

MEMORANDUM

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Date: June 6, 2017

Re: OMB Issues Additional Guidance on Implementation of Executive Order 13771 and the Government-wide Reform Plan

Earlier this spring, the White House Office of Management and Budget (OMB) issued additional guidance for agencies on implementing Executive Order (EO) 13771, entitled “Reducing Regulation and Controlling Regulatory Costs.” ^{1/} EO 13771 established the expectation that for every new regulatory action an agency issues, it must offset the cost of the regulatory action with two deregulatory actions. OMB’s guidance supplements the interim guidance the agency issued on February 2, 2017. ^{2/}

Like the previous guidance, OMB’s most recent guidance addresses how agencies should implement Section 2 of EO 13771, which concerns agency actions during fiscal year (FY) 2017. However, it also addresses Section 3(d), which established that for FY 2018 and subsequent years, the White House will set for each agency a total amount of incremental costs that will be allowed when it issues new regulations and repeals regulations for the next fiscal year. The new guidance defines key terms such as an “EO 13771 regulatory action” and “EO 13771 deregulatory action” and provides further clarification of the scope of the EO, how agencies should calculate cost, and addresses how the requirements apply in particular circumstances.

OMB also recently issued a memorandum to the heads of executive departments and agencies that lays out the next steps agencies must take as a part of the comprehensive plan to reform the federal government and reducing the federal civilian workforce. ^{3/} OMB’s memorandum officially ends the federal hiring freeze implemented shortly after the Trump administration took office; however, the memorandum directs each agency to develop a long-term workforce reduction plan, in addition to making near-term workforce reductions and other measures to implement the government-wide reform plan, as discussed further below. This memorandum summarizes the topics covered in OMB’s guidance and memorandum of most relevance to food and agriculture companies.

^{1/} See HL Memo – Trump Administration Issues Executive Order on Reducing Regulations and Controlling Regulatory Costs (Feb. 2, 2017).

^{2/} See HL Memo – OMB Issues Guidance on Executive Order on Reducing Regulation and Controlling Regulatory Costs (Feb. 10, 2017).

^{3/} See HL Memo – Executive Order Directs Agencies on Enforcing Regulatory Reform Agenda (Mar. 1, 2017) and HL Memo – OMB Issues Guidance on Implementation of Regulatory Cap and Hiring Freeze (Feb. 10, 2017).

Guidance on Implementing EO 13771

Key Terms Defined

Section 2 of EO 13771 contains three primary requirements: (1) for each new regulation promulgated, an agency must identify at least two existing regulations to be repealed; (2) the total net cost for all new and repealed regulations for FY 2017 must be no greater than zero; and (3) any new incremental costs associated with a new regulation must be offset by the elimination of existing costs associated with at least two existing regulations. These requirements apply only to “significant regulatory actions,” as defined in Executive Order 12866. The guidance clarifies that agencies may comply with these requirements by issuing two “EO 13771 deregulatory actions” for each “EO 13771 regulatory action.” These two new terms, along with several other key terms, are defined in the guidance.

- **EO 13771 Regulatory Action:** An “EO 13771 regulatory action” is either (1) a significant regulatory action as defined by EO 12866 that has been finalized and that imposes total costs greater than zero; or (2) a significant guidance document reviewed by the Office of Information and Regulatory Affairs (OIRA) under the procedures of EO 12866 that has been finalized and that imposes total costs greater than zero. *This definition is noteworthy because it indicates that two EO 13771 deregulatory actions would not be required for significant guidance documents until (and unless) the guidance is finalized.*
- **EO 13771 Deregulatory Action:** An “EO 13771 deregulatory action” is an action that has been finalized and has total costs less than zero. An EO 13771 deregulatory action may be issued in the form of a wide range of actions, including guidance documents, or information collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements. They are not required to satisfy the requirements for “significant regulatory actions.” EO 13711 deregulatory actions will qualify as both: (1) one of the actions used to satisfy the provision to repeal or revise at least two existing regulations for each new regulation issued and (2) a cost savings for purposes of an agency’s total incremental cost allowance. *This definition is noteworthy because it indicates that either guidance documents or modifications to information collection requirements can be used to offset the cost of new regulations.*
- **Significant Guidance Document:** For purposes of EO 13771, a “significant guidance document” is a guidance document disseminated to regulated entities or the general public that may be reasonably anticipated to:
 - Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal government communities;
 - Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
 - Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
 - Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in EO 12866, as further amended.

Notably, OMB clarifies that significant guidance documents could include internal policies and guidance that “materially affect an agency’s interactions with non-Federal entities, even if nominally directed only to agency personnel.” *For example, OMB indicated that an internal directive to field staff on how to implement a regulatory requirement could be a significant guidance document if it satisfied any of the four criteria listed above.*

- **Agency:** The guidance clarifies that a cabinet department is considered a single agency for purposes of EO 13771 compliance. *This clarification is noteworthy because it confirms that the requirements apply at the department level (i.e., Department of Health and Human Services (HHS) and U.S. Department of Agriculture (USDA), rather than U.S. Food and Drug Administration (FDA) or Food Safety and Inspection Service)). This means that new regulations issued by FDA could be offset by other departments within HHS, and vice versa, and that the regulatory cap on cost would not apply directly to FDA or FSIS. This means the cost of new regulations for FDA or FSIS could still be greater than zero, provided those increases in costs are offset by other deregulatory actions within HHS or USDA.*

Scope of the Order

The guidance also provides additional clarity on the types of rules that fall outside the scope EO 13771's requirements because they are subject to a full or partial exemption. The following categories of EO 13771 regulatory actions may qualify for a full or partial exemption from EO 13771's requirements: 1) actions expressly exempted in EO 13711 (e.g., regulations issued with respect to a military, national security, or foreign affairs function); 2) emergency actions; 3) statutorily or judicially required actions; and 4) *de minimis* actions. *As an example, OMB said that a rule may be exempted from some or all of the EO's requirements as a de minimis regulatory action if, even though OIRA has designated it as a significant regulatory action because it raises a novel legal or policy issue, OIRA estimates the action would have present value costs of \$50,000 spread over a large number of persons and/or entities.*

In addition, the guidance makes clear that the requirements of EO 13771 do not apply to pre-notice of approved rulemaking activities such as an advance notice of proposed rulemaking (ANPRM).

Calculating Costs

The guidance reiterates OMB's previous direction that costs should be estimated using OMB Circular A-4. Where there is ambiguity as to how an effect should be categorized (e.g., treating reduced medical costs as a benefit or a reduced cost), agencies are directed to apply the accounting conventions they followed in past analyses. When estimating the cost savings of deregulatory actions, only those effects that have traditionally been estimated as costs when analyzing a regulatory action should be counted as costs savings for a deregulatory action. *In particular, according to OMB, if medical cost savings are historically counted as benefits when regulating, they should not be counted as "negative cost savings" when deregulating.*

For regulatory actions that expand consumption and/or production options, which sometimes are referred to as "enabling" regulatory actions or regulations, OMB states that the cost savings should include the full opportunity costs of the previously forgone activities.

The guidance also explains that agencies can "bank" cost savings and EO 13771 deregulatory actions for use in identifying two regulations to be repealed as well as to comply with the total incremental cost allowance. For example, if an agency issues four EO 13771 deregulatory actions, the agency may apply them to up to two subsequent EO 13771 regulatory actions, including those occurring in a future fiscal year.

Prioritizing Deregulatory Actions

As previously reported, President Trump recently issued EO 13777, which requires each agency to establish a Regulatory Reform Task Force to evaluate the agency's existing regulations and make

recommendations for whether the regulations should be repealed, replaced, or modified. ^{4/} It also directed agencies to prioritize those their respective Regulatory Reform Task Force have identified as outdated, unnecessary, or ineffective when they are choosing deregulatory actions. OMB's guidance clarifies further that each agency's public engagement may also be used to prioritize regulations to repeal or revise to offset EO 13771 regulator actions. In addition, OMB states that when the costs of an EO 13771 regulatory action will be incurred entirely to a large degree by a certain sector or geographic area, the agency should prioritize EO 13771 deregulatory actions that affect the same sector or geographic area.

Interim and Direct Final Rules

The guidance explains that significant interim and direct final rules must be offset, although they may qualify for an exemption with respect to the timing for identifying and issuing two EO 13771 deregulatory actions. However, a final rule that finalizes an interim final rule (IFR) would not need to be offset if it neither increases nor decreases the cost of the (IFR). Conversely, if the final rule includes changes that increase the cost of the IFR, then the final rule would be required to be offset (unless the final rule imposes only *de minimis* costs, in which case it may qualify for an exemption). If the final rule reduces the cost of the IFR, it may qualify as an EO 13771 deregulatory order.

Memorandum on a Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce

OMB's memorandum requires each agency to 1) begin taking immediate actions to achieve near-term workforce reductions and cost savings; 2) develop a plan to maximize employee performance; and 3) submit an Agency Reform Plan that includes long-term workforce reductions. In undertaking these actions, agencies should align their proposals with the President's FY 2018 budget, which has proposed decreasing or eliminating funding for many programs across the Federal government. ^{5/} In addition to proscribing agency obligations, OMB's memorandum outlines the steps OMB will take to create a comprehensive government-wide reform plan for publication in the President's FY 2019 budget. OMB's comprehensive reform plan will be based on Agency Reform Plans, OMB-coordinated cross-cutting proposals, and public input. OMB states its objectives in developing a government-wide reform plan are:

- Creating a lean, accountable, more efficient government that works for the American people;
- Focus the Federal government on effectively and efficiently delivering those programs that are the highest needs to citizens and where there is a unique Federal role rather than assuming current programs are optimally designed or even needed;
- Align the Federal workforce to meet the needs of today and the future rather than the requirements of the past; and
- Strengthen agencies by removing barriers that hinder front-line employees from delivering results.

Agency Reform Plans

OMB's memorandum predominately focuses on providing guidance to agencies on developing Agency Reform Plans. An Agency Reform Plan should include an analytical framework that examines whether agency activities are aligned with the mission and role of the agency and the performance of individual functions. Proposals for reform should fall into the following four

^{4/} See HL Memo – Trump Administration Directs Agencies on Enforcing Regulatory Reform Agenda (March 1, 2017).

^{5/} See HL Memo – President Trump's Budget Proposes Reduced Funding for FDA & USDA (June 1, 2017).

categories: 1) eliminate activities; 2) restructure or merge; 3) improve organizational efficiency and effectiveness; and 4) workforce management.

OMB sets forth several factors agencies should consider when developing their proposals:

- **Duplicative:** If some or all of the mission functions or administrative capabilities of an agency, component, or program are needlessly redundant with those of another agency, component, or program, then agencies should explore options to eliminate or merge.
- **Non-Essential:** If the service, activity, or function is not core to the agency's mission or obsolete, then explore options to eliminate.
- **Federalism (Appropriate Federal role):** If some or all of the services, activities, or functions could be better performed by another entity, such as state/local/tribal government or the private sector, then explore options to eliminate or restructure.
- **Cost-Benefit:** If the costs of continuing to operate an agency, a component, or a program are not justified by the unique public benefits it provides, then explore options to eliminate, merge, restructure, or improve efficiency and effectiveness.
- **Efficiency and Effectiveness:** If the agency, component, or program – based on the available body of evidence and historical performance data – is ineffective or inefficient (e.g., struggles to make decisions and execute), then explore options to eliminate, restructure, improve efficiency and effectiveness, improve workforce performance/accountability, or enhance evidence-building.
- **Customer Service:** If the agency, component, or program can be redesigned to better meet the needs of the public and partners in service delivery in a more accessible and effective manner, then explore options to restructure, improve efficiency and effectiveness.

Proposals can include changes to current law, regulations, Executive Order, Presidential Memoranda, government-wide guidance, agency Secretarial Order, or other agency guidance or directive. OMB also asks agencies to include opportunities to eliminate or streamline agency reporting burdens.

Workforce Reductions

OMB directs agencies to take near-term and long-term steps to reduce the size and cost of the Federal workforce. In addition to beginning planning for FY 2018 budget reductions where applicable, agencies must develop a long-term workforce reduction plan as a part of their FY 2019 budget submission to OMB, and develop a plan to improve the agency's ability to maximize employee performance.

By June 30, 2017, agencies are directed to provide a high-level draft of their Agency Reform Plan, a report on their progress on near-term workforce reductions, and their plan to maximize employee performance.

Cross-cutting Proposals

Separate from the agency-specific reform proposals, OMB will also work with agencies and key stakeholders to develop reform proposals that involve multiple agencies. As examples, OMB points to areas where market or technology changes may allow a service to be delivered more efficiently, such as by a shared service provider, or where multiple federal agencies interact in fragmented or duplicative ways with state or local government or other stakeholders. OMB notes these actions could include merging agencies, components, programs, or activities that have similar missions.

Public Input

OMB has also established a web form to solicit input from the general public on reforming or eliminating federal agencies. ^{6/} In addition to soliciting proposals to reform or eliminate specific agencies and programs, the form also asks for input on any management reform ideas or ideas on reorganizing the Federal government.

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OMB indicates that additional guidance on implementing Section 3(a) of EO 13771, which requires agencies, when providing their Regulatory Plans to the White House, to identify offsetting regulations for each regulation that increase incremental cost and provide the agency's best approximation of the total cost or savings associated with each new or repealed regulation. We also expect further agency actions as they work to develop their Reform Plans and workforce reductions. We will continue to monitor the Trump administration's actions and will report on the guidance when it is released. Please contact us if you have any questions.

^{6/} See Reorganizing the Executive Branch: We Need Your Input!, *available at* <https://www.whitehouse.gov/reorganizing-the-executive-branch>.