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MEMORANDUM FOR THE HEADS OF INDEPENDENT REGULATORY AGENCIES

FROM: Cass R. Sunstein *CRS*
Administrator

SUBJECT: Executive Order 13579, "Regulation and Independent Regulatory Agencies"

Executive Order 13579 states that independent regulatory agencies, no less than executive agencies, should "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." It also states that independent regulatory agencies should follow the key principles of Executive Order 13563, designed to promote public participation, improve integration and innovation, promote flexibility and freedom of choice, and ensure scientific integrity. Finally, it asks independent regulatory agencies to produce plans for retrospective analysis of existing rules.

The purpose of this Memorandum is to provide relevant guidance to independent agencies on Executive Order 13579. In doing so, this Memorandum builds on and adapts guidance issued to the heads of executive agencies and departments on February 2, 2011.¹ It is understood that this guidance is issued with full respect for the independence of the agencies to which it is addressed, and hence nothing said here is meant to be binding.

Key Principles

Section 1(a) of Executive Order 13579 emphasizes the importance of public participation and of careful analysis of consequences, including both costs and benefits. Analysis of costs and benefits, undertaken in advance, can be a helpful way of assessing alternatives and of ensuring that regulation is justified. Section 1(a) of Executive Order 13579 states: "To the extent permitted by law, [regulatory] decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative)." Section 1(b) of Executive Order 13579 stresses the importance of protecting public health and welfare while also promoting economic growth and job creation.

¹ Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, M-11-10, "Executive Order 13563, 'Improving Regulation and Regulatory Review'" (February 2, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

We devote particular attention in this guidance to section (1)(c), which states that independent regulatory agencies should follow the central requirements of Executive Order 13563, listed in section (2) through (5) of that order.

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.” Section 2 aims to promote 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 calls for 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 provided during the rulemaking process itself. In this way, section 2 is designed to foster better and more informed agency decisions.

The goals of this provision are not met 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 purpose 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 of Executive Order 13563 also requires executive 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. Independent agencies should follow this provision. For proposed rules, independent agencies, no less than executive agencies, should include an opportunity for public comment on the rulemaking docket, including comment on relevant scientific and technical findings.²

Finally, section 2 directs executive 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. Independent agencies should follow this provision, which particularly

² The requirement of Executive Order 13563 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), 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.”

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. Independent agencies should promote that goal.

Integration and Innovation

Section 3 of Executive Order 13563 calls for “[g]reater coordination across agencies” in order to produce simplification and harmonization of rules. Section 3 thus instructs executive 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 emphasizes the crucial importance of simplifying and harmonizing regulations. It 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. Independent agencies should promote these important goals.

Efforts at harmonization might occur within agencies, as efforts are made to coordinate various rules. Such efforts might also occur across agencies, as agencies work together to simplify rules and make them more predictable. In particular, executive agencies and independent agencies should try to ensure, to the extent permitted by law, that their own efforts are well-coordinated and do not promote confusion, uncertainty, or excessive cost. In some contexts, executive and independent agencies have overlapping responsibilities, and clarity and predictability can be promoted, and unnecessary costs avoided, through coordination and harmonization. Such efforts can also help to promote innovation.

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.” Independent agencies should follow this provision.

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 improve the operation of free markets or that maintain and promote flexibility and freedom of choice (for example, by ensuring informed decisions, by choosing sensible default rules, by selecting performance standards rather than design standards, and by using tradable permits rather than rigid commands). It directs executive 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.

Independent agencies should seriously consider such tools as well. When properly used, these tools may promote innovation and growth as well as competition among regulated entities.

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."³ Section 5 of Executive Order 13563 extends the President's Memorandum and implementing guidance to the context of regulatory actions. Independent agencies should follow this important provision as well.

Retrospective Analysis of Existing Rules

Section 2 of Executive Order 13579 emphasizes the importance of retrospective analysis of rules. It contains a "look back" provision: "Within 120 days of the date of this order, each independent regulatory agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Executive Order 13579 recognizes the importance of maintaining a consistent culture of retrospective review and analysis, drawing on the principle in Executive Order 13563 that our regulatory system "must measure, and seek to improve, the actual results of regulatory requirements." 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 applicable to the issuance of rules remain relevant, 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, redundant, 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. Rules or requirements that impose significant reporting or paperwork burdens may also be good candidates for reconsideration; perhaps electronic

³ John Holdren, Memorandum for the Heads of Agencies and Departments, *Scientific Integrity* (December 17, 2010), <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>.

reporting, use of prepopulated forms, or less frequent reporting would be desirable. 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 as well as expected, and that a stronger, expanded, or somewhat different approach is justified. In formulating its 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 might address the following topics:

- **Public participation.** Consistent with the general commitment to public participation, independent agencies should solicit the views of the public on how best to promote retrospective analysis of rules. Even before 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.⁴ Agencies may want to reach out to stakeholders 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 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 plan should also include an initial list of candidate rules for review over the next two years, with clear timelines and deadlines.
- **Analysis of costs and benefits and of potential savings.** 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. In particular, it is

⁴ 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), 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), http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

important to obtain a clear and concrete sense, to the extent feasible, of the potential savings of reforms in terms of monetary amounts or burden hours. Agencies should attempt to identify and quantify those savings, and should prioritize those reforms with the potential to have a significant impact.

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

Please recall that the plans for retrospective review should be released to the public within 120 days of the date of Executive Order 13579.⁵ An Appendix is attached with a suggested template, provided for your consideration in developing those plans.

⁵ Executive Order 13579 was issued on July 11, 2011.

Appendix: Suggested Template for Independent Agency Plans

[Agency Name]

Plan for Retrospective Analysis of Existing Rules

[Date]

I. Executive Summary of Plan

Please provide a succinct summary, specifying the major reforms and the most important rules identified for reconsideration, with estimates of potential savings (to the extent feasible). Your executive summary could begin with a strong statement about the need for a consistent culture of retrospective analysis. For example:

Executive Orders 13579 and 13563 recognize the importance of maintaining a consistent culture of retrospective review and analysis throughout the federal government. Before a rule has been tested, it is difficult to be certain of its consequences, including its costs and benefits. [Agency's] plan is designed to create a defined method and schedule for identifying and reconsidering certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Its review processes are intended to facilitate the identification of rules that warrant repeal or modification, or strengthening, complementing, or modernizing rules where necessary or appropriate.

II. Scope of Plan

- a. List all subagencies within the agency that are included in the plan:
- b. Check all the types of documents covered under this plan:
 - ☐ Existing regulations
 - ☐ Significant guidance documents
 - ☐ Existing information collections
 - ☐ Unfinished proposed rules
 - ☐ Other (Specify _____)

III. Rules for Retrospective Review

- a. Initial list of candidate rules for review over the next two years, with anticipated timelines (please try to quantify relevant savings in terms of monetary amounts or burden hours for as many initiatives as possible, perhaps highlighting at least 3-5):

IV. Public Access and Participation

- a. Did the agency publish a notice in the Federal Register seeking public input, in advance, on the plan? If yes, please provide a link to the notice.

- b. Did the agency reach out to the public in addition to or instead of the public notice?
 - c. Brief summary of public comments to notice or other efforts to seek input:
 - d. What process, if any, does the agency have in place for receiving public comments on the plan, once it is released?

- V. Current Agency Efforts Already Underway Independent of Executive Order 13579
 - a. Summary of pre-existing agency efforts (independent of Executive Order 13579) already underway to conduct retrospective analysis of existing rules:
 - b. What specific rules, if any, were already under consideration for retrospective analysis?

- VI. Elements of Plan
 - a. How does the agency plan to develop a strong, ongoing culture of retrospective analysis?
 - b. Prioritization. What factors and processes will the agency use in setting priorities?
 - c. Structure and Staffing. High-level agency official responsible for retrospective review.
Name/Position Title:
Email address:
 - d. How does the agency plan to ensure that its retrospective team and process maintain sufficient independence from the offices responsible for writing and implementing regulations?
 - e. Describe agency actions, if any, to strengthen internal review expertise. These actions could include training staff, regrouping staff, hiring new staff, or other methods.
 - f. How will the agency plan for retrospective analysis over the next two years and beyond?
 - g. How will the agency decide what to do with the analysis?
 - h. What are the agency's plans for revising rules? How will it periodically revisit rules (e.g., through identified schedules or sunset provisions, during regular intervals)?
 - i. How, if at all, will the agency coordinate with other federal agencies that have overlapping jurisdiction or expertise?

- j. How, if at all, does the agency plan to use peer review in conducting analyses? If so, how will the peer review input be incorporated into a retrospective analysis? How will the agency ensure independence of the peer reviewers from the analysts conducting the retrospective analysis?

VII. Components of Retrospective Analysis

- a. What metrics will the agency use to evaluate regulations after they have been implemented? For example, will the agency use net benefits, cost-effectiveness ratios, or something else?
- b. What steps has the agency taken to ensure that it has high quality data and robust models with which to conduct retrospective analyses?
- c. How, if at all, will the agency incorporate experimental designs, such as randomized controlled trials, into retrospective analyses?

VII. Publishing the Agency's Plan Online

- a. Where will the agency publish its retrospective review plan and available data?
- b. Through what online mechanisms will people be able to comment on the plan?