



NATIONAL LOW INCOME HOUSING COALITION

February 10, 2017

Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled
“Reducing Regulation and Controlling Regulatory Cost”

Via reducingregulation@omb.eop.gov

Administrator Mancini,

The National Low Income Housing Coalition (NLIHC) is an organization whose members include state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on what is in the best interests of people who receive and those who are in need of federal housing assistance, especially extremely low income people.

On behalf of the NLIHC, I write to express grave concern about the impact that Executive Order (EO) 13771 will have on the low income people served by the programs of the U.S. Department of Housing and Urban Development (HUD). EO 13771 requires the HUD Secretary to repeal at least two existing regulations for each new proposed regulation and to calculate the incremental cost of all new regulations and repealed regulations so that there is no net cost due to regulatory action during a given year. By arbitrarily repealing two sets of regulations for each new, necessary regulation, EO 13771 will prevent HUD from carrying out its duty as authorized by Congress to operate housing and community development programs in a manner that serves and protects low income people.

The Office of Information and Regulatory Affairs (OIRA) Memorandum providing interim guidance for addressing Executive Order (EO) 13771 states that Section 2 applies to “significant” regulatory actions as defined in Section 3(f) of Executive Order 12866. Of the four paragraphs comprising the definition, NLIHC assumes that the second clause in paragraph (1) would be that which is relevant for most regulations pertaining to programs of the HUD: “...or [regulatory action] that “adversely affect in a material way the economy, a sector of the

economy, productivity, competition, jobs, the environment, public health or safety, *or state, local, or tribal governments or communities* (emphasis added).”

On page 3, the third guidance question is “Which existing regulatory actions, if repealed or revised, could be considered deregulatory actions, and thus qualify for savings?” The Memorandum answers, in part, “Meaningful burden reduction through the repeal or streamlining of mandatory reporting, recordkeeping or disclosure requirements may also qualify.” Although the Memorandum reminds agencies that they “should also confirm that they will continue to achieve their regulatory objectives after the deregulatory action is undertaken,” NLIHC thinks that repealing or streamlining reporting and recordkeeping could undermine the integrity of many HUD programs, especially those that have statutory obligations to serve specific populations based on income, age, disability, and unique needs such as those of people who are homeless, fleeing domestic or sexual violence, or exiting the criminal justice system.

An example of a statutory obligation is Section 3 of the “Housing and Urban Development Act of 1968,” which requires preferences in employment and training opportunities for public housing residents and low income residents in the service area of a HUD-assisted housing or community development activity. To ensure the intent of Section 3 is realized, public housing agencies, communities receiving Community Development Block Grant (CDBG) funds, and construction contractors using these funds must report their best efforts to comply with Section 3 and be subject to HUD monitoring. On March 27, 2015, HUD published proposed changes to the 1994 interim rule under which Section 3 has been operating, but a final rule has not yet been issued. Incoming HUD Secretary Carson should seriously consider prioritizing improvements to Section 3, given his stated intentions to assist low income people with improving their economic conditions. If HUD issues a final Section 3 rule, EO 13771 requires HUD to jettison two others. NLIHC cannot think of two HUD rules that can justifiably be eliminated. Even if HUD removes two sets of rules, it is doubtful that any resulting cost savings would accrue to those who would still be responsible for Section 3 record keeping and reporting.

Another example is the new national Housing Trust Fund (HTF) which targets housing construction and rehabilitation to units that will house extremely low income renter households, those with income less than 30% of the area median income or the federal poverty line. In order for Congress to be assured that this statutorily targeted population is actually benefitting from HTF-assisted housing, states must keep records and report to the public, HUD, and Congress. The HTF is currently operating under an interim rule. HUD intends to seek public comment on the interim rule after states and other stakeholders have had about a year of experience implementing the HTF and then issue a final rule based on feedback from stakeholders. There are no good options for alternative rules that HUD would have to repeal.

NLIHC reminds OIRA that all existing rules have been subject to public notice and comment, and that since February 1981 when President Reagan issued EO 12291, agencies have had to prepare regulatory impact analyses that weighed the benefits and costs of rules. President Obama issued EO 13563 requiring agencies to undertake “retrospective analyses of rules that might be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them.” HUD’s plan in response to Mr. Obama’s order was presented on May 26, 2011. Consequently, HUD has already endeavored to cull any excessively burdensome regulations.

EO 13771 and the OIRA Memorandum mention only the “costs” of regulations; their benefits are not discussed. NLIHC’s position is that the OIRA Memorandum overemphasizes cost by requiring cost to be measured as “opportunity costs” to society, as defined in OMB Circular A-4. The Circular asserts, “The principle of ‘willingness-to-pay’ (WTP) captures the notion of opportunity cost by measuring what individuals are willing to forgo to enjoy a particular benefit.” (Circular A-4, page 18) Circular A-4 continues by noting, “Estimating benefits and costs when market prices are hard to measure or markets do not exist is more difficult. In these cases you need to develop appropriate proxies that simulate market exchange.” (Circular A-4, page 19) However, the proxies offered depend on market studies of various sorts. HUD program rules intended to ensure that populations served or protected as required by statute are seldom, if ever, amenable to market studies. Although some HUD regulations such as those pertaining to rent reasonableness studies or fair market rent adjustment surveys are quantitative, and might entail a cost for developers or local jurisdictions, they serve the important purpose of maximizing available HUD resources.

Elsewhere in Circular A-4, OMB acknowledges a broader approach to considerations of cost, one more pertinent to assessing HUD regulations than opportunity cost. “Section D. Analytical Approaches” discusses cost-effectiveness analysis, declaring that this approach “can provide a rigorous way to identify options that achieve the most effective use of resources available without requiring monetization of all relevant benefits or costs.” This section states, “With regard to measuring costs, you should be sure to include all the relevant costs to society – whether public or private.” (Circular A-4, page 11)

On page 5, the Memorandum poses a question about treating unquantified costs and cost savings (but not benefits). The answer instructs agencies to refer to OMB Circular A-4, which contains pages of discussion regarding treatment of non-quantifiable benefits and costs, but does not anticipate the drastic provisions of EO 13771. Two passages in Circular A-4 touch upon the difficult-to-monetize or -quantify nature of most HUD regulations:

- “When important benefits and costs cannot be expressed in monetary units, benefit-cost analysis is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs. You should exercise professional judgment in identifying the importance of non-quantified factors and assess as best you can how they might change the ranking of alternatives based on estimated net benefits. If the non-quantified benefits and costs are likely to be important, you should recommend which of the non-quantified factors are of sufficient importance to justify consideration in the regulatory decision. This discussion should also include a clear explanation that support designating these non-quantified factors as important.” (Circular A-4, page 10)
- “If you are not able to quantify the effects, you should present any relevant quantitative information along with a description of the unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty...In one instance, you may know with certainty the magnitude of a risk to which a substantial, but unknown, number of individuals are exposed...For cases in which the unquantified benefits or costs affect a policy choice, you should provide a clear explanation of the rationale behind the choice. Such an explanation could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs.” (Circular A-4, page 27)

An example of an instance where the magnitude of the risk is substantial but the number of individuals exposed is unknown is the final lead-based paint rule issued by HUD on January 13 and held in abeyance by the Administration because its effective date was to be February 12. That rule amended the existing lead-based paint rule by reducing the blood lead level a child under the age of six that triggers an environmental intervention if the child lives in federally owned or federally assisted housing constructed before 1978. The rule would also establish more comprehensive testing and evaluation procedures for housing where children live. The magnitude of the risk of lead-based paint poisoning to children is of course substantial, but the number of children is difficult to quantify.

By focusing exclusively on cost, Executive Order 13771 precludes meaningful consideration of the benefits of crucial regulations that are not conducive to being monetized or quantified, all to the detriment of the people Congress meant HUD programs to serve. Therefore, Executive Order 13771 should be withdrawn.

Sincerely,

A handwritten signature in cursive script that reads "Diane Yentel".

Diane Yentel
President and CEO, National Low Income Housing Coalition