

# TEN THOUSAND COMMANDMENTS

*An Annual Snapshot of the  
Federal Regulatory State*

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# Ten Thousand Commandments

## An Annual Snapshot of the Federal Regulatory State

2019 Edition

by Clyde Wayne Crews, Jr.

### Executive Summary

Spending control and deficit restraint are indispensable to any nation's long-term economic health. Alarm among conservatives over lack of spending restraint under President Donald Trump's administration,<sup>1</sup> even with the benefit of a healthy economy, has not stemmed disbursements. Without significant changes, more will be spent on debt service than on the entire defense budget.<sup>2</sup> Meanwhile, magical thinking that government outlays create wealth is now fashionable among emboldened progressives who advocate Medicare for All, a Green New Deal, a guaranteed national income, and more.<sup>3</sup> In March 2018, 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.<sup>4</sup> Similarly, the Congressional Budget Office's *Budget and Economic Outlook*, covering 2019 to 2029, shows discretionary, entitlement, and interest spending exceeded \$4.1 trillion in FY 2018 and projects spending above \$5 trillion by FY 2022.<sup>5</sup> The national debt now stands at \$22.074 trillion, up more than \$1 trillion in only one year.<sup>6</sup>

Yet 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. Regulatory burdens can operate as a hidden tax.<sup>7</sup> Unlike on-budget spending, regulatory costs are largely obscured from public view. They are the least disciplined aspects of government activity, which can make regulation overly 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 such training. Just as firms generally pass the costs of some taxes along to consumers,<sup>8</sup> some regulatory compliance costs and mandates borne by businesses will percolate throughout the economy, finding their way into consumer

## Box 1. Executive Actions on Regulatory Process Reform during Trump's First Two Years

- Presidential Memorandum. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, January 24, 2017.<sup>12</sup>
- Executive Order 13755. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, January 24, 2017.<sup>13</sup>
- Executive Order 13771. Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.<sup>14</sup>
- Executive Order 13772. Core Principles for Regulating the United States Financial System, February 3, 2017.<sup>15</sup>
- Executive Order 13777. Enforcing the Regulatory Reform Agenda, February 24, 2017.<sup>16</sup>
- Executive Order 13781. Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017.<sup>17</sup>
- Executive Order 13777. Identifying and Reducing Tax Regulatory Burdens, April 21, 2017.<sup>18</sup>
- Executive Order 13790. Promoting Agriculture and Rural Prosperity in America, April 25, 2017.<sup>19</sup>
- Executive Order 13792. Review of Designations under the Antiquities Act, April 26, 2017.<sup>20</sup>
- Executive Order 13791. Enforcing Statutory Prohibitions on Federal Control of Education, April 26, 2017.<sup>21</sup>
- Executive Order 13795. Implementing an America-First Offshore Energy Strategy, April 28, 2017.<sup>22</sup>
- Executive Order 13807. Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, August 15, 2017.<sup>23</sup>
- Executive Order 13813. Promoting Healthcare Choice and Competition across the United States, October 12, 2017.<sup>24</sup>
- 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.<sup>25</sup>
- Executive Order 13821. Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, January 8, 2018.<sup>26</sup>
- Presidential Memorandum. Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, April 12, 2018.<sup>27</sup>
- Executive Order 13847. Strengthening Retirement Security in America, August 31, 2018.<sup>28</sup>
- Presidential Memorandum. Promoting the Reliable Supply and Delivery of Water in the West, October 19, 2018.<sup>29</sup>
- Presidential Memorandum. Developing a Sustainable Spectrum Strategy for America's Future, October 25, 2018.<sup>30</sup>
- 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.<sup>31</sup>

prices and workers' wages. Rising debt and deficits could incentivize some regulatory reform.

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 they would envelop the economy and society. Over several decades, rules have accumulated year after year with little retrenchment. Over the past two years, there were some reversals in this regard, such as a slowdown in the issuing of new rules and some rollbacks initiated of existing ones, but there are still reasons for concern.

One of the Trump administration's first directives was a memorandum to executive branch agencies titled "Regulatory Freeze Pending Review."<sup>9</sup> Presidents routinely take similar steps to review predecessors' pending actions and prioritize their own.<sup>10</sup> Some of Trump's executive actions since taking office worryingly emphasized trade restrictions, anti-dumping, and "buy American" agendas.<sup>11</sup> But the president also issued a series of actions related to general regulatory process reform, liberalizing particular sectors, reforming the executive branch itself, and streamlining internal agency processes and timeliness of approvals (see Box 1).

Government heavily influences society through regulation as well as spending. Therefore, lawmakers should work toward scrupulous tracking and disclosure of regulatory costs and perform some periodic housecleaning. The limited cost-benefit analysis currently undertaken by agencies relies largely on agency self-reporting and covers only a fraction of rules.<sup>32</sup> 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 agency rulemaking.<sup>33</sup>

Excess regulation is largely driven by the longstanding delegation by Congress of its rightful lawmaking power to regulatory agencies. Addressing the situation effectively will require the restoration of Congress' duties under Article I of the Constitution. 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."<sup>34</sup>

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.<sup>35</sup> Scattered government and private data exist about the number of regulations issued by agencies and their costs and effects. 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 2019 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 six 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 and a discussion of Trump's own regulatory impulses that could undermine the effort.
3. An overview of the scope of the regulatory state, including its appraised size compared with federal budgetary components and gross domestic product (GDP).
4. 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 provides a brief survey of memoranda, notices, and other "regulatory dark matter," and examines implementation of Trump's "one-in, two-out" process for new regulations and its limitations as an executive branch program.
5. Recommendations for reform that emphasize disclosure and improving congressional accountability for rulemaking.
6. An appendix containing historical tables of regulatory trends over past decades.

For the good of the nation's 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 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 Obama administration rules in the pipeline;
  - Multipronged streamlining of permitting for pipelines, bridges, 5G broadband, rural broadband, and other infrastructure;

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- Agency restraint in initiating large, significant rulemakings;
- Continued progress 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.
- ***Agencies have noted some warning signs.*** While the Trump administration can be said to have technically met the goal of implementing a “one-in, two-out” process for federal regulations—as prescribed by Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”—the longer-term horizon shows agencies inclined to reverse this, poised to issue substantially more regulatory actions without a deregulatory course correction.
- ***Some warning signs are of Trump's own creation.*** President Trump's regulatory streamlining could be offset by his actions and comments favorable toward regulatory intervention in areas such as antitrust; speech, social media, and tech regulation; trade restrictions; infrastructure and farm spending and other distortionary subsidies; hints at 5G telecommunications regulation; food, drug, and firearm regulation; nascent financial regulation; funding technology and scientific research; and potential new job training and family leave programs.
- Given the limited available federal government data and reports, and contemporary studies—and the illegal neglect on the part of the federal government 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 some context and rudimentary comparison with federal spending and other economic metrics. This report also contains an outline of the vast sweep of intervention and policies for which costs are disregarded.
- The burden of regulatory intervention is equivalent to over 40 percent of the level of federal spending, projected to be \$4.4 trillion in 2019.
- Regulatory costs of \$1.9 trillion amount to 9 percent of U.S. GDP, which was estimated at \$20.66 trillion in 2018 by the Commerce Department's Bureau of Economic Analysis.
- When regulatory costs are combined with estimated federal FY 2018 projected outlays of \$4.412 trillion, the federal government's share of the entire economy reaches 30 percent (not including state and local spending and regulation).
- If it were a country, U.S. regulation would be the world's ninth-largest economy, ranking behind India and ahead of Canada.
- The regulatory hidden “tax” is equivalent to federal individual and corporate income tax receipts combined, which totaled \$1.88 trillion in 2018 (\$1.66 trillion in individual income tax revenues and \$218 billion in corporate income tax revenues).
- Regulatory costs rival corporate pretax profits of \$2.182 trillion.
- If one assumed that all costs of federal regulation and intervention flowed all the way down to households, U.S. households would “pay” \$14,615 annually on average in a regulatory hidden tax. That amounts to 20 percent of the average pretax income of \$73,573, and 24 percent of the average expenditure budget of \$60,060. The regulatory “tax” exceeds every item in the household budget except housing. More is “spent” on embedded regulation than on health care, food, transportation, entertainment, apparel, services, and savings.
- Trump finished 2018 with 3,368 rules. A year prior, the 2017 *Federal Register* contained 3,281 completed or final rules, which was the lowest count since records began being kept in the 1970s (in the 1990s and early 2000s, rule counts regularly exceeded 4,000 annually).

- During calendar year 2018, while agencies issued those 3,368 rules, Congress enacted “only” 313 laws. Thus, agencies issued 11 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. The average ratio for the past decade has been 28.
- In 2017, Trump’s first year, the *Federal Register* finished 2017 at 61,308 pages, the lowest count since 1993 and a 36 percent drop from President Barack Obama’s 95,894 pages in 2016, which had been the highest level in history. The 2018 *Federal Register* rose to 63,645 pages (however, Trump’s rollbacks of rules can 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 \$71.4 billion in fiscal year 2018 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 2018, 2,072 proposed rules were in the *Federal Register* pipeline.
- In the pipeline now, 67 federal departments, agencies, and commissions have 3,534 regulatory actions at various stages of implementation (recently “Completed,” “Active,” and “Long-term” stages), according to the fall 2018 “Unified Agenda of Federal Regulatory and Deregulatory Actions.” Of the 3,534 rules, 671 are “Deregulatory” for Executive Order 13771 purposes, broken down as follows:
  - Of 2,399 rules in active phase, 514 deemed deregulatory.
  - Of 480 completed rules, 94 deemed deregulatory.
  - Of 655 long-term rules, 63 deemed deregulatory.
- Of the 3,534 regulations in the Agenda’s pipeline (completed, active, and long-term stages), 174 are “economically significant” rules, which the federal government defines as having annual economic effects of \$100 million or more. Of those 174 rules, 38 are deemed deregulatory for purposes of Executive Order 13771 (11 at the completed stage, 26 at the active stage). Only one is at the planned long-term rule phase.
- Since 1993, when the first edition of *Ten Thousand Commandments* was published, agencies have issued 104,748 rules. Since the *Federal Register* first began itemizing them in 1976, there have been 201,838 rules issued.
- The Trump administration’s spring and fall Unified Agenda of Regulatory and Deregulatory Actions contained a combined 35 completed “economically significant” rules (and 88 in 2017). The yearly average for Barack Obama’s eight years was 69; George W. Bush’s average was 49. Trump’s Agendas are the first to contain expressly Deregulatory economically significant rules for purposes of Executive Order 13771.
- In the first year of the Trump administration, the Government Accountability Office issued 54 reports on “major” rules (a category similar to but slightly broader than “economically significant”) as required by the Congressional Review Act. President George W. Bush’s administration averaged 63 “major” rules annually during his eight years in office. President Obama averaged 86, or a 36 percent higher average annual output than that of Bush. Obama issued 685 major rules during his term, compared with Bush’s 505. Halfway through the first term, Trump’s average is 51.
- Of the 3,534 regulations in the pipeline, 605 affect small businesses. Of those, 330 required a Regulatory Flexibility Analysis (official assessment of small-business impacts), down from 412 in 2016. An additional 275 were otherwise noted by agencies to affect small businesses in some fashion. Overall, 102 were deemed “Deregulatory.”
- The five most active rule-producing entities—the Departments of Commerce, Defense, Health and Human Services,

Transportation, and the Treasury—account for 1,499 rules, or 42 percent of all rules in the Unified Agenda pipeline.

- President Trump issued 63 executive orders 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.
- President Trump issued 38 presidential memoranda 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. There were 22,025 notices issued in 2018. There have been 594,651 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 two 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.<sup>36</sup>

Assessing agencies' priorities and results to date illustrates some limitations for the prospects for continued streamlining of rules and regulations when the presidential pressure lets up, particularly given that the 116th Congress is unlikely to enact a legislative package aimed at regulatory reform. Barack Obama unapologetically wielded the "pen and phone" to expand federal reach over private affairs.<sup>37</sup> Donald Trump, too, has used the pen and phone, in significant part to attempt to undo Obama programs and otherwise streamline regulation.<sup>38</sup> However, it is also the case, that Trump expresses and exhibits substantial regulatory impulses of his own, including toward certain kinds of regulation that undermine the reform agenda; that will be reviewed as well. The overarching reality is that the government is far larger than ever, and Trump's executive branch reorganization initiative undertaken alongside regulatory streamlining resulted in the elimination of no regulatory agencies.<sup>39</sup>

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

and legal challenges to Trump's regulatory rollback and Executive Order 13771 have ensued.<sup>40</sup> A poor record in court so far has been widely noted for Trump's attempted streamlining.<sup>41</sup> These include rebukes to Trump's efforts to delay certain implementation of the U.S. Environmental Protection Agency's (EPA) Waters of the United States rule, a chemical disaster preparedness and disclosure rule, and more.<sup>42</sup>

The administrative state's fundamental incompatibility with limited government is readily observable in the rulemaking process itself. The 1946 Administrative Procedure Act (APA) 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.<sup>43</sup> The APA's rulemaking process allows for wiggle room 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.<sup>44</sup> Therefore, rules cannot be eliminated via the same "good cause" exemption. Rather, a rule can only be replaced with a new rule or legislation.<sup>45</sup> 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.<sup>46</sup>

The two-for-one executive order was explicit regarding its own limitations. The Trump approach in Executive Order 13771 seems executed well within the rule of law, within the confines of the administrative state.<sup>47</sup>

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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.”<sup>48</sup> 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.”<sup>49</sup> The court losses are 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 that has delegated away much of its lawmaking power to executive branch agencies.

Curiously, while the impression is given by opponents that Trump’s rollbacks are illegal and harming health and safety,<sup>50</sup> some critics call Trump’s boast a “deregulation myth.”<sup>51</sup> Some have written that the administration “claims credit for some regulatory actions begun under Obama.”<sup>52</sup> Trump is both overreaching and not accomplishing anything. Both cannot be true. The problem with these criticisms was acknowledged by then-Office of Management and Budget (OMB) Director Mick Mulvaney (now White House chief of staff), who has 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.”<sup>53</sup>

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 driven by agencies themselves. Substantial regulatory

streamlining of these require either new rule-making or legislation.

The reality is that the administrative state is alive and well, powering ahead, and the president alone can only do some very limited streamlining.<sup>54</sup> In a sense, Executive Order 13771 affirmed a separation of powers in rulemaking by underscoring what a president and his agencies may *not* do.<sup>55</sup> 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 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 move could have staying power with subsequent administrations. In Box 1, sector-specific executive actions are noted in areas such as financial regulation, antiquities and national monuments, offshore resource access, education, and health care. In addition to these, Trump’s regulatory rollbacks—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 Congressional Review Act in 2017, via individual resolutions of disapproval passed by Congress and signed by Trump.<sup>56</sup> The rules removed were generally not headline-grabbing reforms, nor all major ones.<sup>57</sup> There were hundreds of rules eligible to be turned back, which provides the sometimes-needed reality check that, “Many companies like existing rules or want more of them,” especially when they provide advantages over rivals.<sup>58</sup> An additional rule and one guidance document from the Consumer Financial Protection Bureau were also eliminated by resolution of disapproval in 2018.

**Second**, the Trump administration withdrew or delayed 1,579 Obama rules that were in the pipeline but not yet finalized, broken down as follows:<sup>59</sup>

- 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. This manifested in several ways, such as the permitting-related executive actions noted in Box 1, the Commerce Department's permit streamlining action plan,<sup>60</sup> and some elements, with caveats, of the 2019 Trump Budget proposal addressing infrastructure reform.<sup>61</sup>

**Fourth**, to the limited extent possible within congressional requirements and an autopilot administrative state, agencies have largely abstained from issuing significant new rules. Trump's total final rule counts were 3,281 in 2017 and 3,368 in 2018, respectively, compared to Obama's 2016 tally of 3,853 (these are calendar years). Of Obama's finalized rules, 486 were categorized as "significant." The "significant" subset for Trump has been 199 and 108 in 2017 and 2018 respectively. Lower counts can still overstate Trump's rulemaking activity since some were delays or rollbacks.<sup>62</sup>

**Fifth**, technically speaking, Trump exceeded his one-in, two-out regulatory goals for adoption of significant regulatory actions in both fiscal years so far (along with net regulatory cost savings of \$33 billion), but rule offsets are becoming harder to accomplish.<sup>63</sup> Adding to confusion, there exists a bewildering rulemaking nomenclature that places regulations into an array of categories encompassing such terms as rules, significant rules, major rules, economically significant rules, guidance, and more.<sup>64</sup> The point of the spear of the Trump program is the capping of net new regulatory costs at zero, a mini-regulatory-budget of sorts. The eliminations are a tool for that: "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," as OMB Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao noted in the "Introduction to the Fall 2018 Regulatory Plan."<sup>65</sup> Since the administration is acting without any bipartisan support from Congress, rewriting rules under Administrative Procedure Act strictures becomes the increasingly urgent priority as President Trump's Executive Order 13771 one-in, two-out campaign matures. In implementing the streamlining process, two OMB guidance documents on the executive order were issued after the order itself.<sup>66</sup> A separate executive order established Regulatory Reform Task Forces in the agencies.<sup>67</sup> Agencies also sought to establish procedures by inviting public input on rule streamlining.<sup>68</sup>

**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.<sup>69</sup> Interestingly, among the initial 67 rule reductions, nine appeared to be revocations or alterations of sub-regulatory guidance, notices, orders, or information collections. Six rules included in the roundup of 67 were among the 15 eliminated via Congressional Review Act resolutions of disapproval. Some independent agency rules removed by the CRA were not taken as "credit" for two-for-one purposes since the order did not bind independent agencies. Examples of these included a Consumer Financial Protection Bureau arbitration rule,<sup>70</sup> a Securities and Exchange Commission (SEC) rule on foreign resource extraction payment disclosure,<sup>71</sup> and a FCC broadband privacy regulation.<sup>72</sup> The FCC's elimination of Obama-era net neutrality rules<sup>73</sup> and modernization of broadcast ownership rules<sup>74</sup> may be the most significant on the list of successes. But, like all substantial final rules, new rulemaking proceedings will be lengthy.

**In 2018**, OIRA reported in "Regulatory Reform Results for Fiscal Year 2018" that "Agen-

cies issued 176 deregulatory actions and 14 significant regulatory actions,” for an overall 12-to-one ratio.<sup>75</sup> Fifty-seven of these deregulatory actions were deemed significant, so, “Comparing significant deregulatory to significant regulatory actions yields a ratio of 4 to 1.”<sup>76</sup> Here is a summary of the two Trump fiscal years of claimed significant reductions (although it is not required that each of the eliminated items rise to the level of “significant”):

Significant Regulatory Actions	FY2017	FY2018	Total
Regulatory	3	14	17
Deregulatory	67	57	124
Claimed ratio of rules out to rules in	22/1	4/1	7/1

When agencies are discouraged from issuing rules, they may rely increasingly heavily on such sub-regulatory guidance.

Box 2 summarizes the Trump administration’s claimed 176 completed regulatory eliminations or reductions by agency, showing significant and nonsignificant components, along with a breakdown of the claimed \$23 billion in present value cost savings for fiscal year the 2018<sup>77</sup> (or about \$1.6 billion annualized<sup>78</sup>). As Box 2 shows, the Department of Health and Human Services issued both the most claimed deregulatory rules and over half in claimed cost savings.

There are ample critiques of the reality of the claimed cost reductions as in 2017, of their effect on the economy, of their neglect of benefits,<sup>79</sup> and charges of “taking exaggerated credit for small reductions.”<sup>80</sup> But, as then-acting OIRA Director Dominic Mancini stated, “EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB’s *Final Bulletin on Good Guidance Practices*.”<sup>81</sup> Rather, they just needed to offset whatever significant rule was issued. There were other eliminations beyond what the White House took credit for, such as with respect to guidance documents and independent agency streamlining. Detail on precisely what the rules are from each agency, the full list—of 176 deregulatory (57 significant and 119 deemed nonsignificant) and 14 regulatory actions—is provided in

OMB’s “Regulatory Reform Report: Completed Actions for Fiscal Year 2018.”<sup>82</sup> As for the “regulatory budget,” OMB claims agencies have achieved over \$33 billion in savings over the past two fiscal years, and anticipates additional savings in FY 2019 of another \$18 billion. As seen below, this would be a total of nearly \$50 billion if it occurs (not including savings from changes being contemplated separately in vehicle fuel economy rules).<sup>83</sup>

FY 2017 Savings	\$8.148 <sup>84</sup>
FY 2018 Savings	\$23.432 <sup>85</sup>
FY 2019 Savings (anticipated)	\$17.905 <sup>86</sup>
Total	\$49.485

In contrast with Trump’s claimed savings, a November 2017 Heritage Foundation analysis of available information on the Obama administration’s regulatory record isolated the major rules listed in the Government Accountability Office (GAO) database affecting only the private sector and distinguished between those that were deregulatory and 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.”<sup>87</sup>

*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 or “regulatory dark matter” that can have concrete regulatory effect.<sup>88</sup> The exception may be President George W. Bush’s Executive Order 13422, which subjected significant guidance to OMB review,<sup>89</sup> and his administration’s 2007 OMB Good Guidance Practices memorandum.<sup>90</sup> Trump’s executive orders and directives encompass not just “significant regulatory actions,” but significant guidance on a case-by-case basis.<sup>91</sup> The Trump administration not only has declined to issue regulatory guidance to the extent the Obama administration did, but has asked agencies to reduce it. Meanwhile agencies have revoked guidance and directives that were not included among the proclaimed regulatory reductions.<sup>92</sup>

## 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	176	57	119	14	\$(23.432)
Dept. of Agriculture	8	3	5	3	\$(398)
Dept. of Commerce	14	3	11	1	\$(814)
Dept. of Defense	4		4		\$(70)
Dept. of Education	24	4	20		\$(37)
Dept. of Energy	4	1	3		\$(387)
Dept. of Health and Human Services	25	18	7	4	\$(12.487)
Dept. of Homeland Security	13	2	11		\$(164)
Housing and Urban Development	2	1	1	1	\$(507)
Dept. of Interior	18	3	15		\$(2.519)
Dept. of Justice	5	3	2		\$(79)
Dept. of Labor	11	9	2		\$(3.280)
Dept. of Transportation	23	2	21	1	\$(1.237)
Dept. of the Treasury	4	2	2		
Veterans' Affairs	3	2	1	1	\$(212)
Environmental Protection Agency	10	4	6	3	\$(1.228)
DoD/GSA/NASA (Federal Acquisition Regulation)	2		2		
General Services Administration	2		2		\$(8)
National Aeronautics and Space Administration	1		1		\$(5)
Office of Personnel Management	1		1		
Small Business Administration	2		2		
<b>TOTAL</b>	<b>176</b>	<b>57</b>	<b>119</b>	<b>14</b>	<b>\$(23.432)</b>

Source: White House OMB, Regulatory Reform Results for Fiscal Year 2018, <https://www.reginfo.gov/public/do/eAgendaEO13771>.

When agencies are discouraged from issuing rules, they may rely increasingly on such sub-regulatory guidance. To address this and to bolster the diminishing returns of the two-for-one program, Trump should supplement Executive Order 13771 with a new executive order explicitly addressing agency interpretive rules, policy statements, guidance, and other regulatory dark matter.<sup>93</sup> Regulatory reform legislation faces barriers in both the House and Senate. However, the

Guidance Out of Darkness (GOOD) Act, sponsored by Sen. Ron Johnson (R-Wisc.) and Rep. Mark Walker (R-N.C.), could gain some traction.<sup>94</sup> Guidance reform is an area with bipartisan appeal, especially given recognition by the Administrative Conference of the United States of potential abuse of guidance documents.<sup>95</sup> The Trump effort can continue to help eliminate, better classify, disclose, streamline, and check rulemaking by guidance.

# On the Other Hand ... Trump's Own Regulatory Impulses Threaten to Derail Successes

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*Trump's own regulatory impulses are a concern, particularly on issues such as antitrust and regulatory action against tech firms and traditional media companies.*

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President Trump has pruned rules and costs and held down regulatory output with more enthusiasm than other presidents.<sup>96</sup> But on the flipside of Trump's regulatory savings, Trump sports regulatory impulses of his own that could derail or even eclipse the rollback agenda in 2019 and beyond.<sup>97</sup> 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<sup>98</sup>) are well known, but there are additional warning signs of regulatory initiatives that have heightened or emerged since the last edition of *Ten Thousand Commandments*.

On October 17, 2018, the day the 2018 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, Trump said, "I think within a period of about another year, we will have just about everything that we've wanted."<sup>99</sup> On the contrary, there remains much work to be done regarding comprehensive regulatory reform, especially given the administrative state's propensity to grow and built-in defenses against its rollback.

Among the bigger obstacles is the fact that one cannot get rid of regulations; one can generally at best replace a rule with another rule.<sup>100</sup> As former OIRA Administrator Susan Dudley points 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. Since this can take two years or longer, agencies should have at least issued proposals by now for rules they would like to wrap up before the end of Trump's four-year term.<sup>101</sup>

There is much on the books to address in this fashion. But more important, Trump's own regulatory impulses are a concern, particularly where he demonstrates prominent public agreement with regulatory advocates on issues such as antitrust and regulatory action against tech firms and traditional media companies.

**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.<sup>102</sup> But on the other hand, President Trump has been explicit about invoking antitrust action against some tech and telecom firms, striking a discordant tone with the rest of the deregulatory agenda. As a 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."<sup>103</sup> The Justice Department's attempt to block the merger failed.<sup>104</sup>

The president has also said that Google, Facebook, and Amazon may be in a "very anti-trust situation,"<sup>105</sup> and said he was "in charge"

and “looking at it,”<sup>106</sup> in an environment in which some have called for the breakup of those companies.<sup>107</sup> Trump also tweeted that Comcast may be violating antitrust laws,<sup>108</sup> although after mulling it over (such delay of transactions is itself a regulatory cost), the Justice Department did not investigate the Comcast-NBCUniversal alliance.<sup>109</sup> Having already contemplated record-level fines against alleged Facebook privacy violations,<sup>110</sup> a new Federal Trade Commission “technology task force” will increase scrutiny of acquisitions beyond current practice.<sup>111</sup>

### ***Speech, social media, and tech regulation.***

Trump and many on the left agree on regulation of social media search and speech, although each have their own reasons.<sup>112</sup> When Trump economic adviser Lawrence Kudlow was asked in summer 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.”<sup>113</sup> Google is a private entity, search results are free speech, and Google cannot censor; only governments can.<sup>114</sup> The entire Internet and all its underlying capabilities remain intact, unaffected by Google’s existence. Yet Trump has tweeted extensively about social media censorship<sup>115</sup> and even threatened NBC’s broadcast license.<sup>116</sup> 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.”<sup>117</sup> Related to concerns about the social media environment, regulators have considered a record-high fine against Facebook for alleged privacy violations.<sup>118</sup>

***Infrastructure and bipartisan big spending with regulatory effects.*** Trump has taken significant executive actions to liberalize infrastructure permitting.<sup>119</sup> Ominous, though, is talk of a potential arrangement

with House Speaker Nancy Pelosi (D-Calif.) of some sort of big infrastructure federal spending package—at a time when the United States has returned to Obama/Bush-level trillion-dollar deficits, and interest payments are headed toward higher-than-defense levels.<sup>120</sup> Both parties show an inclination toward spending stimulus in the form of infrastructure, when markets should be better empowered as an alternative.<sup>121</sup> Too often, the only bipartisanship found in Washington is in passing big spending bills. Proposed spending levels call for \$1 trillion in direct federal spending, with plenty of regulatory set-asides and stipulations.<sup>122</sup> Heavy government spending in economic quarters will always have regulatory effects and alter the trajectory of industries engaged in large-scale transactions. And Trump has championed the use of eminent domain to build a wall on the southern border. Eminent domain is nothing new, but Trump’s variety uniquely invokes the potential use of a “military version” of such power.<sup>123</sup>

***Trade restrictions.*** While the president—who once referred to himself as “Tariff Man”<sup>124</sup>—has blamed some of 2018’s market downturn (much since recovered as of this writing) on Democrats taking control of the House of Representatives, trade barriers and tariffs create direct costs, regulatory uncertainty, and market losses—likely greater than Trump’s regulatory savings. Trade wars do not work because tariffs hurt Americans.<sup>125</sup> 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.”<sup>126</sup> If one were to assume this burden started in December 2018, Trump’s to-date claimed regulatory savings of \$31.6 billion will be overtaken within two years by increased costs imposed by trade barriers. Anecdotes of harm also abound, such as craft distillers lamenting the trade war killing export plans with Europe<sup>127</sup> or the oddity of reparative payments to farmers damaged by trade restrictions.<sup>128</sup> The fixation on reciprocity in

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trade deals will increase costs of household-level imports like e-commerce purchases by ejecting de minimis exemptions.<sup>129</sup> The tech sector, including artificial intelligence (AI) innovation, is vulnerable to trade restrictions. For example, Adam Thierer and Jennifer Huddleston Skees of the Mercatus Center note: “the Trump Administration [is pondering] a potentially massive expansion of export restrictions on a wide variety of technologies. More than a dozen different AI or autonomous system technologies appear on the list for consideration.”<sup>130</sup> In a notable fusion of trade restrictions and infrastructure spending, Trump also issued an executive order on “Strengthening Buy-American Preferences for Infrastructure Projects.”<sup>131</sup>

**Telecommunications.** Some in the Trump administration have floated a proposal to build a nationalized 5G network.<sup>132</sup> That elicited a rapid letter to the administration in response from U.S. Sens. Ted Cruz (R-Texas) and Catherine Cortez Masto (D-Nev.)<sup>133</sup> and introduction of antinationalization legislation in the 116th Congress.<sup>134</sup> Proposals such as these have long-term effects, such as the compounded costs of long delays of cellular technology and induced airwave scarcity.<sup>135</sup>

**Farm bill and agriculture.** Many interventionist policies have moved along with a life of their own apart from Trump, but these deserve to be called out as overly regulatory when perpetuated. The \$860 billion farm bill, signed in December 2018, was a prominent example. Rep. Justin Amash (R-Mich.) characterized it appropriately in May 2018, tweeting that, “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.”<sup>136</sup> Trump, however, saw things differently: “[T]he House will vote on a strong Farm Bill, which includes work requirements. We must support our Nation’s great farmers!”<sup>137</sup> It can also be the case that stealth regulatory measures or requirements can 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.”<sup>138</sup> The USDA move also highlights the reality that rules operate beyond presidential control and move along on autopilot. An example is a proposed bioengineered food disclosure requirement,<sup>139</sup> 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.<sup>140</sup>

**Food, drugs, and firearms.** Reform legislation of the Food and Drug Administration (FDA) has expanded access to certain needed medications.<sup>141</sup> While nothing has materialized yet, the Trump administration rattled the pharmaceutical industry with charges that companies were “getting away with murder” and voicing support of government drug-price negotiation.<sup>142</sup> The administration has introduced a regulatory proposal of questionable legality for pharmaceutical price-listing mandates in television advertisements.<sup>143</sup> With FDA guidance already in the making, even information generated largely by individuals is not immune from suppression, as the FDA intends to regulate health-tracking apps and software as medical devices.<sup>144</sup> The agency is also implementing regulations on vaping and smokeless tobacco products, which, as an alternative to cigarettes, save lives.<sup>145</sup> There are indications from the FDA that it may consider costly and unhelpful labeling regulation for nondairy products that use the term “milk.”<sup>146</sup> The administration also continues to implement Obama-era menu-labeling rules<sup>147</sup> and is strengthening enforcement of regulation of dietary supplements.<sup>148</sup> Related to other health regulation, new postal regulations on international shipments require providing identifying information and contents, aimed at addressing the opioid abuse issue.<sup>149</sup> Finally, in a move controversial to his base, Trump has moved to ban bump stocks used on semiautomatic weapons by designating them as machine guns.<sup>150</sup>

**Subsidies.** Much fiscal spending has disregarded regulatory effect, displacing private action and steering. Trump is a fan of the Export-Import Bank,<sup>151</sup> long a showcase for cronyism and corporate welfare.<sup>152</sup> The Environmental Protection Agency is considering subsidies for “talking car” technologies that communicate hazard and other information.<sup>153</sup> Trump is also supporter of ethanol subsidies and preferences, warning in campaign mode in October 2018 that Democrats would be anti-ethanol.<sup>154</sup> As a general matter, subsidies or corporate welfare aggravate problems of a president being able to, as Rep. Justin Amash put it, “act as a central planner in chief to bribe and coerce companies.”<sup>155</sup>

**Internet tax.** The Internet sales tax was upheld in the Supreme Court case *South Dakota v. Wayfair*.<sup>156</sup> The Competitive Enterprise Institute’s Jessica Melugin wrote about that decision, observing 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.”<sup>157</sup> While the ruling was by no means Trump’s doing, the president had seemed to favor an Internet tax, perversely seeing it as a shot at Amazon, despite the company being one of the online sales tax’s most high-profile proponents.<sup>158</sup>

**Finance.** The Securities and Exchange Commission is labeling digital currency products as “securities” in a bid to claim jurisdiction over them, a move that would saddle cryptocurrency developers with new layers of red tape.<sup>159</sup> In addition, new Treasury regulations on foreign equity stakes in U.S. biotech firms would subject those firms to greater review.<sup>160</sup> Especially troubling is the reported potential support in the administration for a “global minimum tax” in the name of tax harmonization.<sup>161</sup>

**Industrial policy or market socialist mechanisms.** Overabundance of taxpayer funding of scientific and technology research is incompatible with a future of optimally and lightly regulated science and technology specifically, and with limited government

generally. However, addressing infrastructure and other broad initiatives in his February 5, 2019, State of the Union address, 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.”<sup>162</sup>

A probable showcase for this emphasis was a February 11, 2019, executive order on “Maintaining American Leadership on Artificial Intelligence.”<sup>163</sup> Executive orders are not law, but they can influence policy, and this one promotes “sustained investment in AI R&D in collaboration with industry, academia,” and others. It also calls for federal collection of data, among other centrally coordinated moves. It 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.”

This is concerning on its own, but it occurs in an environment in which much AI research at the federal level happens at the Department of Defense. The Pentagon, the day after Trump’s AI executive order, released its own AI strategy, subtitled “Harnessing AI to Advance Our Security and Prosperity,” describing use, plans, and ethical standards in deployment.<sup>164</sup> 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 fusion of government and private AI deployment is troubling. Where one tech titan’s motto had been “Don’t Be Evil,” a fitting admonition now for the sector as a whole is “Don’t Be Government.” We cannot foresee how future presidents will regard such overly cozy government and private alliances. Their legitimization at the top in this manner makes it harder to achieve regulatory liberalization and any separation of technology and state in the future. The establishment of a “Space Force” is related to this phenomenon, given that commercial space activities have barely taken root beyond NASA contractors and partners.<sup>165</sup> Making the (AI-driven) force

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a new 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.<sup>166</sup> The space force move was preceded by a presidential directive on space traffic management complete with tracking, cataloging, and data sharing with government.<sup>167</sup> It is worth remembering that most debris in space is there thanks to NASA, not private entrepreneurs.

***Welfare regulations.*** Whereas there is no constitutional authority for federal government involvement in job training, a policy program we already mentioned, a “national strategy for training and retraining workers for high-demand industries” is in play.<sup>168</sup> In addition, the announced “nationwide paid family leave” plan included in the Trump budget has been taken up by legislators on both sides of the aisle, surely in order to be expanded beyond its initial federal government targets.<sup>169</sup>

The foregoing comprises an incomplete catalog of active policy implementations with regulatory heft that run counter to the administration’s point-of-the-spear deregulatory campaign. Rules and regulations individually 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 things unintended and unforeseen—especially if the nuclear option on the Senate legislative filibuster comes to fruition.

The conventional administrative state and big-spending appropriations framework exert a considerable force. Trump cannot and has not stopped it all, but he has added his own pro-regulatory elements to the landscape.

Congress has not passed comprehensive regulatory liberalization in nearly a quarter century, and deregulation under Executive Order 13771 will become harder as quick-to-rid regulations are exhausted. As the University of Pennsylvania’s Coglianese states, “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.”<sup>170</sup> The pertinent question is whether any executive branch regulatory liberalization can be maintained over time given the administrative state’s barriers 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 operate under an instruction from OMB Director Mick Mulvaney that deregulation should be their “highest priority”—the permanent bureaucracies are likely biding their time.<sup>171</sup> Without congressional action, much of the Trump streamlining phenomenon will be transitory, especially if he were to back 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 rollbacks, so expectations for executive-branch-only reforms must be tempered.<sup>172</sup>

# Toward a Federal “Regulatory Budget”

When Congress spends, disclosure is necessary for voters to hold representatives accountable. Federal programs are funded by either raising taxes or by borrowing against a promise to repay with interest from future tax collections. Taxpayers can observe those decisions to some degree during the authorization and appropriations processes. They can inspect the costs of programs and agencies in Congressional Budget Office publications<sup>173</sup> and the federal budget’s historical tables.<sup>174</sup>

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. Regulation in such instances functions like an off-budget form of tax-

ation and spending. Although disclosure of spending does not stop deficits, it is still vital to making progress toward that goal. 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 1 provides an overview of the federal regulatory enterprise in 2019.

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Table I. The Regulatory State: A 2018 Overview

	<b>Year-End 2018</b>	<b>1-Year Change</b>	<b>5-Year Change (2012–2018)</b>	<b>10-Year Change (2009–2018)</b>
Total regulatory costs	\$1.9 trillion	n/a	n/a	n/a
Agency enforcement budgets	\$71.0 billion	4.7%	12.6%	18.7%
<i>Federal Register</i> pages	63,645	–3.8%	–18.1%	–7.2%
Devoted to final rules	16,378	–12.5%	–34.1%	–21.2%
<i>Federal Register</i> final rules	3,368	2.7%	–5.2%	–3.9%
Code of Federal Regulations pages	185,434	0.5%	3.4%	13.5%
Total rules in Agenda pipeline	3,534	10.1%	3.5%	–12.6%
Completed	480	2.1%	–23.7%	–28.3%
Active	2,399	21.3%	3.4%	–8.8%
Long term	655	–14.0%	40.9%	–12.0%
“Economically significant” rules in the year-end pipeline	174	24.3%	–13.0%	–5.4%
Completed	25	19.0%	–19.4%	–24.2%
Active	118	66.2%	–9.9%	–4.1%
Long term	31	–35.4%	–18.4%	10.7%
Rules affecting small business	605	2.5%	–10.2%	–20.2%
Regulatory flexibility analysis required	330	–2.1%	–11.8%	–11.3%
Regulatory flexibility analysis not required	275	8.7%	–8.3%	–28.8%
Rules affecting state governments	327	13.1%	–17.4%	–36.4%
Rules affecting local governments	199	15.0%	–13.9%	–39.3%
GAO Congressional Review Act reports on major rules	54	10.2%	–34.1%	–35.7%
<b>FCC Breakdown</b>				
Final rules ( <i>Federal Register</i> )	130	18.2%	–9.7%	2.4%
FCC rules in Agenda	83	–21.7%	–37.1%	–42.8%
FCC rules affecting small business	66	–14.3%	–32.7%	40.0%

n/a = not applicable.

# The Unknowable Costs of Regulation and Intervention

The sole official reckoning citizens get on the scale and scope of regulatory costs is an annual but highly incomplete and inadequate OMB survey of a subset of regulatory costs and benefits.<sup>175</sup> The OMB's *2017 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, is the most recent edition, but this draft-only edition is nearly three years out of date, covering through FY 2016. These reports contain a look back at the numbers of significant rules and a partial quantification of a handful of executive agencies' rules during the most recent 10 years in addition to the current year. An aggregate annual estimate of the regulatory enterprise is required by law, but not performed.<sup>176</sup>

This latest report pegged the annual costs of 137 selected "major" regulations from 2006 to 2016 at between \$78 billion and \$115 billion (in 2015 dollars).<sup>177</sup> The estimated range for benefits in the report spanned \$287 billion to \$911 billion.<sup>178</sup> According to OMB, the 16 rules subjected to both benefit and cost analyses during FY 2016 added annual costs of \$4.3 to \$6.4 billion.<sup>179</sup> Given the report's absence, the fiscal year-end status reports on Executive Order 13771 covered so far serve as something of a stand-in for significant rule costs, but do not replace the scope (intended but not realized) of these annual reports as a management tool.

Some infer precision from the existence of official regulatory cost roundups. For example, Vox saw the 2017 draft report, which was not published until February 23, 2018, as the Trump administration "quietly" vindicating the Obama regulatory agenda.<sup>180</sup>

Actually, of 36,255 final rules published between 2007 and 2016, OMB reviewed 2,670, of which 609 were major.<sup>181</sup> Of these, only 140 featured monetized benefits and costs.<sup>182</sup> No independent agencies' costs were among those surveyed. Another several billion dollars more in annual rule costs generally appear in these reports for rules with cost-only estimates, but they are not tallied and highlighted by OMB.<sup>183</sup>

This author maintains that regulatory costs are unknowable in an elemental sense, and estimates of them are not observable or calculable—much as the economic calculations necessary to enable central economic planning are impossible.<sup>184</sup> Regulatory costs are, in the words of American Enterprise Institute scholar Peter Wallison, inherently "squirrely."<sup>185</sup> Yet even so, the need for disclosure is unavoidable as long as the administrative state remains a means of governance. The solution to the unresolvable dilemma is for Congress to vote on rules. This urgency is reinforced by modern agency-invented contrivances like "co-benefits," by which the modern administrative state reinforces itself. These artifices have appeared on the scene of a stage on which the performance of cost-benefit analysis is already largely a myth.

As for economic effects on traditional concerns like employment, regulation affects not only current jobs, but also the inclination for entrepreneurs to create them in the future. This intertemporal nature of regulation complicates honesty in cost assessment, since nations cannot "lose" jobs that have not been created. This helps illustrate how most of the regulatory enterprise is altogether immeasurable, and therefore unavailable to

## Box 3. Rule of Flaw and Costs of Coercion: Surveying Unmeasured and Unfathomed Costs of the Administrative State and Intervention

### **I. Unmeasured Costs of Shortcomings in Administrative Procedure Act Oversight**

#### *A. Rule Cost Categories Prone to Escaping Measurement and Disclosure*

- 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 Costs*

- 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 the Government Accountability Office and Congress 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 Liberty**

- Costs of regulatory takings and property value destruction
- Costs of abandoning negative rights for a positive rights framework and unequal treatment of citizens under the law
- Costs of delegation of lawmaking power to the executive branch and to unelected administrators
- Costs of Congress’s routine disregard of the Congressional Review Act
- Costs of agency self-funding
- Costs of the impossibility of eliminating agencies
- Costs of paternalism and the normalization of dependency
- Costs of imposing regulation based on secret or creatively leveraged data
- Costs of federal overreach through flouted federalism
- Costs of overcriminalization
- Costs of loss of anonymity

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

- Costs of top-down national plans, agendas and legislative schemes, and treaties
- Costs of distortions created by stimulus spending

- Costs of subsidies and “ordinary” spending with distortionary effects
- Costs of deadweight effects of federal spending and of “budget” or “transfer” rules
- 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)
- 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’ costs
- Costs of steering via government sponsored enterprises
- Costs of blurring corporate and government roles via public/private partnerships
- Costs of government steering by direct ownership or control of resources
- Costs of abandoning enlargement of 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 concerns
- Costs of permission-seeking and over-licensing
- Costs of cronyism: the thoroughgoing centrality of rent-seeking and rent-extraction in a self-preserving administrative state
- Costs of rent-seeking by the so-called “deep state”

### **V. Costs of Negative Effects Including 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**

incorporate into studies or models. Box 3 illustrates the wide range of interventions of the regulatory and administrative state that go unacknowledged.

The ample shortcomings in administrative state disclosures work to the advantage of the professions and the academic legal studies infrastructure it has spawned over the last century. Others get crumbs. 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.

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 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 20th 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 2). Performing an aggregate estimate never was SBA's job, but it remains OMB's neglected one. The data underlying these studies (or any studies) were (inevitably) extraordinarily problematic as this author noted in 2017 and in earlier editions of my working paper *Tip of the Costberg*, the subtitle of which is *On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway*.<sup>186</sup> The federal bureaucracy, with all the resources at its disposal, has done nothing to fulfill its duty to assess the aggregate effects of regulation.

More recently 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).<sup>187</sup> This report had its share of detractors.<sup>188</sup> 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.<sup>189</sup> The authors contend that rules affecting growth rates compound, and that Americans are less than half as rich as they would otherwise be in the absence of much of the regulatory state.

Others have set out to examine how seemingly inconsequential regulations can accumulate and have unintended effects and costs that ought not be ignored.<sup>190</sup> A 2016 study, "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.<sup>191</sup> This represents a loss in real income of approximately \$13,000 per American.<sup>192</sup> In this vein, a 2017 White House Council of Economic Advisors report surveyed material increases in growth potential from moving from regulated to less regulated conditions, but regulatory assessments otherwise are lacking.<sup>193</sup>

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 the effects by firm size vary.<sup>194</sup> Table 3 shows that per-employee regulatory costs for firms of fewer than 50 workers can

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*The federal  
bureaucracy, with  
all the resources  
at its disposal,  
has done nothing  
to fulfill its duty  
to assess the  
aggregate effects  
of regulation.*

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Table 2. 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								
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%20OF%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/1/153774.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/advocacy/laws/archive/law\\_brd.html](http://www.sba.gov/advocacy/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/advocacy/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/advocacy/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/A7A8456F33484E498F40CB46D6167F31ashx>. 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>.

Table 3. 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>.

be 29 percent greater than those for larger firms—\$11,724 for smaller firms, compared with \$9,083 for larger ones.<sup>195</sup>

Looking back, 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 is also referenced among the costs in Box 3 and span the economic, environmental, health, safety, and social costs, compounded over decades. These must necessarily include loss of liberty from overcriminalization to the overthrow of the constitutional order itself in favor of rule by unelected bureaucrats. Some never tire of pointing out the accumulation of wealth by the top percenters in their alleged concern over income inequality, but perpetuation of unnecessary regulation also erases wealth accumulation and harms the most vulnerable.<sup>196</sup>

In the context of these existing and available sources and the federal government’s failure to issue new aggregate analysis, 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).<sup>197</sup> This figure is based on a nonscientific, disclaimer-laden, fusion amalgam of GDP losses, and compliance costs derived from available official data and other sources.<sup>198</sup> 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.

We need greater acknowledgement of what we do not know, to own up to burdens that slip through the cracks. 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. The debate has never been whether the government should perform its cost assessment, but whether it should be bottom up or top down.<sup>199</sup> The answer is that both are needed, and an executive order reaffirming the 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 (see Box 3).<sup>200</sup>

### Regulatory Cost Burdens Compared to Federal Spending and the Deficit

Comparisons of regulation with the costs of federal taxation and spending help place the

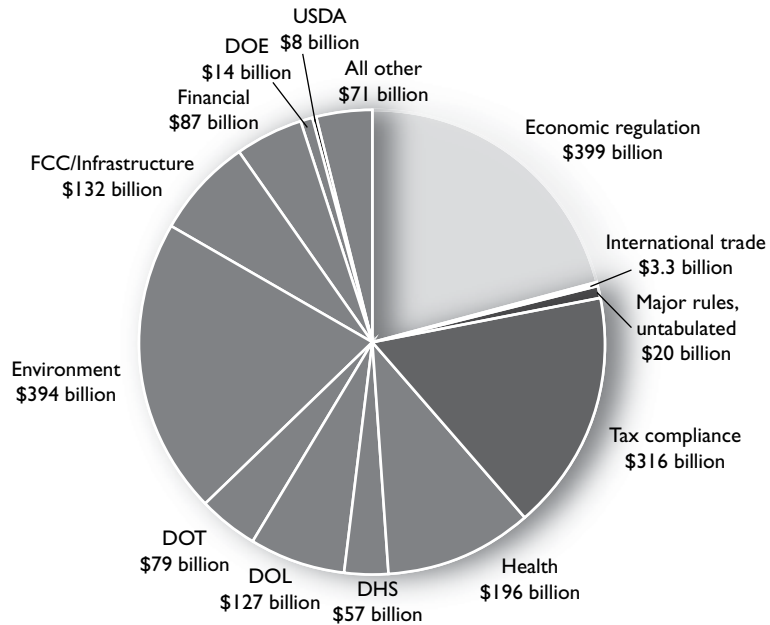
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*Executive orders and guidance to agencies governing cost assessment and regulatory analysis are incomplete and need to incorporate far more elements.*

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Figure 1. Annual Cost of Federal Regulation and Intervention, 2018 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.

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

relative magnitudes in perspective. The U.S. federal government reached \$4.108 trillion in outlays and a deficit of \$779 billion in FY 2018.<sup>201</sup> Figure 2 compares deficits and outlays for 2017–2018 and projected amounts for 2019 to the overall regulation cost estimate of \$1.9 trillion. For 2019, costs of regulatory compliance and intervention are equivalent to about 43 percent of the projected level of fiscal budget outlays of \$4.412 trillion, and more than double the anticipated deficit, which is expected to soar to \$897 billion.

### Regulatory Costs Compared to Income Taxes and Corporate Profits

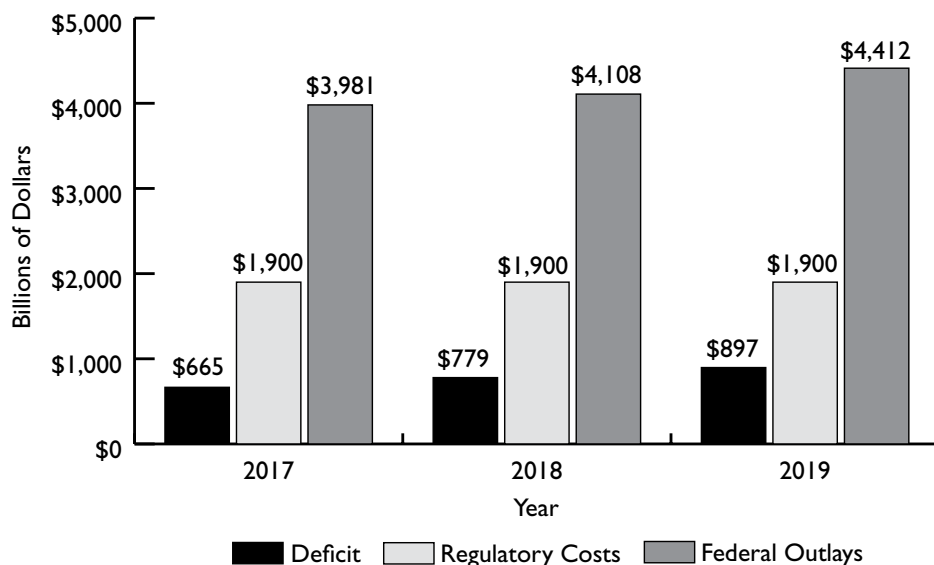
Regulatory costs easily rival revenues from individual income taxes and corporate taxes

combined. As Figure 3 shows, regulatory costs stand well above 2018 estimated individual income tax revenues of \$1.66 trillion.<sup>202</sup> Corporate income taxes collected by the U.S. government—an estimated \$218 billion for 2018—are dwarfed by regulatory costs.<sup>203</sup> The combination of the two, \$1.88 trillion, is roughly equivalent our regulatory cost marker of \$1.9 trillion. Regulatory costs even approach the level of pretax corporate profits, which were \$2.182 trillion in 2017.<sup>204</sup>

### Regulatory Costs compared to GDP

In January 2018, the Commerce Department's Bureau of Economic Analysis estimated U.S. current-dollar GDP for 2018 at \$20.66 trillion.<sup>205</sup> The total regulatory cost

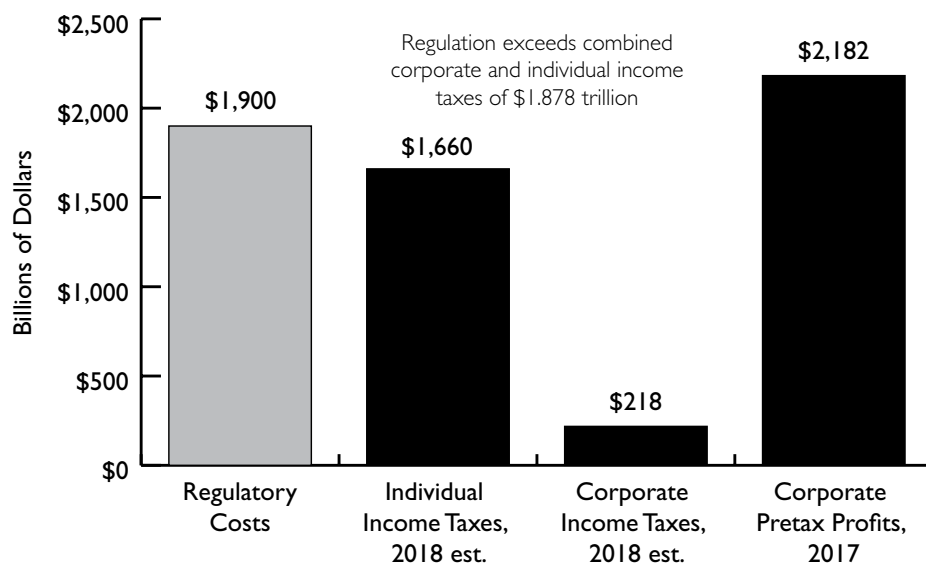
**Figure 2. Federal Outlays and Deficits Compared with Federal Regulatory Costs (2017, 2018, and projected 2019)**



Sources: Deficit and outlays 2018 and proj. 2019 from Congressional Budget Office, *The Budget and Economic Outlook, 2019 to 2029*, Table I-1, "CBO's Baseline Budget Projections, by Category," <https://www.cbo.gov/system/files?file=2019-01/54918-Outlook.pdf>. 2017 deficit and outlays 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*.

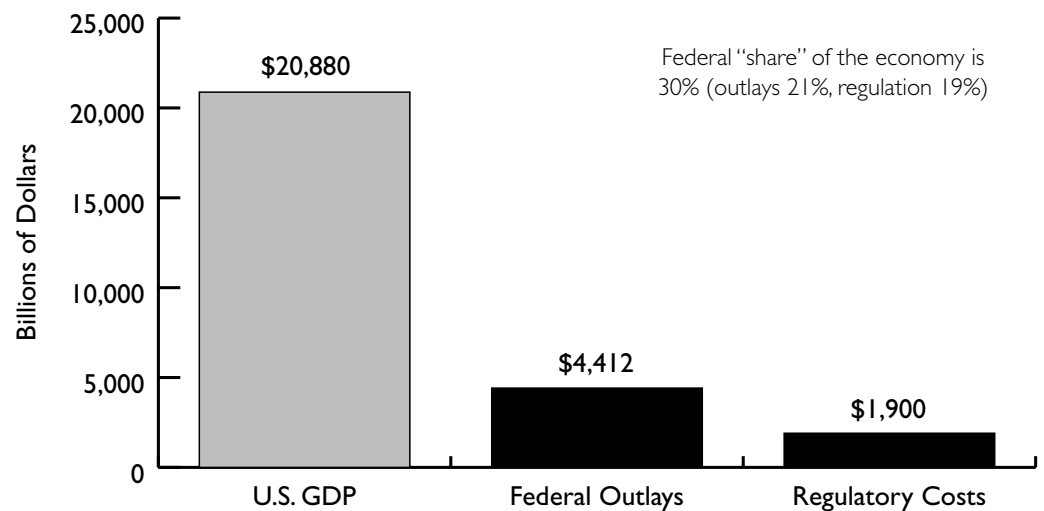
Federal deficit and outlay numbers are by fiscal year; regulatory costs by calendar year.

**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*. 2018 tax figures from OMB, *Historical Tables*, Table 2.1, "Receipts by Source: 1934–2023," [http://www.whitehouse.gov/omb/historical-tables](https://www.whitehouse.gov/omb/historical-tables). 2017 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, "Gross Domestic Product, 3rd quarter 2018 (third estimate);", news release, December 21, 2018, <https://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm>. Outlays from CBO.

figure of \$1.9 trillion annually is equivalent to approximately 9 percent of that amount (as noted, other estimates are far higher). Combining regulatory costs with federal FY 2019 projected outlays of \$4.412 trillion (see Figure 2), the federal government's share of the economy reaches \$6.07 trillion, or 30 percent of GDP (see Figure 4). That does not include state and local spending and regulation. The percentage has been 30 percent for some time. Much that is new is already born into oversight by preexisting bureaus<sup>206</sup> and is regulated without passing laws or even writing rules.<sup>207</sup>

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

Not counting the United States, only eight countries have GDPs that exceed the cost burden of U.S. regulation. U.S. regulatory costs surpass the 2017 GDP of neighbors Canada, at \$1.65 trillion, and Mexico, at \$1.15 trillion. If U.S. regulatory costs of \$1.9 trillion were a country, it would be the world's ninth-

largest economy, ranking behind India and ahead of Canada (see Figure 5).<sup>208</sup>

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 2017 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/Cato Institute *Economic Freedom of the World* report.<sup>209</sup> The U.S. ranks 12th and sixth on these reports, respectively.

### **Regulation: A Hidden Tax on the Family Budget**

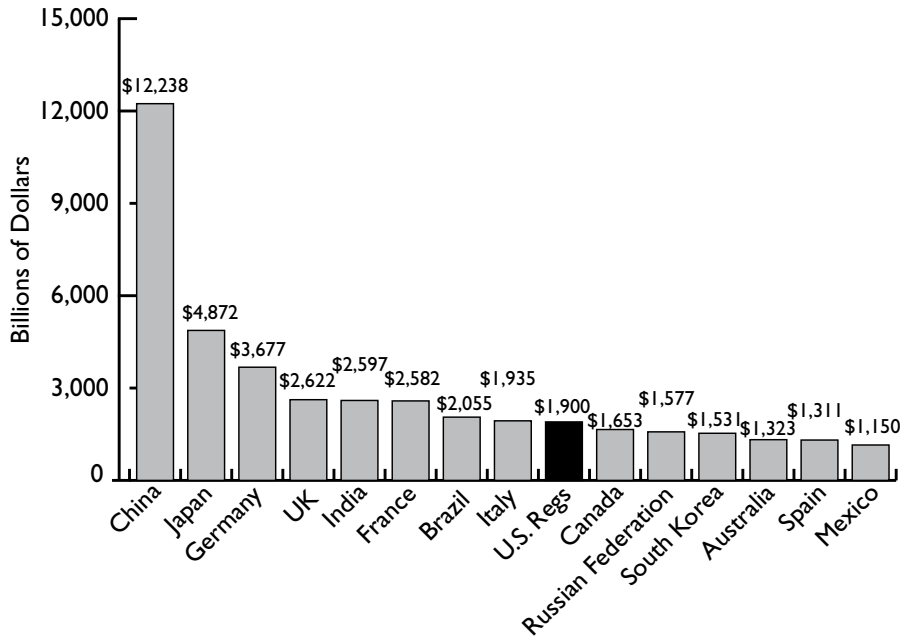
Like the taxes they are required to pay, businesses will pass some regulatory costs on to consumers. Other costs will find their way to workers and investors in regulated companies. By assuming a full pass-through of all such costs to consumers—many consumers are also workers and owners through stock

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***If U.S. regulatory costs of \$1.9 trillion were a country, it would be the world's ninth-largest economy.***

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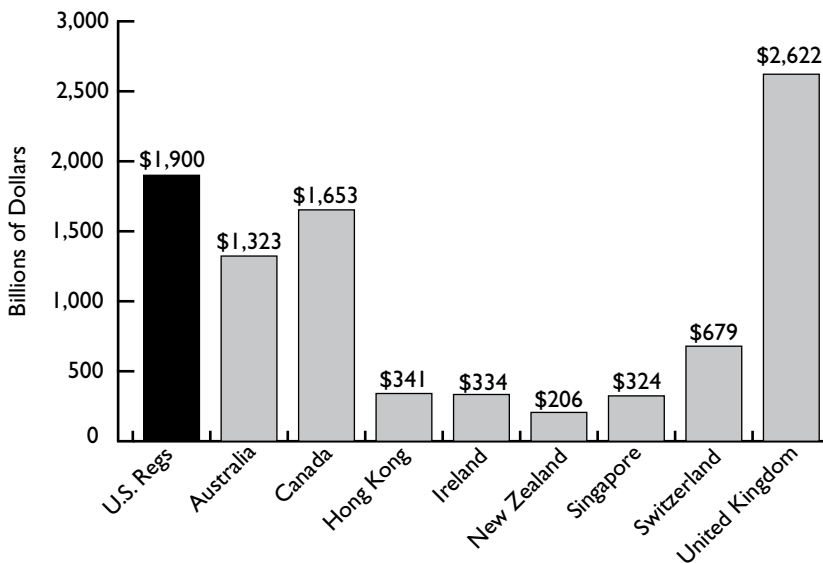
Figure 5. U.S. Regulatory Costs Compared to 2017 Gross Domestic Product of the World's Largest Economies



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>.

If it were an “economy,” U.S. regulations would be the ninth largest. U.S. 2017 GDP of \$19.391 trillion per World Bank is not shown.

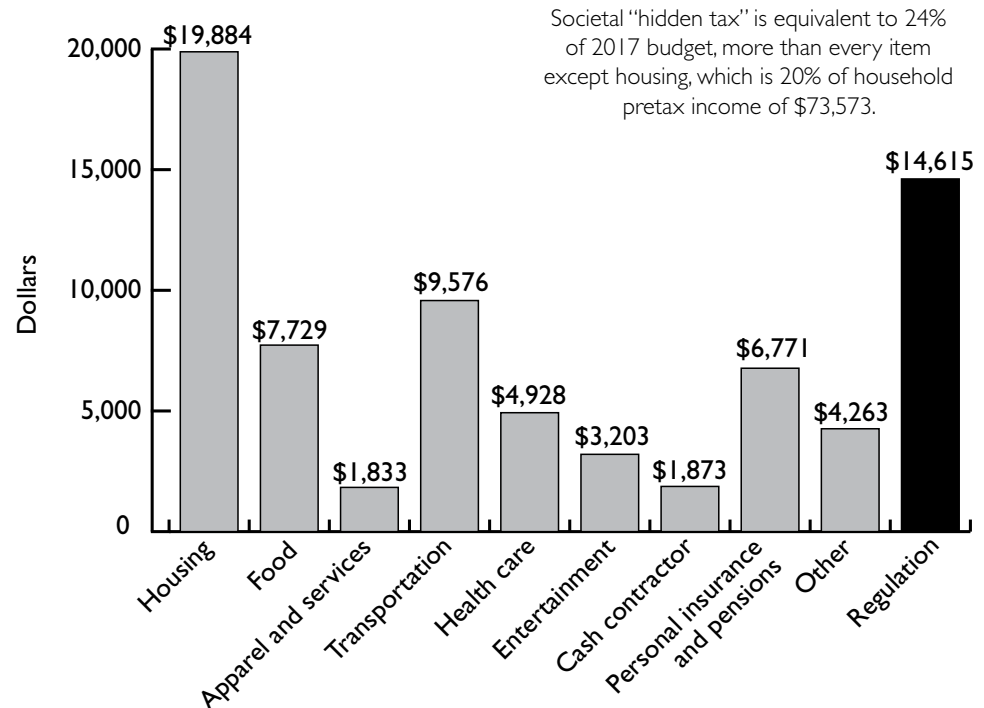
Figure 6. U.S. Regulatory Load Compared to 2017 Gross Domestic Product in World Economies Regarded as Most Free



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 \$60,000 Compared to Regulatory Costs**



Sources: Bureau of Labor Statistics, author calculations.

Proxy for households here is BLS depiction of 129,549,000 “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.”

*The average U.S. household “spends” more on hidden regulation than on health care, food, transportation, entertainment, apparel, services, and savings.*

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 Department of Labor’s Bureau of Labor Statistics (BLS).<sup>210</sup>

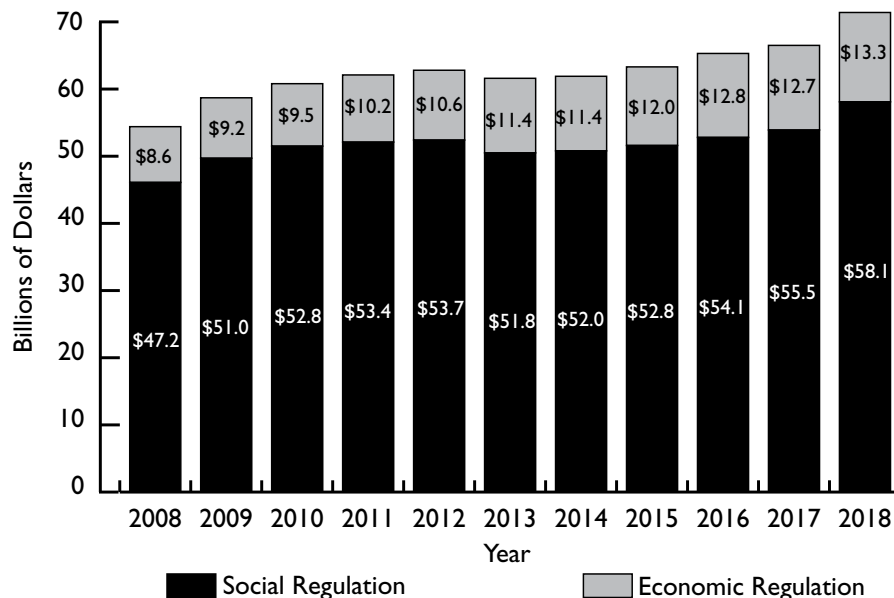
For America’s 130 million households, or “consumer units” in BLS parlance, the average 2017 pretax income was \$73,573.<sup>211</sup> If one were to allocate annual regulatory costs assuming, for simplicity’s sake, a full pass-through of costs to consumers, U.S. households “pay” \$14,615 annually in embedded regulatory or intervention costs (\$1.9 trillion in regulation divided by 130 million “consumer units”), or 20 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 \$60,060. The average

U.S. household “spends” more on hidden regulation than on health care, food, transportation, entertainment, apparel, services, and savings. Of course, some costs of regulation are not hidden. Consumers pay for regulatory agencies 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

Figure 8. Federal Agency Administrative and Enforcement Budgets, \$71 Billion Total in FY 2018



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 2009 constant dollars are adjusted here by the change in the consumer price index between 2009 and 2018, 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).

taxpayers contribute to support agencies’ administrative operations—are disclosed in the federal budget in a way that regulatory compliance and economic costs are not.

According to the latest compilation, FY 2018 enforcement costs incurred by federal departments and agencies stood at \$71.4 billion (in constant 2018 dollars, adjusted from original 2009 dollars) (Figure 8).<sup>212</sup> Of that amount, \$13.3 billion was incurred on administering economic regulations. The larger amount, spent on writing and enforcing social and environmental regulations, was \$58.1 billion. The \$71 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 2018, accounting for 7 percent of the total expected to be spent by all regulatory agencies.<sup>213</sup> The EPA formerly accounted for the lion’s share of govern-

mental administration and enforcement costs, but the Department of Homeland Security (DHS), at an estimated \$33.3 billion, now comprises 48 percent.<sup>214</sup>

The Weidenbaum Center and the Regulatory Studies Center also estimate the number of full-time-equivalent administrative and enforcement staff at 281,300 in FY 2017, up from 280,872 in 2017. The number of federal employees has increased well over 100,000 since the 2001 staffing level of 173,057.<sup>215</sup> 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*.

# Thousands of Pages in the *Federal Register*

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

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The *Federal Register* is the daily repository of all proposed and final federal rules and regulations.<sup>216</sup> Although its number of pages is often cited as a measure of regulation's scope, there are grave 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 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.

Shortcomings notwithstanding, it is worthwhile to track the *Federal Register's* page counts and related tallies as an indicator of regulatory activity. It is probable that the shutdown of December 22, 2018, through January 25, 2019, will have had some effect on the deregulatory efforts to be unveiled in 2019, since it affected some of those carrying out the directives.<sup>217</sup> It also delayed production of the National Archives official archival roundup of pages and numbers of rules, although preliminary data are available.

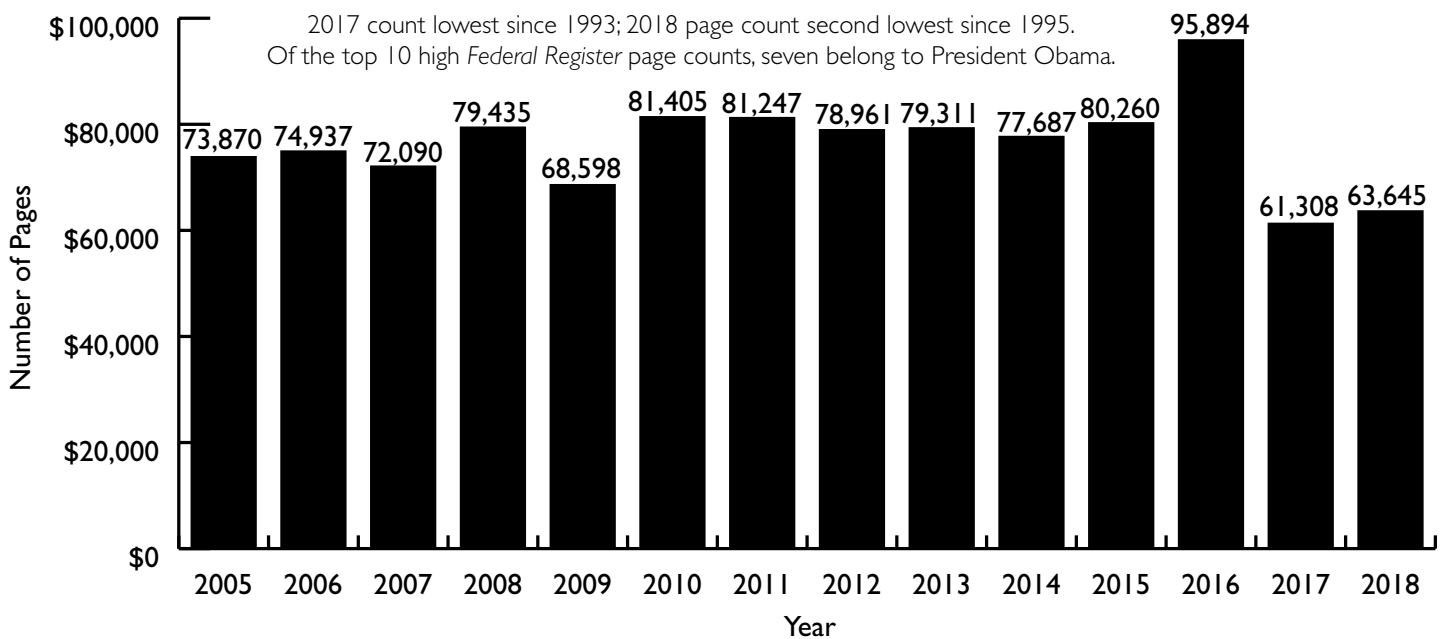
## Federal Register Pages—Up 4 percent between Trump Years One and Two

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 a quarter-century ago in 1993, at 61,166 pages under Bill Clinton.

The 2017 count 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.<sup>218</sup> In 2018, the *Federal Register* reached 63,645 pages, a 4 percent increase over Trump's first year.<sup>219</sup>

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.<sup>220</sup>

Figure 9. Number of *Federal Register* Pages, 2005–2018



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

Trump's recent 2018 count of 63,645 is still 34 percent below Obama's record. The last time the page count was lower was back in 1995. 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* (nor 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,

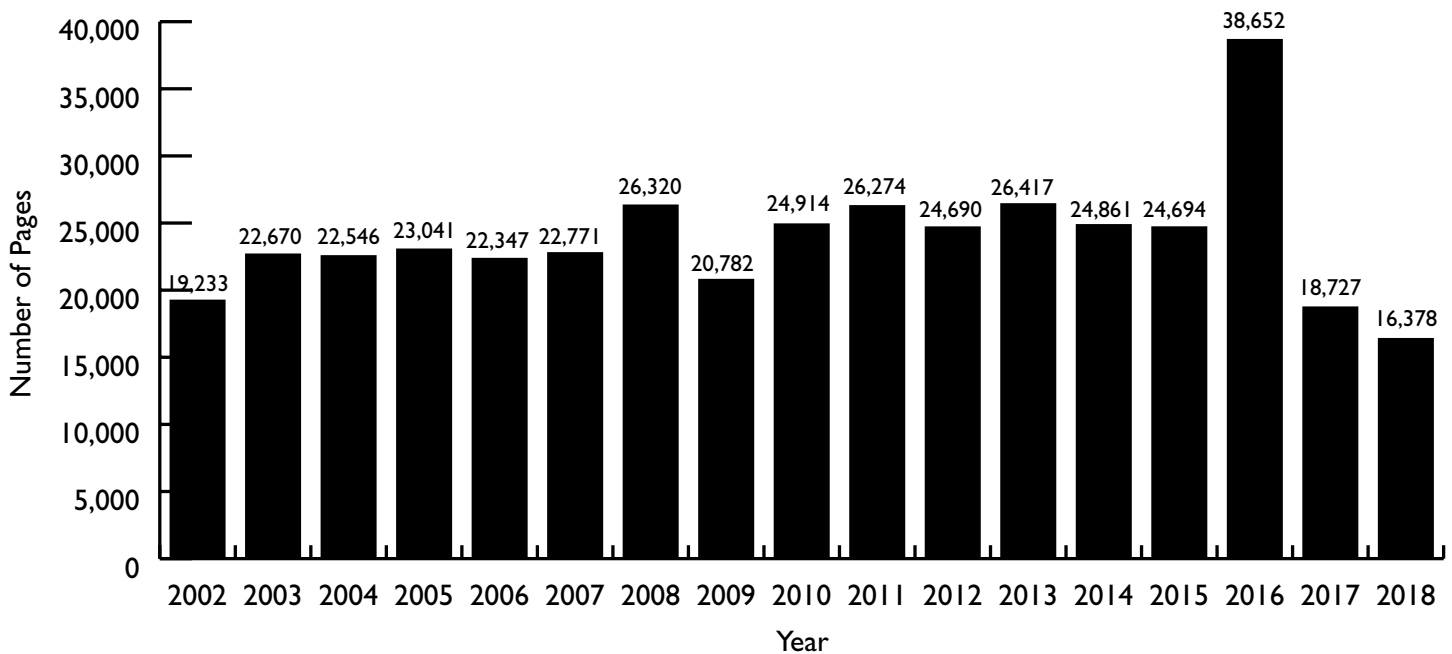
and presidential documents (although those categories can have regulatory effects, too).

Final rule page count of 2018 stands at 16,378, the lowest count since 1992. 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 more relevant measures than pages include underlying restrictions and 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



Figure 10. *Federal Register* Pages Devoted to Final Rules, 2002–2018



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

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. These rose to 16,207 in 2018, however.

Still another way of looking at *Federal Register* trends is by pages per decade (see Figure 11). Even with Trump's cut so late in the 2010s, we still will get a jump over the prior decade. The last bar of Figure 11 projects the average of the past nine years of 77,746 pages for the decade as a whole (the projection at the moment is 777,464). 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 makes clear.

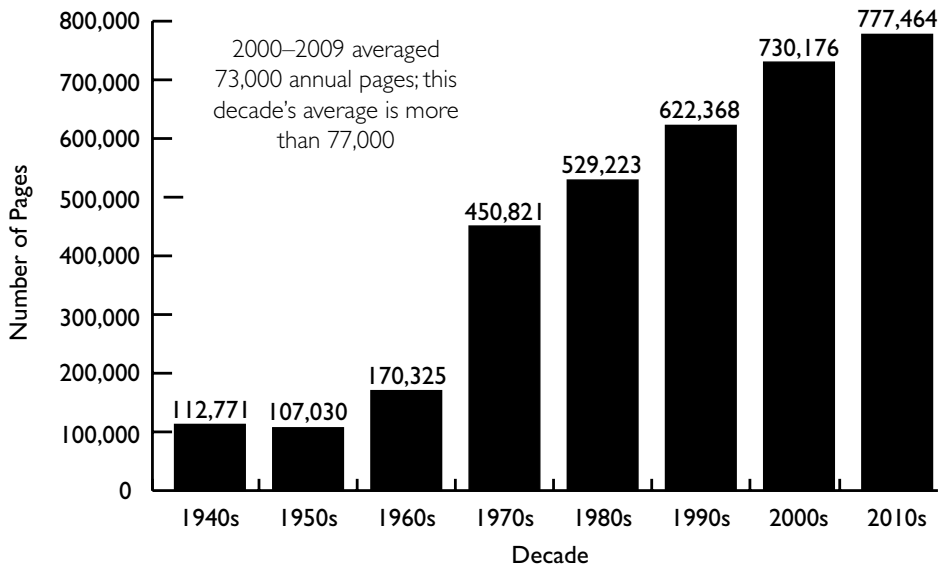
### Number of Final and Proposed Rules in the *Federal Register*

In 2018, Trump has done better than Obama, Bush II, and Clinton in terms of issuing fewer

final regulations, but not as good as his own first year. 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. In 2018, the rule count bumped up to 3,368, the second lowest count.<sup>221</sup>

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, and Obama's lowest count of 3,410 was not much above Trump's new score. 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. Additionally, 207 rules

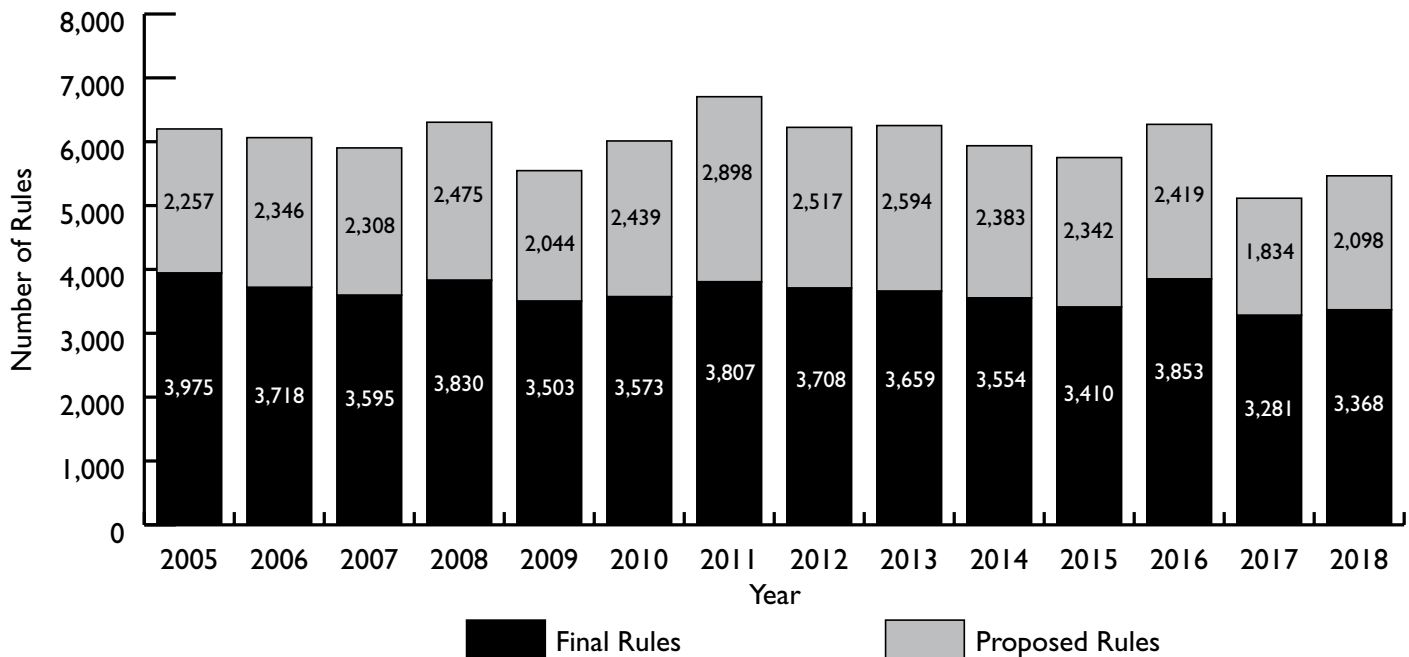
Figure 11. *Federal Register* Pages per Decade  
777,464 Pages Projected for the 2010s



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

2010s is a projection based on the past nine years' average.

Figure 12. Number of Proposed and Final Rules in the *Federal Register*, 2005–2018



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

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

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issued in 2017 up to the point of Trump's inauguration on January 20 were Obama's, giving Trump a "net" of 3,074 that year.<sup>222</sup> 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 assortment than the "economically significant" rules—are worth focusing on.<sup>223</sup> 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 are the norm, the Trump administration issued 199 and 108 in 2017 and 2018, respectively, the lowest since 164 in 2006 and 180 in 2007.<sup>224</sup> (However, figures in the National Archives online database have not remained consistent in tabulations of significant rules.)

As the Trump era has demonstrated, stopping or slowing rules in the pipeline is easier than getting rid of existing rules. On an ongoing basis, 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. That would allow better analysis of the routine and significant among forthcoming rules. In any event, in Obama's final year of 2016, 2,419 proposed rules appeared in the *Federal Register*. In Trump's first year, these fell to 1,834 (counting the 156 that had been issued by Obama during the first three weeks of 2017) and stand at 2,098 in his second year. Back in the 1990s, far greater numbers of proposed rules being present in the annual pipeline were typical.

(For the numbers of proposed and final rules and other documents issued in the *Federal Register* since 1976, see Appendix: Historical Tables, Part B.)

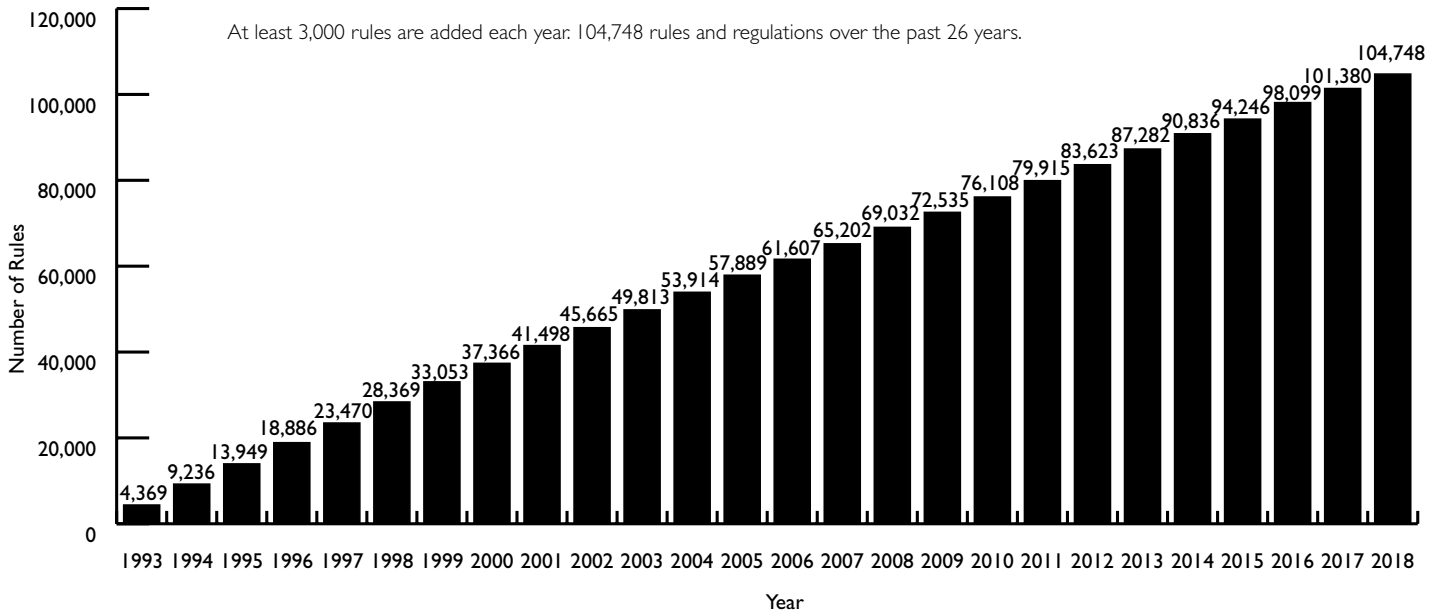
## **Cumulative Final Rules in the Federal Register**

The annual outflow of over 3,000 final rules—and often far more—has meant that 104,748 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, 201,838 rules have been issued (see Historical Tables, Part B).

## **The Expanding Code of Federal Regulations**

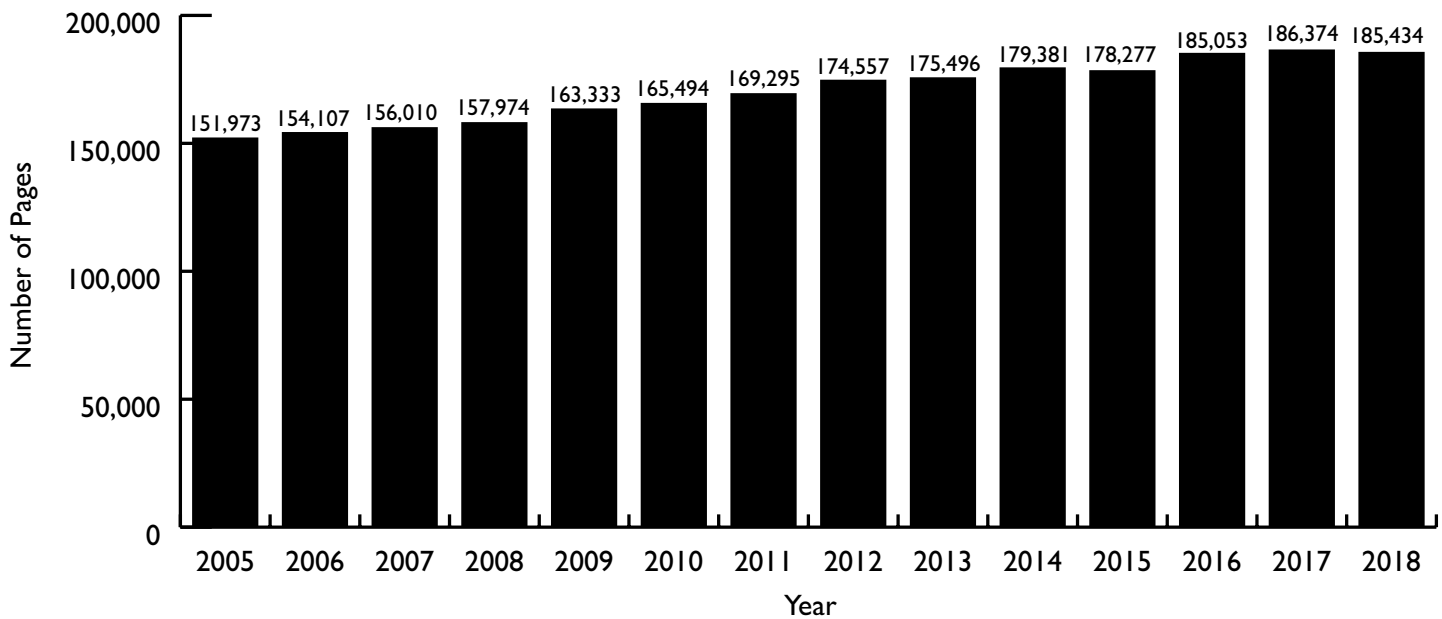
The page count for final general and permanent rules as they come to rest in the *Code of Federal Regulations* (CFR) is more modest than that of the *Federal Register*, but still considerable. In 1960, the CFR contained 22,877 pages. Since 1975, its total page count has grown from 71,224 to 85,434 at the end of 2018, including the index—a 160 percent increase. The number of CFR bound volumes stands at 242, compared with 133 in 1975. (See Figure 14. For the detailed breakdown numbers of pages and volumes in the CFR since 1975, see Appendix: Historical Tables, Part C.) In recent years, traditional rules and regulations have been supplemented by various forms of executive actions and regulatory guidance documents, which are important to track as well.

Figure 13. Cumulative Final Rules Published in the *Federal Register*, 1993–2018



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

Figure 14. *Code of Federal Regulations*, 185,434 Total Pages in 2018, 2005–2018



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

# Regulatory Dark Matter: Presidential Executive Orders and Memoranda

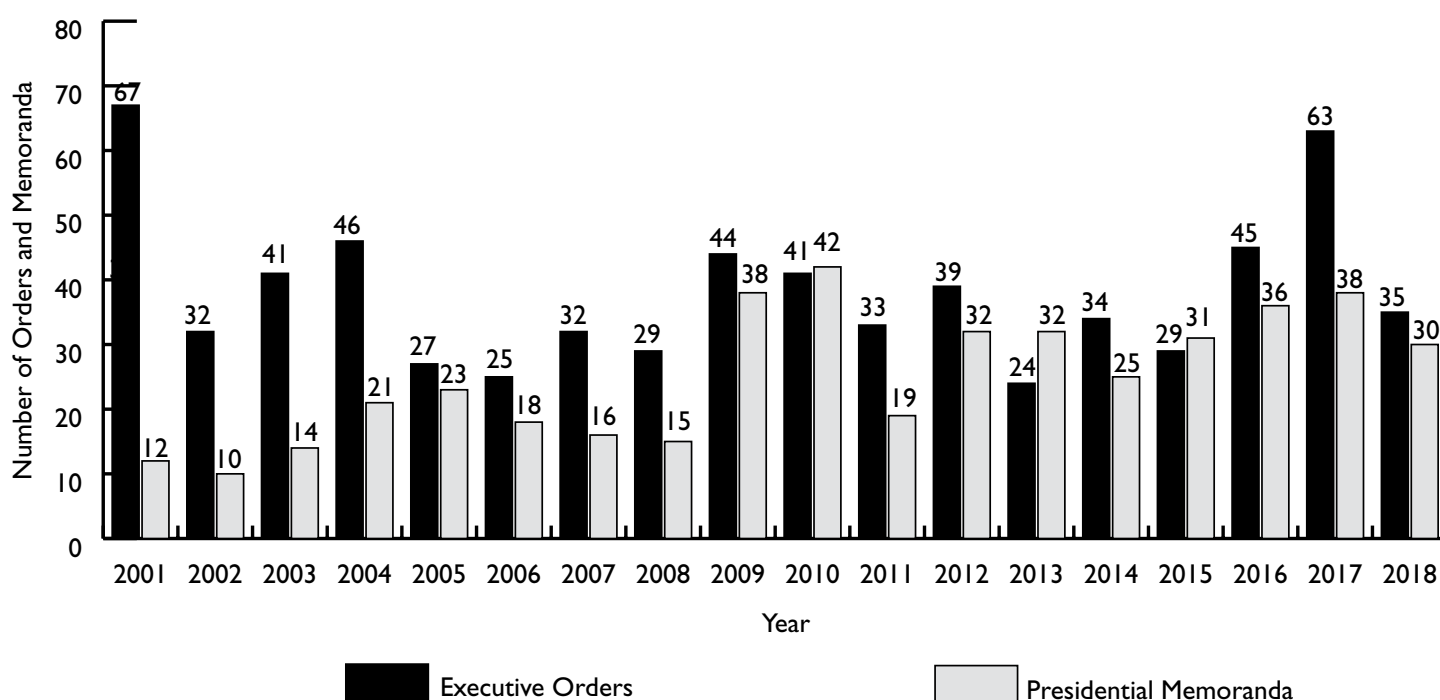
Executive orders, presidential memoranda, and other executive actions make up a large component of executive “lawmaking.” They merit heightened attention from lawmakers, since they can have binding effect.<sup>225</sup>

Executive orders ostensibly deal with the internal workings and operations of the federal government. Subsequent presidents have traditionally been presumed able to overturn them. Their use is not new, dating back to President George Washington’s administration.<sup>226</sup> However, their reporting has not been consistent until recent decades. President Obama’s

executive order totals 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 Figure 15). Trump issued 63 orders in 2017, far outstripping anyone since Bush’s 2001 high-water mark, and 35 in 2018.<sup>227</sup> Among these 35 executive orders and 30 memoranda of the past year are some intended to reduce burdens (see Box 1).

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

Figure 15. Number of Executive Orders and Presidential Memoranda, 2001–2018



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

administration’s own determination of “general applicability and legal effect.”<sup>228</sup> George W. Bush published 131 memoranda during his entire presidency, whereas Barack Obama issued 257 that were published in the *Federal Register*. Bill Clinton published just 14 during his presidency.<sup>229</sup> Donald Trump issued 38 memoranda in 2017, the highest level since 2010, and 30 in 2018.

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.<sup>230</sup> However, four of Obama’s executive orders addressed overregulation and rollbacks.<sup>231</sup> As with the *Federal Register*, counts are interesting but do not tell the full story. Obama’s Executive Order 13563 concerning regulatory review and reform sought to roll back regulation.<sup>232</sup> It amounted to a few billion dollars in cuts, which were swamped by other, newly issued rules and negated by costly guidance.

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. Other key executive orders directed at regulatory restraint were President Clinton’s 1993 Executive Order 12866<sup>233</sup> and President Ronald Reagan’s Executive Order 12291, which formalized central regulatory review at OMB.<sup>234</sup> 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.”<sup>235</sup>

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.<sup>236</sup> Table 4 provides a look at executive order counts by administration since the nation’s founding through Obama.

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*The pertinent question is what executive orders and memoranda are used for and what they do.*

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Table 4. Executive Orders by Administration

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

(continued)

Table 4. Executive Orders by Administration (*continued*)

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
John Tyler	n/a		17
James K. Polk	n/a		18
Zachary Taylor	n/a		5
Millard Fillmore	n/a		12
Franklin Pierce	n/a		35
James Buchanan	n/a		16
Abraham Lincoln	n/a		48
Andrew Johnson	n/a		79
Ulysses S. Grant	n/a		217
Rutherford B. Hayes	n/a		92
James Garfield	n/a		6
Chester Arthur	n/a		96
Grover Cleveland - I	n/a		113
Benjamin Harrison	n/a		143
Grover Cleveland - II	n/a		140
William McKinley	n/a		185
Theodore Roosevelt			1,081
William Howard Taft			724
Woodrow Wilson			1,803
Warren G. Harding			522
Calvin Coolidge			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	38
<b>Total Number of Executive Orders</b>			<b>15,591</b>

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 April 28, 2017.

# Regulatory Dark Matter: Over 22,000 Public Notices Annually

Without actually passing a law, government can specify parameters for various industries, including health care, retirement, education, energy production, finance, land and resource management, science and research, and manufacturing. 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 without regard to the statute's language.<sup>237</sup>

At least 13,000 guidance documents have been issued since 2008.<sup>238</sup>

In addition to the *Federal Register's* tally of some presidential memoranda, public notices in the *Federal Register* 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 and which may or may not be published in the *Federal Register*.<sup>239</sup>

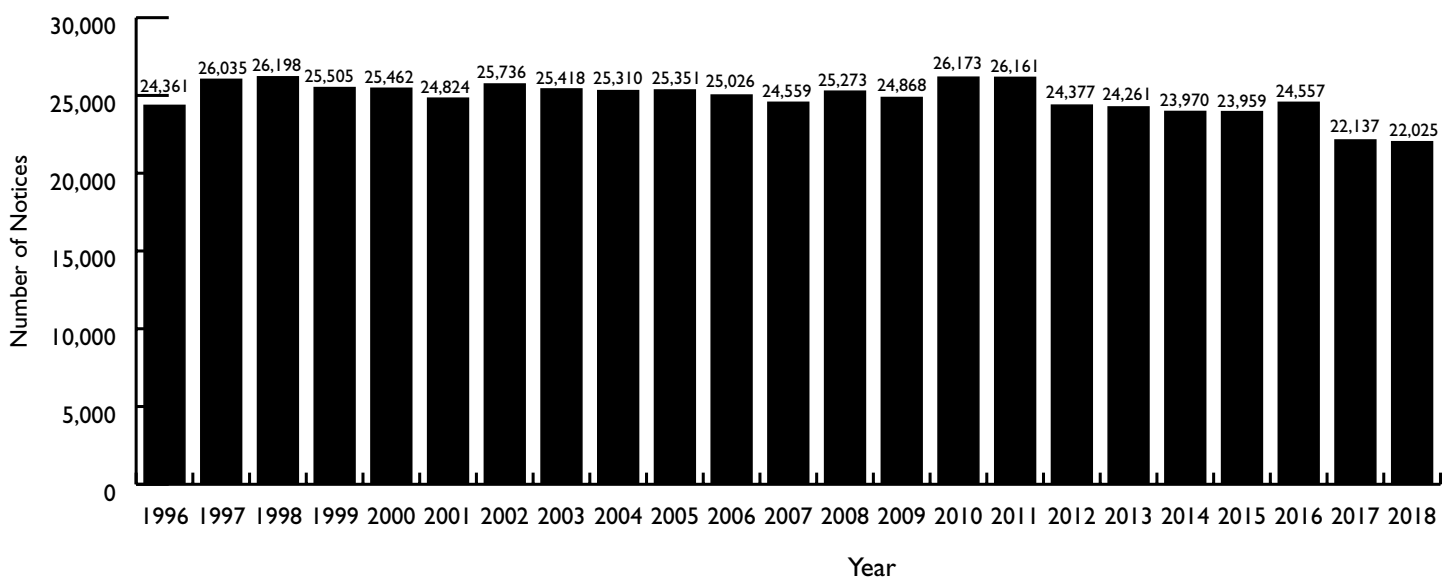
Figure 16 shows the number of notices annually. They peaked at over 26,000 during 2010–2011. They have dipped below 24,000 only four times since 1996, including two drops just above 22,000 in Trump's first two years (the other years were 2014 and 2015). There have been 594,651 public notices since 1994 and well over 1 million since the 1970s, but many of those are trivial.

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*Without passing a law, government can specify parameters for various industries.*

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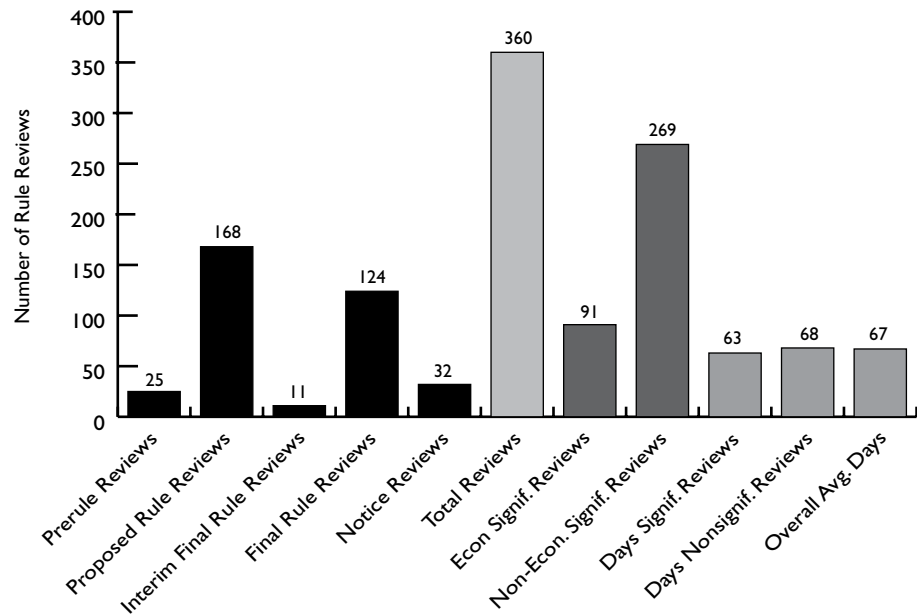
Figure 16. Public Notices in the *Federal Register*, 1996–2018



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



Figure 17. Number of OMB Rule Reviews and Average Days under Review, 2018



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

**Unilateral executive proclamations will render costs and effects of regulation even less transparent than they already are.**

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.<sup>240</sup> 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.<sup>241</sup>

### Rule Reviews at OIRA

The president and Congress can assure that OIRA conducts more reviews of guidance

and notices. As it stands, while agencies issued thousands of notices, only 32 received OMB review during calendar year 2018, up from 24 in Trump's first year, and down from 45 during Obama's last. Several dozen notices reviewed have been deemed to have an "economically significant" effect in recent years. Figure 17 presents the number of rule reviews conducted by OMB, by stage and by economic significance, for calendar year 2018. It also shows the number of days OMB took to review rules in 2018, a process that improved during recent years but that can take several months.

A history of the number of rules and notices reviewed annually by OIRA appears in Appendix: Historical Tables, Part D, where a detailed breakdown is presented of numbers of rules reviewed by type and by average days for review from 1991 through 2018. Each category, except prerule reviews, was down significantly between Obama's last year and Trump's first two. 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 administra-

tion's first 18 months, OIRA reviewed 70 percent fewer regulatory actions than were reviewed under the Obama administration and 66 percent fewer than in the Bush Administration.<sup>242</sup>

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 made 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 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 schedule has become erratic. Election campaign considerations can cause agencies to abstain from rulemaking or to report fewer rules.<sup>243</sup> And reporting priorities by administrations can change the Agenda’s content.

The Trump administration released the fall 2018 edition of the twice-yearly Agenda in December 2018, pairing the occasion with an outline of progress on meeting goals for regulatory streamlining. Usually the Agenda appears with little fanfare, but 2017 and 2018 have been the years of one-in, two-out for federal agency rulemaking, by way of Trump’s Executive Order 13771 on “Reducing Regulation and Controlling Regulatory Costs.” The normal Agenda release was accompanied by White House statements complete with red tape props<sup>244</sup> and a *Wall Street Journal* column by Office of Management and Budget Office of Information and Regulatory Affairs administrator Neomi Rao.<sup>245</sup>

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 commis-

sions (67 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.

The appearance of the Unified Agenda had become erratic in recent years, as its publication has suffered delays in its traditional April and October schedule.<sup>246</sup> This has seemingly been corrected under Trump, but the annual report to Congress on regulatory costs and benefits remains chronically late.

Observers have recognized the fluid, inconsistent nature of the Agenda’s contents. For example, upon release of the fall 2013 Agenda, regulatory expert Leland 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.”<sup>247</sup> Rules and content fluctuate given administration priorities. During the Obama administration, for example, spring

and fall guidelines in 2012 from the OMB's 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.<sup>248</sup>

When subsequent OIRA Administrator Howard Shelanski issued a similar memorandum on August 7, 2013, "please consider terminating" became the more direct "please remove."<sup>249</sup> The drop at that time is apparent in Figure 18. Susan 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."<sup>250</sup>

Policy reversed again in the Trump administration. In 2017, both then-acting OIRA Director Dominic Mancini and current 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.<sup>251</sup>

There are many respects in which rule reporting can be short-circuited and costs

obscured. The Agenda is no different. Agencies are not required to limit their regulatory activity to what they publish in the Unified Agenda. The *Federal Register* has noted the following:

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.<sup>252</sup>

However, this has changed under the Trump administration. As Rao notes:

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.<sup>253</sup>

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 disclosure.

### 3,534 Rules in the Unified Agenda Pipeline; 671 Deemed "Deregulatory"

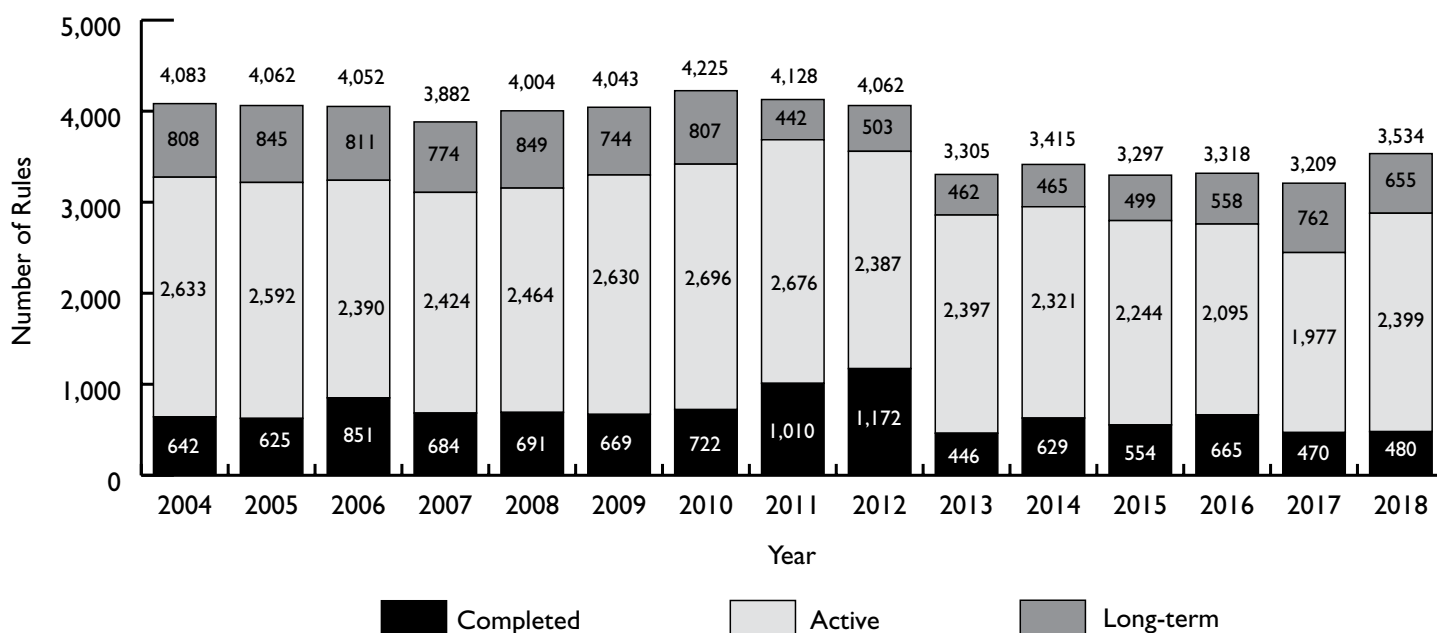
The fall 2018 "Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions" again became the vehicle for Trump's status report on his two-for-one program. The Agenda finds 67 federal agencies, departments, and commissions recognizing 3,534 regulations in the "active" (pre-rule, proposed, and final), "just-completed," and "long-term" stages, many of which have

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*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.*

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Figure 18. Total Agency Rules in the Fall Unified Agenda Pipeline, 2004–2018



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.

been in the pipeline for some time.<sup>254</sup> This is an increase from 3,209 in 2017. By the time of the fall 2017 Agenda, 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, 671 of 2018’s rules 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 19 percent drop from 4,062 rules in 2012 to 3,305 in 2013 in part reflects election year and management directive factors noted above. (For the history of the numbers of rules in the spring and fall editions of 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 be suboptimal and deserve a rethinking in their own right, of course, but they are not generally what people most distress over when it comes to the federal bureaucracy. The total pipeline count of 3,534 rules depicted in Figure 18 is broken out in Table 5 by agency, commission, or issuing department. It shows numbers of rules at the active, completed, and long-term stages.<sup>255</sup>

Perhaps most important for assessing Trump’s one-in, two-out regulatory campaign is the question of which agencies are responsible for the 671 of 3,534 rules that are deemed “Deregulatory.” Independent agency deregulatory actions are not a factor in the 671 (see Table 5). For the total numbers of rules by department and agency from previous year-end editions of the Unified Agenda since 2001, see Appendix: Historical Tables, Part F.

Table 5. Unified Agenda Entries by Department and Agency (Fall 2018)

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	114	72	30	12	32	10	9
Dept. of Commerce	279	162	59	58	43	4	30
Dept. of Defense	246	194	51	1	10	1	
Dept. of Education	49	34	15		11	15	
Dept. of Energy	97	63	8	26	19	5	2
Dept. of Health and Human Services	237	188	22	27	73	13	3
Dept. of Homeland Security	171	89	44	38	19	4	
Dept. of Housing and Urban Development	48	33	4	11	11	1	2
Dept. of the Interior	233	189	35	9	53	7	
Dept. of Justice	70	42	3	25	5	1	1
Dept. of Labor	83	59	10	14	31	8	
Dept. of State	75	60	11	4	5	1	
Dept. of Transportation	298	206	30	62	108	18	10
Dept. of the Treasury	439	332	24	83	35		
Dept. of Veterans Affairs	79	55	19	5	6	2	
Agency for International Development	8	8			2		
American Battle Monuments Commission	1	1					
Architectural and Transportation Barriers Compliance Board	1	1					
Broadcasting Board of Governors	3	3					
Commission on Civil Rights	1	1					
CPBSD*	2	2					
Commodity Futures Trading Commission	36	31	1	4			
Consumer Financial Protection Bureau	22	12	2	8			
Consumer Product Safety Commission	29	18	7	4			
Corporation for National and Community Service	7	3		4			
Council on Environmental Quality	2	2					
Council of Inspector General on Integrity and Efficiency	1	1					
Court Services/Offender Supervision, D.C.	5	5					
Environmental Protection Agency	218	148	22	48	38	1	6
Equal Employment Opportunity Commission	7	7					
Farm Credit Administration	14	13	1				
Federal Acquisition Regulation	53	45	8		6	2	
Federal Communications Commission	83	3		80			
Federal Deposit Insurance Corporation	39	25	4	10			
Federal Energy Regulatory Commission	18		5	13			

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

(continued)

Table 5. Unified Agenda Entries by Department and Agency (Fall 2018) *(continued)*

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
Federal Housing Finance Agency	18	13	2	3			
Federal Maritime Commission	2	1	1				
Federal Mediation and Conciliation Service	1	1					
Federal Reserve System	39	18	11	10			
Federal Trade Commission	18	17		1			
General Services Administration	31	28	3		1		
Institute of Museum and Library Services	1	1					
National Aeronautics and Space Administration	10	6	4		2		
National Archives and Records Administration	7	6	1				
National Commission on Military, National and Public Service	2		2				
National Credit Union Administration	20	10	7	3			
National Endowment for the Arts	6	5		1			
National Endowment for the Humanities	5	5					
National Indian Gaming Commission	7	3	1	3			
National Labor Relations Board	2	1		1			
National Mediation Board	1			1			
National Transportation Safety Board	5	3		2			
Nuclear Regulatory Commission	51	28	6	17			
Office of Government Ethics	7	6	1				
Office of Management and Budget	5	4	1		2		
Office of Personnel Management	26	23	3		1	1	
Peace Corps	4	4					
Pension Benefit Guaranty Corporation	16	13	3				
Postal Regulatory Commission	4		1	3			
Presidio Trust	4	4					
Railroad Retirement Board	6			6			
Securities and Exchange Commission	99	39	8	52			
Small Business Administration	30	26	4		1		
Social Security Administration	31	26	5				
Surface Transportation Board	7		1	6			
Tennessee Valley Authority	1	1					
<b>TOTAL</b>	<b>3,534</b>	<b>2,399</b>	<b>480</b>	<b>655</b>	<b>514</b>	<b>94</b>	<b>63</b>

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

**Active rules.** Since 2004, “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 the time deemed “Deregulatory.” Actives rose to 2,399 in 2018, however 514 of them were deemed “Deregulatory” (see Figure 18).

**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. These completed rules were well below Obama’s past three years’ counts, especially given that of Trump’s completed rules, 62 in 2017 and 94 in 2018 were deregulatory.

**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 decision by Mancini and Rao to include these rules. Thirty of these were deregulatory. In 2018, long-term rules dropped to 655, with 63 of them 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. The five departments and agencies listed in Table 6—the Departments of Commerce, Defense, Health and Human Services, Transportation, and the Treasury—were the most active rulemak-

ers. The Department of the Interior came in sixth with 233 rules, and the Environmental Protection Agency seventh with 218. The top five, with 1,499 rules among them, account for 42 percent of the 3,534 rules in the Unified Agenda pipeline. It is worth noting the percentage of actions at these bodies that are “Deregulatory” for Executive Order 13771 purposes, which Table 5 isolates.

Table 6 also depicts the top five 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, and the Federal Deposit Insurance Corporation.<sup>256</sup> Their total 329 rules account for 9 percent of the 3,534 rules in the Agenda. Combined, the top executive and independent agency components make up 52 percent of the total. However, the difference between this year and prior years is that some entries are now explicitly deemed deregulatory.

## 174 “Economically Significant” Rules in the Unified Agenda; 38 of them Deemed “Deregulatory”; 58 “Regulatory”

A subset of the Unified Agenda’s 3,534 rules is classified as “economically significant,” which broadly means that agencies estimate yearly economic effects of at least \$100 million. Those impacts generally amount to increased costs, although sometimes an economically significant rule is intended to reduce costs, particularly so in the wake of Executive Order 13771. As Table 7 shows, 174 economically significant rules from 20 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, but down from 193 and 218 in the two previous years, respectively)

Figure 19 depicts 2018’s 174 rules alongside those of the previous decade and a half and shows how the of number of economi-

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*A relative handful of executive branch agencies each year account for a large number of the rules in the pipeline.*

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**Table 6. Top Rule-Producing Executive and Independent Agencies**  
(From Fall 2017 Unified Agenda, total of active, completed, and long-term rules)

<b>Executive Agency</b>	<b>Number of Rules</b>
1. Department of the Treasury	439
2. Department of Transportation	298
3. Department of Commerce	279
4. Department of Defense	246
5. Department of Human Services	237
<b>TOTAL</b>	<b>1,499</b>
<b>% of Total Agenda Pipeline of 3,534</b>	<b>42</b>

<b>Independent Agency</b>	<b>Number of Rules</b>
1. Securities and Exchange Commission	99
2. Federal Communications Commission	83
3. Federal Acquisition Regulation	53
4. Nuclear Regulatory Commission	51
5. Federal Deposit Insurance Corporation	39
<b>TOTAL</b>	<b>325</b>
<b>% of Total Agenda Pipeline of 3,534</b>	<b>9</b>

<b>Top 5 Executives plus Independents</b>	<b>1,824</b>
<b>% of Total Agenda Pipeline</b>	<b>52</b>

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.

cally 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 costly 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, particularly given that 30 of his 140 were “Deregulatory.” Among the 174 in the fall 2018 Agenda, 38 were classified deregulatory, and 58 regulatory. How this ratio does or does not square with the two-for-one program is covered in the section “Warning Signs” and is illustrated in Table 8. (The full list of the 174 economically significant rules in the 2018 Agenda pipeline is available in Appendix: Historical Tables, Part G, which flags 38 Regulatory and 58 Deregulatory entries.)

Figure 19 also breaks down economically significant rules into completed, active, and long-term categories. Among the 174 economically significant rules in the fall 2018 edition, 118 of them stand at the “Active” phase, an increase from 71 in the fall 2017 edition and similar to the 113 in the final Obama Agenda. However, 26 of the active category are deemed deregulatory. Barack Obama’s eight-year average of active rules across the fall Agendas was 133; George W. Bush’s eight-year average was 87. As for economically significant rules at the “Completed” stage in the fall Agendas, President Obama’s count was consistently higher than President Bush’s, even taking into account 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,

**Table 7. 140 Economically Significant Rules in the Fall Unified Agenda Pipeline Expected to Have \$100 Million Annual Economic Impact, 30 Deemed Deregulatory, Year-End 2016**

	Rules	Unified Agenda			Deregulatory Actions*		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	8	3	4	1			
Dept. of Commerce	1	1					
Dept. of Defense	1		1				
Dept. of Education	7	7					
Dept. of Energy	9	4	1	4		1	
Dept. of Health and Human Services	60	47	11	2	10	7	
Dept. of Homeland Security	12	8	1	3	1		
Dept. of Housing and Urban Development	2			2			
Dept. of the Interior	5	3	2		2	1	
Dept. of Justice	1	1					
Dept. of Labor	11	4	2	5	3	2	
Dept. of Transportation	12	8		4	4		
Dept. of the Treasury	11	10		1	2		
Dept. of Veterans Affairs	9	7	1	1	1		
Commodity Futures Trading Commission	12	8		4	3		1
Consumer Product Safety Commission	1	1					
Environmental Protection Agency	3	3					
Federal Communications Commission	3			3			
Nuclear Regulatory Commission	5	2	2	1			
Social Security Administration	1	1					
<b>TOTAL</b>	<b>174</b>	<b>118</b>	<b>25</b>	<b>31</b>	<b>26</b>	<b>11</b>	<b>1</b>

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>.

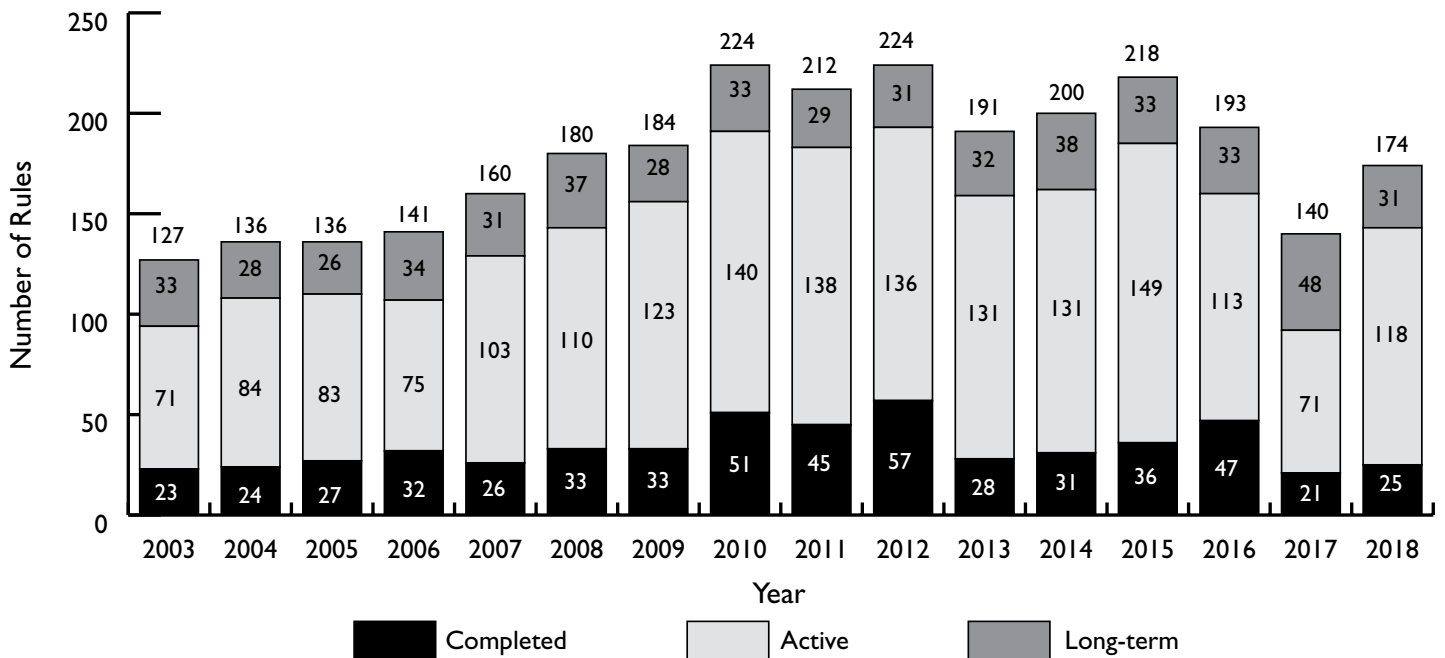
the Trump administration reported 25 completed economically significant rules.

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.<sup>257</sup>

As Figure 20 shows, completed economically significant rules totaled 35 in the combined

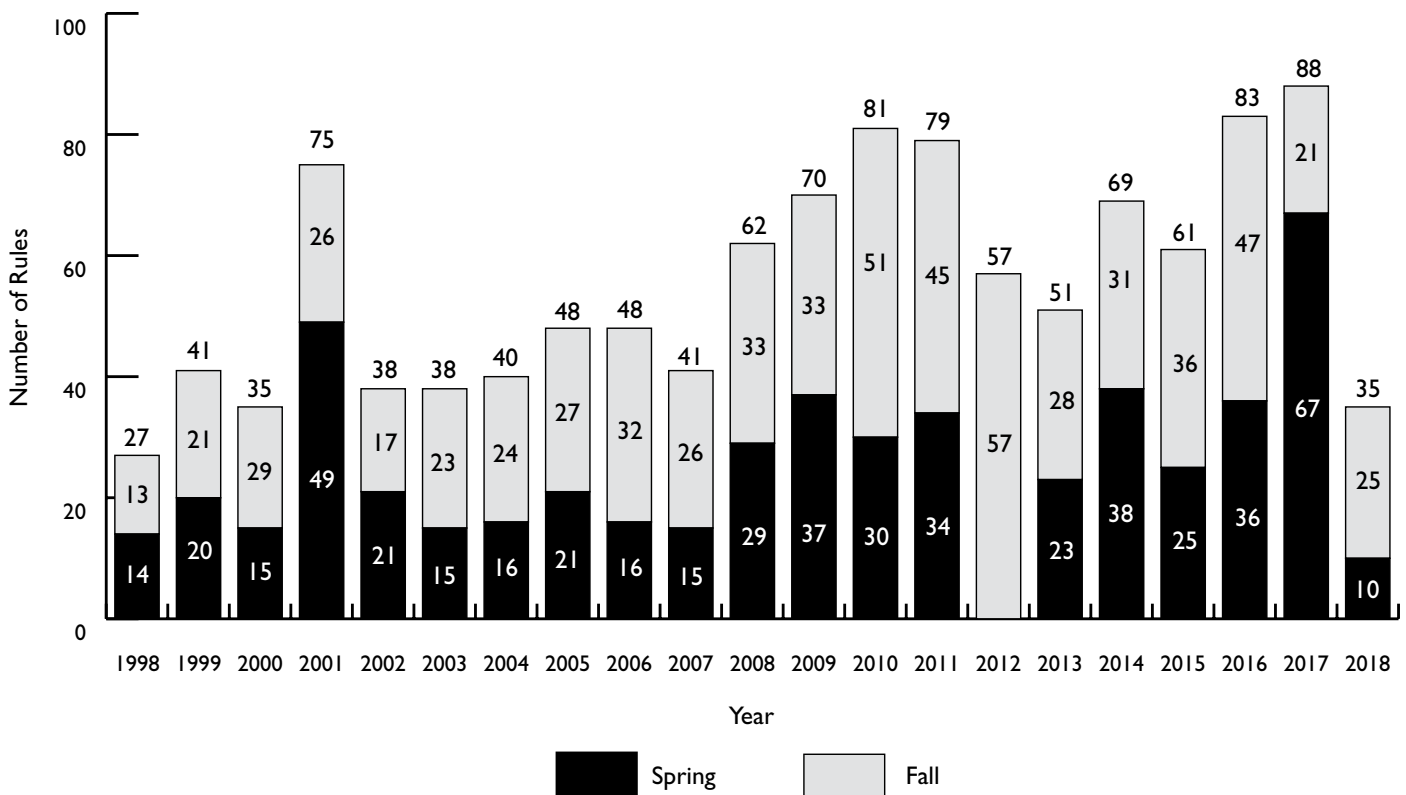
fall and spring 2018 Agendas under Trump. In 2017, Trump had issued more completed economically significant rules than either Bush or Obama in any year. This may have been partly due to the fact that Administrative Procedure Act requires writing a new rule to get rid of an old one. So when agencies are 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 are explicitly deemed deregulatory for Executive Order 13771 purposes. If one were to remove the 16 deregulatory

Figure 19. 140 Economically Significant Rules in the Unified Agenda Pipeline, 2003–2018



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

Figure 20. Annual Completed Economically Significant Rules in the Unified Agenda, 1998–2018



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

rules from Trump's tally, we land at only 19, a major rollback in rulemaking by comparison to predecessor output. Of course, other presidents have issued deregulatory measures; they just did not make the reduction agenda so explicit or ease the tracking of the relevant metrics as the Trump administration did with 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 61, but again, some rules are more explicitly deregulatory.

As noted, each of the 174 economically significant rules scattered among the 3,534 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 impose annual costs of at least \$17 billion (loosely, 174 rules multiplied by the \$100 million economically significant threshold). Some rules may decrease costs, which would offset this total. In Trump's second year, we have explicit declarations of 38 such rules in the pipeline (See Figure 19, Tables 7 and 8, and Part G in the Historical Tables). Yet 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 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 2018 pipeline, 3,360 federal rules were not designated as economically significant (3,534 total rules minus the 174 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 APA's notice-and-comment requirement.

## Notable Regulations by Agency

Although many of the things that regulations purport to do are worthy and needed pursuits, that does not mean that the federal bureaucracy and administrative state are the best ways to achieve them, compared with insurance, liability, and other private sector options, or state and local oversight. As noted, the full list of the 174 economically significant rules in the fall 2018 Agenda pipeline appears in Appendix: Historical Tables, Part G. In recent Unified Agenda editions and in other venues, federal agencies have noted the regulatory initiatives listed below, among others pending or recently completed.

### 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)<sup>258</sup>
- Standards for grades of canned baked beans<sup>259</sup>
- Rural Energy for America Program
- Rural broadband access loans and loan guarantees
- Mandatory inspection of catfish and catfish products
- Multifamily housing reinvention

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*A rule estimated to cost below the \$100 million economically significant threshold can still impose substantial costs on the regulated entities.*

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- 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

- 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

### *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 restrictions<sup>260</sup>
- Requirements for Tobacco Product Manufacturing Practice
- 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”);<sup>261</sup> 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 providers<sup>262</sup>
- Requirements for long-term care facilities: hospice services
- 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
- 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 housing<sup>263</sup>
- 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 shelf<sup>264</sup>
- 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”<sup>265</sup>
- 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)<sup>266</sup>
- Walking working surfaces and personal fall protection systems (slips, trips, and fall prevention)<sup>267</sup>
- 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,<sup>268</sup> 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

### *Department of Transportation*

- Quiet car rule; Minimum Sound Requirements for Hybrid and Electric Vehicles<sup>269</sup>
- Federal Aviation Administration rule on operation and certification of drones (must stay in line of sight, for example)<sup>270</sup> and near critical infrastructure facilities
- National Highway Traffic Safety Administration (NHTSA) proposal on vehicle-to-vehicle communications standardization<sup>271</sup>
- Federal Motor Carrier Safety Administration and NHTSA rule on speed limiters and electronic stability control systems for heavy vehicles<sup>272</sup>
- Federal Railroad Administration’s Train Crew Staffing rule seeking a two-engineers-on-a-train mandate<sup>273</sup>
- NHTSA rule on lighting and marking on agricultural equipment<sup>274</sup>
- Minimum training requirements for entry-level commercial motor vehicle operators and for operators and training instructors of multiple trailer combination trucks<sup>275</sup>
- Passenger car and light truck Corporate Average Fuel Economy standards (newer model years)
- 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
- 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 the Treasury*

- Prohibition of funding of unlawful Internet gambling
- Risk-based capital guidelines; capital adequacy guidelines
- 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

### *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 loans<sup>276</sup>

### *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
- 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
- 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 engines



- cating 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 services<sup>277</sup>

- 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 Limits 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, while many businesses do not want cuts and lobby against them.<sup>278</sup> Note that while significant regulations completed met the two-for-one goals, that is not the case for active and long-term rules being contemplated in the pipeline as a whole

There has long been a need for far 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, one of the most important yet simple modifications has been the noted presentation in Trump's Regulatory Plan and Unified Agenda. The OIRA database better captures specifics of Executive Order 13771-related "Deregulatory" actions, and more explicitly identifies rules not subject to the order.

Rules and regulations can now be more methodically identified in the Unified Agenda as net regulatory or deregulatory.<sup>279</sup> 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 more readily isolate where agencies have classified rules as "Deregulatory" or "Regulatory."<sup>280</sup> Categories of rules not subject to the executive order are now classified and depicted where possible in 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 8 shows the number of these rules at the completed, active, and long-term stages relative to the overall count of 3,534.

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 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. Failure to implement regulatory relief would become obvious over time.

As noted, instead of two-for-one, the administration reported 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 was four-to-one (and 12-to-one when nonsignificant rollbacks are counted).

However, rules can be regulatory but not subject to Executive Order 13771. The order does not apply to nonsignificant rules, yet some nonsignificant rules get labeled deregulatory or regulatory. More broadly, as Table 8 shows, a total of 671 rules in the fall 2018 Unified Agenda pipeline were classified as deregulatory (compared to 540 in 2017). Meanwhile, 257 rules are classified as explicitly regulatory, for an overall ratio of 2.6-to-one in the 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 and 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.<sup>281</sup>

The fall 2017 Agenda pipeline of 3,209 had been the lowest level seen since 1983, even without counting that edition's 540 deregulatory entries. The new fall Agenda count of 3,534 and its 671 deregulatory give a "net" of 2,863. Of course, there is no way to readily tell for comparison what deregulatory elements may have been embedded within prior years' Agenda counts.<sup>282</sup> The detail shown earlier in Table 5 breaks down 2018's 671 deregulatory measures by department and agency, and stage of completion. The Department of Transportation easily led deregulation in both the active and completed

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Table 8. Unified Agenda Entries by Executive Order 13771 Designation (Deregulatory and Regulatory) and by Rule Stage and Significance

	Total # Rules	Completed			Active			Long-Term		
		Total	Economically Significant	Other Significant	Total	Economically Significant	Other Significant	Total	Economically Significant	Other Significant
All Agencies	3,534	480	25	101	2399	118	745	655	31	176
Deregulatory	671	94	11	24	514	26	156	63	1	12
Regulatory	257	12	4	5	163	41	102	82	13	58
Fully or Partially Exempt	333	47	5	17	251	11	117	35	3	11
Not subject to, not significant	797	177	0	4	542	1	11	78	0	0
Other	913	63	2	22	683	32	310	167	10	56
Independent Agency	534	59	2	6	245	7	48	230	4	39
<b>Totals (may not sum fully)</b>	<b>3,505</b>	<b>452</b>	<b>24</b>	<b>78</b>	<b>2398</b>	<b>118</b>	<b>744</b>	<b>655</b>	<b>31</b>	<b>176</b>

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

categories, with 108 and 18 classified as de-regulatory, respectively.

There are some warning signs, however. While agencies can be said to have met Trump's two-for-one goals, a deeper look reveals agencies are planning more rules than rollbacks in future years. The Unified Agenda is a planning document, and agencies plan well more regulating than de-regulating, which further illustrates the limitations of executive action alone.

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 could under the longstanding Executive Order 12866 that governs OMB review of rules. One solution in that regard is expanding coverage of rules via executive order.<sup>283</sup> Table 8's grid of "Completed," "Active," and "Long-term" rule categories depicts "economically significant" and "significant" sub-components. There is time to course correct, but these categories appear to present looming hurdles to meeting future two-for-one strictures.

### **"Completed" Deregulatory and Regulatory Actions in Unified Agenda Achieve a Four-for-One**

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"<sup>284</sup> and in its 12-to-one (four-to-one for significant actions) "Regulatory Reform Results for Fiscal Year 2018." As long as costs are net zero—the primary prescription of the executive order toward which two-for-one is the means—it is adequate for agencies to apply nonsignificant rules for "credit" toward the two-for-one goal.<sup>285</sup> The administration's "update" reporting largely corresponds

to what appears in the Agenda. 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 results. Early in 2018, the spring 2018 edition of the Unified Agenda indicated 80 completed deregulatory actions,<sup>286</sup> while the fall 2018 edition identifies 94 completed deregulatory actions (see Table 8), for a total of 174. The economically significant and "other significant" deregulatory subset of these totals 63.

As Table 8 details, of the 94 Completed "Deregulatory" actions in the 2018 Agenda, 11 are in the "economically significant" category. Twenty-four completed deregulatory rules in Table 8 are deemed "other significant." As for "Regulatory" actions, 12 completed ones appeared in the fall Agenda, with four of them deemed "economically significant" and five "other significant." Taking into account the presence of 12 completed regulatory actions under the database's Executive Order 13771 designation, a nearly eight-to-one ratio prevails well within the requirements of the executive order (The 94 "Deregulatory" actions divided by the 12 "Regulatory" ones in Table 8).

As for "Economically Significant" and "Other Significant" completed actions, Table 8 shows a four-for-one achievement (a total of 35 deregulatory, compared to nine regulatory). This matches the administration's claims. However, there were four regulatory rules at the more weighty economically significant level, and 11 deregulatory ones of

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

<b>Unified Agenda Edition</b>	<b>Deregulatory Entries</b>	<b>Regulatory Entries</b>	<b>Ratio (In/Out)</b>
Fall 2017	22	13	1.7 to 1
Spring 2018	28	9	3.1 to 1
Fall 2018	35	9	3.9 to 1
<b>Grand Total</b>	<b>85</b>	<b>31</b>	<b>2.7 to 1 to date</b>

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*It is best with respect to longer-term prospects of streamlining that economically significant deregulatory rules carry the weight of offsetting the economically significant Regulatory ones.*

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comparable significance, for a lesser but still goal-attaining rate of almost three to one. Box 4 summarizes these Unified Agenda results since fall 2017 to date with respect to rules at the “significant” and above levels. As noted, it is adequate under 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. However, it is best with respect to longer-term prospects of streamlining that economically significant deregulatory rules carry the weight of offsetting the economically significant Regulatory ones.

***Significant “Active” Deregulatory and Regulatory Actions Need Attention***

Active actions—those in the pipeline at the “pre-rule,” “proposed,” and “final” rule stages—are in the production process. Table 8 shows that a total of 514 deregulatory actions in play well exceed 163 regulatory ones, for a more than three-to-one margin overall when nonsignificant rules are included. As non-completed actions, these rules are not obligated at this point to meet the two-for-one goals, but they might be regarded a leading indicator.

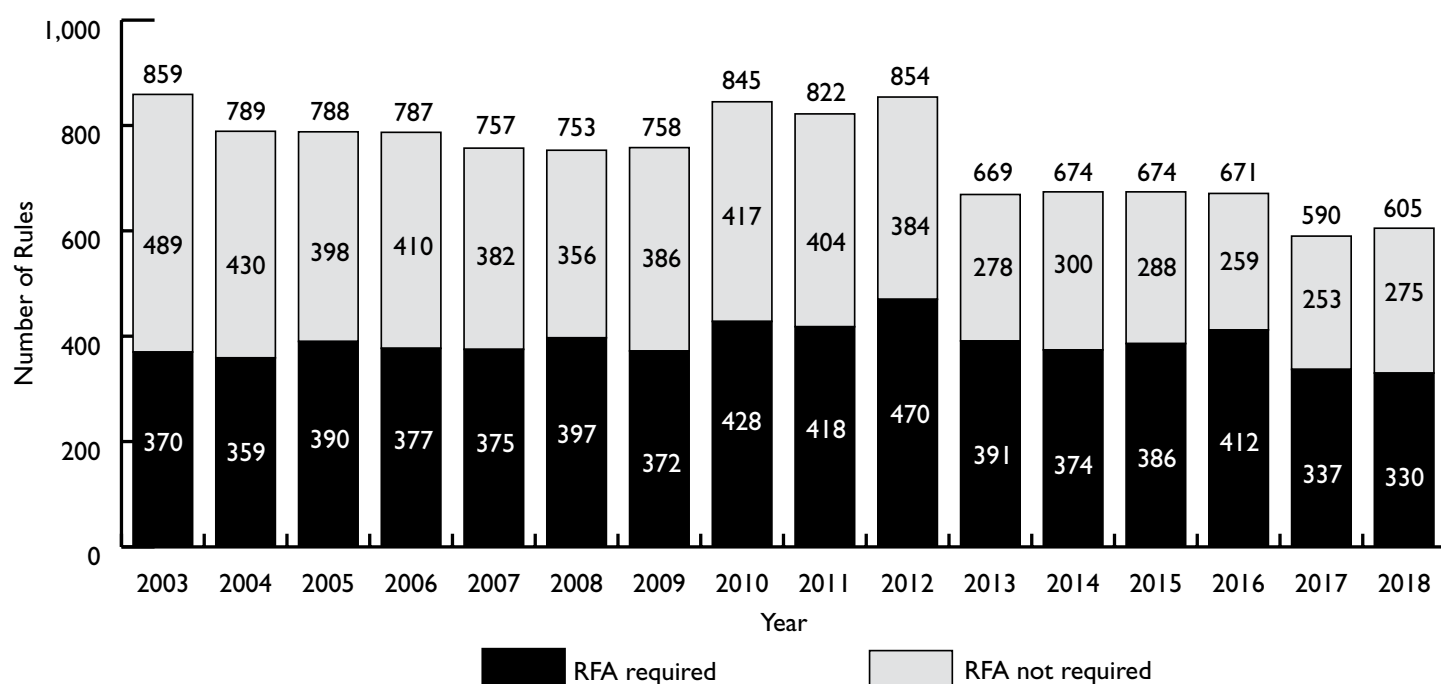
Of more concern are the costlier subsets of active rules. There are 41 economically significant regulatory actions in Table 8 (up from 15 in 2017), but just 26 economically significant deregulatory actions in play, potentially putting two for one on a path to being inverted. In the “other significant” category, 102 regula-

tory actions are outweighed by 156 deregulatory ones, but only by a factor of 1.5. Active rules encompass both proposed and final, and there is time to course-correct as rules in the pipeline move closer to finalization. However, the unfavorable ratios of significant active regulatory to deregulatory rules highlight the limits of unilateral executive regulatory liberalization.

***“Long-term” Planned Regulatory Actions 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. As Table 8 shows, 82 long-term actions are deemed regulatory and 63 are deemed deregulatory, up from 30 deemed deregulatory in 2017. Whereas the deregulatory long-term rule count is up, regulatory rules outweigh them. More worrisome is that, of the anticipated “economically significant” long-term rules, 13 are deemed regulatory, while only one in this costliest category is deregulatory. Even in the “other significant” category, 58 are regulatory, but only 12 are deregulatory. These are warning signs because these more costly rule subsets are where tomorrow’s cost savings need to come from. In 2017, there were no long-term economically significant actions that were deemed deregulatory. However, the number of these deemed regulatory declined from 25 to 13 between 2017 and 2018.

Figure 21. Rules Affecting Small Business, 2003–2018



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

A generous interpretation of the inversions 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 “resistance” to the Trump administration by some career agency personnel.<sup>287</sup> Rolling back regulations requires going through the public notice-and-comment process. It takes time, and the administrative state works to the advantage of agencies that want to maintain vast regulatory edifices. As new editions of the Agenda appear in 2019 and 2020, the situation may be rectified. Another reason for monitoring these situations is that agencies may substitute guidance documents for formal regulations. Again, a more aggressive executive order specifically on the use of guidance to make policy is warranted, especially 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.<sup>288</sup> Figure 21 shows both the number of rules requiring annual regulatory flexibility analysis per the RFA and other rules anticipated by agencies to affect small business, but which do not require 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 already, but dropped even more substantially under Trump, even with some rules presumably comprising rollbacks.

At the end of 2018, overall rules affecting small business stood at 605 compared to 590 the year before and 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, which had not occurred since 2003. Of those 605 rules with small-business impacts, 330 required an RFA, and another 275 rules were otherwise deemed by agencies to affect small business but not require an RFA.<sup>289</sup>

Table 9 breaks out the 2018 fall Unified Agenda's 605 rules affecting small business by department, agency, and commission. The Departments of Commerce, Health and Human Services, and Transportation, along with the Federal Communications Commission and the cross-agency Federal Acquisition Regulations, accounted for 314, or

52 percent, of the 605 rules affecting small business.

Even though the overall reported number of rules affecting small business is down, when it comes to the more hefty ones, those requiring an RFA, the average of Obama's eight years, 406, exceeded Bush's eight-year average of 377. Trump's average annual number of rules affecting small business is far lower than either Bush or Obama, at 333, and nearly a third of these are deregulatory.

Recall that 671 rules among the Unified Agenda's flow of 3,534 are flagged as deregulatory. Of the 605 rules with small business

**Table 9. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Year-End 2018**

	Total Rules	Number Affecting Small Business							% Affecting Small Business	Top 5
		RFA Required			RFA Not Required			Total		
		Active	Completed	L-T	Active	Completed	L-T			
Dept. of Agriculture	114	7	7	1	7	1	1	24	21.1	
Dept. of Commerce	279	35	15	6	22	9	3	90	32.3	90
Dept. of Defense	246							0	0.0	
Dept. of Education	49				2			2	4.1	
Dept. of Energy	97	4		2	4		2	12	12.4	
Dept. of Health and Human Services	237	20	3	12	23	5	1	64	27.0	64
Dept. of Homeland Security	171	16		4	3	1	4	28	16.4	
Dept. of Housing and Urban Development	48				1			1	2.1	
Dept. of the Interior	233	4	2		5		2	13	5.6	
Dept. of Justice	70	1			2		2	5	7.1	
Dept. of Labor	83	4	1	2	13	3	3	26	31.3	
Dept. of State	75				25	2	4	31	41.3	
Dept. of Transportation	298	13		4	15	2	12	46	15.4	46
Dept. of the Treasury	439	1		1	25	2	5	34	7.7	
Dept. of Veterans Affairs	79							0	0.0	
Agency for International Development	8							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							% Affecting Small Business	Top 5
		RFA Required			RFA Not Required			Total		
		Active	Completed	L-T	Active	Completed	L-T			
Broadcasting Board of Governors	3							0	0.0	
Commission on Civil Rights	1							0	0.0	
CPBSD*	2							0	0.0	
Commodity Futures Trading Commission	36	1	1					2	5.6	
Consumer Financial Protection Bureau	22			1	6		3	10	45.5	
Consumer Product Safety Commission	29	3	4	1				8	27.6	
Corp. for National and Community Service	7							0	0.0	
Council on Environmental Quality	2							0	0.0	
Council of Inspector General on Integrity and Efficiency	1							0	0.0	
Court Seivces/Offender Supervision, D.C.	5							0	0.0	
Environmental Protection Agency	218	1		2				3	1.4	
Equal Employment Opportunity Commission	7				3			3	42.9	
Farm Credit Administration	14							0	0.0	
Federal Acquisition Regulation	53	42	7		3	1		53	100.0	53
Federal Communications Commission	83	2		55			4	61	73.5	61
Federal Deposit Insurance Corporation	39							0	0.0	
Federal Energy Regulatory Commission	18							0	0.0	
Federal Housing Finance Agency	18							0	0.0	
Federal Maritime Commission	2							0	0.0	
Federal Mediation and Conciliation Service	1							0	0.0	
Federal Reserve System	39	3		1				4	10.3	
Federal Trade Commission	18				14			14	77.8	
General Services Administration	31	9			17	2		28	90.3	
Institute of Museum and Library Services	1							0	0.0	
National Aeronautics and Space Administration	10							0	0.0	
National Archives and Records Administration	7							0	0.0	
National Comm. on Military, National and Public Service	2							0	0.0	

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

(continued)



**Table 9. Unified Agenda Entries Affecting Small Business by  
Department, Agency, and Commission, Year-End 2018** *(continued)*

	Total Rules	Number Affecting Small Business							% Affecting Small Business	Top 5
		RFA Required			RFA Not Required			Total		
		Active	Completed	L-T	Active	Completed	L-T			
National Credit Union Administration	20							0	0.0	
National Endowment for the Arts	6				1		1	2	33.3	
National Endowment for the Humanities	5							0	0.0	
National Indian Gaming Commission	7							0	0.0	
National Labor Relations Board	2	1						1	50.0	
National Mediation Board	1							0	0.0	
National Transportation Safety Board	5							0	0.0	
Nuclear Regulatory Commission	51	1	1	1				3	5.9	
Office of Government Ethics	7							0	0.0	
Office of Management and Budget	5				1			1	20.0	
Office of Personnel Management	26							0	0.0	
Peace Corps	4							0	0.0	
Pension Benefit Guaranty Corporation	16							0	0.0	
Postal Regulatory Commission	4							0	0.0	
Presidio Trust	4							0	0.0	
Railroad Retirement Board	6							0	0.0	
Securities and Exchange Commission	99	4	4	6	1	1	4	20	20.2	
Small Business Administration	30	12	1		2			15	50.0	
Social Security Administration	31							0	0.0	
Surface Transportation Board	7			1				1	14.3	
Tennessee Valley Authority	1							0	0.0	
TOTAL	3,534	184	46	100	195	29	51	605	17.1	314
		330			275					52% of total
Deregulatory		30	11	2	50	9	9	102		

Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," and from online edition at [www.reginfo.gov](http://www.reginfo.gov).

RFA = regulatory flexibility analysis; L-T = long term.

effects, 102 are deregulatory, up from 83 in 2017 (see bottom row of Table 9). The overall proportion of total rules affecting small business, as noted in Table 9, stands at 17 percent, but the range is wide 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.

## 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 passed in 1995, which required the Congressional Budget Office to produce cost estimates of mandates affecting state, local, and tribal governments above the then-\$50 million threshold.

### 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)

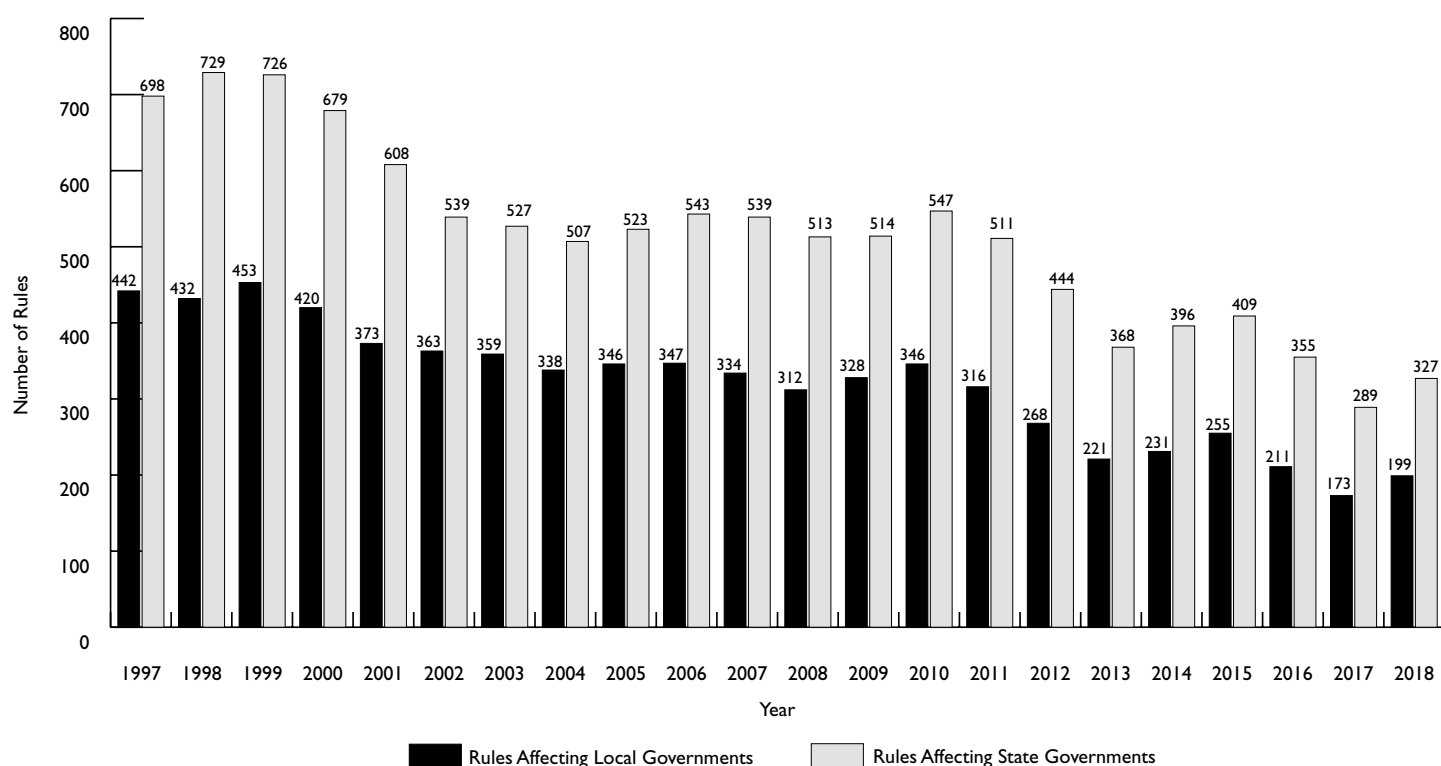
#### 50 EMPLOYEES: ALL THE ABOVE, PLUS

- 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, 1997–2018



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>.

As Figure 22 shows, agencies report that 199 of the 3,534 rules in the fall 2018 Agenda pipeline will affect local governments (this includes all stages—active, completed, and long-term).<sup>290</sup> Since the passage of the Unfunded Mandates Act in the mid-1990s, the number of overall rules affecting local governments has fallen by 62 percent, from 533 to 199. The total number of regulatory actions affecting state governments stands at 327. The overall pipeline count of active, completed, and long-term rules has been trending downward. The change is even more dramatic in the past two years owing to explicit deregulatory actions—47 local actions and 76 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 influ-

ence overall regulatory reform measures. At the 2016 Legislative Summit of the National Conference of State Legislatures (NCSL) in Chicago, the NCSL Standing 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.”<sup>291</sup> The NCSL calls 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.<sup>292</sup>

In May 2016, the Congressional Budget Office (CBO) reported that since 2006, 160

laws have imposed mandates on states and localities, with 342 mandates within these laws.<sup>293</sup> 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.<sup>294</sup> Nonetheless, below appear 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<sup>295</sup> provided).

### *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)
- 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 business 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 maintained in a database at the Government Accountability Office, one can readily observe (a) which of the thousands of final rules that agencies issue each year are major and (b) which departments and agencies are producing the rules.<sup>296</sup>

The CRA gives Congress a window of 60 legislative days in which to review a 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.<sup>297</sup> According to recent reports, however, some final rules are not being properly submitted to the GAO and to Congress as required under the CRA.<sup>298</sup>

Table 10, derived from the GAO database of major rules, depicts the number of final major rule reports issued by the GAO regarding agency rules through 2018. Rules can add burdens, reduce them, implement delays, or set rates and rules for major governmental programs like Medicaid. There were 54 major rules in 2018 based on a search of the GAO's database (counting the pre-inauguration weeks), compared with 48 in 2017 and 119 in 2016.<sup>299</sup> The 119 major rules in 2016 under Obama were the highest count since this tabulation began following passage of the CRA; the 100 rules in 2010 had been the second-highest. The 48 under Trump in 2017 was the lowest, followed by 50 in 2003.

This is a good place to summarize the species of significant rules.<sup>300</sup> 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 three years per various databases appears next.

Table 10. Government Accountability Office Reports on Major Rules as Required by the Congressional Review Act, 1999–2018

	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999
Department of Agriculture	5	2	5	7	8	4	2	4	6	12	3	7	8	6	7	4	7	9		6
Department of Commerce	1	1				2				2	1	2			1			2		5
Department of Defense		1	2	2	1				4	4	6			1			2	3		1
Department of Education		3	2	1	2	5	4	2	5	6	2	1	2							1
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	19	16	38	18	27	24	23	24	24	17	24	19	16	22	22	17	13	15	17	7
Department of Homeland Security	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	1
Department of Justice	2		1				1	1	3				1	1	1		3	4		
Department of Labor	1	2	8	1	3	3	3	2	6	1	2	3	3	1	1		2	3	5	
Department of the Interior	5	3	6	6	6	6	7	6	7	7	10	5	6	6	8	7	7	8	9	6
Department of State	1						1		1		1									
Department of Transportation	1		4	3	3	3	2	2	5	6	8	3	1	3	5	4	6	3		4
Department of the Treasury		2	5	7	6	3	2	1	4		1	1	1		1	1		1		
Department of Veterans Affairs	3	1	1	4	3	1	1	2	2	2		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		3	2	2		4	1	1												
Consumer Product Safety Commission								1					1							
Emergency Oil and Gas Loan Board																				1
Emergency Steel Guarantee Loan Board																				1
Environmental Protection Agency	1	2	7	8	2	3	5	6	8	3	9	2	8	3	7	3	1	4	20	5
Equal Employment Opportunity Commission								1												





		<b>Completed Economically Significant*</b>	<b>Major per GAO**</b>	<b>Major Per Unified Agenda***</b>	<b>Significant****</b>
2016	Obama	83	119	96	486
2017	Trump	88	48	102	199
2018	Trump	35	54	43	108

\* 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](http://www.tenthousandcommandments.com).

President George W. Bush averaged 63 major rules annually during his eight years in office. President Barack Obama averaged 86, a 36 percent higher average annual output than that of Bush. Obama issued 685 major rules over seven years, compared with Bush’s 505 over eight years. (The presentation in this report 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.) Trump’s 48 and 54 major rules in years one and two respectively mean an average of 51 major rules annually; this is less than his two predecessors, even before taking into account that some major rules are deregulatory.

# Regulation and the Federal Communications Commission

The Federal Communications Commission is by no means the heavyweight among regulators as gauged by the number of rules issued each year. Yet the FCC exerts great influence over a major engine in today's economy: telecommunications, the Internet, and the information economy generally. An agency's rule count is not all that matters because a handful of rules can sometimes have an outsized impact.

The FCC is an expensive agency. It spent an estimated \$469 million on regulatory development and enforcement during FY 2018<sup>301</sup>

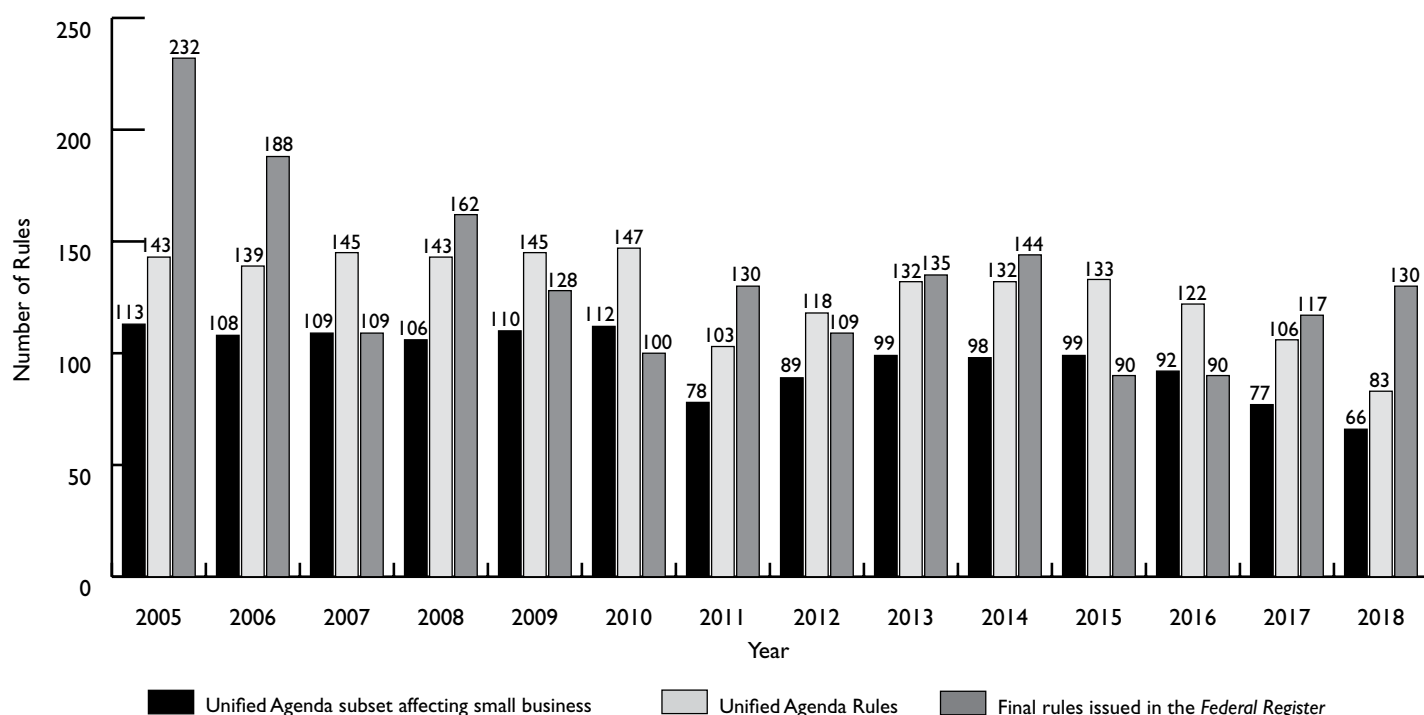
and likely accounts for more than \$100 billion in annual regulatory and economic impact.<sup>302</sup> Figure 23 shows the FCC's final rules in the *Federal Register* during the past decade, its overall number of rules in the fall Unified Agenda, and its Agenda rules affecting small business. Its 83 rules in 2018 in the Unified Agenda pipeline are matched or surpassed by 12 other departments or agencies (see Table 5) and its count of three economically significant rules is also exceeded or equaled by that of 13 other agencies (see Table 7). Of the 3,534 total rules in the fall 2018 Agenda pipeline, 83, or 2 percent, were in the works

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*An agency's rule count is not all that matters because a handful of rules can sometimes have an outsized impact.*

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Figure 23. Number of FCC Rules in the Unified Agenda and *Federal Register*, 2005–2018



Source: Compiled from "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions," *Federal Register*, various years' editions; from online edition at [www.reginfo.gov](http://www.reginfo.gov); and from [FederalRegister.gov](http://FederalRegister.gov).

at the FCC (Figure 23). Sixty-one of the FCC's rules in the fall 2018 pipeline, or 73 percent of its total, affect small business, as Figure 23 and Table 9 show.

In 2018, the FCC finalized 130 rules in the *Federal Register*, up from 110 in 2017. FCC final rules in the *Federal Register* numbered as high as 313 back in 2002, then declined steadily during the decade to lows of 109 in 2012, and then to 90 in both 2015 and 2016 (see Figure 23). As of February 12, 2019, the FCC had finalized six rules in the *Federal Register*.

A pro-regulatory mindset dominated the commission during the Obama administration, notably in the push to apply utility regulation to broadband in alleged pursuit of net neutrality. The overturning of that ruling by the FCC under Chairman Ajit Pai is under court challenge, and the case is likely headed to the Supreme Court.<sup>303</sup> This illustrates the importance of distinguishing regulatory rules from deregulatory ones.

Of the 174 economically significant rules in the works across the entire federal govern-

ment, three belong to the FCC (see Table 7) and are listed below. Such rulemakings—along with other FCC rules in the Agenda pipeline and the dozens made final each year—present opportunities for either liberalization of telecommunications or greater central regulatory oversight and protracted legal battles.<sup>304</sup> The FCC had chosen the latter in recent years, but has changed under Chairman Pai.

### Three Economically Significant Rules in the Pipeline at the FCC

- Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions; GN Docket No. 12-268, RIN 3060-AJ82
- Implementation of Section 224 of the Act; A National Broadband Plan for our Future (WC Docket No. 07-245, GN Docket No. 09-51), RIN 3060-AJ64
- Restoring Internet Freedom; WC Docket No. 17-108; Protecting and Promoting the Open Internet; GN Docket No. 14-28, RIN 3060-AK21

# 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 take further steps to continue to stress regulatory streamlining and further specific actions such as requiring rules and guidance to be submitted to Congress and the GAO as intended 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,<sup>305</sup> but net benefits or even actual costs are not subject to quantification for the most part. 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.<sup>306</sup> 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.<sup>307</sup> 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 11. Agencies could classify their rules on the basis of either (a) cost

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*Many rules that technically come in below the “economically significant” threshold can still be very significant in real-world terms.*

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Table 11. 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

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. That is all well and good, but 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.<sup>308</sup> In addition to revealing burdens, impacts, and trends, it would reveal more clearly what we do *not*

### 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.

know about the regulatory state, such as, for example, the percentage of rules that failed to quantify costs, and the percentage of rules that failed to quantify 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 not impossible. 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’ overly confusing rule classifications to be harmonized.<sup>309</sup> 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 into the report 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 regulatory state seriously.

## Ending Regulation without Representation: The “Unconstitutionality Index”—11 Rules for Every Law

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

gress, do the bulk of U.S. lawmaking. 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.”<sup>310</sup> 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.<sup>311</sup> 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 triumph of the administrative state over the Constitution. There were 11 rules for every law in 2018 (see Figure 24). In calendar year 2018 regulatory agencies issued 3,368 final rules, while the 115th Congress passed and President Trump signed into law 313 bills.<sup>312</sup> While Trump’s rule count was lower, the number of laws enacted was higher than in recent years. The average over the past decade has been 28 rules for every law. Rules issued by agencies are not usually substantively related to the current year’s laws; typically, agencies administer earlier legislation. If agency public notices and executive orders are considered, non-legislative policy making assumes even greater prominence as an issue of concern. (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.)

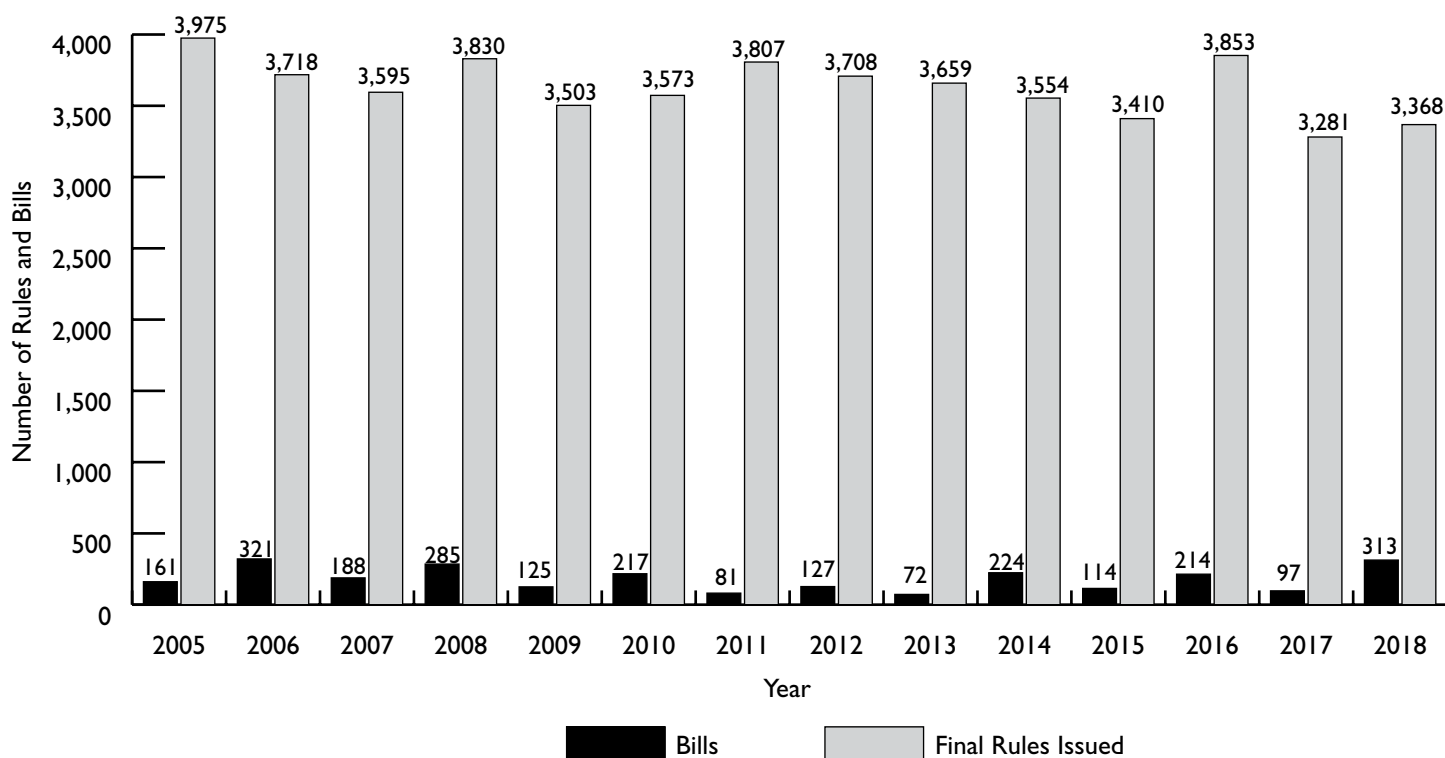
Growing debt and deficits can incentivize Congress to regulate rather than to increase government spending to accomplish pol-

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

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Figure 24. The Unconstitutionality Index, 2005–2018



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>.

*Congress should vote on agencies' final rules before such rules become binding on the public.*

icy 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.<sup>313</sup> 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.”<sup>314</sup> 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 are 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, 1936–2017

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

Year	Unadjusted Page Count	Jumps/Blanks	Adjusted Page Count
1972	28,924	n/a	28,924
1973	35,592	n/a	35,592
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
<b>2018</b>	<b>64,582</b>	<b>937</b>	<b>63,645</b>

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*, 1976–2017

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
<b>2018</b>	<b>3,368</b>	<b>2,098</b>	<b>22,349</b>	<b>27,815</b>

Rules since 1993: 104,748; rules since 1975: 201,838; other since 1975: 1,088,478.

Source: National Archives and Records Administration, Office of the Federal Register.  
\* “Other” documents are presidential documents, agency notices, and corrections.

# Part C. Code of Federal Regulations Page Counts and Number of Volumes, 1975–2017

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
<b>2017</b>	<b>178,628</b>	<b>846</b>	<b>1,170</b>	<b>180,644</b>	<b>5,730</b>	<b>186,374</b>	<b>242</b>

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, 1991–2018

Year	Average Days Review Time										
	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	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

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

ES = economically significant.

## Part E. Unified Agenda Rules History, 1983–2017

### 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			

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

	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000
Department of Agriculture	114	140	155	160	159	276	265	287	327	374	290	311	292	279	323	314	312	327
Department of Commerce	247	231	246	270	250	415	328	296	300	325	303	302	296	273	300	270	342	390
Department of Defense	193	115	117	121	104	146	140	150	133	109	131	143	163	126	108	87	93	117
Department of Education	38	27	25	26	20	24	18	23	22	17	13	16	9	11	13	14	8	21
Department of Energy	87	97	107	105	92	108	96	96	85	54	47	63	61	50	66	53	61	67
Department of Health and Human Services	189	197	213	217	200	204	251	312	231	236	259	257	249	233	219	219	277	308
Department of Homeland Security	123	123	130	141	139	160	232	230	237	252	267	280	295	314	338			
Department of Housing and Urban Development	42	47	52	55	52	58	65	65	60	73	86	92	90	103	109	100	89	113
Department of Justice	68	94	100	102	95	112	120	137	121	138	140	139	124	125	122	249	229	202
Department of Labor	64	94	97	95	84	98	90	99	104	96	94	93	93	88	89	102	141	156
Department of State	64	38	44	47	41	63	35	30	18	27	28	28	24	21	15	41	32	21
Department of the Interior	183	285	288	324	353	320	325	259	277	287	264	305	303	287	295	298	423	418
Department of Transportation	255	240	210	216	220	232	224	223	230	200	199	215	227	301	365	543	511	536
Department of the Treasury	444	469	391	426	428	487	497	580	528	521	545	501	514	532	530	513	458	450
Department of Veterans Affairs	79	76	80	75	66	85	82	81	78	80	65	77	76	79	87	104	164	141
Advisory Council on Historic Preservation				1						0	0	0		1	1	1	0	1
Agency for International Development	9	14	8	7	5	10	14	14	12	7	10	8	10	8	8	7	6	6
American Battle Monuments Commission	2																	
Architectural and Transportation Barriers Compliance Board	3	6	6	7	8		8	7	6	5	5	4	3	4	4	5	5	7
Commission on Civil Rights	1	1	1	1	1		1	1	1	2	1	1	1	1	1	1	1	1
Commodity Futures Trading Commission	32	35	34	26	33	83	68	56	32	25	19	14	11	15	15	19	30	21
Consumer Financial Protection Bureau	29	26	23	21	26	34												
Consumer Product Safety Commission	29	43	45	37	33	48	38	51	39	31	19	24	18	18	20	20	21	20
Corporation for National and Community Service	6	6	7	6	4	5	13	10	7	7	9	11	11	8	9	16	9	6
Council of Inspector General on Integrity and Efficiency	2	1																
Court Services/Offender Supervision, D.C.	6	4	4	3	3	3	3	2	2	2	2	1	1	1	3	7	5	0
CPBSD*	3	4	2	2	2	2	3	3	3	3	5	6	6	5	0	0	0	0
Defense Nuclear Facilities Safety Board	1																	
Environmental Protection Agency	220	203	188	186	179	223	318	345	331	330	336	372	400	416	417	409	416	449
Equal Employment Opportunity Commission	8	10	8	8	9	9	7	7	7	5	7	8	6	3	4	4	3	6
Export-Import Bank of the United States						1												
Farm Credit Administration	31	27	27	26	30	30	25	23	25	19	12	19	20	20	21	14	17	17
Farm Credit System Insurance Corporation	2						25		1	1	0	1	1	1	1	1	1	3
Federal Acquisition Regulation	43	40	42	36	40	50	51	85	55	44	36	42	44	45	49	43	48	56
Federal Communications Commission	106	122	133	132	132	118	103	147	145	143	145	139	143	146	134	141	145	137
Federal Council on the Arts and Humanities										1								
Federal Deposit Insurance Corporation	29	19	25	25	17	22	21	21	21	19	18	24	16	20	17	17	22	26
Federal Emergency Management Agency										0	0	0	0	0	0	24	30	26
Federal Energy Regulatory Commission	17	21	25	24	29	40	41	36	37	39	41	47	35	23	21	19	8	18
Federal Housing Finance Agency	14	20	20	19	20	32	25	27	30	10	3	8	8	9	11	9	12	12
Federal Housing Finance Board										3								
Federal Maritime Commission	4	6	8	7	6	4	8	4	6	3	4	3	5	7	11	8	7	9
Federal Mediation and Conciliation Service						1	1	2	2	2	1	1	2	2	3	4	3	2

Federal Reserve System	29	22	18	23	16	25	29	22	26	18	20	13	17	18	18	24	32	33
Financial Stability Oversight Council						2												
Federal Trade Commission	20	18	20	23	20	23	24	19	20	17	14	16	15	14	12	10	13	14
General Services Administration	20	23	21	25	18	21	29	34	49	54	26	34	33	27	37	40	35	40
Gulf Coast Ecosystem Restoration Council		2	4	4														
Institute of Museum and Library Services	1		1	1	3	3	1	2	1	2	1	1	4	3	6	5	5	4
National Aeronautics and Space Administration	12	12	14	22	23	37	46	26	32	19	11	15	20	27	34	13	17	11
National Archives and Records Administration	8	10	8	10	6	6	4	9	7	10	15	21	17	22	19	20	19	21
National Council on Disability																		
National Credit Union Administration	23		1	22	24	31	28	24	24	22	24	29	27	26	27	20	22	16
National Council on Disability	6	15	26															
National Endowment for the Arts	4	5	7	8	7	8			2	3	2	2	2	2	6	5	5	5
National Endowment for the Humanities	8	4	4	5	4	3	5	4	3	3	3	3	3	3	8	9	8	7
National Indian Gaming Commission	1	9	9	5	5	15	15	9	17	18	19	16	15	14	14	16	15	14
National Labor Relations Board	1			1	1	1												
National Science Foundation	3	2	1	3	2	3	3	2	3	3	0	2	3	3	2	2	3	5
National Transportation Safety Board	8	17	15	14														
Nuclear Regulatory Commission	60	62	65	60	53	73	64	63	61	54	53	45	49	42	45	39	42	55
Office of Federal Housing Enterprise Oversight										10	9	8	6	4	4	7	9	5
Office of Government Ethics	6	8	5	6	4	4	5	7	7	6	9	8	7	7	9	10	11	11
Office of Management and Budget	4	4	4	2	2	5	8	7	7	2	1	2	2	3	4	4	5	5
Office of National Drug Control Policy			1															
Office of Personnel Management	22	38	40	67	54	73	87	77	77	80	75	93	94	103	90	72	91	110
Office of Special Counsel										0	0	0	0	0	0	0	0	3
Office of the Trade Representative	2	3									0	0	0	0	0	0	0	0
Peace Corps	4	4	3	4	4	5	5	1	1	7	6	6	5	4	9	9	9	8
Pension Benefit Guaranty Corporation	17	13	12	12	13	13	12	10	10	12	12	13	9	6	4	6	11	10
Postal Regulatory Commission	3			2	2	2	1	3	2	2	3	0	0	0	0	0	0	0
Presidio Trust	4									0	0	0	2	2	1	2	2	3
Privacy and Civil Liberties Oversight Board	1				1					0	1	0	0	0	0	0	0	0
Railroad Retirement Board	4	2	1	1	1	1	1	1	1	3	2	6	5	6	11	13	13	19
Recovery Accountability and Transparency Board				3	3	2		1	3									
Securities and Exchange Commission	85	75	69	61	76	89	107	75	74	72	76	71	64	79	71	73	80	77
Selective Service System							1	1	1	1	1	1	1	1	1	1	1	1
Small Business Administration	29	30	33	30	30	43	48	51	39	26	28	32	34	29	33	40	37	41
Social Security Administration	27	36	42	39	44	49	53	63	58	64	63	53	68	59	64	63	85	82
Special Insp. Gen. for Afghanistan Reconstr.	1	1				4												
Surface Transportation Board	10	20	12	8	9	10	11	5	5	6	4	7	3	4	5	5	4	3
Tennessee Valley Authority	1									0	0	0	0	0	2	2	3	3
Udall Institute for Environmental Conflict Res.										0	0	0	0	0	1	1	3	3
<b>TOTAL</b>	<b>3,209</b>	<b>3,318</b>	<b>3,297</b>	<b>3,415</b>	<b>3,305</b>	<b>4,062</b>	<b>4,128</b>	<b>4,225</b>	<b>4,043</b>	<b>4,004</b>	<b>3,882</b>	<b>4,052</b>	<b>4,062</b>	<b>4,083</b>	<b>4,266</b>	<b>4,187</b>	<b>4,509</b>	<b>4,699</b>

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: Data 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. 38 Deregulatory actions highlighted in **bold face**; 58 regulatory actions highlighted with underline.

### ACTIVE RULEMAKINGS (118 actions)

#### DEPARTMENT OF AGRICULTURE

1. USDA/AMS, Final Rule Stage, National Bioengineered Food Disclosure Standard, 0581-AD54
2. USDA/FNS, Proposed Rule Stage, Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 0584-AE57
3. USDA/FNS, Proposed Rule Stage, Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 0584-AE62

#### DEPARTMENT OF COMMERCE

4. DOC/PTO, Proposed Rule Stage, Setting and Adjusting Patent Fees, 0651-AD31

#### DEPARTMENT OF EDUCATION

5. ED/OPE, Proposed Rule Stage, State Authorization and Related Issues, 1840-AD36
6. ED/OPE, Proposed Rule Stage, Accreditation and Related Issues, 1840-AD37
7. ED/OPE, Proposed Rule Stage, Ensuring Student Access to High Quality and Innovative Postsecondary Educational Programs, 1840-AD38
8. ED/OPE, Final Rule Stage, Institutional Accountability, 1840-AD26
9. ED/OPE, Final Rule Stage, Federal-State Relationship Agreements, Pell Grant, ACG, National Smart Grant and LEAP, 1840-AD30
10. ED/OPE, Final Rule Stage, Program Integrity; Gainful Employment, 1840-AD31
11. ED/OII, Proposed Rule Stage, Proposed Priorities, Requirements, and Selection Criteria—Charter Schools Program Grants to Charter Management Organizations, 1855-AA14

#### DEPARTMENT OF ENERGY

12. DOE/EE, Proposed Rule Stage, Energy Conservation Standards for Manufactured Housing, 1904-AC11

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

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

16. HHS/FDA, Prerule Stage, Tobacco Product Standard for Characterizing Flavors in Cigars, 0910-AI28
17. HHS/FDA, Proposed Rule Stage, Sunscreen Drug Products for over-the-Counter-Human Use; Tentative Final Monograph, 0910-AF43
18. HHS/FDA, Proposed Rule Stage, Mammography Quality Standards Act; Amendments to Part 900 Regulations, 0910-AH04
19. HHS/FDA, Proposed Rule Stage, Medication Guides; Patient Medication Information, 0910-AH68
20. **HHS/FDA, Proposed Rule Stage, Institutional Review Boards; Cooperative Research, 0910-AI08**
21. HHS/FDA, Proposed Rule Stage, Nutrient Content Claims, Definition of Term: Healthy, 0910-AI13
22. HHS/FDA, Proposed Rule Stage, Rule to Revoke Uses of Partially Hydrogenated Oils in Foods, 0910-AI15
23. **HHS/FDA, Final Rule Stage, Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, Extension of Compliance Dates for Subpart E, 0910-AH93**
24. HHS/OIG, Proposed Rule Stage, Removal of Safe Harbor Protection for Rebates to Plans or PBMs Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection, 0936-AA08
25. **HHS/CMS, Proposed Rule Stage, Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction (CMS-3346-F), 0938-AT23**
26. **HHS/CMS, Proposed Rule Stage, Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction (CMS-3347-P), 0938-AT36**

27. HHS/CMS, Proposed Rule Stage, CY 2020 Notice of Benefit and Payment Parameters (CMS-9926-P), 0938-AT37
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 and CHIP Managed Care (CMS-2408-P), 0938-AT40
30. **HHS/CMS, Proposed Rule Stage, Medicare Shared Savings Program; Accountable Care Organizations (CMS-1701-F), 0938-AT45**
31. HHS/CMS, Proposed Rule Stage, Proficiency Testing Regulations Related to Analytes and Acceptable Performance (CMS-3355-P), 0938-AT55
32. **HHS/CMS, Proposed Rule Stage, Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2020 (CMS-4185-P), 0938-AT59**
33. HHS/CMS, Proposed Rule Stage, FY 2020 Inpatient Rehabilitation Facility (IRF) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1710-P), 0938-AT67
34. HHS/CMS, Proposed Rule Stage, CY 2020 Home Health Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1711-P), 0938-AT68
35. HHS/CMS, Proposed Rule Stage, FY 2020 Inpatient Psychiatric Facilities Prospective Payment System Rate and Quality Reporting Updates (CMS-1712-P), 0938-AT69
36. HHS/CMS, Proposed 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-P), 0938-AT70
37. HHS/CMS, Proposed Rule Stage, FY 2020 Hospice Wage Index, Payment Rate Update, and Quality Reporting Requirements (CMS-1714-P), 0938-AT71
38. HHS/CMS, Proposed Rule Stage, CY 2020 Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Medicare Part B (CMS-1715-P), 0938-AT72
39. HHS/CMS, Proposed Rule Stage, Hospital Inpatient Prospective Payment System for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and FY 2020 Rates (CMS-1716-P), 0938-AT73
40. HHS/CMS, Proposed 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-P), 0938-AT74
41. HHS/CMS, Proposed Rule Stage, FY 2020 Skilled Nursing Facility (SNFs) Prospective Payment System Rate Update and Quality Reporting Requirements (CMS-1718-P), 0938-AT75
42. HHS/CMS, Proposed Rule Stage, Interoperability and Patient Access (CMS-9115-P), 0938-AT79
43. HHS/CMS, Proposed Rule Stage, Miscellaneous Medicare Secondary Payer Clarifications and Updates (CMS-6047-P), 0938-AT85
44. HHS/CMS, Proposed Rule Stage, Medicare and Medicaid Programs; Regulation to Require Drug Pricing Transparency (CMS-4187-P), 0938-AT87
45. HHS/CMS, Proposed Rule Stage, Medicare Coverage of Innovative Technologies (CMS-3372-P), 0938-AT88
46. **HHS/CMS, Proposed Rule Stage, Health Reimbursement Arrangements and Other Account-Based Group Health Plans (CMS-9918-P), 0938-AT90**
47. HHS/CMS, Final Rule Stage, Hospital and Critical Access Hospital (CAH) Changes to Promote Innovation, Flexibility, and Improvement in Patient Care (CMS-3295-F), 0938-AS21
48. HHS/CMS, Final Rule Stage, Revisions to Requirements for Discharge Planning for Hospitals, Critical Access Hospitals, and Home Health Agencies (CMS-3317-F), 0938-AS59
49. HHS/CMS, Final Rule Stage, Medicaid Disproportionate Share Hospital (DSH) Allotment Reductions (CMS-2394-F), 0938-AS63
50. HHS/CMS, Final Rule Stage, Program Integrity Enhancements to the Provider Enrollment Process (CMS-6058-F), 0938-AS84
51. HHS/CMS, Final Rule Stage, CY 2019 Changes to the End-Stage Renal Disease (ESRD) Prospective Payment System, Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) (CMS-1691-F), 0938-AT28
52. HHS/CMS, Final Rule Stage, CY 2019 Home Health Prospective Payment System Rate Update and CY 2020 Case-Mix Adjustment Methodology Refinements; Value-Based Purchasing Model; Quality Reporting Requirements (CMS-1689-F), 0938-AT29
53. **HHS/CMS, Final Rule Stage, CY 2019 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates (CMS-1695-F), 0938-AT30**
54. HHS/CMS, Final Rule Stage, CY 2019 Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Medicare Part B and the Quality Payment Program (CMS-1693-F), 0938-AT31
55. HHS/CMS, Final Rule Stage, Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for CY 2019 (CMS-8068-N), 0938-AT33
56. HHS/CMS, Final Rule Stage, Medicaid Provider Payment Reassignment (CMS-2413-F), 0938-AT61

57. HHS/CMS, Final Rule Stage, Patient Protection and Affordable Care Act; Adoption of the Methodology for the HHS-Operated Permanent Risk Adjustment Program for the 2018 Benefit Year Proposed Rule (CMS-9919-F), 0938-AT66
58. HHS/CMS, Final Rule Stage, CY 2020 Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts (CMS-8071-N), 0938-AT76
59. HHS/OCR, Proposed Rule Stage, Nondiscrimination in Health Programs or Activities, 0945-AA11
60. HHS/OCR, Final Rule Stage, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 0945-AA10
61. HHS/ONC, Proposed Rule Stage, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 0955-AA01
62. HHS/ACF, Proposed Rule Stage, Head Start Service Duration Requirements, 0970-AC73

## DEPARTMENT OF HOMELAND SECURITY

63. DHS/OS, Prerule Stage, Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure, 1601-AA34
64. DHS/OS, Final Rule Stage, Ammonium Nitrate Security Program, 1601-AA52
65. DHS/USCIS, Proposed Rule Stage, Inadmissibility on Public Charge Grounds, 1615-AA22
66. DHS/USCIS, Proposed Rule Stage, Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization, 1615-AC15
67. DHS/USCIS, Proposed Rule Stage, U.S. Citizenship and Immigration Services Fee Schedule, 1615-AC18
68. DHS/USCBP, Proposed Rule Stage, Western Hemisphere Travel Initiative (WHTI)—Noncompliant Traveler Fee, 1651-AB06
69. DHS/USICE, Proposed Rule Stage, Visa Security Program Fee, 1653-AA77
70. DHS/FEMA, Prerule Stage, National Flood Insurance Program (NFIP); Revisions to Methodology for Payments to Write Your Own Companies (WYO), 1660-AA90

## DEPARTMENT OF THE INTERIOR

71. DOI/BSEE, Final Rule Stage, Revisions to the Blowout Preventer Systems and Well Control Rule, 1014-AA39
72. DOI/FWS, Proposed Rule Stage, Migratory Bird Hunting; 2019-2020 Migratory Game Bird Hunting Regulations, 1018-BD10
73. DOI/ASLM, Proposed Rule Stage, Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf, 1082-AA01

## DEPARTMENT OF JUSTICE

74. DOJ/ATF, Final Rule Stage, Bump-Stock-Type Devices, 1140-AA52

## DEPARTMENT OF LABOR

75. DOL/EBSA, Proposed Rule Stage, Health Reimbursement Arrangements and other Account-Based Group Health Plans, 1210-AB87
76. DOL/EBSA, Proposed Rule Stage, Definition of an “Employer” under Section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA)—Association Retirement Plans and Other Multiple Employer Plans, 1210-AB88
77. DOL/OSHA, Prerule Stage, Emergency Response and Preparedness, 1218-AC91
78. DOL/WHI, Proposed Rule Stage, Tip Regulations Under the Fair Labor Standards Act (FLSA), 1235-AA21

## DEPARTMENT OF TRANSPORTATION

79. DOT/FAA, Proposed Rule Stage, Domestic Noise Certification of Supersonic Aircraft, 2120-AL29
80. DOT/FAA, Proposed Rule Stage, UAS Flight Restrictions Near Critical Infrastructure Facilities, 2120-AL33
81. DOT/NHTSA, Prerule Stage, Retroreflective Tape for Single Unit Trucks, 2127-AL57
82. DOT/NHTSA, Proposed Rule Stage, Rear Seat Belt Reminder System, 2127-AL37
83. DOT/NHTSA, Proposed Rule Stage, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021—2026 Passenger Cars and Light Trucks, 2127-AL76
84. DOT/NHTSA, Final Rule Stage, Establish Side Impact Performance Requirements for Child Restraint Systems (MAP-21), 2127-AK95
85. DOT/FRA, Final Rule Stage, Passenger Equipment Safety Standards Amendments, 2130-AC46
86. DOT/PHMSA, Proposed Rule Stage, Pipeline Safety: Gas Pipeline Regulatory Reform, 2137-AF36

## DEPARTMENT OF THE TREASURY

87. TREAS/FINCEN, Proposed Rule Stage, Financial Crimes Enforcement Network: Cross-Border Electronic Transmittals of Funds, 1506-AB01
88. TREAS/CUSTOMS, Final Rule Stage, Automated Commercial Environment (ACE) Required for Electronic Entry/Entry Summary (Cargo Release and Related Entry) Filings, 1515-AE03
89. TREAS/CUSTOMS, Final Rule Stage, Modernized Drawback, 1515-AE23

90. TREAS/IRS, Proposed Rule Stage, Treatment of Certain Interests in Corporations as Stock or Indebtedness, 1545-BO18
91. TREAS/IRS, Proposed Rule Stage, Guidance under Section 199A (Anti-Abuse), 1545-BO69
92. TREAS/IRS, Proposed Rule Stage, Guidance under Section 199A, 1545-BO71
93. TREAS/IRS, Proposed Rule Stage, MEPs and the Unified Plan Rule, 1545-BO97
94. TREAS/IRS, Proposed Rule Stage, Capital Gains Invested in Opportunity Zones, 1545-BP03
95. TREAS/IRS, Proposed Rule Stage, Qualified Opportunity Funds, 1545-BP04
96. TREAS/OCC, Final Rule Stage, Net Stable Funding Ratio, 1557-AD97

## **DEPARTMENT OF VETERANS AFFAIRS**

97. VA, Proposed Rule Stage, VA Claims and Appeals Modernization, 2900-AQ26
98. VA, Proposed Rule Stage, Veterans Community Walk-in Care, 2900-AQ47
99. VA, Proposed Rule Stage, Program of Comprehensive Assistance for Family Caregivers Amendments under the VA MISSION Act of 2018, 2900-AQ48
100. VA, Final Rule Stage, Loan Guaranty: Ability-to-Repay Standards and Qualified Mortgage Definition Under the Truth in Lending Act, 2900-AO65
101. VA, Final Rule Stage, Reimbursement for Emergency Treatment, 2900-AQ08
102. VA, Final Rule Stage, Veterans Care Agreements, 2900-AQ45
103. VA, Final Rule Stage, Veterans Community Care Program, 2900-AQ46

## **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, National Primary Drinking Water Regulations for Lead and Copper: Regulatory Revisions, 2040-AF15
106. EPA/OW, Final Rule Stage, Federal Numeric Nutrient Criteria Applicable to Missouri Lakes, 2040-AF69
107. EPA/OAR, Proposed Rule Stage, Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 2060-AT67
108. EPA/OAR, Proposed Rule Stage, Standards of Performance for New Residential Wood Heaters and New

Residential Hydronic Heaters and Forced-Air Furnaces Amendments., 2060-AU00

109. EPA/OAR, Proposed Rule Stage, SAFE Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 2060-AU09
110. EPA/OAR, Proposed Rule Stage, Renewable Fuel Standard Program Modification of Applicable Volumes, 2020 Standards, and Other Changes, 2060-AU28
111. EPA/OAR, Final Rule Stage, Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 2060-AT55

## **COMMODITY FUTURES TRADING COMMISSION**

112. 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**

113. CPSC, Final Rule Stage, Flammability Standard for Upholstered Furniture, 3041-AB35
114. CPSC, Final Rule Stage, Regulatory Options for Table Saws, 3041-AC31
115. CPSC, Final Rule Stage, Portable Generators, 3041-AC36

## **NUCLEAR REGULATORY COMMISSION**

116. NRC, Proposed Rule Stage, Revision of Fee Schedules: Fee Recovery for FY 2019 [NRC-2017-0032], 3150-AJ99
117. NRC, Final Rule Stage, Mitigation of Beyond Design Basis Events (MBDBE) [NRC-2014-0240], 3150-AJ49

## **SOCIAL SECURITY ADMINISTRATION**

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

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### **DEPARTMENT OF AGRICULTURE**

119. USDA/FAS, Agricultural Trade Promotion Program (ATP), 0551-AA92
120. USDA/FSA, Crops, Trees, Bushes, and Vines Assistance for Losses Due to Hurricanes and Wildfires, 0560-AI39

- 121. USDA/FSA, Seed Cotton Changes to Agriculture Risk Coverage and Price Loss Coverage Programs, and Marketing Assistance Loans, 0560-AI40
- 122. USDA/FSA, Market Facilitation Program, 0560-AI42

## DEPARTMENT OF DEFENSE

- 123. DOD/DARC, Performance-Based Payments and Progress Payments (DFARS Case 2017-D019), 0750-AJ28

## DEPARTMENT OF ENERGY

- 124. DOE/ENDEP, Small-Scale Natural Gas Exports, 1901-AB43

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

- 125. HHS/FDA, Tobacco Product Standard for Characterizing Flavors in Cigars, 0910-AH60
- 126. HHS/FDA, Food Labeling: Revision of the Nutrition and Supplement Facts Labels and Serving Sizes of Foods, 0910-AH92
- 127. HHS/OASH, Proposed Six-Month Delay of the General Compliance Date While Allowing the Use of Three Burden-Reducing Provisions During the Delay Period, 0937-AA05
- 128. HHS/CMS, Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2019 (CMS-4182-F), 0938-AT08
- 129. HHS/CMS, FY 2019 Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities (SNFs) (CMS-1696-F), 0938-AT24
- 130. HHS/CMS, Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2019 (CMS-1688-F), 0938-AT25
- 131. HHS/CMS, FY 2019 Hospice Wage Index and Payment Rate Update and Hospice Quality Reporting Requirements (CMS-1692-F), 0938-AT26
- 132. HHS/CMS, Hospital Inpatient Prospective Payment System for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and FY 2019 Rates (CMS-1694-F), 0938-AT27
- 133. HHS/CMS, Short-Term Limited Duration Insurance (CMS-9924-F), 0938-AT48
- 134. HHS/CMS, Adoption of the Methodology for the HHS-Operated Permanent Risk Adjustment Program Under the Patient Protection and Affordable Care Act for the 2017 Benefit Year (CMS-9920-F), 0938-AT65

- 135. HHS/OCR, HIPAA Privacy Rule: Changing Requirement to Obtain Acknowledgment of Receipt of the Notice of Privacy Practices, 0945-AA08

## DEPARTMENT OF HOMELAND SECURITY

- 136. DHS/USCIS, Application Process for Replacing Forms I-551 without an Expiration Date, 1615-AB36

## DEPARTMENT OF THE INTERIOR

- 137. DOI/BLM, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Revision or Rescission of Certain Requirements, 1004-AE53
- 138. DOI/FWS, Migratory Bird Hunting; 2018-2019 Migratory Game Bird Hunting Regulations, 1018-BB73

## DEPARTMENT OF LABOR

- 139. DOL/EBSA, Definition of an “Employer” Under Section 3(5) of ERISA—Association Health Plans, 1210-AB85
- 140. DOL/EBSA, Short-Term, Limited Duration Insurance, 1210-AB86

## DEPARTMENT OF VETERANS AFFAIRS

- 141. VA, Expanded Access to Non-VA Care Through the Veterans Choice Program, 2900-AP60

## NUCLEAR REGULATORY COMMISSION

- 142. NRC, Revision of Fee Schedules: Fee Recovery for FY 2018 [NRC-2017-0026], 3150-AJ95
- 143. NRC, Price Anderson Adjustment of Deferred Premiums for Inflation [NRC-2017-0030], 3150-AK01

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- 144. 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

- 145. DOE/EE, Energy Conservation Standards for Commercial Packaged Boilers, 1904-AD01
- 146. DOE/EE, Energy Conservation Standards for Portable Air Conditioners, 1904-AD02
- 147. DOE/EE, Energy Conservation Standards for Uninterruptible Power Supplies, 1904-AD69

148. 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**

149. HHS/FDA, General and Plastic Surgery Devices: Sunlamp Products, 0910-AH14  
150. 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

## **DEPARTMENT OF HOMELAND SECURITY**

151. DHS/USCIS, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 1615-AC06  
152. DHS/USCBP, Importer Security Filing and Additional Carrier Requirements, 1651-AA70  
153. DHS/USCBP, Air Cargo Advance Screening (ACAS), 1651-AB04

## **DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

154. HUD/CPD, Housing Trust Fund (FR-5246), 2506-AC30  
155. HUD/PIH, Housing Choice Voucher Program—New Administrative Fee Formula (FR-5874), 2577-AC99

## **DEPARTMENT OF LABOR**

156. DOL/ETA, Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 1205-AB76  
157. DOL/EBSA, Improved Fee Disclosure for Welfare Plans, 1210-AB37  
158. DOL/EBSA, Revision of the Form 5500 Series and Implementing Related Regulations under ERISA, 1210-AB63  
159. DOL/OSHA, Infectious Diseases, 1218-AC46  
160. DOL/OSHA, Process Safety Management and Prevention of Major Chemical Accidents, 1218-AC82

## **DEPARTMENT OF TRANSPORTATION**

161. DOT/FMCSA, Heavy Vehicle Speed Limiters, 2126-AB63  
162. DOT/NHTSA, Heavy Vehicle Speed Limiters, 2127-AK92

163. DOT/NHTSA, Federal Motor Vehicle Safety Standard (FMVSS) 150--Vehicle to Vehicle (V2V) Communication, 2127-AL55  
164. DOT/FRA, High-Speed Intercity Passenger Rail (HSIPR) Program; Buy America Program Requirements, 2130-AC23

## **DEPARTMENT OF THE TREASURY**

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

## **DEPARTMENT OF VETERANS AFFAIRS**

166. VA, Civilian Health and Medical Program of the Department of Veterans Affairs, 2900-AP02

## **ENVIRONMENTAL PROTECTION AGENCY**

167. EPA/OW, National Primary Drinking Water Regulations: Radon, 2040-AA94  
168. EPA/OLEM, Water Resources Reform Development Act Farm Amendments to the Spill Prevention Control and Countermeasures Rule, 2050-AG84  
169. EPA/OAR, Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, 2060-AT79  
170. EPA/OCSPR, Trichloroethylene; Rulemaking Under TSCA Section 6(a); Vapor Degreasing, 2070-AK11

## **FEDERAL COMMUNICATIONS COMMISSION**

171. FCC, Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions (GN Docket No. 12-268), 3060-AJ82  
172. FCC, Implementation of Section 224 of the Act; A National Broadband Plan for Our Future (WC Docket No. 07-245, GN Docket No. 09-51), 3060-AJ64  
173. 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**

174. NRC, Revision of Fee Schedules: Fee Recovery for FY 2020 [NRC-2017-0228], 3150-AK10

# Part H. Rules Affecting Small Business, 1997–2017

	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997
Dept. of Agriculture	31	46	40	47	45	80	65	84	87	93	73	67	54	52	64	39	56	47	49	63	58
Dept. of Commerce	90	94	109	112	103	158	115	98	90	107	112	111	108	79	74	77	89	98	88	52	29
Dept. of Defense	1	1	10	7	12	25	26	16	12	7	13	14	13	12	13	6	8	7	15	21	15
Dept. of Education	2		1	2	3		1	1	0	0	0	1	0	0	0	1	0	0	0	0	1
Dept. of Energy	15	14	8	4	5	8	6	3	2	1	1	0	0	0	1	0	1	1	0	0	2
Dept. of Health and Human Services	67	73	93	103	91	85	100	112	94	93	96	109	112	106	96	92	108	107	75	88	100
Dept. of Homeland Security	27	25	22	25	28	27	34	37	35	42	44	43	43	38	33	0	0	0	0	0	0
Dept. of Housing and Urban Development	2	2	1				0	1	0	1	5	4	4	6	11	6	3	0	1	1	7
Dept. of the Interior	9	30	35	30	23	24	23	18	17	18	19	29	21	20	26	17	20	18	33	29	28
Dept. of Justice	5	12	9	10	10	9	9	5	3	2	5	7	8	8	8	13	15	14	14	10	26
Dept. of Labor	12	20	22	24	22	24	23	26	29	29	26	26	19	19	23	22	26	40	38	41	39
Dept. of State	25	14	18	21	20	31	21	20	4	3	1	0	1	1	2	6	3	2	0	0	1
Dept. of Transportation	47	56	61	53	68	65	56	49	45	41	43	60	63	103	151	216	244	266	246	208	44
Dept. of the Treasury	36	41	23	27	29	39	47	56	48	47	45	37	41	38	27	26	27	31	15	60	50
Dept. of Veterans Affairs	1	1	1	1	2	1	2	3	2	2	0	0	0	0	0	1	1	3	6	6	7
Agency for International Development							1	1	0	0	1	1	0	0	1	2	1	0	0	0	0
Arch. and Trans. Barriers Compliance Board	1	2	2	1	1	1	1	0	0	0	0	0	0	0	0	1	1	2	2	3	0
Commodity Futures Trading Commission	2	2		1			0		1	1	1	0	1	1	2	0	0	0	0	1	0
Consumer Financial Protection Bureau	8	3	4	3	4	8	5														
Consumer Product Safety Commission	5	4	2			2	0			0	0	1	0	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	0
Environmental Protection Agency	4	14	12	6	6	49	73	95	89	83	85	95	110	122	135	167	185	205	179	178	163
Equal Employment Opportunity Commission	3	2	2	2	2	3	5	5	4	2	3	3	3	0	0	0	2	0	0	2	1
Federal Emergency Management Agency											0	0	0	0	0	1	1	1	0	0	0
Federal Acquisition Regulation	43	38	22	24	17	15	10	5	4	6	5	5	7	5	5	6	9	13	16	11	15
Federal Communications Commission	77	92	99	98	99	89	78	112	110	110	109	108	113	113	104	109	117	105	91	82	70
Federal Deposit Insurance Corporation					4	5	2	1													
Federal Energy Regulatory Commission							0			0	1	0	0	0	0	0	0	0	1	0	0
Federal Housing Finance Board							0			0	0	0	0	0	0	0	0	0	0	1	0
Federal Maritime Commission		3	1	1	1	1	3	3	3	3	2	3	5	7	10	7	6	7	4	5	0

Federal Reserve System	2	2	4	7	5	12	17	8	6	5	5	3	7	10	8	2	5	2
Federal Trade Commission	18	16	18	21	18	21	22	16	16	13	11	13	9	9	9	10	10	11
Federal Mediation and Conciliation Service							0			0	0	0	0	1	1	0	0	
General Services Administration	15	13	10	4	2	3	4	5	6	7	3	3	4	1	1	2	2	3
National Aeronautics and Space Administration			1	1	2	2	3			0	0	0	0	0	0	0	1	0
National Archives and Records Administration							0			0	0	0	1	1	0	0	1	1
National Credit Union Administration						2	4	4	7	3	1	4	1	0	0	0	0	1
National Endowment for the Arts	2	2	2	2	2	2				0	0	0	2	2	0	0	0	0
National Endowment for the Humanities							0			0	0	0	0	0	0	0	0	1
Nuclear Regulatory Commission	3	3	3	4	3	6	3	1	2	1	0	1	5	5	3	5	8	9
Office of Management and Budget							0			0	0	0	0	0	1	2	1	1
Pension Benefit Guaranty Corporation	1																	
Railroad Retirement Board							0			0	0	0	0	0	0	0	0	1
Resolution Trust Corporation										0	17	0	0	0	0	0	0	0
Small Business Administration	17	19	28	23	27	38	35	39	20	13	15	21	19	24	21	24	20	13
Social Security Administration							1		1	1	1	1	1	1	0	2	0	0
Surface Transportation Board	1	2		1														
Securities and Exchange Commission	19	24	11	9	15	19	27	21	21	19	29	16	0	25	28	39	27	34
TOTAL	590	671	674	674	669	854	822	845	758	753	757	787	788	789	859	963	937	733

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



## Part I. The Unconstitutionality Index, 1993–2018

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
<b>2018</b>	<b>3,368</b>	<b>313</b>	<b>11</b>	<b>22,025</b>	<b>35</b>	<b>30</b>

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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290 The legislation and executive orders by which agencies are directed to assess effects on state and local governments are described in the Unified Agenda’s appendices.

291 National Conference of State Legislatures, Standing Committee on Budgets and Revenue, Policy Directives and Resolutions, 2016 NCSL Legislative Summit, Chicago, August 8–11, 2016, [https://comm.ncsl.org/productfiles/83453460/2016\\_BR\\_Policies.pdf](https://comm.ncsl.org/productfiles/83453460/2016_BR_Policies.pdf).

292 Letter to House and Senate Leadership on eliminating burdensome and illegal regulations by strengthening the Administrative Procedure Act, from several Republican state attorneys general, July 11, 2016, <http://www.ago.wv.gov/Documents/Regulatory%20reform%20letter.pdf>.

293 Derived from “CBO’s Activities under the Unfunded Mandates Reform Act,” accessed February 11, 2019, <https://www.cbo.gov/publication/51335>.

294 That may be because the Unfunded Mandates Reform Act is not applicable to many rules and programs. Maeve P. Carey, “Cost Benefit and Other Analysis Requirements in the Rulemaking Process,” Congressional Research Service, Report 7-5700, pp. 11–12, <https://fas.org/sgp/crs/misc/R41974.pdf>.

295 “Regulation Identifier Numbers,” *Federal Register* blog, accessed April 15, 2019, <https://www.federalregister.gov/readers-aids/office-of-the-federal-register-blog/2011/04/regulation-identifier-numbers>.

296 Government Accountability Office, “Congressional Review Act FAQ,” accessed April 15, 2019, <https://www.gao.gov/legal/congressional-review-act/faq>.

297 Ibid.

298 Curtis W. Copeland, “Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress,” white paper, July 15, 2014, [https://www.eenews.net/assets/2017/02/22/document\\_pm\\_01.pdf](https://www.eenews.net/assets/2017/02/22/document_pm_01.pdf). Todd Gaziano, “The time to review and kill hundreds of rules under the CRA has not yet begun,” Liberty Blog, Pacific Legal Foundation, April 24, 2017, <http://blog.pacificlegal.org/time-review-kill-hundreds-rules-cra-not-yet-begun/>.

299 In addition to the database search at <http://www.gao.gov/legal/congressional-review-act/overview>, the Government Accountability Office presents rules in a scroll window in reverse chronological order, which was used here for the “hand tally” rows that sum up the individual agency entries in pre-2018 tallies. Some slight differences exist between some hand tallies and the database search engine results (earlier years’ discrepancies are visible in prior editions of *Ten Thousand Commandments*). Also, sometimes slight changes exist in the results the search engine provides from year to year.

300 Crews, “What’s the Difference between ‘Major,’ ‘Significant,’ and All Those Other Federal Rule Categories?”

301 Dudley and Warren, “Regulators’ Budget,” Table A-1, p. 13.

302 Jerry Ellig, “Costs and Consequences of Federal Telecommunications Regulations,” *Federal Communications Law Journal*, Vol. 58, No.1 (January 2006), p. 95, <http://ssrn.com/abstract=982574>.

303 Federal Communications Commission, Declaratory Ruling, Report and Order, and Order, In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, adopted December 14, 2017, released January 4, 2018, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-17-166A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf).

304 Braden Cox and Clyde Wayne Crews Jr., “Communications without Commissions: A National Plan for Reforming Telecom Regulation,” *Issue Analysis* 2005 No. 9, Competitive Enterprise Institute, October 18, 2005, <https://cei.org/studies-issue-analysis/communications-without-commissions>.

305 OMB, Circular A-4, Regulatory Analysis, September 17, 2003, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

306 Crews, “Promise and Peril: Implementing a Regulatory Budget,” *Policy Sciences*, Vol. 31, No. 4 (December 1998), pp. 343–369, <http://cei.org/PDFs/promise.pdf>.

307 Regulatory Accountability Act of 2017, as introduced by Sens. Portman, Heitkamp, Hatch, and Manchin. [https://www.portman.senate.gov/public/index.cfm/files/serve?File\\_id=55976E26-D5DB-4B44-838B-8598272B92A6](https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=55976E26-D5DB-4B44-838B-8598272B92A6).

308 A version of the Competitive Enterprise Institute’s major rule categorization and disclosure recommendations noted in Table 10 and Box 5 is also explored in Crews, “The Other National Debt Crisis.” Those reporting proposals later appeared in the All Economic Regulations Are Transparent (ALERT) Act proposal and in Sen. Olympia Snowe’s (R-Maine) 112th Congress legislation. Section 213 of the latter detailed this proposed

“regulatory transparency reporting,”

<https://www.govtrack.us/congress/bills/112/s3572/text>. Versions of the ALERT Act appeared in later Congresses as well.

309 Crews, “What’s the Difference between ‘Major,’ ‘Significant,’ and All Those Other Federal Rule Categories?”

310 Philip Hamburger, “The History and Danger of Administrative Law,” *Imprimis* Vol. 43, No. 9 (September 2014), [http://imprimis.hillsdale.edu/file/archives/pdf/2014\\_09\\_Imprimis.pdf](http://imprimis.hillsdale.edu/file/archives/pdf/2014_09_Imprimis.pdf). Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

311 William A. Niskanen Jr., *Bureaucracy and Representative Government* (Chicago: Aldine, Atherton, 1971).

312 Public Laws signed during a calendar year may be derived from various sources. However, official archiving sometimes takes time to catalog, so figures may be preliminary and change slightly. Library of Congress, Public Laws website, <https://www.congress.gov/public-laws/>. U.S. Government Publishing Office, Public and Private Laws website, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>. GovTrack website, accessed April 15, 2019, [https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current\\_status\\_date%20-%20current\\_status%5b%5d=9#sort=-current\\_status\\_date&current\\_status\[\]=28](https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current_status_date%20-%20current_status%5b%5d=9#sort=-current_status_date&current_status[]=28).

313 The REINS Act has been introduced in numerous Congresses. Recent version was H.R.26, 115th Congress (2017–2018), <https://www.congress.gov/bill/115th-congress/house-bill/26?q=%7B%22search%22%3A%5B%22reins+act%22%5D%7D&r=2>.

314 American Opportunity Project, Regulation Freedom Amendment, January 2017, <http://www.americanopportunityproject.org/regulation-freedom-amendment/>.

## About the Author

Clyde Wayne Crews, Jr. is Vice President for Policy at the Competitive Enterprise Institute (CEI). He is widely published and a contributor at Forbes.com. A frequent speaker, he has appeared at venues including the DVD Awards Showcase in Hollywood, European Commission–sponsored conferences, the National Academies, the Spanish Ministry of Justice, and the Future of Music Policy Summit. He has testified before Congress on various policy issues. Crews has been cited in dozens of law reviews and journals. His work spans regulatory reform, antitrust and competition policy, safety and environmental issues, and various information-age policy concerns.

Alongside numerous studies and articles, Crews is co-editor of the books *Who Rules the Net? Internet Governance and Jurisdiction*, and *Copy Fights: The Future of Intellectual Property in the Information Age*. He is co-author of *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism*, and a contributing author to other books. He has written in the *Wall Street Journal*, *Chicago Tribune*, *Communications Lawyer*, *International Herald Tribune*, and other publications. He has appeared on Fox News, CNN, ABC, CNBC, and the PBS News Hour. His policy proposals have been featured prominently in the *Washington Post*, *Forbes*, and *Investor's Business Daily*.

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