Ten Thousand Commandments

An Annual Snapshot of the Federal Regulatory State

2019 Edition

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Executive Summary

Spending control and deficit restraint are indispensable to any nation's long-term economic health. Alarm among conservatives over lack of spending restraint under President Donald Trump's administration,[1] even with the benefit of a healthy economy, has not stemmed disbursements. Without significant changes, more will be spent on debt service than on the entire defense budget.[2] Meanwhile, magical thinking that government outlays create wealth is now fashionable among emboldened progressives who advocate Medicare for All, a Green New Deal, a guaranteed national income, and more.[3] In March 2018, the White House budget proposal requested $4.746 trillion in outlays for fiscal year (FY) 2020, with annual spending projected to top $5 trillion in 2022.[4] Similarly, the Congressional Budget Office's *Budget and Economic Outlook*, covering 2019 to 2029, shows discretionary, entitlement, and interest spending exceeded $4.1 trillion in FY 2018 and projects spending above $5 trillion by FY 2022.[5] The national debt now stands at $22.074 trillion, up more than $1 trillion in only one year.[6]

Yet the cost of government extends even beyond what Washington collects in taxes and the far greater amount it spends. Federal environmental, safety and health, and economic regulations and interventions affect the economy by hundreds of billions—even trillions—of dollars annually. Regulatory burdens can operate as a hidden tax.[7] Unlike on-budget spending, regulatory costs are largely obscured from public view. They are the least disciplined aspects of government activity, which can make regulation overly appealing to lawmakers. Budgetary pressures can incentivize lawmakers to impose off-budget regulations on the private sector rather than add to unpopular deficit spending. For example, a government job training or child care initiative could involve either increasing government spending or imposing new regulations that require businesses to provide such training. Just as firms generally pass the costs of some taxes along to consumers,[8] some regulatory compliance costs and mandates borne by businesses will percolate throughout the economy, finding their way into consumer

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

- Presidential Memorandum. Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing, January 24, 2017.[12]
- Executive Order 13755. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, January 24, 2017.[13]
- Executive Order 13771. Reducing Regulation and Controlling Regulatory Costs, January 30, 2017.[14]
- Executive Order 13772. Core Principles for Regulating the United States Financial System, February 3, 2017.[15]
- Executive Order 13777. Enforcing the Regulatory Reform Agenda, February 24, 2017.[16]
- Executive Order 13781. Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017.[17]
- Executive Order 13777. Identifying and Reducing Tax Regulatory Burdens, April 21, 2017.[18]
- Executive Order 13790. Promoting Agriculture and Rural Prosperity in America, April 25, 2017.[19]
- Executive Order 13792. Review of Designations under the Antiquities Act, April 26, 2017.[20]
- Executive Order 13791. Enforcing Statutory Prohibitions on Federal Control of Education, April 26, 2017.[21]
- Executive Order 13795. Implementing an America-First Offshore Energy Strategy, April 28, 2017.[22]
- Executive Order 13807. Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, August 15, 2017.[23]
- Executive Order 13813. Promoting Healthcare Choice and Competition across the United States, October 12, 2017.[24]
- Presidential Memorandum. Memorandum for the Secretary of the Interior: Supporting Broadband Tower Facilities in Rural America on Federal Properties Managed by the Department of the Interior, January 8, 2018.[25]
- Executive Order 13821. Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America, January 8, 2018.[26]
- Presidential Memorandum. Promoting Domestic Manufacturing and Job Creation—Policies and Procedures Relating to Implementation of Air Quality Standards, April 12, 2018.[27]
- Executive Order 13847. Strengthening Retirement Security in America, August 31, 2018.[28]
- Presidential Memorandum. Promoting the Reliable Supply and Delivery of Water in the West, October 19, 2018.[29]
- Presidential Memorandum. Developing a Sustainable Spectrum Strategy for America's Future, October 25, 2018.[30]
- Executive Order 13855. Promoting Active Management of America's Forests, Rangelands, and other Federal Lands to Improve Conditions and Reduce Wildfire Risk, December 21, 2018.[31]

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

When the U.S. federal administrative state began its growth a century ago, few likely imagined the tangle of rules it would yield and how they would envelop the economy and society. Over several decades, rules have accumulated year after year with little retrenchment. Over the past two years, there were some reversals in this regard, such as a slowdown in the issuing of new rules and some rollbacks initiated of existing ones, but there are still reasons for concern.

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

Government heavily influences society through regulation as well as spending. Therefore, lawmakers should work toward scrupulous tracking and disclosure of regulatory costs and perform some periodic housecleaning. The limited cost-benefit analysis currently undertaken by agencies relies largely on agency self-reporting and covers only a fraction of rules.[32] Regulators are reluctant to acknowledge when a rule's benefits do not justify its costs. In fact, one could expect agencies to devise new and suspect categories of benefits to justify agency rulemaking.[33]

Excess regulation is largely driven by the longstanding delegation by Congress of its rightful lawmaking power to regulatory agencies. Addressing the situation effectively will require the restoration of Congress' duties under Article I of the Constitution. This could take the form of congressional votes on significant or controversial agency rules before they become binding. Getting lawmakers on the record as supporting or opposing specific rules would reestablish congressional accountability and affirm a principle of "no regulation without representation."[34]

Federal regulatory transparency report cards, similar to the presentation in *Ten Thousand Commandments*, could be issued each year to distill information for the public and policy makers about the scope of the regulatory state.[35] Scattered government and private data exist about the number of regulations issued by agencies and their costs and effects. Compiling some of that information can shed light on the scope of the federal regulatory enterprise. That goal is central to the annual *Ten Thousand Commandments* report.

The 2019 edition of *Ten Thousand Commandments* is the latest in an annual series that examines the scope of the federal regulatory state to help illustrate the need for measures like regulatory budgeting and ultimately congressional accountability. This report contains six major elements:

1. A bulleted summary of highlights.
2. An overview of ways the Trump administration has attempted to stem the flow of regulations and roll back old ones and a discussion of Trump's own regulatory impulses that could undermine the effort.
3. An overview of the scope of the regulatory state, including its appraised size compared with federal budgetary components and gross domestic product (GDP).
4. An analysis of trends in the numbers of rules and regulations issued by agencies, based on information provided in the *Federal Register* and in "The Regulatory Plan and Unified Agenda of Federal Regulatory and Deregulatory Actions." This section provides a brief survey of memoranda, notices, and other "regulatory dark matter," and examines implementation of Trump's "one-in, two-out" process for new regulations and its limitations as an executive branch program.
5. Recommendations for reform that emphasize disclosure and improving congressional accountability for rulemaking.
6. An appendix containing historical tables of regulatory trends over past decades.

For the good of the nation's economic health, the regulatory process should be made as transparent as possible and be brought under greater democratic accountability and constitutional norms. Some highlights from the report follow.

- Apart from sector-specific executive orders and memoranda, there are six ways the Trump administration has streamlined regulation so far:
  - Elimination of 15 rules and one guidance document via the Congressional Review Act (CRA);
  - Delay or withdrawal of 1,570 Obama administration rules in the pipeline;
  - Multipronged streamlining of permitting for pipelines, bridges, 5G broadband, rural broadband, and other infrastructure;

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- Agency restraint in initiating large, significant rulemakings;
- Continued progress on the presidential requirement that agencies eliminate at least two rules for every one issued;
- Steps toward addressing agency guidance documents and other subregulatory decrees.

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

Trump's regulatory streamlining could be offset by his actions and comments favorable toward regulatory intervention.

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

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

- President Trump issued 63 executive orders in 2017 and 35 in 2018. From the nation's founding through the Obama administration, more than 15,285 executive orders have been issued. President Obama issued a total of 276, similar to President George W. Bush's 291.
- President Trump issued 38 presidential memoranda in 2017, and 30 in 2018. President George W. Bush published 131 memoranda in the *Federal Register* over his entire presidency, whereas President Obama published 257.
- Public notices in the *Federal Register* normally exceed 24,000 annually, with uncounted guidance documents and other proclamations with potential regulatory effect among them. There were 22,025 notices issued in 2018. There have been 594,651 public notices since 1994 and well over a million since the 1970s.