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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND OF INDEPENDENT REGULATORY AGENCIES

FROM: Cass R. Sunstein
Administrator

SUBJECT: Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Order 13563 states that "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It sets out certain principles and requirements designed to promote public participation, improve integration and innovation, increase flexibility, ensure scientific integrity, and increase retrospective analysis of existing rules. The purpose of this Memorandum is to offer guidance on these principles and requirements.

Relationship between Executive Order 13563 and Executive Order 12866

Executive Order 13563 is designed to affirm and to supplement Executive Order 12866; it adds to and amplifies the provisions of Executive Order 12866, rather than displacing or qualifying them. After the issuance of Executive Order 13563, agencies should continue to follow the principles and requirements contained in Executive Order 12866.

Section 1 of Executive Order 13563 specifically reiterates five principles from Executive Order 12866. These principles generally involve consideration of benefits, costs, and burdens. Section 1 also asks agencies "to use the best available techniques to quantify anticipated present and future costs as accurately as possible," such as identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. The goal of this provision is to promote careful and accurate quantification. At the same time, Section 1 recognizes that agencies may consider and discuss certain values that "are difficult or impossible to quantify"; such values include "equity, human dignity, fairness, and distributive impacts."

Public Participation

Section 2 of Executive Order 13563 emphasizes the importance of public participation. It requires agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than

60 days." This section complements a corresponding provision in Executive Order 12866,[1] while also emphasizing the importance of public comment through the Internet. Section 2 aims to promote agencies' continuing efforts to use online technologies to facilitate greater participation in the rulemaking process, thus making that process simpler and more accessible—and less burdensome and costly—for all stakeholders.

Section 2 also requires an "open exchange" of information among government officials, experts, stakeholders, and the public. In this context, "open exchange" refers to a process in which the views and information provided by participants are made public to the extent feasible, and before decisions are actually made. Section 2 thus seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself. In this way, Section 2 is designed to foster better and more informed agency decisions.

This provision is not satisfied simply through the acceptance of electronic submission of rulemaking comments by interested parties who lack information about the arguments and information provided by other parties. A central goal of public participation is to improve the content of rules, and open exchanges of information by interested parties can be helpful in that endeavor.

Section 2 also directs agencies (to the extent feasible and permitted by law) to give the public timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings. For proposed rules, agencies are required to include an opportunity for public comment on the rulemaking docket, including comment on relevant scientific and technical findings.[2]

Finally, Section 2 directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking. This provision emphasizes the importance of prior consultation with "those who are likely to benefit from and those who are potentially subject to such rulemaking." One goal is to solicit ideas about alternatives, relevant costs and benefits (both quantitative and qualitative), and potential flexibilities.

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[1] "Each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." Executive Order 12866, Section 6(a)(1).

[2] This requirement is consistent with Office of Information and Regulatory Affairs, Memorandum for the President's Management Council, *Increasing Openness in the Rulemaking Process – Improving Electronic Dockets* (May 28, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf, which states, "To the extent feasible, and consistent with applicable laws, regulations, and policies, agencies should make their electronic regulatory dockets on Regulations.gov consistent with their paper-based dockets. Both dockets should provide the public with access to all relevant materials. To the extent that they are part of a rulemaking, supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket."

Integration and Innovation

Section 3 of Executive Order 13563 calls for "[g]reater coordination across agencies" to produce simplification and harmonization of rules. This provision complements related provisions of Executive Order 12866, such as the provision asking each agency to "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations."[3]

Section 3 of Executive Order 13563 instructs agencies (1) to consider the combined effects of their regulations (together with those of other agencies) on particular sectors and industries and (2) to promote coordination across agencies and harmonization of regulatory requirements. Section 3 thus emphasizes the crucial importance of simplifying and harmonizing regulations and acknowledges that, at times, regulated entities might be subject to requirements that, even if individually justified, may have cumulative effects imposing undue, unduly complex, or inconsistent burdens. Section 3 is designed to reduce burdens, redundancy, and conflict, and at the same time to promote predictability, certainty, and innovation.

Efforts at harmonization might occur within agencies, as efforts are made to coordinate various rules. Such efforts may also occur across agencies, as agencies work together to produce greater simplicity and predictability. Such interagency efforts may be promoted or assisted by OIRA.

Flexible Regulatory Tools

Section 4 of Executive Order 13563 states that ". . . each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public." Such approaches include "warnings, appropriate default rules, and disclosure requirements, including provision of information to the public about risks in a form that is clear and intelligible." This provision complements, and does not displace, related provisions in Executive Order 12866 (such as the provision in Section 1(b)(3), asking each agency to "identify and assess available alternatives to direct regulation, including…providing information upon which choices can be made by the public").

Section 4 acknowledges the importance of considering flexible approaches and alternatives to mandates, prohibitions, and command-and-control regulation. It emphasizes the potential value of approaches that maintain freedom of choice and improve the operation of free markets (for example, by promoting informed decisions). It directs agencies to consider the use of tools that can promote regulatory goals through actions that are often less expensive and more effective than mandates and outright prohibitions. When properly used, these tools may also encourage innovation and growth as well as competition among regulated entities.

[3] Executive Order 12866, Section 1(b)(11).

Science

Section 5 of Executive Order 13563 refers to the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and implementing guidance. It emphasizes that each agency shall "ensure the objectivity of any scientific and technological information used to support the agency's regulatory actions."

In implementing guidance, the President's Science Adviser stated, "Science, and public trust in science, thrives in an environment that shields scientific data and analyses from inappropriate political influence; political officials should not suppress or alter scientific or technological findings."[4] Section 5 of Executive Order 13563 extends the President's Memorandum and implementing guidance to the context of regulatory actions.

Retrospective Analysis of Existing Rules

Section 6 of Executive Order 13563 emphasizes the importance of retrospective analysis of rules and contains a "look back" requirement: "Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. During the process of retrospective analysis, the principles set forth in Sections 1 through 5 remain fully applicable, and should help to orient agency thinking.

Agency plans should not, of course, call into question the value of longstanding agency rules simply because they are longstanding. Many important rules have been in place for some time. The aim is instead to create a defined method and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Agencies should explore how best to evaluate regulations in order to expand on those that work (and thus to fill possible gaps) and to modify, improve, or repeal those that do not. Candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken. Agency review processes should facilitate the identification of rules that warrant repeal or modification.

While systematic review should focus on the elimination of rules that are no longer justified or necessary, such review should also consider strengthening, complementing, or modernizing rules where necessary or appropriate—including, if relevant, undertaking new rulemaking. Retrospective review may reveal that an existing rule is needed but has not operated

[4] John Holdren, Memorandum for the Heads of Agencies and Departments, *Scientific Integrity* (December 17, 2010), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

as well as expected, and that a stronger, expanded, or somewhat different approach is justified. In formulating its preliminary plan for retrospective review, each agency should exercise its discretion to develop a plan tailored to its specific mission, resources, organizational structure, and rulemaking history and volume.

While each agency should set its own priorities, all plans are expected to address the following topics:

- **Public participation**. Consistent with the general commitment to public participation, agencies should solicit the views of the public on how best to promote retrospective analysis of rules. Even before preliminary plans are written, for example, the public might be asked to provide comments on how such plans might be devised and to help identify those rules that might be modified, streamlined, expanded, or repealed. Consistent with existing guidance on the Paperwork Reduction Act (PRA), agencies may consider general efforts to obtain public feedback, including town hall meetings and online equivalents, to be exempt from PRA requirements.[5] Agencies are encouraged to consider providing a period of public comment after drafts of preliminary plans are written and/or after such plans have been submitted to OIRA. Agencies may want to reach out to stakeholders with an interest in the rules mentioned in the preliminary plans to ensure that diverse views are considered. Because knowledge of the effects of rules is widely dispersed in society, and because members of the public are likely to have useful information and perspectives, agencies should consider developing mechanisms to promote public consultation about existing rules on a continuing basis.

- **Prioritization**. The preliminary plan should specify factors that the agency will consider and the process that the agency will use in setting priorities and in selecting rules for review. To the extent feasible, the preliminary plan should also include an initial list of candidate rules for review over the next two years.

- **Analysis of costs and benefits**. Agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review. Such analyses can inform judgments about whether to modify, expand, streamline, or repeal such regulations, and can also provide valuable insight on the strengths and weaknesses of pre-regulatory assessments, which can be used to enhance the agency's analytic capability.

- **Structure and staffing**. Responsibility for retrospective review should be vested with a high-level agency official who can secure cooperation across the agency. The preliminary plan should also consider how best to maintain sufficient independence from

[5] For further explanation of the applicability of the Paperwork Reduction Act, please see Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Information Collection under the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf and Office of Information and Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (April 7, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

the offices responsible for writing and implementing regulations. Finally, the plan should identify possible actions to strengthen internal review expertise (if necessary).

- **Coordination with other forms of retrospective analysis and review**. Under existing requirements and authorities, many agencies are already engaged in retrospective analysis and review. For example, the Regulatory Flexibility Act, 5 U.S.C. §610, requires agencies to "publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities." The same provision calls for review of all such agency rules every ten years. It is appropriate to use existing processes, and information now at hand, as significant inputs into preliminary plans.

Within 100 days, agencies should submit initial drafts of their preliminary plans to the appropriate desk officer at the Office of Information and Regulatory Affairs (OIRA). OIRA desk officers will review the plans and may provide suggestions to the agencies on possible improvements. OIRA desk officers are also prepared to work with agencies as they finalize their preliminary plans.

Independent Agencies

Executive Order 13563 does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority. In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules.