

Analysis of the Regulatory Plan and Unified Agenda of Federal Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

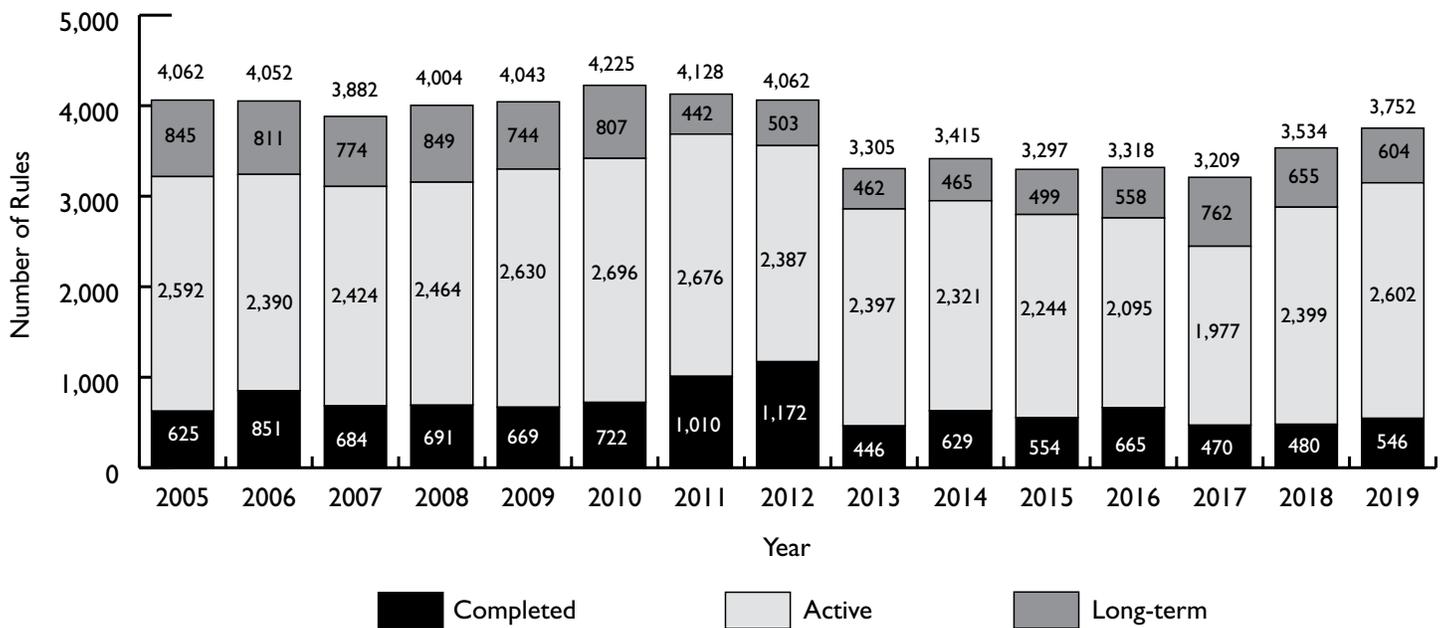
Agencies must make every effort to include actions they plan to pursue, because if an item is not on the Agenda, under Executive Order 13771, an agency cannot move forward unless it obtains a waiver or the action is required by law. A clear and accurate Agenda helps avoid unfair surprise and achieves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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Top Five Rulemaking Departments and Agencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

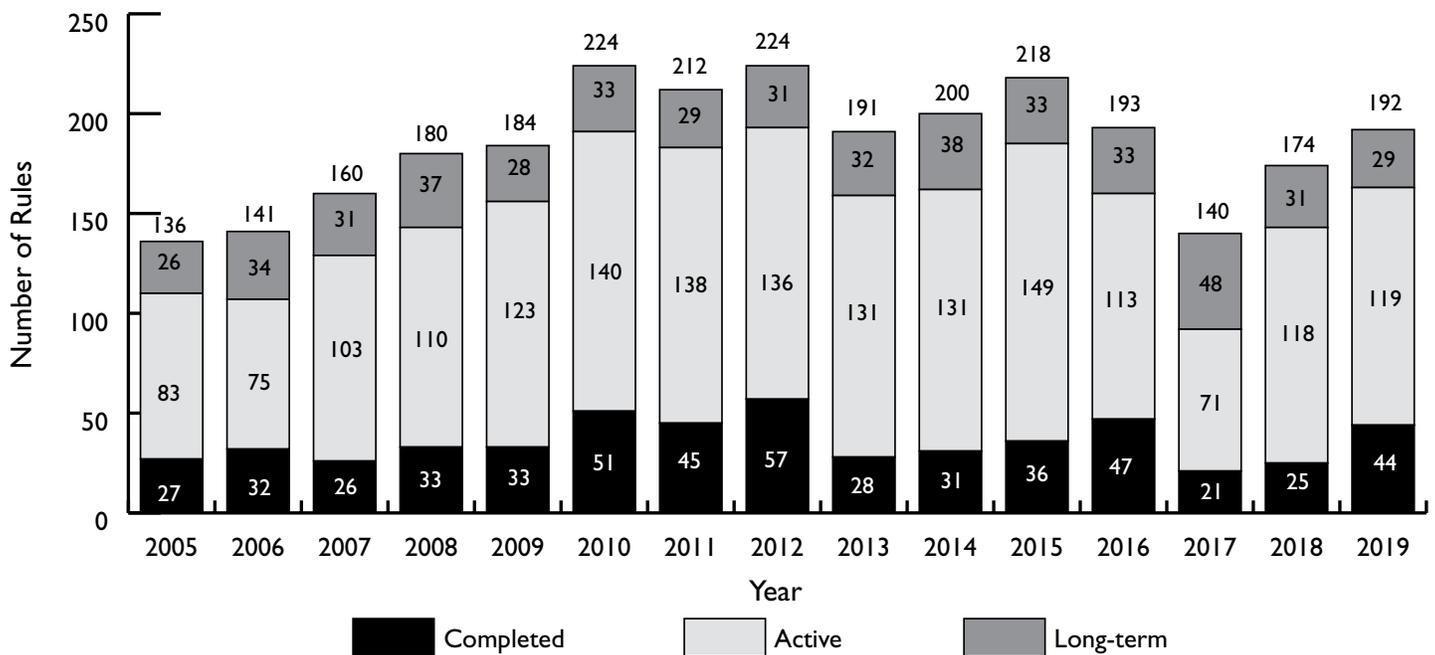
	Rules	Unified Agenda			Deregulatory Actions*		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	21	12	8	1	1		
Dept. of Commerce	1	1					
Dept. of Education	7	3	4			2	
Dept. of Energy	8	4		4			
Dept. of Health and Human Services	55	36	14	5	2	3	1
Dept. of Homeland Security	15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

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

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

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

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



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

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

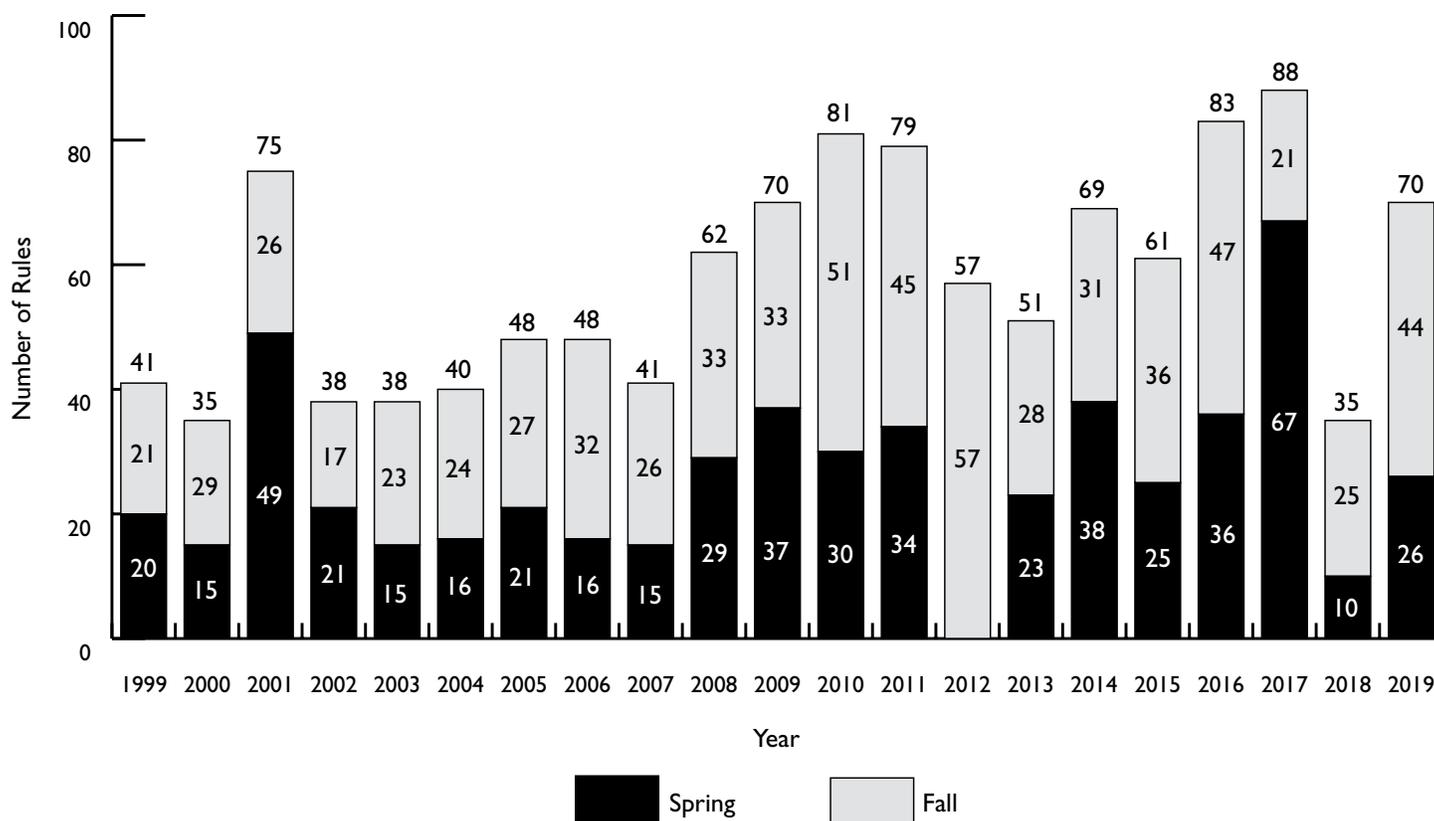
As for economically significant rules at the completed stage in the fall Agendas, President Obama’s count was consistently higher than President George W. Bush’s, even accounting for an Obama midterm election drop between 2011 and 2012. Completed rules in the fall Agenda peaked at 57 in 2012, stood at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

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

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

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

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



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

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

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

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

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

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

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

Notable Regulations by Agency

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

Department of Agriculture

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

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

Department of Commerce

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

Department of Education

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

Department of Energy

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

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

Department of Health and Human Services

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

the-Counter Human Use”);⁴⁷⁴ consumer antiseptics

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

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

Department of Homeland Security

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

Department of Housing and Urban Development

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

Department of the Interior

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

Department of Justice

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

Department of Labor

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

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

Department of Transportation

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

Department of the Treasury

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

Architectural and Transportation Barriers Compliance Board

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

Consumer Financial Protection Bureau

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

Consumer Product Safety Commission

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

Environmental Protection Agency

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

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

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

Federal Communications Commission

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

Federal Deposit Insurance Corporation

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

Federal Energy Regulatory Commission

- Critical infrastructure protection reliability standards

Office of Personnel Management

- Multistate exchanges: implementations for Affordable Care Act provisions

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

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

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

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

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

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

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

In 2019, the directive was barely met invoking significant rules, with a 1.7-out-to-1-in ratio reported in OIRA’s “Regulatory Reform Results for Fiscal Year 2019.”⁴⁹⁴

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

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

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

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

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

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

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

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

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

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

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

Completed Deregulatory and Regulatory Actions in Unified Agenda

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

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

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

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

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

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

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

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

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

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

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

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

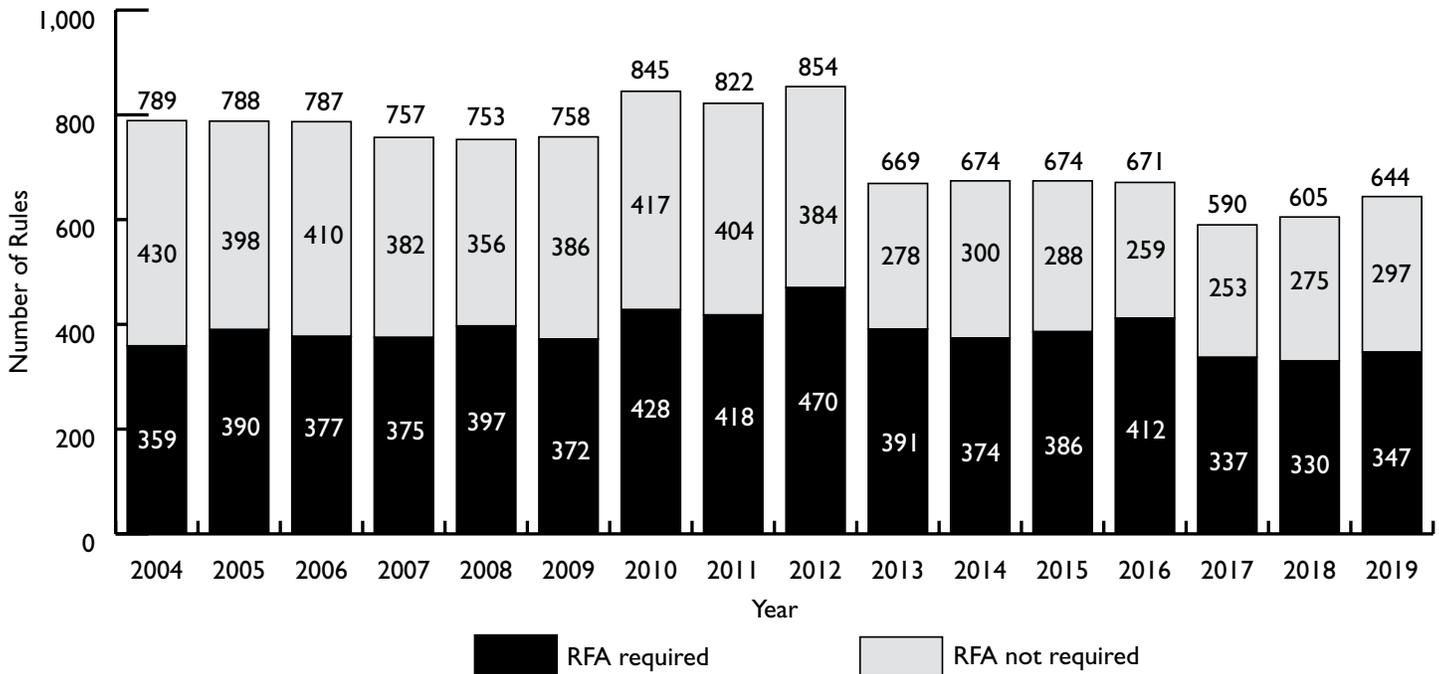
Of more concern are the costlier subsets of active rules. There are 39 economically significant regulatory actions in Table 9 (compared to 41 in 2018 and 15 in 2017), but just 20 economically significant deregulatory actions

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

Long-term Planned Regulatory Actions Greatly Outstrip Deregulatory Ones

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

Figure 21. Rules Affecting Small Business, 2004–2019



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

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

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

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

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

Federal Regulations Affecting Small Business

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

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

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

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

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

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

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

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

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

(continued)

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

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

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

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

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

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

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

Box 5. Federal Workplace Regulations Affecting Growing Businesses

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

1 EMPLOYEE

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

4 EMPLOYEES: ALL THE ABOVE, PLUS

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

15 EMPLOYEES: ALL THE ABOVE, PLUS

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

20 EMPLOYEES: ALL THE ABOVE, PLUS

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

25 EMPLOYEES: ALL THE ABOVE, PLUS

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

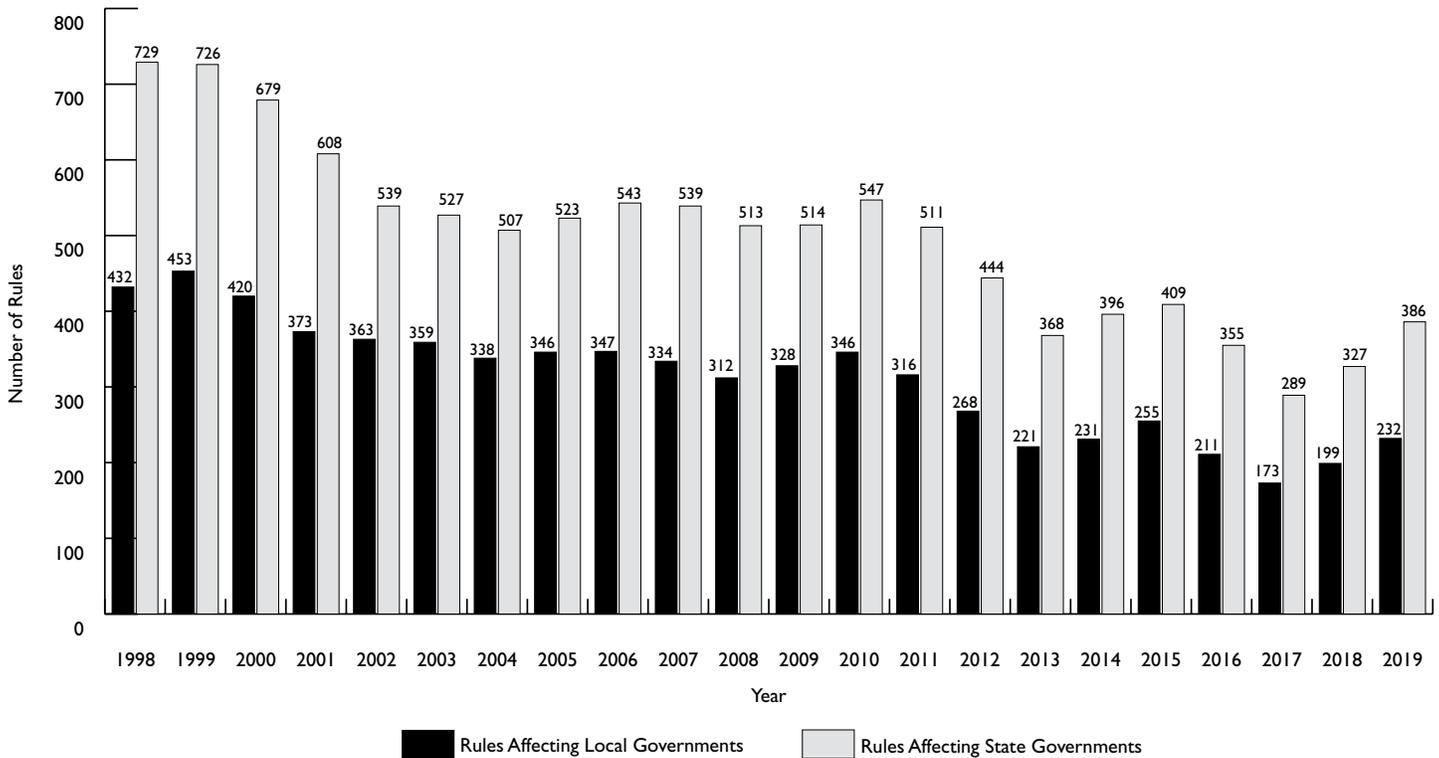
50 EMPLOYEES: ALL THE ABOVE, PLUS

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

100 EMPLOYEES: ALL THE ABOVE, PLUS

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

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



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

Federal Regulations Affecting State and Local Governments

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

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

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

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

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

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

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

Department of Agriculture

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

Department of Health and Human Services

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

Department of Justice

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

Department of Labor

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

Department of Transportation

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

Architectural and Transportation Barriers Compliance Board

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

Environmental Protection Agency

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

Nuclear Regulatory Commission

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

Government Accountability Office

Database on Regulations

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

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

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

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

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

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

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

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

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

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

Table 12. Number of Significant and Major Rules

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

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

** From GAO database by calendar year.

*** From Unified Agenda.

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

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

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

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