

Written Testimony of

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before the

The House Oversight and Government Reform Committee

on

“Shining Light on The Federal Regulatory Process”

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Amit Narang, Regulatory Policy Advocate at Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For 45 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; protected minorities and vulnerable populations from harassment and discrimination based on race, gender and sexual orientation and promoted equality under the law for such populations; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much, much more.

In short, regulation is one of the greatest public policy success stories in terms of benefits to the public and is a testament to the power of Congress in protecting the public through passage of critical, foundational laws such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the Consumer Product Safety Act, the Civil Rights Act, various food safety laws, and many more. Strong and effective public health and safety regulations are a reflection of Congress' desire to protect everyday Americans through laws that are still among the most popular and cherished by the public.

Unfortunately, this Administration has sought to roll back regulatory safeguards in radical and unprecedented fashion. Public Citizen's report from last year, entitled "Sacrificing Public

Protections on the Altar of Deregulation,” presents a full accounting of hundreds of regulatory protections that were unilaterally withdrawn by agencies under the Trump Administration before completion based on detailed empirical analysis of data disclosed in the Spring Unified Regulatory Agenda of 2017.¹ In addition, Congress has resorted to the Congressional Review Act, which bypasses normal legislative procedures and accountability, in order to repeal 14 critical regulatory protections² in a variety of areas that were issued near the end of the previous Administration. Finally, agencies have begun the process of repealing rules finalized under the last Administration and delaying others indefinitely by categorizing them as “long term” actions in the most recent Unified Regulatory Agenda.³

President Trump’s Executive Order on regulations, 13771,⁴ is a key driver of deregulatory activity at all agencies. EO 13771 generally restricts agencies from issuing the most important and beneficial new regulations (i.e. significant regulations) unless agencies are able to first identify and remove at least two other existing regulations and which result in costs savings that fully offset costs imposed by new regulations. In other words, agencies are only allowed to protect the public to the extent that it imposes no new costs on corporate stakeholders. Further, the EO places pressure on agencies to ensure that any regulatory protections the agency seeks to adopt must be fashioned in a way that minimizes costs in order to comply with allocated regulatory budgets under the EO, rather than in a way that maximizes the effectiveness and benefits of the regulatory protection to the public. Agencies have already identified hundreds of crucial public protections as subject to EO 13771⁵ and, thus, required to be offset by deregulatory actions. Among those are new lead in drinking water standards, new gun control measures, new vehicle, truck, and train safety standards, dozens of new environmental protections including restrictions on toxic chemicals, safety standards for new tobacco products like e-cigarettes, numerous workplace safety protections, and updates to energy efficiency standards.

President Trump has justified his deregulatory agenda as a means to create economic growth. After one year, the evidence is clear that there has been no such economic growth. Both GDP and jobs figures show that there has been no greater economic growth under this Administration than there was under the last Administration.⁶ Goldman Sachs issued a report in January of 2017 that undermines any claims that deregulation under the Trump administration has led to job or economic growth. Goldman Sachs studied whether job growth and capital spending have been

¹ <https://www.citizen.org/sites/default/files/trump-withdrawn-regs-report.pdf>

² <https://rulesatrisk.org/>

³ <https://www.reginfo.gov/public/do/eAgendaMain>

⁴ <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>

⁵ In the most recent Unified Regulatory Agenda of Fall 2017, agencies have begun identifying regulatory actions listed on the Agenda as “regulatory,” “deregulatory”],” or otherwise “exempt” for purposes of EO 13771.

⁶ https://www.washingtonpost.com/blogs/right-turn/wp/2018/02/13/president-trumps-deregulation-flop/?utm_term=.a97ce3c3ff3ae

stronger in sectors and companies that were more highly regulated before the most recent election. According to Goldman Sachs, “[W]e find no evidence that employment or capital spending accelerated more after the election in areas where regulatory burdens are higher.”⁷

In addition to regulations, guidance documents have played an essential role in ensuring that Americans receive the benefits of the aforementioned and other regulatory protections. As discussed more fully later in this testimony, agencies have relied on guidance documents to supplement critical public protections in a wide variety of areas by clarifying the technical details of regulations and their applications to particular situations. It is thus important to maintain the efficient and effective use of guidance documents as an essential tool in helping agencies protect the public. Due to the scope of this hearing, I will focus my testimony on guidance documents in particular and the incorrect perception that agencies issue guidance documents without adequate transparency to the public.

I. What Are Guidance Documents?

The term “guidance documents” does not appear anywhere in the Administrative Procedure Act (APA) but has generally come to be understood as encompassing a wide variety of agency actions that are not considered to be binding rules which typically undergo notice and public comment and are subject to other requirements under the APA. Examples of such actions include general agency interpretations of existing legislative rules, statements outlining how an agency intends to regulate an evolving policy area, training manuals written for internal agency staff, compliance guides directed to the general public, advisory opinions tailored to individual case facts, and memoranda from agency leaders providing direction to agency staff members. Thus, agencies use guidance documents not just to manage internal operations but also to communicate essential information to outside parties.

In certain circumstances, agencies do have the discretion to implement congressional mandates or clarify ambiguities in rulemakings through the use of guidance documents. In other circumstances, agencies are only authorized to implement congressional mandates through use of notice and comment rulemaking. The distinction between guidance documents and notice and comment rules is cemented in the APA which explicitly exempts interpretive rules, general statements of policy, and other agency actions that comprise guidance documents.

When agencies have the authority to do so, agencies may opt to issue guidance documents rather than notice and comment rules because doing so allows agencies to communicate its views on agency interpretations of legal authorities and policies to both regulated entities and the public in

⁷<http://www.aei.org/publication/whats-been-the-economic-impact-of-trumps-deregulation-push/>

a significantly more efficient and expeditious manner than under notice and comment rulemaking. Thus, guidance documents allow agencies to avoid devoting scarce time and resources to unnecessary rulemaking. On the other hand, guidance documents are not legally binding on the public which then restricts enforcement of potential non-compliance with guidance documents. Therefore, agencies must weigh the efficiency advantages that are inherent in guidance documents against the lack of legally binding effect when deciding to adopt guidance documents as opposed to notice and comment rules.

A. Guidance Documents Are Not Being Abused or Overused

Unfortunately, the usage of guidance documents has come under unwarranted criticism based on a mistaken belief that agencies deliberately use guidance documents to place binding requirements on regulated parties while evading rulemaking. In his comprehensive and insightful report for the Administrative Conference of the United States (ACUS),⁸ Professor Nicholas Parillo states plainly that use of guidance that is then followed by regulated parties “is not because of any ‘intent’ on the part of the official to bind anyone.” Professor Parillo is certainly correct in dispelling the notion that bad-faith intent on the agency’s part is driving the use of guidance documents. Rather, Professor Parillo makes clear that structural factors in the regulatory process incentivize both regulators to use guidance in appropriate circumstances and regulated parties to follow and, in many cases, affirmatively seek issuance of guidance documents. Unfortunately, critics of perceived over usage of guidance documents by agencies continue to insist on the dispelled notion that agencies deliberately intend to evade rulemaking requirements by issuing guidance documents that bind regulated parties. Such allegations of agencies using guidance documents to flout rulemaking are soundly rejected by the available empirical evidence. The leading study is a 2010 study by Connor Raso in the *Yale Law Journal*⁹ examining whether federal agencies improperly issue guidance documents instead of legally binding notice and comment rules on a widespread basis. Raso tested this by identifying situations where agencies would in theory have a strong incentive to issue guidance rather than notice and comment rules such as at the end of presidential terms when agencies do not have enough time to complete notice and comment rulemaking or whether agencies issued more guidance documents under divided government in order to avoid congressional scrutiny. The study found no evidence that suggests agencies use guidance documents strategically to make important policy decisions outside the notice and comment process.

B. Guidance Documents Benefit the Public

The enormous variety of guidance documents across agencies makes it difficult to encapsulate the impacts and effects of guidance documents in a broad manner without significant nuance and context. Yet, there is no doubt that guidance documents provide Americans with enormous benefits similar to public health and safety regulations that undergo notice and comment. Below

⁸ <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf>

⁹ Connor Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 *Yale L.J.* 782 (2010).

is a small and non-exhaustive sampling of guidance documents from different agencies that make clear how vital guidance documents are to protecting the public:

- **Opioid and Infectious Disease Guidance:** The Centers for Disease Control (CDC) recently issued guidance directing physicians to limit the prescription of opioid pain medication in an effort to combat the serious and growing epidemic of addiction to opioid pain medication that has resulted in fatal overdoses involving pain medication and illegal hard drugs in many parts of the country.¹⁰ The CDC has also recently issued Zika virus guidance that clarifies the dangerous health impacts of the Zika virus, particularly for pregnant women, and provides guidance for how to avoid contracting the virus.¹¹ The CDC had issued similar guidance for the Ebola virus last year.
- **Lead Guidance:** The Environmental Protection Agency (EPA) has issued numerous guidance documents related to the prevention of lead poisoning among the public and particularly children.¹² These include guidance to homeowners about the dangers of lead in paint and the options for lead abatement and guidance to real estate developers on how to conduct renovations in a safe manner to avoid lead poisoning as well as information on the presence of lead that should be disclosed to prospective homebuyers. EPA has also issued important guidance on the harmful presence of lead in drinking water including information on protecting schools and child care facilities from lead contamination as well as simple and clear fact sheets on the EPA's revisions to its regulations controlling lead in water.
- **Food Safety Guidance:** the Food and Drug Administration (FDA) has used guidance documents extensively to ensure the safety of foods sold in the U.S. and prevent tainted food outbreaks.¹³ Specifically, the FDA has provided clarity on what does and does not constitute "adulterated" foods and how to produce and transport food in a safe manner that avoids contamination. Examples of such guidance include the prevention of salmonella in eggs which leads to food poisoning and best manufacturing practices for infant formula to ensure its safety and quality.¹⁴
- **Airline Safety:** The Federal Aviation Administration (FAA) has used guidance documents to ensure both the safety of airplanes by clarifying manufacturing and operational requirements as well as the safety of passengers by prohibiting passengers from bringing dangerous items onto airplanes.¹⁵

¹⁰ <http://www.cdc.gov/drugoverdose/prescribing/guideline.html>

¹¹ <http://www.cdc.gov/zika/pdfs/clinicianppt.pdf>

¹² <https://www.epa.gov/lead/lead-policy-and-guidance>

¹³ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/>

¹⁴ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm384451.htm>

¹⁵ https://www.faa.gov/regulations_policies/

- **Oil and Pipeline Safety Guidance:** The Federal Railroad Administration (FRA) and the Pipeline Hazardous Materials and Safety Administration (PHMSA) jointly issued safety alerts in 2014 warning of the dangers of transporting volatile crude oil by rail and clarifying the need for companies transporting crude oil by rail to notify local authorities when crude oil trains were passing through their jurisdictions and the nature of the crude oil cargo being transported.¹⁶ These actions were taken amidst ongoing crude oil train derailments and explosions and came well before the finalization of regulations that imposed new oil train safety standards.
- **Wage and Hour Guidance:** the Department of Labor (DOL) provides guidance for employees regarding their rights under various labor laws and employers regarding their responsibilities under the law. This guidance is specific to industry sectors and includes guidance on prohibited employment for children and employee rights and benefits under the Family Medical Leave Act.¹⁷
- **Sexual Assault Guidance:** The Department of Education’s Office of Civil Rights (OCR) has issued guidance documents to address the growing problem of sexual harassment and assault on college campuses.¹⁸ Title IX of the Education Amendments of 1972 empowers OCR to prohibit sex discrimination in federally funded educational institutions. OCR has routinely issued technical clarification and guidance to provide educational institutions with clarity of their obligations to students under title IX. Those include “equitable” proceedings with respect to allegations of sexual harassment or assault and findings under a clear preponderance of the evidence standard. Unfortunately, the Department of Education has decided to rescind this guidance under the Trump Administration, thereby providing less clarity to educational institutions seeking to police and combat growing instances of sexual harassment on campus.

Agencies have also relied on guidance documents to protect the right of minorities and other vulnerable populations that have historically been subject to discrimination. The following are examples of guidance documents that have promoted racial, gender, and sexual orientation equality:

- **Employment Discrimination Guidance:** the Equal Employment Opportunity Commission (EEOC) issues only guidance interpreting title VII of the Civil Rights Act of 1964 because it is barred by Congress from issuing substantive regulations which implement title VII.¹⁹ Thus, guidance documents are crucial to the EEOC’s mission of preventing discrimination in hiring practices and in the workplace.²⁰

¹⁶ <https://www.transportation.gov/briefing-room/emergency-order>

¹⁷ <https://www.dol.gov/whd/fact-sheets-index.htm>

¹⁸ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

¹⁹ 42 USC § 2000e-12

²⁰ https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm

- **Disability Discrimination Guidance:** The Department of Justice (DOJ) has issued guidance related to the Americans with Disabilities Act (ADA) in order to clarify the rights of persons with disabilities and to prevent discrimination against such persons based on their disabilities. In 2010, DOJ issued comprehensive guidance that provided standards for state and local governments to ensure disabled access to public facilities, such as wheelchair access.²¹
- **Sexual Orientation Discrimination Guidance:** A number of agencies, including the EEOC, the Department of Education, and the Department of Housing and Urban Development, issue guidance to prevent discrimination in education, housing, and employment based on sexual orientation. Most recently, the DOJ and the Department of Education jointly issued guidance under title IX of the Education Amendments of 1972²² requesting that public education institutions, including higher education institutions, allow transgendered students to use restroom facilities of their preference in order to protect both the personal safety and the civil rights of transgendered students.²³ The Department of Education has also released guidance that aids educational institutions in combatting bullying on the basis of sexual orientation.²⁴ Unfortunately, the Department of Education has rescinded guidance on protection of transgendered students, thereby potentially undermining fundamental civil rights protections for those students.

C. Guidance Documents Benefit Business

One of the primary purposes of guidance documents is to address regulatory uncertainty among businesses as to an agency’s interpretation and application of a specific law or regulation. Often times, businesses explicitly request such guidance and rely on an agency’s ability to quickly and fully provide such guidance. Within this category, there are certain guidance documents that are issued exclusively for the benefit of businesses and other regulated entities. Any “one-size-fits-all” changes to the guidance document process will make it harder for agencies to issue the following types of guidance documents that are designed to benefit business and industry stakeholders:

- **No Action Letters:** Many agencies use No Action Letters (NAL) to clarify for businesses whether a particular activity violates an agency’s regulation. In other words, these letters provide a “safe harbor” for businesses by ensuring that businesses will not be punished when engaging in an activity that could potentially run afoul of a regulation. The Securities and Exchange Commission (SEC) issues many NALs and is the prototypical example. NALs are usually directly requested by businesses that have a strong interest in agencies responding to their requests on an expedited basis. Courts have held that SEC NALs are essentially guidance

²¹ <https://www.ada.gov/regs2010/2010ADASTandards/Guidance2010ADASTandards.htm>

²² 20 U.S.C. §§ 1681–1688 (1972).

²³ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

²⁴ <http://www.ed.gov/news/press-releases/bullying-students-disabilities-addressed-guidance-america%E2%80%99s-schools>

documents that are exempt from notice and comment requirements. While NALs are directed at individual parties or businesses, the SEC and other agencies make the NALs publicly available on their website and thus NALs have the effect of encouraging other businesses to take advantage of the “safe harbor” to engage in the same activity. In this way, NALs are used to set broad policy without notice and comment. Recently, the Consumer Financial Protection Bureau (CFPB) instituted a NAL process in order to allow innovative and consumer-friendly financial products to be marketed without the possibility of an adverse CFPB enforcement action. CFPB decided that NALs would not be subject to notice and comment because that would “unnecessarily discourage NAL applications and delay the NAL process.”

- Small Business Compliance Guides: Congress has required agencies to issue guidance to reduce compliance costs for businesses, and small businesses in particular. Agencies routinely issue “compliance guides” when finalizing a regulation in order to provide regulated parties with a clear and easy to understand manual for how to comply with the new regulation. While these guides have proven helpful for businesses, there is a lack of awareness that such compliance guides exist in the first place due to a lack of agency resources to promote awareness of compliance guides.

D. Trump Administration Usage of Guidance Documents

Despite rhetoric from Trump Administration officials denouncing agency use of guidance documents and claims of alleged overuse of guidance documents by the previous Administration,²⁵ agencies under the Trump Administration have already issued hundreds of guidance documents and, in all likelihood, will continue to do so. For example, Treasury recently issued a notice²⁶ alerting the public that it intends to issue guidance clarifying the application of the so-called “carried-interest” provisions of the recently enacted tax law to private equity and hedge fund managers, many of whom have claimed that Treasury does not have the authority to issue guidance to clarify what are essentially legislative drafting errors that can only be corrected by Congress. The EPA has issued guidance revoking the so-called “once in always in” policy that could incentivize major industrial pollution sources to reverse the progress made in reducing air pollution under the Clean Air Act.²⁷ The Department of Justice recently issued lengthy guidance²⁸ pursuant to Executive Order 13798 stipulating existing protections for religious liberty under Federal laws. Attorney General Jeff Sessions has directed DOJ officials to adhere to the guidance. The Department of Health and Human Services has issued guidance permitting states to refuse Medicaid reimbursement for Planned Parenthood for preventative health services.²⁹ This week, the Department of Education issued guidance that asserts the primacy of

²⁵ <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>

²⁶ <https://www.wsj.com/articles/treasury-issues-tax-guidance-limiting-carried-interest-provision-1519921428>

²⁷ <https://www.vox.com/energy-and-environment/2018/1/26/16936104/epa-trump-toxic-air-pollution>

²⁸ <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>

²⁹ <https://www.politico.com/story/2018/02/12/trump-hhs-planned-parenthood-policy-338084>

federal authority in preempting state authority to regulate student loan servicers, thereby incentivizing loan servicers to ignore strong state standards preventing such servicers from taking advantage of students with loans or debt.³⁰

E. The Dangers of Guidance Document Reforms

While the available empirical evidence demonstrates that there is no abuse of guidance documents in order to evade the notice and comment rulemaking process, it is impossible to ignore the strong incentive agencies have to avoid what has become an increasingly inefficient and dysfunctional rulemaking process across regulatory sectors and at virtually every agency.³¹ If the Committee believes that agencies should be taking action through notice and comment rulemaking rather than through guidance documents, the solution is to make the notice comment process more efficient and streamlined rather than forcing guidance documents into the notice and comment framework reserved for rulemaking. Turning non-binding guidance documents essentially into rules subject to notice and comment as well as other procedural requirements, such as OIRA review, will do nothing to cure the delays and inefficiencies inherent in the current regulatory process. It will only expand those delays to more agency actions that are designed to address regulatory uncertainty in an expedited manner.

F. Making Guidance Documents More Accessible to the Public

There is a mistaken perception that there is currently inadequate transparency with respect to guidance documents. Under the Freedom of Information Act,³² agencies are generally required to make guidance documents available to the public. Thus, while agencies do typically comply with this requirement, the way in which agencies disseminate guidance documents to the public varies according to each agency. In most cases, it is incorrect to assume that agencies are deliberately withholding guidance documents from the public. Nonetheless, there is certainly room for improvement in making guidance documents more accessible to the public in a fashion that is standardized across agencies. Such an effort would increase public awareness of, and accessibility to, guidance documents and should be supported on a bipartisan basis.

One key difficulty in drafting legislative proposals to standardize accessibility of guidance documents across agencies is the fundamental problem of clearly defining the guidance documents that would be subject to new accessibility requirements. As mentioned previously, there is no current commonly accepted definition of guidance document which certainly should not be surprising given the numerous types of agency actions and pronouncements that can be characterized as a guidance documents. Attempts to define guidance documents in legislative proposals and previous Executive Orders clearly manifest the difficulty of doing so. For

³⁰ <https://www.wsj.com/articles/trump-administration-tells-states-to-stop-regulating-federal-student-loans-1520640480?mod=searchresults&page=2&pos=5>

³¹ <http://www.citizen.org/unsafedelaysreport>

³² 5 U.S.C. 552(a)(1)(D), 552(a)(2)(B).

example, EO 13771 subjects a category of guidance documents, “significant” guidance documents, to the requirements under the EO.³³ The EO defines this category by parroting language from the definition of “significant” regulation under EO 12866³⁴ and then stipulating what *is not* a significant guidance document by reference to numerous agency actions and pronouncements that do not constitute “significant” guidance documents for purposes of the EO. It is telling that one of the most visible attempts to define guidance documents did so by referencing what should not be considered a guidance documents rather than setting forth a clear and simple definition of what is a guidance document.

Congress must be thoughtful and deliberate in setting forth a definition of guidance document under any legislative proposal seeking to make those documents more accessible to the public. Specifically, it would be unwise for such a proposal to contain any definition that is too narrow or highly prescriptive. There is no need to define guidance in problematic ways in order to achieve accessibility and transparency aims. In order to maintain bipartisan support for making guidance documents more accessible to the public, Congress should be very careful in defining guidance documents appropriately.

II. Lack of Transparency in the Regulatory Process under the Trump Administration

In the following section, I detail a number of troubling instances where Congress is seeking to reduce, rather than increase, transparency with respect to deregulatory measures as well as instances in which the Trump Administration has taken deregulatory actions that have raised significant transparency concerns.

A. Exempting the Repeal of the Clean Water Rule from the APA

Congress is currently considering potential omnibus legislation that would fund the government for fiscal year 2018. Tucked into one of the appropriations bills that funds the EPA is a stunning ideological policy rider that would wholly exempt the repeal of the Clean Water rule from compliance with the APA,³⁵ as well as potentially other procedural and substantive requirements under other applicable laws including the Clean Water Act.

The result would be to free the EPA from the fundamental requirements of transparency, reasoned decision-making based on evidence, and public participation required by the APA. In other words, Congress is authorizing the EPA to repeal the Clean Water rule in the least transparent fashion possible thereby foreclosing any opportunity for the public to provide the

³³ <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>

³⁴ https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

³⁵ Sec. 108, Energy and Water Development and Related Agencies Appropriations Act, 2018 (H.R. 3266).

agency with feedback, and in a manner that may potentially insulate the EPA from legal challenges to the repeal. The supporters of this rider appear to be willing to sacrifice basic transparency requirements and good government accountability measures in order to obtain their preferred policy outcome. This is unacceptable.

The committee's concern with the current lack of transparency in the regulatory process must begin with this proposed ideological rider that seeks to exempt the repeal of the Clean Water rule from compliance with the APA and other statutes governing EPA authority to ensure that our nation's waterways are free of dangerous pollution and toxins. It is imperative that members of this committee who support preserving transparency in the regulatory process, regardless of whether the action being taken is regulatory or deregulatory in nature, urge appropriators and budget negotiators to remove this provision that shrouds the repeal of the Clean Water rule in secrecy.

B. Intentional Suppression of Economic Analysis in the Department Of Labor's Tip Wage Rule

Last month, news reporting revealed that the Department of Labor (DOL) deliberately withheld economic data³⁶ showing that rolling back the tip wage rule would result in significant economic costs to hardworking Americans across the country that rely on tips to make sure they and their families are able to make ends meet. According to the reporting, the Department of Labor conducted an economic analysis to determine the economic impact of rolling back the tip wage rule promulgated under the Obama administration which would have protected tips earned by restaurant workers. Allegedly, the analysis showed clearly that rolling back the rule would result in the transfer of potentially billions of dollars in tips from restaurant workers to restaurant owners and employers. After repeated attempts to refashion the analysis to lower the expected transfer of tip income, Secretary Acosta allegedly directed DOL staff to publish the proposed rule without any economic analysis. The rule was subsequently proposed in the Federal Register without any accompanying economic analysis.

DOL's deliberate withholding of relevant data during a rulemaking process fundamentally undermines the integrity of that rulemaking process. Equally troubling is the fact that the Office of Information and Regulatory Affairs (OIRA) reviewed the proposed rule before it was published and allowed the rule to be published without any economic analysis, thereby significantly undermining the integrity of its regulatory review process. As stipulated by Executive Order 12866, OIRA typically reviews "significant" or "economically significant" rulemakings from Executive agencies before such rulemakings are proposed or finalized by the issuing agency in order to determine that the rulemaking is grounded in credible data and analysis, including economic analysis, and to allow for interagency review of the proposed or final rulemaking. Thus, it is highly unusual for a rule that is reviewed and cleared by OIRA to

³⁶ <https://bna.com/news/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips>

contain no economic or cost-benefit analysis when published. Indeed, the current Administrator of OIRA noted in her confirmation hearing OIRA's role in "ensuring that administrative agencies...base their decisions on the best possible economic and technical analysis " and promised to "ensure the continuity of OIRA's principles...and maintain the integrity of the process."³⁷

Robust congressional oversight and accountability will be critical to getting to the bottom of what happened here. Public Citizen applauds the members of the House Education and Workforce committee who have sought answers and accountability from DOL.³⁸ Members of this committee should request the same accountability and answers from OIRA. In the interest of transparency, OIRA must make available to the public any economic analysis it reviewed that was ultimately not included in the proposed rule and the basis upon which it authorized DOL to publish the proposed rule without the economic analysis (or analyses) it had conducted.

If DOL finalizes the current rule under consideration, it is likely to be overturned and thrown out as "arbitrary and capricious" if challenged in court. Under the APA, the primary law governing agency compliance with the rulemaking process, agencies are required to "consider all relevant factors" when conducting a rulemaking and ensure that the agency provides a "rational basis" for the agency action based on the rulemaking record. In this case, it is clear that DOL did not consider all relevant factors and instead DOL actively sought to exclude relevant data from the rulemaking record in order to avoid undermining the rational and legal basis for their action rolling back the tip wage rule. Courts are likely to find that this rollback is anything but the product of "reasoned decision-making," as required under the APA, and that the suppression of relevant data resulted in a rulemaking that is "arbitrary and capricious" due to the agency's abuse of discretion. These violations of the APA are certainly serious enough to prevent courts from granting DOL chevron deference. Instead, courts are likely to throw out this rule as unlawful under the APA.

If there is a silver lining here, it is that DOL's deliberate concealment of the economic data not only substantially weakens the policy and legal justifications for rolling back the tip wage rule, but it substantially strengthens the justification for keeping the tip wage rule that DOL issued under the previous administration. The economic data clearly shows that the tip wage rule protects the economic security of hardworking Americans and their families. Rolling back the rule will simply take hard earned money from the pocket books of tipped workers. This is exactly why the Department of Labor and Trump Administration sought to conceal the economic data. It is time for Congress to hold DoL accountable for keeping the public in the dark and ensure that DoL gets back to doing its job of protecting hard-working Americans.

³⁷ Rao, N., United States Senate Homeland Security and Government Affairs Committee (June 7, 2017) (<http://www.hsgac.senate.gov/download/testimony-rao-2017-06-06>)

³⁸ <https://democrats-edworkforce.house.gov/media/press-releases/scott-and-dem-leadership-hold-forum-on-administrations-harmful-proposed-tip-rule>

C. Office of Management and Budget Report to Congress on the Costs and Benefits of Federal Regulations

Federal health, safety, and environmental regulations are one of the best investments that our government can make according to cost-benefit figures compiled by OMB on a yearly basis and submitted to Congress under the “Regulatory Right to Know Act.” The report details the costs and benefits of those rules where agencies were able to fully monetize costs and benefits over the preceding ten fiscal years. Every year the report has been issued by OMB, the report has shown that the public health, safety, and environmental benefits of the regulations issued that fiscal year have substantially exceeded the costs to regulated companies and corporations.³⁹

The OMB draft report for 2017, which covers rules issued in fiscal year 2016, once again found benefits of those rules dramatically exceeding the costs. The draft report showed that rules with monetized costs and benefits issued under President Obama’s last year in office provided the public with 6 dollars of benefits for once one dollar in compliance costs for regulated entities. This is a rate of return on investment that more than fully justifies any compliance costs associated with health, safety, and environmental regulations.

The Committee should note that this year’s draft report missed the deadline for submission to Congress by approximately two months. While the report was supposed to be submitted to Congress, at least in draft form, by the end of the calendar year 2017, OMB ended up submitting the report at the end of February 2018. In addition, OMB released the report late on a Friday evening and without any accompanying statement or press release that would draw attention to the report. Public Citizen believes the report provides important information to the public and should be disseminated in a way that maximizes accessibility and awareness by the public.

D. Lack of Transparency With Respect to Regulatory Guidance

There have been a number of troubling developments regarding both the rescission of guidance in less than transparent fashion as well as delay in issuing guidance that is critical to protecting the public without making the reasons for such delay transparent to the public.

I want to focus the Committee on one important area of much-needed oversight with respect to a draft guidance document⁴⁰ from the Equal Employment Opportunity Commission (EEOC) that was sent to OIRA for review in November of 2017 after unanimous approval by the commission and still is under review with no clear indication as to when it will be released to the EEOC for final publication.⁴¹ The guidance clarifies the application of laws administered by the EEOC in preventing both sexual and sexual orientation –based harassment. This is a much-needed resource for employers at a moment when renewed public attention on sexual harassment,

³⁹ <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/>

⁴¹ <http://thehill.com/regulation/administration/373938-harassment-guidance-for-employers-awaits-approval-from-white-house>

including based on sexual orientation, has focused on ways that government action can combat harassment in the workplace.

It is disappointing to see OIRA continue to review this guidance much longer than the 90 days generally allowed under EO 12866 for OIRA regulatory review. OIRA has made no public indication as to why it has not yet completed its review of the guidance or on what basis it asserted authority to review the guidance in the first place. Because existing OIRA authority to review guidance is quite narrow as compared to regulatory review, OIRA's review of guidance is far more selective and thus indicative of potential concern and opposition to the guidance by OIRA, the Administration, or both. In general, Public Citizen encourages OIRA to make clear when it invokes the authority to review guidance, on what substantive or procedural basis OIRA has sought to review the guidance including any concerns OIRA may have with the guidance, and strictly follow the review periods laid out in EO 12866 in conducting and concluding its review of guidance.

III. Reform Measures to Increase Transparency under the Trump Administration:

There are several areas that present opportunities for the Trump Administration and Congress to increase transparency on both regulatory and deregulatory actions. While the regulatory process is already subject to multiple requirements for reasoned decision making and transparency, certain gaps in transparency persist in the regulatory process.

A. Lack of Transparency at OIRA

A series of GAO reports, beginning in 2003,⁴² have documented numerous transparency concerns regarding the regulatory review process at OIRA. In multiple reports, GAO has found that OIRA does not comply with many of the most important transparency provisions in Executive Order 12866, the primary Executive Order governing OIRA's regulatory review process. OIRA has thus far been unwilling to adopt recommendations that have been made repeatedly by GAO, most recently in 2016, to improve the transparency of its regulatory review process.

The most crucial reform, in terms of creating transparency at OIRA that is on par with the Executive agencies it oversees, would be for OIRA to disclose the substance of the changes it makes to draft proposed and final rules submitted to them for review. One of the virtues of the notice-and-comment rulemaking process by which agencies adopt significant regulations is its inherent transparency. Agency justifications for its decisions regarding the substance of the rule, including its response to comments and agency studies or analyses of the rule, form the transparent basis for adopting the rule. The *Federal Register*, where agencies publish their

⁴² Government Accountability Office, OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews, GAO-03-929

regulatory actions and accompanying analyses, is the cornerstone of transparency in the regulatory process.

By contrast, almost none of the substantive changes that OIRA makes to draft agency rules during its review are required to be disclosed to the public.⁴³ Irrespective of the number and importance of those changes, the public only gets to see the version of the rule in the *Federal Register* with those changes already incorporated. In practical terms, this means that OIRA is able to escape accountability for any changes to a regulation it reviews. This certainly makes it difficult to assert that the OIRA review process improves regulations since OIRA does not show its work. In the rare instance where the agency issuing the rule discloses requested changes and edits during the OIRA review process, attribution of the changes is not disclosed meaning the public is unclear whether OIRA requested the changes or potentially another agency that submitted comments during the interagency review process.

B. Lack of Transparency under EO 13777

In order to implement EO 13771, President Trump issued EO 13777⁴⁴ which largely assigned duties and responsibilities to newly created “regulatory reform task forces” which would oversee implementation of EO 13771 at each agency. While EO 13777 gives considerable authority to these task force officers, one stunning omission is any requirement to disclose the identity of the task force officers themselves. Furthermore, many agencies have been resistant to disclosing the identity of these officers, despite EO 13777 having been issued over a year ago. It is critical that the public know which agency officials are carrying out the deregulatory agendas at each agency and that the public have confidence such officials are not taking action that present a conflict of interest by benefitting those that formerly employed such officials.

C. Lack of Transparency Regarding How Deregulation Benefits President Trump, White House Officials, or Top Agency Officials

Recently, there has been increased interest in revisiting an agreement between the Internal Revenue Service and OIRA that would result in IRS submitting greater number of regulatory actions to OIRA for regulatory review. When the GAO studied the issue, it included statements from a former OIRA Administrator that indicate one of the rationales for excluding OIRA review of IRS rules was to “insulate the Executive Office of the President from the charge that it might use OMB’s review of IRS for political purposes.”⁴⁵

There are a significant number of instances in addition to the one above where deregulatory actions taken by this Administration could potentially directly benefit the President himself or

⁴³ Rules promulgated under the Clean Air Act by the Environmental Protection Agency do require that substantive changes made by OIRA to draft proposed and final rules be disclosed.

⁴⁴ <https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda>

⁴⁵ Government Accountability Office, Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance, GAO-16-720, at pg. 26.

top officials in his Administration. Last year, Public Citizen released a report⁴⁶ with Rep. Cicilline that outlined over a dozen examples ranging from the repeal of the Clean water rule potentially benefiting golf courses owned by President Trump's business holdings to DOL's tip wage rule potentially benefitting casinos or restaurants owned by or affiliated with President Trump.

In order to make such potential conflicts of interest transparent to the public, Rep. Cicilline introduced the DRAIN the Swamp Act (H.R. 4014) which would require agencies to analyze the potential direct benefits of any significant regulatory action, including repeals, to President Trump and top government officials. Public Citizen encourages members of Congress to support H.R. 4014 in order to provide the public with a clearer picture as to how members of the Administration, including the President, are benefitting from deregulatory actions that they direct.

⁴⁶ <https://www.citizenvox.org/2017/10/11/deregulating-dollars-trumps-anti-regulation-agenda-boost-pocketbook/>