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BACKGROUND: THE ADMINISTRATION'S REGULATORY REFORM AGENDA

Following the policy directives of E.O. 13777 and 13331 (see below) and the Administration's Regulatory Reform Agenda, all federal agencies are seeking to identify regulations and guidance to "repeal, modify, or replace." Several agencies have already published notices requesting public comment on which regulations to target for this purpose. For example, EPA's notice requesting comments resulted in a flurry of public attention and comments from the general public attesting to the importance of regulations.¹ In response to HUD's recent request for comments, several civil rights groups filed comments voicing concern that the underlying executive orders undermine agencies' statutory missions and the requirements of the Administrative Procedure Act, and providing proactive support for civil rights rules.²

In responding to these agency requests, we recommend that civil rights groups take care not to state support for the "Regulatory Reform Agenda." They may also wish to file comments opposing the Regulatory Reform Agenda, and/or proactively supporting civil rights regulations and guidance.

The executive orders give the following directives:

E.O. 13777 (Enforcing the Regulatory Reform Agenda, Feb. 24, 2017) directs agencies to designate Regulatory Reform Officers and Task Forces to carry out the Regulatory Reform agenda. The RRO is to oversee the implementation of regulatory reform policies, specifically: EO 13771 (Reducing Regulation and Controlling Regulatory Costs, i.e. 2-for-1 and cost offsetting, Jan. 30, 2017; see below); EO 12866 (Regulatory Planning and Review, Sept. 30, 1993); section 6 of Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), regarding retrospective review; and "the termination, consistent with applicable law, of programs and activities that derive from or implement Executive Orders, guidance documents, policy memoranda, rule interpretations, and similar documents, or relevant portions thereof, that have been rescinded."

EO 13777 directs each Regulatory Reform Task Force to: "evaluate existing regulations (as defined in section 4 of Executive Order 13771) and make recommendations to the agency head regarding their

¹ www.washingtonpost.com/news/energy-environment/wp/2017/05/16/epa-asked-the-public-which-regulations-to-gut-and-got-an-earful-about-leaving-them-alone/?utm_term=.55998e95c5b8

² See, e.g., PRRAC comment letter, www.regulations.gov/document?D=HUD-2017-0029-0281; ACLU letter, www.regulations.gov/document?D=HUD-2017-0029-0080 (focusing on the requirements of the APA; the benefits of civil rights regulations; the role of these rules in advancing HUD's statutory directives; and the substantial process, facts, and reasoning undergirding the existing rules); Lawyers' Committee letter, www.regulations.gov/document?D=HUD-2017-0029-0097; National Housing Law Project letter, www.regulations.gov/document?D=HUD-2017-0029-0259.

repeal, replacement, or modification, consistent with applicable law. At a minimum, each Regulatory Reform Task Force shall attempt to identify regulations that [as HUD inquires above]:

- Eliminate jobs, or inhibit job creation;
- Are outdated, unnecessary, or ineffective;
- Impose costs that exceed benefits;
- Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- Are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516)...in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- Derive from or implement EOs or other Presidential directives that have been subsequently rescinded or substantially modified.”

Those regulations that the Task Force identifies as “outdated, unnecessary, or ineffective” are to be priorities for regulation-cutting as the agency implements EO 13771’s offset scheme.

E.O. 13771 (“Reducing Regulation and Controlling Regulatory Costs,” January 30, 2017), one of the EOs underlying EO 13777, is legally suspect and is currently the subject of a lawsuit brought by Public Citizen, NRDC, and Earthjustice. It directs agencies to offset new regulatory activity with deregulatory offsets and zero-cost caps. (Requiring repeal of two existing regulations for each one passed; also requiring that the combined incremental cost of new regulation is zero; and requiring that costs savings for new rules must come from cost reductions associated with at least two existing rules. While the cost-cap provisions have boilerplate language about compliance with the APA and other law, they create clear conflicts with agencies’ statutory missions.³

Public Citizen & NRDC’s suit alleges that EO 13771 is unconstitutional because in complying with the EO, agencies would violate the APA and the directives of substantive law. (The complaint may be a helpful resources, providing examples of how this would result in consumer protection and environmental law, with many clear analogs in civil rights and other areas. One commentator called this suit a “roadmap for the resistance” against regulatory culling.) Conservative legal commentators have criticized the suit on the basis of standing, ripeness, and its merits in that (they say) it does not *necessarily* result in unlawful activity, or at least hasn’t yet, but rather is (in theory) a priority-setting scheme delimited by existing law. However, if agencies adhere to those limits, a large swath of the order is rendered ineffective, and in any case it has a significant chilling and interference effect.⁴

OIRA guidance published in April further implements EO 13771. This guidance provides definitions and strives to provide a degree of legal cover. It acknowledges that EO 12866 (1993) “remains the primary governing EO regarding regulatory planning and review” such that agencies must continue to assess benefits as well as costs of both regulatory and deregulatory actions (though this remains in tension with its definition of “incremental costs,” used to calculate offsets, with benefits absent from the equation). It notes that agencies should still abide by statutes that prohibit cost assessment, by cutting at other regulatory schemes instead; and it advises agencies that (at least in the context of Fed. Red. publications) “offsetting the costs of regulatory actions to comply with the requirements of EO 13771 should not serve as the basis or rationale, in whole or in part, for issuing an EO 13771 deregulatory

³ www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

⁴ See <http://yalejreg.com/nc/litigation-challenging-trumps-executive-order-on-reducing-regulation-and-controlling-regulatory-costs/>

action.”⁵ A helpful analysis on appropriate cost-benefit analysis and the implications of the EO is available here: <http://blogs.law.columbia.edu/climatechange/2017/04/14/oira-guidance-solidifies-legal-problems-inherent-in-trumps-deregulation-order/>.

The April OIRA guidance also defines the scope of regulatory actions covered by EO 13771.⁶ New regulatory actions (those that will need to be offset) include “significant” rules and guidance and guidance modifications, with “significant” further defined (more broadly and qualitatively than “major” rules as used elsewhere by OMB). “Deregulatory” actions need not be “significant” under this definition, and include the following: informal, formal, and negotiated rulemaking; guidance and interpretative documents; and information collection requests that repeal or streamline recordkeeping, reporting, or disclosure requirements. The guidance defines “statutorily or judicially required” rulemaking, exempt from the EO, as that providing specific deadlines (and requires agencies to consult with OIRA about such designations).

The OIRA guidance also contemplates the possibility that an agency may not meet its EO directives. (Editorially speaking, because, for example, to do so would be counter to law and established cost-benefit principles, which would constitute arbitrary and capricious action.) It states that “in the rare event that an agency is unable to identify sufficient EO 13771 deregulatory actions, OIRA will address such a situation on a case-by-case basis.” If, at the end of a fiscal year, “an agency does not finalize at least twice as many EO 13771 deregulatory actions as EO 13771 regulatory actions issued during the fiscal year, or has not met its total incremental cost allowance for that fiscal year,” the agency must submit a proposed compliance plan and explanation to OMB (though this “excludes EO 13771 regulatory actions that are exempt or where compliance with EO 13771 is prohibited by law.”)

⁵ www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation.

⁶ EO 13771 itself defines “regulation” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency,” with some exceptions. Note that EO 13773 incorporates this definition by reference (but the OIRA guidance postdates 13773).