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**Statement of Advocates for Highway and Auto Safety Regarding**

**Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs;**

**Implications for Motor Carrier and Commercial Motor Vehicle Safety Regulation**

President Trump’s Executive Order (EO) 13771, *Reducing Regulation and Controlling Regulatory Costs*, requires federal agencies to repeal two existing regulations for each new significant regulation (generally rules associated with costs of $100 million or more) [[1]](#endnote-1) an agency intends to adopt. The EO also requires the Office of Management and Budget (OMB) to impose an annual monetary “regulatory cap” on the costs of new regulations issued by an agency in a given year. Because EO 13771 policy contradicts the established criteria for issuing safety regulations, the EO cannot be applied to commercial motor vehicle safety regulations issued by the Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA).

The Motor Carrier Safety Act of 1984 (Safety Act), as amended, requires the Secretary of Transportation (who has delegated authority over motor carriers and commercial vehicle operation and equipment to the Administrator of the FMCSA) to “prescribe requirements for … safety of operation and equipment of, a motor carrier; and … standards of equipment of, a motor private carrier, when needed to promote safety of operation.” 49 U.S.C. § 31502(b). Safety regulations must, “[a]t a minimum … ensure that—(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely …; (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators; (5) an operator of a commercial motor vehicle is not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of” various laws and regulations. 49 U.S.C*.* § 31136(a). While the statute does require the Secretary to consider the costs and benefits of new safety regulations, 48 U.S.C. § 31136(c)(2), this type of analysis is distinctly different from the cost only focus required by EO 13771.

By requiring that safety regulations issued under the Safety Act take into account only regulatory cost (the cost of a new safety standard, that cost in relation to the costs imposed by, and potential cost savings to be derived from, the repeal of existing regulations), and by limiting the issuance of new safety regulations by making them subject to an annual monetary “regulatory cap”, EO 13771 grafts onto the existing statutory regulatory process an entirely new set of non-statutory criteria for issuing safety regulations that are not among the criteria specified in the Safety Act.

For example, pursuant to the authority vested in DOT and FMCSA under the Safety Act, and in light of the numerous studies concluding that the severity of a crash increases with increased travel speed, FMCSA and the National Highway Traffic Safety Administration (NHTSA), jointly issued a notice of proposed rulemaking (NPRM) on speed-limiting devices (speed limiters) in September, 2016. The NPRM proposed (1) to require that newly manufactured trucks, multipurpose passenger vehicles, buses, and school bus vehicles that weigh more than 26,000 pounds (gross vehicle weight rating) be equipped with speed-limiters, and (2) to require motor carriers operating such vehicles in interstate commerce to maintain speed-limiters set at not more than the maximum speed (to be specified in the final rule) for the service life of the vehicle. 81 Fed. Reg. 61942 (2016). The NPRM estimates net benefits of $500 million to $5 billion annually from the rule, including fuel savings and the prevention of thousands of traffic injuries and deaths. 81 Fed. Reg. at 61945, 61961–64. The NPRM estimates that the rule will impose minimal cost on vehicle manufacturers and motor carriers related to the installation of speed limiters, but estimates a social cost from lower travel speeds of $200 million to $1.5 billion annually. *Id*. Therefore, despite the NPRM’s huge net benefits to society, the rule falls within the scope of the EO 13771 policy and cannot be finalized unless two or more other regulations that impose equivalent or greater costs are repealed.

The EO 13771 conditions FMCSA’s promulgation of this and other safety regulations on the FMCSA’s ability to offset the costs of safety regulations by repealing “at least two prior regulations,” EO 13771, sec. 2(c), without taking into account the net benefits either of the new regulation or the existing regulations that would need to be repealed. Thus, in order to issue a final rule requiring speed-limiters, the agencies would have to repeal regulations with costs of $200 million to $1.5 billion annually, without regard to the net benefits of the new regulation and the repealed regulations. Only the costs associated with regulations are considered under the EO 13771 policy.

EO 13771 requires the FMCSA, when engaged in rulemaking, to make its safety decision based on an impermissible choice—whether to issue a new safety standard at the cost of losing the benefits of two or more existing standards. To condition adoption of a vehicle safety standard on criteria not set forth in the Safety Act is arbitrary and capricious. Also, to predicate the issuance of a new safety regulation based on the repeal of two existing regulations is likewise, not a requirement of the statute and, therefore, both contrary to the Safety Act and arbitrary and capricious. Instructing the FMCSA to repeal two or more regulations in order to adopt a new safety rule, imposes burdens that are inconsistent with the Safety Act and which exceed the President’s authority under the Constitution, usurps Congress’s Article I legislative authority, and violates the President’s obligation to take care that the laws be faithfully executed.

Moreover, setting a monetary “regulatory spending cap on the issuance of new regulations, and requiring agency’s to offset, dollar-for-dollar, the cost of new safety regulations with the cost savings from the repeal of existing regulations, is very likely to have a chilling effect on the issuance of needed safety regulations, such as those to ensure the safe operation of autonomous vehicles and determinations of safety fitness. For this reason, the imposition of monetary limits on costs related to the issuance of new safety regulations is arbitrary and capricious.

Furthermore, in the event that the FMCSA decides to follow the procedures included in EO 13771, then the FMCSA must also treat exemptions that are granted to existing safety regulations as deregulatory actions under EO 13771. The OMB guidance on the implementation of EO 13771 (OMB Memorandum),[[2]](#endnote-2) defines an EO 13771 deregulatory action as “an action that has been finalized and has total costs less than zero.”[[3]](#endnote-3) The OMB Memorandum goes on to state that “[a]n EO 13771 deregulatory action may be issued in the form of an action in a wide range of categories of actions…”[[4]](#endnote-4) The OMB Memorandum appears to include an agency exemption action that reduces the cost burden on industry of an existing regulation as an EO 13771 deregulatory action. For that reason, whenever the agency grants an exemption to safety to a regulation, the agency must treat the exemption as a deregulatory action and quantify the costs saved by relieving the Applicant(s) of those regulatory requirements. All exemptions from existing FMCSRs and other regulatory requirements that produce cost savings to persons or entities covered by the exemption should be deemed EO 13771 deregulatory actions and the savings from those exemptions should be calculated and used to offset the cost of EO 13771 regulatory actions.

1. Significant rules have one or more of the following characteristics:

   * Have an annual effect on the economy of $100 million or more or 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;
   * Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
   * Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
   * Raise novel legal or policy issues arising out of legal mandates. . .

   Executive Order 12866, *Regulatory Planning and Review*, Section (3)(f), 58 FR 51735, 51738 (Oct. 4 1993). [↑](#endnote-ref-1)
2. OMB Memorandum, Guidance on Implementing Executive Order 13771, Titled “Reducing Regulation and Controlling Regulatory Costs”, M-17-21 (April 5, 2017) (“OMB Memorandum”). [↑](#endnote-ref-2)
3. OMB Memorandum, p. 4. [↑](#endnote-ref-3)
4. *Id.* Listing such deregulatory actions as including, but not limited to: informal, formal and negotiated rulemaking; guidance and interpretive documents; some actions related to international regulatory cooperation; and, information collection, requests that repeal or streamline recordkeeping, reporting, or disclosure requirements. [↑](#endnote-ref-4)