Comments on
Interim Guidance Implementing Executive Order 13771, § 2

Richard B. Belzer, Ph.D.
President

February 10, 2017

I. Definitions and Coverage Issues

A. Definition of "regulatory action"

EO 13771 does not define *regulatory action*, apparently leaving in place the definition in EO 12866, § 3(e). That definition excludes agency guidance because while guidance is "substantive action by an agency," it neither "promulgates [n]or is expected to lead to the promulgation of a final rule or regulation." EOs 12291 and 12866 created incentives for agencies to evade the regulatory process in favor of guidance, and in recent years, agencies have displayed an increased propensity to regulate through guidance.

EO 13771 intensifies those incentives. Therefore, OMB should exercise the discretionary authority granted by EO 13771 to explicitly include future agency guidance in its normal review procedures to identify cases in which it does not clearly comply with OMB's Final Bulletin for Good Guidance Practices, § II.2.h (72 Fed. Reg. 3432-3440). Guidance that complies should be exempt, but guidance that imposes costs on the public is functionally equivalent to regulation and deserves to be managed in the same way as draft regulation. Having to obtain OMB clearance that guidance is guidance would encourage agencies to regulate in accordance with the Administrative Procedure Act.

B. Regulations implementing Federal spending programs should be covered.

The Interim Guidance proposes to exempt regulations that are "primarily" income transfer programs, but does not necessarily exempt regulations that "impose requirements on non-Federal entities." The distinction between these categories is unclear because virtually all regulations that "primarily" cause income transfers also "impose requirements on non-Federal entities." Moreover, all income transfer regulations generate social costs and deadweight losses. A Medicare payment regulation, for example, has ripple effects throughout the health care system. The fact

PO Box 319
Mount Vernon, VA 22121
(703) 780-1850

that OMB has historically exempted agencies from estimating these costs means EO 13777 provides the right time for OMB to update its instructions to agencies.

Instead of exempting regulations that implement federal spending programs, OMB should set a social cost ceiling above which they must be included. Further, OMB should encourage agencies to eliminate past regulatory actions implementing federal spending programs that impose substantial social costs.

The historic failure to capture these costs, which dates to EO 12291, is a huge hole in regulatory accounting that undermines the purposes of EO 13711. Because these social costs are not estimated, neither Congress nor the public is aware of their magnitude. EO 13771 provides for the first time since 1981 a credible way to eliminate this gap. The opportunity should not be missed. The crowdsourcing recommendation in Section IV.B below provides a helpful way for OMB to lighten its burden while enhancing implementation effectiveness.

C. Credit should not be granted for cost savings resulting from vacatur of a past regulatory action.

The Interim Guidance "generally" denies agencies' credit for regulations that are "overturned" by a court.[1] However, the door is left open at an indeterminate angle and swing velocity. This is worrisome, as it could give agencies a beneficial interest in unlawful rulemaking. The worst-behaving agencies would get the most credit, and agencies that behaved properly would be disadvantaged. Agencies that had misbehaved the most also would be the most relieved of their obligations under EO 13711 § 2.

OMB should unequivocally deny agencies credit for past regulations vacated by a court. Agencies might be allowed partial credit for the elimination of a regulation if they choose to abandon litigation defense. Credit should not be substantial, however, and the choice of the allowable fraction would be complicated and likely controversial.

D. Some (but not all) new guidance should be covered.

The Interim Guidance is ambiguous concerning the extent to which new agency guidance is covered. Its inclusion is vital, however, because regulation via guidance, memorandum, and the like is a serious and growing problem that EO 13711 substantially intensifies. OMB's instruction to "continue to adhere to OMB's 2007 Memorandum [*sic*, should be *Bulletin*] on Good Guidance Practices" is noted, though agency compliance with the GGP is neither empirically evident nor believed to be widespread. Indeed, noncompliant examples of regulation masquerading as guidance

[1] Presumably, OMB means "vacated." Regulations remanded by a court do not go away.

are legion, as are examples of guidance that imposes substantial paperwork burden, both in violation of § II.2.h.[2]

OMB should establish a default that new agency guidance is covered unless and until an agency documents compliance with the GGP (and especially § II.2.h). This serves the public interest by finally enabling the construction of a reliable inventory of agency guidance, which despite the passage of a decade since the GGP was issued still does not yet exist.

For cases in which neither OMB or other Federal agencies know of or reasonably suspect a proposed guidance to include § II.2.h costs, it should establish a procedure through which the public can identify such costs. If no germane public comments are submitted or the agency, it is reasonable for OMB to exempt the guidance from EO 13771.

E. Some (but not all) past guidance should be eligible for credit under § 2 if eliminated

OMB should grant credit under EO 13771, § 2, if an agency substantially modifies or eliminates "significant guidance" (defined in GGP § I.4) that complies with § II.2.h. Such guidance was properly issued and any costs associated with it were voluntarily undertaken.[3]

However, OMB should not grant agencies credit for the elimination of past guidance that violated § II.2.h. Improperly issued guidance imposed costs on the public outside of the normal rulemaking process. Agencies should not be rewarded for having used guidance to impose regulatory costs.

F. The Problem of nonsignificant regulatory actions

The Interim Guidance directs agencies to "continue to follow the standard significance determination process outlined in Executive Order 12866" § 3(f). This may undermine the purposes of EO 13711, for at least three reasons.

First, the criteria set forth in EO 12866 § 3(f)(2)-(4) are vague. Fourteen years, later, the difference between a significant and a nonsignificant regulatory action

[2] § II.2.h says "Each significant guidance document shall … [n]ot include mandatory language such as 'shall,' 'must,' 'required' or 'requirement,' unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties."

[3] It is unlikely that guidance complying with § II.2.h would be a ripe target for elimination precisely because GGP compliance would mean there are no cognizable cost savings to obtain by revocation.

remains utterly unclear to the public.[4] OMB should make public how these criteria are applied. Further, OMB should use crowdsourcing tools (see Section IV.A below) to ensure that regulatory actions are correctly classified. But the structure of EO 12866 makes proper classification unnecessarily difficult. An agency has to have performed a nontrivial amount of analysis to determine whether a regulatory action may "[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency," "[m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof," or "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order." But EO 12866 does not contain any requirement that agencies conduct the analyses necessary to make these determinations.[5]

Second, EO 17331 intensifies agencies' longstanding incentives to misclassify their significant regulatory actions as significant (and their economically significant actions as merely significant). If OMB continues to exempt nonsignificant regulatory actions from oversight, it can expect a dramatic surge in the promulgation of nonsignificant regulatory actions. Some will be misclassified significant regulatory actions; some will be significant regulatory actions broken into multiple regulatory actions, each of which is facially nonsignificant.

Third, a focus on *significant* past regulatory actions frustrates the identification of regulatory actions that were misclassified. In calendar years 2009-16, OMB reviewed 3,389 significant and 968 economically significant draft regulations. OMB does not record, and probably has no idea, how many nonsignificant regulations were promulgated during this period. And it surely has no idea how many nonsignificant regulatory actions were misclassified because it did not review them.

To partially alleviate this problem, OMB should grant credit for the elimination of some nonsignificant regulations. The challenge is to provide agencies proper incentives to identify these regulatory actions but not reward credit for eliminating regulatory actions they knowingly misclassified. OMB could offer agencies credit for past nonsignificant regulatory actions they proactively identify, but deny credit for the elimination of past nonsignificant regulatory actions identified by the public through crowdsourcing (see Section IV.A below). Alternatively, agencies could be credited for eliminating nonsignificant regulatory actions that are now known to have been costly

[4] The best explanation for the difference may be that significant regulatory actions are reviewed by OMB and nonsignificant regulatory actions are not. This explanation, however accurate, is unhelpful to the public.

[5] Economic analysis also is required to determine whether a regulatory action is covered by EO 12866 § 3(f)(1) (i.e., is "economically significant"). EO 12866 establishes no duty to conduct sufficient analysis to make an informed determination.

but which information the administrative record and contemporaneously in the public domain yields no evidence that the agency should have known otherwise.

II. Exemptions

A. Strictly deregulatory actions

The Interim Guidelines propose to exempt from § 2 future regulatory actions that are strictly deregulatory. A potentially superior approach is to count only the past regulatory actions they eliminate.[6] A strictly deregulatory action should not count against an agency's numerical total, but past regulatory actions eliminated should be counted on the other side of the § 2 ledger.

B. Regulatory actions with greater monetized social benefits than monetized social costs

The stated purpose of EO 13771 is "to be prudent and financially responsible in the expenditure of funds, from both public and private sources" (§ 1). This justifies exempting regulatory actions in which properly monetized social benefits exceed properly monetized social costs.

The three qualifiers in this statement should be noted. First, only *monetized* social benefits and costs should be counted. If unmonetized benefits and costs are permitted to count, the exemption would swallow the rule. Second, social benefits and costs must be *properly* monetized. This means adherence to OMB Circular A-4, as determined by OMB, but it also means adherence to OMB's Information Quality Guidelines (67 Fed. Reg. 8452-8460), which require among other things that significant information to be objective and sufficiently transparent as to be capable of being reproduced. Third, monetized social benefits must *exceed* monetized social costs[7].

C. Credit for subsequently enacted organic deregulatory legislation

The Interim Guidance proposes to "generally" credit agencies for cost savings from subsequent enacted legislation. This makes sense for organic legislation that Congress passes and the President signs. For example, if Congress enacts a substantive change to the Clean Air Act, and that change results in cost savings, it is important to account for that because the President is an essential party to enactment.

This inclusion also is needed to ensure symmetry. The Interim Guidance counts against § 2(b) regulatory actions required by Congress if they impose cost, so OMB also

[6] This cannot be a null set or the purportedly deregulatory action could not be deregulatory.

[7] EO 12866 uses weaker language (i.e., benefits "justify" costs) that has no objective meaning and cannot be used to craft a credible exemption.

should credit agencies for organic Congressional actions that reduce regulatory burden. Further, the stated purposes of EO 13711 are enhanced by partnering with Congress.

D. No credit for regulatory actions overturned by Joint Resolutions of Disapproval

While it is sensible to debit or credit the regulatory costs Congress imposes or relieves, it makes no sense to credit an agency for the elimination of costs it imposed by regulation that congressional action was required to overturn. Granting credit would reward agencies for promulgating regulations that a majority in Congress, and the President, viewed as inappropriate. Further, some agencies would be effectively relieved of any responsibility to eliminate burdensome past regulatory actions. A single joint resolution of disapproval could provide all the credit an agency needs to cover a panoply of burdensome new regulatory actions. Credit for joint resolutions of disapproval would allow an agency to win the grand prize in a lottery it never entered.

III. Measurement Challenges

EO 13711 contains two performance measurements: a numerical measurement in § 2(a) and a cost-based measurement in § 2(b). Each presents its own challenges.

A. Numerical measurements

EO 13711 directs agencies to eliminate at least two regulatory actions for each new regulatory action they promulgate. While it directs OMB to publish guidelines, there appears to be no objective way to count past regulatory actions eliminated. Moreover, there are many ways to count strategically, thus portraying agency compliance in either a positive or negative light. The count would be minimized if numerical credit were granted only for past regulatory actions eliminated in full. On the other hand, the count could be maximized if each, finely detailed, specific provision eliminated from a past regulatory action were counted. Each of these methods would yield misleading results.

OMB should articulate a counting method proportionate to the costs of the burdens eliminated. For example, OMB could create a point system such as shown in the table below. New regulatory actions would be assigned points on the same scale, thereby allowing by simple subtraction an easy way for the public to understand in semi-quantitative terms the net effect of regulation under EO 13711. The use of present value, using an interest rate appropriate in OMB's judgment to the regulations involved, would result in standardization that is necessary for effective public communication. This approach also would leave technical debates on quantification to economists – a huge public benefit – and avoid the conventional and misleading metric of counting *Federal Register* pages.

Proposed Metric for Counting under § 2(a)	
Present Value Costs Eliminated	**Deregulatory "Points"**
< $10 million	.05
$10-30 million	.2
$30-100 million	.7
$100-300 million	2
$300-1,000 million	7
$1-3 billion	10
$3-10 billion	20

B. Cost-based measurements

The Interim Guidance directs agencies to rely on OMB Circular A-4, but this may not be very helpful. Many agencies lack staff who understand the principle of opportunity cost. Some agencies have staff who understand it but do not implement it. No agency has staff with substantial experience estimating the cost savings from deregulation. OMB is correct to invoke the opportunity cost principle, but simply deferring to Circular A-4 does not provide enough help.

A few key analytic issues related to estimating cost savings are briefly discussed below. This list is intended to be suggestive, not exhaustive.

1. Paperwork burdens

The Interim Guidance is silent concerning paperwork burden, the control of which ironically is OIRA's primary statutory mission. Agencies are required by the Paperwork Reduction Act to provide OMB (and take public comment on) "specific, objectively supported estimate[s] of burden" (5 CFR § 1320.8(a)). Compliance with the requirement for "objectively supported estimates" appears to be spotty at best.

OMB should encourage agencies to meet the goals of the Executive Order in part by reducing paperwork burden and credit them accordingly. Of course, agencies should not receive credit for reductions in paperwork burden that exceed the amount of burden they reported in the relevant Information Collection Request. If an agency learns that actual burden is significantly greater than what it previously reported and wants to get credit for reducing it, the agency should first follow the procedures set forth in OMB's Information Collection Rule to update their burden estimates and explain how the error occurred. Then the agency can propose changes that reduce paperwork burden and claim credit under § 2(b).

Two potential implementation problems must be addressed. First, OMB must ensure that the only exceptions it grants are those that fall squarely within 5 CFR § 1320.3(h)(1)-(10). These provisions were crafted narrowly to ensure that they applied in uncontroversial situations. OMB should not, as it has recently done at least once, misapply these exemptions broadly to exempt billions of dollars in annual paperwork burden that a plain reading of the regulatory text indicates they are covered.

Second, OMB must not grant an agency credit for reducing paperwork burdens that it never previously acknowledged. If an agency wants credit for eliminating such burden, it should follow normal procedures to obtain new valid OMB Control Numbers, then propose the changes that would eliminate the burden. Any other procedure, and especially informal procedures about which the public is unaware, would be inherently improper.

2. Determining all relevant interactions across regulations

As agencies come forward with candidates for past regulatory actions to eliminate, it is certain that there will be interactive effects among them, and between regulatory actions identified for elimination and regulations left in place. Because of the extent to which multiple Federal agencies regulate in the same space, cost savings from eliminating one agency's past regulatory actions may increase the cost of other agencies' existing regulations. Examining proposed candidates for elimination individually and sequentially will fail to capture many interactive effects and create incentives for strategic behavior in the ordering of past regulatory actions to be eliminated.[8]

OMB should direct agencies to identify all regulations promulgated by other agencies that could be affected by the elimination of one of its own. OMB should share this information with the affected agencies and encourage them to collaborate on an interagency deregulatory package. In addition, OMB should establish a process (see Section IV.B below) enabling the public to identify interacting regulations. Regulated entities are often much more aware of overlapping regulatory requirements than the agencies doing the regulating.

3. Determining the baseline

Circular A-4 provides considerable guidance about devising appropriate baselines for *prospective regulation*. However, A-4 offers little help with respect to the very different task of devising appropriate baselines for *deregulation*. OMB has considerable

[8] Where regulatory costs are the result of the interaction of two regulations promulgated by different agencies, the first mover would be unable to claim cost savings. That incentivizes both agencies to be second movers, which means neither agency will act.

(and unhappy) experience with agencies that have conducted retrospective analyses using fanciful baselines that exaggerate the benefits of regulation. Credible baselines are essential for the stated purposes of EO 13711 to be achieved, and for the public to believe agency (and White House) claims are trustworthy.

Public comments should be explicitly sought on agencies' proposed baselines for deregulatory actions (see Section IV.B below). A serious examination must be required whenever an agency receives a public comment making a credible case that the agency's proposed baseline is inappropriate.

4. Variability and uncertainty

Circular A-4 advises agencies to account for variability and uncertainty, but this advice is limited and too general to be useful. Uncertainty will be most apparent when devising a baseline for deregulation; the task is to figure out the state of the world in the absence of the regulation proposed to be eliminated. Variability should be separately accounted for by explicitly recognizing that the costs of past regulation may have been distributed unevenly across the population. To the extent that the uneven distribution of effects has been systematic instead of random, special methods may be needed to properly estimate them. The guidance in Circular A-4 concerning distributional effects is too limited to be useful.

5. Ex ante Regulatory Impact Analyses deserve no presumption of validity

OMB is correct to reject cost-savings estimates based on ex ante cost estimates in a Regulatory Impact Analysis (RIA). Even if an RIA had objectively portrayed the opportunity cost of a prospective regulation, there is no reason to believe that these estimates are valid representations of the cost savings from deregulation.

6. Double-counting is likely to be especially problematic

Implementation of EO 13711 will set a thousand gears turning at the same time. OMB should require agencies to identify cost savings with exquisite clarity; ambiguous descriptions of cost savings will invite double-counting. This is especially so in cases where there are interactive effects across regulatory actions. OMB should ensure that all estimates of cost-saving are publicly vetted, that disputes about these estimates are resolved, and that no cost-saving is counted more than once.

7. Estimation can improve with experience and proper incentives

Estimation accuracy is likely to be poor at the outset of EO 13711 implementation but improve with experience and as additional data become available. For this reason, OMB should make only provisional determinations concerning the amount of creditable cost savings. This would allow credits to be revised over time. If

the assignment of credit becomes a high-stakes, one-time affair, it will be unnecessarily adversarial.

OMB's information quality principles provide a useful guide to how new knowledge can ensure that cost savings estimates improve over time. Estimates that are well constructed, fully disclosed, and include no observable bias or error should earn a rebuttable presumption of validity. However, this presumption should be a weak one that is rebutted upon presentation to OMB of alternative cost savings estimates that are superior on at least one margin and inferior on none.

This procedure would reduce burden on OIRA Desk Officers, who are otherwise assured of being swamped with more work than they can possibly manage. By crowdsourcing the discovery of correctable error (see Section IV.B below), Desk Officers' task would change from having to intensively review a single cost savings estimate to reviewing at a less demanding level competing estimates and selecting the best one.

To be credible, challenges to initial cost savings estimates and the resolution of challenges must be made in accordance with a transparent public process. Unlike the existing administrative process for managing requests for correction under information quality guidelines, this process should be genuinely independent. The ability of experts to cross examine each other is highly desirable and would save Desk Officers substantial time.

C. Partial deregulation

Deregulatory actions that do not outright repeal existing regulations, but instead revise existing requirements, pose special counting problems. Because many (if not most) deregulatory actions will be of this type, OMB should simply credit agencies for validated net cost savings.[9]

D. No credit for costs reported by public commenters in response to an NPRM but rejected by an agency in a final rule

OMB should grant no credit if there is in the administrative record or contemporaneous public domain evidence showing that an agency knew or should have known about certain costs but declined to acknowledge them. Many regulated entities despair of having devoted substantial effort to providing good-faith cost information only to have an agency ignore it. OMB should not give an agency credit for the elimination of these costs.

EO 13771 provides a rare opportunity to revitalize the public comment process. It is widely believed that agencies routinely ignore public comments because they have

[9] For regulatory actions of this type, no credit for reducing the number of regulatory actions should be given because the number of regulations extant remains unchanged.

already made up their institutional minds by the time proposed rules are published, and there is no credible penalty imposed if comments are ignored. For this segment of the public, the primary purpose served by submitting public comment is to ensure that the administrative record includes evidence that will be relevant if a final regulation is challenged under the Administrative Procedure Act.

OMB can improve the public comment process by creating positive new incentives for the public to submit comments and for agencies to take them seriously. OMB should not give agencies credit for the elimination of costs reported by public commenters or otherwise in the public domain that they chose to ignore.[10]

E. Seek independent advice on methods for quantifying cost savings

In sum, Circular A-4 does not provide adequate guidance for estimating cost savings, and previous agency efforts under Executive Order 13610 do not instill confidence. Something different is needed in lieu of case-by-case consultation (i.e., seat-of-the-pants improvisation).

OMB should instead seek advice from a recognized independent organization, such as the Society for Benefit-Cost Analysis (SBCA, https://benefitcostanalysis.org), to develop principles and practices for the estimation of cost savings from deregulation. OMB should ask the independent organization to establish a committee to develop these guidelines, select committee members who have no material agency conflicts and are balanced with respect to potential bias. OMB also should require that these guidelines be developed in a transparent process in which public participation is welcomed and respected. (The need for genuine transparency and freedom from material agency conflicts are key reasons why the National Research Council is inappropriate for this task.)

IV. Managing Desk Officer Burden Through Crowdsourcing

The Interim Guidance directs agencies numerous places to consult with their OIRA Desk Officer(s). This surely makes sense, especially as OMB and the agencies gain experience implementing § 2. However, the burden the Interim Guidance places on Desk Officers appears overwhelming and makes the implementation process highly susceptible to system failure. Agencies would benefit from purposefully overloading the system by creating review and consultation responsibilities no Desk Officer can meet. If this burden is not proactively managed, implementation is likely to fail.

Desk Officer burden can be reduced by utilizing tools OMB is not familiar with and to which it may have an institutional aversion. These tools include such things as

[10] To be clear, an agency does not ignore public comments when it provides a bona fide rebuttal in the preamble to a final rule.

crowdsourcing candidate regulations for elimination and cost savings estimates. Without such a tool, Desk Officers will remain dependent on agency cost estimates and have limited ability (and even less time) to validate them. Nothing in EO 12866 § 6(b)(4) would be violated or compromised as long as all information OMB receives via crowdsourcing is publicly disclosed.

A. Crowdsourcing the identification of candidate regulatory actions for elimination

The Interim Guidance relies on agencies to identify past regulatory actions as candidates for elimination. While agencies may well be excellent sources for this information, they are not the only sources and in many cases they are unlikely to be the best sources. By necessity, regulated entities have the most informed perspective and are better able to identify the kids of regulatory relief that produce the greatest cost savings.

When asked for candidates or elimination, agencies also have strong incentives to behave strategically. They may offer up candidates that do not matter much at the margin to the agencies themselves, thus limiting the potential social benefit of deregulation. They may offer up candidates that seem to offer substantial cost savings if eliminated, but on close scrutiny it becomes evident that the purported savings are illusory. Other forms of strategic behavior are easy to contemplate.

Agencies can be expected to be poor sources of insight in cases where multiple federal agencies regulate in the same space. A widespread concern is the extent to which regulated entities face duplicative, confusing or contradictory regulatory requirements from multiple Federal agencies. As OMB is well aware, Federal agencies often do not collaborate to ensure the cost-effective achievement of multiple agency missions. Collaboration is especially unlikely when agency missions conflict.

In these situations, agencies will have weak incentives to identify their own regulatory actions for elimination unless other agencies that regulate in the same space do the same. Similarly, in cases where it is inappropriate for *all* federal agencies regulating in the same space to eliminate *all* of their overlapping regulations, agencies will compete over the residual regulatory authority. Even if these problems can be overcome, the assignment of credits for deregulation could be highly contentious. Leadership from OMB will be required to shepherd them toward a reasonable solution, but OMB's ability to do that would be hampered if it has to rely on agencies alone to identify regulatory actions for elimination.

OMB should establish a web portal for crowdsourcing public suggestions for candidate rules for elimination. This should not be hard for OMB, and it need not interfere with OMB's legitimate interest in protecting genuinely deliberative communications.

Computer hardware and software firms rely on customer input to identify bugs and unintended system idiosyncrasies. They reasonably allocate their internal resources to responding to the most serious and widespread problems their customers identify. OMB should do the same, treating the American people as their customers and responding the same way. As the federal government's statutorily established regulator of federal information policy and technology, OIRA clearly has the relevant expertise and statutory authority to do this. Marrying its IT functions with the President' Executive Order makes perfect sense.

With a digital crowdsourcing vehicle in place, the public can identify for all to see their candidate regulatory actions for elimination. Regulated entities could "vote" on candidates for elimination, identify regulatory actions previously promulgated by other agencies, and as noted in Section IV.B below, supply OMB with their own cost estimates. This would supplement, not supplant, agencies' responsibility for adhering to the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and applicable Executive Orders to convert crowdsourced candidates into actual regulatory actions eliminated.

B. Crowdsourcing cost-savings estimates for past regulatory actions identified for elimination

Achieving the President's goal of substantial regulatory burden reduction requires high-quality estimates of cost savings. Agencies do not always supply high-quality cost estimates; their adherence to the opportunity cost principle in OMB Circular A-4 is highly variable.

EO 13771 partially reverses agencies' historic incentives to underestimate costs. Whereas agencies conducting benefit-cost analysis have historically had strong incentives to understate ex ante estimates of the cost of new regulations, an incentive EO 13771 intensifies, they now have an incentive to overstate the cost savings achieved by deregulation. OIRA Desk Officers may be uniquely well-positioned to deal with this new species of strategic behavior, but they are not well-positioned to know the details without extensive investigation. And because the OIRA professional staff is so small, it will not be possible for them to properly investigate every agency cost-savings estimate. Indeed, it is far more likely that they will be able to investigate only a few.

The Interim Guidance appears to be relying on public comment through conventional APA procedures to identify problematic cost-savings estimates. This also is likely to fail because Desk Officers lack the time to sort through dozens, hundreds or thousands of comments to locate those which speak directly to this question. Most public comments deal with the substance of proposed regulations, not their costs or benefits, and locating the most relevant comments would be extraordinarily time-consuming. Desk Officers' ability to ask commenters follow-up questions is limited by procedural constraints on ex parte communication.

A more efficient procedure is to crowdsource information about cost savings. Regulated entities are particularly well situated to explain what cost savings reasonably can be expected by eliminating specified regulatory provisions.

V. Transparency

The Interim Guidance proposes to resolve many implementation challenges by directing agencies to regularly consult with OMB. This includes a general recommendation to consult (p. 1), plus separate recommendations on regulations implementing Federal spending programs (p. 2), new guidance (p. 3), which past regulatory actions are eligible if repealed or revised (p. 3), potential double-counting (p. 5), and waivers (p. 5).

Consultation is certainly welcome, but the Interim Guidance requires informal procedures to bear to great a load. OMB can expect myriad requests for meetings with the OIRA Administrator to lobby for the inclusion or exclusion of specific regulatory actions, or to contest agency cost savings estimates. OMB might refuse to schedule such meetings, but that tactic denies OMB access to relevant information and cannot prevent interested parties denied meetings from suspecting that OMB meet secretly with others.

The absence of transparency also will invite skepticism and in some cases, outright opposition, that could seriously undermine both the EO and OMB institutionally. EO 13771 fundamentally changes the role OMB plays in regulatory oversight. Sticking with essentially the same procedures that were established in 1986 (the “Gramm Memo”) will not suffice.

Transparency also can be justified as an act of pure self-interest. OMB can expect to face a flurry of Freedom of Information Act requests, each of which will divert scarce staff time even if each can be deflected by reliance on FOIA’s deliberative process exemption. Time that is diverted to responding to FOIA requests is time OMB cannot spend implementing EO 13711. Opponents of the EO have every reason to bollix implementation by flooding OMB with FOIA requests, each of which must be managed in accordance with strict statutory deadlines, and litigating denials.

Substantively, it seems unlikely that OMB could sustain the FOIA deliberative process exemption because the issues subject to consultation by the Interim Guidance are procedural and analytical, not substantive. Given recent events, it would not be surprising if the principles and procedures set forth in the Interim Guidelines were subjected to legal challenge and at least one court enjoined OMB from implementing the EO. These risks can be substantially reduced if OMB proactively embraces methods such as crowdsourcing. The public would have a credible means of contributing information and monitoring the process. No genuine confidentiality interest would be implicated.

OMB should begin by establishing a web portal to post comments received on the Interim Guidance, and allow the public a way to comment on these comments. OMB should use this portal to post agency-supplied and crowdsourced candidate regulations for elimination, and enable the public to provide feedback that everyone else can see.[11]

As candidate regulations for elimination are identified, OMB should use this web portal to crowdsource public comment on cost savings estimates. OMB may be tempted to rely on existing portals like regulations.gov instead, but that portal has serious designed-in constraints that are incompatible with EO 13711. Also, because it is structured to be prospective and agency-specific, it cannot manage a government-wide deregulatory effort.

[11] To prevent abuse, OMB should insist on verified identifies and forbid anonymous comments.