

# Analysis of the Regulatory Plan and Unified Agenda of Federal Regulations

The “Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions” (the Agenda) is where agencies outline their priorities. It normally appears in the *Federal Register* each fall and, minus the regulatory plan component, each spring. However, the publication schedule has become erratic. Election campaign considerations can cause agencies to abstain from rulemaking or to report fewer rules (for example, a 2012 *Washington Post* headline proclaimed, “White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy”<sup>121</sup>). And reporting priorities by administrations can change the Agenda’s content.

The Trump administration released the fall 2017 edition of the twice-yearly Agenda in December 2017, emphasizing the occasion to outline progress on meeting goals for regulatory streamlining. Usually, the Agenda appears with little note, but 2017 was the year of one-in, two-out for federal agency rulemaking, by way of Trump’s Executive Order 13771 on “Reducing Regulation and Controlling Regulatory Costs.” The normally sedate and uncommented-upon Agenda was accompanied by a statement, complete with red tape props,<sup>122</sup> and a *Wall Street Journal* column by OIRA Administrator Neomi Rao.<sup>123</sup>

Along with effects on the private sector, the Agenda’s rules 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 of the regulatory pipeline. It details rules recently completed, plus those anticipated or priori-

tized in the upcoming 12 months by federal departments, agencies, and commissions (67 in the newest edition). As a compilation of agency-reported federal regulatory actions at several stages, one might regard the Agenda as a cross-sectional snapshot of rules moving through the regulatory pipeline:

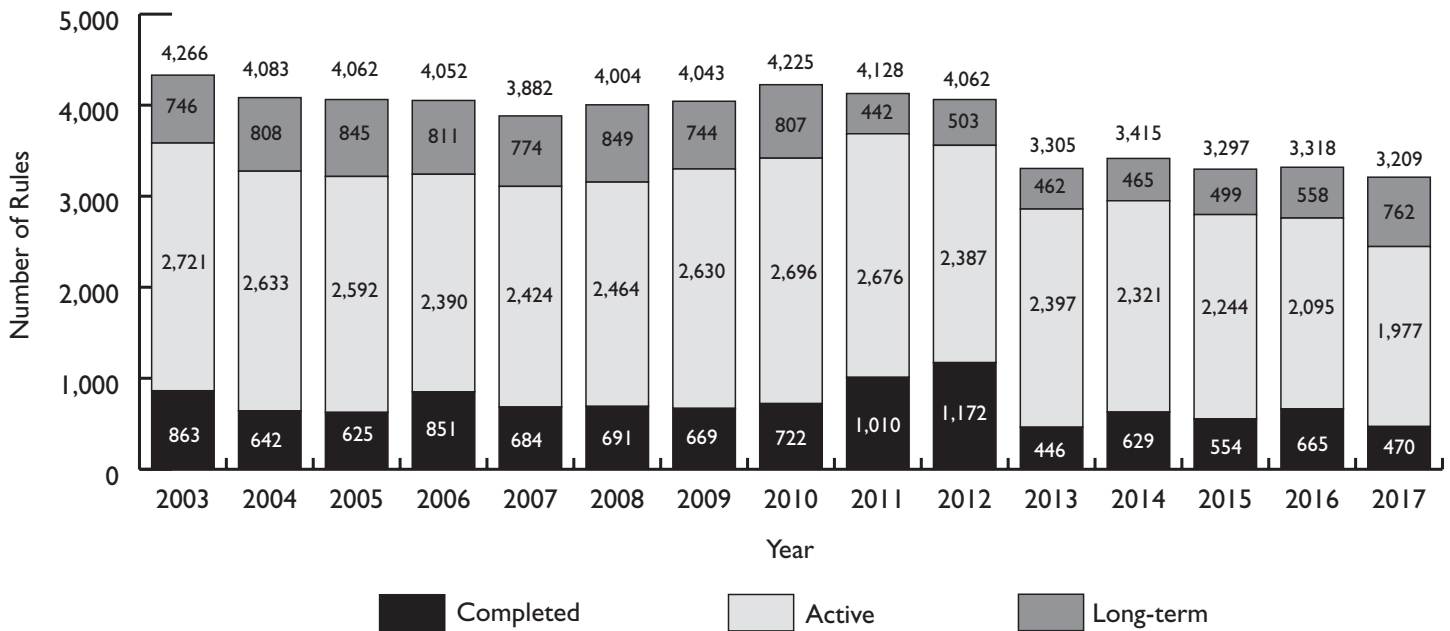
- Prerule actions;
- Proposed and final rules;
- Actions completed during the previous six months; and
- Anticipated longer-term rulemakings beyond 12 months.

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

The appearance of the Unified Agenda had become less reliable in recent years as its delayed publication missed its traditional April and October clockwork-like schedule. The fall 2011 edition did not appear until January 20, 2012.<sup>124</sup> The spring 2012 edition did not appear at all. Later spring editions (including in 2017) began to appear during the summer. “October” releases became Thanksgiving weekend releases, which became December releases. While Trump’s Regulatory Plan is one of the latest ever, his emphasis on reviewing the inventory for cuts and asking agencies to use the Agenda to plan deregulatory actions is unique.

Observers have noted the fluid nature of the Agenda’s contents. Upon release of the fall 2013 Agenda, for example, regulatory expert Leland Beck remarked: “The [A]genda provides only a semi-filtered view of

Figure 18. Total Agency Rules in the Fall Unified Agenda Pipeline, 2003–2017



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. Pre-2004 online database totals do not match the printed, paper editions of that era, so the author has elected to retain the data as compiled in those earlier print editions.

each agency’s intentions and must be considered within its limitations.” Furthermore, it “reflect[s] what the agency wants to make public, not necessarily all that they are actually considering, and some highly controversial issues may be withheld.”<sup>125</sup> Rules fluctuate given administration priorities. In the Obama administration, for example, spring and fall guidelines in 2012 from then-OIRA Administrator Cass Sunstein altered reporting directives to agencies:

In recent years, a large number of Unified Agenda entries have been for regulatory actions for which no real activity is expected within the coming year. Many of these entries are listed as “Long-Term.” Please consider terminating the listing of such entries until some action is likely to occur.<sup>126</sup>

When subsequent OIRA Administrator Howard Shelanski issued a similar memo-

randum on August 7, 2013, “please consider terminating” became the more direct “please remove.”<sup>127</sup> The drop is apparent in Figure 18. As Susan Dudley of the George Washington University Regulatory Studies Center noted in this regard, such changes might be beneficial, but “to the extent that reclassifying actions reduces the public’s ability to understand upcoming regulatory activity, the revisions could reduce transparency and accountability.”<sup>128</sup>

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

In recent years, a large number of Unified Agenda entries have reflected regulatory actions for which no substantial activity was expected within the coming year. Many of these entries are listed as “Long-Term.” We have retained the ability to list these

items in the Agenda, and see merit in their continued inclusion, particularly in some instances of notable rulemakings for which no action is planned in the coming year. Please, however, consider whether the listing of such entries still benefits readers.<sup>129</sup>

Agencies 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.<sup>130</sup>

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

### 3,209 Rules in the Unified Agenda Pipeline; 540 of them Deemed “Deregulatory”

The fall 2017 “Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions” became the vehicle for Trump’s status report on his two-for-one rule-pruning program. The Agenda finds 67 federal agencies, departments, and commissions recognizing 3,209 regulations in the active (prerule, proposed, and final), just-completed, and long-term stages (there had been 3,318 overall in 2016). Many rules have been in the pipeline for some time.<sup>131</sup> Not only is there a lower overall count of rules in Trump’s Unified Agenda pipeline, 540 of them 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 up until 2013. Counts had been even higher in the 1990s, when an all-time-high count of 5,119 rules occurred in the fall 1994 Agenda. (For the history of the numbers of rules in the spring and fall editions of the Agenda since 1983, see Appendix: Historical Tables, Part E.)<sup>132</sup> The 19 percent drop from 2012’s 4,062 rules to 3,305 in 2013 in part reflects election year and management directive factors noted above.

The total pipeline count of 3,209 rules depicted in Figure 18 is broken out in Table 5 by agency, commission, or issuing department. It shows numbers of rules at the active, completed, and long-term stages.<sup>133</sup> Perhaps most important for assessing Trump’s one-in, two-out regulatory campaign is the question of which agencies are responsible for the 540 rules deemed deregulatory, out of a total of 3,209, in Table 5. (For the numbers of rules by department and agency from previous year-end editions of the Agenda since 2000, see Appendix: Historical Tables, Part F.)

**Active rules.** As Figure 18 shows, since 2003, active rule counts in the Agenda consistently remained well above 2,000, until they fell to 1,977 under Trump, with 448 of them deemed deregulatory. As noted, by the time of the fall 2017 Agenda, 1,579 Obama-era planned regulatory actions and rules were withdrawn or delayed during this first year of the Trump administration, which could partly explain the lower number.

**Completed rules.** Completed rules are “actions or reviews the agency has completed or withdrawn since publishing its last agenda.”<sup>134</sup> Note that although the number of rules in the completed category in fall Agendas 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 (spring Agendas are not shown in Figure 18). This category stood at 470 in Trump’s fall 2017 Agenda, well below Obama’s last three

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years' snapshots, especially given that 62 of Trump's completed rules are deregulatory.

**Long-term rules.** Announced long-term rules in the pipeline shown in Figure 18 dropped markedly from 807 to 442 between 2010 and 2011. In the new 2017 Agenda, these rules stand at 762, a jump from 558 in 2016. Thirty of these are deregulatory, but this jump is a development that needs to be monitored closely, even though it may reflect in part the decision of Mancini and Rao to include these rules.

### Top Five Rulemaking Departments and Agencies

A relative handful of executive branch agencies each year account for a large number of the rules in the pipeline. The five departments and agencies listed in Table 6—the Departments of the Treasury, Transportation, Commerce, and Defense

and the EPA—were the most active rulemakers. The Department of the Interior came in sixth with 183 rules. These top five, with 1,359 rules among them, account for 42 percent of the 3,209 rules in the Agenda pipeline.

It is worth noting the percentage of actions at these bodies that are deregulatory for Executive Order 13771 purposes, as Table 5 shows. For comparative purposes, these agencies' deregulatory actions could take their burdens below those of other agencies not in the top five.

Table 6 also depicts the top five independent agencies in the Agenda pipeline by rule count. These are the FCC, the Securities and Exchange Commission, the Nuclear Regulatory Commission, the multi-agency Federal Acquisition Regulation system, and the Consumer Product Safety Commission.<sup>135</sup> Their total 323 rules account for 10 percent of the 3,209 rules in the Agenda. Combined, the

Table 5. Unified Agenda Entries by Department and Agency (Fall 2017)

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
Dept. of Agriculture	114	75	35	4	12	43	1
Dept. of Commerce	247	168	55	24	7	28	5
Dept. of Defense	193	184	7	2		23	
Dept. of Education	38	34	4		1	25	
Dept. of Energy	87	30	11	46		14	1
Dept. of Health and Human Services	189	123	25	41	10	54	7
Dept. of Homeland Security	123	59	10	54	1	14	2
Dept. of Housing and Urban Development	42	18	13	11	5	11	
Dept. of the Interior	183	140	40	3	7	43	
Dept. of Justice	68	20	12	36		6	4
Dept. of Labor	64	44	2	18	1	22	
Dept. of State	64	49	4	11		1	
Dept. of Transportation	255	172	16	67	4	83	2
Dept. of Treasury	444	274	42	128	5	20	2
Dept. of Veterans Affairs	79	60	13	6		5	
Agency for International Development	9	8	1			2	
American Battle Monuments Commission	2	1		1			

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
Architectural and Transportation Barriers Compliance Board	3	1		2			
Commission on Civil Rights	1	1					
CPBSD*	3	2	1				
Commodity Futures Trading Commission	32	22	6	4			
Consumer Financial Protection Bureau	29	13	7	9			
Consumer Product Safety Commission	29	19	2	8			
Corporation for National and Community Service	6	1		5			
Council of Inspector General on Integrity and Efficiency	2	2					
Court Services/Offender Supervision, D.C.	6	3	3				
Defense Nuclear Facilities Safety Board	1		1				
Environmental Protection Agency	220	101	59	60	7	41	6
Equal Employment Opportunity Commission	8	7	1				
Farm Credit Administration	31	14	17				
Federal Acquisition Regulation	43	41	2		1		
Federal Communications Commission	106	4	3	99			
Federal Deposit Insurance Corporation	29	16	7	6			
Federal Energy Regulatory Commission	17		1	16			
Federal Housing Finance Agency	14	9	2	3			
Federal Maritime Commission	4	2	2				
Federal Reserve System	29	13	8	8			
Federal Trade Commission	20	18	2				
General Services Administration	20	18	2			4	
Institute of Museum and Library Services	1	1					
National Aeronautics and Space Administration	12	8	4				
National Archives and Records Administration	8	4	4				
National Credit Union Administration	23	14	6	3			
National Endowment for the Arts	6	6					
National Endowment for the Humanities	4	4					
National Indian Gaming Commission	8	8				1	
National Labor Relations Board	1	1					
National Mediation Board	1		1				
National Science Foundation	3	2	1				
National Transportation Safety Board	8	5	3				
Nuclear Regulatory Commission	60	30	8	22			
Office of Government Ethics	6	6					
Office of Management and Budget	4	3	1		1	3	

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

(continued)

Table 5. Unified Agenda Entries by Department and Agency (Fall 2017) (continued)

	Total Rules	Unified Agenda			Regulatory Plan Component		
		Active	Completed	Long Term	Active	Completed	Long Term
Office of Personnel Management	22	16	6			2	
Office of the Trade Representative	2		2				
Peace Corps	4	4					
Pension Benefit Guaranty Corporation	17	13	1	3			
Postal Regulatory Commission	3			3			
Presidio Trust	4	4					
Privacy and Civil Liberties Oversight Board	1		1				
Railroad Retirement Board	4	4					
Securities and Exchange Commission	85	26	5	54			
Small Business Administration	29	24	5			3	
Social Security Administration	27	25	2				
Special Inspector General for Afghanistan Reconstruction	1		1				
Surface Transportation Board	10	2	3	5			
Tennessee Valley Authority	1	1					
<b>TOTAL</b>	<b>3,209</b>	<b>1,977</b>	<b>470</b>	<b>762</b>	<b>62</b>	<b>448</b>	<b>30</b>

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

top executive and independent agency components comprise 52 percent of the total. However, the difference between this year and previous year portrayals is that some entries are explicitly deemed deregulatory.

### 140 “Economically Significant” Rules in the Unified Agenda; 25 of Them Deemed “Deregulatory”

A subset of the Agenda’s 3,209 rules is classified as “economically significant”—rules for which agencies estimate yearly economic impacts of at least \$100 million. Those impacts generally amount to increased costs, although sometimes an economically significant rule is intended to reduce costs, particularly so in the wake of Executive Order 13771. As Table 7 shows, 140 economically significant rules (down from 193 and 218 in the two previous

years, respectively) from 22 departments and agencies appear at the active (prerule, proposed rule, and final rule), completed, and long-term stages of the pipeline.

Figure 19 shows the annual fall pipeline’s increase under President Barack Obama. President George W. Bush started an uptick. Obama continued it, increasing the flow of costly economically significant rules at the completed and active stages, then President Donald Trump brought the count down substantially in his first year, particularly given that 30 of the 140 are deregulatory. Under Trump, the overall flow of economically significant rules is 27 percent lower fall-to-fall, even though these figures contain numerous “rules” that are deregulatory or withdrawals or holds of preexisting orders.

Figure 19 also breaks down economically significant rules into completed, active, and long-term categories. Among the 140 eco-

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

<b>Executive Agency</b>	<b>Number of Rules</b>
1. Department of the Treasury	444
2. Department of Transportation	255
3. Department of Commerce	247
4. Environmental Protection Agency	220
5. Department of Defense	193
<b>TOTAL</b>	<b>1,359</b>
<b>% of Total Agenda Pipeline of 3,209</b>	<b>42</b>

<b>Independent Agency</b>	<b>Number of Rules</b>
1. Federal Communications Commission	106
2. Securities and Exchange Commission	85
3. Nuclear Regulatory Commission	60
4. Federal Acquisition Regulation	43
5. Consumer Product Safety Commission	29
<b>TOTAL</b>	<b>323</b>
<b>% of Total Agenda Pipeline of 3,209</b>	<b>10</b>

<b>Top 5 Executives plus Independents</b>	<b>1,682</b>
<b>% of Total Agenda Pipeline</b>	<b>52</b>

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

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

nominally significant rules in the fall 2017 Agenda, 71 of them stand at the active phase, far below the 113 active in the fall 2016 Obama Agenda. (The full list of the 140 economically significant rules in the 2017 Agenda pipeline is available in Appendix: Historical Tables, Part G.) Until Trump, the annual body of active economically significant rules had remained above 100 since 2007, as may be seen in Figure 19. Obama’s eight-year average of active rules across the fall Agendas was 133; Bush’s eight-year average was 87. Time will tell if Trump’s 71 represents a new trend. As for economically significant rules at the completed stage in the fall Agendas, Obama’s count was consistently higher than Bush’s, even taking into account an Obama midterm election drop between 2011 and 2012. Completed rules in the fall Agenda peaked at 57 in 2012, stood at 47 in 2016,

and dropped by more than half, to 21, under Trump.

For a fuller picture of completed rules, we need to 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.

As Figure 20 shows, completed economically significant rules totaled 88 in the fall and spring Agendas under Trump. Trump actually issued more completed economically significant rules than either Bush or Obama, but this may be partly because the Administrative Procedure Act requires writing a new rule to get rid of an old one. For example, five of these rules are explicitly deemed deregula-

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

	Rules	Unified Agenda			Deregulatory Actions*	
		Active	Completed	Long Term	Active	Completed
Dept. of Agriculture	5	2	1	2		
Dept. of Commerce	1	1				
Dept. of Defense	1	1				
Dept. of Education	4	3	1			1
Dept. of Energy	10	2	1	7		
Dept. of Health and Human Services	46	30	11	5	13	3
Dept. of Homeland Security	8	5		3	1	
Dept. of Housing and Urban Development	2			2		
Dept. of the Interior	4	4			2	
Dept. of Justice	2		2			
Dept. of Labor	8	3		5	2	
Dept. of State	1	1				
Dept. of Transportation	9	4		5	1	
Dept. of Treasury	8	4	1	3	3	
Dept. of Veterans Affairs	5	4		1		
Architectural Barriers Compliance Board	1			1		
Consumer Product Safety Commission	3			3		
Environmental Protection Agency	12	6	1	5	3	
Federal Acquisition Regulation	1		1			1
Federal Communications Commission	5			5		
Federal Deposit Insurance Corporation	1		1			
Nuclear Regulatory Commission	3	1	1	1		
<b>TOTAL</b>	<b>140</b>	<b>71</b>	<b>21</b>	<b>48</b>	<b>25</b>	<b>5</b>

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

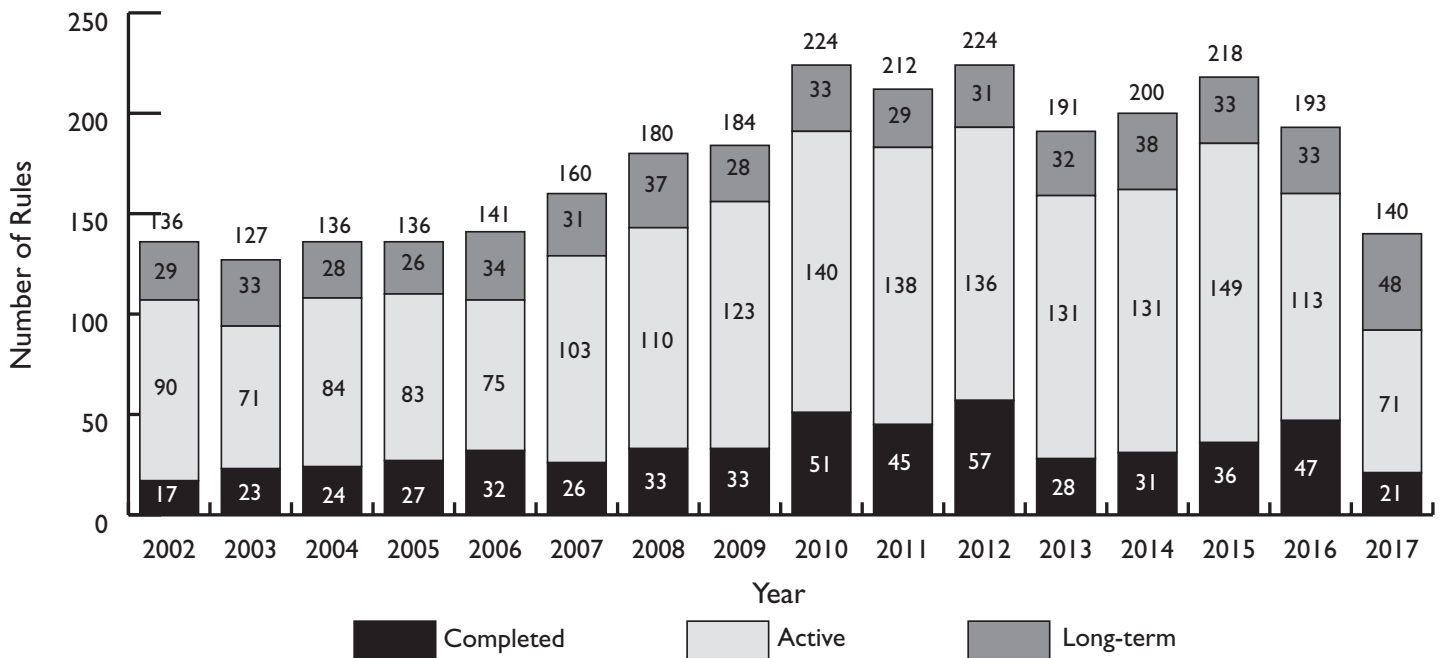
\* No deregulatory actions are listed in the long-term category.

tory for Executive Order 13771 purposes. If the five deregulatory rules were removed from Trump’s tally, the total would be 83 rules, tied with Obama. Still further, the number of deregulatory actions from the spring agenda is not clear, because the Trump-era database search function for “13771 Designation” was not active for that edition. When agencies are directed to eliminate two for one, that can make it appear as if more “rules” are being issued. Of course, other presidents have issued deregulatory rules; they just did not make the reduction agenda so explicit, nor ease the tracking of the relevant metrics.

Apart from 2001, the level of completed economically significant rules from 1996 forward was notably lower during the earlier part of 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” of previous administrations may be reflected in the totals for a first-year president, but this report is primarily concerned with calendar year comparisons. Trump is above these averages, but again, some rules are deregulatory.

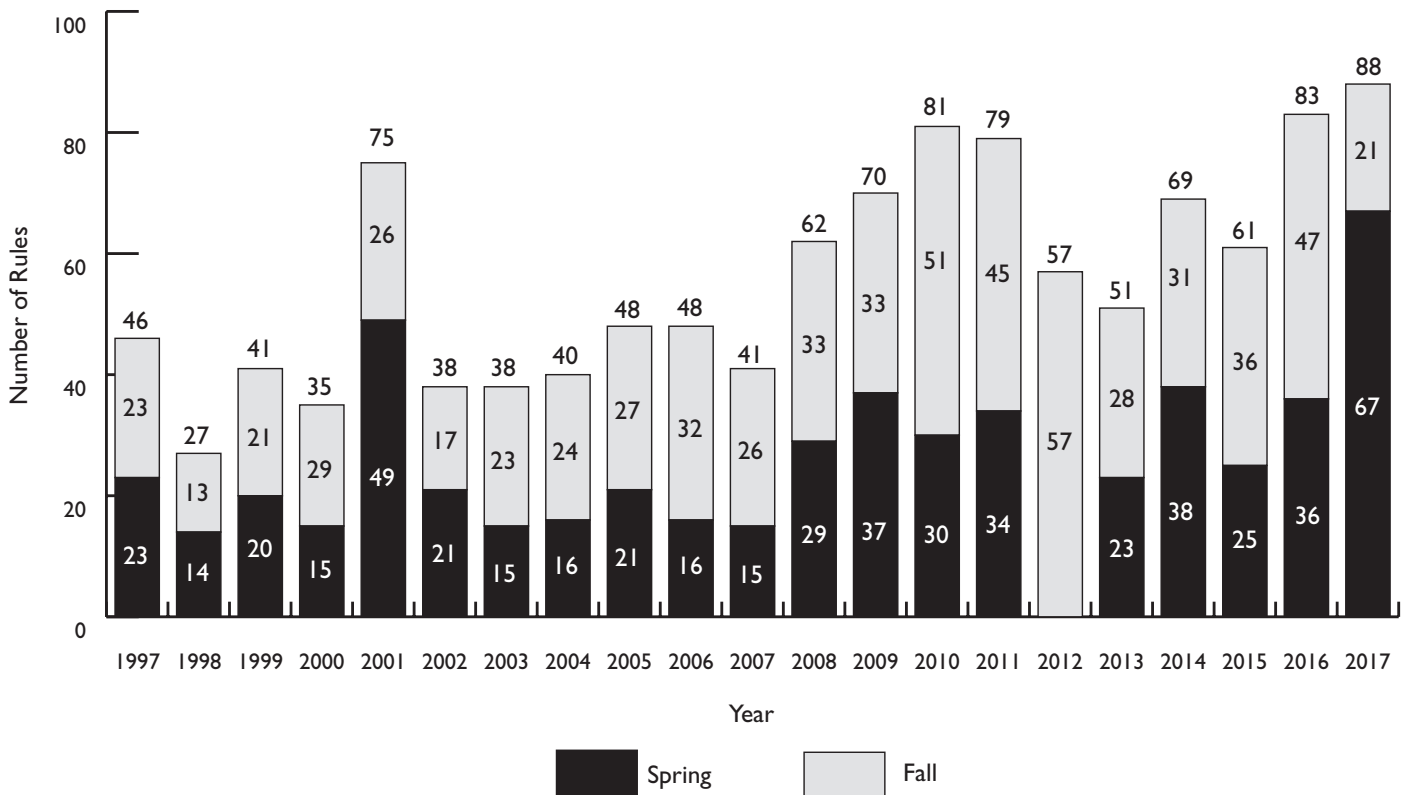


Figure 19. 140 Economically Significant Rules in the Unified Agenda Pipeline, 2002–2017



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

Figure 20. Annual Completed Economically Significant Rules in the Unified Agenda, 1997–2017



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

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

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As noted, each of the 140 economically significant rules scattered among the 3,209 rules in the Agenda is estimated to have annual impacts of at least \$100 million. Had this been any other year, those rules might be expected to impose annual costs of at least \$14 billion (loosely, 140 rules multiplied by the \$100 million economically significant threshold). Some rules may decrease costs, which would offset this total; in Trump's first year, 30 such rules have explicit declarations (See Figure 19 and Table 7). Yet whatever the elusive actual total cost, these costs are cumulative, as recurring annual costs are added to previous years' costs. And, as noted, agencies are not limited to what they list in the Agenda.

Heightened attention to economically significant rules should not tempt policy makers and analysts to ignore the remaining bulk of rules in the annual pipeline. In the fall 2017 pipeline, 3,069 federal rules were not designated economically significant (3,209 total rules minus the 140 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 regulatory dark matter, which avoids congressional oversight and the Administrative Procedure Act's notice-and-comment requirement for rulemaking.

### Notable Regulations by Agency

The full list of the 140 economically significant rules in the fall 2017 Agenda pipeline appears in Appendix: Historical Tables, Part G. In recent Agenda editions and in other venues, federal agencies have noted the initiatives listed below, among others pending or recently completed.

Although many of the things that regulations purport to do are worthy and need pursuing, that does not mean that the federal bureaucracy and administrative state are the best ways to achieve them, compared with insurance, liability, other private sector options, and state and local oversight.

### Department of Agriculture

- 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 school and certification of compliance with meal requirements for the national school lunch program (as required by the Healthy, Hunger-Free Kids Act of 2010)<sup>136</sup>
- Standards for grades of canned baked beans<sup>137</sup>
- 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, and mobile home furnaces; residential dishwashers; residential conventional cooking products; electric distribution transformers; commercial refrigeration units and heat pumps; 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; refrigerated bottled or canned beverage vending machines; and residential central air conditioners and heat pumps
- Incentive program for manufacturing advanced technology vehicles

## Department of Health and Human Services

- Rules deeming electronic cigarettes and components subject to the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act, and being subjected to warning labels and sale restrictions<sup>138</sup>
- Requirements for Tobacco Product Manufacturing Practice
- Food labeling: serving sizes of foods that can reasonably be consumed at one eating occasion; dual-column labeling; modification of certain reference amounts customarily consumed
- Nutrition labeling for food sold in vending machines and for restaurant menu items

- Food labeling: trans fatty acids in nutrition labeling, nutrient content claims, and health claims
- Rule on safety and effectiveness of consumer antibacterial soaps (“Topical Antimicrobial Drug Products for Over-the-Counter Human Use”);<sup>139</sup> consumer antiseptics
- General and plastic surgery devices: sunlamp products
- Federal policy for the protection of human subjects
- Criteria for determining whether a drug is considered usually self-administered
- Substances prohibited from use in animal food or feed; registration of food and animal feed facilities
- Updated standards for labeling of pet food
- Sanitary transportation of human and animal food
- Focused mitigation strategies to protect food against intentional adulteration
- Produce safety regulation
- Centers for Medicare and Medicaid Services standards for long-term nursing care facilities and home health service providers<sup>140</sup>
- Requirements for long-term care facilities: hospice services
- Fire safety and sprinkler requirements for long-term care facilities
- Pediatric dosing for various over-the-counter cough, cold, and allergy products
- Rule on comprehensive care for joint replacement
- Medication Assisted Treatment for Opioid Use Disorders Reporting Requirements
- Patient Protection and Affordable Care Act: standards related to essential health benefits, actuarial value, and accreditation; Medicaid, exchanges, and children’s health insurance programs: eligibility, appeals, and other provisions
- Price regulation: prospective payment system rates for home health, acute, and long-term hospital care; skilled nursing facilities; inpatient rehabilitation facilities
- Good manufacturing practice in manufacturing, packing, or holding dietary ingredients and dietary supplements

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

### *Department of Homeland Security*

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

### *Department of Housing and Urban Development*

- Revision of manufactured home construction and safety standards regarding location of smoke alarms
- Instituting smoke-free public housing<sup>141</sup>
- Regulation of Fannie Mae and Freddie Mac on housing goals
- Regulations within the Real Estate Settlement Procedures Act pertaining to mortgages and closing costs
- Establishing a more effective Fair Market Rent system; using Small Area Fair Market Rents in Housing Choice Voucher Program (modification of income and rent determinations in public and assisted housing)

### *Department of the Interior*

- Revised requirements for well plugging and platform decommissioning
- Increased safety measures for oil and gas operations and exploratory drilling on the Arctic outer continental shelf<sup>142</sup>
- Blowout prevention for offshore oil and gas operations

### *Department of Justice*

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

### *Department of Labor*

- Conflict of interest rule in financial investment advice
- Overtime rule: "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees"<sup>143</sup>
- Establishing a minimum wage for contractors (Executive Order 13658)
- Establishing paid sick leave for businesses that contract with the federal government (in response to Executive Order 13706)<sup>144</sup>
- Walking-working surfaces and personal fall protection systems (slips, trips, and fall prevention)<sup>145</sup>
- Hearing conservation program for construction workers
- Rules regarding confined spaces in construction: preventing suffocation and explosions
- Reinforced concrete in construction
- Preventing back-over injuries and fatalities
- Cranes and derricks
- Protective equipment in electric power transmission and distribution
- Refuge alternatives for underground coal mines

- Combustible dust
- Injury and illness prevention program
- Application of the Fair Labor Standards Act to domestic service
- Improved fee disclosure for pension plans
- Occupational exposure to styrene crystalline silica,<sup>146</sup> tuberculosis, and beryllium
- Implementation of the health care access, portability, and renewability provisions of the Health Insurance Portability and Accountability Act of 1996
- Group health plans and health insurance issuers relating to coverage of preventive services under the Patient Protection and Affordable Care Act
- Health care standards for mothers and newborns
- 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
- 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

### *Department of Transportation*

- Quiet car rule; Minimum Sound Requirements for Hybrid and Electric Vehicles<sup>147</sup>
- Federal Aviation Administration rule on operation and certification of drones (must stay in line of sight, for example)<sup>148</sup>
- National Highway Traffic Safety Administration (NHTSA) proposal on vehicle-to-vehicle communications standardization<sup>149</sup>
- Federal Motor Carrier Safety Administration and NHTSA rule on speed limiters and electronic stability control systems for heavy vehicles<sup>150</sup>
- Federal Railroad Administration's Train Crew Staffing rule seeking a two-engineers-on-a-train mandate<sup>151</sup>
- NHTSA rule on lighting and marking on agricultural equipment<sup>152</sup>
- Minimum training requirements for entry-level commercial motor vehicle operators and for operators and training instructors of multiple trailer combination trucks<sup>153</sup>
- Passenger car and light truck Corporate Average Fuel Economy standards (newer model years)
- Rear-impact guards and other safety strategies for single-unit trucks
- Amendments for positive train control systems
- Aging aircraft safety
- Upgrade of head restraints in vehicles
- Establishment of side-impact performance requirements for child restraint systems
- Registration and training for operators of propane tank-filling equipment
- Monitoring systems for improved tire safety and tire pressure
- Pipeline Safety: Amendments to Parts 192 and 195 to require valve installation and minimum rupture detection standards
- Hazardous materials: transportation of lithium batteries

### *Department of the Treasury*

- Prohibition of funding of unlawful Internet gambling
- Risk-based capital guidelines; capital adequacy guidelines
- Assessment of fees for large bank holding companies and other financial entities

- supervised by the Federal Reserve to fund the Financial Research Fund (which includes the Financial Stability Oversight Council)
- Registration and regulation of security-based swap dealers and major security-based swap participants
- Troubled Asset Relief Program standards for compensation and corporate governance

### ***Architectural and Transportation Barriers Compliance Board***

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

### ***Consumer Financial Protection Bureau***

- Proposed rule regulating business practices on payday and vehicle title loans<sup>154</sup>

### ***Consumer Product Safety Commission***

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

### ***Environmental Protection Agency***

- Control of air pollution from motor vehicles: Tier 3 motor vehicle emission and fuel standards
- Greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles
- Performance standards for new residential wood heaters

- Oil and natural gas: emission standards for new and modified sources
- Model trading rules for greenhouse gas emissions from electric utility generating plants constructed before January 7, 2014
- Financial Responsibility Requirements under Comprehensive Environmental Response, Compensation, and Liability Act Section 108(b) for classes of facilities in the hard-rock mining industry
- Clean air visibility, mercury, and ozone implementation rules
- Effluent limitations guidelines and standards for the steam electric power generating point source category
- Revision of stormwater regulations to address discharges from developed sites
- Formaldehyde emissions standards for composite wood products
- National Emission Standards for Hazardous Air Pollutants (NESHAP) 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
- Revisions of national primary drinking water regulations for lead and copper
- Modernization of the accidental release prevention regulations under the Clean Air Act
- Trichloroethylene; rulemaking under Toxic Substances Control Act Section 6(a); vapor degreasing
- Reassessment of use authorizations for polychlorinated biphenyls (PCBs) in small capacitors in fluorescent light ballasts in schools and day care centers
- Rulemakings regarding lead-based paint and the Lead Renovation, Repair, and Painting Program for public and commercial buildings
- National drinking water regulations covering groundwater and surface water

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

### **Federal Communications Commission**

- Protecting the privacy of customers of broadband and other telecommunications services<sup>155</sup>
- Net neutrality Open Internet order
- Broadband for passengers aboard aircraft
- Broadband over power line systems
- Mobile personal satellite communications
- Satellite broadcasting signal carriage requirements
- Rules regarding Internet protocol-enabled devices

### **Federal Deposit Insurance Corporation**

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

### **Federal Energy Regulatory Commission**

- Critical infrastructure protection reliability standards

### **Office of Personnel Management**

- Multistate exchanges: implementations for Affordable Care Act provisions

## **Warning Signs? What the Unified Agenda Reveals about the Limits of Trump’s One-In, Two-Out Campaign**

Longer term, does the administrative state have anything to fear from Trump’s regulatory liberalization agenda?

There is a need for far greater clarity in the Agenda, *Federal Register*, and OMB *Report to Congress* on regulatory benefits and costs as to whether agency actions are regulatory or deregulatory. Pertinent to tracking regulatory ins and outs, one of the most important modifications in the new Regulatory Plan and Agenda is the transformative change in the rule roundup presented in OIRA’s database to capture the specifics of Executive Order 13771-related deregulatory actions and to explicitly identify rules not subject to the order.

On the landing page of OIRA’s advanced search database there now appears a radio-button search option field for “EO 13771 Designation.” This enables researchers and the public to isolate where agencies have classified rules as “Deregulatory” or “Regulatory.” Categories of rules not subject to the executive order are now classified and depicted where possible: “Fully or Partially Exempt;” “Not Subject to, not significant;” “Other;” and “Independent agency.”<sup>156</sup> Table 8 shows the number of these rules at the completed, active, and long-term stages relative to the overall count of 3,209.

If this practice becomes incorporated into the *Federal Register* presentation and in other forms of agency disclosure, it could make a significant difference over time. In fact, the Executive Order 13771 designation may be even more important than the particular cuts completed so far, because the renewed scrutiny may prompt agencies to continue to report such distinctions long after the Trump administration ends. Any failure to implement regulatory relief would become obvious over time. Requiring inde-

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*The Executive Order 13771 designation may be even more important than the particular cuts completed so far, because the renewed scrutiny may prompt agencies to continue to report such distinctions long after the Trump administration ends.*

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*While agencies can be said to have met the two-for-one goals, a deeper look reveals agencies are planning more rules than rollbacks in future years.*

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pendent agencies to report as well would be fairly low-hanging fruit for congressional reform.

As noted, instead of two-for-one, the administration reported achieving a one-in, 22-out ratio for managing finalized regulations. Put differently, the administration claims that three rules were added but 67 removed for purposes of Executive Order 13771.

More broadly, as Table 8 shows, a total of 540 rules in the fall Agenda pipeline were classified as deregulatory, while 248 rules are classified as regulatory. Rules can be regulatory but not subject to the order. The order does not apply to nonsignificant rules, yet some of them are tabulated for Executive Order 13771 purposes.

As noted, agencies are not required by law to issue only the rules they describe in the Agenda or Regulatory Plan. The administration notes an important qualifier when defining Executive Order 13771 Regulatory Actions:

EO 13771 regulatory actions are defined as those final actions that both impose costs greater than zero and qualify as “significant” under Section 3(f) of EO 12866 (see M-17-21, Q2). Accordingly, the regulatory actions listed in this table [of regulatory cost caps] represent a subset of an agency’s total regulatory actions.<sup>157</sup>

The fall 2017 Agenda pipeline of 3,209 is the lowest level seen since 1983, and incorporating the 540 deregulatory entries gives a net of 2,669 new rules. However, there is no way to readily compare that deregulatory element with past years’ Agenda rule counts, from which some entries would have been deregulatory in nature.<sup>158</sup> Table 5 breaks down the 540 deregulatory measures by department and agency and stage of completion. The Department of Transportation easily led with 89 rules in the pipeline classified as deregulatory.

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

Recall that Executive Order 13771, “Reducing Regulations and Controlling Regulatory Costs,” only applies to “significant regulatory actions” of executive, but not independent, agencies. Agencies can employ sub-significant rules, as well as issue guidance documents, to fly below the radar of two-for-one constraints, just as they could under the longstanding Executive Order 12866, which governs OMB review of rules. One option to address that problem could be to expand coverage of rules via executive order. Stopping or slowing rules in the pipeline is easier than getting rid of existing rules; the Trump administration should do the former more thoroughly in the next Agenda.

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. These are also isolated in Table 8. The economically significant category appears to present hurdles to meeting the two-for-one goal.

### *Completed Deregulatory and Regulatory Actions in Unified Agenda Hit a Four-for-One Target*

The Unified Agenda’s completed component most closely corresponds to the highlighted 22-to-one successes claimed by the Trump administration in its “Two-for-One Status Report and Regulatory Cost Caps.”<sup>159</sup> As long as costs are net zero, the primary prescription of the executive order, it is acceptable to credit non-significant rules toward the two-for-one goal.<sup>160</sup> Where the administration indicated 67 deregulatory actions in its Status Report,



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

	Total # Rules	Completed			Active			Long-Term		
		Total	Economically Significant	Other Significant	Total	Economically Significant	Other Significant	Total	Economically Significant	Other Significant
All Agencies	3,209	470	21	100	1,977	71	535	762	48	204
Deregulatory	540	62	5	17	448	25	126	30	0	16
Regulatory	248	15	6	7	131	15	84	102	25	63
Fully or Partially Exempt	305	64	3	34	206	19	96	35	1	26
Not subject to, not significant	672	186	1	11	404	0	15	82	0	1
Other	938	72	2	17	599	11	182	267	12	62
Independent Agency	497	62	1	10	189	1	32	246	10	36
<b>Totals (may not sum fully)</b>	<b>3,200</b>	<b>461</b>	<b>18</b>	<b>96</b>	<b>1,977</b>	<b>71</b>	<b>535</b>	<b>762</b>	<b>48</b>	<b>204</b>

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

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*It is worrisome with respect to longer-term prospects that non-economically significant deregulatory rules are carrying the weight of offsetting the economically significant regulatory ones.*

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the Agenda identifies 62 completed deregulatory actions (see Table 8).

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 do not appear in the Agenda (These nine appear in bold type in Box 2).

Another reason is that some removals were achieved via the Congressional Review Act and therefore do not appear in the Agenda.

Still another difference between the two tabulations is that the administration did not take credit for each of the economically significant rules eliminated. As Table 8 also shows, of the 62 completed deregulatory actions in the Agenda, five are in the economically significant category. However, the administration noted only one of these—repeal of the Fair Pay and Safe Workplaces Rule—in its “Two-for-One Status Report.”<sup>161</sup> Seventeen rules in Table 8 are deemed “other significant,” with the remainder being more routine.

In its roundup, the administration pointed to three completed “significant regulatory actions” that had been adequately offset on the claimed 22-to-one basis. Actually, 15 completed regulatory actions appeared in the fall Agenda, with 6 of them deemed economically significant. For purposes of Executive Order 13771, significant regulations are required to be offset, so even with six economically significant actions rather than three completed, the overall two-for-one goal is still met given—at least—62 deregulatory actions. Even taking into account the presence of 15 completed regulatory actions under the database's EO 13771 designation, the two-for-one target is still attained at a four-to-one ratio (The 62 deregulatory actions divided by the 15 regulatory ones in Table 8). Note, however, that, while there were six regulatory rules at the economically significant level, there were only five deregulatory ones of comparable significance. It is worrisome with respect to longer-term prospects that non-economically significant

deregulatory rules are carrying the weight of offsetting the economically significant regulatory ones.

### **“Active” Deregulatory and Regulatory Actions Hit a Three-for-One Target**

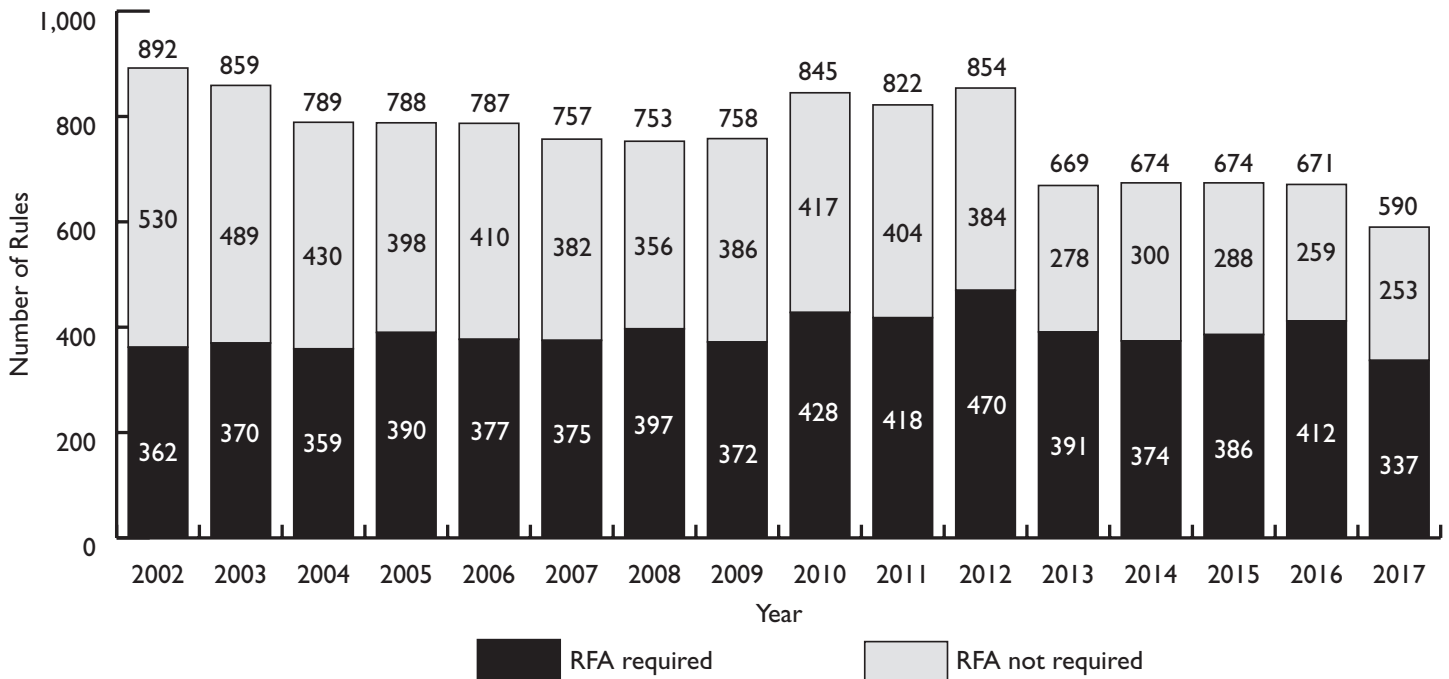
Active actions—those in the pipeline at the prerule, proposed, and final rule stages—are the ones in play. Table 8 shows a total of 448 deregulatory actions in play, in excess of the 131 regulatory ones by more than a three-to-one margin. As noncompleted actions, at this point these rules do not need to be counted to meet the two-for-one goals, but they are still a leading indicator.

Of more concern is the costlier subsets of active rules. There are 15 economically significant regulatory actions in Table 8. While the 25 active economically significant deregulatory actions outweigh the regulatory actions, they do so only by a meager factor of 1.6. Similarly, 84 other significant regulatory actions are outweighed by 126 deregulatory ones, but only by a factor of 1.5. There is time to correct course as rules move closer toward finalization, but this ratio highlights the limits of unilateral executive regulatory liberalization.

### **“Long-Term” Planned Regulatory Actions Outstrip Deregulatory Ones**

Longer-term rules inspire even less confidence. As Table 8 shows, 102 long term actions are deemed regulatory, but only 30 are deemed deregulatory. The two-for-one ratio is inverted with respect to long-term planned rules, with a three-for-one ratio in favor of regulation. Even more worrisome is that, of the anticipated economically significant long-term rules, 25 are deemed regulatory, while none in this costliest category are deregulatory. Even in the other significant category, 63 are regulatory, but only 16 de-

Figure 21. Rules Affecting Small Business, 2002–2017



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

regulatory. These are warning signs because these more costly rule subsets are presumably where tomorrow’s cost savings need to come from.

A charitable interpretation is that agencies are focused on meeting the administration’s goals for two-for-one streamlining and will eventually get around to these longer-term rule reductions. Others might be inclined to ascribe these numbers to the “#resistance” to the Trump administration by some career agency personnel.<sup>162</sup>

Rolling back regulations requires going through the public notice-and-comment process. It takes time, and the administrative state works to the advantage of agencies that want to maintain vast regulatory edifices. As newer Agendas appear in 2018 and 2019, the situation may be rectified. In addition, agencies may substitute guidance documents for formal regulations. Therefore, a more aggressive executive order specifically on the use of guidance to make policy is warranted,

especially in the absence of congressional action on regulatory reform.

### Federal Regulations Affecting Small Business

The Regulatory Flexibility Act directs federal agencies to assess their rules’ effects on small businesses.<sup>163</sup> Figure 21 shows both the number of rules requiring annual regulatory flexibility analysis per the Regulatory Flexibility Act and other rules anticipated by agencies to affect small business, but which do not require a regulatory flexibility analysis (RFA). In recent years, disclosure of this category of rules appears to have diminished. The number of rules acknowledged to significantly affect small business dropped substantially after 2012 during the Obama administration, in part reflecting reporting changes noted already, but has dropped even more substantially during the Trump administration, even with some rules being rollbacks.

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*The administrative state works to the advantage of agencies that want to maintain vast regulatory edifices.*

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At the end of 2017, overall rules affecting small business stood at 590, a 12 percent drop from 671 the year before. Before the 2013 drop and flat trajectory since then, the number of rules with small-business impacts during the Obama administration regularly exceeded 800, which had not occurred since 2003. Of those 590 rules with small-business impacts, 337 required an RFA, down from the previous year's 412. Another 253 rules were otherwise deemed by agencies to affect small business but not require an RFA, comparable to Obama's last year.

Even though the overall reported number of rules affecting small business is down,

when it comes to the more hefty ones, those requiring an RFA, the average of Barack Obama's eight years, 406, exceeded George W. Bush's eight-year average of 377. Donald Trump's count is well below Bush's average.

Table 9 breaks out the 2017 fall Unified Agenda's 590 rules affecting small business by department, agency, and commission. The Departments of Commerce, Health and Human Services, and Transportation, along with the FCC and the cross-agency Federal Acquisition Regulations, accounted for 324, or 55 percent, of the 590 rules affecting small business.

**Table 9. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Year-End 2017**

	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	114	12	7		5	6	1	31	27.2	
Dept. of Commerce	247	40	14	4	27	4	1	90	36.4	90
Dept. of Defense	193	1						1	0.5	
Dept. of Education	38				2			2	5.3	
Dept. of Energy	87	3	3	3	1		5	15	17.2	
Dept. of Health and Human Services	189	17	7	10	22	4	7	67	35.4	67
Dept. of Homeland Security	123	9	1	9	2	1	5	27	22.0	
Dept. of Housing and Urban Development	42			1	1			2	4.8	
Dept. of the Interior	183	3	1		3	1	1	9	4.9	
Dept. of Justice	68					2	3	5	7.4	
Dept. of Labor	64	1		1	5	1	4	12	18.8	
Dept. of State	64				17		8	25	39.1	
Dept. of Transportation	255	13		3	17	2	12	47	18.4	47
Dept. of Treasury	444	1			21	2	12	36	8.1	
Dept. of Veterans Affairs	79					1		1	1.3	
Agency for International Development	9							0	0.0	
American Battle Monuments Commission	2							0	0.0	
Architectural and Transportation Barriers Compliance Board	3			1				1	33.3	

	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			
Commission on Civil Rights	1							0	0.0	
CPBSD*	3							0	0.0	
Commodity Futures Trading Commission	32	1		1				2	6.3	
Consumer Financial Protection Bureau	29	1	2		3		2	8	27.6	
Consumer Product Safety Commission	29		1	4				5	17.2	
Corp. for National and Community Service	6							0	0.0	
Council of Inspector General on Integrity and Efficiency	2							0	0.0	
Court Sevices/Offender Supervision, D.C.	6							0	0.0	
Defense Nuclear Facilities Safety Board	1							0	0.0	
Environmental Protection Agency	220		2	2				4	1.8	
Equal Employment Opportunity Commission	8				3			3	37.5	
Farm Credit Administration	31							0	0.0	
Federal Acquisition Regulation	43	39	2		2			43	100.0	43
Federal Communications Commission	106	3	3	68			3	77	72.6	77
Federal Deposit Insurance Corporation	29							0	0.0	
Federal Energy Regulatory Commission	17							0	0.0	
Federal Housing Finance Agency	14							0	0.0	
Federal Maritime Commission	4							0	0.0	
Federal Reserve System	29	2						2	6.9	
Federal Trade Commission	20				16	2		18	90.0	
General Services Administration	20	7			7	1		15	75.0	
Institute of Museum and Library Services	1							0	0.0	
National Aeronautics and Space Administration	12							0	0.0	
National Archives and Records Administration	8							0	0.0	
National Credit Union Administration	23							0	0.0	
National Endowment for the Arts	6				2			2	33.3	
National Endowment for the Humanities	4							0	0.0	

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

(continued)

Table 9. Unified Agenda Entries Affecting Small Business by Department, Agency, and Commission, Year-End 2017 (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 Indian Gaming Commission	8							0	0.0	
National Labor Relations Board	1							0	0.0	
National Mediation Board	1							0	0.0	
National Science Foundation	3							0	0.0	
National Transportation Safety Board	8							0	0.0	
Nuclear Regulatory Commission	60	1	1	1				3	5.0	
Office of Government Ethics	6							0	0.0	
Office of Management and Budget	4							0	0.0	
Office of Personnel Management	22							0	0.0	
Office of the Trade Representative	2							0	0.0	
Peace Corps	4							0	0.0	
Pension Benefit Guaranty Corporation	17							0	0.0	
Postal Regulatory Commission	3							0	0.0	
Presidio Trust	4							0	0.0	
Privacy and Civil Liberties Oversight Board	1							0	0.0	
Railroad Retirement Board	4							0	0.0	
Securities and Exchange Commission	85	5	2	8		1	3	19	22.4	
Small Business Administration	29	13	2		2			17	58.6	
Social Security Administration	27							0	0.0	
Special Inspector General for Afghanistan Reconstruction	1							0	0.0	
Surface Transportation Board	10			1				1	10.0	
Tennessee Valley Authority	1							0	0.0	
<b>TOTAL</b>	<b>3,209</b>	<b>172</b>	<b>48</b>	<b>117</b>	<b>158</b>	<b>28</b>	<b>67</b>	<b>590</b>	<b>18.4</b>	<b>324</b>
		<b>337</b>			<b>253</b>					<b>55% of total</b>
<b>Deregulatory</b>	<b>540</b>	<b>28</b>	<b>8</b>	<b>2</b>	<b>37</b>	<b>7</b>	<b>1</b>	<b>83</b>		

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

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

Recall that 540 rules among the Agenda's flow of 3,209 are flagged as deregulatory. Of the 590 rules with small business effects, 83 are deregulatory, distributed as seen in Table 9. The overall proportion of total rules affecting small business stands at 18 percent, but the range varies widely among agencies. (For the numbers of rules affecting small business broken down by department and agency for fall Agendas since 1996, see Appendix: Historical Tables, Part H.)

For additional perspective on the small-business regulatory climate, Box 3 depicts a partial list of the basic, non-sector-specific laws and regulations that affect small business.

## 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. It required the Congressional Budget Office (CBO) to produce cost estimates of mandates affecting state, local, and tribal governments above the then-\$50 million threshold.

### Box 3. 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)

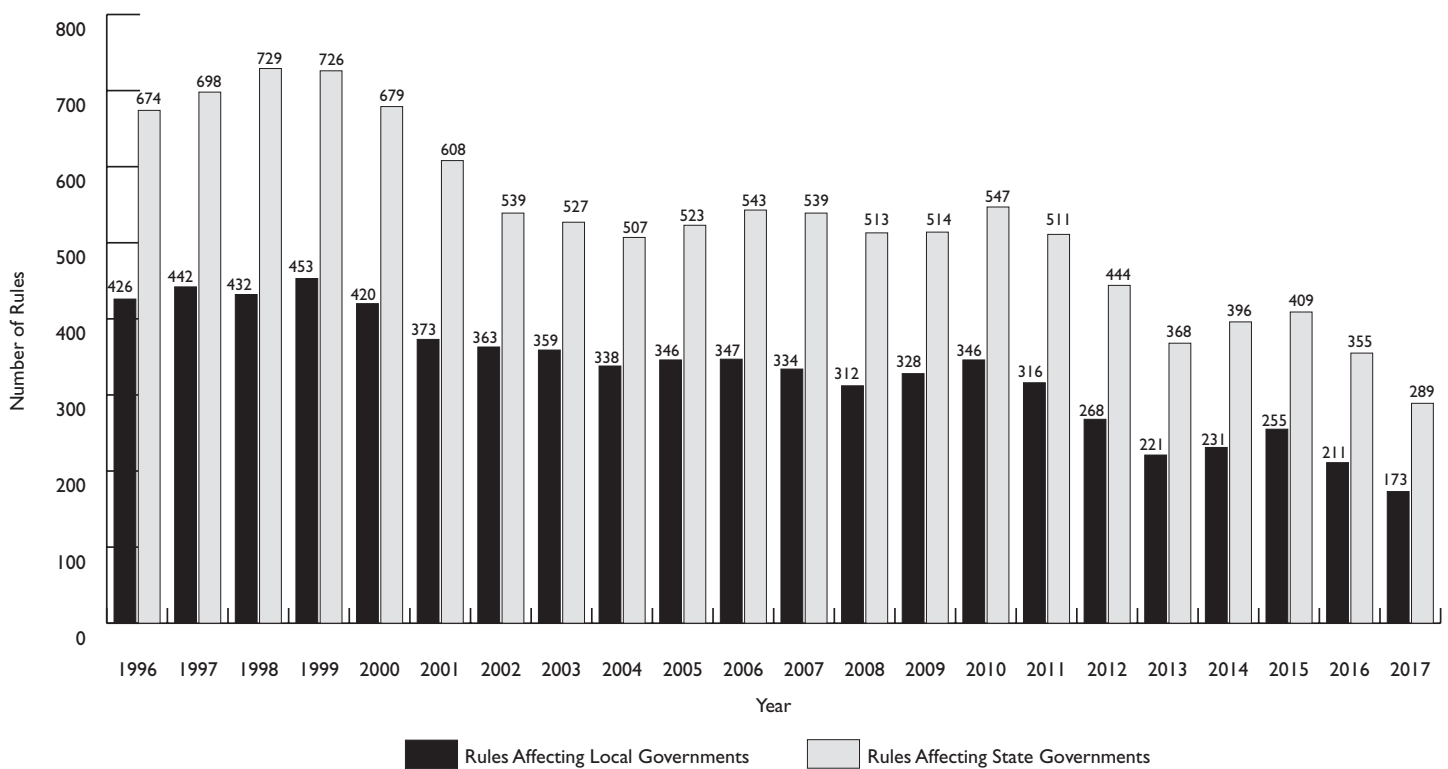
#### **50 EMPLOYEES: ALL THE ABOVE, PLUS**

- 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, 1996–2017



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>.

*State and local officials’ realization during the 1990s that their own priorities were being overridden by federal mandates generated demands for reform.*

As Figure 22 shows, agencies report that 173 of the 3,209 rules in the fall 2017 Agenda pipeline will affect local governments, compared with 211 last year and 255 the year before (this includes all stages, active, completed, and long-term).<sup>164</sup> Since the passage of the Unfunded Mandates Act in the mid-1990s, the number of overall rules affecting local governments has fallen by 67 percent, from 533 to 173, the lowest level over the period.

The total number of regulatory actions affecting state governments stands at 289 (compared with a recent peak of 409 in 2015). Again, the overall pipeline count of active, completed, and long-term rules has been trending downward. The change is even more dramatic for 2017, since about a quarter of rules across the active, completed, and

long-term categories (45 local and 69 state) are deregulatory.

At the 2016 Legislative Summit of the National Conference of State Legislatures (NCSL) in Chicago, the NCSL Standing Committee on Budgets and Revenue issued a resolution on unfunded mandates that asserts, “The growth of federal mandates and other costs that the federal government imposes on states and localities is one of the most serious fiscal issues confronting state and local government officials.”<sup>165</sup> The NCSL calls for “reassessing” and “broadening” the 1995 Unfunded Mandates Reform Act. Likewise, state attorneys general in 2016 wrote to House and Senate leadership over federal agencies’ “failing to fully consider the effect of their regulations on States and state law,” and called for strengthening the Administrative Procedure Act.<sup>166</sup>



In May 2016, the CBO reported that since 2006, 167 laws have imposed mandates on states and localities, with a notable trailing off since 2012.<sup>167</sup> Regulatory mandates can derive from such laws, as well as from agencies acting unilaterally. According to the official data, since 2010, none 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 that very few of the rules in Figure 22 impose unfunded mandates on states and localities.<sup>168</sup> Nonetheless, below is a compilation of some notable or substantial completed or pending regulations since 2009 that federal agencies have acknowledged in the Agenda as unfunded mandates, with their RINs.<sup>169</sup>

### *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/CDC: Establishment of Minimum Standards for Birth Certificates (0920-AA46)
- HHS/CMS: CY 2016 Notice of Benefit and Payment Parameters (CMS-9944-P) (0938-AS19)
- HHS/FDA: Combinations of Bronchodilators with Expectorants; Cold, Cough, Allergy, Bronchodilator, and Antiasthmatic Drug Products for Over-the-Counter Human Use (0910-AH16)
- HHS/FDA: Over-the-Counter Drug Review—Internal Analgesic Products (0910-AF36)

- HHS/FDA: Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents (0910-AG33)

### *Department of Justice*

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

### *Department of Labor*

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

### *Department of Transportation*

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

### *Architectural and Transportation Barriers Compliance Board*

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

### *Environmental Protection Agency*

- 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: 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 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: NESHAP: Portland Cement Notice of Reconsideration and NSPS for Portland Cement (2060-A015)
- EPA/OCSPP: Polychlorinated Biphenyls; Reassessment of Use Authorizations for PCBs in Small Capacitors in Fluorescent Light Ballasts in Schools and Daycares (2070-AK12)
- EPA/OW: National Primary Drinking Water Regulations (2040-AA94)
- EPA/SWER: Standards for the Management of Coal Combustion Residuals Generated by Commercial Electric Power Producers (Coal Ash) (2050-AE81)
- EPA/SWER: Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training (2050-AG46)
- EPA/WATER: Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category (2040-AF14)

### *Nuclear Regulatory Commission*

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