

Regulatory Dark Matter: Over 22,000 Public Notices Annually

Without actually passing a law, government can specify parameters for various industries, including health care, retirement, education, energy production, finance, land and resource management, science and research, and manufacturing. A prominent Obama-era example is the Internal Revenue Service’s granting of waivers of the Patient Protection and Affordable Care Act’s employer mandate without regard to the statute’s language.²³⁷

At least 13,000 guidance documents have been issued since 2008.²³⁸

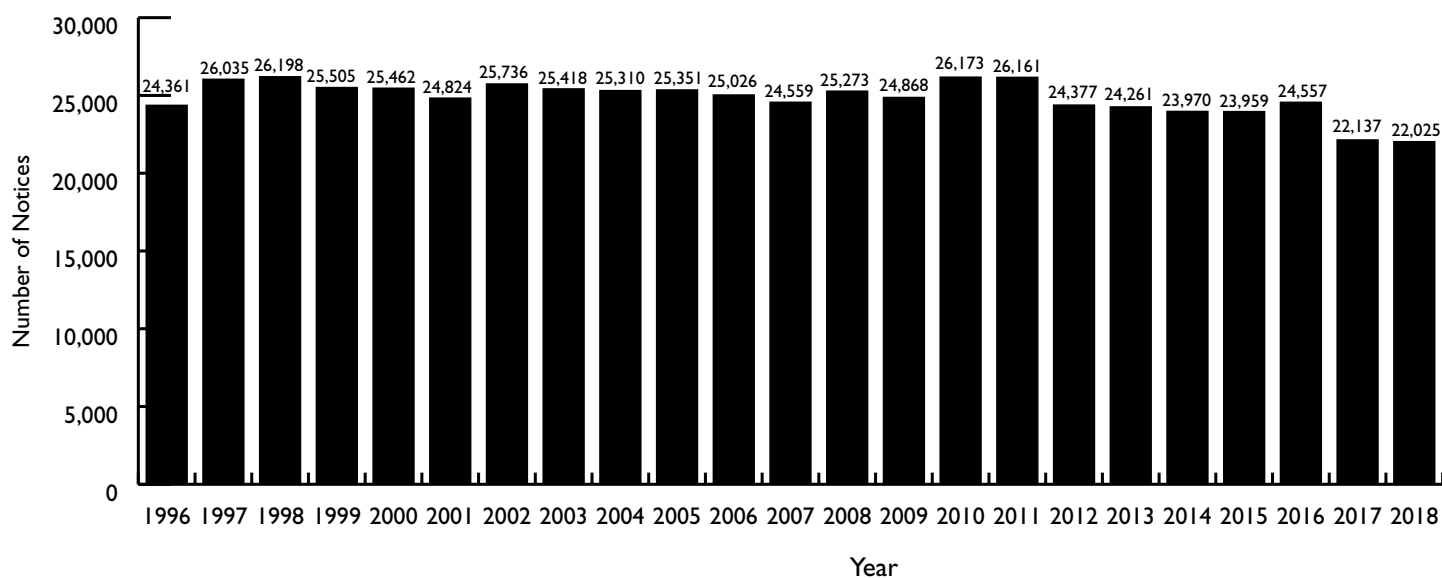
In addition to the *Federal Register’s* tally of some presidential memoranda, public notices in the *Federal Register* typically consist of non-rulemaking documents such as

meeting and hearing notices and agency-related organizational material. But the tens of thousands of yearly public notices can also include memoranda, bulletins, guidance documents, alerts, and other proclamations, many of which may be consequential to the public and which may or may not be published in the *Federal Register*.²³⁹

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

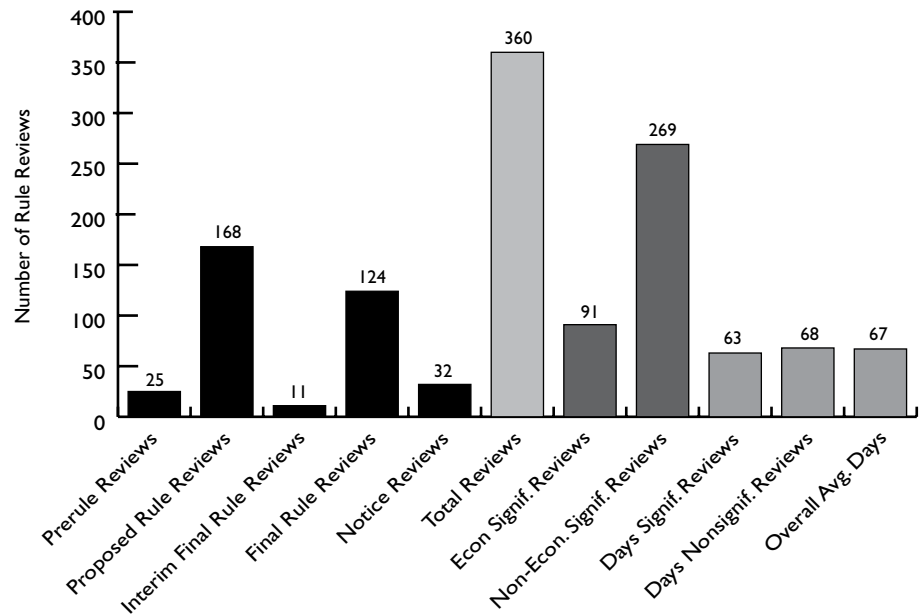
Without passing a law, government can specify parameters for various industries.

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



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

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



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

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Given that many notice-and-comment regulations already lack cost-benefit or other analysis, policy makers should pay greater attention to the “notices” component of the *Federal Register*, given the modern administrative state’s inclination to advance policy by memorandum, notice, letter, bulletin, and other means. Yet much guidance does not appear in the *Federal Register*. Increased unilateral executive proclamations atop “traditional” rules and regulations will render costs and effects of regulation even less transparent than they already are. As the House Oversight Committee detailed in a 2018 report, *Shining Light on Regulatory Dark Matter*, of at least 536 known significant guidance documents issued since 2008, just 328 were submitted to OMB for review.²⁴⁰ Furthermore, while 13,000-plus guidance documents should have been submitted to both Congress and the GAO as required by the Congressional Review Act, only 189 were.²⁴¹

Rule Reviews at OIRA

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

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

A history of the number of rules and notices reviewed annually by OIRA appears in Appendix: Historical Tables, Part D, where a detailed breakdown is presented of numbers of rules reviewed by type and by average days for review from 1991 through 2018. Each category, except prerule reviews, was down significantly between Obama’s last year and Trump’s first two. During the pre-Executive Order 12866 years depicted there, 1991–1993, review times were shorter, although numbers of rules were considerably higher then. During the Trump administra-

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

Tracking effects of rules and regulations, executive orders, memoranda, and other

regulatory guidance is vital. These alternative regulatory actions should receive more scrutiny and oversight, since they have become powerful means of working around the constitutional system of government envisioned by the Framers: legislation made by elected representatives.