

9,999 Commandments? Six Ways Rule Flows Were Reduced or Streamlined in 2017

Rather than jump directly into the numbers of rules and regulations, this year's *Ten Thousand Commandments* begins with a survey of approaches the Trump administration took in its first year to fulfill promises to reduce red tape. This is appropriate given the administration's vocal emphasis on regulatory reform. Later sections of this report will put Trump's 2017 numbers in context with the historical record, which will allow us to examine Trump's success, or lack thereof, in implementing the requirement in Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs") to eliminate two regulations for every one issued and subsequent White House guidance on carrying out the program.²⁸

In the process, we can assess what agencies' priorities and numbers to date indicate about the prospects for continued streamlining of rules and regulations, assuming Congress does not enact a broader legislative package aimed at regulatory reform.

The 2018 edition of *Ten Thousand Commandments* helps illustrate the need for a regulatory budget. It contains four sections:

1. An overview of the costs and scope of the regulatory state, including its appraised size compared with federal budgetary components and gross domestic product;
2. An analysis of trends in the numbers of 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 discussion also explores the Trump administra-

tion's success in implementing a "one-in, two-out" process for new regulations, as well as barriers that it may face as an executive branch program;

3. Recommendations for reform that emphasize disclosure and improving congressional accountability for rule-making; and
4. An appendix containing historical tables of regulatory trends over past decades.

Presidents come and go, but few really attempt to roll back regulations or statutes, no matter the party. President Barack Obama unapologetically wielded the "pen and phone" to expand federal reach over private affairs.²⁹ President Donald Trump, too, has used the pen and phone, but largely in an attempt to undo Obama programs.³⁰ Some legal challenges to Executive Order 13771 aside, the Trump approach, at least within the framework of regulatory restraint or rollback, seems executed within the rule of law.³¹ 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."³² There were no arbitrary, illegal cuts in regulation. Rather, Executive Order 13771 in a sense implemented a restoration a separation of powers in rulemaking by underscoring what a president and his agencies may *not* do.³³ As such, Executive Order 13771 represents a voluntary *weakening* of executive power (we are not addressing wider policy matters in this context). The underlying message is that if something needs to be done, Congress should pass a law.

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President Trump made much news over slowing down the flow of regulations and promising to reduce even more red tape in 2018, which raises two questions.³⁴ First, which regulations, exactly, did Trump get rid of? Second, were the rules added costly compared to those eliminated?

Some progressive commentators call Trump's boast a "deregulation myth,"³⁵ while others insist his rollbacks are "illegal" and are harming health and safety.³⁶ Obviously, both cannot be true. Yet, wholesale regulatory streamlining requires Congress to roll back regulations, because the president cannot make law unilaterally. The Administrative Procedure Act (APA) requires that rules must be eliminated either by writing a new rule or through legislation.

Some lesser rules were eliminated in the 11 months Trump occupied the White House in 2017. But undoing or reforming major regulations, like the Environmental Protection Agency's (EPA) Waters of the United States or Clean Power Plan rules, takes years. As Heritage Foundation analyst James Gattuso put it: "Given the procedural and institutional obstacles to repealing a rule, it is unlikely that any administration would be able to achieve substantial deregulation in its first year."³⁷

For context on the limits of the possible, a report by the Mercatus Center at George Mason University looked at regulatory restrictions (as opposed to numbers of rules or costs) "produced by counting select words and phrases, such as shall or must, that are typically used in legal language to create binding obligations or prohibitions." This analysis found that "the numbers don't show a massive deregulation—in fact, they show that the quantity of regulatory restrictions actually grew. But it grew by less than we might have expected based on historical patterns."³⁸ The number of restrictions added was well below that of previous administrations, and some may have been inherited and part of longstanding statutory implementation, which are off-limits to most executive orders. Rules not subject

to Executive Order 13771 would proceed, which could also help explain some new restriction terminology.

One helpful change is that, in implementing Executive Order 13771, the Trump administration has begun to explicitly separate deregulatory actions from regulatory ones. This move could have staying power with subsequent administrations regardless of whether Congress implements regulatory reform. Box 1 notes many sector-specific executive actions on 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 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, plus a 2017 Consumer Financial Protection Bureau (CFPB) rule on arbitration agreements, were eliminated using the Congressional Review Act (CRA), via individual resolutions of disapproval passed by Congress and signed by Trump.³⁹ The rules removed were generally not particularly well-known, headline-grabbing reforms, nor all major ones.⁴⁰ However, some repeals generated significant controversy, such as those of the CFPB arbitration rule, a Federal Communications Commission (FCC) privacy rule, and an Interior Department stream protection rule. There were hundreds of rules actually 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.⁴¹

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

- 635 regulations were withdrawn.
- 244 regulations were made inactive.
- 700 regulations were delayed.

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In July 2017, White House Office of Management and Budget (OMB) Director Mick Mulvaney acknowledged that of the rules by that time addressed, “None of them are very sexy.” He commented: “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.”⁴² Small regulations can accumulate and have unintended effects and ought not be ignored.⁴³

Third, streamlining permitting for bridges, pipelines, transportation, telecommunications, and other infrastructure is being interpreted as a more open season for infrastructure planning. This manifested in several ways, such as the permitting-related executive actions noted earlier in Box 1; the Commerce Department’s permit streamlining action plan⁴⁴ and some elements, with caveats, of the 2019 Trump Budget proposal addressing infrastructure reform.⁴⁵

Fourth, agencies have largely abstained from issuing significant new rules, to the extent possible within congressional requirements and an autopilot administrative state. The total 2017 rule count was 3,281, compared to Obama’s 2016 tally of 3,853. Of Obama’s rules, 486 were categorized as “significant”; the significant subset for 2017 was 199. The lower count can overstate Trump’s rulemaking activity, however, since some were delays or rollbacks and many were part of the ever-present Federal Aviation Administration airworthiness directives and Coast Guard rules.

Fifth, President Trump’s Executive Order 13771 required executive—not independent—agencies to eliminate at least two rules for every significant one issued and required the capping of net new regulatory costs at zero. The White House maintains that the goal of one-in, two-out for regulations was exceeded with a 22-to-one out/in ratio, since only three significant new regulatory actions were imposed during 2017⁴⁶ (see the OMB website or the Regulation Identifier Number [RIN] for particulars⁴⁷):

1. **Department of Energy:** Energy Conservation Standards for Walk-in Cooler

and Freezer Refrigeration Systems RIN: 1904-AD59

2. **Food and Drug Administration:** FY 2018 Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities (SNFs), SNF Value-Based Purchasing Program, SNF Quality Reporting Program (CMS-1679-F) RIN: 0938-AS96

3. **Environmental Protection Agency:** Effluent Limitations Guidelines and Standards for the Dental Category RIN: 2040-AF26

The assertions of a 22-to-one success ratio received the expected criticisms, including claims that new rules and offsets are not comparable and that other sub-significant rules did not count in the tally.⁴⁸ But Executive Order 13771 never applied to nonsignificant rules, only to a “significant regulatory action” as defined by Executive Order 12866. It also did not apply to significant rules from independent agencies like the FCC or the CFPB or to rules mandated by Congress as opposed to those driven by agency discretion.

Implementing the streamlining process was not automatic; two OMB guidance documents on the executive order were issued after the order itself,⁴⁹ and a separate executive order established Regulatory Reform Task Forces.⁵⁰ Agencies sought to establish procedures by inviting public input on rule streamlining.⁵¹ Last but not least, agencies may or may not choose to deem an action significant that should be. In any event, the no-net-new costs provisions of Trump’s two-for-one executive order could be seen as something of a mini-regulatory budget.

Box 2 lists Trump’s claimed 67 completed regulatory eliminations or reductions.⁵² The Environmental Protection Agency and the Department of Interior generated the most reductions, at 16 and 12, respectively. Among Trump’s initial 67 rule reductions, nine appear to be revocations or alterations of sub-regulatory guidance, notices, orders, or information collections (these appear in bold type in Box 2).

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Box 2. Regulatory Reform: Completed Executive Order 13771 Deregulatory Actions

Orders, guidance, notices, and information collection changes are presented in **bold type**

Department of Agriculture (5)

1. Importation of Bone-in Ovine Meat from Uruguay RIN: 0579-AE21
2. Importation of Fresh Persimmon with Calyxes from Japan into the U.S. RIN: 0579-AE27
3. Importation of Fresh Pitahaya Fruit from Ecuador into the Continental U.S. RIN: 0579-AE12
4. Importation of Hass Avocados from Colombia RIN: 0579-AE29
5. Republic of Korea Orchids Imported in Growing Media RIN: 0579-AE24

Department of Commerce (7)

6. Capital Construction Fund; Fishing Vessel Capital Construction Fund Procedures RIN: 0648-AW57
7. Framework Action to Modify Commercial Permit Restrictions for King and Spanish Mackerel in the Gulf of Mexico and Atlantic Federal Waters RIN: 0648-BG56
8. Framework Amendment to the Coastal Pelagic Species Fishery Management Plan; Change to Pacific Mackerel Management Cycle From an Annual to Biennial Specification Schedule RIN: 0648-BF96
9. Regulatory Omnibus Framework Adjustment to Modify Reporting Requirements for Electronic Vessel Trip Reports by Federally-Permitted for-Hire Vessels and Operators in the Mid-Atlantic Region RIN: 0648-BG60
10. Repeal of Regulations Governing the Public Telecommunications Facilities Program RIN: 0660-AA34
11. Timing of Accountability Measure-Based Closures Amendment RIN: 0648-BG29
12. Withdrawal of Proposed Rule for Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery RIN: 0648-BG23

Department of Health and Human Services (7)

13. Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments RIN: 0910-AG57
- 14. FDA De Novo Classifications**
- 15. Office of the National Coordinator for Health Information Technology (ONC) Certification Program guidance**
16. Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2018 Rates (CMS-1677-F) RIN: 0938-AS98
- 17. FDA Medical Device Notices**
18. FY 2018 Inpatient Rehabilitation Facility (IRF) Prospective

Payment System (CMS-1671F) RIN: 0938-AS99

19. Changes to the Medicaid Eligibility Quality Control and Payment Error Rate Measurement (PERM) Programs in Response to the Affordable Care Act (CMS-6068-F) RIN: 0938-AS74

Department of Homeland Security (4)

- 20. Equivalency Determination for “Marine Charts,” “Charts,” or “Maps,” “Publications,” and Navigation Functions—Notice of Availability of Navigation and Vessel Inspection Circular 01–16 Change I**
21. Exercise of Time-Limited Authority to Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program RIN: 1615-AC12
- 22. Hazard Mitigation Assistance Acquisition Projects: Hydraulic Fracturing and Horizontal Directional Drilling FEMA Policy 302-094-03**
- 23. Jones Act Ruling Rescission**

Department of Interior (12)

24. Effectuating Congressional Nullification of the Stream Protection Rule under the Congressional Review Act RIN: 1029-AC63
25. Endangered and Threatened Wildlife and Plants; Reinstatement of Removal of the Gray Wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife RIN: 1018-BC04
26. Endangered and Threatened Wildlife and Plants; Removal of the Greater Yellowstone Ecosystem Population of Grizzly Bears from the List of Endangered and Threatened Wildlife RIN: 1018-BA41
27. Endangered and Threatened Wildlife and Plants; Removal of the Hualapai Mexican Vole from the List of Endangered and Threatened Wildlife RIN: 1018-AX99
28. Endangered and Threatened Wildlife and Plants; Removal of the Scarlet-Chested Parakeet and Turquoise Parakeet from the List of Endangered and Threatened Wildlife RIN: 1018-BB29
29. Migratory Bird Permits; Control Order for Introduced Migratory Bird Species in Hawaii (Cattle Egrets and Barn Owls) RIN: 1018-AZ69
30. Non-Subsistence Take of Wildlife and Public Participation and Closure Procedures on National Wildlife Refuges in Alaska RIN: 1018-BA31
31. Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Lease Continuation Through Operations RIN: 1014-AA35
- 32. Order No. 3346 “Revocation of the United States Fish and Wildlife Service Director’s Order No. 219 (Use of Nontoxic Ammunition and Fishing Tackle)”**

Box 2. Regulatory Reform: Completed Executive Order 13771 Deregulatory Actions (continued)

33. Repeal of Consolidated Federal Oil and Gas and Federal and Indian Coal Valuation Reform Rule RIN: 1012-AA20

34. Subsistence Handicrafts RIN: 1018-BB24

35. OMB Control No. 1018-0101, Monitoring Recovered Species After Delisting—American Peregrine Falcon

Department of Labor (7)

36. Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness (Volks) RIN: 1218-AC84

37. Definition of Fiduciary—Delay of Applicability Date RIN: 1210-AB79

38. Exercise of Time-Limited Authority to Increase the FY 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program RIN: 1205-AB84

39. Federal-State Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants RIN: 1205-AB63

40. Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" RIN: 1290-ZA02

41. Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees RIN: 1210-AB76

42. Savings Arrangements Established by States for Non-Governmental Employees RIN: 1210-AB71

Department of the Treasury (4)

43. Dividend Equivalents from Sources within the United States RIN: 1545-BN76

44. IRS Notice 2017-36, One Year Delay in Application of IRS' 385 rule (§ 1.385-2)

45. Transactions Involving the Transfer of No Net Value. RIN: 1545-BI18

46. Withholding on Payments of Certain Gambling Winnings. RIN: 1545-BN58

Department of Transportation (2)

47. Add New Electrical Safety Requirements during Normal Vehicle Use and Optional Post Crash Requirements to FMVSS No. 305 RIN: 2127-AL68

48. Metropolitan Planning Organization Coordination and Planning Area Reform RIN: 2125-AF75

Department of Veterans Affairs (1)

49. Fisher House and Other Temporary Lodging. RIN: 2900-AP45

Environmental Protection Agency (16)

50. Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Further

Delay of Effective Date RIN: 2050-AG91

51. Amendment to Standards and Practices for All Appropriate Inquiries under CERCLA RIN: 2050-AG94

52. Certification of Pesticide Applicators; Delay of Effective Date RIN: 2070-AK38

53. Clean Water Act Methods Update Rule for the Analysis of Effluent RIN: 2040-AF48

54. Compliance Date Extension; Formaldehyde Emission Standards for Composite Wood Products RIN: 2070-AK35

55. Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements RIN: 2070-AK39

56. Labeling Relief; Formaldehyde Emission Standards for Composite Wood Products RIN: 2070-AK30

57. Mercury and Air Toxics Standards (MATS) Electronic Reporting Requirements RIN: 2060-AS75

58. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay RIN: 2060-AT63

59. Technical Amendments to Procedure 6 RIN: 2060-AS86

60. Phosphoric Acid Manufacturing and Phosphate Fertilizer Production Risk and Technology Review Reconsideration RIN: 2060-AT14

61. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category RIN: 2040-AF76

62. Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources RIN: 2060-AT15

63. Approval of Tennessee's Request To Relax the Federal Reid Vapor Pressure Gasoline Volatility Standard for Davidson, Rutherford, Sumner, Williamson, and Wilson Counties; and Minor Technical Corrections for Federal Reid Vapor Pressure Gasoline Volatility Standards in Other Areas RIN: 2060-AT32

64. Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for MSW Landfills. RIN: 2060-AT62

65. OMB Control No. 2060-0705, Withdrawal of the 2016 Information Collection Effort for Oil and Gas Facilities

Federal Acquisition Regulation (1)

66. Federal Acquisition Regulation (FAR); FAR Case 2017-015, Removal of Fair Pay and Safe Workplaces Rule RIN: 9000-AN52

Small Business Administration (1)

67. Miscellaneous Amendments to Business Loan Programs and Surety Bond Guarantee Program. RIN: 3245-AF85

Six rules included in the roundup of 67 were among the 15 eliminated via the Congressional Review Act. Other independent agency rules were removed by the CRA but were not taken as credit for two-for-one purposes, such as the CFPB's arbitration rule,⁵³ a Securities and Exchange Commission rule on foreign resource extraction payment disclosure,⁵⁴ and an FCC broadband privacy regulation.⁵⁵ Similarly, some controversial Obama-era guidance documents the Trump administration revoked were not claimed in the roundup of 67. These include withdrawn transgender school facilities guidance, issued jointly by the Departments of Education and Justice,⁵⁶ and Labor Department guidance on independent contracting and joint employment.⁵⁷

One could argue that the FCC's elimination of Obama-era net neutrality rules⁵⁸ and modernization of broadcast ownership rules might be more significant than anything else on the list of successes.⁵⁹ But, like all substantial final rules, new rulemaking proceedings will be lengthy. Despite these successes, Trump could derail much of it with his 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).⁶⁰

As for Executive Order 13771's directive that "total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero," the present value cost savings from these 67 rule rollbacks was claimed in December 2017 to be just under \$8 billion, or around \$600 million annually.⁶¹ In September 2017, Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao issued a memorandum to regulatory reform officers at executive departments and agencies, calling on them to "prepare a proposed total incremental cost allowance" for the upcoming 2018 fiscal year and to articulate how it conforms to Trump's deregulatory executive order.⁶² Where Executive Order 13771 had called for zero net new costs and achieved the purported \$8 billion in savings, Rao's memorandum went further, "expect[ing]

that each agency will propose a net reduction in total incremental regulatory costs for FY 2018." In response, agencies have projected forthcoming cost savings of \$10 billion in present value terms, or \$700 million annualized.⁶³

The first-year results roughly correspond to an analysis by the American Action Forum (AAF), which found that of 23 final actions the administration subjected to one-in, two-out that contained cost estimates, realized estimated annualized cost savings totaled \$893 million, "most ... from delays in compliance deadlines and paperwork changes."⁶⁴ AAF anticipates larger second-year savings as rule reductions make their way through the notice-and-comment process. These Trump-era reported savings share some parallels with Obama's savings from retrospective review, yet they are only minor dents in the federal regulatory state.⁶⁵ All such savings can be either augmented or eclipsed by new costs added by independent agencies not subject to Executive Order 13771.

The truly pertinent question regarding the two-for-one campaign is not the extent of its success to date, but whether any executive branch regulatory liberalization can be maintained over time given the administrative state's barriers to any reform at all. Congress has not passed comprehensive regulatory liberalization in nearly a quarter century. Deregulation under Executive Order 13771 will become harder as low-hanging, quick-to-rid regulations are exhausted.⁶⁶

Sixth, the Trump administration has arguably taken more steps than any of its predecessors (apart from President George W. Bush's Executive Order 13422, which subjected significant guidance to OMB review,⁶⁷ and his administration's 2007 OMB Good Guidance Practices memorandum⁶⁸) to address the proliferation of significant guidance documents and other allegedly sub-regulatory decrees that have concrete regulatory effect—a phenomenon I have termed "regulatory dark matter."⁶⁹ Trump's executive orders and directives encompass not just

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“significant regulatory actions,” but significant guidance on a case-by-case basis.⁷⁰ 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 and has revoked guidance and directives that were not included among the 67 deregulatory actions claimed.

When agencies are discouraged from issuing rules, they may rely increasingly on sub-regulatory guidance documents, interpretive bulletins, memoranda, and other agency issuances to implement de facto rule changes. To address this, Trump should supplement Executive Order 13771 with a new executive order explicitly addressing regulatory guidance and other “regulatory dark matter.” Even if Congress does not act and pass leg-

islation such as the Guidance Out of Darkness (GOOD) Act (S. 2296, H. R. 4809), sponsored by Sen. Ron Johnson (R-Wis.) and Rep. Mark Walker (R-N.C.)⁷¹ on guidance disclosure, it is within the power of the president to disclose, eliminate, better classify, and streamline guidance and to hold accountable those issuing it to excess.

When all is said and done, the administrative state cannot be said to have fundamentally changed under Trump. While agencies like the FCC, the EPA, and the CFBP are currently led by pro-liberalization appointees, the agency bureaucracies are likely biding time. Without congressional action, much of the Trump streamlining phenomenon will be transitory. Longer-lasting regulatory reform will require action by Congress.