

# Mapping Washington's Lawlessness 2016

A Preliminary Inventory of  
"Regulatory Dark Matter"

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*By Clyde Wayne Crews Jr.*

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## A Preliminary Inventory of "Regulatory Dark Matter"

by Clyde Wayne Crews Jr.

### Executive Summary

Congress passes and the president signs a few dozen laws every year. Meanwhile, federal departments and agencies issue well over 3,000 rules and regulations of varying significance. A weekday never passes without new regulation. Beyond those rules, however, we lack a clear grasp on the amount and cost of the many thousands of executive branch and federal agency proclamations and issuances, including memos, guidance documents, bulletins, circulars, and announcements with practical regulatory effect. There are hundreds of "significant" agency guidance documents now in effect, plus thousands of other such documents that are subject to little scrutiny or democratic accountability.

Congress passes a few dozen laws every year, while federal agencies issue several thousand "legislative rules" and regulations. The Administrative Procedure Act (APA) of 1946 established the process of public notice for proposed rulemaking, and provided the opportunity for public input and comment before a final rule is published in the *Federal Register*, and a 30-day period before it becomes effective. But the APA's requirement of publishing a notice of proposed rulemaking and allowing public comment does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."

In addition to non-congressional lawmaking, the executive branch often declines to enforce laws passed

by Congress. Most prominent recently was the July 2013 Treasury Department's unilateral delay, first by blog post, then by IRS guidance, of the Affordable Care Act's (ACA) employer mandate and its accompanying tax penalty for non-compliance. Then came the November 2013 declaration—first by the president during a news conference and subsequently in Department of Health and Human Services guidance material—that insurers could continue to sell non-ACA compliant health policies.

It has long been the case that there are far more regulations than laws. That is troublesome enough. But with tens of thousands of agency proclamations annually, agencies may articulate interpretations and pressure regulated parties to comply without an actual formal regulation or an understanding of the costs. No one knows how much the regulatory state "weighs," or even the number of agencies at the center of our bureaucratic "big bang." But for We the Regulated, ignorance of the law is no excuse.

The upshot of regulatory dark matter is that, without Congress actually passing a law or an APA-compliant legislative rule or regulation being issued, the federal government increasingly injects itself into our states, our communities, and our personal lives. This report is a preliminary effort at outlining the scope of this phenomenon. It concludes with steps for Congress to address dark matter and to halt the over-delegation of legislative power that has permitted it.

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## Introduction: From Rule of Law to Rule by...Whatever

*I've got a pen and I've got a phone.*

*And that's all I need.<sup>1</sup>*

—President Barack Obama, to applause from the U.S. Conference of Mayors

Astrophysicists have concluded that ordinary visible matter—the Sun, the Moon, the planets, the Milky Way, the multitudes of galaxies beyond our own, and their trillions of component stars, planets, and gas clouds—make up only a tiny fraction of the universe. How tiny a fraction? Less than 5 percent. Instead, dark matter and dark energy make up most of the universe, rendering the bulk of existence beyond our ability to directly observe.<sup>2</sup>

Here on Earth, in the United States, there is also “regulatory dark matter” that is hard to detect, much less measure.

Congress passes a few dozen public laws every year, but federal agencies issue several thousand “legislative rules” and regulations. The post-New Deal Administrative Procedure Act (APA) of 1946 established the process of public notice for proposed rulemaking, and provided the opportunity for public input and comment before a final rule is published in the *Federal Register*, and a 30-day period before it becomes effective.<sup>3</sup> We have ordinary public laws on the one hand, and ordinary allegedly above-board, costed-out and commented-upon regulation on the other. But the APA’s

requirement of publishing a notice of proposed rulemaking and allowing public comment does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>4</sup> There are varying degrees of both clarity of language and adherence to rule of law for pronouncements that may bind or change behavior:

(1) When issuing rules and regulations, agencies are legally required to adhere to the APA and subsequent strengthening legislation, but many do not. Further, most regulations’ costs and benefits are unknown, so even much of the ostensibly APA-compliant body of rulemaking lacks transparency.

(2) “Dark matter” such as agency and presidential memoranda, guidance documents (“non-legislative” or interpretive rules), notices, bulletins, directives, news releases, letters, and even blog posts may enact policy while flouting the APA’s public notice and comment requirements for legislative rules.<sup>5</sup> They also can escape judicial review. Agencies and bureaus sometimes regulate without writing down anything. Explicit or veiled<sup>6</sup> threats achieve this, as can adverse publicity, whereby an agency issues unfavorable news releases to force compliance from private parties, who are left with no recourse to the courts.<sup>7</sup>

*Agencies  
and bureaus  
sometimes  
regulate  
without  
writing down  
anything.*

“Sub rosa” regulation has long been an issue, and scholars have studied it extensively. In his 1989 book, *Regulation and the Reagan Era*, economist Robert A Rogowski explained:

Regulatory bureaucracies are able to accomplish their goals outside the realm of formal rulemaking. ... An impressive underground regulatory infrastructure thrives on investigations, inquiries, threatened legal actions, and negotiated settlements. ... Many of the most questionable regulatory actions are imposed in this way, most of which escape the scrutiny of the public, Congress, and even the regulatory watchdogs in the executive branch.<sup>8</sup>

Agency guidance documents and directives do not go through ordinary APA processes and are technically supposed to be non-binding, but one ignores them at peril. As the D.C. Circuit famously noted in the 2000 case, *Appalachian Power Co. v. Environmental Protection Agency*:

Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards, and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One

guidance document may yield another and then another and so on. ... Law is made, without notice and comment, without public participation, and without publication in the *Federal Register* or the Code of Regulations.<sup>9</sup>

The upshot of regulatory dark matter is that without Congress actually passing a law or a “normal” APA-compliant legislative rule or regulation being issued, the federal government increasingly injects itself into our states, our communities, and our personal lives on matters such as health care, retirement, labor policy, education policy and funding, finance, critical infrastructure, land access and usage, resource management, science and research funding, energy policy, and frontier manufacturing and technology.

In addition to non-congressional lawmaking, the executive branch often declines to enforce laws passed by Congress. Most prominent recently was the July 2013 Treasury Department’s unilateral delay, first by blog post, then by IRS guidance, of the Affordable Care Act’s employer mandate and its accompanying tax penalty for non-compliance.<sup>10</sup> Then came the November 2013 declaration, first by the president during a news conference and subsequently in Department of Health and Human Services guidance material, that insurers could continue to sell non-ACA compliant health policies.<sup>11</sup> Similarly, the Department of Homeland

Security's policy, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents," was announced in an internal agency memorandum.<sup>12</sup>

President Obama's apparent disdain for Congress has brought about a dark matter apex of sorts. As he said in 2011:

I've told my administration to keep looking every single day for actions we can take without Congress. ... And we're going to be announcing these executive actions on a regular basis.<sup>13</sup>

That stance was reiterated during President Obama's 2014 State of the Union Address, when he pledged to implement a "year of action," with or without Congress.<sup>14</sup> Agency officials have largely gone along in this aggressive off-the-books rulemaking. "One of the ways that the White House plays a role is to think forward and challenge the agencies to be proactive in saying, 'What more can we do? And what more can we do that's consistent with certain themes?'" explained Obama adviser Brian Deese to *USA Today*.<sup>15</sup> *USA Today* also tallied an increase in "fact sheets" highlighting new agency initiatives during the course of the administration, of which there were 224 in 2014, more than the administration's first three years combined.<sup>16</sup> While President Obama

has experienced some backlash over his exercise of executive power, the current dynamic in Washington is still one of Congress responding to the president's legislative agenda rather than the president responding to Congress.<sup>17</sup>

The president is not wholly to blame, though. Congress' over-delegation of its own authority has undermined checks and balances and the principle of separation of powers. Our government's branches seem not to so much to check-and-balance as to leapfrog one another, to ratchet the growth of government upward rather than constrain it to a constitutionally limited role. Cronyism is one thing, but undermining the rule of law and replacing it with officials' whim is the essence of usurpation and ultimately tyranny. When representative lawmaking gets delegated to untethered bureaucrats, the decrees of those autonomous administrators can eventually outweigh normal lawmaking as regulatory dark matter expands. As Congress shirks, the presidential "pen and phone" become easier to deploy.

From federal agency regulations on Internet neutrality<sup>18</sup> to ACA implementation to renewable energy power plans that Congress itself rejected when recorded votes mattered, it appears some in power see the private sector as optional.<sup>19</sup> The rise of dark matter indicates many see the Constitution as optional as well.

*Congress' over-delegation of its own authority has undermined checks and balances and the principle of separation of powers.*



*If nobody knows  
how many  
agencies exist  
by whose decrees  
we must abide,  
that means we  
do not know how  
many people  
work for the  
government nor  
how many rules  
there really are.*

## **The Unknown Number of Federal Agencies Issuing Rules**

As bureaucracy sprawls, no one can say with complete authority exactly how many federal agencies exist.<sup>20</sup> The twice-annual *Unified Agenda of Federal Deregulatory and Regulatory Actions*, which compiles agency regulatory plans in the federal pipeline, listed 60 agencies in the spring 2015 edition,<sup>21</sup> a count that can vary slightly from report to report. The fall 2014 edition, which also contained many agencies' so-called Regulatory Plan, also listed 60.

However, in recent years, the once-routine *Unified Agenda's* April-and-October schedule appears to be a thing of the past, as it has been published late or failed to appear at all, as in spring 2012. Moreover, the Draft 2015 *Report to Congress on the Benefits and Costs of Federal Regulations*, which usually appears by April at the latest, was the latest ever, appearing on October 16.<sup>22</sup> The previous editions were those straddling the two Bush/Obama transition years.<sup>23</sup>

The Administrative Conference of the United States lists 115 agencies in the appendix of its "Sourcebook of United States Executive Agencies,"<sup>24</sup> but notes:

[T]here is no authoritative list of government agencies. For example, FOIA.gov [maintained by the Department of Justice] lists 78 independent executive agencies and 174 components of the executive

departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The United States Government Manual lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.<sup>25</sup>

In a 2015 Senate Judiciary Committee hearing, Chairman Chuck Grassley (R-IA) noted: "The *Federal Register* indicates there are over 430 departments, agencies, and sub-agencies in the federal government."<sup>26</sup> The Senator apparently was citing the Federal Register Agency List, which depicts 438 agencies as of this writing.<sup>27</sup> The online Federal Register Index depicts 257.<sup>28</sup> Table 1 summarizes various tallies.

If nobody knows how many agencies exist by whose decrees we must abide, that means we do not know how many people work for the government (let alone contractors making a living from taxpayers) nor how many rules there really are. But even when we isolate a given, knowable agency, it may be hard to tell exactly what is and is not a rule. That, combined with the growing concern that issuing a rule may not even

**Table 1. How Many Federal Agencies Exist?**

Unified Agenda	60
Administrative Conference of the United States	115
FOIA.gov (at Department of Justice)	252
Federal Register Index page	257
Regulations.gov	289
United States Government Manual	316
Federal Register Agency List page	438

*Much binding law comes from agencies rather than elected lawmakers.*

be necessary to achieve bureaucratic ends, calls out for congressional response. But let us start with what we do know about agency rules.

far in 2015, agencies have issued 2,674 rules, as of October 16, 2015. Looking back 20 years, there have been 84,310 rules since 1995.

### **How Many Rules Do Federal Agencies Issue that We Know About?**

*We've got to fool the fools*

*We got to plan the plans*

*We got to rule the rules*

*We got to stand the stands*

—Pete Townshend, “Face the Face,”

*White City*

Another 2,383 proposed rules appeared in 2014 and are under agency consideration. So far in 2015, agencies have issued 1,947 additional proposed rules (as of October 28).

As Table 2 also shows, a few dozen rules are characterized as “major,” “economically significant,” or “significant.” There are differences between these defined in law and executive orders, but the usual characterization is of at least \$100 million in annual economic impact.<sup>31</sup> Notably, “significant” regulatory actions regularly exceed the number of duly enacted laws.

Much binding law comes from agencies rather than elected lawmakers. Federal departments, agencies, and commissions issued 3,554 rules in 2014, while Congress passed and the president signed 224 bills into law—a ratio of 16 rules for every law.<sup>30</sup> The average has been 26 rules for every law over the past decade as Table 2 indicates. The rules issued in a given year are typically not substantively related to the current year’s laws, since agency output represents ongoing implementation of earlier legislation. So

### **Even When We Can Measure Ordinary Regulatory Matter, Public Protections Lag**

*[A]s more goals are pursued through rules and regulations mandating private outlays rather than through direct government expenditures, the*



**Table 2. Public Laws vs. Agency Rules by Category**

	Year	Public Laws	Total Rules	Econ. Signif. Rules	Major Rules (GAO)	Signif. Rules
<i>We are supposed to be bound solely by laws enacted by Congress and signed by the president, but things do not quite work out that way.</i>	1995	88	4,713			
	1996	246	4,973		42	308
	1997	153	4,584		46	268
	1998	241	4,899	27	76	242
	1999	170	4,684	41	51	231
	2000	410	4,313	35	76	288
	2001	108	4,132	75	69	295
	2002	269	4,167	38	50	284
	2003	198	4,148	38	50	336
	2004	299	4,101	40	65	321
	2005	161	3,975	48	56	258
	2006	321	3,718	48	55	163
	2007	188	3,595	41	61	180
	2008	285	3,830	62	94	427
	2009	125	3,503	70	83	371
	2010	217	3,573	81	100	420
	2011	81	3,807	79	80	444
	2012	127	3,708	57	67	347
	2013	72	3,659	51	79	331
	2014	224	3,554	69	80	290
2015 *	49	2,674		37	223	
<b>TOTALS:</b>		<b>4,032</b>	<b>84,310</b>	<b>900</b>	<b>1317</b>	<b>6027</b>

\*As of 10/16/2015; Blanks are not available at source or database

Sources: Public Laws: Government Printing Office; Total Rules and Significant Rules: author search on FederalRegister.gov advanced search function, economically significant rules; Unified Agenda of Federal Regulations search on RegInfo.gov; Major Rules: Government Accountability Office. *Figures updated at www.tenthousandcommandments.com.*

*Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends.*

—Economic Report of the President (Jimmy Carter), 1980

We are supposed to be bound solely by laws enacted by Congress and signed by the president, but things do not quite work

out that way. Theoretically, thousands of federal agency rules receive scrutiny under the Administrative Procedure Act. Proposed rules are issued, and the public is supposed to have ample time to comment before final rules are published and become binding. Laws amending the APA have sought to subject complex and expensive rules to additional analysis. These reforms include the Paperwork

Reduction Act of 1980,<sup>33</sup> the Regulatory Flexibility Act (to address small business impacts),<sup>34</sup> and the Congressional Review Act (CRA), which enables Congress to vote on a resolution of disapproval to reject agency regulations.<sup>35</sup> In addition, various presidential executive orders govern central review of rules by the Office of Management and Budget (OMB) and address cost-benefit analysis for some rules.<sup>36</sup> Regulatory dark matter can escape these requirements.

To put the dark matter discussion into context, we should note shortcomings in oversight of the ordinary, everyday rules and regulations.

*First*, the central review process at the Office of Management and Budget set up by President Ronald Reagan’s Executive

Order 12291<sup>37</sup> (as well as subsequent executive orders from other presidents) to assure rule benefits exceed costs is incomplete.<sup>38</sup> President Bill Clinton’s 1993 Executive Order No. 12866 eased off the heavier OMB oversight of the Reagan order in that it sought “to reaffirm the primacy of Federal agencies in the regulatory decision-making process.”<sup>39</sup> The process was never thorough—it incorporated only executive agencies, not independent agencies—but today central review captures only a fraction of rulemaking.

During calendar year 2014, when 3,554 rules were finalized by over 60 federal departments, agencies, and commissions, OMB’s 2015 *Draft Report to Congress* reviewed a few hundred significant rules

**Table 3. Major Executive Agency Rules Reviewed by OMB**

Year	Rules with both costs and benefits	Rules with costs only	Grand total, rules with costs	Federal Register final rules
2001	14	13	27	4,132
2002	3	0	3	4,167
2003	6	4	10	4,148
2004	11	7	18	4,101
2005	13	2	15	3,943
2006	7	1	8	3,718
2007	12	4	16	3,995
2008	13	6	19	3,830
2009	16	12	28	3,503
2010	18	8	26	3,573
2011	13	6	19	3,807
2012	14	9	23	3,708
2013	7	11	18	3,659
2014	13	3	16	3,554
<b>TOTALS</b>	<b>160</b>	<b>86</b>	<b>246</b>	<b>53,838</b>

Sources: Costed rule counts, OMB, 2015 Draft Report to Congress on regulatory costs, *Federal Register* Final Rules: author search on FederalRegister.gov advanced search function

*Agencies too often act as if it is practical, necessary, and in the public interest to bypass Congress and make law unilaterally,*

and 54 major rules—but presented net-benefit analysis for only 13.<sup>40</sup> Apart from listing some of their major rules, OMB completely ignores independent agencies, some of which are highly influential, such as the Federal Communications Commission and the several bodies implementing and enforcing the Dodd-Frank law. Table 3 compares OMB reviews with the total final rule count in the *Federal Register* over recent years. Overall, OMB has reviewed just 160 rules since 2001 that happened to incorporate both cost and benefit analysis, and another 86 with cost analysis. While these thousands of rules are all subject to the APA, much is “dark matter” in its own right, in the sense that we know little about costs, benefits, and burdens.

**Second**, the APA process is broken in that agencies fail to issue a Notice of Proposed Rulemaking for a substantial portion of their rules.<sup>41</sup> According to a Government Accountability Office (GAO) report:

Agencies did not publish a notice of proposed rulemaking (NPRM), enabling the public to comment on a proposed rule, for about 35 percent of major rules and about 44 percent of nonmajor rules published during 2003 through 2010.<sup>42</sup>

Agencies often cite the APA’s “good cause” exemption,<sup>43</sup> which in GAO’s sample agencies used “for 77 percent of

major rules and 61 percent of non-major rules published without an NPRM.”<sup>44</sup> Yet, the sky is rarely falling in a way that requires such haste. Rather, agencies too often act as if it is practical, necessary, and in the public interest to bypass Congress and make law unilaterally, compounding the breakdown in accountability embodied in delegation itself.

In their defense, agencies tend to ask for public comments more often than not on final rules for which they had never issued a notice of proposed rulemaking. But that gesture is too little too late, since as GAO notes, “the public does not have an opportunity to comment before the rule’s issuance, nor is the agency obligated to respond to comments it has received.”<sup>45</sup> Reports like the GAO survey appear, and nothing happens to rectify things.

**Third**, Congress rarely uses its most powerful accountability tool, the Congressional Review Act, to pass resolutions of disapproval (RODs) of costly or controversial agency rules. With spotty public notice and inadequate accountability, it is imperative that Congress frequently go on record via such resolutions to push back against agency overreach. The Regulations from the Executive in Need of Scrutiny (REINS) Act, which has passed the House of Representatives but not yet the Senate, would build on the CRA by creating a requirement akin to an affirmative CRA-style resolution. Under the REINS Act, no major rule—costing

\$100 million or more annually—could become effective until Congress explicitly approved it.<sup>46</sup> This is a principle that also should apply to dark matter like agency guidance documents and memoranda.

*Fourth*, even if Congress were inclined to assert its authority, the CRA itself is further undermined by agency lapses. As Curtis W. Copeland found in a white paper prepared for the Administrative Conference of the United States, many final rules are no longer properly submitted by agencies to the GAO’s Comptroller General and to Congress, as required under the CRA.<sup>47</sup>

That submission is indispensable, since Congress awaits reports to issue a resolution of disapproval in the first place. By failing to submit rules, Copeland notes: “[T]he rulemaking agencies have arguably limited Congress’ ability to use the expedited disapproval authority that it granted itself with the enactment of the CRA.”<sup>48</sup> In other words, Congress lacks the raw material it needs to even contemplate a resolution of disapproval. Remedies for this include passing REINS or automating RODs for every final rule.

Technically, the CRA already applies to agency actions like guidance documents that are ostensibly not formal rules. In a 1999 *Administrative Law Review* article, Morton Rosenberg of the Congressional Research Service describes legislative history that shows that the scope of the CRA extends beyond agency rules. Rather, noted Rosenberg, the CRA “intentionally

adopted the broadest possible definition of the term ‘rule’ when it incorporated the APA’s definition,” and was “meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public.”<sup>49</sup> The CRA’s framers recognized the phenomenon of agency strategic avoidance of APA. As Rosenberg notes:

The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically, and noted that it was the intent of the legislation to subject just such documents to scrutiny.<sup>50</sup>

The regulatory bureaucracy is not the only place Washington’s attitude toward the public is to conceal rather than disclose. Misleading unemployment and GDP statistics are often cited to justify increased government spending.<sup>51</sup> Recent news headlines report on inadequate responses by agencies to Freedom of Information Requests, the use of private email for official business, and loss of government emails.<sup>52</sup> Reporters

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*DePaul University law professor David L. Franklin notes: “The distinction between what is binding regulation and what is exempt from notice and comment has been called ‘tenuous,’ ‘baffling,’ and ‘enshrouded in considerable smog.’”*

describe difficulty in accessing federal data.<sup>53</sup> We even find claims in the water-flows-uphill category to justify rulemaking: that switching from fossil energy to more expensive and less reliable “alternative” sources of electricity saves money,<sup>54</sup> that adding regulations creates jobs and growth,<sup>55</sup> that minimum wages do not decrease employment,<sup>56</sup> and that forcing companies to pay for expanded overtime pay helps to grow the middle class.<sup>57</sup>

The Obama administration sports a pen and phone but also a cloak and a lock, even as it calls itself the “most transparent administration in history.”<sup>58</sup> That makes dark matter, although most assuredly not a new phenomenon, more of a concern in the modern era.

### **A Partial Inventory of Regulatory Dark Matter**

*The champions of socialism call themselves progressives, but they recommend a system which is characterized by rigid observance of routine and by a resistance to every kind of improvement. They call themselves liberals, but they are intent upon abolishing liberty. They call themselves democrats, but they yearn for dictatorship. They call themselves revolutionaries, but they want to make the government omnipotent. They promise the blessings of the Garden of Eden, but they plan to transform*

*the world into a gigantic post office. Every man but one a subordinate clerk in a bureau.*

— Ludwig von Mises, *Bureaucracy* (1944)

We can count agency proposed and final rules, and even executive orders and memos, but agency memos, guidance documents, bulletins, and other dark matter are more difficult to broadly grasp and measure. And there is a *lot* of it.

Over-delegation by Congress and non-compliance with the Administrative Procedure Act by agencies are bad enough. But the inability and disinclination to discipline ordinary regulation via the tools purportedly created specifically to ensure that self-restraint—including APA notice-and-comment and OMB central review—is exacerbated by the presence of regulatory dark matter, which escapes constraint. Regulatory compliance costs are often referred to as a hidden tax, but dark matter occupies a class by itself, with its lack of disclosure, supervision, and transparency.<sup>59</sup> Guidance documents, presidential and agency memoranda, and notices and bulletins with legal effect can skirt nearly everything: the constitutional lawmaking process, the APA’s notice-and-comment requirements, and federal OMB review. As DePaul University law professor David L. Franklin notes: “The distinction between what is binding regulation and what is exempt from notice and comment has been called ‘tenuous,’ ‘baffling,’ and ‘enshrouded in considerable smog.’”<sup>60</sup>



What follows represents an initial stab at tallying a snapshot of regulatory dark matter. While not all of these are prescriptive regulations, the cumulative effect of the policy making dark matter is highly significant and burdensome. The bottom line: Our elected Congress needs to reassert its constitutional authority over what rules legitimately affect the public.

### **Executive Orders**

*And though we sung his fame*

*We all went hungry just the same*

—Steely Dan

“Kings,” on the album *Can't Buy a Thrill*.

A song about the transition from Richard the Lionheart to King John, prior to the Magna Carta.

The use of executive orders (EOs) is nothing new historically, dating back to George Washington's administration.<sup>61</sup> They are not strictly dark matter, but they contribute to policy being implemented without Congress doing so explicitly. Executive orders' realm is that of the internal workings and operations of the federal government. While technically orders affect just the current administration and subsequent presidents can overturn them, the complexity of overturning them grows as Washington intervenes into more spheres of private activity. For example, President Obama's executive order for a minimum wage for federal contractors,<sup>62</sup> a Non-Retaliation for Disclosure of Compensation Information decree,<sup>63</sup> and an executive

order on paid sick leave for federal contractors will reverberate for years among private firms that deal with the government.<sup>64</sup> The same is true for orders on cybersecurity information sharing<sup>65</sup> and sanctions on individuals allegedly engaged in malicious cyber activity.<sup>66</sup> Both are controversial not only because of their potential effects on privacy, but also for their not having been passed by Congress.<sup>67</sup> Other Obama EOs have addressed matters internal to executive operations, such as blocking accounts of Russian authorities believed responsible for the Ukrainian crisis.<sup>68</sup>

Obama is far from an EO record-holder. He is no match for Franklin Delano Roosevelt's 3,467 executive orders, among them the seizure of gold.<sup>69</sup> And unlike Harry Truman, he has not attempted to seize steel mills.<sup>70</sup> As of the end of 2014, President Obama had issued 215 executive orders in total, and he has issued 23 in 2015 as of October 16, 2015.<sup>71</sup> Executive orders numbered in the single digits or teens until Abraham Lincoln and the subsequent Reconstruction period. The Ulysses S. Grant administration issued 217, then a record.<sup>72</sup> Beginning in the 20th century, orders topped 100 for each presidential term and sometimes numbered in the thousands (again, FDR). The total since the nation's founding exceeds 15,000.<sup>73</sup> Table 4 lists executive orders issued over the past two decades, showing 777 since 1994, according to the *Federal Register* office;

*The use of executive orders is nothing new historically, dating back to George Washington's administration. They are not strictly dark matter, but they contribute to policy being implemented without Congress doing so explicitly.*

**Table 4. Number of Executive Orders**

	Year	Federal Register Database	White House Tally
<i>In American Banker, an unnamed Justice Department official was quoted as saying, “The system is working and as a result, banks are cutting off processors, processors are cutting off scammers, and scammers are starting to get desperate for a way to access consumers’ bank accounts.”</i>	1995	40	
	1996	50	
	1997	38	
	1998	38	
	1999	35	
	2000	39	
	2001	67	
	2002	32	
	2003	41	
	2004	46	
	2005	27	
	2006	25	
	2007	32	
	2008	29	
	2009	44	39
	2010	41	38
	2011	33	36
2012	39	39	
2013	24	19	
2014	34	29	
2015*	23	20	
<b>TOTALS:</b>	<b>777</b>	<b>220</b>	

As of 10/16/2015

Blanks are not available at source or database

Sources: Author search on FederalRegister.gov advanced search function; Presidential Documents; White House Press Office. *Figures updated at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com).*

the Obama White House lists significant executive orders separately.<sup>74</sup>

Whether lengthy or brief, orders and memoranda can have significant impacts for or against liberty—a smaller number does not necessarily mean small effects. Like the *Federal Register*, or the numbers of final rules, tallies are interesting but do not tell the whole story. The pertinent question is what executive orders and memoranda—and the ones to come now

that the pen and phone are unleashed—are used for and what they do. Executive actions can expand governmental power, or they can liberalize and enhance freedom (think Lincoln’s Emancipation Proclamation). Obama’s Executive Order No. 13563 concerning “Improving Regulation and Regulatory Review” was a pledge to streamline regulation; however it has so far amounted to a few billion dollars in cuts that were swamped by

costs from other rules issued.<sup>75</sup> In all, four of Obama’s executive orders address regulatory liberalization and reform, but their effectiveness has been limited.<sup>76</sup>

Some executive activity that transpires today appears without precedent. *The Washington Post* characterized Obama’s unilateral executive action on immigration as one that “flies in the face of congressional intent—no matter how indefensible that intent looks.”<sup>77</sup> More notable from the “dark matter” perspective is that the president never actually signed such an executive order, and the Department of Homeland Security never published a rule in the *Federal Register*. Rather, a memorandum was issued by Homeland Security Secretary Jeh Johnson.<sup>78</sup>

### **Executive Memoranda**

*USA Today* calls presidential memoranda “[e]xecutive orders by another name” that are “not numbered” and “not indexed.”<sup>79</sup> Memoranda are hard to count, because they may or may not be published, depending on the administration’s own determination of “general applicability and legal effect.”<sup>80</sup>

While presidential memoranda are not new, their quantity has grown significantly in recent years. President Obama’s pace tops that of George W. Bush’s presidency. Bush issued 131 memos that were published in the *Federal Register* over his entire

presidency,<sup>81</sup> while Obama issued 188 during his first six years, with 213 as of October 16, 2015, with another year to go.<sup>82</sup> As noted, not all memoranda get published in the *Federal Register*. Some may appear on the White House press office’s Web page.<sup>83</sup> Indeed, the Obama White House tally is significantly higher than what gets published in the *Federal Register*. Table 5 shows both tallies.

Not all memoranda have regulatory impact, but many do. In 2014, Obama memoranda did such things as create a new financial investment instrument and impose new requirements on government contractors regarding work hours and employment preferences. Note again that these are not laws passed by Congress. They are not regulations. They are not even executive orders. They are memos. Presidential memoranda “hereby direct” someone in the federal hierarchy to do something that often leads to new controls and larger government. They are often aimed at government contractors, which spill over on the private sector or affect private sector planning, and they remain in place unless a future president revokes them. Here are some recent examples among the count above that were documented in the *Federal Register*:

- Student Aid Bill of Rights to Help Assure Affordable Loan Repayment 03/13/2015
- Establishment of the Cyber Threat Intelligence Integration Center 03/03/2015

*Presidential memoranda “hereby direct” someone in the federal hierarchy to do something that often leads to new controls and larger government.*

**Table 5. Number of Presidential Memoranda**

<b>Year</b>	<b>Federal Register Database</b>	<b>White House Tally</b>	<b>Rules with Both Costs and Benefits</b>	<b>Economically Significant Rules</b>
2000	13			35
2001	12		14	75
2002	10		3	38
2003	14		6	38
2004	21		11	40
2005	23		13	48
2006	18		7	48
2007	16		12	41
2008	15		13	62
2009	38	68	16	70
2010	42	70	18	81
2011	19	85	13	79
2012	32	85	14	57
2013	32	52	7	51
2014	25	45	13	69
2015*	25		50	
<b>TOTALS:</b>	<b>355</b>	<b>455</b>		

\*As of 10/16/2015; Blanks are not available at source or database

*Sources:* Author search on FederalRegister.gov advanced search function, Presidential Documents; White House Press Office; Presidential Memoranda.

*Figures updated at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com)*

- Promoting Economic Competitiveness while Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems 02/20/2015
- Expanding Federal Support for Predevelopment Activities for Nonfederal Domestic Infrastructure Assets 01/22/2015
- Modernizing Federal Leave Policies for Childbirth, Adoption, and Foster Care to Recruit and Retain Talent and Improve Productivity 01/15/2015
- Enhancing Workplace Flexibilities and Work-Life Programs 06/27/2014
- Helping Struggling Federal Student Loan Borrowers Manage their Debt 06/12/2014
- Advancing Pay Equality through Compensation Data Collection 04/11/2014
- Updating and Modernizing Overtime Regulations 03/18/2014
- Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color 03/07/2014

- Job-Driven Training for Workers 2/05/2014
- Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and those Facing Financial Difficulty through No Fault of their Own 02/05/2014
- Retirement Savings Security 02/04/2014
- Establishing a White House Task Force to Protect Students From Sexual Assault 01/27/2014
- Establishing a Quadrennial Energy Review 01/14/2014

There are 3,500-plus rules and regulations annually, while OMB presents cost-benefit analyses for just a handful each year of the few hundred it reviews. OMB has reviewed just 160 rules with both cost and benefit analysis since 2001, and another 86 with cost analysis (Tables 3 and 5),

Interestingly, the number of presidential memoranda each year exceeds the numbers of “ordinary matter” rules with OMB-reviewed cost-benefit analyses (Tables 3 and 5). In other words, while administrations often emphasize the alleged “net benefits” of major rules,<sup>84</sup> those few are topped by the number of “mere” memoranda, many of which appear to have significant impacts. The number of memoranda, per the White House tally, can sometimes approach or even exceed that of completed economically significant rules

(\$100 million in annual economic impact) published in the *Unified Agenda* (Tables 2 and 5).

### **Agency Guidance Documents**

*Too often, however, agencies opt for shortcuts. Rather than bothering with the burdensome rule-making process, they use faster and more flexible means of imposing mandates. To avoid running afoul of the letter of the Administrative Procedure Act, these mandates are often couched in tentative, temporary or voluntary terms. Regardless of the language and the format, the effect is the same for regulated entities. The agency suggests that you do something — even if it says that it might suggest something different later — and you do it.<sup>85</sup>*  
—Hester Peirce, Mercatus Center

If we do not measure agency rules well, we most assuredly do not measure agency guidance with anything approaching precision. As noted, the Administrative Procedure Act’s publishing requirement for proposed rulemaking does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>86</sup> Such memos, bulletins, and letters can take up considerable space in the *Federal Register* and on agency websites. The problem is that agencies may issue instructions or new interpretations of existing regulations

*The number of presidential memoranda each year exceeds the numbers of “ordinary matter” rules with OMB-reviewed cost-benefit analyses.*



*While purportedly not legally binding, guidance may be binding “as a practical matter.”*

and pressure regulated parties into complying without issuing an actual formal regulation, much less an estimate of costs or burdens.

While purportedly not legally binding, guidance may be binding “as a practical matter,” as the late George Mason University law professor and chairman of the Administrative Conference of the United States Robert A. Anthony noted in a 1992 *Duke Law Journal* article, given that “failure to conform will bring adverse consequences, such as an enforcement action or denial of an application.”<sup>87</sup> Guidance documents may help agencies circumvent oversight, similar to the “good cause” exemption that already results in notices of proposed rulemaking not being issued for some formal rules. Agencies can also place conditions on their guidance in ways that make it hard to punish them—such as for example, the “contains nonbinding recommendations” caveat that appears throughout the Food and Drug Administration’s (FDA) guidance on “Distributing Scientific and Medical Publications on Unapproved New Uses—Recommended Practices.”<sup>88</sup>

As a July 2012 House Oversight and Government Reform Committee report explained:

Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However ...

they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel forced to comply.<sup>89</sup>

John Graham, former head of OMB’s Office of Information and Regulatory Affairs (OIRA), and James Broughel of the Mercatus Center at George Mason University call this phenomenon “stealth regulation.” They note:

[Guidance documents] Can have the same effects as a regulation adopted under the APA if regulated entities have no realistic choice but to comply with these agency directives. Moreover, agencies can change these directives without notice-and-comment, and because these documents are generally not published in the Code of Federal Regulations, compliance is more costly for firms that must survey an array of sources to determine how to maintain compliance.<sup>90</sup>

Guidance is pervasive. As University of Washington School of Law reference librarian Mary Wisner notes: “[T]he body of guidance documents (or non-legislative rules) is growing, both in volume and in importance.”<sup>91</sup> This paper is an attempt to quantify this mass of sub-rosa regulation. Columbia University law professor Peter Strauss noted (in the same issue of *Duke*

*Law Journal* as Anthony): “Federal Aviation Administration rules are two inches thick while corresponding guidance totals 40 feet; similarly, IRS rules consume a foot of space while supporting guidance documents total over 20 feet.”<sup>92</sup>

Noting that the Congressional Review Act is applicable to guidance and other documents, not merely rules (but alas, has yet to be applied to them), Morton Rosenberg characterized high volume back in 1999. Since most of the material submitted to the Comptroller General per the CRA has been ordinary notice-and-comment regulation, Rosenberg maintained:

It is likely that virtually all the 15,000-plus non-major rules thus far reported to the [Comptroller General] have been either notice-and-comment rules or agency documents required to be published in the *Federal Register*. This would mean that perhaps thousands of covered rules have not been submitted for review. Pinning down a concrete number is difficult since such covered documents are rarely, if ever, published in the *Federal Register*, and thus will come to the attention of committees or members only serendipitously.<sup>93</sup>

Even in the face of such volume, some dispute the notion that recent guidance is meant to circumvent Congress. Connor N.

Raso in the *Yale Law Journal* contends that “agencies do not frequently use guidance documents to avoid the rule-making process.”<sup>94</sup> Raso argues that concerns over guidance are overblown, because the amount of significant guidance documents issued is low compared to APA rules, and agency heads rarely reverse predecessors’ guidance. However, the expansive modern regulatory state is a bipartisan phenomenon and there is no good reason to believe that either party would remove very much guidance upon a change in administration.

Moreover, officially “significant” guidance documents may not capture the extent of guidance that is, in fact, significant. Ohio State law professor Peter Shane defends Raso’s article and the guidance-propelled regulatory state itself.<sup>95</sup> But that gets it backward. If thousands of regulations and directives were not a fact of life, there would exist less of a “need.” As the economics writer Henry Hazlitt noted: “[I]f the government confined itself to enacting a code of laws simply intended to prevent mutual aggression and to maintain peace and order, it is hard to see how such a code would run into any great number of laws.”<sup>96</sup>

Congress has taken an interest in getting clarity on how agencies use guidance and whether agencies regard it as binding, and if so, securing public comment as is done for formal rules.<sup>97</sup> In May 2015,

*The expansive modern regulatory state is a bipartisan phenomenon and there is no good reason to believe that either party would remove very much guidance upon a change in administration.*

Sens. Lamar Alexander (R-Tenn.) and James Lankford (R-Okla.) sent letters to the Departments of Labor, Education, and Health and Human Services, and the Equal Employment Opportunity Commission, stating, “We are concerned that agencies may be issuing guidance to avoid regulatory requirements,” and requesting:<sup>98</sup>

- 1) Alist of all guidance issued on or after July 24, 2007, that have been the subject of a complaint that DOL is not following the procedures outlined in OMB’s Final Bulletin for Agency Good Guidance Practices.
- 2) Alist of all guidance issued on or after July 24, 2007, that have been the subject of a complaint that DOL is improperly treating a guidance document as a binding requirement.
- 3) Alist of all guidance, including guidance not deemed significant, issued on or after July 24, 2007, that have been the subject of a complaint or written comments that DOL should have engaged in APA notice and comment rulemaking instead of issuing guidance.
- 4) Provide the complaints or written comments and all documents and communications referring or relating to the complaints or written comments referenced in requests one through three.

- 5) Alist of guidance issued on or after July 24, 2007, that has been overturned by a court of law, including guidance that has been overturned in which an appeal is pending.
- 6) From July 24, 2007, to present, all documents and communications referring or relating to a decision to issue guidance on a topic instead of proceeding with notice and comment rulemaking under the APA.
- 7) The number of guidance documents issued on or after July 24, 2007, broken down by year, sub-agency, and whether or not the guidance is significant.
- 8) Alist of all guidance currently in draft form and the date the draft was issued.
- 9) Alist of all guidance that has been withdrawn on or after July 24, 2007.

While the Senators requested this information by May 29, 2015, no publicly available response has appeared. On the contrary, concern over bypassing the rulemaking process continues. A September 29, 2015 letter by these and other Senators to the Department of Labor requested withdrawal of three costly recent guidance documents from the Occupational Safety and Health Administration and asked that the Department pursue the changes “only

through the rulemaking process.”<sup>99</sup> In the interim, the Homeland Security and Government Affairs Committee held a hearing on September 23, 2015, “Examining the Use of Agency Regulatory Guidance” featuring representatives from the Departments of Labor and Education.<sup>100</sup> The Government Accountability Office was also on hand to provide testimony on how agencies can strengthen internal controls on guidance documents.<sup>101</sup> Members expressed concern that agencies short-circuit the ordinary rulemaking process and issue guidance when they ought to be issuing formal rulemaking per the Administrative Procedure Act, and that the means by which an agency initiative becomes a rule on the one hand or a guidance on the other is a “black box” that evades Congressional scrutiny.<sup>102</sup>

Guidance documents are subject to CRA review and resolutions of disapproval, but have not been deeply scrutinized in this manner—a clear instance of Congress failing to live up to its oversight duties. Granted, there are instances of agencies performing retrospective review of some of their own guidance documents, but there is little OMB review of how agencies certify those results.<sup>103</sup> Moreover, what constitutes “notice” is unclear. For example, Richard Williams and James Broughel of the Mercatus Center note that of 444 FDA guidance documents issued since 2007, only one notice was reviewed by OMB, and that OMB “is vague as to what documents are included in its

‘notice’ category, saying only that these are documents that announce new programs or agency policies, which presumably includes guidance documents.”<sup>104</sup>

Alongside the aforementioned waivers of provisions of the Patient Protection and Affordable Care Act, prominent recent executive agency guidance documents include:

- The Department of Labor’s blog post and “Administrative Interpretation” informing the public that most independent contractors are now employees.<sup>105</sup>
- The Environmental Protection Agency’s (EPA’s) Clean Water Act interpretive guidance on “Waters of the United States.”<sup>106</sup> This directive took the step of soliciting notice and comment per the APA, though with significant controversy,<sup>107</sup>
- A Federal Aviation Administration rule interpretation on drones via a “Notice of Policy”<sup>108</sup> that temporarily outlawed commercial activity in violation of the APA, before a reversal by the National Transportation Safety Board;<sup>109</sup>
- A flow of Education Department guidance documents, at the rate of one issuance per business day, imposing new mandates on colleges and schools without going through the notice-and-comment process required by the APA;<sup>110</sup>

*Guidance documents are subject to CRA review and resolutions of disapproval, but have not been deeply scrutinized in this manner—a clear instance of Congress failing to live up to its oversight duties.*

- Greater use by the National Labor Relations Board of memoranda that affect non-union employers.<sup>111</sup>

### **Significant Executive Agency Guidance**

With respect to “significant guidance,” some executive, though not independent, agencies make nods toward compliance with a 2007 OMB memo on “Good Guidance Principles”—in effect, guidance for guidance.<sup>112</sup> “Significant” guidance often means that having an economic effect of \$100 million annually, similar to the definition for significant and major rules.<sup>113</sup> In fact, President George W. Bush’s executive order 13422 subjected significant guidance to OMB review.<sup>114</sup> President Obama’s EO 13497 revoked that requirement early in his presidency, but in March 2009, then-OMB Director Peter Orszag issued a memo to “clarify” that “documents remain subject to OIRA’s review under [Clinton] Executive Order 12866.”<sup>115</sup>

With conspicuous exceptions such as the Departments of Energy, Housing and Urban Development, and Health and Human Services (HHS), some agencies not only continue to invoke the 2007 OMB memo, but follow its directive of maintaining Web pages devoted specifically to their “significant guidance,” even though it is a suggestion rather than a command. Indeed the FDA confesses no “significant guidance,” even though there are 1,184 pieces of acknowledged final guidance from FDA.

Table 6 lists a running inventory of significant guidance documents based largely upon these scattered executive department and agency websites.<sup>117</sup>

There are 580 significant guidance documents in total in this compilation (as of August 2015).<sup>118</sup> The EPA’s 206 significant guidance documents dominate the tally.

Reporting quality from executive agencies varies, as does the length of documents and the number and nature of mandates contained within guidance. Some agencies, such as several U.S. Department of Agriculture (USDA) and HHS sub-units, maintain online landing pages dedicated to significant guidance, but claim none to report. Sometimes an agency sub-unit, like the Office of Diversion Control at the Department of Justice, will present own set of guidance documents not noted by the parent agency.<sup>119</sup> Similarly, the Federal Emergency Management Agency within the Department of Homeland Security lists guidance documents under several sub-agencies. Some, like the FDA’s Office of the Inspector General, report no guidance that rises to the level of significance,<sup>120</sup> yet it hosts other Web pages presenting certain public guidance.<sup>121</sup> Some agencies feature sophisticated search engines (FDA, although it fails to flag significance); some present detailed itemizations (EPA, Interior); some host descriptive Web pages and list guidance documents on a separate pdf file (Education). Other times, guidance may rise to the level of



**Table 6. Significant Guidance Documents in Effect: A Partial Inventory  
Executive Departments and Agencies**  
(As of August 2015)

<b>Department of Agriculture</b>		<b>Department of Justice</b>	
Economic Research Service	4	Antitrust Division	2
Food and Nutrition Service	4	Civil Rights Division	10
U.S. Forest Service	7	Drug Enforcement Administration	8
Food Safety and Inspection Service	17	Office of Justice Programs	10
<b>USDA Total</b>	<b>32</b>	U.S. Trustee Program	3
		<b>DoJ Total</b>	<b>33</b>
<b>Department of Commerce</b>		<b>Department of Labor</b>	
Patent and Trademark Office	3	Employment and Training	
		Administration	34
<b>Department of Defense</b>	1	Mine Safety and Health	
		Administration	2
<b>Department of Education</b>		<b>Total</b>	<b>36</b>
Adult Education	2		
American Recovery and Reinvestment		<b>Department of Transportation</b>	
Act of 2009	12	Office of the Secretary	11
Career and Technical Education	11	Federal Aviation Administration	38
Civil Rights	28	Federal Transit Administration	7
Elementary and Secondary Education	61	Maritime Administration	7
Grants and Contracts	1	National Highway Traffic Safety	
Higher Education	4	Administration	1
Special Education	21	<b>DOT Total</b>	<b>64</b>
<b>DoE Total</b>	<b>140</b>		
		<b>Department of the Treasury</b>	2
<b>Department of Health and Human Services</b>			
Centers for Disease Control		<b>Environmental Protection Agency</b>	
and Prevention	1	Office of Air and Radiation	60
		Office of Chemical Safety	
<b>Department of Homeland Security</b>		and Pollution Prevention	39
National Infrastructure Protection Plan	1	Office of Environmental	
U.S. Citizenship and Immigration Services	26	Information	3
U.S. Coast Guard	7	Office of Solid Waste and	
Federal Emergency Management Agency	12	Emergency Waste	50
Transportation Security Administration	12	Office of the Science Advisor	19
<b>DHS Total</b>	<b>58</b>	Office of Water	20
		Regional Office	15
<b>Department of the Interior</b>		<b>EPA Total</b>	<b>206</b>
Surface Mining Reclamation and Enforcement	2		
Fish and Wildlife Service	2	<b>TOTAL</b>	<b>580</b>
<b>DoI Total</b>	<b>4</b>		

*(Full chart and updates at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com))*

*While an agency may choose not to trouble itself determining significance, those affected do not have that luxury.*

significance, but it is up to the reader to figure it out. For example, at the Centers for Medicare and Medicaid (CMS) services, we are told of thousands of pieces of guidance:

CMS issues thousands of new or revised guidance documents annually and cannot make individual decisions on each as to whether it is “significant” as defined under the Executive Order (e.g., annual effect of \$100 million or more on the economy). At present, there are approximately 37,000 documents on the CMS Web site and many, perhaps most of these, include guidance.<sup>122</sup>

While an agency may choose not to trouble itself with determining significance, those affected do not have that luxury. While Table 5 understates significant guidance counts, since some agencies do not report at all, and those that do self-report, it still serves as an inventory of some of what we know, and as an exercise in showing policy makers and interested parties *what we do not know*. For example, while the Centers for Medicare and Medicaid Services acknowledges thousands of directives of indeterminate impact, GAO noted in 2015 that four agencies issue between 10 and 100 guidance documents per year.<sup>123</sup> The Department of the Interior, which issued 94 rules in 2014, boasts that the Fish and Wildlife Service, one of its several agencies, usually publishes more than 500 *Federal Register*

documents annually.”<sup>124</sup> Given all the agency disclaimers and qualifications, no representations of completeness are made here.<sup>125</sup> Indeed, the EPA offers no warranties of completeness: “Please be aware that the lists do not include every guidance document issued by EPA. They only encompass those documents that are ‘significant’ as defined by the GGP Bulletin.” The OMB order is not strictly binding, yet the EPA does solicit public comment, and that is a stance policy makers can build upon.<sup>126</sup>

During the 10-year period 2005-2014, OMB reported: “Federal agencies published 36,457 final rules in the *Federal Register*.” OMB reviewed 2,851 of these, among which 549 were considered major.<sup>127</sup> While guidance specifically deemed “significant” seems comparable to the number of major rules, agencies like Interior and CMS maintain document flows that rival or outpace rulemaking, so Congress needs to pay more attention to guidance documents, whether they are deemed significant or not.

Even a small number of guidance documents can have a significant impact. The Justice Department’s Antitrust Division has only two documents classified as significant guidance documents, but other important DOJ policy statements, guidance documents, and notices affect such matters as cybersecurity, joint ventures, intellectual property, health care, and mergers.<sup>128</sup> Many of these are economically significant

for those affected. Until Congress requires consistency in guidance reporting, what agencies publicly disclose as guidance in response to the 2007 OMB memo will remain haphazard.

Moreover, sound future reporting will need to make distinctions. Guidance directed at agency procedures gets lumped in by those complying with the 2007 memo, such as the National Archives compilation of guidance pertaining to the release of classified information.<sup>129</sup> Other guidance affecting agencies can be noteworthy, such as numerous OMB privacy guidances to federal agencies over the years.<sup>130</sup>

### ***Significant Independent Agency Guidance***

Independent agencies sometimes compile guidance on websites, though they are not required to list their guidance documents under the 2007 OMB directive. The U.S. Equal Employment Opportunity Commission maintains a Web page where it lists its significant guidance documents (23 entries as of this writing).<sup>131</sup> An example of these is the EEOC's guidance to employers on the accommodation of pregnancy.<sup>132</sup> Among other agencies, there is the Federal Trade Commission's page of "Advisory Opinions" issued "to help clarify FTC rules and decisions,"<sup>133</sup> as well as its page detailing "Guidance,"<sup>134</sup> a recent example of which was advertising guidance on disclosure of paid search engine results.<sup>135</sup> The Consumer Financial

Protection Bureau has published numerous guidance documents and further ominously invites the regulated public to contact the Office of Regulations "to receive informal guidance from a staff attorney."<sup>136</sup>

While not formal rules, guidance from independent agencies often carries veiled warnings that you better pay attention. The Federal Housing Finance Agency (FHFA), for example, issues guidance with the standard caveat: "Although an Advisory Bulletin does not have the force of a regulation or an order, it does reflect the position of FHFA on the particular issue and is followed by supervisory staff."<sup>137</sup>

In the wake of the Dodd-Frank financial law, banking agency guidance in particular is on the rise. One industry newsletter noted:

The pace in which banking agencies are issuing guidance appears to have increased considerably since the economic downturn. There have been well over 20 significant pieces of interagency guidance issued just since 2010, including those covering appraisal and evaluations, concentration risk, interest rate risk management, and troubled debt restructurings. This does not even include the stand-alone guidance that agencies unilaterally issue in the form of financial institution letters (FDIC), bulletins (Office of the Comptroller of the Currency)

*Until Congress requires consistency, what agencies publicly disclose as guidance will remain haphazard.*

and supervision and regulation letters (Federal Reserve Board).<sup>138</sup>

The Federal Reserve Bank of St. Louis compiles itemized lists of federal banking guidance it deems “significant” (in addition to lists of standard notice-and-comment regulation).<sup>139</sup> While this characterization of “significant” will not necessarily conform to the 2007 OMB memo nomenclature, the current tally of 69 guidance documents appears summarized nearby in Table 7. Note that some financial sector guidance is multi-agency (The Treasury Department, an executive agency, is listed here for completeness).

Note that this compilation represents a handful of pieces of “significant” banking guidance. The Federal Agency Guidance Database from the Conference of State

Bank Supervisors contains a far larger number of other financial sector items like directives, manuals, notices, announcements, and more from numerous agencies.<sup>140</sup> Yet there is even more dark matter from both executive and independent agencies.

**Notices and Other Things that Are Not Quite Regulations that May or May Not Bind the Public**

*[W]hen I am 100 percent utterly and completely certain that it is an absolute certainty that it is an absolute necessity that I need to recruit a new employee, I go to bed, sleep well and hope that the feeling has gone away by the morning.*

—A British businessman lamenting French labor regulations.<sup>141</sup>

**Table 7. Independent Agency Significant Guidance: A Partial Inventory (As deemed significant by the St. Louis Fed)**

Commodity Futures Trading Commission	2
Consumer Financial Protection Bureau (CFPB)	12
Federal Deposit Insurance Corporation (FDIC)	11
Federal Financial Institutions Examination Council (FFIEC)	2
Federal Housing Finance Agency	2
Office of the Comptroller of the Currency (OCC)	29
Securities and Exchange Commission	5
Treasury Department	1
FDIC/Board of Governors of the Federal Reserve System (FRS)	1
FDIC/FRS/OCC	6
FDIC/FRS/National Credit Union Administration (NCUA)/OCC	1
FDIC/FinCEN/FRS/NCUA/OCC	1
CFPB/FDIC/FFIEC/FRS/NCUA/OCC	1
<b>TOTAL (As of 10/14/2015):</b>	<b>74</b>

House Majority Leader Kevin McCarthy (R-Calif.) was called out by *The Washington Post's* fact checker, for claiming in January 2015 that there were 300 federal rules issued in just a week.<sup>142</sup> He quickly corrected and noted a staffer's blunder in counting notices and proposed rules alongside final rules. But that only raises the question: How can we measure, much less bring under control, the effects of tens of thousands of notices, guidance documents, memos, and other regulatory dark matter when it is so difficult just to determine their actual number?

You read right, tens of thousands. The emphasis so far has been on significant guidance, but there is much more agency dark matter beyond significant guidance. It is worth keeping in mind that the denial of significance is a prerogative agencies already exercise liberally for ordinary APA notice-and-comment rules.<sup>143</sup>

Like major rules that are treated as non-major but are in fact major in a real-world sense, guidance that is actually significant but not treated as such could be buried among heaps of notices. OMB is not clear on this.

The FDA's search page on guidance documents, for example, illuminates much more going on below the surface. While the agency reports no officially "significant" guidance, under the "document type" heading, we find not just ordinary guidance documents for which one may search, but also:

- Agreement
- Bulletin
- Compliance Policy Guide
- Concept Paper
- Industry Letter
- Information Sheet
- Manual
- Memorandum
- Small Entity Compliance Guide
- Special Controls Document

However, this, is just one agency's inventory of Things that Are Not Quite Regulations. On the regulations.gov website, dozens of document sub-types in addition to rules and notices of rulemakings appear:<sup>144</sup>

- Denial of Application
- Action Memo/Letter
- Adjudication
- Advisory Opinions
- Agreement/Contract
- Analysis
- Approval
- Audit
- Brief
- Certification
- Clarification
- Comment Response
- Company/Organization Comment
- Complaint
- Consent Decree
- Consent Order
- Data
- Decision
- Decree
- Delay of Effective Date

*How can we measure, much less bring under control, the effects of tens of thousands of notices, guidance documents, memos, and other regulatory dark matter when it is so difficult just to determine their actual number?*



*The total count for notices since 1994 has been 517,812. That is over half a million in 20 years.*

Determinations  
Early Comment  
Economic Analysis  
Environmental Assessment  
Environmental Impact Statement  
Evaluation  
Exemption  
Extension of Comment Period  
Fact/Data Sheet  
Findings of Fact  
Guidance  
Hearings  
ICR Supporting Statement  
Industry Circular  
Information Collection Request  
Interagency Review  
Letter  
Management Directive  
Meeting  
Meeting Materials  
Memorandum  
Motion  
Notice of Adequacy  
Notice of Approval  
Notice of Data Availability  
Notice of Filing  
Notice of Intent  
Notice of Receipt of Petition  
Order  
Permit/Registration  
Petition  
Policy  
Press Release  
Public Announcement/Notice  
Procedure  
Public Comment  
Public Hearing Deposition/Testimony  
Public Participation  
Publication

Report  
Request for Comments  
Request for Grant Proposals  
Risk Assessment  
Settlement Agreement  
Significant Guidance  
Study  
Supplement  
Technical Support Document  
Waivers  
Withdrawal  
Work Plan

This wide gamut of nomenclature captures the magnitude of the matter. Determining what is binding is a challenge, to put it mildly. Table 8 shows annual counts, which stood at 23,970 in 2014, and have otherwise topped 24,000 since 1995. The total count for notices since 1994 has been 517,812. That is over half a million in 20 years.

To what extent do notices get review or oversight? While it is unclear what the criteria are, a portion get reviewed at OMB as if they were the same as notice-and-comment rules, and some notices are even deemed “significant” under EO 12866. As Table 8 shows, at least a few dozen notices rise to the level of receiving OMB review during each calendar year, with around half that many deemed “significant.” All in all, since 1994, OMB says it has reviewed 955 notices, of which 483 were significant. In addition, 126 have been flagged “economically significant” (however, entries of this type abruptly halted in October 2014).<sup>145</sup>

But what criteria may trigger review of notices and the application of these particular categories is not specified. “The OIRA website is vague about what constitutes a notice,” former OIRA Administrator John Graham and James Broughel note: “More clarity about what constitutes guidance notices worthy of review would be valuable.”<sup>146</sup>

Oversight matters. The number of notices, *Federal Register* pages, and final rules

dropped significantly following President Reagan’s EO 12291, before starting to rise again.<sup>147</sup> The “other” documents category in the *Federal Register* (which included these notices plus presidential documents) had been as high as 33,670 in 1980.<sup>148</sup> During the late 1980s, the tally hovered at a considerably lower 22,000 annually.<sup>149</sup> Since 1976, there have been well over 994,791 “other” documents or notices, which means they on pace to surpass the million mark by year-end 2015.<sup>150</sup> There is no coordinated

**Table 8. . Public Notices in the *Federal Register***

	<b>Total Notices</b>	<b>OMB Reviews</b>	<b>Significant Rules Under EO 12866</b>	<b>Economically Significant Rules</b>
1995	23,162	53	18	4
1996	24,367	31	24	3
1997	26,033	51	21	9
1998	26,197	40	22	3
1999	25,505	36	24	4
2000	25,470	40	30	2
2001	24,829	37	24	10
2002	25,743	55	36	9
2003	25,419	59	35	7
2004	25,309	58	23	9
2005	25,353	59	18	8
2006	25,031	46	18	8
2007	24,476	25	12	2
2008	25,279	28	25	6
2009	24,753	49	22	8
2010	26,173	77	34	17
2011	26,161	61	31	4
2012	24,408	40	19	6
2013	24,261	37	22	2
2014	23,970	46	18	4
2015*	19,054	27	7	0
<b>TOTALS:</b>	<b>517,812</b>	<b>955</b>	<b>483</b>	<b>126</b>

\*As of 10/16/2015; Figures updated at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com). Sources: Total Notices and Number of “Significant” Notices under EO 12866: author search on [FederalRegister.gov](http://FederalRegister.gov) advanced search function; number of OMB Reviews: author search on [RegInfo.gov](http://RegInfo.gov), review counts database search engine under Regulatory Review heading.

*There is no coordinated congressional or executive branch effort to identify the regulatory dark matter embedded within the thousands of agency notices, but that is exactly what is needed.*

congressional or executive branch effort to identify the regulatory dark matter embedded within the thousands of agency notices, but that is exactly what is needed.

At the individual agency level, some guidance and notice material gets listed on cabinet agency websites much like OMB-compliant significant guidance does. For example, the USDA's Animal and Plant Health Inspection Service has no online tally of significant guidance, but does post numerous "Manuals and Guidelines."<sup>151</sup> Further examples include the "Advisory Opinions" page from the Department of Commerce's Bureau of Industry and Security,<sup>152</sup> the "Agency Guidance" page from the Department of Transportation's Pipeline Safety and Hazardous Materials Safety Administration,<sup>153</sup> the Department of Energy's "Policy and Guidance" page,<sup>154</sup> and the Department of Housing and Urban Development's "Public Guidance Documents" page on real estate settlement regulations.<sup>155</sup>

Beneath agency guidance not officially deemed significant, we descend the great regulatory chain of being to such diktats as "circulars" at the Federal Transit Administration,<sup>156</sup> "policy statements" at Federal Energy Regulatory Commission,<sup>157</sup> and "Warning Letters" to businesses from the FDA.<sup>158</sup> One pointed warning letter can change firms' behavior, such as the FDA's calling out of a company for making health claims about nuts,<sup>159</sup> and its warning to the genetic testing company 23andMe to

halt marketing of its Saliva Collection Kit and Personal Genome Service for failure to secure premarket approval.<sup>160</sup> Agencies issue *hundreds* of such letters.

And it continues. For independent agencies not obliged to obey even the loose bounds of the OMB Good Guidance Principles memo, there are numerous forms of guidance. These include:

- The Consumer Financial Protection Bureau's "Guidance Documents;"<sup>161</sup>
- The Federal Deposit Insurance Corporation's "Supervisory Guidance" page<sup>162</sup> (as well as a page of numerous "Financial Institution Letters;"<sup>163</sup>
- The Commodity Futures Trading Commission's "Staff Letters"<sup>164</sup> and "Opinions and Adjudicatory Orders;"<sup>165</sup>
- The Federal Housing Finance Administration's "Advisory Bulletins;"<sup>166</sup> and
- The Consumer Product Safety Commission Office of General Counsel's "Advisory Opinions,"<sup>167</sup> "Voluntary Standards,"<sup>168</sup> and "Recall Guidance."<sup>169</sup>

Among dark matter, "Sue and settle" orders expand government's power and size without congressional oversight, or even the APA's weak discipline.<sup>170</sup> These consent and settlement agreements "commit ... the agency to actions that haven't been publicly scrutinized," as Senate Judiciary Committee Chairman

Grassley remarked in June 2015 upon introducing legislation to “shine light on these tactics and provide much-needed transparency before regulatory decisions are finalized.”<sup>171</sup> Tallies of enforcement actions and administrative law rulings are worth further study in the context of the overall regulatory state, especially given the development that substantial recent agency rulemakings have been overturned by courts.<sup>172</sup>

In the previous section, we noted 69 pieces of “significant” financial agency guidance as compiled by the St. Louis Fed, primarily from executive agencies. The Conference of State Bank Supervisors’ federal guidance database lists a greater collection of bulletins, directives, manuals, notices, announcements, and more from several financial agencies such as the

Consumer Financial Protection Bureau.<sup>173</sup> Table 9 shows these 1,445 items in effect as of August 2015.

Many notice-and-comment regulations already lack impact analysis. Notices, memos, bulletins, guidance, and the like number in the thousands and deserve policy makers’ attention. We have highlighted over 1,400 affecting the financial sector alone, but there are many tens of thousands of documents in play across the economy.

### **The Dark Energy of the Regulatory Process: When Fewer Regulations Mean Less Freedom**

*To limit abuse by the rulers, ancient Rome wrote down the law and permitted citizens to read it. Under Dodd-Frank, regulatory authority is*

**Table 9. Financial Agency Directives: A Partial Inventory Compiled by the Conference of State Bank Supervisors**  
*All guidance published by the Federal Financial Regulatory Agencies*

Consumer Financial Protection Bureau	49
Financial Accounting Standards Board	56
Federal Deposit Insurance Corporation	225
Federal Reserve Board	370
Federal Financial Institutions Examination Council	56
Federal Housing Finance Agency	32
Financial Crimes Enforcement Network	204
Office of the Comptroller of the Currency	192
Office of Thrift Supervision	48
Securities and Exchange Commission	38
Treasury Department	175
<b>TOTAL (As of 10/14/2015):</b>	<b>1,445</b>

*As government grows to encompass more spheres of activity—from health care to finance to the Internet—agencies will be able to issue fewer written rules yet still expand control.*

*now so broad and so vague that this practice is no longer followed in America. The rules are now whatever regulators say they are.*<sup>174</sup>

– Former Texas Senator Phil Gramm

Policy makers routinely debate regulatory costs, but regulatory dark matter’s consequences can escape measurement, undermining efforts to fully assess the impact or cost of regulatory intervention. No one really knows what the regulatory state “weighs.” For example, the federal government’s running of Social Security, on top of trust fund sleight-of-hand, is not counted as a cost of intervention. Yet there is a substantial cost in the extra wealth people could have accumulated through investing, and in the inability to bequeath an estate to heirs after a lifetime of garnishment. Yet government says it needs more control to deal with the income inequality it has in no small measure helped cause.

In other words, as government grows to encompass more spheres of activity—from health care to finance to the Internet—agencies will be able to issue fewer written rules yet still expand control. They will not need a law from Congress, notice-and-comment rules, or perhaps even interpretive guidance or memos. In an instant classic example, consider the *Credit Union Times*’ warning to the industry about the Dodd-Frank financial law’s unfair, deceptive, or abusive acts and practices (UDAAP) provisions:<sup>175</sup>

UDAAP does not have any implementing regulations and it probably never will. In fact, CFPB Director Richard Cordray said the bureau will not issue any regulations that define exactly what actions or practices violate the law. ... So how will a bank, credit union or other financial services provider know if it has violated the law?

As modern bureaucracies take this stance, “law” can become even more arbitrary and less democratic than the dark matter itself. The Consumer Financial Protection Bureau tells regulated parties: “You can contact our Office of Regulations to receive informal guidance from a staff attorney about the Bureau’s regulations. ... Any such informal guidance would not constitute an official interpretation or legal advice.”<sup>176</sup> Who will not obey?

Another alarming example of the descent into arbitrary, unwritten lawmaking influencing an entire sector of the economy is the Federal Communications Commission’s order on net neutrality. Here we see the unprecedented use of “advisory opinions” that threaten the industry’s autonomy and capacity to innovate.<sup>177</sup>

We conclude that use of advisory opinions similar to those issued by DOJ’s Antitrust Division is in the public interest and would advance the Commission’s goal of providing legal certainty. Although the Commission historically has not



used advisory opinions to promote compliance with our rules, we conclude that they have the potential to serve as useful tools to provide clarity, guidance, and predictability concerning the open Internet rules. *Advisory opinions will enable companies to seek guidance on the propriety of certain open Internet practices before implementing them*, enabling them to be proactive about compliance and avoid enforcement actions later. The Commission may use advisory opinions to explain how it will evaluate certain types of behavior and the factors that will be considered in determining whether open Internet violations have occurred. [Emphasis added]

In effect, the FCC has chosen to regulate tomorrow's Internet as if it were yesterday's common carrier utility. Companies will be reduced to checking with the commission first before conducting business; no laws need to be passed by Congress, and no further APA-compliant rules need to be issued by the agency for it to be able to exert control over the Internet industry's future. This regime will start with infrastructure firms, but is guaranteed to eventually encompass the content and app sectors despite the FCC's assurance to the contrary.<sup>178</sup>

Another case of tomorrow's rules being whatever rulers say is the Operation

Choke Point initiative. Originating in President Obama's Financial Fraud Enforcement Task Force within the Department of Justice, it is an apparent intimidation campaign aimed at pushing banks to cut off services to legal but politically disfavored businesses like pawn shops and gun stores. There was no law or executive order, no written regulations issued—just lists of targeted types of businesses, threats against those businesses, and pressure on their banks.<sup>179</sup>

Alarming as such developments are, the arbitrariness they embody is not new. Antitrust intervention—or the threat of it—has derailed business deals and redirected economic resources and investment for over a century. The scale, though, is new. Only certain politically connected firms, protected from competitive processes, will be able to thrive in such a system.

If the universe's dark energy is “a force that repels gravity,” in the policy realm it might be regarded as a force that repels liberty.<sup>180</sup> In much the way dark matter is crucial to understanding the universe, understanding and curbing the proliferation of regulatory dark matter is now central to the preservation of economic liberty.

## Conclusion and Recommendations

*The accumulation of all powers,  
legislative, executive, and judiciary,  
in the same hands, whether of one,  
a few, or many, and whether hereditary,*

*The FCC has  
chosen to  
regulate  
tomorrow's  
Internet as  
if it were  
yesterday's  
common  
carrier utility.*

*self-appointed, or elective, may justly be pronounced the very definition of tyranny.*<sup>181</sup>  
—James Madison, *Federalist* No. 47.

*If the universe's dark energy is "a force that repels gravity," in the policy realm it might be regarded as a force that repels liberty.*

*The Constitution has been discarded and cannot be restored. ... [S]olutions are now beyond the reach of the electoral and legislative processes. The citizenry must therefore create new counterweights.*<sup>182</sup>  
—Charles Murray, *By the People, Rebuilding Liberty without Permission*

The Universe weighs “100 trillion trillion trillion tonnes, give or take a few kilograms,” according to *New Scientist*.<sup>183</sup> Here on Earth, no one knows how much the regulatory state “weighs,” or even the number of agencies at the center of our own bureaucratic “big bang.” But for We, the Regulated, ignorance of the law is no excuse; our “duty to read” the *Federal Register* was established shortly after the Administrative Procedure Act passed, as one drought-suffering Idaho wheat farmer relying upon a complicated federal crop insurance program found out the hard way. In the 1947 case, *Federal Crop Ins. V. Merrill*, Justice Felix Frankfurter delivered the opinion:

Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the *Federal*

*Register* gives legal notice of their contents.<sup>184</sup>

In his dissent, Justice Robert H. Jackson maintained:

To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the *Federal Register* contains, or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically worded regulations would enlighten him much, in any event.<sup>185</sup>

Decades later, Congress has allowed regulations to expand and rendered us increasingly duty-bound, with little or no say in the matter. As attorney and legal scholar Harvey Silverglate notes, we probably break about three laws a day, without even knowing it.<sup>186</sup> The relationship of the individual to the state continues to change, as the growing quantity and relevance of regulatory dark matter takes the potential for abuse to new heights.

The rise of regulatory dark matter has entirely changed the nature of the

regulatory reform debate. It has long been the case that there are far more regulations than laws. That is troublesome enough. But with tens of thousands of agency proclamations annually, OMB review of executive agency “significant” or “major” rules cannot suffice.

Ordinary executive agency rules and independent agencies have gotten a pass for far too long. With dark matter added to the mix, agencies may articulate interpretations and pressure regulated parties to comply without an actual formal regulation or an understanding of the costs. Left unaddressed, regulatory dark matter can gain new ground, as agencies avoid public and congressional scrutiny by issuing memos, letters, guidance documents, bulletins, and other proclamations and decrees that influence public policy outside normal Administrative Procedure Act processes and OMB oversight, let alone the constitutional lawmaking process.

To address overregulation and dark matter, Congress must act. It will take the nation’s elected representatives to stop dark matter and punish officials engaging in arbitrary behavior. Power must be returned to elected lawmakers.

Regulatory reform emphasizes the things we can count, so it usually focuses on steps like better cost-benefit analysis, sunseting of rules, bipartisan regulatory reduction commissions, new calls for regulatory budgeting, and other measures.<sup>187</sup> These are important, but the

persistence of dark matter means it is not enough to just track notice-and-comment regulation.

Below are some recommendations for Congress to address regulatory dark matter. All must be anchored in Congress explicitly going on record as approving all agency decrees.

***All agency decrees matter, not just the “rules”***

Unless Congress requires consistency in the reporting of dark matter, the haphazard nature of what agencies disclose as guidance will continue to be a problem. The 2007 memo is a useful starting point. It should be expanded to cover (1) non-significant guidance since agencies should not get to decide what is significant, and (2) independent agencies. We need what Paul R. Noe and John Graham have called “due process and management” for guidance.<sup>188</sup> Reforms will require creating an authoritative list of federal agencies—one does not currently exist—and requiring each agency to maintain consistent, uniform Web pages and databases. The guidance documents compiled in this report came from many disparate agency sources.

In the process, Congress can hold investigations and hearings to determine agencies’ criteria for classifying guidance documents as significant and the breakdown of the various types of documents issued by agencies each year. Decisions must be made regarding the

*The rise of regulatory dark matter has entirely changed the nature of the regulatory reform debate.*

appropriateness of some guidance and memoranda not appearing in the *Federal Register*. On disclosure, the All Economic Regulations Are Transparent (ALERT) Act) of 2015 (H.R. 1759) aims at broad clarity regarding regulatory impacts with monthly reports and schedules of completion, estimates of costs and economic burdens, and annual summary reports.<sup>189</sup> Such disclosure and “report cards” for individual agencies can and must be expanded to incorporate dark matter.<sup>190</sup>

***Congress must subject dark matter to enhanced APA-like procedures and more intense OMB review***

To address stealth regulation, John Graham and James Broughel propose options such as reinstating a George W. Bush-era requirement to prepare analysis for significant guidance documents, explicitly labeling guidance documents as nonbinding, and requiring notice and comment for significant guidance documents. They also call for agencies to inform parties “when a communication is only a recommendation and is not legally binding.”<sup>191</sup> These should all be done, but more is needed, since even ordinary regulations outflank such constraints.

Attempts to force more informal regulatory dark matter into the notice-and-comment stream may prompt agency creativity in skirting review by using “darker” dark matter measures,

like threats and warnings, to escape oversight.<sup>192</sup> In response, Congress can codify President Obama’s four executive orders on regulation, and extend their provisions to guidance. The Regulatory Accountability Act of 2015 (H.R. 185), which has passed the House of Representatives, contains provisions on early notice, public participation, evidence requirements, and formal hearings, which can be applied to dark matter.<sup>193</sup>

Canada<sup>194</sup> and Great Britain have both implemented rule-in, rule-out requirements with some success.<sup>195</sup> In the U.S., the Regulations Endanger Democracy (RED) Tape Act (S. 1944) would introduce the same requirement for ordinary regulations, and extend it to guidance and memoranda.<sup>196</sup> Another recent effort at implementing a guidance document reform agenda is the Regulatory Predictability for Business Growth Act (S.1487), which would require interpretive rules and guidance documents that alter previously issued interpretive rules to undergo public notice and comment before they can go into effect.<sup>197</sup>

Administrative and institutional reforms like those noted above can help bring measurable accountability and moderation to the rulemaking process. Administrative disclosure and scrutiny can also play a role. Consider that the number of federal regulations stood at around 7,000 in the late 1970s. After Ronald Reagan’s EO 12291 on OMB

regulatory review, the count went down to around 6,000 in the early 1980s, then to 4,700 by 1988. The count stayed below 5,000 during the 1990s, and now clocks in each year around the 3,500 mark.

***Congress must vote approval of costly or controversial dark matter decrees***

Congress' over-delegation of power is at the root of Washington's out-of-control growth. It is not enough for OMB to try to do its "darndest" on regulatory oversight and review.<sup>198</sup> Congressional accountability is indispensable in offsetting the pro-regulatory bias that prevails across the entire federal bureaucracy, including its independent agencies.

The new effort by Senators to investigate and scrutinize potential efforts by federal agencies to skirt the law via guidance is well past due. Nothing will change until Congress has to affirm all expensive or controversial agency decrees and actions, from ordinary rules to dark matter.

The Regulations from the Executive in Need of Scrutiny (REINS) Act of 2015 (H.R.427), which has already passed the

House, would require this step for regulations.<sup>199</sup> It should be expanded to cover significant and contentious dark matter.

In the meantime, appropriations restrictions can help rein in agencies' use of dark matter. In addition, Congress should recognize that guidance documents and all dark matter decrees are covered by the Congressional Review Act, and thus subject them to resolutions of disapproval.<sup>200</sup>

Financial stability, Internet access, cybersecurity, competitiveness, food safety, and other good things that agencies purport to safeguard by "regulating" are forms of wealth and prosperity. Those values require something more than the man-made administrative agency behemoths created by long-dead ideologues or rent-seekers to advance their interests.

Free enterprise does not mean companies get to run wild, and the competitive process itself has a vital role to play in "regulation." Real *regulation*, real *discipline*, requires something other than the bureaucratic mindset.

*Congress' over-delegation of power is at the root of Washington's out-of-control growth.*





## NOTES

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