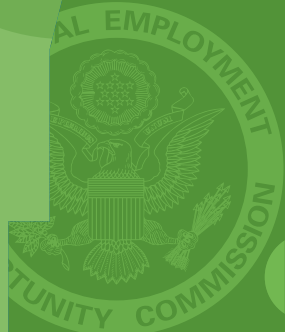


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TEN THOUSAND COMMANDMENTS

[*An Annual Snapshot of the Federal Regulatory State*]

CLYDE WAYNE CREWS JR.

Ten Thousand Commandments

An Annual Snapshot of the Federal Regulatory State

2020 Edition

by Clyde Wayne Crews, Jr.

Executive Summary

Spending control and deficit restraint are indispensable to a nation's stability and long-term economic health. Yet alarm over lack of spending restraint under President Donald Trump's administration, even with the benefit of a healthy economy, has not stemmed disbursements.¹ Without significant changes, more will soon be spent on debt service than on the entire defense budget, especially as interest rates rise.² Meanwhile, magical thinking that government outlays create wealth is now fashionable among emboldened progressives who advocate Medicare for All, a Green New Deal, and a guaranteed national income, while supposed fiscal conservatives have lost the appetite for addressing spending.³

In March 2019, the White House budget proposal requested \$4.746 trillion in outlays for fiscal year (FY) 2020, with annual spending projected to top \$5 trillion in 2022.⁴ This year, the Congressional Budget Office's January 2020 *Budget and Economic Outlook*, covering 2020 to 2030, shows discretionary, entitlement, and interest spending exceeded \$4.4 trillion in FY 2019 and projects spend-

ing above \$5 trillion by FY 2022, and nearly \$7.5 trillion by 2030.⁵ The national debt now stands at \$23.2 trillion, up more than \$2 trillion since 2018.⁶

As imposing as that is, the cost of government extends even beyond what Washington collects in taxes and the far greater amount it spends. Federal environmental, safety and health, and economic regulations and interventions affect the economy by hundreds of billions—even trillions—of dollars annually. These regulatory burdens can operate as a hidden tax.⁷ Unlike on-budget spending, regulatory costs caused by government are largely obscured from public view. As the least disciplined aspect of government activity, regulation can be appealing to lawmakers. Budgetary pressures can incentivize lawmakers to impose off-budget regulations on the private sector rather than add to unpopular deficit spending. For example, a government job training or child care initiative could involve either increasing government spending or imposing new regulations that require businesses to provide those ben-

efits. Just as firms generally pass the costs of some taxes along to consumers, some regulatory compliance costs and mandates borne by businesses will percolate throughout the economy, finding their way into consumer prices and workers' wages.⁸

When the U.S. federal administrative state began its growth a century ago, few likely imagined the tangle of rules it would yield and how those would envelop the economy and society. Over several decades, rules have accumulated year after year with little retrenchment. Over the past three years, there have been some reversals in this regard, such as a slowdown in the issuing of new rules and some rollbacks of existing ones, but there remain reasons for concern.

One of the Trump administration's first directives was a memorandum to executive branch agencies titled "Regulatory Freeze Pending Review."⁹ Presidents routinely take similar steps to review predecessors' pending actions and prioritize their own.¹⁰ The president went further in issuing a series of actions related to general regulatory process reform, reforming the executive branch itself, and streamlining internal agency processes and timeliness of regulatory approvals and removing undue burdens generally.

Some of Trump's executive actions since taking office worryingly have gone the other way, such as emphasizing trade restrictions, anti-dumping, "buy American" agendas, and more.¹¹ The extensive executive actions undertaken aimed at liberalization have been both broad-based and sector-specific to areas such as financial regulation, antiquities and national monuments, offshore resource access, education, health care,¹² agricultural biotechnology, and more (see Box 1).

Since the federal government heavily influences society through regulation as well as spending, lawmakers should work toward thorough tracking and disclosure of regulatory costs and perform periodic housecleaning. The limited cost-benefit analysis currently undertaken by agencies relies largely on agency self-reporting and covers

only a fraction of rules.¹³ Regulators are reluctant to acknowledge when a rule's benefits do not justify its costs. In fact, one could expect agencies to devise new and suspect categories of benefits to justify rulemaking.¹⁴

Excess regulation is largely driven by the longstanding delegation by Congress of its rightful lawmaking power to executive branch regulatory agencies. Addressing that situation effectively will require the restoration of Congress' duties under Article I of the Constitution rather than "mere" administrative law reforms. This could take the form of congressional votes on significant or controversial agency rules before they become binding. Getting lawmakers on the record as supporting or opposing specific rules would reestablish congressional accountability and affirm a principle of "no regulation without representation."¹⁵

Federal regulatory transparency report cards, similar to the presentation in *Ten Thousand Commandments*, could be issued each year to distill information for the public and policy makers about the scope of the regulatory state.¹⁶ Scattered government and private data exist about the number of regulations issued by agencies and their costs and effects. Improving and compiling some of that information can shed light on the scope of the federal regulatory enterprise. That goal is central to the annual *Ten Thousand Commandments* report.

The 2020 edition of *Ten Thousand Commandments* is the latest in an annual series that examines the scope of the federal regulatory state to help illustrate the need for measures like regulatory budgeting and ultimately congressional accountability. This report contains seven major elements:

1. A bulleted summary of highlights.
2. An overview of ways the Trump administration has attempted to stem the flow of regulations and roll back old ones.
3. A detailed discussion of Trump's own regulatory impulses—implemented, pending, and potential—that could undermine his own regulatory effort.

Box I. Prominent Executive Actions on Regulatory Process Reform during Trump's First Three Years

2017

- Presidential Memorandum, Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, January 24, 2017.¹⁷
- Executive Order 13755, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, January 24, 2017.¹⁸
- Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.¹⁹
- Executive Order 13772, Core Principles for Regulating the United States Financial System, February 3, 2017.²⁰
- Executive Order 13777, Enforcing the Regulatory Reform Agenda, February 24, 2017.²¹
- Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017.²²
- Executive Order 13777, Identifying and Reducing Tax Regulatory Burdens, April 21, 2017.²³
- Executive Order 13790, Promoting Agriculture and Rural Prosperity in America, April 25, 2017.²⁴
- Executive Order 13792, Review of Designations under the Antiquities Act, April 26, 2017.²⁵
- Executive Order 13791, Enforcing Statutory Prohibitions on Federal Control of Education, April 26, 2017.²⁶
- Executive Order 13795, Implementing an America-First Offshore Energy Strategy, April 28, 2017.²⁷
- Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, August 15, 2017.²⁸
- Executive Order 13813, Promoting Healthcare Choice and Competition across the United States, October 12, 2017.²⁹

2018

- Presidential Memorandum, Memorandum for the Secretary of the Interior: Supporting Broadband Tower Facilities in Rural America on Federal Properties Managed by the Department of the Interior, January 8, 2018.³⁰

- Executive Order 13821, Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, January 8, 2018.³¹
- Presidential Memorandum, Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, April 12, 2018.³²
- Executive Order 13847, Strengthening Retirement Security in America, August 31, 2018.³³
- Presidential Memorandum, Promoting the Reliable Supply and Delivery of Water in the West, October 19, 2018.³⁴
- Presidential Memorandum, Developing a Sustainable Spectrum Strategy for America's Future, October 25, 2018.³⁵

2019

- Executive Order 13855, Promoting Active Management of America's Forests, Rangelands, and other Federal Lands to Improve Conditions and Reduce Wildfire Risk, December 21, 2018.³⁶
- Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents, October 9, 2019.³⁷
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.³⁸
- Executive Order 13879, Advancing American Kidney Health, July 15, 2019.³⁹
- Executive Order 13878, Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, June 25, 2019.⁴⁰
- Executive Order 13874, Modernizing the Regulatory Framework for Agricultural Biotechnology Products, June 11, 2019.⁴¹
- Executive Order 13868, Promoting Energy Infrastructure and Economic Growth, April 10, 2019.⁴²

4. An overview of the scope of the regulatory state, including a taxonomy of categories and instances of unmeasured costs of regulation and intervention, and depictions of its appraised size compared with federal budgetary components and gross domestic product (GDP).

5. An analysis of trends in the numbers of rules and regulations issued by agencies, based on information provided in the *Federal Register* and in the Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions. This section also provides a brief survey of memo-

randa, notices, and other “regulatory dark matter,” and examines implementation of Trump’s “one-in, two-out” process for new regulations and its limitations.

6. Recommendations for reform that emphasize disclosure and improving congressional accountability for rulemaking.
7. An appendix containing historical tables of regulatory trends over past decades.

For the good of the nation’s stability and economic health, the regulatory process should be made as transparent as possible and be brought under greater democratic accountability and constitutional norms. Some highlights from the report follow.

- Apart from sector-specific executive orders and memoranda, there are six prominent ways the Trump administration has streamlined regulation so far:
 - Elimination of 15 rules and one guidance document via the Congressional Review Act (CRA);
 - Delay or withdrawal of 1,570 of Obama administration rules in the pipeline;
 - Multipronged streamlining of permitting for pipelines, bridges, 5G broadband, rural broadband, and other infrastructure;
 - Agency restraint in initiating large, significant rulemakings;
 - Continued progress, albeit with declining marginal returns, on the presidential requirement that agencies eliminate at least two rules for every one issued;
 - Steps toward addressing agency guidance documents and other sub-regulatory decrees.
- For the first time, in fiscal year 2019, the administration did not meet the one-in, two-out goals as prescribed by Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” Instead of “one-in, two-out,” the ratio was 1.7 to one.
- *Agencies’ stated priorities and “inventories” of rules signal some warning signs for Trump’s deregulatory agenda.* While the Trump administration can be said to have

technically met the goal of implementing a “one-in, two-out” process for federal regulations over the past three years taken as a whole, the longer-term horizon plainly shows agencies poised to reverse this and to issue substantially more regulatory actions than deregulatory ones.

- *Some warning signs are of Trump’s own creation.* President Trump’s regulatory streamlining is being offset by his own favorable comments and explicit actions toward regulatory intervention in the following areas:
 - Antitrust intervention
 - Financial regulation
 - Hospital and pharmaceutical price transparency mandates and price controls
 - Speech and social media regulation
 - Tech regulation
 - Digital taxes
 - Bipartisan large-scale infrastructure spending with regulatory effects
 - Trade restrictions
 - Farming and agriculture
 - Subsidies with regulatory effect
 - Telecommunications regulation, including for 5G infrastructure
 - Personal liberties: health-tracking, vaping, supplements, and firearms
 - Industrial policy or market socialist funding mechanisms (in scientific research, artificial intelligence, and a Space Force)
 - Welfare and labor regulations (job training, the new family leave)
- Given the limited available federal government data and reports, as well as contemporary studies—and the federal government’s failure to provide a regularly updated estimate of the aggregate costs of regulation—this report employs a placeholder estimate for regulatory compliance and economic effects of federal intervention of \$1.9 trillion annually. This is for purposes of context and rudimentary comparison with federal spending and other economic metrics. This report also presents an outline of the vast sweep of intervention and policies for which costs are disregarded.

Trump’s regulatory streamlining could be offset by his actions favorable toward regulatory intervention.

- The burden of regulatory intervention is equivalent to over 40 percent of the level of federal spending, projected to be \$4.6 trillion in 2020.
- Regulatory costs of \$1.9 trillion amount to 9 percent of U.S. GDP, which was estimated at \$21.54 trillion in 2019 by the Commerce Department’s Bureau of Economic Analysis.
- When regulatory costs are combined with estimated federal FY 2019 outlays of \$4.447 trillion, the federal government’s share of the entire economy reaches 30 percent (state and local spending and regulation would add to that).
- If it were a country, U.S. regulation would be the world’s eighth-largest economy (not counting the U.S. itself), ranking behind Italy and ahead of Brazil.
- The regulatory hidden “tax” is equivalent to federal individual and corporate income tax receipts combined, which totaled \$1.914 trillion in 2019 (\$1.698 trillion in individual income tax revenues and \$216 billion in corporate income tax revenues).
- Regulatory costs rival corporate pretax profits of \$2.063 trillion.
- If one assumed that all costs of federal regulation and intervention flowed all the way down to households, U.S. households would “pay” \$14,455 annually on average in a regulatory hidden tax. That amounts to 18 percent of the average pretax income of \$78,635 and 24 percent of the average expenditure budget of \$61,224. The regulatory “tax” exceeds every item in the household budget except housing. That means that an average American household “spends” more on embedded regulation than on health care, food, transportation, entertainment, apparel, services, or savings.
- Calendar year 2019 ended with 2,964 final rules in the *Federal Register*, which was the lowest count since records began being kept in the 1970s and is the only sub-3,000 tally ever (in the 1990s and early 2000s, rule counts regularly exceeded 4,000 annually).
- During calendar year 2019, while agencies issued those 2,964 rules, Congress enacted “only” 105 laws. Thus, agencies issued 28 rules for every law enacted by Congress. This “Unconstitutionality Index”—the ratio of regulations issued by agencies to laws passed by Congress and signed by the president—highlights the entrenched delegation of lawmaking power to unelected agency officials. As it happens, the average ratio for the past decade has also been 28.
- In 2017, Trump’s first year, the *Federal Register* finished at 61,308 pages, the lowest count since 1993 and a 36 percent drop from President Barack Obama’s 95,894 pages, which had been the highest level in history. The 2019 *Federal Register* tally rose to 70,938 pages. However, Trump’s rollbacks of rules—and as noted there are far fewer rules overall—also necessarily add to rather than subtract from the *Register*.
- The Weidenbaum Center at Washington University in St. Louis and the George Washington University Regulatory Studies Center in Washington, DC, jointly estimate that agencies spent \$72 billion in fiscal year 2019 to administer and police the federal regulatory state. This on-budget sum is in addition to compliance and economic burdens.
- At the end of calendar year 2019, 2,131 proposed rules were contained in the *Federal Register* pipeline.
- In contrast to the 2,964 rules finalized in calendar year 2019, 68 federal departments, agencies, and commissions have in the pipeline 3,752 regulatory actions at various stages of implementation (recently completed, active, and long-term stages), according to the fall 2019 Unified Agenda of Federal Regulatory and Deregulatory Actions. Of the 3,752 rules, 689 are “Deregulatory” for Executive Order 13771 purposes, broken down as follows:
 - Of 2,602 rules in the active phase, 522 are deemed deregulatory.
 - Of 546 completed rules, 106 are deemed deregulatory.

If it were a country, U.S. regulation would be the world’s eighth-largest economy.

- Of 604 long-term rules, 613 are deemed deregulatory.
- Of the 3,752 regulations in the Agenda’s pipeline (completed, active, and long-term stages), 192 are “economically significant” rules, which the federal government describes as having annual economic effects of \$100 million or more. Of those 192 rules, 33 are deemed deregulatory for purposes of Trump Executive Order 13771 (11 at the completed stage, 20 at the active stage). Only two are at the planned long-term rule phase.
- Since 1993, when the first edition of *Ten Thousand Commandments* was published, agencies have issued 107,712 rules. Since the *Federal Register* first began itemizing them in 1976, 204,802 final rules have been issued.
- The Trump administration’s spring and fall 2019 editions of the Unified Agenda of Regulatory and Deregulatory Actions contained a combined 70 completed “economically significant” rules (the counts were 35 and 88 in 2018 and 2017, respectively). The yearly average for Barack Obama’s eight years was 69; George W. Bush’s average over his term was 49. Trump’s average so far is 64, but his Agendas are the first to contain expressly deregulatory economically significant rules for purposes of Executive Order 13771.
- During calendar year 2019 the Government Accountability Office (GAO) issued 74 reports on “major” rules—a category similar to but slightly broader than economically significant—as the Congressional Review Act requires it to do. In the first year of the Trump administration, the count was 49, the lowest ever. President George W. Bush’s administration averaged 63 major rules annually during his eight years in office. President Obama averaged 86. Obama issued 685 major rules during his term, compared with Bush’s 505. Approaching the end of Trump’s first term, the president’s average is 59 yearly, but a significant portion are deemed deregulatory.
- Of the 3,752 regulations in the pipeline, 644 affect small businesses. Of those, 347 required a Regulatory Flexibility Analysis (official assessment of small-business impacts), down from 412 in 2016. An additional 297 were otherwise noted by agencies to affect small businesses in some fashion. Overall, 102 rules affecting small business were deemed “deregulatory.”
- The seven most active rule-producing entities—the Departments of Commerce, Defense, Health and Human Services, the Interior, Transportation, the Treasury, and the Environmental Protection Agency (EPA)—account for 2,002 rules, or 53 percent of all rules in the Unified Agenda pipeline.
- President Trump issued 47 executive orders in 2019 (after 63 in 2017 and 35 in 2018). From the nation’s founding through the Obama administration, more than 15,285 executive orders have been issued. President Obama issued a total of 276, similar to President George W. Bush’s 291. Prior to the 20th century, most presidents had no more than a few dozen. In contrast, Woodrow Wilson issued 1,803, Coolidge issued 1,204, and Franklin D. Roosevelt issued 3,467.
- President Trump issued 26 presidential memoranda in 2019, after issuing 38 in 2017, and 30 in 2018. President George W. Bush published 131 memoranda in the *Federal Register* over his entire presidency, whereas President Obama published 257.
- Public notices in the *Federal Register* normally exceed 24,000 annually, with uncounted guidance documents and other proclamations with potential regulatory effect among them (and other guidance documents that do not appear in the *Register* at all). There were 21,804 notices issued in 2019. There have been 616,455 public notices since 1994 and well over a million since the 1970s.

9,999 Commandments? Six Ways Rule Flows Have Been Reduced or Streamlined

This edition of *Ten Thousand Commandments* begins with a survey of approaches the Trump administration took in its first three years to fulfill promises to streamline red tape. The report then puts Trump's numbers in historical context and examines some specifics of implementation of Trump's Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," and subsequent White House guidance to eliminate two regulations for every "significant regulatory action" issued.⁴³

Assessing agencies' priorities and results to date illustrates some limitations for the prospects for continued streamlining of rules and regulations when presidential attention turns elsewhere (particularly given that the 116th Congress will not enact a legislative regulatory reform package). Barack Obama unapologetically wielded the "pen and phone" to expand federal reach over private affairs.⁴⁴ Donald Trump, too, has used the pen and phone, in significant part to attempt to undo Obama programs and otherwise streamline regulation.⁴⁵ However, Trump also expresses substantial regulatory impulses of his own that arguably undermine his administration's reform agenda; that will be reviewed here as well. The overarching reality is that the federal government is far larger than ever, and Trump's executive branch reorganization initiative undertaken alongside regulatory streamlining has resulted in the elimination of no regulatory agencies.⁴⁶

Presidents come and presidents go, but few systematically and in such prolonged fashion attempt to freeze and roll back rulemaking. Agencies and outside advocacy groups react strongly to protect the administrative state,

and legal challenges to Trump's regulatory rollback and Executive Order 13771 predictably ensued.⁴⁷ A poor record in court for some Trump streamlining measures has been widely noted.⁴⁸ These included early judicial rebukes to Trump's efforts to delay implementation of certain elements of the EPA's Waters of the United States rule and of a chemical disaster preparedness and disclosure rule.⁴⁹

The administrative state's fundamental incompatibility with limited government is readily observable in the rulemaking process itself. The 1946 Administrative Procedure Act requires adherence to process for rolling back rules or changing policy, not just for issuing a rule in the first place as court losses show.⁵⁰ The Administrative Procedure Act's rulemaking process allows for wiggle room to grow regulation via its "good cause" exemption, by which an agency may deem notice and comment for certain rules as "impracticable, unnecessary, or contrary to the public interest," but that leniency seems not to have applied to rollbacks.⁵¹ Therefore, rules cannot be eliminated via the same "good cause" exemption. Rather, a rule can be replaced only with a new rule or legislation.⁵² Further eroding accountability, the logic of the administrative state has generated a judicial philosophy known as *Chevron* deference, whereby courts yield to agencies' interpretations of the enabling statutes under which they write their rules, as long as the agency's interpretation has some "rational basis," which is not much of a restraint.⁵³

The two-for-one executive order was explicit regarding its own legal limitations. The Trump approach in Executive Order 13771

*The Administrative
Procedure Act
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*The reality is
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well, powering
ahead.*

seems executed well within the rule of law, as much as that concept applies in the context of the administrative state.⁵⁴ Executive Order 13771 asserts: “Nothing in this order shall be construed to impair or otherwise affect ... the authority granted by law to an executive department or agency. ... This order shall be implemented consistent with applicable law.”⁵⁵ Reforming or revoking major regulations, like the EPA’s Waters of the United States or Clean Power Plan rules, takes years. As Heritage Foundation analyst James Gattuso said of Trump’s first year: “Given the procedural and institutional obstacles to repealing a rule, it is unlikely that any administration would be able to achieve substantial deregulation.”⁵⁶ And sure enough, early on, then-Office of Management and Budget (OMB) Director Mick Mulvaney (who then served as White House acting chief of staff until March 2020) affirmed that when it came to rollbacks of Obama “midnight rules” and not-yet-implemented rules in the pipeline, “None of them are very sexy. ... None of them are very glamorous. None of them really rise to the level of getting national attention. But think about that—860 of them.”⁵⁷ The big changes, like recodification of the Waters of the United States⁵⁸ and Clean Power Plan rules, took time but eventually did occur.⁵⁹

The court losses were a rebuke, but they also highlight the permanence of an entrenched administrative state immune to unilateral reduction in scope. This is not necessarily a bad thing from a long-term perspective, as it can help shift the focus to where it belongs—on a Congress with transitory membership that has delegated away much of its lawmaking power to executive branch agencies and their career personnel.

Curiously, while the impression is given by opponents that Trump’s rollbacks are illegal and undermine health and safety and “safeguards”⁶⁰ in their sweeping character, other progressive commentators, covering all the bases presumably, call Trump’s boasts a “deregulation myth.”⁶¹ Complaints, sometimes contradictory, range from the dismissive observation that the administration

“claims credit for some regulatory actions begun under Obama”⁶² to the claim that Trump merely wants to offload red tape to the government.⁶³ We find progressives’ characterization of a “war on regulation”⁶⁴ and Paul Krugman’s outlandish claim that “Donald Trump Is Trying to Kill You.”⁶⁵ We have claims that the “rollback has largely been a bust. In some cases, in fact, it’s been an outright fraud.”⁶⁶ So Trump is both overreaching and not accomplishing anything, according to progressives and other opponents. Both cannot be true.⁶⁷

The success or failure dispute notwithstanding, the reality is that the administrative state is alive and well, powering ahead. While improvements can be made to the implementation of Executive Order 13771⁶⁸ and to newer orders issued to restrain abuse of guidance documents, a president can achieve only a limited streamlining in a systemic imbalance tilted toward escalating administrative state power.⁶⁹ Executive Order 13771, in an arena in which agencies make most law, underscores what a president may *not* do acting alone.⁷⁰ As such, Executive Order 13771 represents a voluntary weakening of executive power regarding certain regulation (we are not addressing wider policy matters in this context). The underlying message of Executive Order 13771 is that of Article I of the Constitution: If something needs to be regulated, Congress should pass a law. In the meantime, in implementing Executive Order 13771 and reporting results, the Trump administration now explicitly separates actions deemed deregulatory from those deemed regulatory. This designation could have staying power and be carried forward by subsequent administrations.

Meanwhile, Executive Order 13771 did not apply either to rules from independent agencies like the Federal Communications Commission (FCC) or the Consumer Finance Protection Bureau (CFPB) or to rules mandated by Congress, as opposed to those spearheaded by agencies themselves. Substantial regulatory streamlining of these require either new rulemaking or legislation.

Trump’s regulatory rollbacks over the past three years—limited given their largely unilateral implementation within the inertia of a rigid preexisting administrative state—have consisted of six main elements:

First, 14 rules that had been finalized during the closing months of the Obama administration and on track to take effect were eliminated using the CRA in 2017, via individual resolutions of disapproval passed by Congress and signed by Trump.⁷¹ The rules removed were generally not headline-grabbing reforms, nor all major ones.⁷² There were hundreds of rules eligible to be rolled back, which provides the reality check that businesses often favor regulation that provide advantages over rivals.⁷³ An additional rule not originated under Obama and one guidance document from the Consumer Financial Protection Bureau were also eliminated by resolution of disapproval in 2018. In similar fashion, when Trump leaves office, rules issued in the waning months of his presidency, including those meant to streamline, would be similarly vulnerable.

Second, the Trump administration withdrew or delayed 1,579 Obama administration rules that were in the pipeline at the time of inauguration but not yet finalized, as follows:⁷⁴

- 635 withdrawn;
- 244 made inactive;
- 700 delayed.

Third, streamlining permitting for bridges, pipelines, transportation, telecommunications, and other infrastructure is being interpreted as creating a more favorable climate for infrastructure planning.⁷⁵ This manifested in several ways, such as the permitting-related executive actions noted in Box 1, the Commerce Department’s permit streamlining action plan (which contained a collection of rule recommendations),⁷⁶ and some elements, with caveats, of the 2019 Trump Budget proposal addressing infrastructure reform.⁷⁷

Fourth, to the limited extent possible, agencies have largely abstained from issuing sig-

nificant new regulatory initiatives. While more significant rules have been removed than added, such rules still have been added. Trump’s total final rule counts were 3,281 in 2017; 3,368 in 2018; and 2,964 in 2019, compared to Obama’s 2016 tally of 3,853 (these are calendar years).⁷⁸ Of Obama’s finalized rules, 486 were categorized as “significant.” The “significant” subset for Trump has been 199, 108, and only 66 for the past three years, respectively. Even these lower rule counts can still overstate agencies’ conventional rulemaking activity, since some “rules” have been and are Executive Order 13771–driven delays or rollbacks of existing rules.

Fifth, the Trump administration technically exceeded the one-in, two-out goals for adoption of significant regulatory actions in the first two fiscal years,⁷⁹ but the increasing difficulty of rule offsets led to not quite meeting the objective in fiscal year 2019 without rounding up.⁸⁰ In implementing the streamlining process, two OMB guidance documents on the one-in, two-out executive order were issued after the order itself.⁸¹ Further, another 2017 executive order established Regulatory Reform Task Forces at various agencies.⁸² Agencies also sought public input on rule streamlining.⁸³ But these changes are bumping against limits. Since the administration is acting without any bipartisan support from Congress, rewriting rules under the strictures of the Administrative Procedure Act becomes the only option left as Trump’s Executive Order 13771 one-in, two-out campaign matures, and that affects the ratio considerably.

However, while it inevitably becomes harder to eliminate more than two rules for each added without Congress contributing to the effort, the point of the spear of the Trump deregulatory program is the capping of net new regulatory costs at zero, for which the regulatory eliminations are a tool—a mini-regulatory budget of sorts. “By requiring a reduction in the number of regulations, the order incentivizes agencies to identify regulations and guidance documents that do not provide sufficient benefits to the public,”

Businesses often favor regulation that provide advantages over rivals.

Table I. Significant Regulatory Actions

	FY2017	FY2018	FY2019	Total
Regulatory	3	14	35	52
Deregulatory	67	57	61	185
Claimed ratio—rules out/rules in	22/1	4/1	1.7/1	3.6/1

noted then-OMB Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao in the “Introduction to the Fall 2018 Regulatory Plan.”⁸⁴ In that respect, the administration claimed net regulatory cost savings of \$50.9 billion in total present-value regulatory costs across the government between 2017 and 2019, with \$13.5 billion of that occurring in 2019.⁸⁵ The trajectory of out/in follows:

In 2017, the White House maintained that the goal of one-in, two-out for regulations was exceeded with a claimed 22-to-one out/in ratio, since only three “significant” new regulatory actions were imposed during that fiscal year, while 67 reductions were made.⁸⁶ Six rules included in the roundup of 67 were among the 15 eliminated via Congressional Review Act resolutions of disapproval. Interestingly, among the initial 67 rule reductions, nine appeared to be revocations or alterations of sub-regulatory guidance, notices, orders, or information collections.

A bewildering rulemaking nomenclature places regulations into an array of categories encompassing such terms as rules, significant rules, major rules, economically significant rules, guidance, and more.⁸⁷ Some independent agency rules were removed via CRA procedures but not taken as “credit” for two-for-one purposes, since the order did not bind independent agencies. Examples of these included a CFPB arbitration rule,⁸⁸ a Securities and Exchange Commission (SEC) rule on foreign resource extraction payment disclosure,⁸⁹ and an FCC broadband privacy regulation.⁹⁰ The FCC’s elimination of Obama-era net neutrality rules⁹¹ and modernization of broadcast ownership rules are among significant undertakings not included in two-for-one, but like all substantial final

rules, new rulemaking proceedings can be lengthy.⁹²

In 2018, OIRA reported in “Regulatory Reform Results for Fiscal Year 2018” that “Agencies issued 176 deregulatory actions and 14 significant regulatory actions,” for an overall 12-to-one ratio.⁹³ Fifty-seven of these deregulatory actions were deemed significant, so comparing significant deregulatory to significant regulatory actions yielded a four-to-one ratio.⁹⁴

In 2019, OIRA reported in “Regulatory Reform Results for Fiscal Year 2019” that “Agencies issued 150 deregulatory actions and 35 significant regulatory actions,” for an overall 4.3-to-one ratio.⁹⁵ Sixty-one deregulatory actions were significant, so comparing significant deregulatory to significant regulatory actions yields a ratio of 1.7 to 1, falling a bit short of the one-in, two-out goal.⁹⁶

Below is a summary of the three Trump fiscal years of claimed significant reductions. The overall ratio stands at about 3.6 to one, as shown in Table 1.

Box 2 summarizes the Trump administration’s 2019 claimed 150 completed regulatory eliminations or reductions by agency, showing significant (59) and other/non-significant (91) components, along with a breakdown of the claimed \$13 billion in present value cost savings for fiscal year 2019.⁹⁷ As Box 2 shows, the Department of Health and Human Services issued the most claimed significant deregulatory rules (11) and led in claimed cost savings (\$11.4 billion); Veterans Affairs and the EPA account for most of the cost added. While overall the “no net new costs” directive is apparently being met given the body of agency activity

Box 2. Completed EO 13771 Deregulatory (Significant and other) Actions, Regulatory Actions, and Claimed Cost Savings, FY2018

	Deregulatory Actions			Regulatory Actions	Present Value Savings
	Total	Significant	Other		
Executive Department/Agency	150	61	89	35	(\$13,470.9)
Dept. of Agriculture	13	5	8		\$(2,152.0)
Dept. of Commerce	18	0	18		\$(73.2)
Dept. of Defense	4	2	2		\$(21.5)
Dept. of Education	4	2	2		\$(3,081.5)
Dept. of Energy	5	2	3		\$(305.9)
Dept. of Health and Human Services	14	11	3	13	\$(11,400.7)
Dept. of Homeland Security	11	4	7	3	\$(781.1)
Housing and Urban Development	2	2	0	1	\$(365.0)
Dept. of Interior	18	4	14		\$(1,452.8)
Dept. of Justice	1	0	1	1	\$20.8
Dept. of Labor	8	8	0	2	\$(7,959.3)
Dept. of Transportation	23	8	15	4	\$(2,319.2)
Dept. of the Treasury	4	3	1	1	\$61.7
Veterans' Affairs	3	1	2	3	\$8,129.9
Environmental Protection Agency	18	4	14	6	\$8,392.4
DoD/GSA/NASA (Federal Acquisition Regulation)	1	1	0	1	\$(8.8)
Office of Personnel Management	1	1	0		
Small Business Administration	1	1	0		\$(16.3)
U.S. Agency for International Development	1	0	1		\$(138.50)
TOTAL	150	59	91	35	\$(13,471.0)

Source: White House OMB, Regulatory Reform Results for Fiscal Year 2019, <https://www.reginfo.gov/public/do/eAgendaEO13771>.

surveyed by OMB, it appears to not necessarily be happening by individual agency in a given year. As noted, deregulatory campaigns take years.

Again, there are ample critiques of the reality of the claimed cost reductions, of their effect on the economy, of their neglect of benefits,⁹⁸ and charges of “taking exaggerated credit for small reductions.”⁹⁹ But, as then-acting OIRA Director Dominic Mancini stated in 2017, “EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB’s *Final Bulletin on Good Guidance Practices*.”¹⁰⁰ Nonsignificant deregulatory rules issued

may contribute to cost savings. Additionally, there have been eliminations beyond what the White House took credit for, such as with guidance documents and independent agency streamlining. Details on precisely what the rules are from each agency, the full list—of 150 deregulatory (59 significant and 91 nonsignificant) and 35 regulatory actions—is provided in OMB’s “Regulatory Reform Report: Completed Actions for Fiscal Year 2019.”¹⁰¹

Regarding the net zero “regulatory budget,” we noted that OMB claims agencies have achieved \$50.9 billion in savings over the past three fiscal years.¹⁰² The White House

claims to anticipate additional savings in FY 2020, topping another \$51.6 billion, with the Department of Transportation and the EPA to contribute the vast bulk of cost reductions, and the Department of Homeland Security adding the most cost.¹⁰³ As it happens, the savings goal of \$18 billion for 2019 was not met.¹⁰⁴ Still, as seen below, savings would total roughly \$100 billion if the new goals are met (the individualized yearly annual reports depict slightly less savings, about \$45 billion, than OMB claims now).¹⁰⁵

- FY 2017 savings: \$8.148 billion¹⁰⁶
- FY 2018 savings: \$23.432 billion¹⁰⁷
- FY 2019 savings: \$13.471 billion¹⁰⁸
- FY 2020 savings (anticipated): \$50.949 billion¹⁰⁹
- Total: \$96.000 billions

The Obama administration's cost picture contrasted sharply with Trump's claimed savings. A November 2017 Heritage Foundation analysis of available information on the Obama regulatory record isolated the major rules listed in the GAO database affecting only the private sector and distinguished between those that were deregulatory and those that were regulatory. The report concluded: "During the Obama years, the nation's regulatory burden increased by more than \$122 billion annually as a result of 284 new 'major' rules."¹¹⁰

Each of the prior three fiscal years' rollbacks are detailed in OMB's respective "Regulatory Reform Results" tabulation.¹¹¹ Many are obscure, as noted, but there are still prominent examples of rule rollbacks and alterations beyond prominent aforementioned ones such as the Clean Power Plan, Waters of the United States, and other environmental rules.¹¹² In some instances, independent agencies participated in rollbacks despite not being subject to executive orders. Among much else, notable rules and proposals for rollback have included:

- The Fish and Wildlife Service's "improvements to the implementing regulations of the ESA [Endangered Species Act] designed to increase transparency

and effectiveness" regarding critical habitat designation, unoccupied territory subject to inclusion, and adding or removing species to the endangered list using the "best available scientific and commercial information."¹¹³

- An EPA and National Highway Traffic Safety Administration withdrawal of the California waiver on vehicle emissions afforded by the Clean Air Act.¹¹⁴
- An proposed EPA rule on "strengthening transparency" and limitations on "secret science."¹¹⁵
- A Department of Energy final rule withdrawing energy conservation standards for incandescent light bulbs issued under the Obama administration on January 19, 2017.
- A Department of Labor final rule expanding retirement savings options to make it easier for employers to band together and create joint retirement plan options for employees.¹¹⁶
- A 2020 proposed rule issued by the White House aimed at updating or modernizing the 1978 National Environmental Policy Act's implementing regulations with respect to environmental reviews of infrastructure projects.¹¹⁷
- A final rule from the Treasury Department's Office of the Comptroller of the Currency raising of thresholds for stress testing for banks and savings and loans.¹¹⁸
- A final rule from the Office of the Comptroller of the Currency, Federal Reserve, and Federal Deposit Insurance Corporation raising limits for prohibitions on interlocking managements.¹¹⁹

Some proposed rules reductions and streamlining that likely will contribute to one-in, two-out seem economically significant in the normal sense of that term, but do not get characterized as such under the one-in, two-out regime. Examples include:

- Alcohol and Tobacco Tax and Trade Bureau notices of proposed rulemaking on relaxing container standards and requirements for wine¹²⁰ and distilled spirits;¹²¹
- Modernization of authorizations for supersonic flights;¹²²

- Lessening of restrictions on logging in federal forests put in place during the Clinton administration;¹²³ and
- The Department of Housing and Urban Development’s proposed rule to “amend HUD’s interpretation of the Fair Housing Act’s disparate impact standard to better reflect” Supreme Court interpretation and address the abuse of such claims with respect to neutral policies.¹²⁴

Notably, treaties are not normally considered regulation, yet relevant in the current context but not counted are savings from withdrawal from the Paris climate agreement.¹²⁵

As the OMB’s own breakdown of specific regulations and rollbacks makes clear, regulations are still being added in the two-for-one era. While some rules are intended to cut or streamline, overarching regulatory regimes exist apart from any president and cannot be undone by one.

Sixth, the Trump administration has arguably taken more steps than any predecessor to address the proliferation of significant guidance documents and other sub-regulatory decrees and “regulatory dark matter” that can have regulatory effect.¹²⁶ The most prominent to this point had been President George W. Bush’s Executive Order 13422, which subjected significant guidance to OMB review,¹²⁷ and his administration’s 2007 OMB Good Guidance Practices memorandum.¹²⁸ Trump’s initial executive orders and directives encompassed not just “significant regulatory actions,” but significant guidance on a case-by-case basis.¹²⁹ Meanwhile, agencies have revoked guidance and directives that were not included among the proclaimed regulatory reductions.¹³⁰ Continued emphasis on guidance documents is important since agencies discouraged from issuing rules may rely more heavily on such sub-regulatory guidance. Addressing guidance more explicitly can also be important for reckoning with the diminishing returns of the two-for-one program.

In 2019, two prominent developments happened at the White House level. April 11 brought an update of a 20-year-old OMB

memo to agencies called “Guidance on Compliance with the Congressional Review Act.”¹³¹ The April 2019 OMB memo reinforced the ignored reality that guidance documents are “rules” and underscored the ignored legal obligations agencies have to send new rules and guidance to both Congress and the GAO before they can take effect, and to ensure that rule status—whether they are major or not—gets formally established before rules are published and considered binding. The level of compliance with these important directives on disclosure and accountability remains unclear, although it is the case that final rule counts dropped substantially in 2019, which could signify some positive effect.¹³²

The most significant step in addressing guidance document abuse was the Trump administration’s issuance in October 2019 of two new executive orders (among those listed earlier in Box 1).

- Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents, October 9, 2019.¹³³
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, October 9, 2019.¹³⁴

Executive Order 13891, “Improved Agency Guidance Documents,” seeks to enable a now-lacking infrastructure for disclosure of guidance documents by creating a “single, searchable, indexed database” at every executive branch agency. Creating those indexes will be streamlined at the outset by an agencies-wide rescission of guidance that “should no longer be in effect.” The order discusses actively “rescinding” guidance documents, but those not added to the database would be void regardless. Where existing guidance is retained or new guidance is issued, its nonbinding nature shall be affirmed. It also required the development of procedures for the public to petition for revocation or alteration.

For the subset of “significant guidance documents,” there are further requirements. These are:

***Regulations
are still being
added in the
two-for-one era.***

- New processes for public notice and comment (subject to “good cause” waiver);
- Public responses from agencies before significant guidance documents are finalized;
- Signoff on significant guidance by a presidentially appointed official; and
- OIRA review under Executive Order 12866 to affirm benefits justify costs (as well as adherence to other regulatory oversight executive orders in effect).

These requirements were followed up on by an implementation memo aimed at clarifying and reinforcing agencies’ duties and compliance.¹³⁵ The risk now is that agencies undermine the April 2019 OMB order and Trump’s executive orders on guidance deliberately or simply through disregard.¹³⁶

Like the one-in, two-out order, the new guidance orders have their detractors. The Center for Progressive Reform complained of the “transparency and fairness” order that “Rather than solving a real problem ... seems more focused on creating a myth that agencies are running around punishing companies with arbitrary enforcement actions. That just doesn’t happen in reality.”¹³⁷ The bipartisan Administrative Conference of the United States would differ on that score.¹³⁸ Yet, it should not be surprising that proponents of stricter regulations might seek to use restrictions on guidance to target guidance intended to lessen regulatory burdens.¹³⁹

Agencies have housed regulatory reform “task forces” since early in the Trump administration, and they are now charged with revising rulemaking and guidance procedures and publishing them under the new executive order. Apart from the White House guidance executive orders, some agencies have taken steps individually. For example, the Department of Transportation took initiative by building on Trump’s initial executive orders on regulatory streamlining with what has been called a “rule on rules,” addressing processes and transparency for rules, guid-

ance, enforcement, and due process.¹⁴⁰ While Trump’s executive orders can be revoked by a new president, this final rule incorporating some of the principles presents hurdles (not insurmountable, of course) to immediate rollback since the benefits of transparency and accountability would have to be denied. To a less formal but still significant extent, in moves that will likely incorporate guidance, bodies like the Department of Transportation¹⁴¹ and the Environmental Protection Agency maintain their own running online tallies to provide up-to-date public information.¹⁴² Relatedly, the FCC, though as an independent agency not bound by any Trump executive order, issued a January 2020 white paper enumerating steps taken on “Eliminating and Modernizing Outdated Regulations.”¹⁴³

While regulatory reform legislation in general faces substantial barriers in both the House and Senate, guidance reform is an area with bipartisan appeal, especially given recognition by the Administrative Conference of the United States of the potential for abuse and misunderstandings surrounding guidance documents. Measures like the Guidance out of Darkness Act, sponsored in the 116th Congress by Sen. Ron Johnson (R-WI) and Rep. Mark Walker (R-NC), could conceivably gain traction in coming years.¹⁴⁴ Unlike the one-in, two-out order likely to be revoked by a future Democratic president, the attention to guidance documents and their proliferation can amount to a real legacy for the Trump administration. This development can inform the broader goal of Article 1 Restoration in the future. The Trump effort can continue to help eliminate, better classify, disclose, streamline, and check guidance as well as traditional rulemaking and regulations.

In the next section, however, we look at expansion of or threatened regulations of Trump’s own making, increases in burdens or restrictions of liberty that are not attributable to the preexisting administrative state that Trump inherited.

Swamp Things—Trump’s Discordant Regulatory Impulses Threaten to Derail His Successes and Expand the Administrative State

I will be signing our 738 Billion Dollar Defense Spending Bill today. It will include 12 weeks Paid Parental Leave, gives our troops a raise, importantly creates the SPACE FORCE, SOUTHERN BORDER WALL FUNDING, repeals “Cadillac Tax” on Health Plans, raises smoking age to 21! BIG!

—Tweet by President Donald Trump, December 20, 2019.¹⁴⁵

President Trump has pruned rules and costs and held down regulatory output with more enthusiasm than other presidents.¹⁴⁶

Trump cuts. But Trump also adds.

Some increases in regulation remain inevitable, and the spending state propels that as well. A president is limited in any ability to unilaterally roll back much of the administrative state. For example, the Trump administration’s making peace with the Affordable Care Act now seems near-inevitable given the grinding machinery of the administrative state, driven by massive, sweeping legislation that delegates enormous power to agencies.¹⁴⁷ This ratcheting upward of federal administration, with rare retrenchment, is endemic of institutionalized social-policy fiscal spending and regulation, the cost of which is rarely measured beyond the purely budgetary element.

On the flipside of Trump’s regulatory savings, Trump sports regulatory impulses of his own that could derail or even eclipse the rollback agenda not just in 2020 but for years beyond.¹⁴⁸ Not every Trump executive

order has reduced regulatory intervention; some open the door to it. Trump’s proclivity for trade restrictions and his ad hoc zeal for antitrust and media regulation (such as swipes at Amazon and the AT&T–Time Warner merger) are well known.¹⁴⁹ There are additional less well-known warning signs of regulatory initiatives that have emerged or heightened during the Trump tenure, such as the president’s approval of a permanent reauthorization of the Land and Water Conservation Fund,¹⁵⁰ and his boasting of “the largest public lands package in a decade, designating 1.3 million acres ... of new wilderness” for a federal government that already owns a large portion of the continent.¹⁵¹

In the worst case—one-in, two-out and net-zero “regulatory budget” notwithstanding—Trump could be adding more than he is subtracting in terms of the broader federal administrative state interventionist dynamic. And just as some of the relaxation of regulatory action does not show up in the *Federal Register*, many of the interventions now in play may not show up immediately or lend themselves to measurability.

Notably, on October 17, 2018, the day the 2018 fiscal year two-for-one update was released, Trump held an Oval Office meeting on regulations and the economy with several industry-specific workers and cabinet officials during which he said: “We’ve removed more regulations, and we will continue to get rid of regulations.” But then, in a little-noted remark at the time, Trump said, “I think within a period of about another year, we will have just about everything that we’ve wanted.”¹⁵² Yet, there remains plenty to be done regarding comprehensive regulatory

There are additional warning signs of regulatory initiatives that have emerged or heightened during the Trump tenure.

The administration has energized pursuit of antitrust-related campaigns related to long-dormant issues like price fixing.

reform, especially given the administrative state's propensity to grow and its built-in defenses against retrenchment.

Among the bigger complications for the Trump streamlining agenda is the fact that one cannot get rid of regulations; one can generally at best replace a rule with another rule.¹⁵³ As former OIRA Administrator Susan Dudley pointed out:

For significant regulations, agencies must develop a legal and factual record to support the action, engage in interagency review led by OMB, seek public comment on the revisions, and justify the final action with information in the record.¹⁵⁴

This does not give any president much time in the face of a patient careerist-dominated administrative state, yet there is much on the books that may only be addressed in this fashion when Congress sits idly by. But more important, Trump's own regulatory impulses have become the most pertinent concern, particularly where he exhibits substantial agreement with regulatory advocates on issues such as antitrust policy, regulatory action against tech firms and traditional media companies, and industrial and social policy.¹⁵⁵ What follows are areas where the administration has added regulation or aggressively signaled support for intervention. This section will conclude with observations about rules with ambiguous effect and the complexities those present in streamlining bureaucracy.

Antitrust. On the one hand, the Trump administration has taken steps to cut merger review times overall and to speed up bank merger approvals via internal streamlining at the Federal Reserve and Comptroller of the Currency.¹⁵⁶ But on the other hand, President Trump has casually invoked antitrust action against some tech and telecom firms, striking a discordant note with his deregulatory agenda. A hint occurred when candidate Trump proclaimed, "AT&T is buying Time Warner, a deal that we will not approve in my administration ... because it is too

much concentration of power in the hands of too few. ... We will look at breaking that deal up and other deals like it."¹⁵⁷ The Justice Department's attempt to block the merger ultimately failed.¹⁵⁸ Similarly, Trump tweeted in 2018 that Comcast may be violating antitrust laws.¹⁵⁹ However, after mulling it over (such delay of transactions is itself a regulatory cost), the Justice Department did not investigate the Comcast-NBCUniversal alliance.¹⁶⁰ Further, the president has said that Google, Facebook, and Amazon may be in a "very antitrust situation,"¹⁶¹ and said he was "in charge" and "looking at it,"¹⁶² in an environment in which politicians and pundits across the political spectrum have called for the breakup of those companies.¹⁶³

In early 2019, the Federal Trade Commission (FTC) announced a "technology task force" to assess tech sector "antitrust" violations and increase scrutiny of acquisitions beyond current practice.¹⁶⁴ In the wake of that, and in contrast to the administration's recognition of the misuse of guidance elsewhere, the FTC is now in the process of drafting guidance on how the antitrust laws apply to the technology sector and defending its own role in policing it.¹⁶⁵

In other antitrust developments, the FTC is pondering an injunction against Facebook's procedures for interoperability across platforms.¹⁶⁶ The FTC is also in the early stages of investigating Amazon, having started interviews in 2019 with businesses that sell on the site.¹⁶⁷ Other signals point to a potentially expanding Trump administration antitrust agenda by the Department of Justice and FTC beyond big Internet firms.¹⁶⁸ The FTC, for example, is challenging an acquisition transaction in DNA sequencing.¹⁶⁹

Hospital and pharmaceutical price transparency mandates and price controls. Reform legislation affecting the Food and Drug Administration (FDA), known as "right to try," has expanded the public's access to certain needed medications.¹⁷⁰ On the other hand, the administration has energized pursuit of antitrust-related campaigns related to long-dormant issues like price fixing. The

Trump administration in 2018 rattled the pharmaceutical industry with charges that companies were “getting away with murder” and voicing support of government drug-price negotiation.¹⁷¹ The administration that year introduced a regulatory proposal to require pharmaceutical price-listing mandates in television advertisements.¹⁷² A federal judge blocked the subsequent rule from the Department of Health and Human Services.¹⁷³ Demonstrating Trump’s own contention that regulation drags down markets, the drugmakers’ shares rose upon the blocking of the rule.¹⁷⁴

We have not likely seen the end of such campaigns. Some Republicans in the U.S. Senate proposed not just transparency but controls on prices (tying them to lower prices charged in some other nations), in an attack on “big pharma companies,”¹⁷⁵ which would affect availability and medication research and innovation.¹⁷⁶ The president is reported to support the idea as well, in the wake of the judicial rejection of compelled TV ad listings.¹⁷⁷

The president also issued an executive order in mid-2019 on hospital price transparency that, while it expanded Health Savings Accounts and Flexible Spending Accounts, included negotiated rates for services and shoppable items.¹⁷⁸ This presaged finalization of a rule in November 2019 about which the president boasted, “Under the new price transparency rule ... hospitals will soon be required to publish the price of everything from individual medical supplies to the total cost of common procedures.”¹⁷⁹ Today, little of the nation’s medical sector remains unsupervised by the federal government.

Speech, social media, and tech regulation.

Trump and many on the left agree on regulation of social media search and speech, although each camp has its own reasons.¹⁸⁰ When Trump’s economic adviser Lawrence Kudlow was asked in the summer of 2018 about the administration’s openness to regulating Google search results, he responded, “We’ll let you know. ... We’re taking a look at it.”¹⁸¹ Google is a private entity, and the

search results it offers up represent free speech of Google’s own. Facebook, Google, Twitter, and other private platforms cannot censor; only governments can do that.¹⁸²

Yet Trump has tweeted extensively about media censorship,¹⁸³ and not just social media censorship. At one point candidate Trump even threatened NBC’s broadcast license,¹⁸⁴ and in June 2018 called for a boycott of AT&T over CNN’s coverage of himself.¹⁸⁵ Candidate Trump in 2016 proclaimed at a rally, “I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”¹⁸⁶ Trump reaffirmed that sentiment at a January 2018 cabinet meeting, telling reporters, “We are going to take a strong look at our country’s libel laws.”¹⁸⁷

Asked at a November 7, 2018, press conference if he would regulate social media companies, Trump acknowledged that “when you start regulating, a lot of bad things can happen.” Nonetheless he said, “I would do that. Yeah. I would look at that very seriously. I think it’s a serious problem. At the same time, you start getting into speech; that’s a very dangerous problem. That could be the beginning. So it’s very dangerous. ... But I would certainly talk to the Democrats if they want to do that. And I think they do want to do that.”¹⁸⁸ In the wake of a June 2019 *Fox Business* interview Trump attacked tech giants like Google and Facebook for “bias ... toward Democrats” and “hatred” for Republicans and said legislation may be warranted, and that they “should be sued.”¹⁸⁹ And in June 2019 Trump said he was “all in” for a “no brainer” constitutional amendment proposed by Sen. Steve Daines (R-MT) to ban burning of the American flag.¹⁹⁰

In May 2019 the administration set up a tattletale Tech Bias Story Sharing Tool (since discontinued) for members of the public to report to the White House allegations of online bias and censorship, such as account suspension or termination.¹⁹¹ That was followed by a July 11, 2019, White House Social Media Summit featuring a number of right-of-center personalities.¹⁹² In a Tweet

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private platforms
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Taxes influence behavior and are regulatory, and the tech sector is naturally a target in that regard.

showcasing the event, the president asserted, “Today, I am directing my Administration to explore all regulatory and legislative solutions to protect the free speech rights of ALL AMERICANS. We hope to see more transparency, more accountability, and more FREEDOM!”¹⁹³

The White House also appears to be considering an executive order to combat alleged anti-conservative social media bias.¹⁹⁴ This move would complement other moves by conservatives, potentially working with progressives, to change the regulatory environment of social media and big tech and its accountability for user-generated content. The result of that would likely backfire on conservatives by making bias real rather than imaginary or exaggerated.¹⁹⁵

Tech regulation. The regulatory apparatus aimed at social media goes beyond market-power and speech concerns. In July 2019, the Federal Trade Commission approved a record-level fine against Facebook for alleged privacy violations involving consulting firm Cambridge Analytica gaining improper access to user data.¹⁹⁶ The agreement could result in very close regulatory supervision of the company’s moves henceforth.¹⁹⁷

Another major but much smaller privacy settlement is that of the FTC with YouTube over the service’s collecting children’s information without parents’ consent. Illegal behavior and violation of contract need to be addressed, but overzealous responses can backfire as well as affect firms that have not misbehaved. As former FTC chief technologist Neil Chilson noted on Twitter, “The FTC has shifted in a way that will require platforms to police user-generated content more heavily. This is an incremental change for big platforms who already have large staffs to review content; it is a much bigger deal for small players.”¹⁹⁸

Alongside antitrust, social media “censorship,” and privacy-related incursions, other escapades illustrate the many ways policy makers, even in a deregulatory Trump ad-

ministration, will seek openings to creatively expand power.

In a rerun of a contentious move that happens periodically, some high-level security officials in the Trump administration are seeking to bar encryption that law enforcement cannot circumvent.¹⁹⁹

The FTC has discussed in hearings concerns with algorithms that share user data in behind-the-scenes “auctions” that influence the advertisements viewers see.²⁰⁰

The FTC hosted a workshop to “examine consumer protection issues related to video game ‘loot boxes,’ in-game rewards players can buy while playing a video game.” Sharing sentiments with and mirroring pursuits of some legislators who wish to treat video gaming as an “addiction” and elevate government-as-parent in response, one panel examined “potential social, psychological, and economic motivations associated with loot box spending,” while another focused “on current initiatives for disclosing in-game micro-transactions and explore ideas for other mechanisms that may enhance consumer protection.”²⁰¹

Online taxes. Taxes influence behavior and are regulatory, and the tech sector is naturally a target in that regard. When the Internet sales tax was upheld in the 2018 Supreme Court case *South Dakota v. Wayfair, Inc.*,²⁰² the Competitive Enterprise Institute’s Jessica Melugin observed that “the U.S. Supreme Court reversed 50 years of precedent by allowing states to collect sales taxes from businesses located completely outside that states’ borders.”²⁰³ While the ruling was by no means any of Trump’s doing, the president had seemed to favor an Internet tax, perversely seeing it as a shot at Amazon, despite that company’s being one of the online sales tax’s most high-profile proponents.²⁰⁴ On the international stage, French President Emmanuel Macron proclaimed on Twitter, “Some digital players pay very little tax. This is an injustice that destroys jobs. @realDonaldTrump and I have just agreed to work together on an agreement at the @OECD level to modernize international tax rules.”²⁰⁵

Bipartisan large-scale infrastructure spending with regulatory effects. Too often, the only bipartisanship found in Washington is in passing big spending bills, as both parties show an inclination toward spending stimulus in the form of infrastructure.²⁰⁶ Proposed spending levels have called for \$1 trillion in direct federal spending, with plenty of regulatory set-asides and stipulations.²⁰⁷ Heavy government spending in economic quarters will always have regulatory effects and alter the trajectory of industries engaged in large-scale transactions. At this writing, it is too early to tell the regulatory effects of the \$2 trillion-plus COVID-19 relief legislation, though those should be apparent by the time of the 2021 edition of this report.

Trump has engaged in a number of significant executive actions to liberalize infrastructure permitting and expansion.²⁰⁸ Ominous, though now perhaps off the table following the impeachment episode, was talk of a potential arrangement with House Speaker Nancy Pelosi (D-CA) of some form of major federal infrastructure spending package.²⁰⁹

At the FCC, the infrastructure subsidy/welfare Rural Digital Opportunity Fund intends to spend tens of billions of dollars to bring old-school telephony subsidies to the modern age, with new mapping approaches to expand it in the future.²¹⁰ At one point, Trump championed the enlistment of eminent domain to contribute to building a wall on the southern border with Mexico, invoking the potential use of a “military version” of an already awesome power.²¹¹

Trade restrictions. President Trump once referred to himself as “Tariff Man.”²¹² Trade wars do not work because tariffs hurt Americans.²¹³ Barriers create direct costs, regulatory uncertainty, and market losses—likely greater than Trump’s regulatory savings. In a study of the Trump administration’s trade policy on prices and welfare, the London-based Centre for Economic Policy Research found that the “full incidence of the tariff falls on domestic consumers, with a reduction in U.S. real income of \$1.4 billion per month by the end of 2018.”²¹⁴

If one were to assume this trade barrier cost burden commenced in December 2018 and stayed constant, Trump’s claimed regulatory savings of \$51 billion to date would be eclipsed in about three years. One interpretation maintains that the trade war tariffs wipe out the typical household’s savings from the tax reform package enacted under Trump.²¹⁵ Resolution with China can resolve the pain of the trade war hammer.²¹⁶

In a notable fusion of trade restrictions and infrastructure spending, Trump also issued a January 2019 executive order on “Strengthening Buy-American Preferences for Infrastructure Projects.”²¹⁷ That was followed in summer 2019 by an order on “Maximizing Use of American-Made Goods, Products, and Materials” in federal contracting.²¹⁸ A fixation on reciprocity in trade deals can increase costs of household-level imports like e-commerce purchases by ejecting de minimis exemptions.²¹⁹

Anecdotes of trade harm also abound. The tariffs that were to boost the steel industry are claimed to have not had their desired effect.²²⁰ Other unanticipated effects include craft distillers canceling plans to export to Europe,²²¹ calls for helping Maine’s lobster industry suffering from the trade war,²²² and the oddity of reparative payments to farmers damaged by the trade war.²²³ Harm to farmers increased in 2019,²²⁴ compounded by the bulk of restorative aid said to unfairly benefit the largest farmers.²²⁵ Yet Trump sees nothing amiss in the latter, no problem that reparations cannot handle, upping the ante in January 2020, proclaiming of a spending package, “We’re signing a monster. A big, beautiful monster. Forty to fifty billion dollars to our farmers. ... I keep saying go buy larger tractors.”²²⁶ Even the resulting dispute resolutions can result in overly managed, backward-looking trade.²²⁷

Frontier sectors, including artificial intelligence (AI) innovation, are vulnerable to trade restrictions as well. For example, Adam Thierer and Jennifer Huddleston of the Mercatus Center at George Mason University in Virginia noted, with respect to the Trump

Too often, the only bipartisanship found in Washington is in passing big spending bills.

Government spending has often disregarded regulatory effects, such as the displacement of private action by steering toward government-chosen ends, and by creating marketplace distortions.

administration’s pondering of a “potentially massive expansion of export restrictions on a wide variety of technologies,” that more “than a dozen different AI or autonomous system technologies appear on the list for consideration.”²²⁸

Added features of the trade war with China included Trump’s call for companies to leave China altogether and for importers to police drug trafficking.²²⁹ Shares of UPS, Amazon, and FedEx fell after Trump tweeted, “I am ordering all carriers, including Fed Ex, Amazon, UPS and the Post Office, to SEARCH FOR & REFUSE ... all deliveries of Fentanyl from China (or anywhere else!).”²³⁰

Farm bill and agriculture. Many interventionist policies move along with a life of their own, but some deserve to be called out as overly regulatory when accentuated. The \$860 billion farm bill, signed December 2018, was a prominent example. Rep. Justin Amash of Michigan, a former Republican now independent, characterized it appropriately in May 2018, tweeting, “This farm bill is loaded with corporate welfare and subsidies. It’s a big-government, anti-market swamp creature that puts special interests ahead of the American people. Every conservative should oppose it.”²³¹ Trump, however, saw things differently: “[T]he House will vote on a strong Farm Bill ... We must support our Nation’s great farmers!”²³²

Stealth regulatory measures or requirements can also accompany ostensibly deregulatory ones. University of Pennsylvania Law Professor Cary Coglianese noted that when the “USDA [United States Department of Agriculture] lifted its import ban on pitahaya fruit,” it also “imposed a regulatory regimen on production sites, calling for work plans, inspections, and various pest management techniques.”²³³ That USDA move highlighted the reality that rules operate beyond presidential control as elements of regimes moving on autopilot. One example was a proposed bioengineered food disclosure requirement,²³⁴ which, according to Henry I. Miller of the Hoover Institution and University of Oklahoma Law Professor Drew L.

Kershen, “may be the worst regulation,” costing hundreds of millions annually with no benefits.²³⁵

Subsidies with regulatory effect. Government spending has often disregarded regulatory effects, such as the displacement of private action by steering toward government-chosen ends, and by creating marketplace distortions. This can come from unexpected quarters; the EPA, for its part, considered subsidies for “talking car” technologies to communicate hazard and other information.²³⁶ As a general matter, subsidies or corporate welfare aggravate problems of a president being able to, as Rep. Amash put it, “act as a central planner in chief to bribe and coerce companies.”²³⁷ The president has expressed support of the Export-Import Bank,²³⁸ long deemed a showcase for cronyism and corporate welfare.²³⁹

Trump also supports ethanol subsidies, even warning (while in campaign mode in October 2018) that Democrats would be anti-ethanol.²⁴⁰ And the EPA issued a rule in 2019 boosting the amount of ethanol allowed in gasoline blends during summer months.²⁴¹ If that were not enough, Trump set about reassuring farmers in mid-2019 nervous about his commitment to ethanol: “Farmers are going to be so happy when they see what we are doing for Ethanol. ... It will be a giant package, get ready! At the same time I was able to save the small refineries from certain closing. Great for all!”²⁴²

Telecommunications. The FCC’s approach has been deregulatory, as noted, but a long legacy of the top-down control of the “expert” administrative state leaves only new regulation and law to cope with mundane matters—like caller ID spoofing or robo-calling—with inordinate fines that competitive markets might have put to rest ages ago.²⁴³ That makes it hard to keep regulators away from more momentous concerns in any sector. But other aberrations have come from above. Early in the Trump administration, there were growing calls to build a nationalized 5G network.²⁴⁴ That elicited a response letter to the administration from

U.S. Senators Ted Cruz (R-TX) and Catherine Cortez Masto (D-NV)²⁴⁵ and introduction of anti-nationalization legislation in the 116th Congress.²⁴⁶ Proposals such as these would have substantial unmeasured long-term effects, such as the compounded costs of delays of cellular technology and induced airwave scarcity.²⁴⁷

A June 2019 executive order, “Securing the Information and Communications Technology and Services Supply Chain,” aims at preventing foreign adversaries’ use or acquisition of “any information and communications technology or service.”²⁴⁸ This has now been elevated to a proposed rule from the Commerce Department²⁴⁹ that appears to arrogate an alarming degree of unilateral power to interfere with or block foreign transactions with entities controlled or influenced by whomever the administration declares to be an “adversary.”²⁵⁰ While Commerce “invites comments,” it informs us in no uncertain terms that “the determination of a ‘foreign adversary’ for purposes of implementing the Executive order is a matter of executive branch discretion and will be made by the Secretary.”²⁵¹

Personal liberties: health-tracking, vaping, supplements, anti-privacy, and firearms.

While on the one hand, the FDA is said to be approving drugs at greater speed (which is a cause of concern for some), it is currently engaged in numerous regulatory or potentially regulatory pursuits beyond the Department of Health and Human Services’ hospital and drug disclosure/pricing regulations.²⁵² FDA guidance aims to clarify when the agency would regulate health-tracking apps and software as medical devices.²⁵³ It is already regulating (“approving”) robotic exosuits for rehabilitation.²⁵⁴

The agency also spent energy on regulations on vaping and smokeless tobacco products, which, as an alternative to cigarettes, save lives.²⁵⁵ The president stopped the push for a ban of all flavored e-cigarettes, but tight deadlines for e-cigarette makers are in place for filing pre-market tobacco applications.²⁵⁶ And in December 2019, as part

of the larger defense spending bill, Trump signed into law a ban on the sale of vaping products to those under age 21.²⁵⁷ In another tobacco-related move challenged on free speech grounds, the FDA sought in 2019 to mandate graphic, photorealistic images on cigarette packages, in addition to the traditional Surgeon General warning.²⁵⁸

The FDA has also been considering costly and unhelpful labeling regulation for non-dairy products that use the term “milk.”²⁵⁹ The administration continued to implement Obama-era menu-labeling rules.²⁶⁰ The FDA is also continuing strengthening enforcement of regulation of dietary supplements.²⁶¹ In one campaign, the FDA is warning companies, while not banning the herb, to stop selling kratom as treatment for opioid addition or cancer.²⁶²

New postal regulations aimed at addressing the opioid abuse issue require providing identifying information and contents on international shipments.²⁶³ On the surveillance or threat-to-privacy front, the White House, in a response to gun violence, has begun to explore tracking the mentally ill or those suspected of being so via their wearable devices (like the health monitoring ones the FDA would enjoy regulating) and smartphones.²⁶⁴ The Department of Homeland Security, already now one of the more costly agencies, is preparing regulation requiring biometric face scans of all travelers, including U.S. citizens, entering or leaving the country.²⁶⁵ Finally, in a move controversial to his base, Trump moved to ban bump stocks used on semi-automatic weapons by designating them as machine guns.²⁶⁶

Finance. Along with favorable executive actions, the Trump administration signed legislation such as rolling back financial regulatory excesses of the Dodd-Frank law said to overburden smaller institutions,²⁶⁷ and, as part of a spending package for the 2020 fiscal year, the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which changes rules of inherited retirement plans and allows small businesses to band together to offer retirement plans, and

The administration has exhibited regulatory impulses in the financial arena.

allows part-timer participation in employer retirement plans.²⁶⁸ Other steps toward liberalization included, for example, policies from the Consumer Financial Protection Bureau (alas, now a fixture) allowing for easing test experimentation for certain financial products and the streamlining of consumer disclosures.²⁶⁹

But as in other sectors, the administration has exhibited regulatory impulses of its own in the financial arena, particularly with respect to newfangled offerings enabled by technology and the Internet that threaten incumbents and the vast financial regulatory superstructure. Prominent are efforts to regulate cryptocurrencies, and for the establishment of government-run real-time payment systems.

The Securities and Exchange Commission deems digital currency products, such as Facebook's Libra, to be "securities" in a bid to claim jurisdiction over them, which would saddle cryptocurrency developers with new layers of red tape.²⁷⁰ Companies failing to register their "tokens" are being targeted with restraining orders by the SEC.²⁷¹ Yet, the SEC has no legal jurisdiction over most crypto and tokens; its assertions and actions to the contrary constitute a power grab.²⁷² While Democratic members of Congress have proposed barring big tech's digital currencies, Trump administration officials seek a clampdown.²⁷³ Treasury Secretary Steven Mnuchin calls crypto a "national security" issue and said digital currency providers must be regulated and not be operated in the shadows.²⁷⁴ Likewise, Federal Reserve Chairman Jerome Powell testified in the Senate that Facebook's Libra "raises serious concerns" and "cannot go forward" without satisfying government regarding money laundering and other concerns, and told senators that Fed oversight was "an interesting idea."²⁷⁵ In a three-part Twitter thread, the president himself express his great distaste for crypto, that he is "not a fan of Bitcoin and other Cryptocurrencies, which are not money," that they are "highly volatile" and will have "little standing or dependability." He continued that if tech firms want to "become a bank,"

they must seek charters and become subject to all "Banking Regulations."²⁷⁶ And naturally, if you have income from cryptocurrencies, the IRS expects to hear from you.²⁷⁷

The same Federal Reserve that wants to regulate crypto also proposes to directly compete with private banks' processes of confirming and completing financial transactions.²⁷⁸ In its enthusiasm to implement its "FedNow" scheme, the Fed is skirting laws like the Congressional Review Act and the Paperwork Reduction Act.²⁷⁹ As Peter Wallison of the American Enterprise Institute put it, this is an agency that already has too much to do and should leave the payments system to the private sector.²⁸⁰

There is more. The Treasury Department has contemplated regulations on foreign equity stakes in U.S. biotech firms to subject those firms to greater review.²⁸¹ Troubling also, especially in light of the new talk of digital taxes, is the reported potential support in the administration for a "global minimum tax" in the name of tax harmonization.²⁸²

Industrial policy or market socialist mechanisms. Overabundant taxpayer funding of scientific and technology research is incompatible with a future of lightly regulated science and technology specifically, and with limited government generally.²⁸³ Neither major political party takes that view, in today's rule-of-experts, send-tax-dollars-home America. Addressing infrastructure and other broad initiatives in his February 5, 2019, State of the Union address, for example, the president called for legislation "including investments in the cutting edge industries of the future" and proclaimed, "This is not an option, this is a necessity."²⁸⁴ Along with the regulatory effects of strings attached of such spending, it is not proper for the sciences and their practical applications to proceed walled off from one another in an arbitrary legislative appropriations environment.

Artificial intelligence serves as a warning. A February 11, 2019, executive order, "Maintaining American Leadership on Artificial Intelligence," established the "AI Initiative,"

which was followed by the March 19, 2019, launch of the federal hub AI.gov (now whitehouse.gov/ai). Executive orders are not law, but they can influence policy, and this one promotes “sustained investment in AI R&D [research and development] in collaboration with industry, academia,” and others. It also calls for federal collection of data, among other centrally coordinated moves. The orders states: “Actions shall be implemented by agencies that conduct foundational AI R&D, develop and deploy applications of AI technologies, provide educational grants, and regulate and provide guidance for applications of AI technologies.”²⁸⁵

This “federalization” is concerning on its own, but it occurs in an environment in which much federal AI research happens at the Department of Defense. The Pentagon, on the day after Trump’s AI executive order, released its own AI strategy, describing use, plans, and ethical standards in deployment.²⁸⁶ Where is a definition of AI codified in federal statute? In the John S. McCain National Defense Authorization Act for Fiscal Year 2019.²⁸⁷ Alas, when it comes to robotics and military, Isaac Asimov’s famous Laws of Robotics (devised to protect humans) are programmed out, not in. This makes fusion of government and private AI deployment troubling. Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the AI sector is “Don’t Be Government.”

The most recent development is OMB’s Guidance for Regulation of Artificial Intelligence Applications.²⁸⁸ The January 2020 document strikes the right tone. It aims at engaging the public and forbearance, limiting regulatory overreach, eliminating duplication and redundancy across agencies, improving access to government data and models, recognizing that one size regulatory shoe does not fit all, using performance-based objectives rather than rigid rules, while avoiding over-precaution.²⁸⁹ Michael Kratsios, chief technology officer of the United States, called the guidance, which is directed at heads of federal executive branch agencies, the “first-of-its-kind set of regula-

tory principles to govern AI development in the private sector” to “address the challenging technical and ethical questions that AI can create.”²⁹⁰

The guidance states: “When considering regulations or policies related to AI applications, agencies should continue to promote advancements in technology and innovation, while protecting American technology, economic and national security, privacy, civil liberties, and other American values, including the principles of freedom, human rights, the rule of law.”²⁹¹ The guidance mentions “American values” five times, without recognizing the degree of incompatibility of the administrative state with those values, and the extent the bureaucracy has an opposite vision of “rule of law.”

As such, the guidance contains numerous exploitable elements. The guidance correctly states: “The deployment of AI holds the promise to improve safety, fairness, welfare, transparency, and other social goals, and America’s maintenance of its status as a global leader in AI development is vital to preserving our economic and national security.” On the other hand, it says “AI applications could pose risks to privacy, individual rights, autonomy, and civil liberties that must be carefully assessed and appropriately addressed.”²⁹² But governments, not competitive free enterprise, are the primary threat to these values.

Agencies not only want to get in on the game, they have been invited. In evaluating “benefits and costs” of regulatory alternatives, agencies are to evaluate “impacts to equity, human dignity, fairness, potential distributive impacts, privacy and civil liberties, and personal freedom.”²⁹³ These favor agency governmental proclivities, not the competitive process and nongovernmental resolutions of the difficult issues that will naturally arise. Agencies always answer the question, “is there call for regulation,” in the affirmative. The guidance invites agencies to “consider whether a change in regulatory policy is needed due to the adoption of AI applications in an already regulated industry,

Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the AI sector is “Don’t Be Government.”

or due to the development of substantially new industries facilitated by AI.”²⁹⁴ Regulating the latter, as a blank canvas, will prove irresistible.

The notion that industry likes regulation that disadvantages rivals is generally true of AI regulation specifically: “Companies cannot just build new technology and let market forces decide how it will be used,” says one leading tech CEO.²⁹⁵ While companies may not like the kind of regulation that makes them ask Mother-may-I, established players, especially given the government contracting and military head-start presence in AI, will appreciate federal approaches that forestall those with a different idea. Here are a few additional concerns with the guidance at this stage.

The notion that industry likes regulation that disadvantages rivals is generally true of AI regulation specifically.

- The first item in the “Template for Agency Plans” invites agencies to establish “Statutory Authorities Directing or Authorizing Agency Regulation of AI Applications” and instructs them to “List and describe any statutes that direct or authorize your agency to issue regulations specifically on the development and use of AI applications.”²⁹⁶ No definition of AI existed at the time such “predicates” came to be, and this request for statutory rationales for future intervention will be stretched to justify regulation. The guidance fails to engage Congress or recognize its primacy, and does not call on agencies to consult with Congress for clarity.²⁹⁷
- The guidance invokes executive orders, OMB guidance, pursuits like maximizing net benefits, and “regulatory impact analyses” as restraints on excessive AI regulation, but these tools have not been able to either restrain or facilitate regulatory streamlining, much less a hands-off approach. On the contrary, they are apt to be used to reinforce rather than resist calls for regulation.
- The guidance invites expansion of anti-trust regulation: “Agencies should also consider that an AI application could be deployed in a manner that yields anticompetitive effects that favor in-

- cumbents at the expense of new market entrants, competitors, or up-stream or down-stream business partners.”²⁹⁸
- The guidance invites social policy regulation: “AI applications have the potential of reducing present-day discrimination caused by human subjectivity.”²⁹⁹ On the other hand, it invites political predation in the form of social policy regulation: “When considering regulations or non-regulatory approaches related to AI applications, agencies should consider ... issues of fairness and non-discrimination with respect to outcomes and decisions produced by the AI application at issue.”³⁰⁰ Further, “there is a risk that AI’s pursuit of its defined goals may diverge from the underlying or original human intent and cause unintended consequences—including those that negatively impact privacy, civil rights, civil liberties, confidentiality, security, and safety.”³⁰¹
 - The OMB directive may create vulnerability to the very guidance documents that the administration is seeking to restrain elsewhere. In the noted call for a premature inventory of sector-specific statutory authority, agencies are invited to use their conclusions regarding their authority “to issue non-regulatory policy statements, guidance, or testing and deployment frameworks.”
 - Relatedly, there may be opportunities for gaming of the system and rent-seeking in well-meaning attempts to “allow pilot programs that provide safe harbors” and the systematization of “collaboration with industry, such as development of playbooks and voluntary incentive frameworks.”³⁰² The White House has invited “Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies.” Furthermore, it states: “Federal engagement with the private sector on the development of voluntary consensus standards will help agencies develop expertise in AI and identify practical standards for use in regulation.”³⁰³ Such “voluntary consen-

sus standards” will only be favored by some, not all, firms and entrepreneurs.

Sometimes there is misdiagnosis of the source of problems. The OMB guidance calls on agencies to “encourage the consideration of safety and security issues throughout the AI design, development, deployment, and operation process.”³⁰⁴ But the government is more prone to undermine encryption used in private sector applications, and, especially given government’s heavy “collaborative” role, indemnify winner companies when things go wrong. The guidance also stretches the bounds of the possible. It acknowledges that “current technical challenges in creating interpretable AI can make it difficult for agencies to ensure a level of transparency necessary for humans to understand the decision-making of AI applications.”³⁰⁵ Agencies cannot do this; no one can. It is the nature of black box machine learning.

The administration’s AI proclamations belong in the regulatory rather than the deregulatory camp, so it is good that “strong” AI (the potentially sentient, self-improving version) is ostensibly not addressed. Republicans and Democrats alike seek major government funding of science generally, including a proposal to appoint a “manufacturing czar.”³⁰⁶ Internationally, governments are moving toward regulation, along with the U.S.³⁰⁷

This state of affairs is not particularly the fault of policy makers within the White House, but is more likely due to the lack of a constituency for a hands-off approach. Unfortunately, in part due to Trump’s order and subsequent guidance, we can confidently predict that future presidents will expand cozy government alliances with a subset of private sector winners, perhaps even promote a sort of cartelization. The legitimization of this concept at the top by an ostensibly deregulation-oriented president will make it harder to achieve regulatory liberalization and any “separation of technology” and state in the future.

The establishment of a “Space Force,” enacted in the National Defense Authorization Act of 2020,³⁰⁸ presents the same lock-in,

given that commercial space activities have barely taken root beyond NASA contractors and partners.³⁰⁹ Making the AI-driven force a sixth branch of the armed forces is bound to alter freedoms and commercial space activities, heavily influencing technology investment in a sector that barely exists yet.³¹⁰ The space force move had already been preceded by a presidential directive on space traffic management complete with tracking, cataloging, and data sharing with government.³¹¹ It is worth remembering that most debris in space used to justify calls for regulation is there thanks to NASA, not private entrepreneurs.³¹² “Normalizing” commercial space activities for a “diverse portfolio of actors and approaches” is not compatible with heavy regulation.³¹³

In a similar vein, an October 2019 executive order established a new President’s Council of Advisors on Science and Technology that declares:

Through collaborative partnerships across the American science and technology enterprise, which includes an unmatched constellation of public and private educational institutions, research laboratories, corporations, and foundations, the United States can usher extraordinary new technologies into homes, hospitals, and highways across the world. These technologies would have American values at their core. By strengthening the ties that connect government, industry, and academia, my Administration will champion a new era of American research and innovation, which will give rise to new discoveries that create the industries of the future.”³¹⁴

This appeared in the wake of Executive Order 13885, “Establishing the National Quantum Initiative Advisory Committee,”³¹⁵ aimed at implementing the 2018 National Quantum Initiative Act in its purpose of “supporting research, development, demonstration, and application of quantum information science and technology.”³¹⁶

Large-scale federal initiatives morph over time into interventions unintended and unforeseen—or perhaps not so unintended.

Welfare and labor regulations. We noted earlier the propensity for federal government involvement in job training. In the Trump administration, a “national strategy for training and retraining workers for high-demand industries” is in play, spearheaded by Ivanka Trump.³¹⁷ In other labor regulation, the president also signed into law as part of the same defense compilation the Fair Chance Act, which bars government and contractors from inquiring into job applicants’ criminal history prior to making an offer. Some companies follow such guidelines already, but this move is meant to “ban the box,” the familiar job application query into whether or not one has been convicted of a crime.³¹⁸ It is a form of regulation that can be expected to backfire and aggravate the discrimination problem it is purported to solve, but only the public will be punished, not those who knowingly imposed a faulty rule.³¹⁹

In addition, a “nationwide paid family leave” plan was touted by Trump in his second State of the Union Address,³²⁰ an issue that has been taken up by legislators on both sides of the aisle.³²¹ This development represents another example of the extent to which the regulatory state is statutory and fiscally driven. Senators released a “bipartisan framework” for mandated family leave in summer 2019.³²² The plan ultimately came to fruition in the same December 2019 compromise defense spending package that included the Space Force.³²³ A mandate on the private sector is baked in, since, as Ivanka Trump put it (speaking in her role representing the federal government), “It’s very hard for people to say, well, employers should provide this benefit—if we are unwilling to provide it ourselves. So you have to lead by example.”³²⁴

As opponent Sen. Ron Johnson (R-WI) put it, “[I]n the end, President Trump should get full credit for this because he’s the one who made it happen. I know the Democrats won in the House, but this would not have happened had not President Trump strongly supported it.”³²⁵ Then, in summer 2019, Trump signed legislation that requires all federal buildings to provide a room for nurs-

ing mothers to breastfeed, including members of the public, not just federal employees. The mandate is so specific that it requires that “rooms provide privacy and contain a chair, working surface and an electric outlet for breast pumps,” as NPR described it.³²⁶

The foregoing comprises an incomplete catalog of active policy implementations and proposals with substantial regulatory heft that run counter to the administration’s deregulatory campaign as summarized by OMB in each year’s “Regulatory Reform Report: Completed Items for Fiscal Year.” That official roundup catalogs what are in most cases less dramatic examples of the kinds of regulatory actions cataloged here. Individual rules and regulations matter, but the overall structure of the market, business environment, and prospects for economic growth are also heavily influenced by overarching government policy. Large-scale federal initiatives morph over time into interventions unintended and unforeseen—or perhaps not so unintended. The conventional administrative state and big-spending appropriations framework exert a considerable influence. Trump cannot and has not stopped it all, which is to be expected, but he has also counterproductively added his own pro-regulatory predispositions to the landscape, which are enough to outweigh his claimed billions in streamlining.

There are ambiguities as well, given administrative law’s entrenchment. Changes with ambiguous effect may be rooted in factors that cannot be laid at Trump’s feet. Some items get deemed deregulatory, such as streamlining subsidized small business loans, yet are inherently distortionary. This self-reinforcing growth is abetted by the fusion of the budgetary and regulatory, and the complexities over who is the beneficiary in the cost/benefit calculus—whether taxpayers or some targeted public.

Trump issued an executive order commanding “free speech” at colleges that receive federal research or education grants.³²⁷ Free speech is nonnegotiable in society, but a directive like this one would not be an issue

if government were not funding education and inflating its cost in the process. Also illustrative of ambiguities is revocation of an Obama “gainful employment” rule cutting off funding to poorly performing for-profit colleges while leaving nonprofit ones alone. Neither should be receiving federal funding.³²⁸ A similar situation exists with respect to a Trump rule invoking “Federal conscience and anti-discrimination laws” that take into account religious objections to providing certain services or that prevent certain abortion referrals by health clinics that receive federal dollars. Had there been no federal funding, there would be no or less “regulation” over which to argue divergent, incompatible views of benefits and costs.

Prominent programs in this category include joint State Department and Department of Homeland Security issuances on “Inadmissibility on Public Charge” grounds,³²⁹ in response to Trump’s intent to suspend immigration that would “Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans,”³³⁰ the Department of Agriculture’s changes to the Supplemental Nutrition Assistant Program’s eligibility and asset rules,³³¹ work requirements for the able bodied with no dependents,³³² and a Department of Housing and Urban Development–proposed rule on public housing eligibility and asset limitations.³³³ All these are deemed and characterized regulatory and appear as part of the one-in, two-out “Regulatory Reform Report: Actions for Fiscal Year 2019.”³³⁴

It is notable that efforts to make government spending more difficult or to tighten benefits eligibility or qualifications for government programs are characterized as costs. These raise distributional issues, but can involve direct outlays. Even components of the deregulatory repeal of the Clean Power Plan are deemed regulatory in the new Unified Agenda disclosures and the 2019 Regulatory Reform Report.³³⁵ Such is also the case with the Trump SEC’s ostensibly deregulatory re-

write of the Obama Department of Labor’s “fiduciary rules” targeted at investment advisors. While better, these remain costly, and with the SEC being an independent agency, the rule did not appear in the one-in, two-out roundup.³³⁶

These peculiarities further show the difficulty of disclosure and basic tractability. In perpetuating the administrative state approach, streamlining may do only short-term good. Congress has not passed comprehensive regulatory liberalization in nearly a quarter century, and deregulation under Executive Order 13771 has inevitably become a more difficult task as quick-to-rid regulations are exhausted. As the University of Pennsylvania’s Coglianesse observed at the outset, “In a single year the regulatory rule book simply cannot be changed dramatically enough to make a palpable dent in the obligations imposed on industry.”³³⁷ Therefore, the pertinent question is whether any executive branch regulatory liberalization can be maintained over time given the administrative state’s barriers and intractable resistance to any reform at all.

When all is said and done, the administrative state cannot be said to have fundamentally changed under Trump. While agencies like FCC, EPA, and CFBP are led by pro-liberalization appointees—and at one point operated under an instruction from then-OMB Director Mick Mulvaney that deregulation should be their “highest priority”—the permanent bureaucracies are likely biding their time.³³⁸ Without congressional action on general reforms (there have been targeted ones such as the Economic Growth, Regulatory Relief and Consumer Protection Act aimed at reducing burdens on small banks), much of the Trump streamlining phenomenon will be transitory, especially if he backs off from that streamlining or sends mixed signals. A pruned weed is a healthy weed when it comes to the administrative state’s half-hearted roll-backs, so expectations for executive-branch-only reforms must be tempered.³³⁹

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Toward a Federal “Regulatory Budget”

When Congress spends, no one questions that disclosure is necessary for voters to hold representatives accountable. Federal expenditure programs are funded by either raising taxes or borrowing against a promise to repay with interest from future tax collections. Taxpayers can readily observe those decisions during the authorization and appropriations processes (not that it is a simple thing to do). They can inspect the costs of programs and agencies in Congressional Budget Office (CBO) publications³⁴⁰ and the federal budget’s historical tables.³⁴¹ The point is, disclosure exists for spending, however extravagant it may be.

However, Congress often “funds” objectives and programs through regulatory mandates. Regulation and spending are related; both are mechanisms by which governments act or compel individuals. Rather than taxing and paying directly, federal regulation can compel the private sector, as well as state and local governments, to bear the costs of federal initiatives (and that too, is regulation). Regulation in such instances functions as an

off-budget form of taxation and spending. Although disclosure of spending does not stop deficits and debt from growing, it is still vital for making progress toward those ends. Likewise, policy makers should disclose regulatory costs to the extent possible so that the choice to regulate can at least have an opportunity to get the full consideration it deserves.

Because the costs and economic effects of regulatory compliance are not budgeted and disclosed the way that federal spending is, regulatory initiatives can commandeer private sector resources with comparatively little public controversy. Policy makers may find it easier to impose regulatory costs than to embark on government spending because of the former’s lack of disclosure and accountability. And when regulatory compliance costs prove burdensome, Congress can escape accountability by blaming an agency for issuing an unpopular rule. Table 2 provides a 2020 overview of the federal regulatory enterprise to be discussed in the following pages.

Table 2. The Regulatory State: A 2020 Overview

	Year-End 2019	1-Year Change (2018–2019)	5-Year Change (2015–2019)	10-Year Change (2010–2019)
Total regulatory costs	\$1.9 trillion	n/a	n/a	n/a
Agency enforcement budgets	\$72.0 billion	0.88%	9.4%	145%
<i>Federal Register</i> pages	70,938	14.0%	–11.6%	–12.9%
Devoted to final rules	20,986	15.4%	–15.0%	–15.8%
<i>Federal Register</i> final rules	2,964	–12.0%	–13.1%	–17.0%
Code of Federal Regulations pages	185,984	0.3%	4.3%	12.4%
Total rules in Agenda pipeline	3,752	6.2%	13.8%	–11.2%
Completed	546	13.8%	–1.4%	–24.4%
Active	2,602	8.5%	16.0%	–3.5%
Long term	604	–7.8%	21.0%	–252.0%
“Economically significant” rules in the year-end pipeline	192	10.3%	–11.9%	–14.3%
Completed	44	76.0%	–22.2%	–13.7%
Active	119	0.8%	–20.1%	–15.0%
Long term	29	–6.5%	–12.1%	–12.1%
Rules affecting small business	644	6.4%	–4.5%	–23.8%
Regulatory flexibility analysis required	347	5.2%	–10.1%	–18.9%
Regulatory flexibility analysis not required	297	8.0%	3.1%	–28.8%
Rules affecting state governments	386	18.0%	–5.6%	–29.4%
Rules affecting local governments	232	16.6%	–9.0%	–32.9%
GAO Congressional Review Act reports on major rules	74	34.5%	–3.9%	–26.0%

n/a = not applicable.

What Comes after “Trillion”?

The Unknowable Costs of Regulation and Intervention

If real debt levels on the fiscal budget and entitlements can be vastly higher than the public is generally told,³⁴² what might that say about true costs of the even less disciplined regulatory enterprise? Should we expect that which is untracked to behave better than what is systematically disclosed? The nonchalance with which this is treated³⁴³ even extends to the president, who asked staff to look at cuts in his second term.³⁴⁴ “Who the hell cares about the budget,” Trump reportedly proclaimed at a January 2020 fundraiser.³⁴⁵ With peacetime deficits and debts ignored at a time of low interest rates, rescue-by-deficit spending during some future recession may be unavailable.³⁴⁶

Little timely review of federal regulation occurs to assure anyone that individual regulations do more good than bad, and no assessment is made for regulatory burdens as a whole.³⁴⁷ The sole official reckoning citizens get regarding the scale and scope of regulatory costs is an annual (in law³⁴⁸ but not in practice³⁴⁹) OMB survey of a subset of regulatory costs and benefits called the *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*.³⁵⁰ These reckonings contain a limited overview of the numbers of significant rules and partial quantification of costs and benefits of a handful of executive agencies’ rules during the current fiscal year and the most recent 10 years. An aggregate annual estimate of the regulatory enterprise is required by law³⁵¹ but has not been performed since 2002.³⁵²

OMB’s 2017 report is the most recent relatively complete edition, but in cover-

ing fiscal year 2016 Obama-era rules and regulations, it arrived nearly four years overdue, in December 2019.³⁵³ There is a long history of tardiness and incompleteness for this report, but this years-long delay was unprecedented.³⁵⁴ A frenzy to catch up brought forth a truncated *Draft Report* combining the overdue fiscal years 2018, 2019, and 2020 in one abbreviated volume the day before Christmas Eve,³⁵⁵ along with helpful supplemental tables in electronic format, but without the 10-year lookbacks that had become standard.³⁵⁶ While the reports were late, the public did get year-end status reports on Trump’s one-in, two out Executive Order 13771 directive on agency regulations.³⁵⁷

OMB’s last 10-year survey from fiscal year 2016 reported that federal agencies published 36,255 final rules in the *Federal Register*, and that it only reviewed 2,670 of these final rules under Executive Order 12866. Of these OMB-reviewed rules, 609 were considered major. Yet, OMB claimed high net regulatory benefits, pegging the cumulative benefits of a selection of 137 of 609 major regulations issued between 2006 and 2016 at between \$287 billion and \$911 billion (in 2015 dollars). The estimated range for the decade’s costs was \$78 billion to \$115 billion. The 16 rules subjected to both benefit and cost analyses during FY 2016 added annual costs in the range of \$4.3 billion to \$6.4 billion.

Bringing it all up to date, the new White House composite report covering fiscal years 2017–2019 covers only a handful of rules and admits to total of costs and benefits of only a few billion each:

- FY 2017, \$5.9 billion to \$9.5 billion in annual benefits; \$2.2 billion to \$3.2 billion in annual costs (2016\$)
- FY 2018, \$0.6 billion in annual benefits; \$0.1 billion to \$0.3 billion in annual costs (2017\$)
- FY 2019, \$0.2 billion to \$3.7 billion in annual benefits; up to \$0.6 billion in annual costs (2018\$)

Regulators decide what counts as major. As OMB acknowledges: “As has been the practice for many years, all estimates presented ... are agency estimates of benefits and costs, or minor modifications of agency information performed by OMB.”³⁵⁸ OMB admits that its report “does not purport to demonstrate all costs or benefits from federal regulation; instead, the report summarizes the anticipated costs and benefits that the Regulatory Impact Analyses (RIAs) of individual final rules reported for those rules.”³⁵⁹ The administration acknowledges what it calls an “often-overlooked detail”—that “the totals listed ... include only the benefits and costs for the minority of rules for which both those categories of impacts were estimated.”³⁶⁰

As this report will cover, there have been over 9,000 rules and regulations, large and small, issued since Trump’s inauguration,³⁶¹ but the amalgamated three-year report shows only 27 rules with both benefits and costs quantified and another 29 with costs alone quantified.³⁶² OMB asserts the major rules (including budget rules) it reviewed “represent approximately one-fourth” of the significant regulatory actions reviewed by OMB.³⁶³ Overall, the 2018–2020 consolidated *Report to Congress* encompasses only 145 “major” rules, a small number compared to the 9,604 rules issued during the corresponding calendar years.

Of the hundreds of executive agency major rules issued since 2001 (among tens of thousands of nonmajor rules issued), just a relative handful received OMB-reviewed quantified cost analysis, let alone cost and benefit analysis; overall, about 38 percent sport quantitative cost estimates.³⁶⁴ When

we look beyond the officially self-designated “major” rules, the proportion of all rules with any reviewed cost analysis averages less than 1 percent.³⁶⁵

OMB references a 2004 claim that the “major” rules reviewed account for the bulk of regulatory costs.³⁶⁶ Other OMB reports had been more forthcoming about indirect and unfathomed costs. OMB does not review *independent agency* rules like those of the FCC or financial regulatory bodies. Entire categories of oversight or intervention like those referenced nearby in Box 3 get no scrutiny. And the Unfunded Mandates Reform Act, surveyed in the *Report to Congress*, exempts almost everything from critical analysis and repeal.³⁶⁷ Transfer and budget programs, unless related to defense or justice, are inherently interventionist and regulatory in nature. Yet the costs of distortions caused by federal spending are not counted,³⁶⁸ nor are the deadweight effects of the budget rules, even when the federal government has taken over the bulk of retirement and senior health care.³⁶⁹ Pell grants alter private college financing. Federal medical programs have altered the medical markets, to such extent now that single payer is contemplated. Washington’s expansion of middle-class dependency on the federal government is about as fundamental as social regulation gets.

Compulsory transfer utilitarianism is not a part of traditional American principles, yet agencies engage in it in their net-benefit pursuits, implying costs do not matter as long as “benefits” exceed them. The fundamental problem with the regulatory *Report to Congress* regime is that net-benefit analysis is oxygen for an ever-expanding government. Creative regulators can alternate between maximizing net benefits (as in OMB’s 18-year-old “Circular A-4” guidance on regulatory analysis), or claiming benefits “justify” costs as specified in Executive Order 12866. Cost-benefit analysis is mute on superior benefits that may have accrued if an agency’s “regulatory budget” allocation belonged instead to another agency. So there exists no genuine net-benefit pursuit adopting a wider perspective than that of agencies

Washington’s expansion of middle-class dependency on the federal government is about as fundamental as social regulation gets.

in isolation. Still further, costs of “regulatory dark matter” like agency memoranda, guidance documents, bulletins, circulars, and manuals do not appear in OMB’s annual assessments. Far too much is left out, even though OMB has had decades to practice.

On the plus side, a 2019 report from the Council of Economic Advisers on *The Economic Effects of Federal Deregulation* points to hundreds of billions in direct and indirect annual savings from changes not just in a set of rules removed but in approaches to regulation as such:

The Council of Economic Advisers (CEA) estimates that after 5 to 10 years, this new approach to Federal regulation will have raised real incomes by \$3,100 per household per year. Twenty notable Federal deregulatory actions alone will be saving American consumers and businesses about \$220 billion per year after they go into full effect. They will increase real (after-inflation) incomes by about 1.3 percent. ...

This new approach to regulation not only reduces or eliminates costly regulations established by prior administrations but also sharply reduces the rate at which costly new Federal regulations are introduced. The ongoing introduction of costly regulations had previously been subtracting an additional 0.2 percent per year from real incomes, thereby giving the false impression that the American economy was fundamentally incapable of anything better than slow growth.³⁷⁰

The CEA approach implies far greater costs attributable to regulation than the annual *Report to Congress* has ever addressed. For example, regulation affects not only current jobs, but also entrepreneurs’ inclination to create new ones in the future. This intertemporal nature of regulation complicates cost assessment, since nations cannot “lose” jobs that have not been created.

The CEA’s assertions were blasted as “bad fiction”³⁷¹ by progressives and received the requisite fact checks.³⁷² Yet, if there is validity to the propositions that such regulatory changes reduced costs substantially, it is also reasonable to presume prior additions to regulation that have gone unmeasured will have added billions of dollars beyond what are seen in the normal compliance measures. It is appropriate to address costs of progressive policies and the benefits of lifting them. Government steering without issuing a rule is also “regulation,” as implied in the CEA report.

Regulatory costs are unknowable in an elemental sense; they are not observable or calculable—much as the economic calculations necessary to enable central economic planning are impossible.³⁷³ Regulatory costs are, in the words of American Enterprise Institute scholar Peter Wallison, inherently “squirrely.”³⁷⁴ This is why regulatory or administrative state reform is not a goal, but restoration of Article I of the Constitution is. Even so, the need for disclosure is an imperative as long as the administrative state remains a means of governance. The solution to the dilemma is for Congress to vote not just on costly and controversial rules but on all of them, or to legislate.

The annual OMB cost-benefit breakdown omits independent agencies and incorporates only those rules for which agencies have expressed both benefits and costs in quantitative and monetary terms—amounting to a couple dozen at best, when several thousand rules and guidance documents not subject to notice and comment appear each year. This helps illustrate how most of the regulatory enterprise is unaccounted for. For this reason, more efforts like that of CEA are needed, as well as some official reconciliation between the two. Box 3 illustrates a wide range of regulatory and administrative state interventions that often go unacknowledged.³⁷⁵

Regulatory costs are unknowable in an elemental sense; they are not observable or calculable.

Box 3. Rule of Flaw and Costs of Coercion

Surveying Unmeasured, Disregarded, and Unfathomed Costs of the Administrative State

I. Unmeasured Costs of Shortcomings in Administrative Procedure Act Oversight

A. Rule Cost Categories Prone to Escaping Measurement and Disclosure³⁷⁶

- Costs of rules not deemed economically significant by agencies that in fact are
- Costs of independent agency regulations
- Costs of unfunded mandates on states and localities
- Costs of interpretive rules and guidance documents
- Indirect costs
- Job costs of regulation

B. Process/Oversight Shortcomings Generating Unknown Financial and Societal Costs³⁷⁷

- Costs of abandonment of formal rulemaking
- Costs of agencies' failure to issue a notice of proposed rulemaking for a significant portion of rules
- Costs of agency-gamed notice-and-comment processes
- Costs of agencies' undermining the Congressional Review Act by failing to submit final rules to Congress and the Government Accountability Office for consideration
- Costs of baked-in pro-regulatory bias of the administrative state
- Costs of policy uncertainty that disrupts economic activity
- Costs of regulation by sue-and-settle agreements
- Costs of regulatory accumulation
- Costs of differential effects of rules on businesses

II. Unmeasured Costs of the Loss of Liberty³⁷⁸

- Costs of regulatory takings and property value destruction³⁷⁹
- Costs of abandoning negative rights for a positive rights framework and unequal treatment of citizens under the law³⁸⁰
- Costs of delegation of lawmaking power to the executive branch and to unelected administrators³⁸¹
- Costs of agency liberation from Congress, self-funding, and permanence³⁸²
- Costs of paternalism and the normalization of dependency
- Costs of imposing regulation based on secret or creatively leveraged data³⁸³
- Costs of abandoned federalism³⁸⁴
- Costs of authoritarianism and overcriminalization³⁸⁵
- Costs of loss of anonymity in the administrative surveillance state³⁸⁶

III. Costs of Spending and Legislative Programs with Sweeping Regulatory Effect

- Costs of top-down national plans, agendas and legislative schemes, and treaties³⁸⁷

- Costs of distortions created by "ordinary" federal spending, subsidies, and stimulus³⁸⁸
- Costs of deadweight effects of federal spending and of "budget" or "transfer" rules³⁸⁹
- Costs of government spending to steer investment in science and technology

IV. Costs of the Administrative State's Derailment of Market Institutions

- Costs of the presumption of agency expertise (and denial of nonexpertise and disruption)³⁹⁰
- Costs of the market failure fallacy and disregard of government failure
- Costs of interference with price, distribution, and access mechanisms
- Costs of antitrust regulation and the institutionalization of raising competitors' costs³⁹¹
- Costs of blurring corporate and government roles with government-sponsored enterprises and public-private partnerships³⁹²
- Costs of government steering by direct ownership or control of resources³⁹³
- Costs of abandoning property rights institutions in favor of political path dependence and the barring of regulatory exit
- Costs of establishment and perpetuation of hyper-regulatory public utility, siloed-infrastructure models
- Costs of anti-property approaches to environmental amenities and concerns³⁹⁴
- Costs of permission-seeking and over-licensing
- Costs of cronyism: the centrality of rent-seeking in a self-preserving administrative state³⁹⁵
- Costs of permanent bureaucracy and rent-seeking³⁹⁶

V. Costs of Lethality

- Costs of failure to see benefits as forms of wealth
- Costs of the precautionary principle and the derailment of normal evolutionary risk-management innovation
- Costs of selective expression of benefits
- Costs and distributional abuses of the net-benefit pursuit
- Costs of ignoring general wealth and health reduction induced by regulation
- Health (as distinct from economic) costs of rent-seeking
- Costs of undermining markets in information
- Costs of death by government

VI. Compound Fracture: Costs of the Foregoing Propagated across Centuries

Table 3. Assessments of Federal Regulation: Late 20th Century, Early 21st Century, Billions of Dollars

	Hopkins 1992 (1991 dollars)	Government Accountability Office 1995 (1995 dollars)	Hopkins 1995 (1995 dollars)	Small Business Admin. 2001 (2001 dollars)	Office of Management & Budget 2002 (2001 dollars)	Small Business Admin. 2005 (2004 dollars)	Small Business Admin. 2010	National Association of Manufacturers 2014 (2012 dollars)
Environmental	115		168	197	203	221	281	330
Other Social	36		55		30			
Transportation					22			
Labor					22			
Economic Regulation						591	1,236	1,448
Efficiency	73		80		150			
Transfers	130		147		337			
Efficiency - Domestic				101				
Transfers - Domestic				202				
Efficiency - Int'l Trade				44				
Transfers - Int'l Trade				88				
Workplace and Homeland Security				82		106	75	92
Paperwork/Process/ Info Collection (tax compliance)	189		218	129	190	195	160	159
Totals	543	647	668	843	954	1,113	1,752	2,029
Totals, converted to 2013 dollars		1,019.03	1,052.10	1,142.27	1,292.67			

Sources: Thomas D. Hopkins, "Costs of Regulation: Filling the Gaps, Report prepared for the Regulatory Information Service Center," Washington, D.C., August 1992, <http://www.thecre.com/pdf/COST%20CF%20REGULATION%20FILLING%20THE%20GAPS.pdf>; General Accountability Office, Briefing Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, Regulatory Reform: Information on Costs, Cost Effectiveness, and Mandated Deadlines for Regulations, (GAO/PEMD 95 18BR), March 1995, <http://archive.gao.gov/t2pbat/1153774.pdf>; Thomas D. Hopkins, "The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress," Office of the Chief Counsel for Advocacy, U.S. Small Business Administration, Washington, D.C., October 1995, http://www.sba.gov/advo/laws/archive/law_brd.html; W. Mark Crain and Thomas D. Hopkins, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, RFP No. SBAHQ-00-R-0027, October 2001, <http://www.sba.gov/advo/research/rs207tot.pdf>; Office of Management and Budget, "Draft Report to Congress on the Costs and Benefits of Federal Regulations," Federal Register, March 28, 2002, pp. 15037-15038, <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/infocreg/cbreport.pdf>; W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract no. SBHQ-03-M-0522, September 2005, <https://www.sba.gov/sites/default/files/files/rs264tot.pdf>; Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract No. SBAHQ-08-M-0466, September 2010, <http://www.sba.gov/advo/research/rs371tot.pdf>; Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," report prepared for the Small Business Administration, Office of Advocacy, Contract No. SBAHQ-08-M-0466, September 2010, <http://www.sba.gov/advocacy/7540/49291>; National Association of Manufacturers, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," W. Mark Crain and Nicole V. Crain, September 10, 2014, <http://www.nam.org/~media/A7A8456F33484E498F40CB46D6167F31.ashx>. Some figures here are adjusted to 2016 by the change in the consumer price index between 2001 and 2016, derived from "CPI Detailed Report Data for January 2017," Bureau of Labor Statistics, Washington, D.C. (Table 24, Historical Consumer Price Index for All Urban Consumers (CPI-U), U.S. city average, all items), <http://www.bls.gov/cpi/cpid1404.pdf>.

The ample shortcomings in disclosure partly inventoried in Box 3 work to the advantage of the professions and the academic legal studies infrastructure it has spawned over the last century. With government that unbridled, there are lots of ways to get to trillions in regulatory costs, just as federal spending occupies those heights.

The Small Business Administration (SBA) last published an assessment of the federal regulatory apparatus in 2010, pegging regulatory compliance costs at \$1.75 trillion for 2008, but that report was discontinued and not replaced. The primary purpose of the SBA report series was not an aggregate cost estimate but rather to examine regulatory burdens on small firms, which have higher per-employee regulatory costs than larger ones. Earlier governmental assessments around the turn of the 21st century from OMB, GAO, and SBA also found aggregate annual costs in the hundreds of billions of dollars, some in excess of \$1 trillion in today's dollars (see Table 3). Performing an aggregate estimate never was SBA's job, but remains OMB's neglected duty. The data underlying these studies were problematic, as I noted in 2017.³⁹⁷ Yet, the federal bureaucracy, even with all the vast resources at its disposal, has done nothing to fulfill its duty to assess the aggregate effects of regulation and intervention in which it engages.

In a 2014 report, the National Association of Manufacturers (NAM) modeled 2012 total annual regulatory costs in the economy of \$2.028 trillion (in 2014 dollars).³⁹⁸ The NAM report likewise drew its share of detractors.³⁹⁹ Still another report, by economists John W. Dawson of Appalachian State University and John J. Seater of North Carolina State University, pushes regulatory costs into orbit by counting the long-term reduction in economic growth caused by decades of cumulative opportunity costs imposed by economic regulation. Their report posits dozens of trillions of dollars in lost GDP annually.⁴⁰⁰ The authors contend that rules affecting growth rates compound, and that Americans are less than half as rich as they

would be in the absence of much of the regulatory state.

Some have set out to examine how seemingly inconsequential regulations accumulate and have unintended effects and costs that ought not be ignored.⁴⁰¹ A 2016 report, "The Cumulative Cost of Regulations" by the Mercatus Center at George Mason University, employs a microeconomic model investigating regulations' effect on firms' investment choices to attempt to determine "how much regulation distorts the investment decisions of firms and thus hampers long-run economic growth." Using a 22-industry data set covering 1977 through 2012, the report concluded that had regulatory burdens remained constant since 1980, the 2012 U.S. economy would have been 25 percent larger. Put another way, the 2012 U.S. economy was \$4 trillion smaller than it would have been in the absence of cumulative regulatory growth since 1980.⁴⁰² This represents a loss in real income of approximately \$13,000 per American.⁴⁰³

In the context of these existing and available sources and the federal government's failure to issue new aggregate analysis, apart from the CEA's new effort, this report employs a baseline for across-the-board costs of federal regulation and intervention of \$1.9 trillion annually in compliance costs, economic and GDP losses, and social costs (see Figure 1).⁴⁰⁴ This placeholder estimate is based on a non-scientific, disclaimer-laden, fusion and amalgam of GDP losses and compliance costs derived from available official data and the other sources that exist.⁴⁰⁵ Even so, this assessment is more representative and inclusive than official estimates and more "conservative" in that burdens conceivably are considerably more, as the Mercatus and Dawson and Seater approaches imply.

As Box 3 illustrates, enormous costs simply never find their way into regulatory analyses or public disclosure. "Regulation," in fact, is too narrow a word to capture the effects of wholesale government intervention into human lives from health care to education to retirement, let alone economic intervention. That cost calculations are largely impossible

There are lots of ways to get to trillions in regulatory costs, just as federal spending occupies those heights.

Table 4. Regulatory Costs in Small, Medium, and Large Firms, 2012

	Cost per Employee for All Business Types			
	All Firms	< 50 Employees	50–99 Employees	> 100 Employees
All Federal Regulations	\$9,991	\$11,724	\$10,664	\$9,083
Economic	\$6,381	\$5,662	\$7,464	\$6,728
Environmental	\$1,889	\$3,574	\$1,338	\$1,014
Tax Compliance	\$960	\$1,518	\$1,053	\$694
Occupational/Homeland Security	\$761	\$970	\$809	\$647

Source: W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," National Association of Manufacturers, September 10, 2014, <http://www.nam.org/~media/A7A8456F33484E498F40CB46D6167F31.ashx>.

is not the fault of critics of the regulatory state; nonetheless, these are the kinds of costs that should be assessed and described to the public in the aggregate, as required by the Regulatory Right-to-Know Act.

Regarding regulations' unequal effects on different kinds of firms, the NAM model noted above found overall annual per-employee regulatory costs to firms of \$9,991 on average, but to vary by firm size.⁴⁰⁶ Table 4 shows that per-employee regulatory costs for firms of fewer than 50 workers can be 29 percent greater than those for larger firms—\$11,724 for smaller firms, compared with \$9,083 for larger ones.⁴⁰⁷

The SBA and earlier OMB surveys had traditionally conveyed regulatory costs in the following categories:

- Economic regulatory costs (for example, market entry restrictions and transfer payments such as price supports;
- Workplace regulatory costs;
- Environmental regulatory costs; and
- Paperwork costs.

Differential effects of accumulating regulations on firms and people are also referenced among the costs in Box 3 and span economic, environmental, health, safety, and social costs, compounded over decades. These effects include loss of liberty from overcriminalization to the overthrow of the constitutional order in favor of rule by unelected bureaucrats. Some never tire of pointing out the accumulation of wealth by the top per-

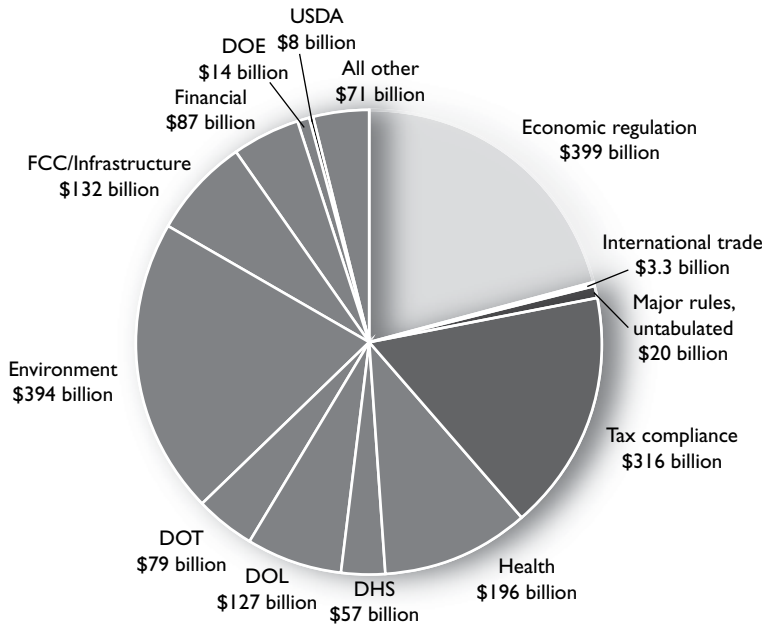
centers in their alleged concern over income inequality, but the perpetuation of unnecessary regulation that also erases wealth accumulation and harms the most vulnerable garners little concern.⁴⁰⁸

Numerous kinds of costs are not captured by the government and are ignored outright, such as the presence of the antitrust threat and the costs of the distortions it has inflicted over a century.⁴⁰⁹ These include common carriage and public-utility regulation of networks, health care governance (spending on which is about 18 percent of the economy), the predominance of public-private partnerships rather than private free enterprise in large-scale infrastructure projects, restrictions on Western lands with respect to resource use, the reluctance to move spectrum and other commons into the wealth-creating sector, central control of the money supply, a "too big to fail" stance toward financial entities that implies future bailouts, the permanent war economy, surveillance of private citizens, the detachment of nuclear power from institutions of market evolution and discipline, the monopolization of airport security, influence in housing markets and financing (perhaps a third of the U.S. economy), and much more.

We need greater acknowledgement of what we do not know, to own up to burdens that slip through the cracks (or canyons). Unless Congress votes on rules, the federal government must continue to be forced to assess regulatory costs from the standpoint of compliance, efficiency, and losses of liberty

Costs of regulatory compliance and intervention are equivalent to about 43 percent of the projected level of fiscal budget outlays of \$4.412 trillion.

Figure I. Annual Cost of Federal Regulation and Intervention, 2020 Estimate, \$1.9 Trillion



Source: Clyde Wayne Crews, Jr., *Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway*, 2017 ed., <http://ssrn.com/abstract=2502883>.

DHS = Department of Homeland Security; DOE = Department of Education; DOL = Department of Labor; DOT = Department of Transportation; FCC = Federal Communications Commission; USDA = U.S. Department of Agriculture.

even if such assessments can never be accurate. In terms of disclosure, the debate has never been whether the government should perform its cost assessment, but whether it should be bottom up or top down.⁴¹⁰ The answer is that both are needed, and an executive order reaffirming the longstanding obligation to assess aggregate costs is warranted. Executive orders and guidance to agencies governing cost assessment and regulatory analysis are incomplete and need to incorporate far more elements, as explored above.⁴¹¹

Regulatory Cost Burdens Compared to Federal Spending and the Deficit

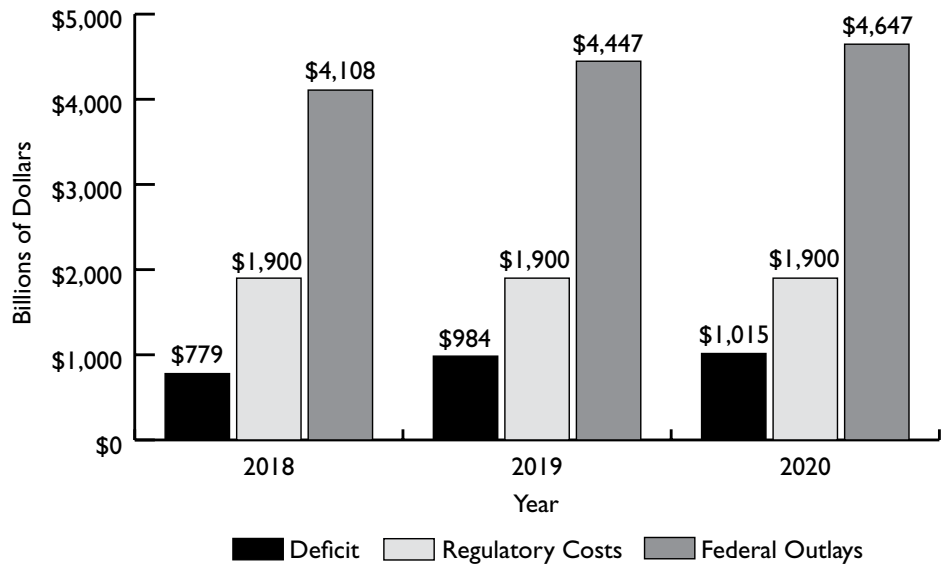
Comparisons of regulation with the costs of federal taxation and spending help place the relative magnitudes in perspective. The first ever trillion-dollar budget occurred in the latter half of the 1980s; now deficits of that size are projected with no end in sight.⁴¹² The U.S. federal government reached \$4.447 tril-

lion in outlays and a deficit of \$984 billion in FY 2019.⁴¹³ In the Congressional Budget Office's new *Budget and Economic Outlook*, unremitting trillion-dollar deficits continue every year through 2030, at which point the projection is \$1.7 trillion.⁴¹⁴ Figure 2 compares deficits and outlays for fiscal years 2018 and 2019 and projected amounts for 2020 to the overall regulatory burden placeholder estimate of \$1.9 trillion. For 2020, costs of regulatory compliance and intervention are equivalent to about 41 percent of the projected level of fiscal budget outlays of \$4.647 trillion, and more than double the anticipated deficit expected to soar to \$1.01 trillion.

Regulatory Costs Compared to Income Taxes and Corporate Profits

Regulatory costs easily rival revenues from individual income taxes and corporate taxes combined. As Figure 3 shows, regulatory costs stand well above 2019 estimated indi-

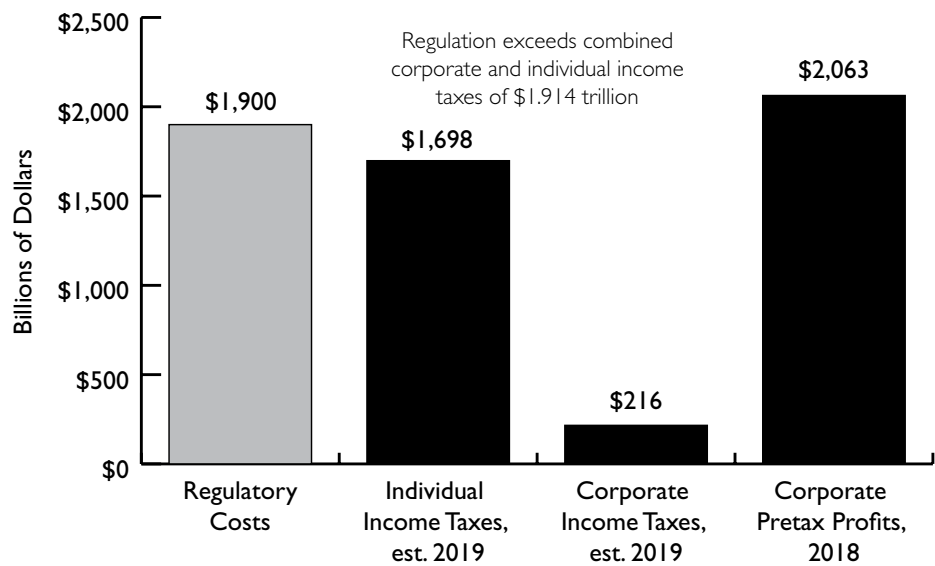
Figure 2. Federal Outlays and Deficits Compared with Federal Regulatory Costs (2018, 2019, and projected 2020)



Sources: Deficit and outlays and projected outlays from Congressional Budget Office, *The Budget and Economic Outlook*, Table I-1, “CBO’s Baseline Budget Projections, by Category,” various years, <https://www.cbo.gov>. Deficit and outlays also from White House Office of Management and Budget, Historical Tables, Table I.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2023, <https://www.whitehouse.gov/omb/historical-tables/>. Regulatory cost estimate from Crews, *Tip of the Costberg*.

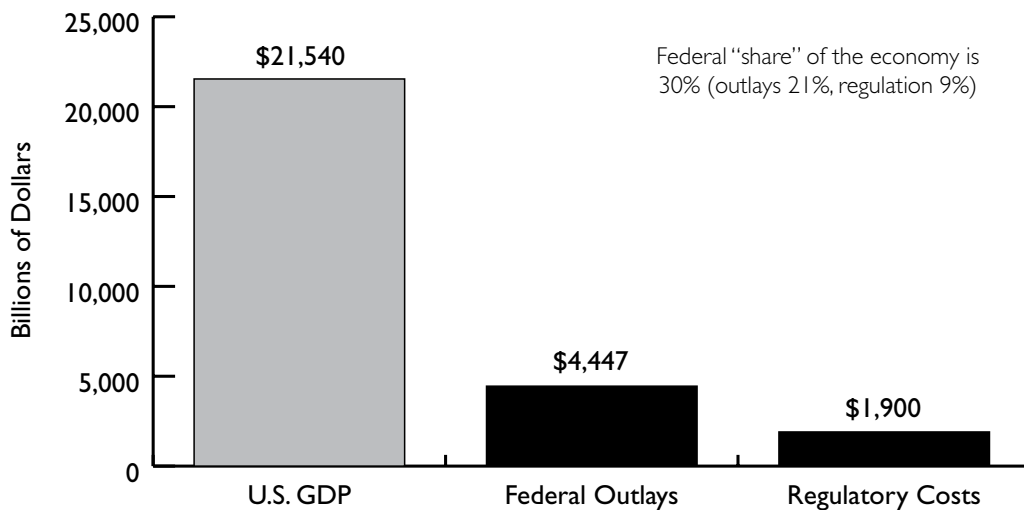
Federal deficit and outlay numbers are by fiscal year; regulatory costs by calendar year.

Figure 3. Regulatory Compliance Compared with Individual Income Taxes, Corporate Income Taxes, and Corporate Pretax Profits



Sources: Regulatory cost estimate from Crews, *Tip of the Costberg*. 2019 tax figures from OMB, Historical Tables, Table 2.1, “Receipts by Source: 1934–2023,” <https://www.whitehouse.gov/omb/historical-tables/>. 2018 corporate pretax profits (domestic and international) from Bureau of Economic Analysis, *National Income and Product Accounts Tables*, Table 6.17D, “Corporate Profits before Tax by Industry.”

Figure 4. GDP Compared to Federal Outlays and Regulation



Sources: Crews, *Tip of the Costberg*. GDP from U.S. Department of Commerce, Bureau of Economic Analysis. Outlays from CBO, White House, and OMB.

vidual income tax revenues of \$1.698 trillion.⁴¹⁵ Corporate income taxes collected by the U.S. government—an estimated \$216 billion for 2019—are dwarfed by regulatory costs.⁴¹⁶ The combination of the two, \$1.914 trillion, is roughly equivalent our regulatory cost marker of \$1.9 trillion. Regulatory costs even approach the level of pretax corporate profits, which were \$2.063 trillion in 2018.⁴¹⁷

Regulatory Costs Compared to GDP

In January 2018, the Commerce Department's Bureau of Economic Analysis estimated U.S. current-dollar GDP for 2019 at \$21.54 trillion.⁴¹⁸ The total regulatory cost figure of \$1.9 trillion annually (as noted, other considerations could take that sum far higher) is equivalent to approximately 9 percent of that amount. Combining regulatory costs with federal FY 2019 outlays of \$4.447 trillion, the federal government's share of the economy reaches \$6.35 trillion, or 29 percent of GDP (see Figure 4). That does not include state and local spending and regula-

tion. The percentage has been approximately 30 percent for some time.

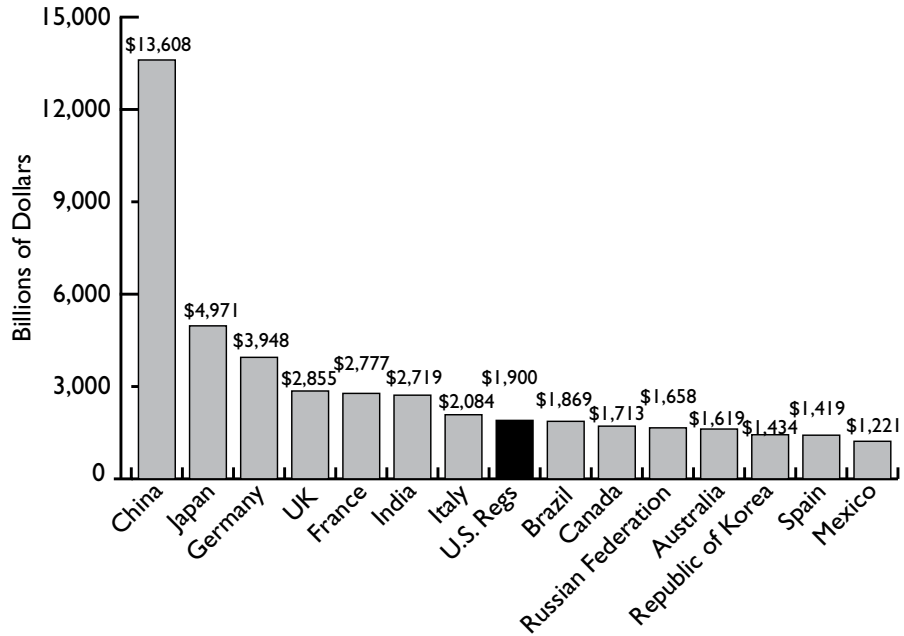
U.S. Regulation Compared with Some of the World's Largest and Freest Economies

Not counting the United States, only seven countries have GDPs that exceed the burden of U.S. regulation. U.S. regulatory costs surpass the 2018 GDP of neighbors Canada, at \$1.7 trillion, and Mexico, at \$1.2 trillion. If U.S. regulatory costs of \$1.9 trillion were a country, it would be the world's eighth-largest economy, ranking behind Italy and ahead of Brazil (see Figure 5).⁴¹⁹

The U.S. regulatory figure of \$1.9 trillion easily exceeds the output of many of the world's major economies, including those, with the exception of the United Kingdom, ranked as the freest economically by two prominent annual surveys of global economic freedom. Figure 6 depicts the 2018 GDPs of the countries common to the top 10 in both the *Wall Street Journal*/Heritage Foundation *Index of Economic Freedom*, and the Fraser Institute/

The federal government's share of the economy reaches \$6.35 trillion, or 29 percent of GDP.

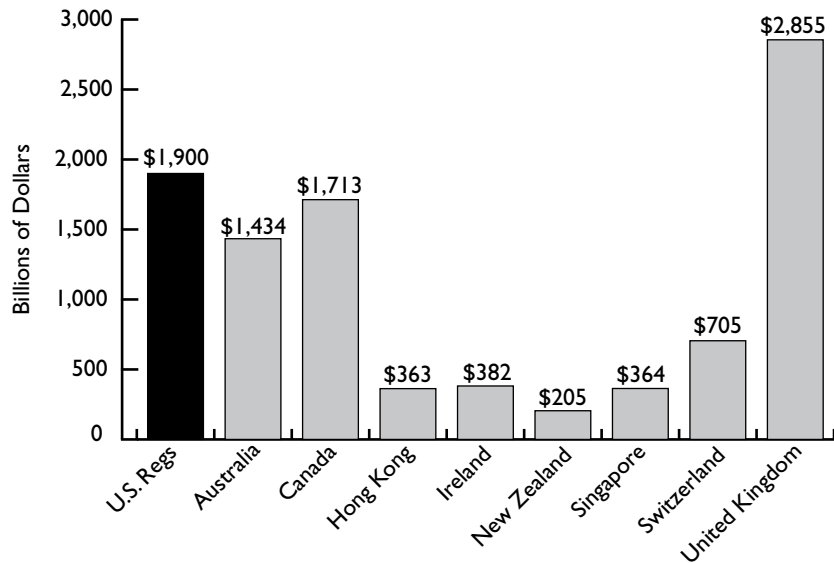
Figure 5. U.S. Regulatory Costs Compared to 2018 Gross Domestic Product of the World's Largest Economies



Source: Crews, *Tip of the Costberg*. Gross Domestic Product data from World Bank, Washington, D.C., GDP Data, <http://data.worldbank.org/indicator/NY.GDPMKTP.CD/countries> and <https://databank.worldbank.org/data/download/GDP.pdf>.

If it were an “economy,” U.S. regulations would be the eighth largest.

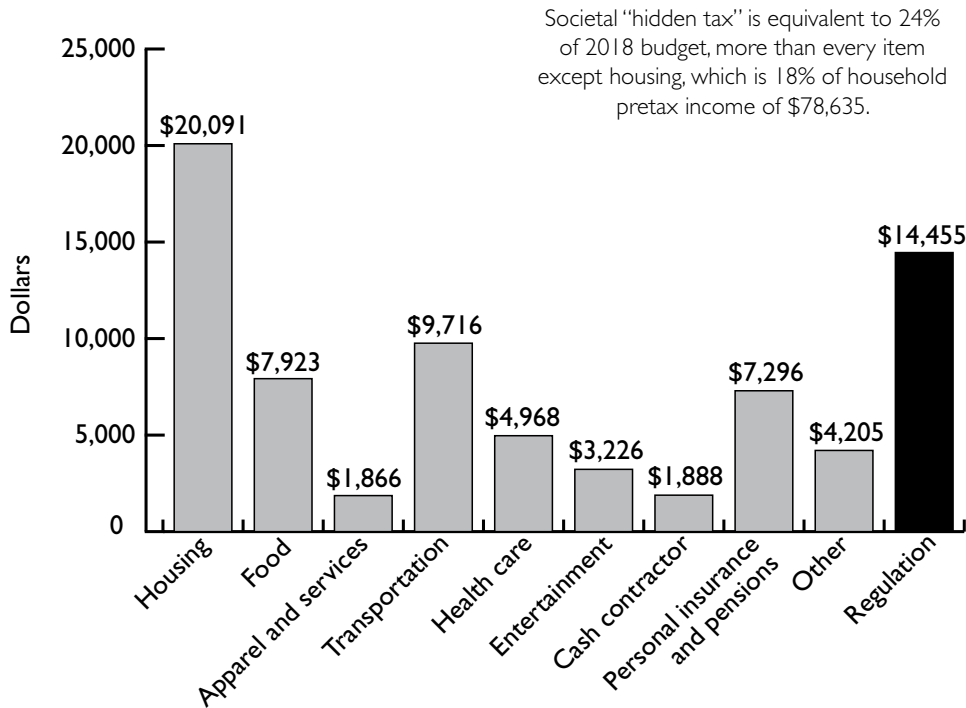
Figure 6. U.S. Regulatory Load Compared to 2018 Gross Domestic Product in World Economies Regarded as Most Free



Sources: Crews, *Tip of the Costberg*. Gross Domestic Product data from World Bank, Washington, D.C., GDP Data, <http://data.worldbank.org/indicator/NY.GDPMKTP.CD/countries>.

“Free” economies consist of those in the top 10 of both the Heritage Foundation/*Wall Street Journal* Index of Economic Freedom and the Fraser Institute/Cato Institute *Economic Freedom of the World* reports.

Figure 7. The U.S. Household Expense Budget of \$61,224 Compared to Regulatory Costs



Sources: Bureau of Labor Statistics, author calculations.

Proxy for households here is BLS depiction of 131,439,000 "consumer units," which comprise "families, single persons living alone or sharing a household with others but who are financially independent, or two or more persons living together who share expenses." Other consists of "personal care products and services," "education," and "all other expenditures."

Cato Institute *Economic Freedom of the World* report.⁴²⁰ The U.S. ranks 12th and fifth in these reports, respectively.

Regulation: A Hidden Tax on the Family Budget

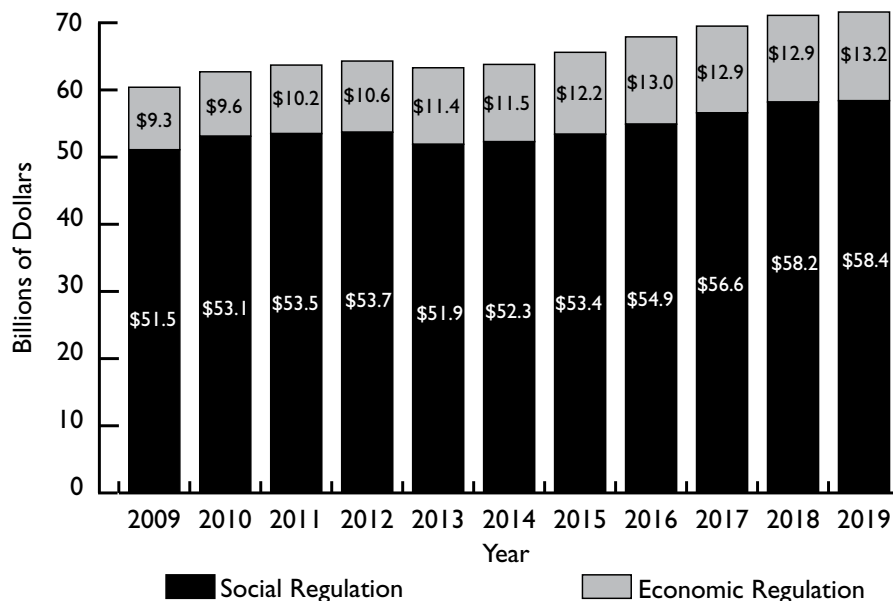
The pain of taxes can seem more immediate and present than that of regulation, but, like the taxes they are required to pay, businesses will pass some regulatory costs on to consumers. Other costs will find their way to workers and investors in regulated companies. By assuming a full pass-through of all such costs to consumers—many consumers are also workers and owners through stock and mutual fund holdings—we can look at the share of each household's regulatory costs and compare it with total annual expenditures as compiled by the Depart-

ment of Labor's Bureau of Labor Statistics (BLS).⁴²¹

For America's 131.4 million households, or "consumer units" in BLS parlance, the average 2018 pretax income was \$78,635.⁴²² If one were to allocate annual regulatory costs assuming, for simplicity's sake, a full pass-through of costs to consumers, U.S. households "pay" \$14,455 annually in embedded regulatory costs (\$1.9 trillion in regulation divided by 131,439,000 "consumer units"), or 18 percent of average income before taxes, and more as a share of after-tax income. This regulatory "hidden tax" is higher than every annual household budgetary expenditure item except housing (see Figure 7). Regulatory costs amount to up to 24 percent of the typical household's expenditure budget of \$61,224. The average U.S. household "spends" more on hidden regulation than on health care, food, transportation, enter-

Like the taxes they are required to pay, businesses will pass some regulatory costs on to consumers.

Figure 8. Federal Agency Administrative and Enforcement Budgets, \$72 Billion Total in FY 2019



Source: Susan Dudley and Melinda Warren, Annual “Regulators’ Budget” Series, published jointly by the Regulatory Studies Center at the George Washington University and the Weidenbaum Center on the Economy, Government, and Public Policy.

Original 2012 constant dollars are adjusted here by the change in the consumer price index between 2012 and 2019, derived from Consumer Price Index tables, U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C. All Urban Consumers (CPI-U), U.S. city average, all items).

tainment, apparel, services, and savings. Of course, some costs of regulation are not hidden. Consumers pay for regulatory agencies and administration more directly through taxes.

The Administrative and Enforcement Costs of Regulation

Regulatory estimates attempt to capture costs experienced by the public, but those estimates do not include administrative costs—the on-budget amounts spent by federal agencies to produce and enforce rules. The Weidenbaum Center at Washington University in St. Louis and the George Washington University Regulatory Studies Center regularly examine the president’s annual budget proposal to compile the administrative costs of developing and enforcing rules. These amounts—as funds that taxpayers contribute to support agencies’ administrative opera-

tions—are disclosed in the federal budget in the way regulatory compliance and economic costs are not.

According to the latest compilation, FY 2019 enforcement costs incurred by federal departments and agencies stood at \$72 billion (in constant 2019 dollars, adjusted from original 2012 dollars) (Figure 8).⁴²³ Of that amount, \$13.2 billion was incurred on administering economic regulations. The larger amount, spent on writing and enforcing social and environmental regulations, was \$58.4 billion. The \$72 billion in regulatory agency enforcement costs helps complete a picture of the federal regulatory apparatus, as these come on top of other estimates of regulatory compliance and economic burdens. In current dollars, the EPA alone spent an estimated \$5.172 billion in this category in 2019, accounting for 7 percent of the total expected to be spent by all regulatory agencies.⁴²⁴ The EPA formerly accounted for the lion’s share of governmental administration

and enforcement costs, but the Department of Homeland Security, at an estimated \$33.3 billion, now comprises 48 percent.⁴²⁵

The Weidenbaum Center and the Regulatory Studies Center also estimate the number of full-time-equivalent administrative and enforcement staff at 287,063 in FY 2020, up from 281,606 in 2018. The number of federal employees has increased well over 100,000 since the 2001 staffing level of 173,057.⁴²⁶ Much of the post-2001 surge

may be attributable to the then newly created Transportation Security Administration's hiring of thousands of airport screening personnel.

Costs are one way to attempt to capture the size and scope of the federal regulatory enterprise, which is massive. Another is to assess the paper production—the regulatory material that agencies publish each year in sources like the *Federal Register*.

Tens of Thousands of Pages and Rules in the *Federal Register*

The *Federal Register* is the daily repository of all proposed and final federal rules and regulations.⁴²⁷ Although its number of pages is often cited as a measure of regulation's scope, there are problems with relying on page counts. A short rule may be costly and a lengthy one may be relatively cheap. The *Federal Register* also contains many administrative notices, corrections, rules relating to the governance of federal programs and budgets, presidential statements, and other material. They all contribute bulk and bear some relation to the flow of regulation, but they are not strictly regulations. Blank pages, skips, and corrections also affect page counts. In previous decades, blank pages numbered into the thousands owing to the Government Publishing Office's imperfect estimation of the number of pages that agencies would require.

In terms of Trump's one-in, two-out agenda, one cannot easily look at the *Federal Register* and get a sense of what rules are being cut. Moreover, a rule that some see as deregulatory, others may see as regulatory. Reducing regulations could make the *Federal Register* grow rather than shrink. While the *Register* has always been treated as a document cataloging regulations, it recently has chronicled their reduction, although a look at the daily *Federal Register* may not give that impression.

Shortcomings notwithstanding, it is worthwhile to track the *Federal Register's* page counts. Preliminary data available at the time of publication will be updated in the next edition of *Ten Thousand Commandments*.

Federal Register Pages up 16 Percent between Trump Years One and Three

The first calendar year of the Trump administration finished with 61,308 pages in the *Federal Register* (see Figure 9). The last time annual page count had been that low was in 1993, at 61,166 pages under President Bill Clinton.

The 2017 count also contains three weeks of Obama administration output, however, and by the time Trump was inaugurated on January 20, 2017, the Obama administration had already added 7,630 pages to the *Federal Register*, making Trump's "net" page count 53,678.⁴²⁸

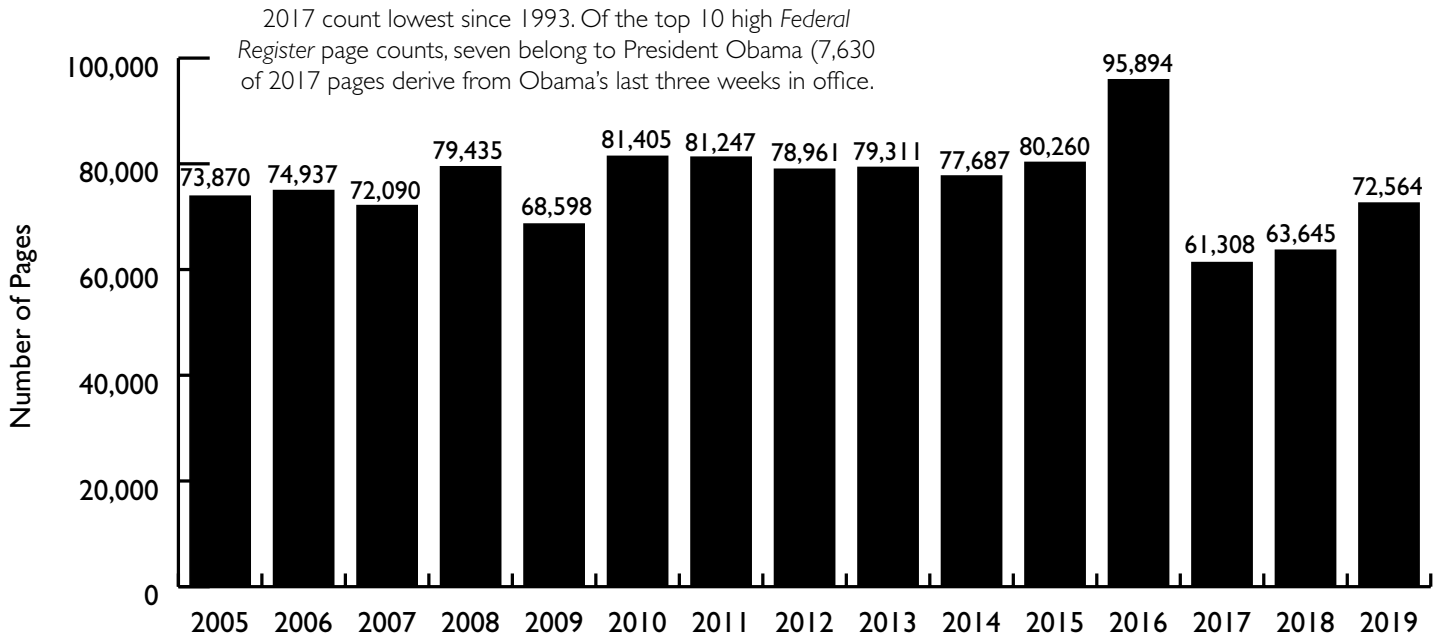
In 2018, the *Federal Register* reached 67,225 pages, a 10 percent increase over Trump's first year.⁴²⁹ The new 2019 count of 70,938 is 16 percent above Trump's first year.⁴³⁰

By contrast with both of these, at the end of Obama's final calendar year of 2016, the number of *Federal Register* pages stood at 95,854, which was the highest level in the history of the *Federal Register*, and a 19 percent jump over Obama's second-to-last year's count. Trump's 2017 count was 36 percent below Obama's record. The last time a drop in *Federal Register* page counts of the Trump magnitude happened was when Ronald Reagan reduced the count from Jimmy Carter's 73,258 in 1980 to 44,812 by 1986, but that 28,446-page drop took five years.⁴³¹

Trump's recent 2019 count of 72,564 is still 24 percent below Obama's record. The last time the page count was lower was back in

***A short rule may
be costly and a
lengthy one may
be relatively
cheap.***

Figure 9. Number of *Federal Register* Pages, 2005–2019



Source: National Archives and Records Administration, Office of the Federal Register.

2009. Keep in mind that to eliminate a rule, agencies have to write a rule. So, in a perverse sense, Trump cannot shrink the *Federal Register* (or the number of rules), yet is still doing so. As Figure 9 also captures, 2010 and 2011 had been the prior all-time record years, at 81,405 and 81,247, respectively. Of the 10 all-time high *Federal Register* page counts, seven occurred during the Obama administration. (For a history of *Federal Register* page totals since 1936, see Appendix: Historical Tables, Part A.)

Federal Register Pages Devoted to Final Rules

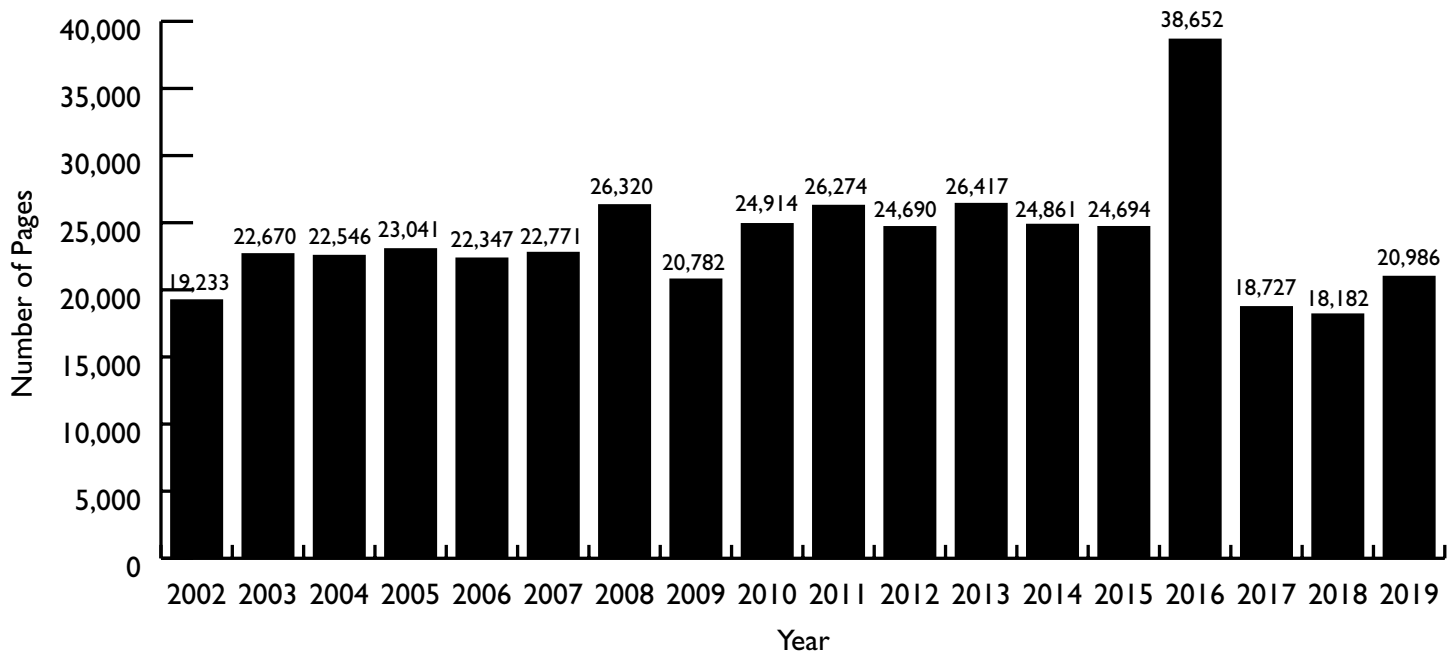
Isolating the pages devoted to *final* rules might be more informative than gross page counts, because it omits pages devoted to proposed rules, agency notices, corrections, and presidential documents (although those categories can have regulatory effects, too).

The final rule page count of 2018 stood at 18,182, the lowest count since 1992; the tally for 2019 rose to 20,986. Nonetheless,

two things stand out in Figure 10: (a) the jump from 2015 to 2016 under Obama, when the number of pages devoted to final rules jumped by 56 percent, from 24,694 to 38,652 and (b) the drop of 51 percent from there to 18,727 pages of rules under Trump in 2017. Obama's high was a record that shattered 2013's then-peak of 26,417 by 46.3 percent. Trump's 2017 count, by contrast, was the lowest seen since 1995.

While there are more relevant measures than pages to account for actual burdens, for page counts to drop so steeply between administrations is significant. Relevant to the discussion about controlling future regulatory costs are pages of proposed rules, those under production in the regulatory pipeline. These peaked at 23,193 in 2011, and Obama's final page count of proposed rules was 21,457 in 2016. Under Trump, *Federal Register* pages devoted to proposed rules in 2017 were 10,892, half the level of Obama's concluding years, and the lowest since 1981. However, these rose to 17,246 in 2018 and to 19,363 in 2019. A considerable proportion of this is presumably deregulatory activity.

Figure 10. *Federal Register* Pages Devoted to Final Rules, 2002–2019



Source: National Archives and Records Administration, Office of the Federal Register.

Federal Register Pages Published by Decade

Still another way of looking at *Federal Register* trends is by pages per decade (see Figure 11). Even with Trump’s cuts late in the 2010s, a hefty jump over the prior decade materialized. The last bar of Figure 11 shows that the just-ended decade of the 2010s brought forth 774,236 pages of *Federal Register*, for an average of 77,424 pages per year. The prior decade had yielded 730,176 pages and an average of 73,018 pages. Even with the page count reduction during Trump’s administration, decade page counts could easily top 1 million in the 2020s, as a glance at increases since the 1940s implies.

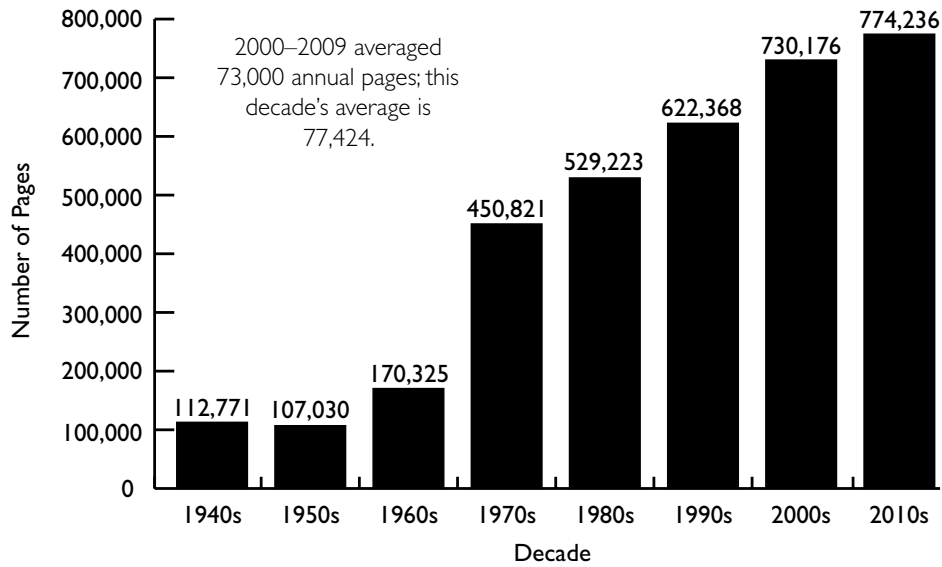
Number of Final and Proposed Rules in the *Federal Register*

The slowed pace of traditional rulemaking (as opposed to Trump’s grand impulses on antitrust, trade, tech policy, family leave social policy, and other areas) is the real breakthrough. The president has issued fewer new

regulations (less than 3,000) than we have seen since record keeping began in the 1970s.

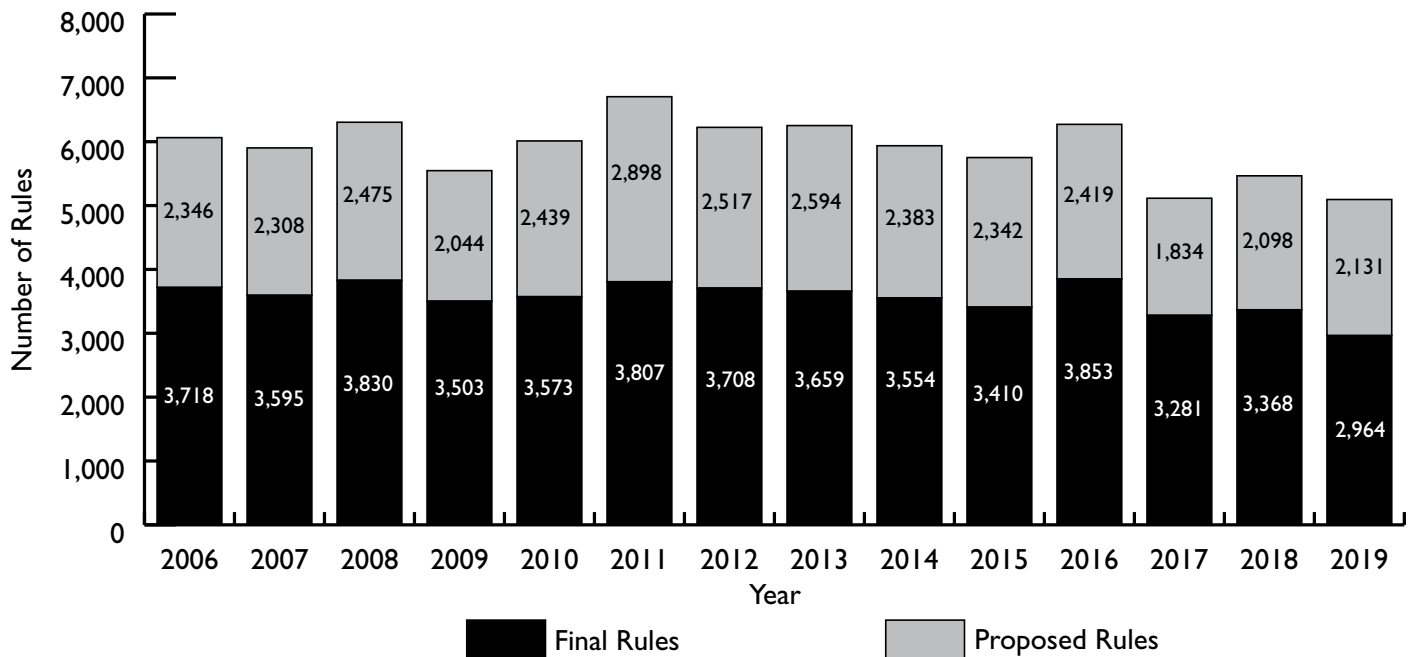
In 2016, the final full year of the Obama administration, the number of final rules published in the *Federal Register* reached 3,853, the highest total of the Obama administration and the highest level since 2005. Under Trump, final rules dipped to 3,281 in 2017 (see Figure 12). This was the lowest count since records began being kept in the mid-1970s. Additionally, 207 rules issued in 2017 up to the point of Trump’s inauguration were Obama’s, giving Trump a “net” of 3,074 that year.⁴³² In 2018, the rule count bumped up to 3,368, still the second lowest count.⁴³³ The 2019 tally of final rules fell to 2,964, even lower than the 2017 record despite the fact that some of the rules were deregulatory in character. The reduction may be partly attributable to the requirement for a major rule designation under the April 2019 OMB directive to agencies. The fact that records of the amount of non-congressional lawmaking were not kept until the latter half of the 1970s—three decades after the Administrative Procedure Act became law—is indicative of the problems with the out-of-control administrative state.

Figure 11. *Federal Register* Pages per Decade
774,236 Pages Projected for the 2010s



Source: National Archives and Records Administration, Office of the Federal Register.

Figure 12. Number of Proposed and Final Rules in the *Federal Register*, 2006–2019



Source: National Archives and Records Administration, Office of the Federal Register.

Stopping or slowing rules in the pipeline is easier than getting rid of existing rules.

The number of final rules currently being published is lower than it was throughout the 1990s, when the average annual total of final regulations was 4,596. The average for the period 2000–2009 was 3,948. Even Obama’s highest count was below those levels. Of course, not all rules are created equal, and fewer of Obama’s rules would be expected to have been devoted to rollbacks of prior initiatives, the emphasis of Trump’s one-in, two-out directive. Note again that deregulatory actions by Trump that require notice-and-comment will add to his final and proposed rule counts.

Rules deemed “significant”—a broader category than the economically significant rules typically deemed to impart \$100 million in annual costs or benefits—are worth focusing on.⁴³⁴ Among Obama’s 3,853 final rules in 2016, 486 were deemed “significant” under Executive Order 12966, the highest count over the past two decades. While several hundred “significant” final rules each year are the norm, this has changed drastically under the Trump administration. Trump has issued 199, 108, and 66 in 2017, 2018, and 2019, respectively, the lowest levels since 2006’s 164 significant final rules.⁴³⁵

As the Trump deregulatory effort has demonstrated, stopping or slowing rules in the pipeline is easier than getting rid of existing rules. On an ongoing basis as administrations change, more detailed official proposed rule analysis would be worthwhile. For example, it would be helpful for the *Federal Register* to clearly flag which among proposed rules are deregulatory as opposed to regulatory (something now done in the Unified Agenda). That would allow more fruitful analysis of the routine and the significant alike among forthcoming rules, since the quantity of both significant and lesser proposed rules are a leading indicator of expanding government.

In Obama’s final year of 2016, 2,419 proposed rules appeared in the *Federal Register*. In Trump’s first year, the count fell to 1,834 (including the 156 proposals that had been issued by Obama during the first three weeks

of 2017). Like final rules, Trump’s 2017 count represented the lowest since record keeping began. These rules stood at 2,098 in his second year and 2,131 in 2019. Back in the 1990s, far greater numbers of proposed rules appeared in the annual pipeline. (For the numbers of proposed and final rules and other documents issued in the *Federal Register* since 1976, see Appendix: Historical Tables, Part B.)

Cumulative Final Rules in the *Federal Register*

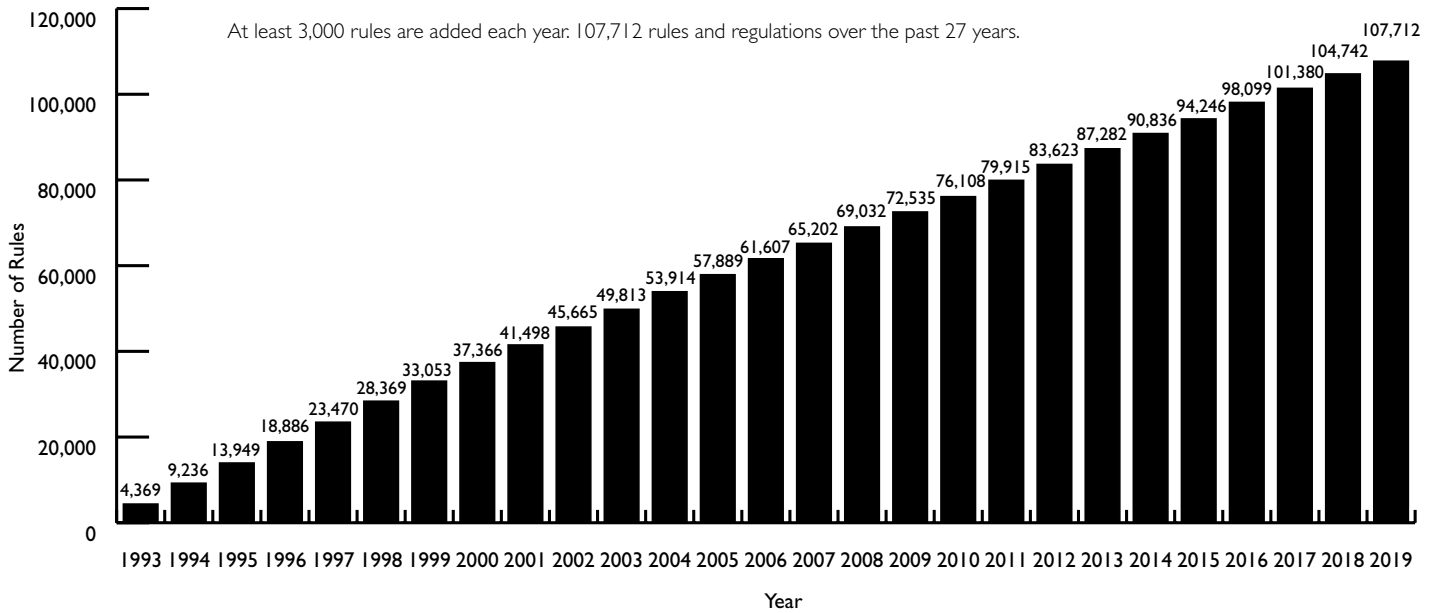
Trump’s 2019 final rule count is the only one ever below 3,000. The annual outflow of over 3,000 final rules—and often far more—has meant that 107,712 rules have been issued since 1993, when the first edition of *Ten Thousand Commandments* was published (see Figure 13). Going back to 1976, when the *Federal Register* first began itemizing them, 204,802 rules have been issued (see Historical Tables, Part B).

The Expanding Code of Federal Regulations

The page count for final general and permanent rules as they come to their final destination in the *Code of Federal Regulations* (CFR) is not as dramatic as the yearly count of tens of thousands for the *Federal Register*, but still considerable. (See Figure 14.) In 1960, the CFR contained 22,877 pages. Since 1975, its total page count has grown from 71,224 to 185,984 at the end of 2019, including the index—a 160 percent increase. The number of CFR bound volumes stands at 242, compared with 133 in 1975. (For the detailed breakdown numbers of pages and volumes in the CFR since 1975, see Appendix: Historical Tables, Part C.)

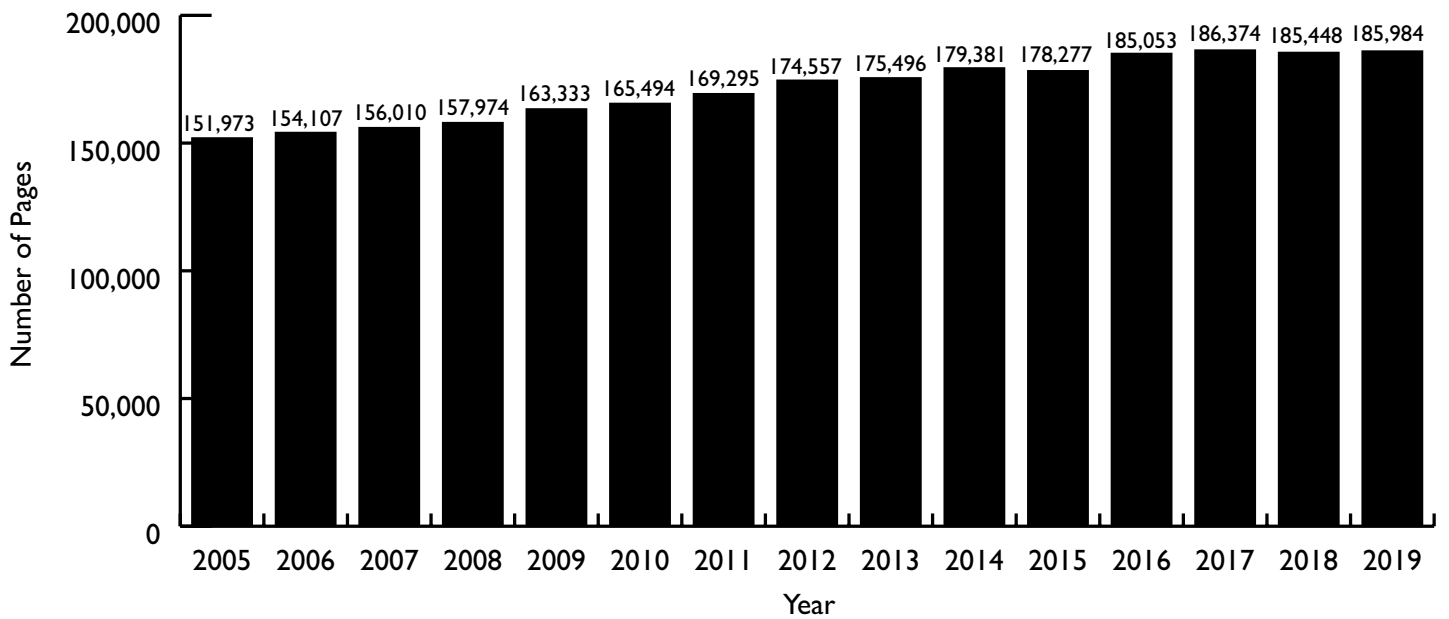
As noted, in recent years, traditional rules and regulations have been overshadowed in part by various forms of executive actions and regulatory guidance documents,

Figure 13. Cumulative Final Rules Published in the *Federal Register*, 1993–2019



Source: National Archives and Records Administration, Office of the Federal Register.

Figure 14. *Code of Federal Regulations*, 185,984 Total Pages in 2019, 2005–2019



Source: National Archives and Records Administration, Office of the Federal Register.

which are important to track as well. There is no CFR-style repository for these, but Trump's Executive Order 13981, "Promoting

the Rule of Law through Improved Agency Guidance Documents," will begin the process of an inventory during 2020.

Regulatory Dark Matter: Presidential Executive Orders and Memoranda

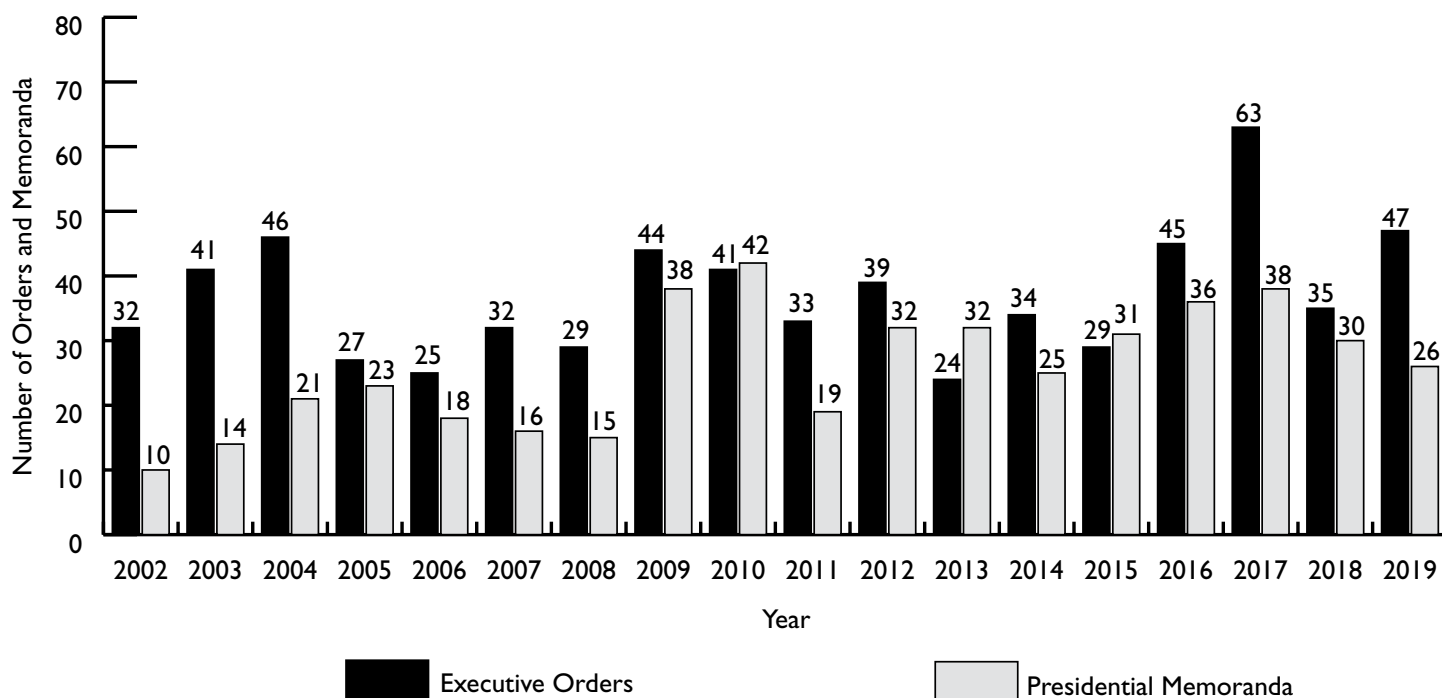
Executive orders, presidential memoranda, and other executive actions make up a large component of executive “lawmaking.” They merit heightened attention from lawmakers, since they can have, or appear to have, binding effect.⁴³⁶

Executive orders ostensibly deal with the internal workings and operations of the federal government, and presidents have traditionally been presumed able to overturn those issued by their predecessors. Their use is not new, dating back to President George Washington’s administration.⁴³⁷ However, this reporting

has not been consistent until recent decades. President Obama’s executive order totals, “pen and phone” notwithstanding, were not high compared with those of other presidents. At the end of his term, Obama had issued 276 executive orders, whereas President George W. Bush’s final tally was 291, and that of President Bill Clinton was 364 (see Table 4 and Figure 15). Trump issued 63 orders in 2017 (far outstripping anything since Bush’s 2001 high water mark), 35 in 2018, and 47 in 2019.⁴³⁸

Memoranda are trickier to tally. They may or may not be published, depending on each

Figure 15. Number of Executive Orders and Presidential Memoranda, 2002–2019



Source: National Archives and Records Administration, Office of the Federal Register.

The United States existed for many decades before a president issued more than two dozen executive orders.

administration’s own determination of “general applicability and legal effect.”⁴³⁹ George W. Bush published 131 memoranda during his entire presidency, whereas Barack Obama issued 257 that were published in the *Federal Register* (Figure 15). Bill Clinton published just 14 during his presidency.⁴⁴⁰ Donald Trump issued 38 memoranda in 2017, the highest level since 2010, and 30 in 2018. Among the 47 executive orders and 26 memoranda of the past year under Trump are some intended to reduce burdens (see Box 1); but some such proposals are regulatory.

The pertinent question as far as regulatory burdens are concerned is what these executive orders and memoranda are used for and what they do. Whether lengthy or brief, orders and memoranda can have significant effects, and a smaller number of them does not necessarily mean small effects. In 2014 alone, Obama memoranda created a new financial investment instrument and implemented new positive rights regarding work hours and employment preferences for federal contractors.⁴⁴¹ On the other hand, four of Obama’s executive orders addressed overregulation and rollbacks.⁴⁴² Obama’s Executive Order 13563 concerning regulatory review and reform, for example, sought to roll back regulation.⁴⁴³ It amounted to a few billion dollars in cuts, which were swamped by other, newly issued rules and negated by costly guidance. As with the *Federal Register*, counts are interesting but do not tell the full story.

Other key executive orders directed at regulatory restraint were President Clinton’s 1993 Executive Order 12866⁴⁴⁴ and President Ronald Reagan’s Executive Order 12291, which formalized central regulatory review at OMB.⁴⁴⁵ Clinton’s was a step back from the stronger oversight of the Reagan order in that it sought “to reaffirm the primacy of Federal agencies in the regulatory decision-making process.”⁴⁴⁶ In Trump’s case, a handful of his executive orders and memoranda itemized at the beginning of this report comprise perhaps the most aggressive attempt by the executive branch to streamline regulation.

The United States existed for many decades before a president issued more than two dozen executive orders—that was President Franklin Pierce, who served from 1853 to 1857. Orders numbered in the single digits or teens until President Abraham Lincoln and the subsequent Reconstruction period. President Ulysses S. Grant issued 217, then a record. From the 20th century onward, executive orders have numbered over 100 during each presidency and sometimes reached into the thousands. President Franklin D. Roosevelt—the longest-serving president in U.S. history, elected to four terms and having served a full three—issued 3,721 executive orders.⁴⁴⁷ Table 5 provides a look at executive order counts by administration since the nation’s founding through the Obama presidency.⁴⁴⁸

Table 5. Executive Orders by Administration

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
George Washington	n/a	n/a	8
John Adams	n/a	n/a	1
Thomas Jefferson	n/a	n/a	4
James Madison	n/a	n/a	1
James Monroe	n/a	n/a	1
John Quincy Adams	n/a	n/a	3
Andrew Jackson	n/a	n/a	12
Martin van Buren	n/a	n/a	10
William Henry Harrison	n/a	n/a	0

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
John Tyler	n/a	n/a	17
James K. Polk	n/a	n/a	18
Zachary Taylor	n/a	n/a	5
Millard Fillmore	n/a	n/a	12
Franklin Pierce	n/a	n/a	35
James Buchanan	n/a	n/a	16
Abraham Lincoln	n/a	n/a	48
Andrew Johnson	n/a	n/a	79
Ulysses S. Grant	n/a	n/a	217
Rutherford B. Hayes	n/a	n/a	92
James Garfield	n/a	n/a	6
Chester Arthur	n/a	n/a	96
Grover Cleveland - I	n/a	n/a	113
Benjamin Harrison	n/a	n/a	143
Grover Cleveland - II	n/a	n/a	140
William McKinley	n/a	n/a	185
Theodore Roosevelt	n/a	n/a	1,081
William Howard Taft	n/a	n/a	724
Woodrow Wilson	n/a	n/a	1,803
Warren G. Harding	n/a	n/a	522
Calvin Coolidge	n/a	n/a	1,203
Herbert Hoover	6,070	5,075	996
Franklin D. Roosevelt	9,537	6,071	3,467
Harry S. Truman	10,431	9,538	894
Dwight D. Eisenhower	10,913	10,432	482
John F. Kennedy	11,127	10,914	214
Lyndon B. Johnson	11,451	11,128	324
Richard Nixon	11,797	11,452	346
Gerald R. Ford	11,966	11,798	169
Jimmy Carter	12,286	11,967	320
Ronald Reagan	12,667	12,287	381
George H.W. Bush	12,833	12,668	166
William J. Clinton	13,197	12,834	364
George W. Bush	13,488	13,198	291
Barack Obama	13,764	13,489	276
Donald Trump	13,802	13,490	138
Total Number of Executive Orders			15,691

Source: W. Crews's tabulations; Executive Orders Disposition Tables Index, Office of the Federal Register; National Archives, <http://www.archives.gov/federal-register/executive-orders/disposition.html>; "Executive Orders," The American Presidency Project, ed. John T. Woolley and Gerhard Peters (Santa Barbara, CA: 1999–2014), <http://www.presidency.ucsb.edu/data/orders.php>. Executive orders for President Trump are as of March 26, 2020.

Regulatory Dark Matter: Over 22,000 Public Notices Annually

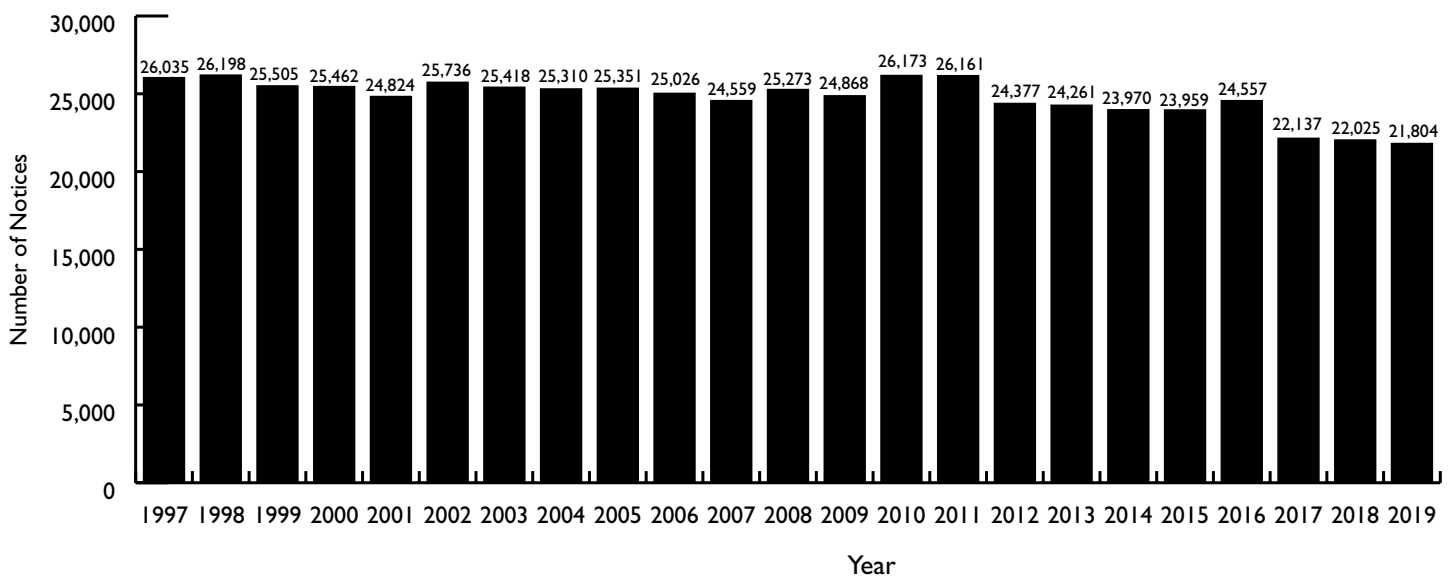
Without actually passing a law, government can signal expectations, specify parameters for and influence various industries—including health care, retirement, education, energy production, finance, land and resource management, science and research, and manufacturing—through various kinds of guidance documents. A prominent Obama era example is the Internal Revenue Service’s granting of waivers of the Patient Protection and Affordable Care Act’s employer mandate despite the statute’s language.⁴⁴⁹ In one assessment, a 2018 report by the House Committee on Oversight and Government Reform found at least 13,000 guidance documents that had been issued since 2008.⁴⁵⁰

Guidance documents are difficult to pin down, a situation addressed in the new Ex-

ecutive Order 13891, “Promoting the Rule of Law through Improved Agency Guidance Documents,” with its requirement for inventories, which will feature in future editions of *Ten Thousand Commandments*. In addition to the *Federal Register*’s tally of rules, public notices appear in the *Federal Register*. These typically consist of non-rulemaking documents such as meeting and hearing notices and agency-related organizational material. But the tens of thousands of yearly public notices can also include memoranda, bulletins, guidance documents, alerts, and other proclamations, many of which may be consequential to the public.⁴⁵¹

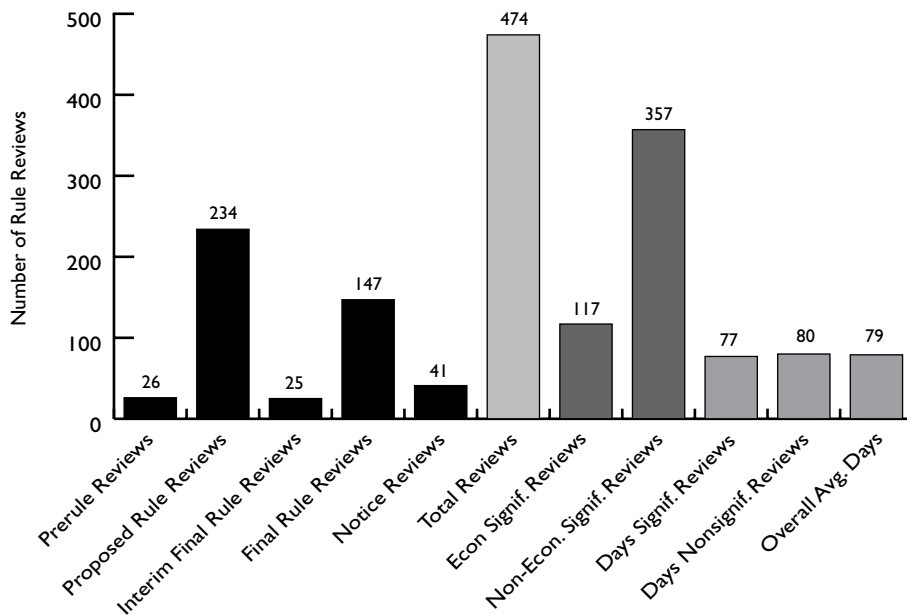
Figure 16 depicts the number of notices published annually in the *Federal Register*. These peaked at over 26,000 during 2010–2011.

Figure 16. Public Notices in the *Federal Register*, 1997–2019



Source: National Archives and Records Administration, Office of the Federal Register.

Figure 17. Number of OMB Rule Reviews and Average Days under Review, 2019



Source: Author search on RegInfo.gov, “Review Counts” database search engine under Regulatory Review heading.

Standing at 21,804 at year-end 2019, these have dipped below 24,000 only five times since 1996, including Trump’s first three years (the other years were 2014 and 2015). There have been 616,455 public notices since 1994 and well over 1 million since the 1970s, but, again, many of those are trivial.

Given that many notice-and-comment regulations already lack cost-benefit or other analysis, policy makers should pay greater attention to the “notices” component of the *Federal Register*, given the modern administrative state’s inclination to advance policy by memorandum, notice, letter, bulletin, and other means. Yet much guidance does not appear in the *Federal Register*. Increased unilateral executive proclamations atop “traditional” rules and regulations will render costs and effects of regulation even less transparent than they already are. As the House Oversight Committee detailed in a 2018 report, *Shining Light on Regulatory Dark Matter*, of at least 536 known significant guidance documents issued since 2008, just 328 were submitted to OMB for review. Furthermore, while 13,000-plus guidance documents

should have been submitted to both Congress and the GAO as required by the Congressional Review Act, only 189 were.⁴⁵²

Rule Reviews at OMB’s Office of Information and Regulatory Affairs

The president and Congress can assure that more review and supervision of guidance documents and notices take place. As it stands, while agencies issued thousands of “notices,” only 41 received OMB review during calendar year 2019, up from 24 in Trump’s first year, and on par with the 45 during Obama’s last. Several dozen notices reviewed by OMB have been deemed to have an economically significant effect in recent years.⁴⁵³ Figure 17 presents the number of rule reviews conducted by OMB, by stage and by economic significance, for calendar year 2019. It also shows the number of days OMB took to review rules in 2019, a process that improved during recent years but that at times can take several months.

Increased unilateral executive proclamations atop “traditional” rules and regulations will render costs and effects of regulation even less transparent than they already are.

A history of the number of rules and notices reviewed annually by OIRA appears in Appendix: Historical Tables, Part D, in which a detailed breakdown is presented of numbers of rules reviewed by type and by average days for review from 1991 through 2019. During the pre-Executive Order 12866 years depicted there, 1991–1993, review times were shorter, although numbers of rules were considerably higher then. During the Trump administration’s first 18 months, it was claimed that OIRA reviewed 70 percent fewer regulatory actions than were reviewed under the Obama administration and 66 percent fewer

than in the George W. Bush administration.⁴⁵⁴ Trump’s total review counts still have not hit Obama’s 2016 tally, but are otherwise comparable.

Tracking effects of rules and regulations, executive orders, memoranda, and other regulatory guidance is vital. These alternative regulatory actions should receive more scrutiny and oversight, since they have become powerful means of working around the constitutional system of government envisioned by the Framers: legislation enacted by elected representatives.

Analysis of the Regulatory Plan and Unified Agenda of Federal Regulations

The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions (Agenda) is the document where agencies outline their priorities. It normally appears in the *Federal Register* each fall and, minus the regulatory plan component, each spring. However, the publication of the Unified Agenda had become erratic in recent years, as its publication has suffered delays in its traditional April and October schedule.⁴⁵⁵ This has been largely corrected under Trump, but the annual report to Congress on regulatory costs and benefits remains chronically late. Election campaign considerations can cause agencies to abstain from rulemaking or to report fewer rules.⁴⁵⁶ And reporting priorities by administrations can change the Agenda's content.

The Trump administration released the fall 2019 edition of the twice-yearly Agenda in November 2019. Usually the Agenda appears with little fanfare and the 2019 edition was no exception. However, 2017 and 2018 saw the beginning of the one-in, two-out directive for federal agency rulemaking, by way of Trump's Executive Order 13771 "Reducing Regulation and Controlling Regulatory Costs." The normally unremarkable Agenda release was accompanied by White House statements touting progress on meeting goals for regulatory streamlining and media events complete with red tape props⁴⁵⁷ and, in 2017, with a *Wall Street Journal* column by then-Office of Management and Budget Office of Information and Regulatory Affairs Administrator Neomi Rao.⁴⁵⁸

Along with those affecting the private sector, many rules in the Unified Agenda concern the operations of state and local governments

and the federal government itself. In normal circumstances, the Agenda gives regulated entities and researchers a sense of the flow in the regulatory pipeline. It details rules recently completed, plus those anticipated or prioritized in the upcoming 12 months by federal departments, agencies, and commissions (68 in the newest edition). As a compilation of agency-reported federal regulatory actions at several stages, one might regard the Agenda as a cross-sectional snapshot of the following actions moving through the regulatory pipeline:

- Prerule actions;
- Proposed and final rules;
- Actions completed during the previous six months; and
- Anticipated longer-term rulemakings beyond 12 months.

The rules contained in the Unified Agenda often carry over at the same stage from one year to the next, or they may reappear in subsequent editions at different stages.

Observers have long recognized the fluid, inconsistent nature of the Agenda's contents. For example, upon release of the fall 2013 Agenda, regulatory expert Leland E. Beck remarked: "The [A]genda provides only a semi-filtered view of each agency's intentions and must be considered within its limitations." Furthermore, it "reflect[s] what the agency wants to make public, not necessarily all that they are actually considering, and some highly controversial issues may be withheld."⁴⁵⁹ Rules and content fluctuate given administration priorities. During the Obama administration, for example, spring and fall guidelines in 2012 from the OMB's

Healthy skepticism is justified regarding the counts in the Unified Agenda, given the lack of clarity regarding its content and strategic rule timing by administrations.

then-director of the Office of Information and Regulatory Affairs, Cass Sunstein, altered reporting directives to agencies:

In recent years, a large number of Unified Agenda entries have been for regulatory actions for which no real activity is expected within the coming year. Many of these entries are listed as “Long-Term.” Please consider terminating the listing of such entries until some action is likely to occur.⁴⁶⁰

When subsequent OIRA Administrator Howard Shelanski issued a similar memorandum on August 7, 2013, “please consider terminating” became the more direct “please remove.”⁴⁶¹ The drop at that time is apparent in Figure 18. Susan E. Dudley of the George Washington University Regulatory Studies Center noted that such changes might be beneficial, but advised “to the extent that reclassifying actions reduces the public’s ability to understand upcoming regulatory activity, the revisions could reduce transparency and accountability.”⁴⁶²

Policy reversed again in the Trump administration. In 2017, both then-acting OIRA Director Dominic Mancini and former administrator Rao instructed agency heads:

In recent years, a large number of Unified Agenda entries have reflected regulatory actions for which no substantial activity was expected within the coming year. Many of these entries are listed as “Long-Term.” We have retained the ability to list these items in the Agenda, and see merit in their continued inclusion, particularly in some instances of notable rulemakings for which no action is planned in the coming year. Please, however, consider whether the listing of such entries still benefits readers.⁴⁶³

There are many respects in which rule reporting can be short-circuited and costs obscured. The Agenda is no different. Agen-

cies are not required to limit their regulatory activity to what they publish in the Unified Agenda. The *Federal Register* has noted:

The Regulatory Plan and the Unified Agenda do not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.⁴⁶⁴

However, this has changed under the Trump administration. As former OIRA Administrator Rao noted:

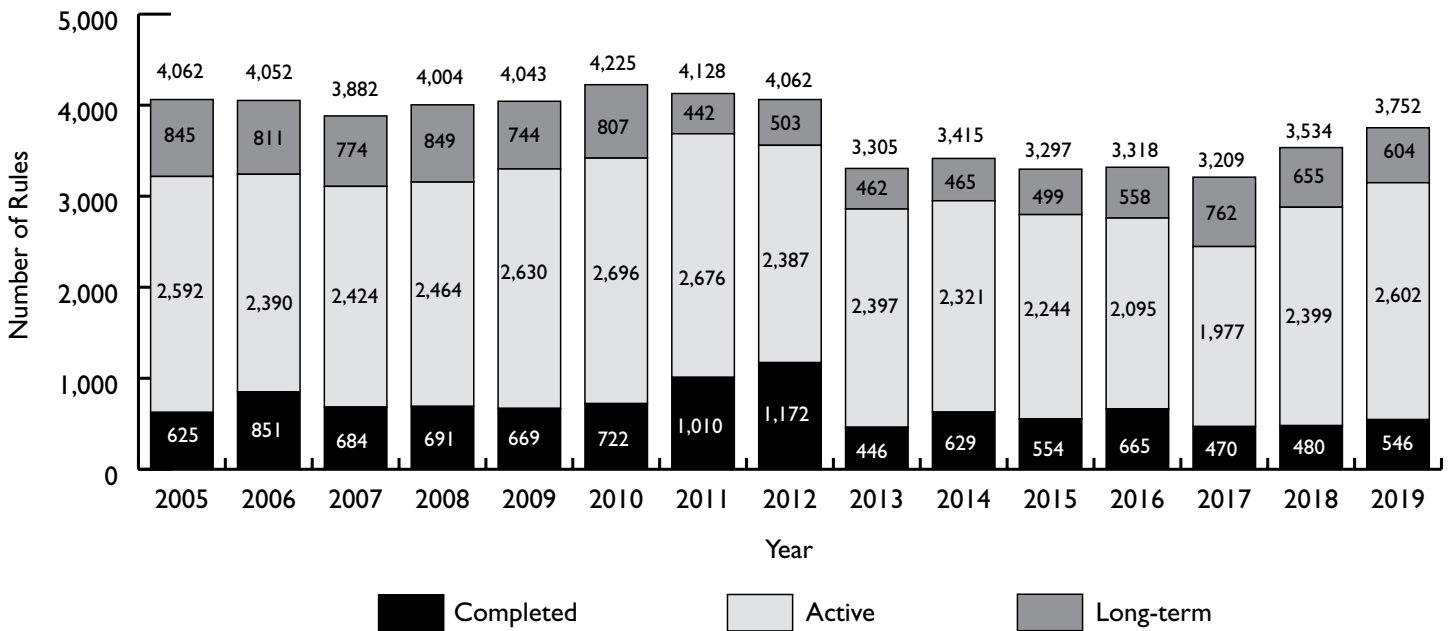
Agencies must make every effort to include actions they plan to pursue, because if an item is not on the Agenda, under Executive Order 13771, an agency cannot move forward unless it obtains a waiver or the action is required by law. A clear and accurate Agenda helps avoid unfair surprise and achieves greater predictability of upcoming actions.⁴⁶⁵

Healthy skepticism is justified regarding the counts in the Unified Agenda, given the lack of clarity regarding its content and strategic rule timing by administrations. But like the *Federal Register*, the Agenda is one of the few limited and imperfect tools we have, and so we need to use it; one of the goals of reform should be improving its relevance and the disclosure it provides.

3,752 Rules in the Fall 2019 Unified Agenda Pipeline; 689 Deemed Deregulatory, 324 Regulatory

The fall 2019 Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions finds 68 federal agencies, departments, and commissions recognizing 3,752 regulations in the active (prerule, proposed, and final), just-completed, and long-term

Figure 18. Total Agency Rules in the Fall Unified Agenda Pipeline, 2005–2019



Source: Compiled by the author from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, fall edition, consecutive years, and database at <http://reginfo.gov>.

“Active” rules consist of rules at the prerule, proposed, and final stages.

stages, many of which have been in the pipeline for some time.⁴⁶⁶ This is a 6 percent increase from 3,534 in 2018. There had been 3,209 in 2017, a time when 1,579 Obama-era planned regulatory actions and rules had been withdrawn or delayed during the first year of the Trump administration.

Trump’s overall count of rules in the Unified Agenda pipeline is the highest since 2012, under Obama. However, note that 689 of 2019’s rules in the pipeline are deemed “deregulatory” for purposes of Executive Order 13771.

Figure 18 illustrates how, apart from 2007, the overall Unified Agenda pipeline (active, completed, long-term) exceeded 4,000 rules each fall through 2012. Counts had been even higher in the 1990s, when an all-time-high count of 5,119 rules occurred in the fall 1994 Agenda. The sharp 19 percent drop under Obama from 4,062 rules in 2012 to 3,305 in 2013 in part reflects election year and management directive factors noted earlier. (For a partially complete his-

tory of the numbers of rules in the Unified Agenda since 1983, see Appendix: Historical Tables, Part E.)

Rule counts remain in the thousands, but many of those are routine safety directives from agencies like the Federal Aviation Administration and Coast Guard rather than new initiatives. Such procedures might deserve a rethinking, but they are not generally what people most distress over when it comes to the federal bureaucracy. The total pipeline count of 3,752 rules depicted in Figure 18 is broken out in Table 6 by issuing agency, commission, or department. It shows numbers of rules at the active, completed, and long-term stages.⁴⁶⁷

Perhaps most important for assessing Trump’s one-in, two-out regulatory campaign is the question of which agencies are responsible for the 689 of 3,752 rules that are deemed “deregulatory” (see Table 5). For the total numbers of rules by department and agency from previous year-end editions

Table 6. Unified Agenda Entries by Department and Agency (Fall 2019)

	Total Rules	Unified Agenda			Deregulatory Actions		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	185	107	49	29	24	10	17
Dept. of Commerce	294	218	49	27	61	16	10
Dept. of Defense	253	196	57		11	3	
Dept. of Education	32	22	10		1	2	
Dept. of Energy	134	117	4	13	20	4	2
Dept. of Health and Human Services	241	188	39	14	54	15	1
Dept. of Homeland Security	154	95	17	42	14	3	1
Dept. of Housing and Urban Development	51	42	2	7	12	1	1
Dept. of the Interior	296	244	45	7	53	15	1
Dept. of Justice	86	65	3	18	10	1	
Dept. of Labor	98	63	18	17	27	9	2
Dept. of State	77	58	10	9	5		
Dept. of Transportation	295	198	26	71	115	13	15
Dept. of the Treasury	402	271	58	73	40	3	5
Dept. of Veterans Affairs	70	49	15	6	5		
Agency for International Development	13	12	1		2	1	
American Battle Monuments Commission	1	1					
Architectural and Transportation Barriers Compliance Board	1	1					
CPBSD*	2	2			1		
Commodity Futures Trading Commission	40	30	5	5			
Consumer Financial Protection Bureau	19	10	1	8			
Consumer Product Safety Commission	26	19	2	5			
Corporation for National and Community Service	8	7		1			
Council on Environmental Quality	2	2					
Court Services/Offender Supervision, D.C.	4	4					
Environmental Protection Agency	221	145	23	53	43	7	6
Equal Employment Opportunity Commission	10	10					
Farm Credit Administration	16	14	1	1			
Federal Acquisition Regulation	60	54	6		7	1	
Federal Communications Commission	93		8	85			
Federal Deposit Insurance Corporation	42	22	15	5			
Federal Energy Regulatory Commission	19		8	11			
Federal Housing Finance Agency	12	8	2	2			
Federal Maritime Commission	2	2					
Federal Mediation and Conciliation Service	2	1	1				
Federal Mine Safety and Health Review Commission	4	2		2			

	Total Rules	Unified Agenda			Deregulatory Actions		
		Active	Completed	Long Term	Active	Completed	Long Term
Federal Reserve System	48	21	12	15			
Federal Trade Commission	19	16	3				
General Services Administration	27	21	6		1		
Institute of Museum and Library Services	4	2	2				
National Aeronautics and Space Administration	8	6	2			1	
National Archives and Records Administration	7	7					
National Credit Union Administration	20	18	1	1			
National Endowment for the Arts	6	5		1			
National Endowment for the Humanities	7	6	1				
National Indian Gaming Commission	6	3		3			
National Labor Relations Board	6	6					
National Mediation Board	2		1	1			
National Transportation Safety Board	6	5		1			
Nuclear Regulatory Commission	56	29	6	21			
Office of Government Ethics	11	10	1				
Office of Management and Budget	9	7	2		2		
Office of Personnel Management	37	33	3	1	1	1	
Peace Corps	5	5					
Pension Benefit Guaranty Corporation	14	13	1				
Postal Regulatory Commission	5		4	1			
Presidio Trust	2	2					
Privacy and Civil Liberties Oversight Board	4	1	3				
Railroad Retirement Board	7		1	6			
Securities and Exchange Commission	101	48	16	37			
Small Business Administration	40	38		2	13		
Social Security Administration	15	13	2				
Surface Transportation Board	9	3	3	3			
U.S. Agency for Global Media	3	3					
U.S. Chemical Safety and Hazard Investigation Board	1	1					
U.S. Commission on Civil Rights	1	1					
U.S. International Development Finance Corporation	1		1				
TOTAL	3,752	2,602	546	604	522	106	61

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, and from the online edition at <http://www.reginfo.gov>. With Executive Order 13771 Deregulatory Component

* Committee for Purchase from People Who Are Blind or Severely Disabled.

of the Unified Agenda since 2001, see Appendix: Historical Tables, Part F.

Active rules. Since 2005, active rule counts in the Agenda consistently remained well above 2,000, until they fell to 1,977 under Trump in 2017, even with 448 at that time deemed deregulatory. Active rules rose to 2,399 in 2018 (with 514 deemed deregulatory) and to 2,602 in 2019 (522 deregulatory) (see Figure 18). The proportion of active rulemaking that is explicitly deregulatory appears to be on the decline in these raw numbers.

Completed rules. Completed rules are “actions or reviews the agency has completed or withdrawn since publishing its last Agenda.” Note that although the number of rules in the completed category in fall Agendas (spring Agendas are not shown in Figure 18) rose steadily and rapidly under Obama—from 669 in 2009 to 1,172 in 2012, a 75.2 percent increase—they, like the overall count, dropped precipitously in 2013. This category stood at 470 and 480 in Trump’s fall 2017 and 2018 Agendas, respectively, before rising to 546 in 2019. These completed rules were well below Obama’s past three years’ counts, especially given that of Trump’s completed rules, a few dozen each year have been deregulatory (62 in 2017, 94 in 2018, and 106 in 2019).

Long-term rules. Announced long-term rules in the pipeline dropped markedly from 807 to 442 between 2010 and 2011 (see Figure 18). In the 2017 Agenda, these rules stood at 762, a jump from 558 in 2016, which may have reflected in part the directives by Mancini and Rao to include these rules. Thirty of them were deregulatory. In 2018, long-term rules dropped to 655, with 63 of them deemed deregulatory. In 2019 these dropped yet again, to 604, with 61 deemed deregulatory. After covering economically significant rules in the Agenda, we will revisit the deregulatory component of the fall Agenda and its implications for future regulatory reductions.

Top Five Rulemaking Departments and Agencies

A relative handful of executive branch agencies each year account for a large number of the rules in the pipeline. Without distinguishing between regulatory and deregulatory, the seven departments and agencies listed in Table 7—the Departments of Commerce, Defense, Health and Human Services, the Interior, Transportation, and the Treasury along with the Environmental Protection Agency—were the most active rule-makers. These top seven, with 2,002 rules among them, account for 53 percent of the 3,752 rules in the Unified Agenda pipeline.

Table 7 also depicts the top seven independent agencies in the Unified Agenda pipeline by rule count. These are the Securities and Exchange Commission, Federal Communications Commission, the multi-agency Federal Acquisition Regulation system, Nuclear Regulatory Commission, Federal Reserve System, Federal Deposit Insurance Corporation, Commodity Futures Trading Commission, and the Small Business Administration (the latter two tied for seventh).⁴⁶⁸ Their total 358 rules account for 10 percent of the 3,752 rules in the Agenda. Combined, the top executive and independent agency components make up 63 percent of the total. However, the difference between this year and prior years is that some entries are now explicitly deemed deregulatory. Therefore, it is worth noting the percentage of actions at these bodies that are deregulatory for Executive Order 13771 purposes, which Table 6 isolates.

192 “Economically Significant” Rules in the Unified Agenda; 33 of them Deemed Deregulatory; 67 Regulatory

A subset of the Unified Agenda’s 3,752 rules is classified as economically significant, which broadly means that agencies estimate

Table 7. Top Rule-Producing Executive and Independent Agencies
(From Fall 2019 Unified Agenda, total of active, completed, and long-term rules)

Executive Agency	Number of Rules
1. Department of the Treasury	402
2. Department of the Interior	296
3. Department of Transportation	295
4. Department of Commerce	294
5. Department of Defense	253
6. Department of Health and Human Services	241
7. Environmental Protection Agency	221
TOTAL	2002
% of Total Agenda Pipeline of 3,752	53

Independent Agency	Number of Rules
1. Securities and Exchange Commission	101
2. Federal Communications Commission	93
3. Federal Acquisition Regulation	60
4. Nuclear Regulatory Commission	56
5. Federal Reserve System	48
6. Federal Deposit Insurance Corporation	42
7. Commodity Futures Trading Commission	40
7. Small Business Administration	40
TOTAL	358
% of Total Agenda Pipeline of 3,752	10

Top 7 Executives plus Independents	2,360
% of Total Agenda Pipeline	63

Source: Compiled by the author from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, Fall edition, and database at <http://www.reginfo.gov>.

“Active” rules consist of rules at the prerule, proposed, and final stages.

yearly economic effects of at least \$100 million. Those effects generally reflect increased costs, although it is certainly the case that sometimes an economically significant rule is intended to reduce costs, particularly so in the wake of Executive Order 13771. As Table 8 shows, 192 economically significant rules from 21 departments and agencies appear at the active (prerule, proposed rule, and final rule), completed, and long-term stages of the pipeline. This count is up from 140 in 2017 and 174 in 2018 (as seen in Figure 19).⁴⁶⁹

Figure 19 depicts 2019’s 192 economically significant rules alongside those of the

previous decade and a half and shows how the of number of economically significant rules in the annual fall pipeline became considerably higher under President Barack Obama. President George W. Bush started an uptick. Obama continued it, increasing the flow of economically significant rules at the completed and active stages and finishing 2016 with 193. Trump brought the count down by 27 percent in his first fall Agenda, the effect of which was magnified given that 30 of the 140 then were deregulatory. Among the 192 in the fall 2019 Agenda, 33 were classified deregulatory, and 67 regulatory. How this ratio does or

Table 8. 192 Economically Significant Rules in the Fall Unified Agenda Pipeline Expected to Have \$100 Million Annual Economic Impact, 33 Deemed Deregulatory, Fall 2019

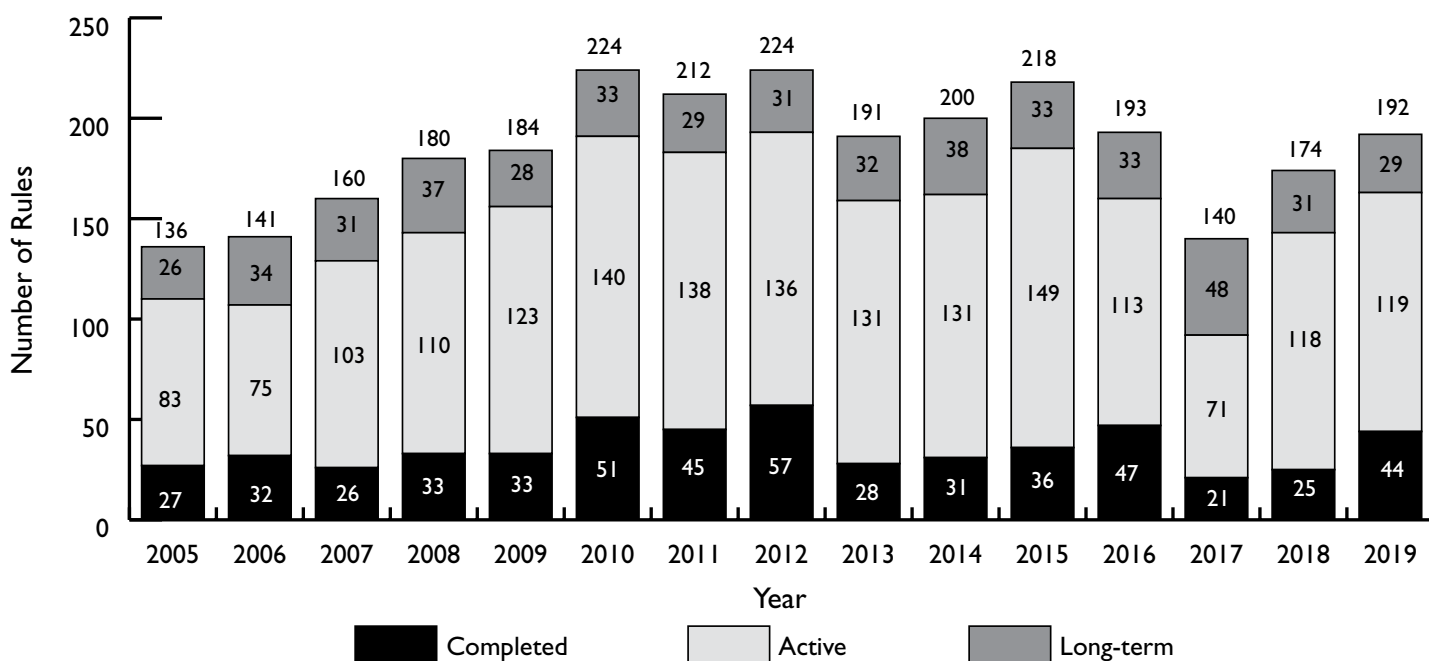
	Rules	Unified Agenda			Deregulatory Actions*		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	21	12	8	1	1		
Dept. of Commerce	1	1					
Dept. of Education	7	3	4			2	
Dept. of Energy	8	4		4			
Dept. of Health and Human Services	55	36	14	5	2	3	1
Dept. of Homeland Security	15	9	2	4	1		
Dept. of Housing and Urban Development	2	2					
Dept. of the Interior	4	2	2			1	
Dept. of Labor	14	6	4	4	4	3	
Dept. of Transportation	11	6	1	4	3	1	
Dept. of the Treasury	24	19	4	1	4		
Dept. of Veterans Affairs	6	3	2	1			
Commodity Futures Trading Commission	1	1					
Consumer Product Safety Commission	2	2					
Environmental Protection Agency	10	6	2	2	4	1	1
Federal Acquisition Regulation	1	1			1		
Federal Communications Commission	2			2			
General Services Administration	1	1					
National Indian Gaming Commission	3	3					
Nuclear Regulatory Commission	3	1	1	1			
Social Security Administration	1	1					
TOTAL	192	119	44	29	20	11	2

Source: Compiled from “The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, and from the online edition at <http://www.reginfo.gov>.

does not square with the two-for-one program is covered in the section “Warning Signs” and is illustrated in Table 9. (The full list of the 192 economically significant rules in the 2018 Agenda pipeline is available in Appendix: Historical Tables, Part G, which flags the 33 regulatory and 67 deregulatory entries.)

Figure 19 also breaks down economically significant rules into completed, active, and long-term categories. Among the 192 economically significant rules in the fall 2019 edition, 119 of them stand at the active phase, about even with 2018 but an increase from 71 in the fall 2017 edition. While these levels are back on par with the final

Figure 19. 192 Economically Significant Rules in the Unified Agenda Pipeline, 2005–2019



Source: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, fall edition, various years.

Obama Agenda, 20 in the active category were deemed deregulatory in both 2019 and 2018. Barack Obama’s eight-year average of active rules across the fall Agendas was 133; George W. Bush’s eight-year average was 87. Trump’s average is 64, but that includes deregulatory measures.

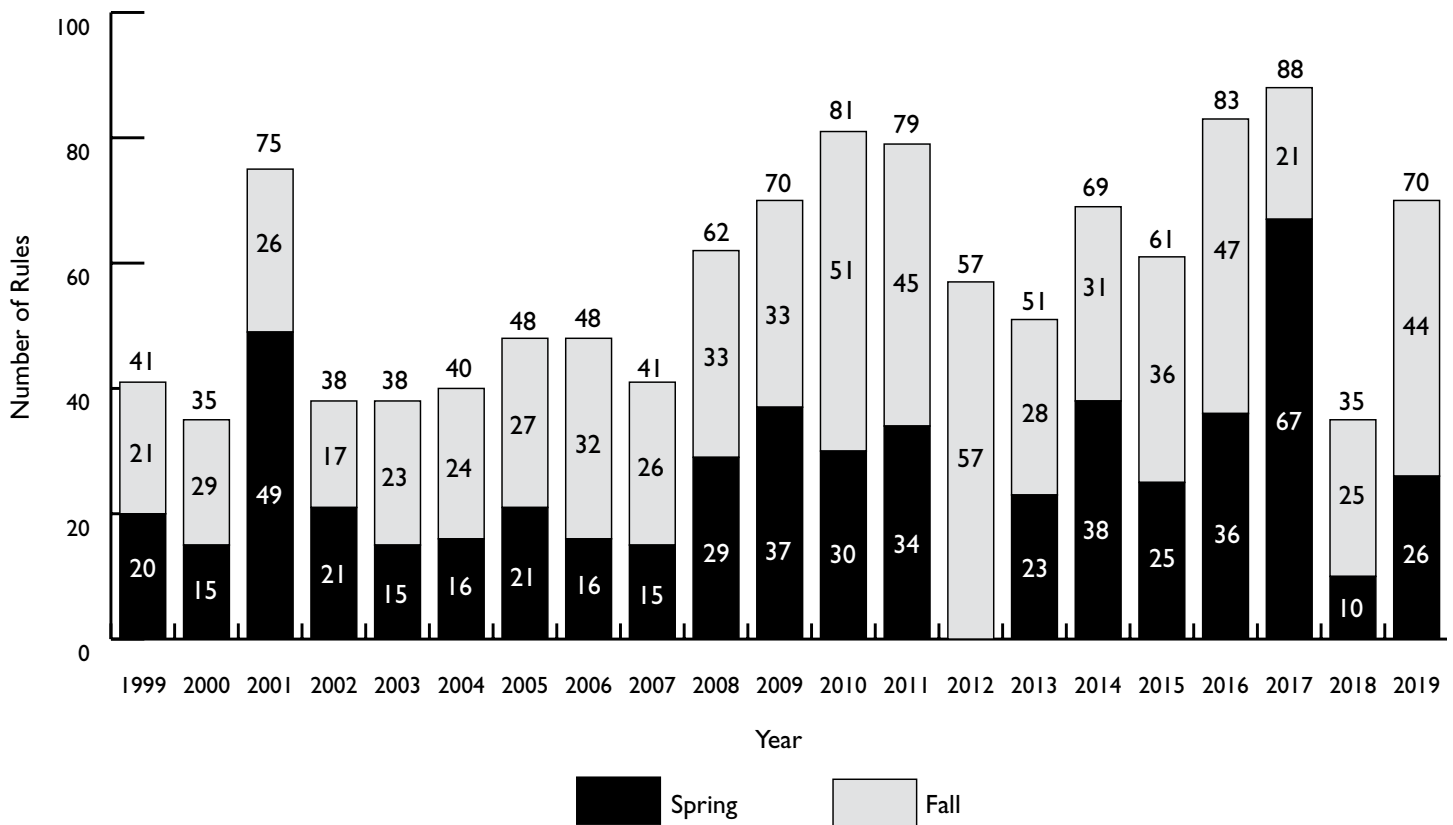
As for economically significant rules at the completed stage in the fall Agendas, President Obama’s count was consistently higher than President George W. Bush’s, even accounting for an Obama midterm election drop between 2011 and 2012. Completed rules in the fall Agenda peaked at 57 in 2012, stood at 47 in 2016, and dropped by more than half, to 21, under Trump in 2017. In the fall of 2018, the Trump administration reported 25 completed economically significant rules, and that jumped to 44 in 2019. However, 11 of those are deemed deregulatory.

For a fuller picture of completed rules in any given year, one must incorporate the completed rules from the spring Agendas. Figure 20 isolates the totals of completed economically significant rules since 1996 from both

the spring and the fall Agendas for closer analysis of yearly trends in this category.⁴⁷⁰

As Figure 20 shows, completed economically significant rules totaled 35 in the combined fall and spring 2018 Agendas under Trump, and rose to 70 in 2019. In 2017, Trump issued more completed economically significant rules than either Bush or Obama in any year. This may have been partly due to the fact that the Administrative Procedure Act requires writing a new rule to get rid of an old one. So when agencies are directed to eliminate two for one, that can make it appear as if more “rules” are being issued. In 2018, 16 of the 35 completed rules were explicitly deemed deregulatory for Executive Order 13771 purposes. In 2019, 18 of 70 are designated deregulatory. If one were to remove the deregulatory rules from Trump’s tallies, a substantial rollback in economically significant rulemaking is evident compared to predecessors’ output. Of course, other presidents have issued deregulatory measures; but they did not make the reduction agenda so explicit or ease the tracking of the relevant metrics as the Trump administration did

Figure 20. Annual Completed Economically Significant Rules in the Unified Agenda, 1999–2019



Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, spring and fall editions, various years.

with the new Executive Order 13771 designations in the OIRA database.

Apart from 2001, the level of completed economically significant rules from 1996 forward was notably lower during the late 1990s and early 2000s. Bush’s total number of completed economically significant rules was 390, for an average of 49 per year. Obama’s total was 551, an average of 69 per year. Some agency “midnight regulations” from the prior administration may be reflected in the totals for a first-year president, but this report is primarily concerned with calendar year comparisons. Trump’s average at the moment is 64 (on a total of 193), but again, some rules are more explicitly deregulatory.

As noted, each of the 192 economically significant rules scattered among the 3,752 rules in the Agenda is estimated to have annual impacts of at least \$100 million. Had

this been any other year, those rules might be expected to eventually impose annual costs of at least \$19 billion (loosely, 192 rules multiplied by the \$100 million economically significant threshold). Some rules may decrease costs, which would offset this total. Whatever the elusive actual total cost, these costs are cumulative, recurring annual costs to be added to previous years’ costs. And, as noted, agencies are not limited in their activities to what they list in the Agenda.

Heightened attention to economically significant rules should not tempt policy makers and analysts to ignore the remaining bulk of rules in the annual pipeline. In the fall 2019 pipeline, 3,560 federal rules were not designated as economically significant (3,752 total rules minus the 192 economically significant ones). However, a rule estimated to cost below the \$100 million economically significant threshold can still impose substantial costs on the regulated entities. To

this we must add the phenomenon of guidance documents with regulatory impact, which avoid congressional oversight and the Administrative Procedure Act's notice-and-comment requirement.

Notable Regulations by Agency

While many of the things that regulations purport to do are worthy and needed pursuits, that does not mean the federal administrative bureaucracy offers the best ways to achieve them, compared to state and local oversight along with insurance, liability, and other private sector options. In recent Unified Agenda editions and in other venues, federal agencies have noted the regulatory initiatives listed below, among others pending or recently completed. As noted, the full list of the 192 economically significant rules in the fall 2019 Agenda pipeline appears in Appendix: Historical Tables, Part G.

Department of Agriculture

- National Bioengineered Food Disclosure Standard
- Revision of nutrition facts panels for meat and poultry products and updating certain reference amounts customarily consumed
- Mandatory country-of-origin labeling of beef, fish, lamb, peanuts, and pork
- National school lunch and school breakfast programs: nutrition standards for all foods sold in schools and certification of compliance with meal requirements for the national school lunch program (as required by the Healthy, Hunger-Free Kids Act of 2010)⁴⁷¹
- Standards for grades of canned baked beans⁴⁷²
- Rural Energy for America Program
- Rural broadband access loans and loan guarantees
- Mandatory inspection of catfish and catfish products
- Multifamily housing reinvention

- Inspection regulations for eggs and egg products
- Performance standards for ready-to-eat processed meat and poultry products
- Nutrition labeling of single-ingredient and ground or chopped meat and poultry products
- Modernization of poultry slaughter inspection
- Regulations concerning importation of unmanufactured wood articles (solid-wood packing material)

Department of Commerce

- Taking of marine mammals incidental to conducting geological and geophysical exploration of mineral and energy resources on the outer continental shelf
- Right-whale ship strike reduction

Department of Education

- Gainful Employment rule to prepare students for employment in a recognized occupation
- Proposed Priorities, Requirements, Definitions, and Selection Criteria: Striving Readers Comprehensive Literacy Program
- Income-driven “pay as you earn” program
- Race to the Top

Department of Energy

- Energy efficiency and conservation standards for the following: ceiling fans; manufactured housing; automatic commercial ice makers; wine chillers; battery chargers and power supplies; televisions; residential dehumidifiers; computer servers and computers; walk-in coolers and freezers; residential furnace fans, boilers, central air conditioners, heat pumps, dishwashers, conventional cooking products, non-weatherized gas furnaces; mobile home furnaces and gas furnaces; electric distribution transformers; commercial refrigeration units, heat

While many of the things that regulations purport to do are worthy and needed pursuits, that does not mean the federal administrative bureaucracy offers the best ways to achieve them.

- pumps, and water heating equipment; clothes washers and dryers; room air conditioners; portable air conditioners; pool heaters and direct heating equipment; fluorescent and incandescent lamps; metal halide lamp fixtures; small electric motors; and refrigerated bottled or canned beverage vending machines
- Incentive program for manufacturing advanced technology vehicles
 - Fossil fuel-generated energy consumption reduction for new federal buildings and major renovations of federal buildings

Department of Health and Human Services

- Tobacco product standard for characterizing flavors in cigars
- Sunscreen drug products for over-the-counter human use guidance
- Nutrient content claims, definition of the term “healthy”
- General and plastic surgery devices: sunlamp products
- Rules deeming electronic cigarettes and components subject to the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act, and being subjected to warning labels and sale restrictions⁴⁷³
- Requirements for Tobacco Product Manufacturing Practice
- Required warnings for cigarette packages and advertisements
- Food labeling: serving sizes of foods that can reasonably be consumed at one eating occasion; dual-column labeling; modification of certain reference amounts customarily consumed
- Nutrition labeling for food sold in vending machines and for restaurant menu items
- Food labeling: trans fatty acids in nutrition labeling, nutrient content claims, and health claims
- Rule on safety and effectiveness of consumer antibacterial soaps (“Topical Antimicrobial Drug Products for Over-

the-Counter Human Use”);⁴⁷⁴ consumer antiseptics

- General and plastic surgery devices: sunlamp products
- Federal policy for the protection of human subjects
- Criteria for determining whether a drug is considered usually self-administered
- Substances prohibited from use in animal food or feed; registration of food and animal feed facilities
- Updated standards for labeling of pet food
- Sanitary transportation of human and animal food
- Focused mitigation strategies to protect food against intentional adulteration
- Produce safety regulation
- Centers for Medicare and Medicaid Services standards for long-term nursing care facilities and home health service providers⁴⁷⁵
- Requirements for long-term care facilities: hospice services
- Mammography quality standards
- Fire safety and sprinkler requirements for long-term care facilities
- Pediatric dosing for various over-the-counter cough, cold, and allergy products
- Rule on comprehensive care for joint replacement
- Medication Assisted Treatment for Opioid Use Disorders Reporting Requirements
- Patient Protection and Affordable Care Act; standards related to essential health benefits, actuarial value, and accreditation; and Medicaid, exchanges, and children’s health insurance programs: eligibility, appeals, and other provisions
- Price regulation: prospective payment system rates for home health, acute, and long-term hospital care; skilled nursing facilities; inpatient rehabilitation facilities
- Revisions to promote patients’ electronic access to health care information and improve interoperability for Medicare- and Medicaid-participating providers and suppliers

- Good manufacturing practice in manufacturing, packing, or holding dietary ingredients and dietary supplements
- Good manufacturing practice regulations for finished pharmaceuticals
- Prior authorization process for certain durable medical equipment, prosthetic, orthotics, and supplies
- Bar code label requirements for human drug products and blood

Department of Homeland Security

- Computer Assisted Passenger Prescreening System, providing government access to passenger reservation information
- Passenger screening using advanced body imaging technology
- Importer security filing and additional carrier requirements
- Air cargo screening and inspection of towing vessels
- Minimum standards for driver's licenses and ID cards acceptable to federal agencies
- United States Visitor and Immigrant Status Indicator Technology program, which is authorized to collect biometric data from travelers and to expand to the 50 most highly trafficked land border ports

Department of Housing and Urban Development

- Revision of manufactured home construction and safety standards regarding location of smoke alarms
- Instituting smoke-free public housing⁴⁷⁶
- Regulation of Fannie Mae and Freddie Mac on housing goals
- Regulations within the Real Estate Settlement Procedures Act pertaining to mortgages and closing costs
- Establishing a more effective Fair Market Rent system; using Small Area Fair Market Rents in Housing Choice Voucher Program (modification of income and rent determinations in public and assisted housing)

Department of the Interior

- Revised requirements for well plugging and platform decommissioning
- Increased safety measures for oil and gas operations and exploratory drilling on the Arctic outer continental shelf⁴⁷⁷
- Blowout prevention for offshore oil and gas operations

Department of Justice

- Nondiscrimination on the basis of disability: accessibility of Web information and services of state and local governments
- National standards to prevent, detect, and respond to prison rape
- Retail sales of scheduled listed chemical products

Department of Labor

- Conflict of interest rule in financial investment advice
- Overtime rule: "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees"⁴⁷⁸
- Establishing a minimum wage for contractors (Executive Order 13658)
- Establishing paid sick leave for businesses that contract with the federal government (in response to Executive Order 13706)⁴⁷⁹
- Walking working surfaces and personal fall protection systems (slips, trips, and fall prevention)⁴⁸⁰
- Hearing conservation program for construction workers
- Rules regarding confined spaces in construction: preventing suffocation and explosions
- Reinforced concrete in construction
- Preventing back-over injuries and fatalities
- Cranes and derricks
- Protective equipment in electric power transmission and distribution

- Refuge alternatives for underground coal mines
- Combustible dust
- Injury and illness prevention program
- Application of the Fair Labor Standards Act to domestic service
- Improved fee disclosure for pension plans
- Occupational exposure to styrene crystalline silica,⁴⁸¹ tuberculosis, and beryllium
- Implementation of the health care access, portability, and renewability provisions of the Health Insurance Portability and Accountability Act of 1996
- Group health plans and health insurance issuers relating to coverage of preventive services under the Patient Protection and Affordable Care Act
- Health care standards for mothers and newborns
- Process Safety Management and Prevention of Major Chemical Accidents
- Fuel efficiency standards for medium- and heavy-duty vehicles and work trucks
- Requirement for installation of seat belts on motor coaches; rear center lap and shoulder belt requirement; seat belt reminder system
- Side impact performance requirements for child restraint systems
- Carrier safety fitness determination
- Retroreflective tape for single-unit trucks
- Hours of service, rest, and sleep for truck drivers; electronic logging devices and hours-of-service supporting documents
- Flight crew duty limitations and rest requirements
- Standard for rearview mirrors
- Commercial driver's license drug and alcohol clearinghouse
- Automotive regulations for car lighting, door retention, brake hoses, daytime running-light glare, and side-impact protection
- Federal Railroad Administration passenger equipment safety standards amendments
- Rear-impact guards and others safety strategies for single-unit trucks
- Amendments for positive train control systems
- Aging aircraft safety
- Upgrade of head restraints in vehicles
- Establishment of side-impact performance requirements for child restraint systems
- Registration and training for operators of propane tank-filling equipment
- Monitoring systems for improved tire safety and tire pressure
- Pipeline Safety: amendments to parts 192 and 195 to require valve installation and minimum rupture detection standards
- Hazardous materials: transportation of lithium batteries

Department of Transportation

- Quiet car rule; Minimum Sound Requirements for Hybrid and Electric Vehicles⁴⁸²
- Federal Aviation Administration rule on operation and certification of drones (must stay in line of sight, for example) and near critical infrastructure facilities⁴⁸³
- National Highway Traffic Safety Administration (NHTSA) proposal on vehicle-to-vehicle communications standardization⁴⁸⁴
- Federal Motor Carrier Safety Administration and NHTSA rule on speed limiters and electronic stability control systems for heavy vehicles⁴⁸⁵
- Federal Railroad Administration Train Crew Staffing rule seeking a two-engineers-on-a-train mandate⁴⁸⁶
- NHTSA rule on lighting and marking on agricultural equipment⁴⁸⁷
- Minimum training requirements for entry-level commercial motor vehicle operators and for operators and training instructors of multiple trailer combination trucks⁴⁸⁸
- Passenger car and light truck Corporate Average Fuel Economy standards (newer model years)
- Prohibition of funding of unlawful Internet gambling
- Risk-based capital guidelines; capital adequacy guidelines

Department of the Treasury

- Assessment of fees for large bank holding companies and other financial entities supervised by the Federal Reserve to fund the Financial Research Fund (which includes the Financial Stability Oversight Council)
- Registration and regulation of security-based swap dealers and major security-based swap participants
- Troubled Asset Relief Program standards for compensation and corporate governance
- Cross-border electronic transmittals of funds
- Anti-money laundering program and suspicious activity report filing requirements for investment advisers
- Greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles
- Performance standards for new residential wood heaters
- Oil and natural gas: emission standards for new and modified sources
- Model trading rules for greenhouse gas emissions from electric utility generating plants constructed before January 7, 2014
- Financial Responsibility Requirements under Comprehensive Environmental Response, Compensation, and Liability Act Section 108(b) for classes of facilities in the hard-rock mining industry
- Clean air visibility, mercury, and ozone implementation rules

Architectural and Transportation Barriers Compliance Board

- Americans with Disabilities Act accessibility guidelines for passenger vessels
- Information and communication technology standards and guidelines

Consumer Financial Protection Bureau

- Proposed rule regulating business practices on payday and vehicle title loans⁴⁸⁹

Consumer Product Safety Commission

- Regulatory options for table saws
- Flammability standards for upholstered furniture and bedclothes
- Testing, certification, and labeling of certain consumer products
- Banning of certain backyard playsets
- Product registration cards for products intended for children

Environmental Protection Agency

- Control of air pollution from motor vehicles: Tier 3 motor vehicle emission and fuel standards

- Effluent limitations guidelines and standards for the steam electric power generating point source category
- Revision of stormwater regulations to address discharges from developed sites
- Formaldehyde emissions standards for composite wood products
- National emission standards for hazardous air pollutants from certain reciprocating internal combustion engines and auto paints
- Review of National Ambient Air Quality Standards for lead, ozone, sulfur dioxide, particulate matter, and nitrogen dioxide
- Revision of underground storage tank regulations: revisions to existing requirements and new requirements for secondary containment and operator training
- Petroleum refineries—new source performance standards
- National primary drinking water regulations for lead, copper, and radon
- Modernization of the accidental release prevention regulations under the Clean Air Act
- Trichloroethylene; rulemaking under Toxic Substances Control Act Section 6(a); vapor degreasing
- Reassessment of use authorizations for polychlorinated biphenyls (PCBs) in small capacitors in fluorescent light ballasts in schools and day care centers
- Rulemakings regarding lead-based paint and the Lead Renovation, Repair, and

- Painting Program for public and commercial buildings
- National drinking water regulations covering groundwater and surface water
- Renewable fuel standards
- Standards for cooling water intake structures
- Standards of performance for municipal solid waste landfills
- Combined rulemaking for industrial, commercial, and institutional boilers and process heaters
- Standards for management of coal combustion wastes (“coal ash”) from electric power producers
- Control of emissions from non-road spark-ignition engines, new locomotives, and new marine diesel engines

Federal Communications Commission

- Protecting the privacy of customers of broadband and other telecommunications services⁴⁹⁰
- Net neutrality Open Internet order
- Broadband for passengers aboard aircraft
- Broadband over power line systems
- Mobile personal satellite communications
- Satellite broadcasting signal carriage requirements
- Rules regarding Internet protocol-enabled devices

Federal Deposit Insurance Corporation

- Standardized approach for risk-weighted assets
- Margin and capital requirements for covered swap entities

Federal Energy Regulatory Commission

- Critical infrastructure protection reliability standards

Office of Personnel Management

- Multistate exchanges: implementations for Affordable Care Act provisions

Warning Signs: What the Unified Agenda Reveals about the Limitations of Trump’s One-In, Two-Out Campaign

Does the administrative state have anything to fear over the longer term from Trump’s deregulatory agenda? Task forces have faded out of sight, although there remains a flurry of deregulatory energy at some agencies. This is offset by the reality that many businesses do not want cuts and lobby against them.⁴⁹¹ Significant regulations completed barely met the Trump administration’s two-for-one goals in 2019, and the case of active and long-term rules contemplated in the pipeline as a whole is even more grave.

There has long been a need for greater clarity as to whether agency actions listed in the Unified Agenda, *Federal Register*, and OMB’s annual *Report to Congress* on benefits and costs are regulatory or deregulatory. Pertinent to tracking regulatory ins and outs, the simplest but perhaps most important modification has been the noted presentation in Trump’s Regulatory Plan and Unified Agenda of matters pertaining to Executive Order 13771. Rules and regulations can now be more methodically identified in the Unified Agenda as net regulatory or deregulatory.⁴⁹² Because of the change, the OIRA database now better captures those and other specifics, such as regulatory measures and identifying rules not subject to the order.

In particular, on the landing page of OIRA’s advanced search database of regulations, there now appears a search option for “Executive Order 13771 Designation.” The Agenda’s specific inclusion of deregulatory actions enables researchers and the public to readily isolate where agencies have classi-

fied rules as deregulatory or regulatory. Over time, that should enable observers to tell whether the regulatory enterprise is escalating or deescalating.⁴⁹³ Categories of rules not subject to the executive order are now classified and depicted where possible in still other categories: “fully or partially exempt,” “not subject to,” “not significant,” “other,” and “independent agency.” To get a better look at the two-for-one, it is helpful to look separately at a grid of completed, active, and long-term rule categories in the aggregate as well as split up into economically significant and other significant components. Table 9 shows the number of these rules at the completed, active, and long-term stages relative to the overall count of 3,752.

If similar practices were incorporated into the *Federal Register* and in other publicly released outlets of agency disclosure, it could make a significant difference over time. In fact, the Executive Order designation itself may be even more important than the particular cuts completed so far in the Trump administration, because the renewed scrutiny may prompt agencies to continue to report such distinctions long after the current administration leaves office. If so, failure to implement regulatory relief would become obvious over time.

As noted, instead of two-for-one in 2017, the administration boasted of achieving a one-in, 22-out ratio for managing significant regulations in 2017. That is, the administration claimed that three rules were added but 67 removed for purposes of Executive Order 13771. In 2018, the ratio for significant regulations for FY 2018 fell but remained at four-to-one (and 12-to-one when nonsignificant rollbacks are counted).

In 2019, the directive was barely met, with a 1.7-out-to-one-in ratio reported in OIRA’s “Regulatory Reform Results for Fiscal Year 2019.”⁴⁹⁴

Rules can be either regulatory or deregulatory yet not subject to Executive Order 13771. The order does not apply to nonsignificant rules, yet some nonsignificant rules

do get labeled deregulatory or regulatory. As Table 8 shows, a total of 689 rules in the fall 2019 Unified Agenda pipeline were classified as deregulatory (compared to 671 in 2018 and 540 in 2017). Meanwhile, 324 rules are classified as explicitly regulatory (higher than the 257 in 2018), for an overall ratio of 2.1-to-one in the fall pipeline as a whole (as opposed to completed). As noted, agencies are not required by law to issue only the rules they describe in the Agenda or Plan. The administration issued an important qualifier when defining Executive Order 13771 regulatory actions:

EO 13771 regulatory actions are defined as those final actions that both impose costs greater than zero and qualify as “significant” under Section 3(f) of EO 12866 (see M-17-21, Q2). Accordingly, the regulatory actions listed in this table [of regulatory cost caps] represent a subset of an agency’s total regulatory actions.⁴⁹⁵

The fall 2017 Agenda pipeline of 3,209 (see Figure 18) had contained the fewest rules seen since 1983, even without counting that edition’s 540 deregulatory entries. The new fall Agenda count of 3,752 and its 689 deregulatory give a “net” of 3,063. Of course, there is no way to readily compare what deregulatory elements may have been embedded within prior years’ Agenda counts.⁴⁹⁶ The detail shown earlier in Table 5 depicts a breakdown of 2019’s 689 deregulatory measures by issuing department or agency, and stage of completion. The Department of Commerce led deregulation in both the completed category with 16 classified as deregulatory; the Department of Transportation leads in the active component with 115.

There are plenty of warning signs. While agencies can be said to have met Trump’s two-for-one goals up to this point (if we round 2019 up a tad), a deeper look reveals agencies are planning more regulatory activity than deregulation or rollbacks in future years when constraints are lifted. Table 9’s grid of completed, active, and long-term rule

Does the administrative state have anything to fear over the longer term from Trump’s deregulatory agenda?

Table 9. Unified Agenda Entries by Executive Order 13771 Designation (Deregulatory and Regulatory) and by Rule Stage and Significance, Fall 2019

	Total # Rules	Completed			Active			Long-Term		
		Total	Economically Significant	Other Significant	Total	Economically Significant	Other Significant	Total	Economically Significant	Other Significant
All Agencies	3,752	546	44	102	2,602	119	866	604	29	187
Deregulatory	689	106	11	26	522	20	174	61	2	18
Regulatory	324	34	16	12	211	39	136	79	12	61
Fully or Partially Exempt	294	40	2	16	221	12	125	33	2	12
Not subject to, not significant	944	176	0	4	686	2	37	82	0	3
Other	892	66	10	20	688	37	327	138	10	52
Independent Agency	592	107	1	16	274	9	67	211	3	41
Totals (may not sum fully)	3,735	529	40	94	2,602	119	866	604	29	187

Source: Compiled from fall 2017 "Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions."

categories depicts economically significant” and other significant sub-components. There is time to course correct, but these categories appear to present looming hurdles to meeting future two-for-one strictures. The Unified Agenda is a planning document, and agencies plan well more regulating than deregulating, which further illustrates the limitations of executive action alone.

Furthermore, recall that Executive Order 13771, “Reducing Regulations and Controlling Regulatory Costs,” only applies to “significant regulatory actions” of executive, but not independent, agencies. Agencies can employ sub-significant rules, as well as issue guidance documents, to fly below the radar of two-for-one constraints, just as they can under the longstanding Executive Order 12866 that governs OMB review of rules. One recommended solution in that regard was expanding coverage of rules via executive order, which occurred in October 2019.⁴⁹⁷

Completed Deregulatory and Regulatory Actions in Unified Agenda

The administration’s “update” reporting has largely corresponded to what appears in the Agenda. The Unified Agenda’s completed component most closely corresponds to the highlighted “22-to-one” successes claimed by the Trump administration in its 2017 “Two-for-One Status Report and Regulatory Cost Caps,”⁴⁹⁸ its 12-to-one (four-to-one for significant actions) “Regulatory Reform Results for Fiscal Year 2018,” and the 1.7-to-one in the corresponding 2019 report.⁴⁹⁹ As long as costs are net zero—the primary prescription of the two-for-one executive order—agencies have begun to apply nonsignificant rules for “credit” toward the two-for-one goal.⁵⁰⁰ In 2017, for example, where the administration indicated 67 deregulatory actions in its Status Report, the 2017 Unified Agenda identified a similar 62 completed deregulatory actions. Part of the discrepancy is likely due to the fact that nine of Trump’s rule cuts involved agency sub-regulatory guidance documents or notices, some of which did not

appear in the Agenda. (These nine appear in bold-type in Box 2 of the 2018 edition of *Ten Thousand Commandments*, pp. 9–10.) Another reason is that some removals were achieved via the Congressional Review Act and therefore do not appear in the Agenda.

By 2018, the Congressional Review Act and rollback of Obama midnight rules were no longer factors available to boost one-in, two-out results. As Table 9 details, of the 106 completed deregulatory actions in the 2019 Agenda, 11 are in the economically significant category, and 26 are deemed other significant. As for regulatory actions, 34 completed ones appeared in the fall Agenda, with 16 of them deemed economically significant and 12 other significant (compared to just four and five, respectively, at this point in 2018). Therefore, given the past few months covered by the fall agenda, a seemingly still healthy 3.1-to-one ratio prevails overall (106 deregulatory actions divided by the 34 regulatory ones in Table 9). Granted, we do not necessarily know to what all the other, not subject to, and partially exempt categories refer—and there are thousands of them. This could be something of a red flag, since most rules get placed in these categories. These classifications, as well as agency guidance documents, need audit.

However, what really counts for Executive Order 13771 purposes are the economically significant and other significant subsets of the completed deregulatory actions. Table 8 shows only a 1.3-to-one achievement (a total of 37 significant deregulatory actions overall, compared to 28 regulatory). Taking the spring agenda’s completed actions into account to provide a full year’s lookback, a 2.2-to-one ratio loosely corresponds with the administration’s claims.

Box 4 summarizes Unified Agenda deregulatory-to-regulatory results since fall 2017 with respect to rules at the significant and economically significant levels. As noted, it is adequate under the Executive Order 13771 for nonsignificant rules to offset significant ones to meet the two-for-one goal; the governing criterion is the net-zero cost stricture How-

Agencies can employ sub-significant rules, as well as issue guidance documents, to fly below the radar of two-for-one constraints.

Box 4. Completed Deregulatory vs Regulatory Rules, and “D-to-R” Ratios:
(Combined “economically significant” + “other significant” categories)

Unified Agenda Edition	Deregulatory Entries	Regulatory Entries	Ratio (In/Out)
Fall 2017	22	13	1.7 to 1
Spring 2018	28	9	3.1 to 1
Fall 2018	35	9	3.9 to 1
Spring 2019	33	15	2.2 to 1
Fall 2019	37	28	1.3 to 1
Grand Total	155	74	2.1 to 1 to date

With respect to prospects of longer-term streamlining, it is worrying that economically significant Deregulatory rules are not offsetting the economically significant Regulatory ones.

ever, with respect to prospects of longer-term streamlining, it is worrying that economically significant Deregulatory rules are not offsetting the economically significant Regulatory ones. Increasingly, “significant” actions appear to be getting overwhelmed, such that enlisting other deregulatory but less significant measures will be needed to make the ratios work. This is still acceptable as far as the executive order’s no-net-cost mandate is concerned, but a disappointment if one’s goal is significant rollback of the administrative state.

Significant Active Deregulatory and Regulatory Actions Need Significant Attention for Two-for-One to Be Sustained

Active actions—those in the pipeline at the pre-rule, proposed, and final rule stages—comprise the rules in the production process. Table 9 shows that a total of 522 deregulatory actions in play well exceeds 211 regulatory ones. That represents a 2.5-to-one margin overall when nonsignificant rules are included. As noncompleted actions, these rules are not obligated at this point to meet the two-for-one goals, but they might be regarded a leading indicator.

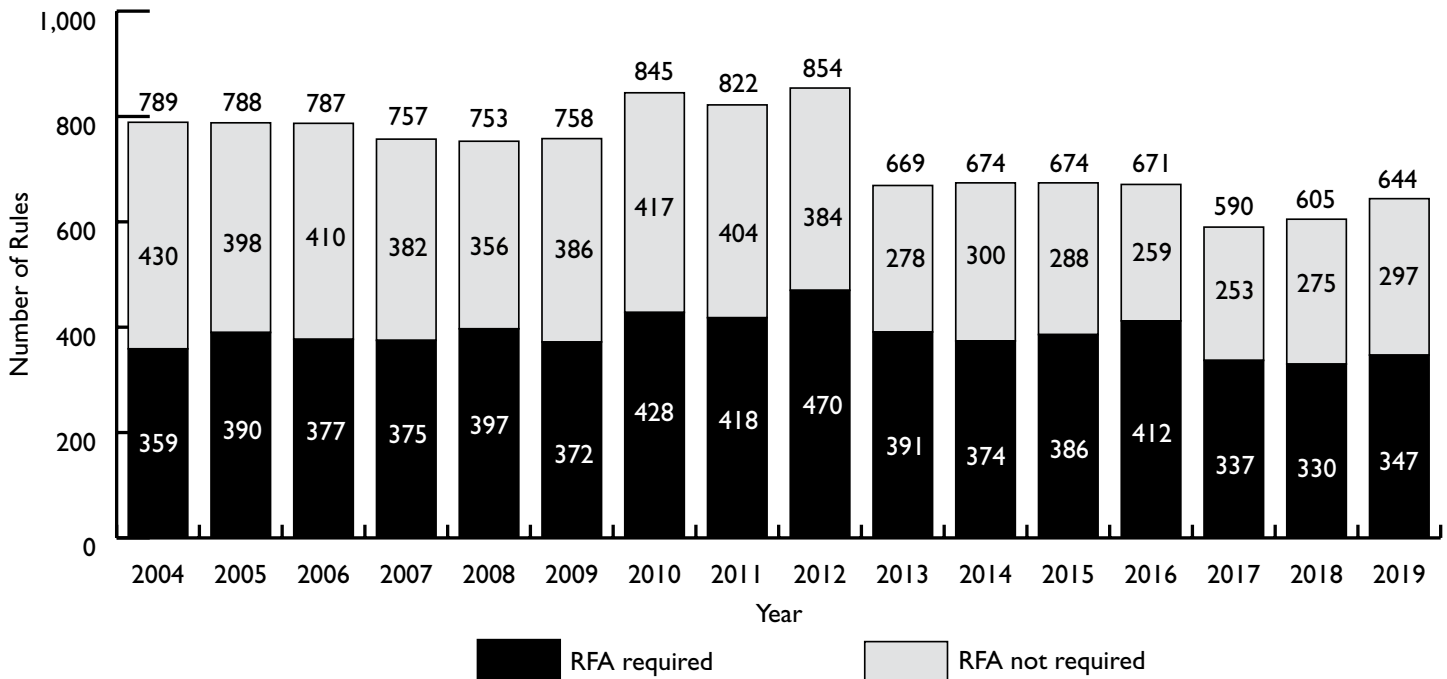
Of more concern are the costlier subsets of active rules. There are 39 economically significant regulatory actions in Table 9 (compared to 41 in 2018 and 15 in 2017), but just 20 economically significant deregulatory actions

in play (compared to 26 in 2018). This potentially puts two-for-one on a path to being not just unmet, but inverted. In the “other significant” category, 136 regulatory actions (up from 102 to previous year) are outweighed by 174 deregulatory ones (up from 156 the year before), but not by a factor of two to one. Active rules encompass both proposed and final rules, and there is time to course correct as rules in the pipeline move closer to finalization. However, the increasingly unfavorable ratios of significant active regulatory to deregulatory rules highlight the limits of unilateral executive regulatory liberalization apart from freezes or slowdowns.

Long-term Planned Regulatory Actions Greatly Outstrip Deregulatory Ones

The costlier longer-term significant rules inspire even less confidence for the ultimate success of one-in, two-out, given their high ratios in favor of regulation. Here, agencies clearly show they plan more regulating than deregulating as soon as any restraints are lifted. As Table 9 shows, 79 long-term actions are deemed regulatory and 61 are deemed deregulatory. More worrisome is that, this deep into Trump’s term, only two economically significant deregulatory actions are listed as planned by agencies. By contrast, 12 are deemed regulatory. How will those costs be offset when planned regulatory actions exceed deregulatory ones by six to one?

Figure 21. Rules Affecting Small Business, 2004–2019



Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, Fall edition, various years.

Even in the other significant category, regulatory planned actions exceed deregulatory ones by more than three to one; here there are 18 deregulatory actions planned, but 61 regulatory measures. These are warning signs because these more costly rule subsets are presumably where tomorrow’s cost savings need to come from. The “long-term” category in particular illustrates how regulatory liberalization will require congressional action, but like the debt and deficit, there is little bipartisan interest to address it.

A generous interpretation of the inversion of two-for-one at the long-term stage is that agencies focused in 2017 and 2018 on meeting the administration’s immediate short-term goals for two-for-one streamlining, and they will eventually get around to these longer-term significant rule reductions. Others might be inclined to ascribe what we observe to the publicly avowed “resistance” to the Trump administration by some career agency personnel.⁵⁰¹

Rolling back longstanding regulations requires going through the public notice-and-

comment process. It takes time, and the administrative state works to the advantage of agencies that desire to maintain vast regulatory edifices. As new editions of the Agenda appear in 2020 and beyond, the situation may be rectified, but that is optimistic. Another reason monitoring is important is agencies’ ability to substitute guidance documents for formal regulations. The 2019 executive orders on the use of guidance to make policy is warranted, particularly in the absence of congressional action on regulatory reform.

Federal Regulations Affecting Small Business

The Regulatory Flexibility Act (RFA) directs federal agencies to assess their rules’ effects on small businesses.⁵⁰² Figure 21 shows the number of rules requiring annual regulatory flexibility analysis per the RFA and other rules anticipated by agencies to affect small business, but purportedly do not rise to the level of requiring a regulatory flexibility

analysis. The number of rules acknowledged to significantly affect small business dropped substantially after 2012 during the Obama administration, in part reflecting reporting changes noted, but they dropped even more substantially under Trump, even with some rules presumably comprising rollbacks.

At the end of 2019, overall rules affecting small business stood at 644, compared to 605 in 2018 and 590 in 2017. There had been 671 in Obama’s final year. Before the 2013 drop and flat trajectory since then, the number of rules with small business impacts during the Obama administration regularly exceeded 800, a level not seen since 2003. Of those 605 rules with small-business impacts, 347 required

RFA analysis, and another 297 rules were otherwise deemed by agencies to affect small business but not require RFA analysis.⁵⁰³

Table 10 breaks out the 2019 fall Unified Agenda’s 644 rules affecting small business by department, agency, and commission. The top six—Departments of Commerce, Health and Human Services (HHS), Transportation, and the Treasury along with the Federal Communications Commission and the cross-agency Federal Acquisition Regulations—accounted for 349, or 54 percent, of the 644 rules affecting small business (HHS and Federal Acquisition Regulations were tied at 60).

Table 10. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Fall 2019

	Total Rules	Number Affecting Small Business						Total	Affecting Small Business	Top 5
		RFA Required			RFA Not Required					
		Active	Completed	L-T	Active	Completed	L-T			
Dept. of Agriculture	185	6	4	3	11	4	2	30	16.2%	
Dept. of Commerce	294	40	4	2	28	10	1	85	28.9%	85
Dept. of Defense	253	4						4	1.6%	
Dept. of Education	32					2		2	6.3%	
Dept. of Energy	134	4		2	8			14	10.4%	
Dept. of Health and Human Services	241	22	7	4	22	5		60	24.9%	60
Dept. of Homeland Security	154	11	4	5	1	1	5	27	17.5%	
Dept. of Housing and Urban Development	51				1			1	2.0%	
Dept. of the Interior	296	3	3		10		2	18	6.1%	
Dept. of Justice	86				4			4	4.7%	
Dept. of Labor	98	3	4	3	14	4	3	31	31.6%	
Dept. of State	77				22	2	7	31	40.3%	
Dept. of Transportation	295	6	1	8	11	1	12	39	13.2%	39
Dept. of the Treasury	402	3			26	3	4	36	9.0%	36
Dept. of Veterans Affairs	70	1			1			2	2.9%	
Agency for International Development	13							0	0.0%	
American Battle Monuments Commission	1							0	0.0%	
Architectural and Transportation Barriers Compliance Board	1							0	0.0%	

	Total Rules	Number Affecting Small Business						Total	Affecting Small Business	Top 5
		RFA Required			RFA Not Required					
		Active	Completed	L-T	Active	Completed	L-T			
CPBSD*	2							0	0.0%	
Commodity Futures Trading Commission	40			1				1	2.5%	
Consumer Financial Protection Bureau	19	2			6		4	12	63.2%	
Consumer Product Safety Commission	26	3		2				5	19.2%	
Corp. for National and Community Service	8							0	0.0%	
Council on Environmental Quality	2							0	0.0%	
Court Sevices/Offender Supervision, D.C.	4							0	0.0%	
Environmental Protection Agency	221	1		2	3			6	2.7%	
Equal Employment Opportunity Commission	10				5			5	50.0%	
Farm Credit Administration	16							0	0.0%	
Federal Acquisition Regulation	60	46	5		8	1		60	100.0%	60
Federal Communications Commission	93		7	60			2	69	74.2%	69
Federal Deposit Insurance Corporation	42				2	2		4	9.5%	
Federal Energy Regulatory Commission	19							0	0.0%	
Federal Housing Finance Agency	12							0	0.0%	
Federal Maritime Commission	2							0	0.0%	
Federal Mediation and Conciliation Service	2							0	0.0%	
Federal Mine Safety and Health Review Commission	4							0	0.0%	
Federal Reserve System	48		2	1				3	6.3%	
Federal Trade Commission	19				14	2		16	84.2%	
General Services Administration	27	5	2		14	3		24	88.9%	
Institute of Museum and Library Services	4							0	0.0%	
National Aeronautics and Space Administration	8							0	0.0%	
National Archives and Records Administration	7							0	0.0%	
National Credit Union Administration	20							0	0.0%	
National Endowment for the Arts	6				1		1	2	33.3%	

* Committee for Purchase from People Who Are Blind or Severely Disabled.

(continued)

Table 10. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Fall 2019 (continued)

	Total Rules	Number Affecting Small Business						Total	Affecting Small Business	Top 5
		RFA Required			RFA Not Required					
		Active	Completed	L-T	Active	Completed	L-T			
National Endowment for the Humanities	7							0	0.0%	
National Indian Gaming Commission	6							0	0.0%	
National Labor Relations Board	6	2						2	33.3%	
National Mediation Board	2							0	0.0%	
National Transportation Safety Board	6							0	0.0%	
Nuclear Regulatory Commission	56	1	1	1				3	5.4%	
Office of Government Ethics	11							0	0.0%	
Office of Management and Budget	9	1					1	2	22.2%	
Office of Personnel Management	37							0	0.0%	
Peace Corps	5							0	0.0%	
Pension Benefit Guaranty Corporation	14							0	0.0%	
Postal Regulatory Commission	5							0	0.0%	
Presidio Trust	2							0	0.0%	
Privacy and Civil Liberties Oversight Board	4							0	0.0%	
Railroad Retirement Board	7							0	0.0%	
Securities and Exchange Commission	101	17	6	10			1	34	33.7%	
Small Business Administration	40	10		1				11	27.5%	
Social Security Administration	15							0	0.0%	
Surface Transportation Board	9			1				1	11.1%	
U.S. Agency for Global Media	3							0	0.0%	
U.S. Chemical Safety and Hazard Investigation Board	1							0	0.0%	
U.S. Commission on Civil Rights	1							0	0.0%	
U.S. International Development Finance Corporation	1							0	0.0%	
TOTAL	3,752	191	50	106	212	41	44	644	17.2%	349
		347			297					54% of total
Deregulatory		28	9	4	44	13	4	102		

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," and from online edition at www.reginfo.gov. RFA = regulatory flexibility analysis; L-T = long term.

The overall reported number of rules affecting small business is down in the Trump administration when it comes to the heftier ones requiring RFA analysis. The average of those during Obama's eight years, 406, exceeded George W. Bush's eight-year average of 377. Trump's average annual number of rules affecting small business is lower than either Bush or Obama, at 347, and well over a quarter of these are deregulatory.

Recall that 689 rules among the Unified Agenda's flow of 3,752 are flagged as deregulatory. Of the 644 rules with small business effects, 102 are deregulatory, the same as last

year and up from 83 in 2017 (see bottom row of Table 10). The overall proportion of total rules affecting small business, as noted in Table 10, stands at 17 percent, but ranges widely among agencies. (For the numbers of rules affecting small business broken down by department and agency for fall Agenda editions since 1996, see Appendix: Historical Tables, Part H.)

For additional perspective on the small-business regulatory climate, Box 5 depicts a partial list of the basic, non-sector-specific laws and regulations that affect small business, stacking as they grow.

Box 5. Federal Workplace Regulations Affecting Growing Businesses

Assumes nonunion, nongovernment contractor, with interstate operations and a basic employee benefits package. Includes general workforce-related regulation only. Omitted are (a) categories such as environmental and consumer product safety regulations and (b) regulations applying to specific types of businesses, such as mining, farming, trucking, or financial firms.

1 EMPLOYEE

- Fair Labor Standards Act (overtime and minimum wage [27 percent minimum wage increase since 1990])
- Social Security matching and deposits
- Medicare, Federal Insurance Contributions Act (FICA)
- Military Selective Service Act (allowing 90 days leave for reservists; rehiring of discharged veterans)
- Equal Pay Act (no sex discrimination in wages)
- Immigration Reform Act (eligibility must be documented)
- Federal Unemployment Tax Act (unemployment compensation)
- Employee Retirement Income Security Act (standards for pension and benefit plans)
- Occupational Safety and Health Act
- Polygraph Protection Act

4 EMPLOYEES: ALL THE ABOVE, PLUS

- Immigration Reform Act (no discrimination with regard to national origin, citizenship, or intention to obtain citizenship)

15 EMPLOYEES: ALL THE ABOVE, PLUS

- Civil Rights Act Title VII (no discrimination with regard to race, color, national origin, religion, or sex; pregnancy-related protections; record keeping)
- Americans with Disabilities Act (no discrimination, reasonable accommodations)

20 EMPLOYEES: ALL THE ABOVE, PLUS

- Age Discrimination Act (no discrimination on the basis of age against those 40 and older)
- Older Worker Benefit Protection Act (benefits for older workers must be commensurate with younger workers)
- Consolidation Omnibus Budget Reconciliation Act (COBRA) (continuation of medical benefits for up to 18 months upon termination)

25 EMPLOYEES: ALL THE ABOVE, PLUS

- Health Maintenance Organization Act (HMO Option required)
- Veterans' Reemployment Act (reemployment for persons returning from active, reserve, or National Guard duty)

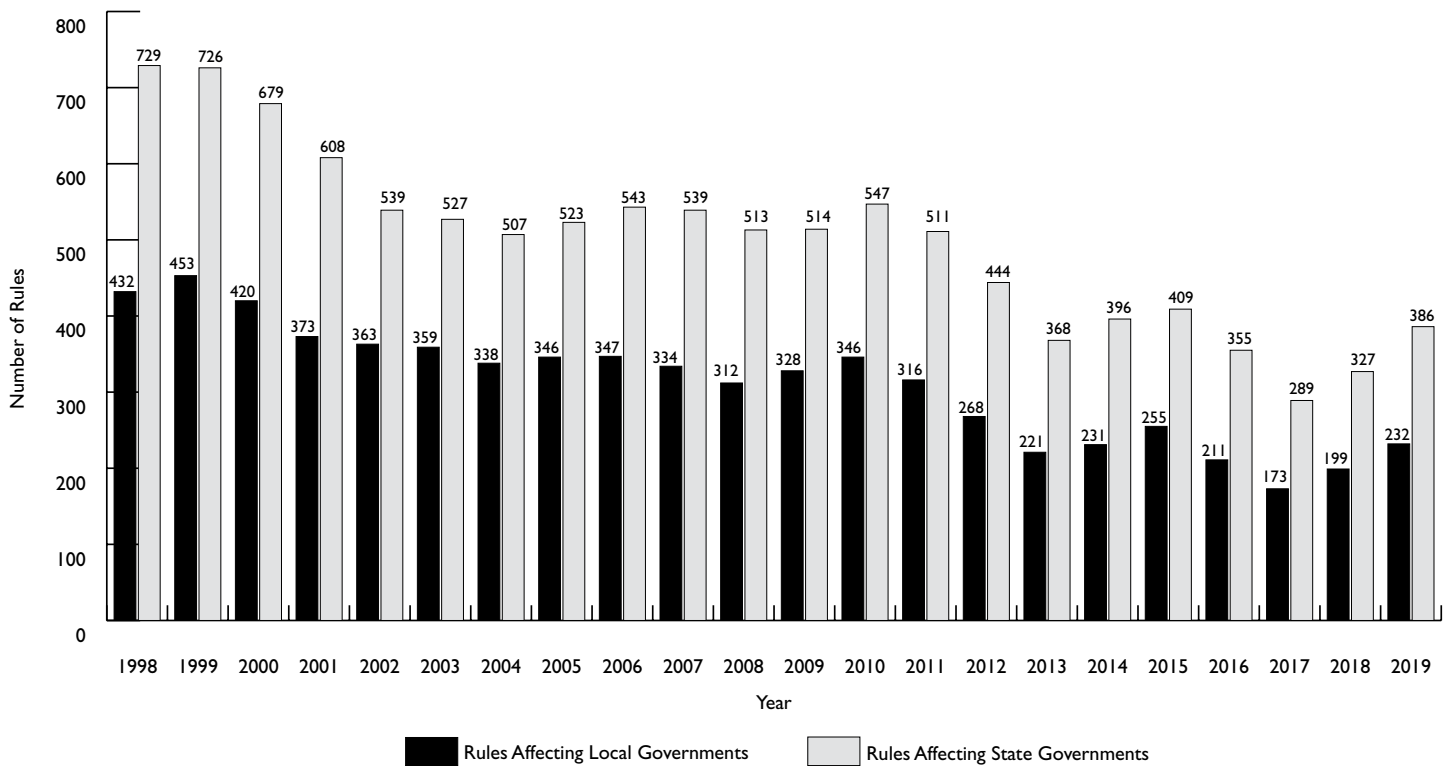
50 EMPLOYEES: ALL THE ABOVE, PLUS

- Family and Medical Leave Act (12 weeks unpaid leave to care for newborn or ill family member)

100 EMPLOYEES: ALL THE ABOVE, PLUS

- Worker Adjusted and Retraining Notification Act (60-days written plant closing notice)
- Civil Rights Act (annual EEO-1 form)

Figure 22. Rules Affecting State and Local Governments, 1998–2019



Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, various years’ editions; and from online edition at <http://www.reginfo.gov>.

Federal Regulations Affecting State and Local Governments

Ten Thousand Commandments primarily emphasizes regulations imposed on the private sector. However, state and local officials’ realization during the 1990s that their own priorities were being overridden by federal mandates generated demands for reform. As a result, the Unfunded Mandates Act was enacted in 1995 and required the Congressional Budget Office to produce cost estimates of mandates affecting state, local, and tribal governments above the then-\$50 million threshold.

As Figure 22 shows, agencies report that 232 of the 3,752 rules in the fall 2019 Agenda pipeline will affect local governments (this includes all stages—active, completed, and long-term).⁵⁰⁴ This is an increase of 17 percent over the past year. Since the passage of

the Unfunded Mandates Act in the mid-1990s, the number of overall rules affecting local governments has fallen by 56 percent, from 533 to 232. Meanwhile, the total number of regulatory actions affecting state governments stands at 386, an 18 percent jump over 2018. The overall pipeline count of active, completed, and long-term rules had been trending downward despite these jumps. The change is even more dramatic in the past two years owing to explicit deregulatory actions—45 local actions and 69 state actions deemed deregulatory for Executive Order 13771 purposes, across the active, completed, and long-term categories.

Unfunded federal mandates on state and local governments remain an issue that could influence overall regulatory reform measures. At the 2016 Legislative Summit of the National Conference of State Legislatures (NCSL) in Chicago, the NCSL Stand-

ing Committee on Budgets and Revenue issued a resolution on unfunded mandates that asserts, “The growth of federal mandates and other costs that the federal government imposes on states and localities is one of the most serious fiscal issues confronting state and local government officials.”⁵⁰⁵ The NCSL called for “reassessing” and “broadening” the 1995 Unfunded Mandates Reform Act. Likewise, state attorneys general in 2016 wrote to House and Senate leadership over federal agencies’ “failing to fully consider the effect of their regulations on States and state law,” and called for strengthening the Administrative Procedure Act.⁵⁰⁶

In May 2016, the Congressional Budget Office reported that since 2006, 160 laws have imposed mandates on states and localities, with 342 mandates within these laws.⁵⁰⁷ Regulatory mandates can derive from such laws, as well as from agencies acting unilaterally. According to official data, few have imposed costs on states and localities exceeding the noted statutory threshold (aggregate direct costs during any of the mandate’s first five years of \$50 million in 1996; \$77 million now), but this should be examined further.

Agencies claim very few of the rules in Figure 22 impose unfunded mandates on states and localities.⁵⁰⁸ Nonetheless, below are some notable completed or pending regulations since 2009 that federal agencies have acknowledged in the Unified Agenda as unfunded mandates, (with their Regulation Identifier Number provided).⁵⁰⁹

Department of Agriculture

- USDA/FNS: National School Lunch and School Breakfast Programs: Nutrition Standards for All Foods Sold in School, as Required by the Healthy, Hunger-Free Kids Act of 2010 (0584-AE09)
- USDA/RBS: Debt Settlement—Community and Business Programs (0570-AA88)

Department of Health and Human Services

- HHS/FDA: Combinations of Bronchodilators with Expectorants; Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products for Over-the-Counter Human Use (0910-AH16)
- HHS/CMS: CY 2016 Notice of Benefit and Payment Parameters (CMS-9944-P) (0938-AS19)
- HHS/FDA: Over-the-Counter Drug Review—Internal Analgesic Products (0910-AF36)
- HHS/CDC: Establishment of Minimum Standards for Birth Certificates (0920-AA46)
- HHS/FDA: Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents (0910-AG33)

Department of Justice

- DOJ/LA: Supplemental Guidelines for Sex Offender Registration and Notification (1105-AB36)
- DOJ/CRT: Nondiscrimination on the Basis of Disability in State and Local Government Services (1190-AA46)

Department of Labor

- DOL/OSHA: Occupational Exposure to Crystalline Silica (1218-AB70)

Department of Transportation

- DOT/PHMSA: Hazardous Materials: Real-Time Emergency Response Information by Rail (2137-AF21)
- DOT/FHWA: Real-Time System Management Information Program (2125-AF19)

Architectural and Transportation Barriers Compliance Board

- ATBCB: Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles (3014-AA38)

Environmental Protection Agency

- EPA/OW: National Primary Drinking Water Regulations (2040-AA94, 2040-AF15)
- EPA/OCSPP: Polychlorinated Biphenyls; Reassessment of Use Authorizations for PCBs in Small Capacitors in Fluorescent Light Ballasts in Schools and Daycares (2070-AK12)
- EPA/WATER: Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (2040-AF14)
- EPA/SWER: Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training (2050-AG46)
- EPA/SWER: Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers (Coal Ash) (2050-AE81)
- EPA/AR: Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards (2060-AQ86)
- EPA/AR: National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Reconsideration (2060-AR13)
- EPA/AR: National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Electric Utility Steam Generating Units (2060-AP52)
- EPA/AR: NESHAP from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Electric Utility Steam Generating Units—Appropriate and Necessary Finding (2060-AR31)
- EPA/AR: National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers (2060-AM44)
- EPA/AR: National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters (2060-AQ25)
- EPA/AR: NESHAP: Portland Cement Notice of Reconsideration and NSPS for Portland Cement (2060-AO15)

Nuclear Regulatory Commission

- NRC: Revision of Fee Schedules (3150-AI93)

Government Accountability Office

Database on Regulations

The various federal reports and databases on regulations serve different purposes:

- The *Federal Register* shows the aggregate number of proposed and final rules—both those that affect the private sector and those that deal with internal government machinery or programs—and numerous notices and presidential documents.
- The Unified Agenda depicts agency regulatory priorities and provides details about the overall number of rules at various stages in the regulatory pipeline, as well as those with economically significant effects and those affecting small businesses and state and local governments.

The 1996 Congressional Review Act requires agencies to submit reports to Congress on their major rules—those with annual estimated costs of \$100 million or more. Owing to such reports, which are prepared and maintained in a database at the Government Accountability Office, one can more readily observe (a) which of the thousands of final rules that agencies issue each year are major (to the extent the directive is obeyed) and (b) which departments and agencies are producing the major rules.⁵¹⁰

The CRA gives Congress a window of 60 legislative days in which to review a received major rule and pass a resolution of disapproval rejecting the rule. Despite the issuance of thousands of rules since the CRA's passage, including many dozens of major rules, prior to 2017 only one had been rejected: the Department of Labor's rule on workplace repetitive-motion injuries in early

2001. Since the start of the 115th Congress in January 2017, the CRA has been used 16 times to overturn regulations.⁵¹¹ According to recent analysis, however, some final rules are not being properly submitted to the GAO and to Congress as required under the CRA, and major guidance only rarely has been submitted.⁵¹²

Major rules can add burdens, reduce them, implement delays, or set rates and standards for major governmental programs like Medicaid. Table 11 depicts the number of final major rule reports issued by the GAO regarding agency rules through calendar year 2019. There were 74 major rules in 2019 based on a search of the GAO's database, a significant increase from the 55 in 2018 and 49 in 2017.⁵¹³ The 119 major rules in 2016 under Obama were the highest count since this tabulation began at GAO following passage of the CRA; the 100 rules in 2010 was the second-highest. The 49 under Trump in 2017 was the lowest since these records began, followed by 50 in 2003.

This is a good place to summarize the species of significant rules.⁵¹⁴ For example, an economically significant rule is major, but a major one is not necessarily economically significant (so there are fewer economically significant rules than major ones). Both economically significant rules and major ones qualify as significant. Numbers of each over the past four years per various databases appears in Table 12.

An object in the universe cannot be larger than the universe, but note the economically significant rule counts being larger than the major or significant count in some instances.

Table I I. Government Accountability Office Reports on Major Rules as Required by the Congressional Review Act, 2000–2019

	2019	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000
Department of Agriculture	7	5	2	5	7	8	4	2	4	6	12	3	7	8	6	7	4	7	9	
Department of Commerce		1	1				2				2	1	2			1			2	
Department of Defense	1		1	2	2	1				4	4	6			1			2	3	
Department of Education	6		3	2	1	2	5	4	2	5	6	2	1	2						
Department of Energy		2	4	8	2	6	3	1	5	4	7	3	3				1	1	3	3
Department of Health and Human Services	21	19	16	38	18	27	24	23	24	24	17	24	19	16	22	22	17	13	15	17
Department of Homeland Security	2	2		5	3	2	2	1	1	3	1	5	4	2	3	2	2			
Department of Housing and Urban Development			1	2	1				2	1	1	2			1	1			1	2
Department of Justice		2		1				1	1	3				1	1	1		3	4	
Department of Labor	2	1	2	8	1	3	3	3	2	6	1	2	3	3	1	1		2	3	5
Department of the Interior	3	5	3	6	6	6	6	7	6	7	7	10	5	6	6	8	7	7	8	9
Department of State		1						1		1		1								
Department of Transportation	1	1		4	3	3	3	2	2	5	6	8	3	1	3	5	4	6	3	
Department of the Treasury	13		2	5	7	6	3	2	1	4		1	1	1		1	1		1	
Department of Veterans Affairs	3	3	1	1	4	3	1	1	2	2	2	1	1		1		2	1	3	
Architectural Barriers Compliance Board			1													1				1
Commodity Futures Trading Commission				4		1	4	9	6											
Consumer Financial Protection Bureau	2		3	2	2		4	1	1											
Consumer Product Safety Commission									1					1						
Emergency Oil and Gas Loan Board																				
Emergency Steel Guarantee Loan Board																				
Environmental Protection Agency	1	2	2	7	8	2	3	5	6	8	3	9	2	8	3	7	3	1	4	20
Equal Employment Opportunity Commission									1											

Table 12. Number of Significant and Major Rules

		Completed Economically Significant*	Major per GAO**	Major Per Unified Agenda***	Significant****
2016	Obama	83	119	96	486
2017	Trump	88	48	102	199
2018	Trump	35	54	43	108
2019	Trump	70	74	84	66

* From Unified Agenda by (loosely) “fiscal” year; see Figure 20’s completed economically significant rules.

** From GAO database by calendar year.

*** From Unified Agenda.

**** From Federal Register.gov advanced search of “significant” final rules; these may be found at www.tenthousandcommandments.com.

The basic relationship is economically significant ≥ major ≥ significant. There may be different explanations, such as calendar and fiscal year nonalignment, rules not being reported to GAO but being noted at OMB, different categorizations of independent agency rules in the databases, or differing treatment of budget/transfer rules. Greater clarity can be had with an executive order or legislation that clarifies nomenclature, reconciles record keeping across the various databases, and brings independent agencies fully in to review.⁵¹⁵

Sticking with the GAO compilation, President Barack Obama issued 691 major rules

over eight years, compared with President George W. Bush’s 505 over eight years. (This presentation uses calendar years, so Bush’s eight years contain a couple of Bill Clinton’s presidential transition weeks at the top before his inauguration, whereas Obama’s first year would include the Bush administration’s final weeks.) President Bush averaged 63 major rules annually during his eight years in office. President Obama averaged 86, a 36 percent higher average annual output than that of Bush. Trump’s 40, 55, and 74 major rules between 2017 and 2019, respectively, mean an average of 59 major rules annually. This is less than his two predecessors, even before considering that some major rules are deregulatory.

Liberate to Stimulate

Policy makers frequently propose spending stimulus as a way to grow economies. It rarely goes well. A regulatory liberalization stimulus, on the other hand, can offer confidence and certainty for businesses and entrepreneurs. While congressional action is needed, the executive branch can continue to stress regulatory streamlining and specific actions such as requiring rules and guidance to be submitted to Congress and the GAO as required by the Congressional Review Act. In addition, President Trump should issue new executive orders (a) requiring review of independent agency rules, (b) outlining principles for guidance document preparation and disclosure, and (c) calling for the completion of the aggregate regulatory cost estimate already required by law.

Steps to Improve Regulatory Disclosure

Certainly, some regulations' benefits exceed costs under the parameters of guidance to agencies such as OMB Circular A-4, but for the most part net benefits or even actual costs are not subject to quantification.⁵¹⁶ Without more thorough regulatory accounting than we get today—backed up by congressional certification of what agencies specifically do—it is difficult to know whether society wins or loses as a result of rules.⁵¹⁷ Pertinent, relevant, and readily available regulatory data should be summarized and reported publicly to help nurture the political climate for better disclosure and reform. One incremental but important step toward greater openness would be for Congress to require—or for the administration

or OMB to initiate—publication of a summary of available but scattered data. Such a regulatory transparency report card could resemble some of the presentation in *Ten Thousand Commandments*.

Accountability is even more important than disclosure. Congress routinely delegates legislative power to unelected agency personnel. Reining in off-budget regulatory costs can occur only when elected representatives assume responsibility and end “regulation without representation.” Changes made by comprehensive regulatory reform, such as the Regulatory Accountability Act, could help induce Congress to internalize pressures that would inspire cost-benefit appraisals before issuing open-ended directives to agencies to write rules.⁵¹⁸ More stringent limitations on delegation, such as requiring congressional approval of rules, are essential.

Regulations fall into two broad classes: (a) those that are economically significant or major (with effects exceeding \$100 million annually) and (b) those that are not. Agencies typically emphasize reporting of economically significant or major rules, which OMB also tends to highlight in its annual regulatory reports. A problem with this approach is that many rules that technically come in below that threshold can still be very significant in real-world terms.

Moreover, agencies need not specify whether any or all of their economically significant or major rules cost just above the \$100 million threshold or far above it. One helpful reform would be for Congress to require agencies to break up their cost categories into tiers, as depicted in Table 13. Agencies could clas-

Policy makers frequently propose spending stimulus as a way to grow economies. It rarely goes well.

Table 13. A Possible Breakdown of Economically Significant Rules

Category	Breakdown
1	> \$100 million, < \$500 million
2	> \$500 million, < \$1 billion
3	> \$1 billion, < \$5 billion
4	> \$5 billion, < \$10 billion
5	> \$10 billion

sify their rules on the basis of either (a) cost information that has been provided in the regulatory impact analyses that accompany some economically significant rules or (b) separate internal or external estimates.

Further, much of the available regulatory information is difficult to compile or interpret. To learn about regulatory trends and acquire information on rules, interested citizens once needed to comb through the Agenda’s 1,000-plus pages of small, multicolumn print, and

today compile results from online searches and agencies’ regulatory plans and sites like Regulations.gov. Data from the Unified Agenda could be made more accessible and user-friendly if elements of it were officially summarized in charts and presented as a section in the federal budget, in the Agenda itself, or in the *Economic Report of the President*. Suggested components of this Regulatory Transparency Report Card appear in Box 6.⁵¹⁹ In addition to revealing burdens, impacts, and trends, it would reveal more clearly what we

Box 6. Regulatory Transparency Report Card, Recommended Official Summary Data by Program, Agency, and Grand Total, with Five-Year Historical Tables

- Tallies of “economically significant” rules and minor rules by department, agency, and commission.
- Tallies of significant and other guidance documents, memoranda, and other “regulatory dark matter” by department, agency, and commission.
- Numbers and percentages of executive and independent agency rules deemed “Deregulatory” for E.O. 13,771 purposes.
- Numbers and percentages of rules affecting small business; deregulatory component.
- Depictions of how regulations/guidance accumulate as a small business grows.
- Additional rules agencies elected to subject to Regulatory Impact Analysis and E.O. 13,771 scrutiny.
- Aggregate cost estimates of regulation by category: paperwork, economic (for example, financial, antitrust, communications), social, health and safety, environmental.
- Tallies of existing cost estimates, including subtotals by agency and grand total.
- Numbers and percentages of regulations that contain numerical cost estimates.
- Numbers and percentages lacking cost estimates, with explanation (Compile statistics on what we do not know about regulatory burdens).
- Analysis of the *Federal Register*, including number of pages and proposed and final rule breakdowns by agency.
- Number of major rules reported on by the Government Accountability Office in its database of reports on regulations.
- Number/percentage of agency rules and guidance documents presented properly to Congress in accordance with the Congressional Review Act.
- Ranking of most active rulemaking agencies.
- Rules that affect internal agency procedures alone.
- Number of rules new to the Unified Agenda; number that are carryovers from previous years.
- Numbers and percentages of rules facing statutory or judicial deadlines that limit executive branch ability to restrain them or for which weighing costs and benefits is statutorily prohibited.
- Ultimate percentages of rules reviewed by the OMB and action taken.

do *not* know about the regulatory state, such as, for example, the percentage of rules that failed to quantify either costs or benefits.

Furthermore, the accumulation of regulatory guidance documents, memoranda, and other regulatory dark matter to implement policy calls for greater disclosure of these kinds of agency issuances than exists now, since these can be regulatory in effect but are nowhere to be found in the Unified Agenda. Inventorying such dark matter is difficult to do, but formal attempts will be made in 2020. Legislation such as the Guidance out of Darkness Act would help remedy the disclosure problem.

In addition, we have little ability to distinguish between additive and subtractive rules and little guidance in terms of burdens imposed. Future regulatory reforms by Congress should require regulatory and deregulatory actions to be classified separately in the *Federal Register* and for agencies' confusing array of rule classifications to be harmonized.⁵²⁰ Current reporting also distinguishes poorly between rules and guidance affecting the private sector and those affecting internal governmental operations.

Given a basic framework, additional information could be incorporated as warranted—for instance, success or failure of special initiatives such as executive branch restructuring or specific regulatory reform efforts. Providing historical tables would prove useful to scholars, third-party researchers, members of Congress, and the public. By making agency activity more explicit, a regulatory transparency report card would help ensure that policy makers take the growth of the administrative state seriously.

Ending Regulation without Representation: The “Unconstitutionality Index”—28 Rules for Every Law

Regulatory agencies do not answer to voters. Yet in a sense, regulators, rather than

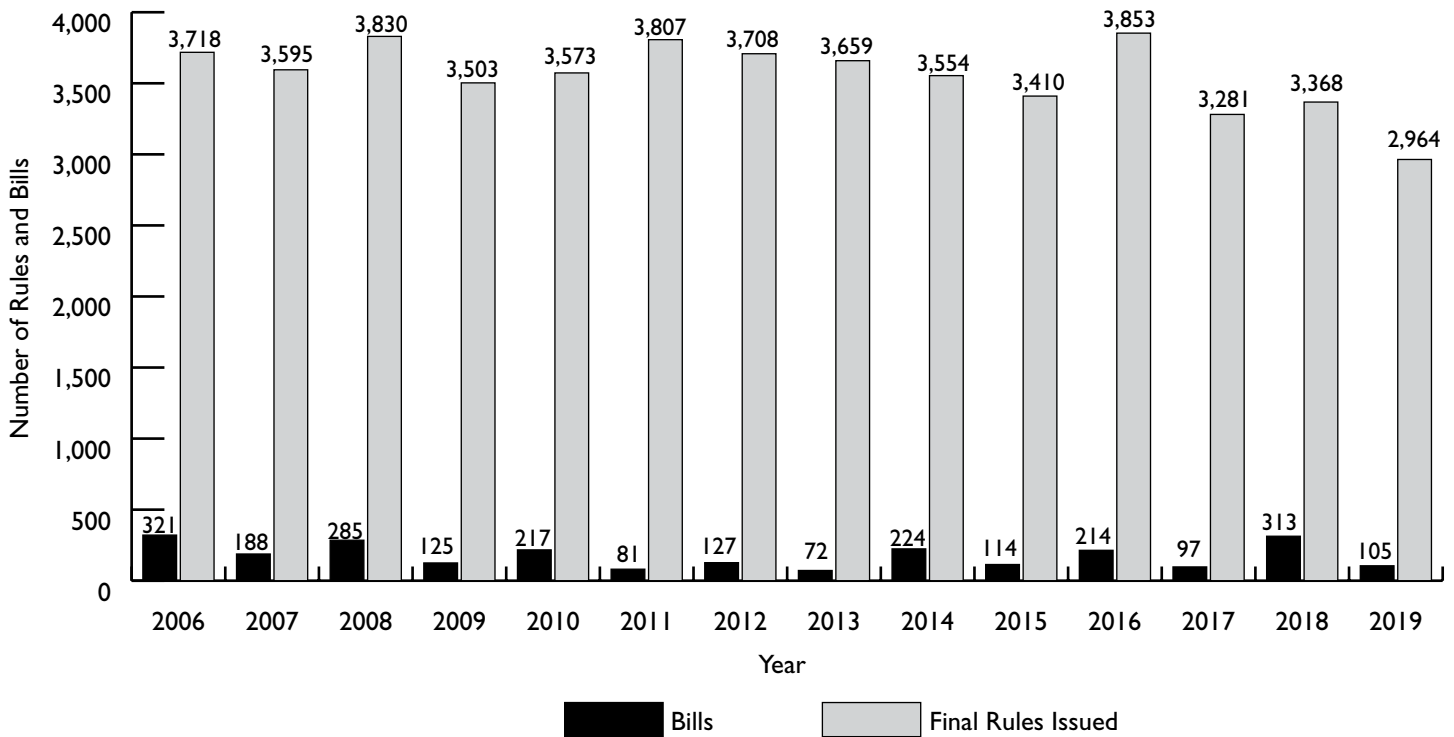
Congress, do the bulk of U.S. lawmaking. Columbia University legal scholar Phillip Hamburger has described the rise of a monarchical administrative state in defiance of a Constitution that “expressly bars the delegation of legislative power.”⁵²¹ But agencies are not the sole offenders. For too long, Congress has shirked its constitutional duty to make the tough calls. Instead, it routinely delegates substantial lawmaking power to agencies and then fails to ensure that they deliver benefits that exceed costs.

The primary measure of an agency's productivity—other than growth in its budget and number of employees—is the body of regulation it produces.⁵²² Agencies face significant incentives to expand their turf by regulating even without established need. It is hard to blame agencies for carrying out the very regulating they were set up to do in the first place. Better to point a finger at Congress.

The “Unconstitutionality Index”—the ratio of rules issued by agencies relative to laws passed by Congress and signed by the president—underscores the primacy of the administrative state over the Constitution. There were 28 rules for every law in 2019 (there had been 11 in 2018, see Figure 23). In calendar year 2019 regulatory agencies issued 2,964 final rules, while the 116th Congress passed and President Trump signed into law 105 bills.⁵²³ Both Trump's rule count and the number of laws enacted were lower than last year, but there is no overall pattern to this, since the numerator (number of rules) and denominator (number of laws) can vary widely for a variety of correlated and uncorrelated reasons. The Index is in keeping with anecdotes about rules being far heftier than the laws that led to the rules. Back in 2013, when agencies had published over 11 million words of Obamacare regulations, observers pointed out that there were “only” 381,517 words in the underlying law itself.⁵²⁴ Such complexities aside, the takeaway of the Unconstitutionality Index is that the unelected personnel of federal agencies, not elected members of Congress, do the bulk of lawmaking.

*For too long,
Congress has
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constitutional
duty to make the
tough calls.*

Figure 23. The Unconstitutionality Index, 2006–2019



Source: *Federal Register* data from National Archives and Records Administration and from Crews tabulation at <http://www.tenthousandcommandments.com>. Public Laws data compiled from Government Printing Office, Public and Private Laws at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>; and from National Archives, Previous Sessions: Public Law Numbers at <http://www.archives.gov/federal-register/laws/past/index.html>.

The Unconstitutionality Index average over the past decade has been (also, coincidentally) 28 rules for every law. Rules issued by agencies are not usually substantively related to the current year’s laws; typically, agencies’ rules comprise the administration of prior years’ legislative measures. If agency public notices and executive orders are considered, non-legislative policy making assumes even greater prominence as an issue of concern. In the current streamlining context, since eliminating a rule requires issuing one, the Index is ironically “worsened” by deregulation. (Appendix: Historical Tables, Part I, depicts the “Unconstitutionality Index” dating back to 1993 and shows the numbers of executive orders and the numbers of agency notices, which one might arguably incorporate into the Index, if so inclined.)

Mounting debt and deficits can incentivize Congress to regulate rather than to increase

government spending to accomplish policy ends. If Congress wanted to boost job training, funding a program to do so would require legislative approval of a new appropriation for the Department of Labor, which would appear in the federal budget and increase the deficit. Instead, Washington could try to induce Fortune 500 companies to implement job training programs, to be carried out according to new regulations issued by the Department of Labor. The latter option would add little to federal spending but would still let Congress take credit for the program. By regulating instead of spending, government can expand almost indefinitely without explicitly taxing anybody one extra penny.

An annual regulatory transparency report card is needed, but it is not the complete response. Regulatory reforms that rely on agencies policing themselves within the lim-

ited restraints of the Administrative Procedure Act will not rein in the regulatory state or address regulation without representation. Rather, Congress should vote on agencies' final rules before such rules become binding on the public. Affirmation of new major and controversial regulations would ensure that Congress bears direct responsibility for every dollar of new regulatory costs.

The Regulations from the Executive in Need of Scrutiny Act (REINS) Act offers one such approach.⁵²⁵ REINS would require Congress to vote on all economically significant agency regulations. It has passed the House in the 115th and the three prior congressional sessions but has not moved forward in the Senate. To avoid getting bogged down in approving myriad agency rules, Congress could vote on agency regulations in bundles. Another way to expedite the process is via congressional approval or disapproval of new regulations by voice vote rather than by tabulated roll-call vote. What matters most is that Members of Congress go on record for whatever laws the public must heed.

If Congress does not act, states could take the ball from Congress. Many state legislators have indicated support for the Regulation Freedom Amendment, which reads, in its entirety: "Whenever one quarter of

the members of the U.S. House or the U.S. Senate transmit to the president their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation."⁵²⁶ Pressures from states could prompt Congress to decide to act before matters deteriorate that far, but the Constitution does provide for states to check federal power.

While there are possible approaches to boosting disclosure, transparency, and accountability, congressional—rather than agency—approval of regulatory laws and their costs should be the main goal of reform. When Congress ensures transparency and disclosure and finally assumes responsibility for the growth of the regulatory state, the resulting system will be one that is fairer and more accountable to voters.

These safeguards are necessary but not sufficient. Legislative regulatory reform and executive branch streamlining are elements of more fundamental debates. Congress is responsible for the fiscal budget, yet deficits remain the norm. The larger questions at hand are over the role and legitimacy of the administrative state and the role of government in a constitutional republic.

Appendix: Historical Tables

Part A. Federal Register Page History, 1936–2019

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1936	2,620	n/a	2,620
1937	3,450	n/a	3,450
1938	3,194	n/a	3,194
1939	5,007	n/a	5,007
1940	5,307	n/a	5,307
1941	6,877	n/a	6,877
1942	11,134	n/a	11,134
1943	17,553	n/a	17,553
1944	15,194	n/a	15,194
1945	15,508	n/a	15,508
1946	14,736	n/a	14,736
1947	8,902	n/a	8,902
1948	9,608	n/a	9,608
1949	7,952	n/a	7,952
1950	9,562	n/a	9,562
1951	13,175	n/a	13,175
1952	11,896	n/a	11,896
1953	8,912	n/a	8,912
1954	9,910	n/a	9,910
1955	10,196	n/a	10,196
1956	10,528	n/a	10,528
1957	11,156	n/a	11,156
1958	10,579	n/a	10,579
1959	11,116	n/a	11,116
1960	14,479	n/a	14,479
1961	12,792	n/a	12,792
1962	13,226	n/a	13,226
1963	14,842	n/a	14,842
1964	19,304	n/a	19,304
1965	17,206	n/a	17,206
1966	16,850	n/a	16,850
1967	21,088	n/a	21,088
1968	20,072	n/a	20,072
1969	20,466	n/a	20,466
1970	20,036	n/a	20,036
1971	25,447	n/a	25,447
1972	28,924	n/a	28,924
1973	35,592	n/a	35,592

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1974	45,422	n/a	45,422
1975	60,221	n/a	60,221
1976	57,072	6,567	50,505
1977	65,603	7,816	57,787
1978	61,261	5,565	55,696
1979	77,498	6,307	71,191
1980	87,012	13,754	73,258
1981	63,554	5,818	57,736
1982	58,494	5,390	53,104
1983	57,704	4,686	53,018
1984	50,998	2,355	48,643
1985	53,480	2,978	50,502
1986	47,418	2,606	44,812
1987	49,654	2,621	47,033
1988	53,376	2,760	50,616
1989	53,842	3,341	50,501
1990	53,620	3,825	49,795
1991	67,716	9,743	57,973
1992	62,928	5,925	57,003
1993	69,688	8,522	61,166
1994	68,108	3,194	64,914
1995	67,518	4,873	62,645
1996	69,368	4,777	64,591
1997	68,530	3,981	64,549
1998	72,356	3,785	68,571
1999	73,880	2,719	71,161
2000	83,294	9,036	74,258
2001	67,702	3,264	64,438
2002	80,332	4,726	75,606
2003	75,798	4,529	71,269
2004	78,852	3,177	75,675
2005	77,777	3,907	73,870
2006	78,724	3,787	74,937
2007	74,408	2,318	72,090
2008	80,700	1,265	79,435
2009	69,644	1,046	68,598
2010	82,480	1,075	81,405
2011	82,415	1,168	81,247
2012	80,050	1,089	78,961
2013	80,462	1,151	79,311
2014	78,796	1,109	77,687
2015	81,402	1,142	80,260
2016	97,069	1,175	95,894
2017	61,950	642	61,308
2018	68,082	857	67,225
2019	71,851	913	70,938

Source: National Archives and Records Administration, Office of the Federal Register.

Publication of proposed rules was not required before the Administrative Procedure Act of 1946. Preambles to rules were published only to a limited extent before the 1970s.

n/a = not available.

Part B. Number of Documents in the *Federal Register*, 1976–2019

Year	Final Rules	Proposed Rules	Other*	Total
1976	7,401	3,875	27,223	38,499
1977	7,031	4,188	28,381	39,600
1978	7,001	4,550	28,705	40,256
1979	7,611	5,824	29,211	42,646
1980	7,745	5,347	33,670	46,762
1981	6,481	3,862	30,090	40,433
1982	6,288	3,729	28,621	38,638
1983	6,049	3,907	27,580	37,536
1984	5,154	3,350	26,047	34,551
1985	4,843	3,381	22,833	31,057
1986	4,589	3,185	21,546	29,320
1987	4,581	3,423	22,052	30,056
1988	4,697	3,240	22,047	29,984
1989	4,714	3,194	22,218	30,126
1990	4,334	3,041	22,999	30,374
1991	4,416	3,099	23,427	30,942
1992	4,155	3,170	24,063	31,388
1993	4,369	3,207	24,017	31,593
1994	4,867	3,372	23,669	31,908
1995	4,713	3,339	23,133	31,185
1996	4,937	3,208	24,485	32,630
1997	4,584	2,881	26,260	33,725
1998	4,899	3,042	26,313	34,254
1999	4,684	3,281	26,074	34,039
2000	4,313	2,636	24,976	31,925
2001	4,132	2,512	25,392	32,036
2002	4,167	2,635	26,250	33,052
2003	4,148	2,538	25,168	31,854
2004	4,101	2,430	25,846	32,377
2005	3,943	2,257	26,020	32,220
2006	3,718	2,346	25,429	31,493
2007	3,595	2,308	24,784	30,687
2008	3,830	2,475	25,574	31,879
2009	3,503	2,044	25,218	30,765
2010	3,573	2,439	26,543	32,555
2011	3,807	2,898	26,296	33,001
2012	3,708	2,517	24,755	30,980
2013	3,659	2,594	24,517	30,770
2014	3,554	2,383	24,257	30,194
2015	3,410	2,342	24,294	30,046
2016	3,853	2,419	24,912	31,184
2017	3,281	1,834	22,132	27,247
2018	3,368	2,098	22,349	27,815
2019	2,964	2,131	22,181	27,276

Source: National Archives and Records Administration, Office of the Federal Register.

* "Other" documents are presidential documents, agency notices, and corrections. n/a = not available at time of writing.

Rules since 1993: 107,712; rules since 1975: 204,802; other since 1975: 1,088,478.

Part C. Code of Federal Regulations Page Counts and Number of Volumes, 1975–2019

Year	Actual Pages Published (includes text, preliminary pages, and tables)				Unrevised CFR Volumes**	Total Pages Complete CFR	Total CFR Volumes (exclud- ing Index)
	Titles 1–50 (minus Title 3)	Title 3 (POTUS Docs)	Index*	Total Pages Published			
1975	69,704	296	792	70,792	432	71,224	133
1976	71,289	326	693	72,308	432	72,740	139
1977	83,425	288	584	84,297	432	84,729	141
1978	88,562	301	660	89,523	4,628	94,151	142
1979	93,144	438	990	94,572	3,460	98,032	148
1980	95,043	640	1,972	97,655	4,640	102,295	164
1981	103,699	442	1,808	105,949	1,160	107,109	180
1982	102,708	328	920	103,956	982	104,938	177
1983	102,892	354	960	104,206	1,448	105,654	178
1984	110,039	324	998	111,361	469	111,830	186
1985	102,815	336	1,054	104,205	1,730	105,935	175
1986	105,973	512	1,002	107,487	1,922	109,409	175
1987	112,007	374	1,034	113,415	922	114,337	185
1988	114,634	408	1,060	116,102	1,378	117,480	193
1989	118,586	752	1,058	120,396	1,694	122,090	196
1990	121,837	376	1,098	123,311	3,582	126,893	199
1991	119,969	478	1,106	121,553	3,778	125,331	199
1992	124,026	559	1,122	125,707	2,637	128,344	199
1993	129,162	498	1,141	130,801	1,427	132,228	202
1994	129,987	936	1,094	132,017	2,179	134,196	202
1995	134,471	1,170	1,068	136,709	1,477	138,186	205
1996	129,386	622	1,033	131,041	1,071	132,112	204
1997	128,672	429	1,011	130,112	948	131,060	200
1998	132,884	417	1,015	134,316	811	135,127	201
1999	130,457	401	1,022	131,880	3,052	134,932	202
2000	133,208	407	1,019	134,634	3,415	138,049	202
2001	134,582	483	1,041	136,106	5,175	141,281	206
2002	137,373	1,114	1,039	139,526	5,573	145,099	207
2003	139,550	421	1,053	141,024	3,153	144,177	214
2004	143,750	447	1,073	145,270	2,369	147,639	217
2005	146,422	103	1,083	147,608	4,365	151,973	221
2006	149,594	376	1,077	151,047	3,060	154,107	222
2007	149,236	428	1,088	150,752	5,258	156,010	222
2008	151,547	453	1,101	153,101	4,873	157,974	222
2009	158,369	412	1,112	159,893	3,440	163,333	225
2010	152,455	512	1,122	154,089	11,405	165,494	226
2011	159,129	486	1,136	160,751	8,544	169,295	230
2012	164,884	472	1,154	166,510	8,047	174,557	235
2013	166,352	520	1,170	168,042	7,454	175,496	235
2014	165,016	538	1,170	166,724	12,657	179,381	236
2015	170,278	495	1,170	171,943	6,334	178,277	237
2016	174,769	570	1,170	176,509	8,544	185,053	242
2017	178,628	846	1,170	180,644	5,730	186,374	242
2018	170,952	608	1,170	172,730	12,718	185,448	242
2019	172,022	1,092	1,170	174,284	11,700	185,984	242

Source: Chart from National Archives and Records Administration, Office of the Federal Register.
 *General Index and Finding Aids volume for 1975 and 1976. **Unrevised CFR volumes page totals include those previous editions for which a cover only was issued during the year or any previous editions for which a supplement was issued.

Part D. Number of Regulatory Reviews at the Office of Information and Regulatory Affairs, 1991–2019

Year	Prerule reviews	Proposed rule re-views	Interim final rule reviews	Final rule reviews	Notice reviews	Total reviews	ES re-views	Non-ES reviews	Days ES reviews	Days non-ES reviews	Average Days Review Time	
											Overall average days	Overall average days
1991		1,201		1,322		2,523	142	2,381	39	29	29	
1992		970		1,315		2,285	121	2,164	44	39	39	
1993	2	976	6	1,155	28	2,167	106	2,061	53	42	43	
1994	16	317	68	302	128	831	134	697	33	30	31	
1995	8	225	64	270	53	620	74	546	41	35	35	
1996	28	160	56	232	31	507	74	433	39	42	42	
1997	20	196	64	174	51	505	81	424	47	54	53	
1998	15	192	58	182	40	487	73	414	33	50	48	
1999	19	247	71	214	36	587	86	501	51	53	53	
2000	13	210	66	253	40	582	92	490	60	62	62	
2001	9	274	95	285	37	700	111	589	46	60	58	
2002	23	261	81	249	55	669	100	569	44	46	46	
2003	23	232	92	309	59	715	101	614	42	50	49	
2004	26	237	64	241	58	626	85	541	35	55	53	
2005	18	221	66	247	59	611	82	529	39	59	57	
2006	12	229	43	270	46	600	71	529	34	59	56	
2007	22	248	44	250	25	589	85	504	49	64	61	
2008	17	276	39	313	28	673	135	538	53	63	61	
2009	28	214	67	237	49	595	125	470	33	40	39	
2010	36	261	84	232	77	690	138	552	48	51	51	
2011	24	317	76	262	61	740	117	623	51	60	58	
2012	12	144	33	195	40	424	83	341	69	81	79	
2013	11	177	33	160	37	418	104	314	121	143	137	
2014	17	201	43	144	46	452	114	338	106	134	127	
2015	8	178	29	164	35	415	130	285	84	90	88	
2016	14	231	28	303	45	623	156	467	83	79	80	
2017	13	84	12	103	24	237	70	167	56	74	68	
2018	25	168	11	124	32	360	91	269	63	68	67	
2019	26	234	25	147	41	474	117	357	77	80	79	

Source: Author search on RegInfo.gov, "Review Counts" database search engine under Regulatory Review heading.

ES = economically significant.

Part E. Unified Agenda Rules History, 1983–2019

Total Number of Rules under Consideration or Enacted

1980s			1990s			2000s		
1983	April	2,863	1990	April	4,332	2000	October	4,699
	October	4,032		October	4,470	2001	October	4,509
1984	April	4,114	1991	April	4,675	2002	October	4,187
	October	4,016		October	4,863	2003	December	4,266
1985	April	4,265	1992	April	4,186	2004	December	4,083
	October	4,131		October	4,909	2005	October	4,062
1986	April	3,961	1993	April	4,933	2006	December	4,052
	October	3,983		October	4,950	2007	December	3,882
1987	April	4,038	1994	April	5,105	2008	December	4,004
	October	4,005		October	5,119	2009	December	4,043
1988	April	3,941	1995	April	5,133	2010	December	4,225
	October	4,017		October	4,735	2011	December	4,128
1989	April	4,003	1996	April	4,570	2012	Year-End*	4,062
	October	4,187		October	4,680	2013	November	3,305
			1997	April	4,417	2014	November	3,415
				October	4,407	2015	November	3,297
			1998	April	4,504	2016	November	3,318
				October	4,560	2017	December	3,209
			1999	April	4,524	2018	October	3,534
				October	4,568	2019	October	3,752

Sources: Compiled from “The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, various years’ editions; also from online edition at <http://www.reginfo.gov>.

*Spring edition skipped in 2012.

Part F. Agenda Rules History by Department and Agency, 2000–2017

	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Department of Agriculture	114	114	140	155	160	159	276	265	287	327	374	290	311	292	279	323	314	312
Department of Commerce	279	247	231	246	270	250	415	328	296	300	325	303	302	296	273	300	270	342
Department of Defense	246	193	115	117	121	104	146	140	150	133	109	131	143	163	126	108	87	93
Department of Education	49	38	27	25	26	20	24	18	23	22	17	13	16	9	11	13	14	8
Department of Energy	97	87	97	107	105	92	108	96	96	85	54	47	63	61	50	66	53	61
Department of Health and Human Services	237	189	197	213	217	200	204	251	312	231	236	259	257	249	233	219	219	277
Department of Homeland Security	171	123	123	130	141	139	160	232	230	237	252	267	280	295	314	338		
Department of Housing and Urban Development	48	42	47	52	55	52	58	65	65	60	73	86	92	90	103	109	100	89
Department of Justice	70	68	94	100	102	95	112	120	137	121	138	140	139	124	125	122	249	229
Department of Labor	83	64	94	97	95	84	98	90	99	104	96	94	93	93	88	89	102	141
Department of State	75	64	38	44	47	41	63	35	30	18	27	28	28	24	21	15	41	32
Department of the Interior	233	183	285	288	324	353	320	325	259	277	287	264	305	303	287	295	298	423
Department of Transportation	298	255	240	210	216	220	232	224	223	230	200	199	215	227	301	365	543	511
Department of the Treasury	439	444	469	391	426	428	487	497	580	528	521	545	501	514	532	530	513	458
Department of Veterans Affairs	79	79	76	80	75	66	85	82	81	78	80	65	77	76	79	87	104	164
Advisory Council on Historic Preservation					1						0	0	0		1	1	1	0
Agency for International Development	8	9	14	8	7	5	10	14	14	12	7	10	8	10	8	8	7	6
American Battle Monuments Commission	1	2																
Architectural and Transportation Barriers Compliance Board	1	3	6	6	7	8	8	8	7	6	5	5	4	3	4	4	5	5
Broadcasting Board of Governors	3																	
Commission on Civil Rights	1	1	1	1	1	1	1	1	1	1	2	1	1	1	1	1	1	1
Commodity Futures Trading Commission	36	32	35	34	26	33	83	68	56	32	25	19	14	11	15	15	19	30
Consumer Financial Protection Bureau	22	29	26	23	21	26	34											
Consumer Product Safety Commission	29	29	43	45	37	33	48	38	51	39	31	19	24	18	18	20	20	21
Corporation for National and Community Service	7	6	6	7	6	4	5	13	10	7	7	9	11	11	8	9	16	9
Council of Inspector General on Integrity and Efficiency	1	2	1															
Council on Environmental Quality	2																	
Court Services/Offender Supervision, D.C.	5	6	4	4	3	3	3	3	2	2	2	2	1	1	1	3	7	5
CPBSD*	2	3	4	2	2	2	2	3	3	3	3	5	6	6	5	0	0	0
Defense Nuclear Facilities Safety Board		1																
Environmental Protection Agency	218	220	203	188	186	179	223	318	345	331	330	336	372	400	416	417	409	416
Equal Employment Opportunity Commission	7	8	10	8	8	9	9	7	7	7	5	7	8	6	3	4	4	3
Export-Import Bank of the United States							1											
Farm Credit Administration	14	31	27	27	26	30	30	25	23	25	19	12	19	20	20	21	14	17
Farm Credit System Insurance Corporation			2					25		1	1	0	1	1	1	1	1	1
Federal Acquisition Regulation	53	43	40	42	36	40	50	51	85	55	44	36	42	44	45	49	43	48
Federal Communications Commission	83	106	122	133	132	132	118	103	147	145	143	145	139	143	146	134	141	145
Federal Council on the Arts and Humanities											1							
Federal Deposit Insurance Corporation	39	29	19	25	25	17	22	21	21	21	19	18	24	16	20	17	17	22
Federal Emergency Management Agency											0	0	0	0	0	0	24	30
Federal Energy Regulatory Commission	18	17	21	25	24	29	40	41	36	37	39	41	47	35	23	21	19	8
Federal Housing Finance Agency	18	14	20	20	19	20	32	25	27	30	10	3	8	8	9	11	9	12
Federal Housing Finance Board											3							

Federal Maritime Commission	2	4	4	6	8	8	7	6	4	4	8	4	4	3	3	4	4	3	5	7	11	8	7
Federal Mediation and Conciliation Service	1								1	2	1	2	2	2	2	1	1	1	2	2	3	4	3
Federal Reserve System	39	29	22	18	18	23	23	16	25	29	29	22	26	18	18	20	13	17	17	18	18	24	32
Financial Stability Oversight Council									2														
Federal Trade Commission	18	20	18	20	20	23	23	20	23	24	29	19	20	17	14	16	15	15	14	14	12	10	13
General Services Administration	31	20	23	21	21	25	4	18	21	29	34	49	54	54	26	34	33	33	27	37	40	35	
Gulf Coast Ecosystem Restoration Council			2	4	4																		
Institute of Museum and Library Services	1	1	1	1	1	1	1	3	3	1	2	1	1	2	1	1	4	3	3	6	5	5	
National Aeronautics and Space Administration	10	12	12	14	22	23	37	46	37	46	26	32	19	11	15	20	27	34	27	34	13	17	
National Archives and Records Administration	7	8	10	8	10	6	6	4	9	4	9	7	10	10	15	21	17	22	22	19	20	19	
National Commission on Military, National, and Public Service	2																						
National Council on Disability					1																		
National Credit Union Administration	20	23	15	26	26	22	24	24	31	28	24	24	22	22	24	29	27	26	27	20	22	22	
National Endowment for the Arts	6	6	5	7	8	7	8	7	8			2	3	3	2	2	2	2	2	6	5	5	
National Endowment for the Humanities	5	4	4	4	4	5	4	4	3	5	4	3	3	3	3	3	3	3	3	8	9	8	
National Indian Gaming Commission	7	8	9	9	9	5	5	5	15	15	9	17	18	18	19	16	15	14	14	14	16	15	
National Labor Relations Board	2	1	1						1														
National Science Foundation	1	1																					
National Transportation Safety Board	1	3	2	1	1	3	2	2	3	3	2	3	3	3	0	2	3	3	3	2	2	3	
Nuclear Regulatory Commission	5	8	17	15	14																		
Office of Federal Housing Enterprise Oversight	51	60	62	65	60	60	73	64	63	64	63	61	54	54	53	45	49	42	45	39	42	42	
Office of Government Ethics																							
Office of Management and Budget	7	6	8	5	6	4	4	4	4	5	7	7	6	10	9	8	6	4	4	4	7	9	
Office of National Drug Control Policy	5	4	4	4	4	2	2	2	5	8	7	7	2	2	1	2	2	2	2	3	4	5	
Office of Personnel Management					1																		
Office of Special Counsel	26	22	38	40	40	67	54	73	87	77	77	77	80	75	93	94	103	90	72	91			
Office of the Trade Representative		2	3																				
Peace Corps	4	4	4	3	4	4	4	4	5	5	1	1	7	6	6	5	4	9	9	9	9	9	
Pension Benefit Guaranty Corporation	16	17	13	12	12	12	13	13	13	12	10	10	12	12	13	9	6	4	6	6	11	11	
Postal Regulatory Commission	4	3				2	2	2	2	1	3	2	2	3	0	0	0	0	0	0	0	0	0
Presidio Trust	4	4																					
Privacy and Civil Liberties Oversight Board		1																					
Railroad Retirement Board	6	4	2	1	1	1	1	1	1	1	1	1	3	2	6	5	6	11	13	13			
Recovery Accountability and Transparency Board						3	3	3	2			3											
Securities and Exchange Commission	99	85	75	69	61	76	89	107	75	74	72	76	71	64	79	71	73	80					
Selective Service System																							
Small Business Administration	30	29	30	33	30	30	43	48	51	39	26	28	32	34	29	33	40	37					
Social Security Administration	31	27	36	42	39	44	49	53	63	58	64	63	53	68	59	64	63	85					
Special Insp. Gen. for Afghanistan Reconstr.		1	1				4																
Surface Transportation Board	7	10	20	12	8	9	10	11	5	5	6	4	7	3	4	5	5	4					
Tennessee Valley Authority	1	1																					
Udall Institute for Environmental Conflict Res.																							
TOTAL	3,534	3,209	3,318	3,297	3,415	3,305	4,062	4,128	4,225	4,043	4,004	3,882	4,052	4,062	4,083	4,266	4,187	4,509					

Sources: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," Federal Register, various years' editions; and from online edition at <http://www.reginfo.gov>.
*Committee for Purchase from People Who Are Blind or Severely Disabled.

Part G. List of 174 Economically Significant Rules in the Pipeline, Fall 2018

Source: Compiled by Clyde Wayne Crews Jr. from “The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions,” *Federal Register*, and from online edition at <http://www.reginfo.gov>.

The “Regulation Identifier Number” or RIN appears at the end of each entry. 33 Deregulatory actions highlighted in **bold face**; 67 regulatory actions highlighted with underline.

ACTIVE RULEMAKINGS (119 actions, 20 of them deregulatory, 39 regulatory)

DEPARTMENT OF AGRICULTURE

1. USDA/RUS, Final Rule Stage, Rural Broadband Grant, Loan, and Loan Guarantee Program, 0572-AC46
2. USDA/RHS, Proposed Rule Stage, Implementation of the Multi-Family Housing U.S. Citizenship Requirements, 0575-AC86
3. USDA/NRCS, Final Rule Stage, Conservation Stewardship Program (CSP), 0578-AA67
4. USDA/NRCS, Final Rule Stage, Environmental Quality Incentives Program (EQIP) Changes, 0578-AA68
5. USDA/NRCS, Final Rule Stage, Regional Conservation Partnership Program (RCPP), 0578-AA70
6. **USDA/AMS, Final Rule Stage, Establishment of a Domestic Hemp Production Program, 0581-AD82**
7. USDA/FNS, Proposed Rule Stage, Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 0584-AE62
8. USDA/FNS, Proposed Rule Stage, Supplemental Nutrition Assistance Program (SNAP): Standardization of State Heating and Cooling Standard Utility Allowances, 0584-AE69
9. USDA/FNS, Proposed Rule Stage, Strengthening Integrity and Reducing Retailer Fraud in the Supplemental Nutrition Assistance Program (SNAP), 0584-AE71
10. USDA/FNS, Proposed Rule Stage, Supplemental Nutrition Assistance Program: Procedural Requirements for Households that Have Zero Gross Countable Income and Include A Work Registrant, 0584-AE76
11. USDA/FNS, Final Rule Stage, Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 0584-AE57
12. USDA/FNS, Final Rule Stage, Supplemental Nutrition Assistance Program Requirement for Interstate Data Matching to Prevent Multiple Issuances, 0584-AE75

DEPARTMENT OF COMMERCE

13. DOC/PTO, Final Rule Stage, Setting and Adjusting Patent Fees During Fiscal Year 2020, 0651-AD31

DEPARTMENT OF EDUCATION

14. ED/OPE, Proposed Rule Stage, Ensuring Student Access to High Quality and Innovative Postsecondary Educational Programs, 1840-AD38
15. ED/OPE, Final Rule Stage, Federal-State Relationship Agreements, Pell Grant, ACG, National Smart Grant and LEAP, 1840-AD46
16. ED/OPE, Final Rule Stage, Total and Permanent Disability Discharge of Loans Under Title IV of the Higher Education Act, 1840-AD48

DEPARTMENT OF ENERGY

17. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Manufactured Housing, 1904-AC11
18. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Residential Non-Weatherized Gas Furnaces and Mobile Home Gas Furnaces, 1904-AD20
19. DOE/EE, Final Rule Stage, Energy Conservation Standards for Commercial Water Heating Equipment, 1904-AD34
20. DOE/OGC, Proposed Rule Stage, Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation, 1990-AA39

DEPARTMENT OF HEALTH AND HUMAN SERVICES

21. HHS/FDA, Proposed Rule Stage, Nutrient Content Claims, Definition of Term: Healthy, 0910-AI13
22. HHS/FDA, Proposed Rule Stage, Tobacco Product Standard for Characterizing Flavors in Cigars, 0910-AI28
23. HHS/FDA, Final Rule Stage, Sunscreen Drug Products For Over-the-Counter-Human Use; Final Monograph, 0910-AF43
24. HHS/FDA, Final Rule Stage, Mammography Quality Standards Act; Amendments to Part 900 Regulations, 0910-AH04
25. HHS/FDA, Final Rule Stage, General and Plastic Surgery Devices: Sunlamp Products, 0910-AH14
26. HHS/FDA, Final Rule Stage, Required Warnings for Cigarette Packages and Advertisements, 0910-AI39

27. [HHS/CMS, Proposed Rule Stage, Conditions for Coverage for End-Stage Renal Disease Facilities—Third Party Payments \(CMS-3337-P\), 0938-AT11](#)
28. HHS/CMS, Proposed Rule Stage, Adoption of Standards for Health Care Attachments Transactions, Acknowledgments Transactions, Electronic Signatures, and Modification to Referral Certification and Authorization Standard (CMS-0053-P), 0938-AT38
29. HHS/CMS, Proposed Rule Stage, Medicaid Fiscal Accountability (CMS-2393-P), 0938-AT50
30. [HHS/CMS, Proposed Rule Stage, Medicare Coverage of Innovative Technologies \(CMS-3372-P\), 0938-AT88](#)
31. [HHS/CMS, Proposed Rule Stage, International Pricing Index Model For Medicare Part B Drugs \(CMS-5528-P\), 0938-AT91](#)
32. HHS/CMS, Proposed Rule Stage, Proposed Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Program for Contract Year 2021 (CMS-4190-P), 0938-AT97
33. HHS/CMS, Proposed Rule Stage, HHS Notice of Benefit and Payment Parameters for 2021 (CMS-9916-P), 0938-AT98
34. [HHS/CMS, Proposed Rule Stage, Revisions to Promote Patient’s Electronic Access to Healthcare Information and Improve Interoperability for Medicare and Medicaid Participating Providers and Suppliers \(CMS-9123-P\), 0938-AT99](#)
35. HHS/CMS, Proposed Rule Stage, Transparency in Coverage (CMS-9915-P), 0938-AU04
36. HHS/CMS, Proposed Rule Stage, FY 2021 Inpatient Rehabilitation Facility (IRF) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1729-P), 0938-AU05
37. [HHS/CMS, Proposed Rule Stage, CY 2021 Home Health Prospective Payment System Rate Update and Quality Reporting Requirements \(CMS-1730-P\), 0938-AU06](#)
38. HHS/CMS, Proposed Rule Stage, CY 2021 Changes to the End-Stage Renal Disease (ESRD) Prospective Payment System and Quality Incentive Program (CMS-1732-P), 0938-AU08
39. HHS/CMS, Proposed Rule Stage, FY 2021 Hospice Wage Index, Payment Rate Update, and Quality Reporting Requirements (CMS-1733-P), 0938-AU09
40. [HHS/CMS, Proposed Rule Stage, CY 2021 Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Medicare Part B \(CMS-1734-P\), 0938-AU10](#)
41. HHS/CMS, Proposed Rule Stage, Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals; the Long-Term Care Hospital Prospective Payment System; and FY 2021 Rates (CMS-1735-P), 0938-AU11
42. [HHS/CMS, Proposed Rule Stage, CY 2021 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates \(CMS-1736-P\), 0938-AU12](#)
43. HHS/CMS, Proposed Rule Stage, FY 2021 Skilled Nursing Facility (SNFs) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1737-P), 0938-AU13
44. HHS/CMS, Proposed Rule Stage, Payment Policies for Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) (CMS-1738-P), 0938-AU17
45. HHS/CMS, Proposed Rule Stage, HHS Notice of Benefit and Payment Parameters for 2022 (CMS-9914-P), 0938-AU18
46. HHS/CMS, Proposed Rule Stage, Medicaid Eligibility Determination and Mechanized Claims Processing and Retrieval Systems (CMS-2433-P), 0938-AU20
47. HHS/CMS, Final Rule Stage, Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2020; Risk Adjustment Data Validation (CMS-4185-F2), 0938-AT59
48. HHS/CMS, Final Rule Stage, CY 2020 Home Health Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1711-F), 0938-AT68
49. HHS/CMS, Final Rule Stage, CY 2020 Changes to the End-Stage Renal Disease (ESRD) Prospective Payment System, Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) (CMS-1713-F), 0938-AT70
50. HHS/CMS, Final Rule Stage, CY 2020 Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Medicare Part B (CMS-1715-F), 0938-AT72
51. HHS/CMS, Final Rule Stage, CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates (CMS-1717-F), 0938-AT74
52. HHS/CMS, Final Rule Stage, CY 2020 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8071-N), 0938-AT76
53. HHS/CMS, Final Rule Stage, CY 2021 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8074-N), 0938-AU14
54. **HHS/OCR, Final Rule Stage, Nondiscrimination in Health and Health Education Programs or Activities, 0945-AA11**

55. HHS/ONC, Final Rule Stage, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 0955-AA01
56. **HHS/ACF, Final Rule Stage, Head Start Service Duration Requirements, 0970-AC73**

DEPARTMENT OF HOMELAND SECURITY

57. **DHS/OS, Prerule Stage, Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure, 1601-AA34**
58. DHS/USCIS, Proposed Rule Stage, Removing H-4 Dependent Spouses From the Classes of Aliens Eligible for Employment Authorization, 1615-AC15
59. DHS/USCIS, Proposed Rule Stage, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 1615-AC18
60. DHS/USCIS, Proposed Rule Stage, Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 1615-AC19
61. DHS/USCIS, Proposed Rule Stage, Asylum Application, Interview, and Employment Authorization for Applicants, 1615-AC27
62. DHS/USCBP, Proposed Rule Stage, Western Hemisphere Travel Initiative (WHTI)—Noncompliant Traveler Fee, 1651-AB06
63. DHS/USCBP, Final Rule Stage, Collection of Biometric Data From Aliens Upon Entry To and Exit From the United States, 1651-AB12
64. DHS/USICE, Proposed Rule Stage, Visa Security Program Fee, 1653-AA77
65. DHS/FEMA, Proposed Rule Stage, Cost of Assistance Estimates in the Disaster Declaration Process for the Public Assistance Program, 1660-AA99

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

66. HUD/HUDSEC, Final Rule Stage, Housing and Community Development of 1980: Verification of Eligible Status, 2501-AD89
67. HUD/CPD, Final Rule Stage, Housing Trust Fund (FR-5246), 2506-AC30

DEPARTMENT OF THE INTERIOR

68. DOI/FWS, Proposed Rule Stage, Migratory Bird Hunting; 2020-2021 Migratory Game Bird Hunting Regulations, 1018-BD89

69. DOI/FWS, Proposed Rule Stage, Migratory Bird Hunting; Proposed 2021–22 Migratory Game Bird Hunting Regulations With Requests for Indian Tribal Proposals, 1018-BE34

DEPARTMENT OF LABOR

70. **DOL/ETA, Final Rule Stage, Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A workers), 1205-AB89**
71. **DOL/EBSA, Proposed Rule Stage, Default Electronic Disclosures by Employee Pension Benefit Plans Under ERISA, 1210-AB90**
72. DOL/EBSA, Proposed Rule Stage, Transparency in Coverage, 1210-AB93
73. DOL/OSHA, Prerule Stage, Emergency Response, 1218-AC91
74. **DOL/WHI, Proposed Rule Stage, Tip Regulations Under the Fair Labor Standards Act (FLSA), 1235-AA21**
75. **DOL/WHI, Final Rule Stage, Joint Employer Status Under the Fair Labor Standards Act, 1235-AA26**

DEPARTMENT OF TRANSPORTATION

76. DOT/FAA, Proposed Rule Stage, Remote Identification of Unmanned Aircraft Systems, 2120-AL31
77. **DOT/FMCSA, Proposed Rule Stage, Hours of Service of Drivers, 2126-AC19**
78. DOT/NHTSA, Prerule Stage, Retroreflective Tape for Single-Unit Trucks, 2127-AL57
79. DOT/NHTSA, Final Rule Stage, Establish Side Impact Performance Requirements for Child Restraint Systems (MAP-21), 2127-AK95
80. **DOT/NHTSA, Final Rule Stage, The Safer Affordable Fuel-Efficient (Safe) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 2127-AL76**
81. **DOT/PHMSA, Proposed Rule Stage, Pipeline Safety: Gas Pipeline Regulatory Reform, 2137-AF36**

DEPARTMENT OF THE TREASURY

82. TREAS/FINCEN, Proposed Rule Stage, Financial Crimes Enforcement Network: Cross-Border Electronic Transmittals of Funds, 1506-AB01
83. TREAS/FINCEN, Final Rule Stage, Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Investment Advisers, 1506-AB10
84. **TREAS/CUSTOMS, Final Rule Stage, Automated Commercial Environment (ACE) Required for**

Electronic Entry/Entry Summary (Cargo Release and Related Entry) Filings, 1515-AE03

85. **TREAS/IRS, Proposed Rule Stage, Treatment of Certain Interests in Corporations as Stock or Indebtedness, 1545-BO18**
86. TREAS/IRS, Proposed Rule Stage, Rules for Denial of Deduction for Certain Fines, Penalties, and Other Amounts, 1545-BO67
87. TREAS/IRS, Proposed Rule Stage, Guidance on the Elimination of Interbank Offered Rates, 1545-BO91
88. TREAS/IRS, Proposed Rule Stage, Revisions to the Section 168(k) Final Regulations, 1545-BP32
89. TREAS/IRS, Final Rule Stage, Hybrid Dividends and Payments, 1545-BO53
90. TREAS/IRS, Final Rule Stage, Section 250 Regulations, 1545-BO55
91. TREAS/IRS, Final Rule Stage, Section 59A Proposed Regulations, 1545-BO56
92. TREAS/IRS, Final Rule Stage, Rules Regarding Business Interest Limitation Under Section 163(j), 1545-BO73
93. TREAS/IRS, Final Rule Stage, Additional First-Year Depreciation Allowance, 1545-BO74
94. **TREAS/IRS, Final Rule Stage, Capital Gains Invested in Opportunity Zones, 1545-BP03**
95. **TREAS/IRS, Final Rule Stage, Qualified Opportunity Funds, 1545-BP04**
96. TREAS/IRS, Final Rule Stage, Guidance Under Section 199A (RIC-REIT), 1545-BP12
97. TREAS/IRS, Final Rule Stage, Guidance Under Sections 951(b) and 951A, 1545-BP15
98. TREAS/IRS, Final Rule Stage, Tax Cuts and Jobs Act (TCJA) Foreign Tax Credit Guidance, 1545-BP19
99. TREAS/OCC, Proposed Rule Stage, Reforming the Community Reinvestment Act Regulatory Framework, 1557-AE34
100. TREAS/OCC, Final Rule Stage, Net Stable Funding Ratio, 1557-AD97

DEPARTMENT OF VETERANS AFFAIRS

101. VA, Proposed Rule Stage, Schedule for Rating Disabilities—Ear, Nose, Throat, and Audiology Disabilities; Special Provisions Regarding Evaluation of Respiratory Conditions; Respiratory System, 2900-AQ72
102. VA, Proposed Rule Stage, Program of Comprehensive Assistance for Family Caregivers Amendments Under the VA MISSION Act of 2018, 2900-AQ48
103. VA, Final Rule Stage, Civilian Health and Medical Program of the Department of Veterans Affairs, 2900-AP02

ENVIRONMENTAL PROTECTION AGENCY

104. EPA/RODENVER, Proposed Rule Stage, Federal Implementation Plan for Oil and Natural Gas Sources: Uintah and Ouray Indian Reservation in Utah, 2008-AA03
105. **EPA/OW, Proposed Rule Stage, Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category- Reconsideration, 2040-AF77**
106. EPA/OW, Proposed Rule Stage, National Primary Drinking Water Regulations for Lead and Copper: Regulatory Revisions, 2040-AF15
107. **EPA/OAR, Proposed Rule Stage, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act, 2060-AM75**
108. **EPA/OAR, Final Rule Stage, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 2060-AT54**
109. **EPA/OAR, Final Rule Stage, the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 2060-AU09**

COMMODITY FUTURES TRADING COMMISSION

110. CFTC, Final Rule Stage, Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds (Volcker Rule), 3038-AE72

CONSUMER PRODUCT SAFETY COMMISSION

111. CPSC, Final Rule Stage, Flammability Standard for Upholstered Furniture, 3041-AB35
112. CPSC, Final Rule Stage, Regulatory Options for Table Saws, 3041-AC31

FEDERAL ACQUISITION REGULATION

113. **FAR, Proposed Rule Stage, Federal Acquisition Regulation (FAR); FAR Case 2018-004; Increased Micro-Purchase and Simplified Acquisition Thresholds, 9000-AN65**

GENERAL SERVICES ADMINISTRATION

114. GSA, Proposed Rule Stage, Federal Permitting Improvement Steering Council (FPISC); FPISC Case 2019-001, Adding a New Sector of Covered Projects Under FAST-

NATIONAL INDIAN GAMING COMMISSION

- 115. NIGC, Proposed Rule Stage, Definitions, 3141-AA32
- 116. NIGC, Proposed Rule Stage, Management Contracts, 3141-AA58
- 117. NIGC, Proposed Rule Stage, Buy Indian Goods and Services (BIGS), 3141-AA62

NUCLEAR REGULATORY COMMISSION

- 118. NRC, Proposed Rule Stage, Revision of Fee Schedules: Fee Recovery for FY 2020 [NRC-2017-0228], 3150-AK10

SOCIAL SECURITY ADMINISTRATION

- 119. SSA, Proposed Rule Stage, Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 0960-AI27

COMPLETED ACTIONS (44 actions, 11 of the deregulatory, 16 regulatory)

DEPARTMENT OF AGRICULTURE

- 120. USDA/FSA, Emergency Conservation Program, 0560-AH43
- 121. USDA/FSA, Crop Assistance Program, 0560-AI11
- 122. USDA/FSA, Dairy Margin Coverage (DMC) Program and Dairy Indemnity Payment Program, 0560-AI37
- 123. USDA/FSA, Trade Mitigation Program, 0560-AI51
- 124. USDA/FSA, Agricultural Disaster Assistance Indemnity Programs, 0560-AI52
- 125. USDA/RBS, Strategic Economic and Community Development, 0570-AA94
- 126. USDA/NRCS, Environmental Quality Incentives Program, 0578-AA45
- 127. USDA/FNS, Supplemental Nutrition Assistance Program: Farm Bill of 2008 Retailer Sanctions, 0584-AD88

DEPARTMENT OF EDUCATION

- 128. ED/OPE, **Institutional Accountability, 1840-AD26**
- 129. ED/OPE, **Program Integrity; Gainful Employment, 1840-AD31**
- 130. ED/OPE, State Authorization and Related Issues, 1840-AD36

- 131. ED/OPE, Accreditation and Related Issues, 1840-AD37

DEPARTMENT OF HEALTH AND HUMAN SERVICES

- 132. HHS/OIG, Removal of Safe Harbor Protection for Rebates to Plans or PBMs Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection, 0936-AA08
- 133. HHS/CMS, Hospital and Critical Access Hospital (CAH) Changes to Promote Innovation, Flexibility, and Improvement in Patient Care (CMS-3295-F), 0938-AS21
- 134. HHS/CMS, Revisions to Requirements for Discharge Planning for Hospitals, Critical Access Hospitals, and Home Health Agencies (CMS-3317-F), 0938-AS59
- 135. HHS/CMS, Medicaid Disproportionate Share Hospital (DSH) Allotment Reductions (CMS-2394-F), 0938-AS63
- 136. HHS/CMS, Program Integrity Enhancements to the Provider Enrollment Process (CMS-6058-F), 0938-AS84
- 137. **HHS/CMS, Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction (CMS-3346-F), 0938-AT23**
- 138. HHS/CMS, Medicaid Provider Payment Reassignment (CMS-2413-F), 0938-AT61
- 139. HHS/CMS, FY 2020 Inpatient Rehabilitation Facility (IRF) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1710-F), 0938-AT67
- 140. **HHS/CMS, FY 2020 Hospice Wage Index, Payment Rate Update, and Quality Reporting Requirements (CMS-1714-F), 0938-AT71**
- 141. HHS/CMS, Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals; the Long-Term Care Hospital Prospective Payment System; and FY 2020 Rates (CMS-1716-F), 0938-AT73
- 142. HHS/CMS, FY 2020 Skilled Nursing Facility (SNFs) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1718-F), 0938-AT75
- 143. **HHS/CMS, Health Reimbursement Arrangements and Other Account-Based Group Health Plans (CMS-9918-F), 0938-AT90**
- 144. HHS/OCR, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 0945-AA10
- 145. HHS/ACE, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 0970-AC42

DEPARTMENT OF HOMELAND SECURITY

- 146. DHS/USCIS, Inadmissibility on Public Charge Grounds, 1615-AA22
- 147. DHS/USICE, Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children, 1653-AA75

DEPARTMENT OF THE INTERIOR

- 148. DOI/BSEE, Revisions to the Blowout Preventer Systems and Well Control Rule, 1014-AA39
- 149. DOI/FWS, Migratory Bird Hunting; 2019-2020 Migratory Game Bird Hunting Regulations, 1018-BD10

DEPARTMENT OF LABOR

- 150. DOL/EBSA, Revision of the Form 5500 Series and Implementing Related Regulations under the Employee Retirement Income Security Act of 1974 (ERISA), 1210-AB63
- 151. DOL/EBSA, Health Reimbursement Arrangements and Other Account-Based Group Health Plans, 1210-AB87
- 152. DOL/EBSA, Definition of an “Employer” Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple Employer Plans, 1210-AB88
- 153. DOL/WHI, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 1235-AA20

DEPARTMENT OF TRANSPORTATION

- 154. DOT/NHTSA, 49 CFR Part 578, Civil Penalties, 2127-AL94

DEPARTMENT OF THE TREASURY

- 155. TREAS/IRS, Application of Various Provisions of Section 2711 of the Public Health Service Act, the Affordable Care Act, and the Internal Revenue Code to Health Reimbursement Arrangements, 1545-BO46
- 156. TREAS/IRS, Guidance Related to Section 951A (Global Intangible Low-Taxed Income Regulations), 1545-BO54
- 157. TREAS/IRS, Foreign Tax Credit Guidance Under Tax Cuts and Jobs Act (TCJA), 1545-BO62
- 158. TREAS/IRS, State and Local Tax (SALT) Credits and Charitable Contributions, 1545-BO89

DEPARTMENT OF VETERANS AFFAIRS

- 159. VA, Veterans Community Care Program, 2900-AQ46
- 160. VA, Urgent Care, 2900-AQ47

ENVIRONMENTAL PROTECTION AGENCY

- 161. EPA/OW, Definition of “Waters of the United States”—Recodification of Preexisting Rule, 2040-AF74
- 162. EPA/OAR, Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations, 2060-AT67

NUCLEAR REGULATORY COMMISSION

- 163. NRC, Revision of Fee Schedules: Fee Recovery for FY 2019 [NRC-2017-0032], 3150-AJ99

LONG-TERM ACTIONS (29 actions, two of them deregulatory, 12 regulatory)

DEPARTMENT OF AGRICULTURE

- 164. USDA/FSIS, Revision of the Nutrition Facts Panels for Meat and Poultry Products and Updating Certain Reference Amounts Customarily Consumed, 0583-AD56

DEPARTMENT OF ENERGY

- 165. DOE/EE, Energy Conservation Standards for Commercial Packaged Boilers, 1904-AD01
- 166. DOE/EE, Energy Conservation Standards for Portable Air Conditioners, 1904-AD02
- 167. DOE/EE, Energy Conservation Standards for Uninterruptible Power Supplies, 1904-AD69
- 168. DOE/EE, Fossil Fuel-Generated Energy Consumption Reduction for New Federal Buildings and Major Renovations of Federal Buildings, 1904-AB96

DEPARTMENT OF HEALTH AND HUMAN SERVICES

- 169. HHS/CMS, Durable Medical Equipment Fee Schedule, Adjustments to Resume the Transitional 50/50 Blended Rates to Provide Relief in Non-Competitive Bidding Areas (CMS-1687-F), 0938-AT21
- 170. HHS/CMS, Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction (CMS-3347-F), 0938-AT36
- 171. HHS/CMS, Proficiency Testing Regulations Related to Analytes and Acceptable Performance (CMS-3355-F), 0938-AT55
- 172. HHS/CMS, Interoperability and Patient Access (CMS-9115-F), 0938-AT79

173. HHS/CMS, Specialty Care Models To Improve Quality of Care And Reduce Expenditures (CMS-5527-F), 0938-AT89

DEPARTMENT OF HOMELAND SECURITY

174. DHS/USCIS, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 1615-AC06
175. DHS/USCBP, Importer Security Filing and Additional Carrier Requirements, 1651-AA70
176. DHS/USCBP, Air Cargo Advance Screening (ACAS), 1651-AB04
177. DHS/CISA, Ammonium Nitrate Security Program, 1670-AA00

DEPARTMENT OF LABOR

178. DOL/ETA, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 1205-AB76
179. DOL/EBSA, Improved Fee Disclosure for Welfare Plans, 1210-AB37
180. DOL/OSHA, Infectious Diseases, 1218-AC46
181. DOL/OSHA, Process Safety Management and Prevention of Major Chemical Accidents, 1218-AC82

DEPARTMENT OF TRANSPORTATION

182. DOT/FMCSA, Heavy Vehicle Speed Limiters, 2126-AB63
183. DOT/NHTSA, Heavy Vehicle Speed Limiters, 2127-AK92
184. DOT/NHTSA, Federal Motor Vehicle Safety Standard (FMVSS) 150--Vehicle to Vehicle (V2V) Communication, 2127-AL55
185. DOT/FRA, High-Speed Intercity Passenger Rail (HSIPR) Program; Buy America Program Requirements, 2130-AC23

DEPARTMENT OF THE TREASURY

186. TREAS/CDFIF, Interim Rule for the CDFI Bond Guarantee Program, 1559-AA01

DEPARTMENT OF VETERANS AFFAIRS

187. VA, Reimbursement for Emergency Treatment, 2900-AQ08

ENVIRONMENTAL PROTECTION AGENCY

188. **EPA/OAR, Revision of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 2060-AT79**
189. EPA/OCSPP, Trichloroethylene (TCE); Rulemaking Under TSCA Section 6(a); Vapor Degreasing, 2070-AK11

FEDERAL COMMUNICATIONS COMMISSION

190. FCC, Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions (GN Docket No. 12-268), 3060-AJ82
191. FCC, Restoring Internet Freedom (WC Docket No. 17-108); Protecting and Promoting the Open Internet (GN Docket No. 14-28), 3060-AK21

NUCLEAR REGULATORY COMMISSION

192. NRC, Revision of Fee Schedules: Fee Recovery for FY 2021 [NRC-2018-0292], 3150-AK24

Part H. Rules Affecting Small Business, 1997–2018

	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Dept. of Agriculture	24	31	46	40	47	45	80	65	84	87	93	73	67	54	52	64	39	56	47	49	63
Dept. of Commerce	90	90	94	109	112	103	158	115	98	90	107	112	111	108	79	74	77	89	98	88	52
Dept. of Defense		1	1	10	7	12	25	26	16	12	7	13	14	13	12	13	6	8	7	15	21
Dept. of Education	2	2		1	2	3		1	1	0	0	0	1	0	0	0	1	0	0	0	0
Dept. of Energy	12	15	14	8	4	5	8	6	3	2	1	1	0	0	0	1	0	1	1	0	0
Dept. of Health and Human Services	64	67	73	93	103	91	85	100	112	94	93	96	109	112	106	96	92	108	107	75	88
Dept. of Homeland Security	28	27	25	22	25	28	27	34	37	35	42	44	43	43	38	33	0	0	0	0	0
Dept. of Housing and Urban Development	1	2	2	1				0	1	0	1	5	4	4	6	11	6	3	0	1	1
Dept. of the Interior	13	9	30	35	30	23	24	23	18	17	18	19	29	21	20	26	17	20	18	33	29
Dept. of Justice	5	5	12	9	10	10	9	9	5	3	2	5	7	8	8	8	13	15	14	14	10
Dept. of Labor	26	12	20	22	24	22	24	23	26	29	29	26	26	19	19	23	22	26	40	38	41
Dept. of State	31	25	14	18	21	20	31	21	20	4	3	1	0	1	1	2	6	3	2	0	0
Dept. of Transportation	46	47	56	61	53	68	65	56	49	45	41	43	60	63	103	151	216	244	266	246	208
Dept. of the Treasury	34	36	41	23	27	29	39	47	56	48	47	45	37	41	38	27	26	27	31	15	60
Dept. of Veterans Affairs		1	1	1	1	2	1	2	3	2	2	0	0	0	0	0	1	1	3	6	6
Agency for International Development								1	1	0	0	1	1	0	0	1	2	1	0	0	0
Arch. and Trans. Barriers Compliance Board		1	2	2	1	1	1	1	1	0	0	0	0	0	0	0	1	1	2	2	3
Commodity Futures Trading Commission	2	2	2		1			0	1	1	1	1	0	1	1	2	0	0	0	0	1
Consumer Financial Protection Bureau	10	8	3	4	3	4	8	5													
Consumer Product Safety Commission	8	5	4	2			2	0	0		0	0	1	0	0	0	0	0	0	0	0
Corporation for National and Community Service								0		0	0	0	1	1	0	0	0	0	0	0	0
Environmental Protection Agency	3	4	14	12	6	6	49	73	95	89	83	85	95	110	122	135	167	185	205	179	178
Equal Employment Opportunity Commission	3	3	2	2	2	2	3	5	5	4	2	3	3	3	0	0	0	2	0	0	2
Federal Emergency Management Agency												0	0	0	0	0	1	1	1	0	0
Federal Acquisition Regulation Commission	53	43	38	22	24	17	15	10	5	4	6	5	5	7	5	5	6	9	13	16	11
Federal Communications Commission	61	77	92	99	98	99	89	78	112	110	110	109	108	113	113	104	109	117	105	91	82
Federal Deposit Insurance Corporation						4	5	2	1												
Federal Energy Regulatory Commission								0			0	1	0	0	0	0	0	0	0	1	0
Federal Housing Finance Board								0			0	0	0	0	0	0	0	0	0	0	1
Federal Maritime Commission			3	1	1	1	1	3	3	3	3	2	3	5	7	10	7	6	7	4	5

Part H. Rules Affecting Small Business, 1998–2018 (continued)

	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998
Federal Reserve System	4	2	2	4	7	5	12	17	8	6	5	5	3	6	5	3	7	10	8	2	5
Federal Trade Commission	14	18	16	18	21	18	21	22	16	16	13	11	13	12	11	9	9	9	9	10	10
Federal Mediation and Conciliation Service								0			0	0	0	0	0	0	0	1	1	0	0
General Services Administration	28	15	13	10	4	2	3	4	5	6	7	3	3	3	1	5	4	1	1	2	2
National Aeronautics and Space Administration				1	1	2	2	3			0	0	0	0	0	0	0	0	0	0	1
National Archives and Records Administration								0			0	0	0	1	1	1	0	0	0	0	1
National Credit Union Administration							2	4	4	7	3	1	4	1	2	0	0	0	0	0	0
National Endowment for the Arts	2	2	2	2	2	2	2				0	0	0	0	0	2	2	0	0	0	0
National Endowment for the Humanities								0			0	0	0	0	0	0	0	0	0	0	0
National Labor Relations Board	1																				
Nuclear Regulatory Commission	3	3	3	3	4	3	6	3	1	2	1	2	1	1	0	3	5	5	3	5	8
Office of Management and Budget	1							0			0	0	0	0	0	0	0	0	1	2	1
Pension Benefit Guaranty Corporation			1																		
Railroad Retirement Board								0			0	0	0	0	0	0	0	0	0	0	0
Resolution Trust Corporation													0	17	0	0	0	0	0	0	0
Small Business Administration	15	17	19	28	23	27	38	35	39	20	13	15	21	19	18	24	21	21	24	28	20
Social Security Administration								1		1	1	1	1	1	1	1	1	0	0	2	0
Surface Transportation Board	1	1	2		1																
Securities and Exchange Commission	20	19	24	11	9	15	19	27	21	21	19	29	16	0	20	25	28	26	40	39	27
TOTAL	605	590	671	674	674	669	854	822	845	758	753	757	787	788	789	859	892	996	1054	963	937

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," Federal Register, various years' editions, www.reginfo.gov.

Part I. The Unconstitutionality Index, 1993–2019

Year	Final Rules	Public Laws	The Index	Notices	Executive Orders	Executive Memos
1993	4,369	210	21			
1994	4,867	255	19			
1995	4,713	88	54	23,105	40	
1996	4,937	246	20	24,361	50	
1997	4,584	153	30	26,035	38	
1998	4,899	241	20	26,198	38	
1999	4,684	170	28	25,505	35	
2000	4,313	410	11	25,470	39	13
2001	4,132	108	38	24,829	67	12
2002	4,167	269	15	25,743	32	10
2003	4,148	198	21	25,419	41	14
2004	4,101	299	14	25,309	46	21
2005	3,975	161	25	25,353	27	23
2006	3,718	321	12	25,031	25	18
2007	3,595	188	19	24,476	32	16
2008	3,830	285	13	25,279	29	15
2009	3,503	125	28	24,753	44	38
2010	3,573	217	16	26,173	41	42
2011	3,807	81	47	26,161	33	19
2012	3,708	127	29	24,408	39	32
2013	3,659	72	51	24,261	24	32
2014	3,554	224	16	23,970	34	25
2015	3,410	114	30	24,393	29	31
2016	3,853	214	18	24,557	45	36
2017	3,281	97	34	22,137	63	38
2018	3,368	313	11	22,025	35	30
2019	2,964	105	28	21,804	47	26

Sources: Final rules, notices, and executive orders compiled from database at National Archives and Records Administration, Office of the Federal Register, <https://www.federalregister.gov/articles/search#advanced>; Public laws from Government Printing Office, Public and Private Laws, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>.

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IV. Notice and Public Comment for Economically Significant Guidance Documents:

1. In General: Except as provided in Section IV(2), when an agency prepares a draft of an economically significant guidance document, the agency shall:

a. Publish a notice in the Federal Register announcing that the draft document is available.

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