Introduction to the Fall 2018 Regulatory Plan

Regulatory reform is a cornerstone of President Trump's agenda for economic growth. This Plan reaffirms the principles of individual liberty and limited government essential to reform. It also highlights the success of ongoing efforts, initiatives for improving accountability, and the promotion of good regulatory practices.

Across the Trump Administration, real regulatory reform is underway. As the agency examples throughout the Plan demonstrate, the benefits of a more rational regulatory system are felt far and wide and create opportunities for economic growth and development. Farmers can more productively use their land. Small businesses can hire more workers and provide more affordable healthcare. Innovators will be able to pursue advances in autonomous vehicles, drones, and commercial space exploration. Veterans enjoy expanded access to doctors through a telehealth program. Infrastructure can be improved more quickly with streamlined permitting requirements. These reforms and many others make life better for all Americans through lower consumer prices, more jobs, and, in the long run, improvements in well-being that result from the advance of innovative new products and services.

Private choices of individuals and businesses should generally prevail in a free society. Yet in modern times, the expansion of the administrative state has placed undue burdens on the public, impeding economic growth, technological innovation, and consumer choice. This Administration has spearheaded an unprecedented effort to restore appropriate checks on the regulatory state, ensuring that agencies act within the boundaries of the law and in a manner that yields the greatest benefits to the American people while imposing the fewest burdens. Our policies focus on restoring political accountability and protecting the constitutional values of due process and fair notice. Government should respect the private decisions of individuals and businesses unless a compelling need can be shown for intervention, a longstanding principle affirmed in Executive Order 12866 ("Regulatory Planning and Review," September 30, 1993). We approach regulation with humility, trusting Americans to direct their energy and capital productively and to reap the benefits that result from a free exchange of goods and ideas.

The Administration's regulatory agenda involves structural reforms as well as the practical work of eliminating and revising regulations. Agencies continue to advance the health and safety mandates that Congress has entrusted to them and to revamp vital programs to increase their effectiveness. At the same time, agencies are revising or rescinding regulations that fail to address real-world problems, that are needlessly burdensome, and that prevent Americans from advancing innovative solutions. Our reform efforts emphasize the rule of law, respect for the Constitution's separation of powers, and the limits of agency authority.

<u>Reducing Regulatory Burdens</u>

At the outset, President Trump set forth a general mandate for regulatory reform across the Administration. Consistent with legal obligations, Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs," January 30, 2017) directs a two-fold approach to reform: It requires that agencies eliminate two regulations for each new significant regulation and also requires

that agencies offset any new regulatory costs. By requiring a reduction in the number of regulations, the order incentivizes agencies to identify regulations and guidance documents that do not provide sufficient benefits to the public. Agencies have reduced or eliminated unnecessary requirements large and small. For the first time in decades, Federal agencies have decreased new regulatory costs, while continuing to pursue important regulatory priorities.

Agencies have achieved historic and meaningful regulatory reform in the first two years.

- For fiscal year 2018, agencies achieved $23 billion in net regulatory cost savings across the government.
- Agencies issued 176 deregulatory actions (57 of which are significant deregulatory actions) and 14 significant regulatory actions.
- These results expand and build upon the success of the Administration's first year, for a total regulatory cost reduction of $33 billion.

In addition to these impressive results, the agencies project $18 billion in regulatory cost savings for 2019. In addition, the "Safer Affordable Fuel-Efficient Vehicles Rule" revises the greenhouse gas standards and Corporate Average Fuel Economy standards for passenger cars and light trucks. The Department of Transportation and the Environmental Protection Agency have proposed a range of options that are projected to save between $120 and $340 billion in regulatory costs and anticipate completion of the rule in fiscal year 2019. The momentum for reform continues to accelerate as agencies complete substantial deregulatory actions.

Promoting the Rule of Law: Political Accountability, Guidance Documents, and Respecting Congress' Lawmaking Power

The Administration's regulatory reform is committed to the rule of law, understood as respect for the constitutional structure as well as the specific laws enacted by Congress. The Constitution establishes a relatively simple framework for regulation. Congress is vested with limited and enumerated legislative powers, which it may use to set regulatory policy and establish the authority of agencies to issue regulations. The President is vested with the executive power, which includes overseeing and directing administration of the laws. Within the framework and directions established by Congress, political accountability for regulatory policy depends on presidential responsibility and control. As Alexander Hamilton explained, "Energy in the executive is a leading character of good government. It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws." The Federalist No. 70.

The annual Regulatory Plan has provided a longstanding form of presidential accountability for the regulatory policy of federal agencies as well as for the specific regulatory actions planned for the forthcoming year. Through the process of reviewing the Plan and Unified Agenda of Regulatory and Deregulatory Actions, OIRA helps agencies to direct administrative action consistent with presidential priorities. Agency heads explain their priorities through the narrative of the Regulatory Plan and list specific deregulatory and regulatory actions expected to be completed in the coming year. This process provides an important gatekeeping role to ensure agencies pursue only those actions consistent with law and that have the support of the heads of agencies and ultimately the

President. Likewise, review of draft regulatory actions through Executive Order 12866 advances good regulatory policy consistent with legal requirements, sound analysis, and presidential priorities.

Faithful execution of the laws also includes respect for the lawmaking power of Congress. Although Congress often confers substantial discretion on agencies, OIRA works with agencies to limit expansive interpretations of executive authority and to regulate within the boundaries of the law. Carefully examining statutory authority and keeping agencies within the limits set by Congress protects against executive agencies exercising the legislative power. OIRA also works with agencies to ensure compliance with the Administrative Procedure Act. The requirements of public notice and opportunity for comment bolster the legitimacy of agency action and can provide refinements that improve the ultimate policy chosen by an agency.

Moreover, OIRA is looking closely at existing statutory requirements for limiting administrative excess across federal agencies, including within the historically independent agencies. Under the Paperwork Reduction Act, all federal agencies must comply with specific requirements before collecting information from the public. OIRA plays an important role in reviewing forms that collect information, verifying that they have practical utility and are as minimally burdensome as possible. Reduction of paperwork burdens plays an important role in eliminating unnecessary, duplicative, or conflicting regulatory requirements.

The Administration's commitment to the rule of law finds expression in other initiatives, such as restoring the proper use of guidance documents. While guidance documents may provide needed clarification of existing legal obligations, they have sometimes been stretched to impose new obligations. OIRA and the White House Counsel's Office have repeatedly affirmed the importance of due process and fair notice in regulatory policy and worked closely with agencies to prevent the misuse of guidance documents. Agencies should not surprise the public with new requirements through an informal memo, speech, or blog post. When agencies impose new regulatory obligations, they must follow the appropriate administrative procedures.

Through the review process for significant guidance documents, OIRA has identified proposed agency guidance that should be undertaken only through notice and comment rulemaking. Some agencies have withdrawn expansive guidance from the previous administration and are replacing it with rulemaking, rather than simply a revised guidance document. Rulemaking undoubtedly requires more agency time and resources; however, it also provides fair notice and allows input from the public, which ultimately results in more lawful and predictable regulatory policy.

Other agencies are also taking important steps. The Department of Justice clarified that guidance documents would not be used for enforcement purposes. Several agencies subsequently followed this principle, including a group of historically independent financial regulatory agencies. Other agencies are in the process of revising their guidance policies to promote greater accountability in the development, promulgation, and access to guidance documents.

Ensuring the proper use of guidance documents; eliminating outdated or stale guidance; requiring internal checks that enhance accountability for guidance; and providing greater transparency and online access to guidance documents are steps forward in promoting sound

regulatory policy across the federal government. OIRA will continue to work with agencies to improve and refine their guidance practices.

Good Regulatory Practices: Transparency, Coordination, and Analysis

Regulatory reform in the Trump Administration includes the promotion and expansion of longstanding good regulatory practices such as transparency, coordination, and cost-benefit analysis. These practices improve regulatory outcomes irrespective of the policy preferences of an agency or administration.

Transparency in the regulatory process provides one of the most important checks on administrative agencies by allowing the public to have notice of regulatory actions and opportunities for comment in the administrative process. This Administration has taken specific steps to improve transparency.

For example, OIRA collaborates with agencies to make the Unified Agenda of Regulatory and Deregulatory Actions a more accurate reflection of what agencies plan to pursue in the coming year. Agencies must make every effort to include actions they plan to pursue, because if an item is not on the Agenda, under Executive Order 13771, an agency cannot move forward unless it obtains a waiver or the action is required by law. A clear and accurate Agenda helps avoid unfair surprise and achieves greater predictability of upcoming actions.

This Administration has also published the so-called "Inactive List," a list of regulations contemplated by agencies, but previously not made public in the Agenda. Agencies continue to review these lists and remove actions they no longer plan to pursue. Publication of the list promotes agency accountability for all regulatory actions under consideration and a more accurate picture of regulations in the pipeline.

Furthermore, in the process of implementing the historic reforms of Executive Order 13771, OIRA published detailed information about the cost allowances, cost savings, and specific actions counted as regulatory and deregulatory. OIRA issued early guidance on how the Executive Order would be implemented. Drawing from the successful experience of similar deregulatory programs in the United Kingdom and Canada, the guidance explained that even small deregulatory actions would be counted in order to incentivize agencies to eliminate unnecessary regulatory burdens of all sizes. This transparency allows the public to understand the accounting methodology and the choices made to encourage the greatest possible reform efforts from the agencies.

Coordination is an important component of the OIRA regulatory review process. Coordination facilitates consistent application of presidential priorities, legal interpretation, and regulatory policy across different agencies. Centralized review allows the Administration to advance broader principles, such as concern for the rule of law, due process, and fair notice, as well as to reduce regulatory costs across the board.

Through the review process, agencies and senior officials within the Executive Office of the President have an opportunity to comment on draft regulations. These reviewers flag policy concerns or problems of duplication, inconsistency, and inefficiency. Such coordination allows for careful consideration of competing priorities and how they should be balanced across the Executive Branch. The review process also allows for coordination in other contexts, such as when one

agency's rule implicates the programs or legal authorities of another. Interagency review can ameliorate problems arising from overlapping statutory mandates. Review can also strengthen the legal foundation and the supporting analysis of rules—bolstering their effectiveness and also their ability to survive legal challenge.

The historically independent agencies sometimes participate in the review process when a regulation raises issues that implicate their jurisdiction. Because these agencies are not generally subject to other White House coordination mechanisms, the review process provides an opportunity to ensure greater consistency across all agencies within the Executive Branch.

Finally, *cost-benefit analysis* must justify the need for regulation. As Executive Order 12866 recognizes, private choices of individuals and businesses are the baseline in the American system of government. To warrant departure from this baseline, regulatory actions must be consistent with statutory authority and should have benefits that substantially exceed costs.

Careful analysis that accurately captures both the benefits and costs of regulation is essential to achieving good regulatory policy. Consideration of alternatives and an assessment of their costs and benefits serves an important function by providing transparency for regulatory decisions and information that can inform public comment on the impact of regulatory alternatives before a rule is finalized. While anticipating and quantifying the costs and benefits of regulations pose challenges in some contexts, OIRA will continue to work closely with agencies to improve their analyses.

One of the practical consequences of Executive Order 13771 is that agencies have a new and meaningful incentive to engage in retrospective review of regulations, which President Obama called for in Executive Order 13563 ("Improving Regulation and Regulatory Review," January 18, 2011). When issuing a rule, an agency can only *predict* the costs and benefits. Periodically reviewing the *actual* costs and benefits of regulations allows agencies to modify rules for greater effectiveness or to repeal rules that are unnecessary or counterproductive.

Review of tax regulations under Executive Order 12866

Administration-wide regulatory reform efforts have been coupled with targeted reforms in specific high-burden areas. For example, the President issued Executive Order 13789 ("Identifying and Reducing Tax Regulatory Burdens," April 21, 2017), directing the Department of the Treasury to identify and reduce tax regulatory burdens because America's "Federal tax system should be simple, fair, efficient, and pro-growth." In addition to other measures, the President called for a review of whether tax regulations should go through the centralized OIRA regulatory review process. Tax regulations were previously exempt from this process, in part contributing to the problem of burdensome, complicated, and inefficient tax regulatory policy identified by Executive Order 13789.

After conducting this review, the Office of Management and Budget and the Department of the Treasury signed a Memorandum of Agreement (MOA), "Review of Tax Regulations under Executive Order 12866" (April 11, 2018). The MOA recognizes the importance of presidential oversight and accountability, particularly where tax regulations reflect the exercise of discretion, raise important legal or policy questions, or impose substantial costs on the public. Tax regulations uniquely impact all Americans and have significant consequences for investment, economic growth,

and innovation. The OIRA review process provides an important check to ensure that tax regulations are consistent with the President's priorities for a "simple, fair, efficient, and pro-growth" tax system.

The historic reforms enacted in the Tax Cuts and Jobs Act (TCJA) require Treasury to issue a number of regulations. The MOA provides for the possibility of expedited review of TCJA regulations in order to provide timely guidance and information to the public. Over the past few months, Treasury and OIRA have worked closely together to improve tax regulations, ensuring that regulations are consistent with law, demonstrate benefits that exceed the costs, and impose the fewest possible burdens on the public. The review process encourages greater transparency of the impacts of the regulation, highlighting where the agency exercises discretion and the anticipated burdens placed on the public, including paperwork and other compliance burdens. When Treasury provides this information in a proposed rule, the public has a more informed basis from which to comment on the rule and share information about the consequences of particular regulatory choices. Moreover, the review process facilitates coordination with other agencies to avoid conflict with other administration priorities.

The improvement of tax regulations demonstrates a specific success in the Administration's regulatory reform agenda. It also reaffirms the value of the OIRA centralized review process for promoting presidential priorities and good regulatory practices such as transparency, coordination, and robust cost-benefit analysis.

Conclusion

Consistent with its longstanding commitment to the principles of good regulatory policy, OIRA works closely with agencies to advance regulatory policy that is consistent with law and the President's priorities and yields substantial net benefits for the public. The first two years of the Administration have produced unparalleled reform, and we project even more significant results in the coming year.

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