

Center for Regulatory Effectiveness

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Office of Information and Regulatory Affairs
725 17th Street, NW
Washington, DC 20503

Re: OIRA's Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs"

I. The Regulatory Budget

The [regulatory budget](#) established by President Trump's Executive Order provides a sound mechanism for breaking through bureaucratic [ossification](#) and reigning in the regulatory state. The Order is firmly rooted in bipartisan ideas for governance that were [first developed](#) during the Carter Administration. A comprehensive [repository](#) of information on regulatory budgets is available to assist OIRA and other stakeholders engaged in implementing the Order.

OIRA should supplement its Interim Guidance by including the substance of the [Regulatory Cost Accounting Act](#). Although proposed in 1980, it remains relevant to OIRA today. There are a number of options regarding ownership of the regulatory budget; please note that after prolonged discussions in 1980 it was decided and announced in the legislation's interagency transmittal [letter](#) that responsibility for the regulatory budget was to reside in OMB.

OIRA's Need for Additional Resources

The implementation of a regulatory budget process is comparable to establishing the fiscal budget process as required by the Budget and Accounting Act of 1921; it is an undertaking of considerable magnitude which requires that OIRA obtain additional staff. Probably the only way that OIRA is going to be able to augment its existing staff is by pursuing a two-fold [entrepreneurial](#) approach for obtaining the needed resources:

- A. [Developing a National Constituency for OIRA](#). Unlike the fiscal budget process and until which time legislation is passed which provides Congress with a defined role in the formulation of a regulatory budget, OIRA working through OMB will have the sole responsibility for the management of the regulatory budget. This new responsibility will differ markedly from OIRA's more restricted role in reviewing individual regulations.

Consequently OIRA will need to [develop](#), working with others in the Executive Office of the President, an outreach program which will not only provide it with additional resources but will also provide a transparent program for public input into the formulation

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of a regulatory budget. There is no better place to build a national constituency for both OIRA and a regulatory budget than by capitalizing on the world's most educated constituents who reside within our universities.

- B. Leveraging CEA's Staff. In its 1980 Annual Report, the Council of Economic Advisers endorsed establishing a regulatory budget explaining, "tools like the regulatory budget may have to be developed" to ensure that agencies set priorities in order "to make certain that the first problems addressed are those in which regulations are likely to bring the greatest social benefits."

Since CEA recognizes the need for a regulatory budget, CEA should assist OIRA in implementing the regulatory budget by:

- (1) Stakeholder Engagement. Engaging with stakeholders on an ongoing basis to ensure that the regulatory budget reflects the needs of all stakeholders and to make periodic reports to OIRA.
- (2) Supporting OIRA. Contributions that CEA can make to helping achieve its long sought goal of a establishing a regulatory budget include,
 - a. Interagency Working Group. Establishing an interagency working group which would provide OIRA with additional staff capacity by responding to their requests for assistance.
 - b. Analytic Framework. Assisting OIRA in developing an analytical framework for establishing budget totals by agency.
 - c. Methodological Considerations. Addressing major issues raised during the near forty year debate on the implementation of a regulatory budget including:
 - i. Costs What costs elements are to be considered, compliance costs, loss of jobs; reduced international competitiveness and/or burdens imposed on State, local and tribal authorities?
 - ii. Benefits Are the benefits of a regulation(s) to be considered in defining the "cost" of a regulation, establishing its ranking within the regulatory budget and/or in the establishment of an agency budget level?
 - iii. Budget Offsets What options are available for an agency to offset the cost of its regulatory program so that additional regulations can be issued?
- (3) Bounded Institutions Analysis. Reviewing the literature on bounded institutions and prepare an assessment of its applicability to developing a regulatory budget.

II. Guidance Documents

The OMB/OIRA Memorandum should state that all agencies preparing significant guidance documents shall be required (1) to state publicly that no one will be penalized in any way for not following the guidance, and (2) ensure that the record for the guidance demonstrates compliance with OMB's Memorandum.

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For example, guidance is often used in agency permitting, licensing, registration, leasing, or other agency authorization/approval proceedings. The records for both the guidance and specific relevant proceedings should include an unambiguous statement by the agency that (1) compliance with the guidance is not necessary to receive the permit, license, registration, or other agency authorization/approval, and (2) that non-compliance is not a basis for denying the permit, license, registration, or other agency authorization/approval.

If the guidance and proceeding records do not contain the statements described in the preceding paragraph, then both the guidance and the proceeding should be considered subject to the rulemaking requirements of the Administrative Procedure Act, to the requirements of Executive Orders 12866, and to all OMB/OIRA Memoranda, Bulletins and other documents implementing this Executive Order. The OMB/OIRA Memorandum should also state that guidance documents are subject to the requirements of the OMB Peer Review Bulletin if they meet the definitions applied in the Bulletin.

III. The Data Quality Act: The Governor of the Regulatory Budget

Centralized regulatory review came into existence because when Executive Order 12291 was signed OMB had in existence an operating office with nearly ninety employees and personnel who had been reviewing regulations for a number of years. In the case of initiating a regulatory budget neither of these two conditions exist, in part because a regulatory budget has not been implemented on even a pilot basis. This deficit must be filled by exploiting the entrepreneurial approach to staffing requirements outlined above in conjunction with the authorities of the Data Quality Act.

The [Data Quality Act](#) is a powerful tool that [OIRA](#) can and should use to leverage its resources, engage all stakeholders, and ensure the quality of the regulatory budget. The Department of Justice [informed](#) the courts that OMB is the ultimate decision-maker for determining federal data quality under the Act which means that OMB is the final arbiter of all data in the regulatory budget.

The DQA's Request for Correction process provides an established mechanism—accessible to all stakeholders—for identifying rules that should receive priority consideration for removal. A [Recommendation](#) to Administrative Conference explained that OMB should use the DQA for the retrospective review of regulations “by simply issuing a statement directing agencies to issue guidance stating that stakeholders can use the DQA to petition for the review of existing regulations based upon data that is no longer accurate or representative of the ‘best available’ information.”

The DQA, in conjunction with careful application of the [Paperwork Reduction Act](#), also provides a [mechanism](#) for OMB review of independent agency regulations under existing law which opens the door for eventual inclusion of independent agency rules in the [regulatory budget](#).

Respectfully,



Jim Tozzi