. (June 27, 2017), https://www.theregreview.org/2017/06/27/slesinger-weissman-ordering-agencies-violate-law.

100. *See* OFFICE OF MGMT. & BUDGET, *supra* note 47.

101. *See generally* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012) (explaining that ossification refers to how the notice-and-comment rulemaking process has become unduly lengthy and burdensome on agency resources).

102. *See generally id.* at 1494.

103. Tobacco Product Standard for N-Nitrosonornicotine Level in Finished Smokeless Tobacco Products, 82 Fed. Reg. 8004 (proposed Jan. 23, 2017) (to be codified at 21 C.F.R. pt. 1132).

104. *Id.* at 8004.

of the regulation would significantly reduce morbidity associated with oral cancer.[105] Now, the FDA must arbitrarily and capriciously hold this rulemaking action in abeyance until the agency can identify two regulations that have already been deemed necessary to sacrifice.[106] In order to promulgate the NNN rule, the two rules on the chopping block could conceivably be wholly unrelated to a rule limiting a carcinogen in a tobacco product.[107] In the meantime, the FDA is in a holding pattern that represents a "shadow regulatory process" where the public is often unaware of what is taking place behind the scenes while the rulemaking is on hold.[108]

In addition to compromising rulemaking actions by subjecting them to delay, the two-for-one Executive Order serves as a deterrent to agencies that are now more likely to withhold rulemaking actions they would have otherwise pursued to avoid the daunting task of identifying two regulations for repeal as a tradeoff.[109] For example, in the fall of 2016 the FDA announced plans to update regulations related to computer tomography (CT) X-ray systems.[110] Specifically, the FDA announced it would propose a regulation to

105. *Id.* at 8005 (estimating that thousands of newly diagnosed cases of oral cancer and oral cancer deaths would be prevented within 20 years of implementing these standards, resulting in nearly 15,200 life years gained).

106. Brief of Public Health Law Center et al. as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment at 9, Pub. Citizen, Inc. v. Trump, (D.D.C. May 23, 2017) (No. 1:17-CV-00253-RDM), 2017 WL 4508646 (explaining that the FDA is being forced to comply with requirements outside of what is specified in its enabling statute, despite the fact that the agency has determined that the tobacco product standard at issue is apposite to public health).

107. *Id.*

108. *See, e.g.*, Cheryl Bolen, *Judge Questions 'Shadow' Process in Challenge to Regulatory Order*, BLOOMBERG BNA (Aug. 10, 2017), https://www.bna.com/judge-questions-shadow-n73014463018 (describing the additional process agencies have to go through behind the scenes to identify rules to repeal, beyond the standard notice-and-comment rulemaking process); Diane Carman, *Federal Judge Sees 'Shadow Regulatory Process' Under Trump's 'Two-For-One' Executive Order*, EARTHJUSTICE (Aug. 14, 2017), https://earthjustice.org/blog/2017-august/federal-court-hears-arguments-challenging-president-trump-s-illegal-two-for-one-executive-order; Michael Macagnone, *Enviros Urge DC Judge To Nix Trump's 2-for-1 Order*, LAW360 (Aug. 10, 2017), https://www.law360.com/articles/953201/enviros-urge-dc-judge-to-nix-trump-s-two-for-one-order.

109. *See generally* Danny Vinik, *Under Trump, Regulation Slows to a Crawl*, POLITICO (June 7, 2017, 5:06 AM), https://www.politico.com/agenda/story/2017/06/07/trump-regulation-slowdown-000446 (stating the two-for-one Executive Order is impacting some industries awaiting regulations that have yet to come to fruition).

110. FOOD & DRUG ADMIN., RIN 0910-AH03, UNIFIED AGENDA, RADIOLOGY DEVICES; DESIGNATION OF SPECIAL CONTROLS FOR THE COMPUTED TOMOGRAPHY X-RAY SYSTEM (2016), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&

ensure that CT X-ray devices remain a safe and effective means of diagnostic study, considering the possible risks associated with such technology.[111] Since the FDA designated this proposed regulation as "economically significant," it may not come to fruition unless two existing regulations can be identified for repeal as offsets.[112]

III. MANAGING REGULATORY REFORM CAUTIOUSLY AND REASONABLY

A. Forceful Deregulation is Imprudent

President Trump's direction requiring deregulation is deeply misguided and impractical to manage. In addition to being unlawful and seriously hindering administrative agencies from promulgating necessary regulations, the two-for-one Executive Order will place additional burdens on businesses by undermining regulatory uniformity.[113] In the absence of federal regulation and where preemption is not a legal barrier, state and local governments could have an opportunity to establish distinct and potentially conflicting regulatory standards with which businesses would be obligated to comply.[114] The lack of uniformity could significantly impact companies doing business in multiple jurisdictions that would then be required to adjust business practices accordingly to remain compliant and competitive.[115] This impact is counter to the Executive Order's intended purpose of alleviating regulatory burdens.[116]

The National Highway Traffic Safety Administration (NHTSA), a subagency of DOT, as an example, establishes federal motor vehicle safety standards, including child restraint performance standards, with the goal of

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RIN=0910-AH03.

111. *Id.* (describing the risks to include burns, skin reddening, hair loss, sterility, and radiation poisoning).

112. *See generally* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

113. *See supra* Part II.

114. *See, e.g.*, Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 636 (1985) (explaining that courts are likely to uphold state regulatory action where Congress has not explicitly preempted the relevant issue and where the state action does not conflict with federal regulatory requirements).

115. *See* C. Boyden Gray, *Regulation and Federalism*, 1 YALE J. REG. 93, 93 (1983) (asserting that uniformity in regulations at the federal level may be necessary where interstate commerce is concerned).

116. *See generally* Exec. Order No. 13,771, 82 Fed. Reg. at 9339 (stating it is important to reduce the cost of compliance with federal regulations).

reducing traffic accident-related death and injury.[117] On February 27, 2012, NHTSA issued a final rule amending the federal motor vehicle safety standard to expand the applicability of child restraint systems to include children weighing up to eighty pounds, imposing safety standards to a weight range that was previously unregulated.[118] The rule also amended the safety standard to include the use of a test dummy representative of a ten-year-old child for compliance testing purposes.[119] This rulemaking was the culmination of nearly twelve years of effort.

In 2000 NHTSA began a lengthy endeavor seeking the creation of a child test dummy between six-to-twelve-years-old for crash testing purposes which was followed by supportive legislation, substantial research, and multiple rulemaking proposals, ultimately resulting in the promulgation of the February 27, 2012, Final Rule.[120] This rulemaking involved a significant expenditure of resources, and through multiple proposed rulemakings, sought public comment from product manufacturers and other key stakeholders. NHTSA's efforts on this action highlight a key feature of the APA—public participation in the rulemaking process.[121] The public process afforded by the APA in this instance allowed manufacturers of child restraint systems to provide public comment and be prepared for the new regulatory standard which would ultimately require them to modify their product-design specifications.[122]

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117. 49 U.S.C. § 30,101 (2012).

118. Child Restraint Systems; Hybrid III 10-Year-Old Child Test Dummy, 77 Fed. Reg. 11,626 (Feb. 27, 2012) (codified at 49 C.F.R. pt. 571) (regulating the sixty-five to eighty-pound weight range for the first time).

119. *Id.*

120. *Id.* at 11,627 (implementing Anton's Law, Pub. L. No. 107-38, 116 Stat. 2772 (2002), which directed the National Highway Traffic Safety Administration to develop and study a test dummy representing a ten-year-old child for child restraint testing purposes, and to initiate rulemaking action within one year of evaluating the test dummy); Federal Motor Vehicle Safety Standards (FMVSS), Child Restraint Systems; Hybrid III 10-Year-Old Child Test Dummy, 75 Fed. Reg. 71,648 (proposed Nov. 24, 2010) (responding to comments and supplementing the Jan. 23, 2008 Supplemental Notice of Proposed Rulemaking (NPRM)); FMVSS, Child Restraint Systems; Anthromorphic Test Devices (Hybrid III 10-Year-Old and Hybrid III 6-Year-Old Child Dummies), 73 Fed. Reg. 3901 (proposed Jan. 23, 2008) (responding to comments and supplementing the Aug. 31, 2005 NPRM); FMVSS, Child Restraint Systems, 70 Fed. Reg. 51,720 (proposed Aug. 31, 2005) (seeking to expand child restraint systems for children up to eighty pounds and require that booster seats and other child restraint systems meet established performance criteria developed using a crash test dummy representative of a ten-year-old child).

121. 5 U.S.C. § 553 (2012).

122. *See generally id.*

This regulatory structure and process provides a case study demonstrating the potential regulatory consistency problems that the two-for-one mandate might impose. Hypothetically, if the regulatory standard for child restraint systems established in 2012 were repealed under the mandate, it is possible states would be preempted from regulating in this area. In the case of safety standards for child restraint systems, the enabling statute provides that while a motor vehicle safety standard is in effect, states can establish the same standards or higher standards.[123] The federal regulation thus establishes the minimum requirements.[124] Since it takes a rulemaking effort to eliminate an existing regulation with supporting rationale from the promulgating agency, states could be preempted from enforcing a different standard than the standard the agency chose to apply—in this example, no standard.[125] Thus, safety standards for restraint systems designed for children in the sixty-five to eighty-pound weight range could potentially cease to exist.[126]

Procedurally, the repeal of any existing regulation must follow the notice-and-comment rulemaking process and is subject to judicial review.[127] If the NHSTA safety standard for children in the sixty-five to eighty-pound weight range were identified for repeal under the two-for-one mandate, it might not survive a legal challenge. As discussed above there are three primary factors that are generally relied upon by the courts in reviewing an arbitrary and capricious challenge.[128] In order to repeal this rule lawfully, DOT would have to provide sufficient evidence to support a factual conclusion that the rule is no longer justified and sufficiently set forth the factual basis for its rational and reasonable policy conclusions.[129] Agencies have an uphill battle ahead with any future rulemaking actions while the two-for-one Executive Order is in effect.

Putting aside the legal issues associated with preemption and surviving judicial review under the two-for-one Executive Order, eliminating federal regulations threatens uniformity where there are common goals across jurisdictional lines. For example, where there is a common goal to ensure child passenger safety, and when significant federal resources have been dedicated to determining the safest course of action, it is difficult to justify the possibility

123. 49 U.S.C. § 30,103(b)(2) (2012) (providing that a state may enforce a standard identical to a standard in effect under this authority).

124. *Id.*

125. *See generally id.*

126. *See generally* 49 C.F.R. § 571 (2016).

127. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983).

128. *See* LUBBERS, *supra* note 7, at 425.

129. *See generally id.*

of multiple states and local governments promulgating different standards.[130] Furthermore, businesses with multi-state consumers stand to suffer harm if state and local governments begin regulating.[131]

Consider Graco—a manufacturer of child restraint systems and an active commenter in the rulemaking process resulting in a regulatory standard for child restraint systems for the sixty-five to eighty-pound weight range—for example.[132] If that safety regulation was repealed, all of the time, effort, and resources Graco invested to be compliant would be lost.[133] Graco, among many other competitors, would have to modify business practices to comply with potentially fifty different state regulatory safety standards, or more if subdivisions of a state begin regulating. While the federal regulatory process under the APA is public, transparent, and allows for manufacturers such as Graco to comment on the proposed rulemaking action, the rulemaking processes of various state and local governments would be much more burdensome for manufacturers to track and keep up with. Deregulating at the federal level in a two-for-one fashion is akin to taking two steps backward in terms of uniformity and standardization.

B. Recommendation: Require Recurring Review and Fiscal Accountability of Agency Regulations

While historically there has been an effort to review and improve existing regulations, past reform efforts led by the legislative and executive branches have focused more narrowly on new regulations with less attention to ensuring that existing regulations effectively accomplished what they sought to achieve.[134] Every administration since President Carter has called for retrospective review in one form or another, suggesting that historical attempts to

130. *See generally* Pierce, *supra* note 114, at 655 (explaining that the federal government has a comparative advantage over states, especially smaller states, in terms of expertise and resources to dedicate toward regulatory work).

131. *See* Susan Bartlett Foote, *Beyond the Politics of Federalism: An Alternative Model*, 1 YALE J. REG. 217, 220 (1984) (explaining that regulations imposing costs on manufacturers are inappropriate when they interfere with goods produced for national distribution).

132. Child Restraint Systems, Hybrid III 10-Year-Old Child Test Dummy, 77 Fed. Reg. 11,626, 11,626, 11,635, 11,642–43 (Feb. 27, 2012) (codified at 49 C.F.R. pt. 571).

133. *See generally* Sam Batkins & Ike Brannon, *Five Guiding Thoughts for Regulatory Reform in the Next Administration*, REG., Winter 2016–2017, at 32 (discussing the concerns associated with sunken costs and asserting that rolling back regulations actually has the potential to harm businesses by allowing new competitors to enter the market with lower cost requirements).

134. *See Federal Regulation: A Review of Legislative Proposals, Part II: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 112th Cong. 232 (2011) (statement of Susan E. Dudley, Director, The George Washington University Regulatory Studies Center).

promote such review have not been very effective.[135] A prudent approach to achieving regulatory reform is to promote regulatory responsibility by requiring agencies to continue engaging in retrospective review similar to what was established by way of Executive Order 13,563.[136] Rather than encouraging or promoting retrospective review, this recommendation proposes requiring agencies to establish a cyclical review process whereby existing regulations are reviewed for continued relevance and effectiveness. This is similar to a recommendation made by eight former OIRA administrators who participated in a roundtable discussion on September 8, 2016, in Washington, D.C., to discuss recommendations for improving the regulatory review process.[137] But again, the recommendation of the former OIRA administrators focused on imposing retrospective review requirements on new significant rules.[138] Requiring agencies to not only include provisions for retrospective review for new rules, but also to develop a plan for existing rules, may be worthwhile to support the continuation of existing regulations.

As part of the annual regulatory plan,[139] agencies could hypothetically be required to identify a percentage (e.g., no less than ten percent) of existing regulations that will be thoroughly reviewed in the upcoming year for: (1) substantive continued necessity, and for significant rules;[140] (2) fiscal accountability requiring the agency to prepare a renewed economic impact analysis as a check on the initial analysis provided at the rulemaking stage. Where the initial economic impact analysis was significantly over- or under-stated at the time of initial rulemaking resulting in an undue burden on any entity, the agency could be required to either (a) justify the continued need for the rule, or (b) begin the notice-and-comment process to rescind or substantively modify the rule as necessary. Such analyses could be forwarded to OIRA,

135. *See* INST. FOR POLICY INTEGRITY, STRENGTHENING REGULATORY REVIEW: RECOMMENDATIONS FOR THE TRUMP ADMINISTRATION FROM FORMER OIRA LEADERS 1, 3, 8 (2016), http://policyintegrity.org/files/publications/RegulatoryReview_Nov2016.pdf.

136. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

137. *See* INST. FOR POLICY INTEGRITY, *supra* note 135, at 8–9 (recommending that President Trump instruct agencies to develop measures and metrics to assess the effectiveness of each new economically significant regulation, which should be identified in the preamble for each new rule and subject to Office of Information and Regulatory Affairs (OIRA) examination).

138. *Id.* at 1, 8–9.

139. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring agencies to develop a regulatory plan, which is to be submitted to OIRA as part of the Unified Regulatory Agenda with a description of each agency's most substantial regulatory priorities for the fiscal year).

140. *Id.* (defining "significant regulatory action" as, e.g., one that has an annual economic impact of $100 million or more, one that raises novel legal policy issues, etc.).

published in the Federal Register, and included in any proposed rulemaking efforts if deregulation is sought as a result.

In addition to engaging in regulatory impact analysis for new regulations, this recommendation proposes a "look back" approach that would allow for such analyses to be replicated for existing regulations to ensure the initial analysis was in fact valid and remains valid. Imposing a retrospective review requirement would result in the need for additional agency resources that can dedicate time and attention to this effort. This is an undertaking that the regulatory task forces mandated under Executive Order 13,777 could begin discussing and prioritizing.[141] In terms of numbers, if agencies were required to review ten percent of existing regulations each year on an ongoing basis, that would allow for all regulations to be reviewed and deemed necessary or otherwise over a ten-year period. This could be an ongoing requirement that would allow for continuous examination of rulemaking actions on a cyclical basis. This recommendation would impose additional requirements on agencies that are related to, but not yet part of, established requirements under the APA. If stringent requirements under the auspices of retrospective review with an emphasis on renewed economic impact analysis are favored, the ideal method for imposing such requirements would be through congressional amendment of the APA.[142]

CONCLUSION

Under the APA, agencies have the authority to promulgate new regulations without regard to whether existing regulations are identified for repeal.[143] Executive Order 13,771 handicaps administrative agencies from acting efficiently and responsibly to fulfill their missions.[144] While past administrations have issued Executive Orders to include specific operating guidelines for administrative agencies to adhere to, Executive Order 13,771 exceeds reasonable boundaries and is unlawful.[145] Executive Order 13,771 requires agencies to consider factors not currently required under existing law, which creates several problems not just for regulated entities but also for society.[146] A more rational and palatable approach to achieving regulatory reform is in order.

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

142. 5 U.S.C. §§ 551–559, 701–706 (2012).

143. *See generally id.*

144. *Supra* Section II.B.

145. *Supra* Section II.A.

146. *Supra* Section III.A.