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A FIRST STEP: ISSUES WITH IMPLEMENTING THE EXECUTIVE ORDER TO REDUCE REGULATION

RICHARD A. WILLIAMS, PhD

Senior Affiliated Scholar, Mercatus Center at George Mason University

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

Agency: Office of Information and Regulatory Affairs

Proposed: February 2, 2017

Comment period closes: February 10, 2017

Submitted: February 10, 2017

This new executive order (EO) is a welcome first step toward the goal of reducing the burden of federal regulations, even though it is limited to “economically significant” regulatory actions. Agencies and the Office of Information and Regulatory Affairs (OIRA) will face several challenges in meeting this executive order, including determining credible estimates of benefits and costs of proposed regulations, conducting adequate oversight of the process, and choosing the right regulations to eliminate. Guidance on ensuring that poor regulations are eliminated will be a particular challenge in meeting the executive order.

1. SCOPE OF THE EO

The executive order only applies to “significant” regulatory actions. There is likely to be conflict over what constitutes significant but, in the end, it is OIRA’s decision to determine what is significant. The meaning of OIRA calling a regulation significant is, ultimately, that it chooses to review the regulation under one or more of the multiple criteria in EO 12866.¹ OIRA’s lack of resources will be a problem in its effort to address all new significant regulations, given

1. Exec. Order No. 12866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601 (1994).

For more information, contact
Robin Bowen, Director of Federal Outreach
703-993-8582, rbowen@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

that OIRA is now at half the strength it was at its creation (from 90 full-time equivalents in 1981 to about 45 today).

2. CHOOSING REGULATIONS TO ELIMINATE

The *Code of Federal Regulations* was almost 175,000 pages long in 2014, and it contained over 1 million restrictions.² It is among these that OIRA will find regulations that can be eliminated.

Credible Benefit-Cost Analysis

There is pressure on agency economists to justify new regulations by finding larger benefits and reducing their estimates of costs.³ There will now be further pressure to find large ongoing costs of existing regulations that can be used to offset the costs of proposed regulations. Agencies are extremely protective of regulations that take years to produce and enable them to control private markets. It should be noted that the costs of a proposed regulation include the one-time costs of implementing the regulation, the ongoing costs for incumbents, and the implementation costs for new entrants. As part of the cost savings for existing regulations, they should include ongoing costs for incumbents as well as reduced costs for potential entrants.

OIRA oversight is the only real help that agency economists have in trying to produce credible estimates of benefits and costs given the pressure put on them by agency decisionmakers. OIRA, with 45 full-time analysts, simply lacks the staff to adequately fulfill this function. In addition, currently, no stakeholder of any kind can challenge regulatory impact analyses (RIAs) or, in some cases, the underlying risk assessments in court. This could change if, for example, a version of the Regulatory Accountability Act is passed that would allow such changes.⁴

Incentives for Agencies

As long as the current situation remains unchanged, much of the responsibility of choosing which regulations to eliminate in order to comply with the executive order rests with the agencies. Agencies may very well choose to try to remove effective regulations. According to this approach, they would claim that the executive order forced them to eliminate net beneficial regulations that will put Americans at risk. This would be a sort of regulatory Washington Monument strategy.⁵

A similar strategy would be to try to repeal regulations based on popular laws. The executive order pleads that “agencies should also confirm that they will continue to achieve their regulatory objectives after the deregulatory action is undertaken.” This presumes that agencies have, or Congress has given them, well-defined regulatory objectives. But a study by Jerry

2. Patrick A. McLaughlin and Richard Williams, “Why We Need Regulatory Reform in Two Charts,” Mercatus Center at George Mason University, May 27, 2014.

3. Richard Williams, “The Influence of Regulatory Economists in Federal Health and Safety Agencies” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2008).

4. Regulatory Accountability Act of 2017, H.R.5 (2017).

5. Jonathan Bernstein, “The ‘Washington Monument’ Sequester Strategy,” *Washington Post*, February 19, 2013. This describes the strategy of closing popular tourist landmarks in response to budget cuts.

Ellig of the Mercatus Center shows that over a six-year period, only 13 percent of regulations had evidence of the existence or cause of a problem.⁶ Oftentimes, the goal of the regulation is simply to regulate an industry. Because of these peculiar incentives, it is not clear whether this executive order will result in agencies eliminating consequential regulations that have burdens that far exceed their costs.

3. FOLLOWING UP ON COMPLIANCE

The effectiveness of the executive order could be at risk because it apparently does not actually require agencies to remove regulations before issuing a new one, unless they get permission from OIRA to go forward with a new regulation without a simultaneous proposal to eliminate two regulations. Who will follow up to see that they do so? The incentive is unlikely to come from most of the existing stakeholders. It can be expected that many companies in regulated industries, along with activists, will oppose the removal of regulations. This is a sort of reverse “bootleggers and Baptists” effect.⁷ Companies in regulated industries often object to the removal of existing regulations because they serve as a barrier to entry. These companies are also concerned about new regulations that will replace the removed ones, perhaps in a new administration. If the administration is looking to industry or activists to provide helpful comments on removing regulations, it is unlikely to happen for many regulations.

4. INCREASING EFFECTIVENESS

An important effect of repealing existing regulations should be to help expand entry into markets. Therefore, perhaps more than just increasing OIRA staff is needed. With a rising population, we would expect firm births to exceed firm deaths but, although there is some dispute about how they are counted, there appears to be a troubling trend in this area.⁸ At a minimum, firm births are currently no more than equal to firm deaths. It might be helpful to have a public-private review team examine whether any proposed actions adequately take into account whether or not the proposed actions will expand access for potential entrants. This might include, for example, Department of Commerce economists, Council of Economic Advisers economists, and independent regulatory economists.

The executive order appears to expire in September of this year. Hopefully this signals a more aggressive approach to reining in new and existing regulations, perhaps taking advantage of some of the dozens of bills put forth in Congress over the last six years.⁹ In order to truly make a long-term dent in the growth of the regulatory state, it will be necessary to close down federal programs or agencies that are ineffective, that are no longer necessary because the authorizing

6. Jerry Ellig, “Evaluating the Quality and Use of Regulatory Impact Analysis” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, July 2016).

7. Bruce Yandle, “Bootleggers and Baptists—The Education of a Regulatory Economist,” *Regulation* 7, no. 3 (1983): 12–16.

8. Lori Robertson, “A GOP Talking Point Turned False,” FactCheck.Org, November 4, 2015.

9. Memorandum to Reeve Bull on Regulatory and Administrative Reform Legislation, Administrative Conference of the United States, September 16, 2015.

problem has either been solved or cannot be solved, or whose functions are better executed at lower levels of government.

It should be also noted, of course, that once again independent agencies are not covered by this executive order. President Obama “encouraged” these agencies to follow his executive orders, but to no avail.

Finally, it must be recognized that many regulations are specifically required by statute, and Congress alone can change laws to rid us of burdensome, ineffective regulations in this category. Perhaps this process could begin a signaling process for Congress to do so.