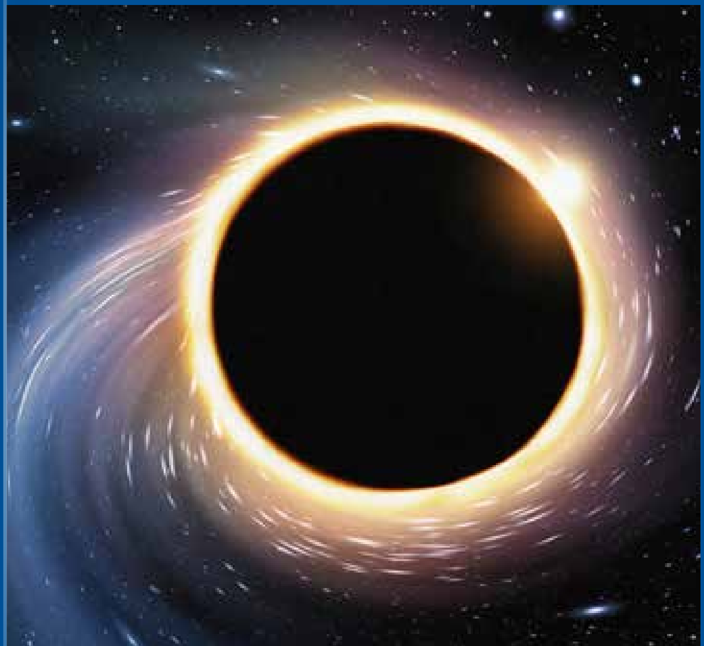
# Mapping Washington's Lawlessness

## An Inventory of "Regulatory Dark Matter" 2017 Edition

*By Clyde Wayne Crews Jr.*

*March 2017*



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## An Inventory of Regulatory Dark Matter
## 2017 Edition

**by Clyde Wayne Crews Jr.**

### Executive Summary

Congress passes and the President signs several dozen laws every year. Meanwhile, federal departments and agencies issue well over 3,000 regulations of varying significance. A weekday never passes without new regulations being issued or proposed. Yet beyond those rules, Congress lacks a clear grasp of the amount and cost of the thousands of executive branch and federal agency proclamations and issuances, including guidance documents, memoranda, bulletins, circulars, and letters that carry practical (if not always technically legally) binding regulatory effect. There are hundreds of "significant" agency guidance documents now in effect, plus many thousands of other such documents that are subject to little scrutiny or democratic accountability.

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 understanding of costs, generally with judicial deference to what agencies contend, an issue of increasing concern to Congress. The result is that no one knows how much the regulatory state "weighs," or even the number of agencies.

The Administrative Procedure Act (APA) of 1946 established the process of public notice for proposed rulemakings, providing the opportunity for public input and comment before a final rule is published in the *Federal Register*, and a 30-day period before the rule 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 sometimes declines to enforce laws passed by Congress. Prominent during the Obama administration 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.

The upshot of such "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 the second in an ongoing series aimed at outlining the scope of this phenomenon. It concludes with recommendations for Congress to address dark matter and the over-delegation of legislative power that has enabled it.

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

> *If the ruling power in America possessed both these means of government and enjoyed not only the right to issue orders of all kinds but also the capability and habit of carrying out those orders; if it not only laid down general principles of government but also concerned itself with the details of applying those principles; and if it dealt not only with the country's major interests but also descended to the limit of individual interests, then liberty would soon be banished from the New World.*[1]
>
> —Alexis de Tocqueville,
> *Democracy in America*

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. Weakly interactive but pervasive dark matter and dark energy make up most of the universe, rendering the bulk of existence beyond our ability to observe directly.[2]

Here on Earth, in the United States, where the government spends $4 trillion annually and regulatory compliance and economic interventions cost nearly half that amount, there is "regulatory dark matter" that is often hard to detect, much less measure.

Congress passes several dozen public laws every year, but federal agencies issue several thousand regulations. The Administrative Procedure Act (APA) of 1946 established the process of public notice for proposed rulemakings, 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.[3] So 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."[4] There are varying degrees of both clarity of language and adherence to the rule of law for pronouncements that may bind or change behavior:

*Congress passes several dozen public laws every year, but federal agencies issue several thousand regulations.*

- When issuing rules and regulations, agencies are legally required to adhere to the APA and subsequent strengthening legislation, but often do not. Further, most regulations' costs and benefits are unknown, so even much of the ostensibly APA-compliant body of rulemaking lacks transparency.
- "Dark matter" such as agency and presidential memoranda, guidance documents, notices, bulletins,

directives, news releases, letters, and even blog posts may enact or influence policy while flouting the APA's public notice and comment requirements for legislative rules.[5] These proclamations also can escape judicial review.

- Agencies and bureaus sometimes "regulate" without writing down anything. Explicit or veiled[6] threats can achieve this, as can adverse publicity, whereby an agency issues unfavorable news releases to force compliance from private parties.[7]

Sub-rosa regulation has long been an issue, and scholars have studied it extensively. In the 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.[8]

While agency guidance documents and directives do not go through the APA notice-and-comment process and are technically supposed to be non-binding, 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 Federal Regulations*.[9]

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 on matters such as health care, retirement, employment, education, finance, infrastructure, land use, resource management, science and research funding, energy, manufacturing, and even frontier technologies.

In addition to non-congressional "lawmaking," the executive branch

often declines to enforce laws passed by Congress, effectively rewriting those laws. Prominent during the Obama administration 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.[10] Then came the November 2013 declaration—first by the President in a news conference and then in Department of Health and Human Services guidance material—that insurers could continue to sell non-ACA compliant health policies.[11]

President Obama was opportunistic but not wholly to blame for the erosion in separation of powers, and similar concerns apply in the Trump administration. Congress' over-delegation of its own authority over decades has seriously undermined checks and balances and the principle of separation of powers.[12] Our government's branches seem not to so much to check-and-balance as to leapfrog one another, to ratchet the government upward rather than constrain it to a constitutionally limited role. Over time, as representative lawmaking is jettisoned and power delegated to untethered bureaucrats, the regulatory dark matter decrees of those autonomous administrators will displace and eventually outweigh normal lawmaking.

### The Unknown Number of Federal Agencies Issuing Rules

As bureaucracy sprawls,[13] no one can say with certainty how many federal agencies exist. The twice-annual *Unified Agenda of Federal Deregulatory and Regulatory Actions*, which compiles agency regulatory plans and actions in the federal pipeline, listed 61 agencies in the Fall 2016 edition, a count that can vary slightly from report to report.[14]

However, the once-routine *Unified Agenda*'s April-and-October schedule became a thing of the past, as it has been published late or failed to appear at all (as in Spring 2012). Moreover, the 2015 *Draft Report to Congress on the Benefits and Costs of Federal Regulations*, which historically usually appeared by April, was the latest at the time, appearing on October 16.[15] The Draft 2016 edition was even later, appearing two days before Christmas.[16] (The previous latest editions were those straddling the two Bush/Obama transition years.[17]) If transparency of the bureaucracy is an issue for ordinary published regulation, then it is impossible to know where dark matter stands.

The Administrative Conference of the United States lists 115 agencies in the appendix of its *Sourcebook of United States Executive Agencies*,[18] but notes:

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

*Our government's branches seem not to so much to check-and-balance as to leapfrog one another.*

*If no one knows definitively how many agencies and commissions exist by whose decrees we must abide, that means we do not know how many employees work for the government or how many rules there really are.*

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.[19]

In a 2015 Senate Judiciary Committee hearing, Chairman Chuck Grassley (R-IA) noted: "[T]he *Federal Register* indicates there are over 430 departments, agencies, and sub-agencies in the federal government."[20] The Senator apparently was citing the *Federal Register*'s agency list, which now depicts 440 agencies as of this writing.[21] The online 2016 *Federal Register*'s index depicts 272.[22] (It had been 257 in December 2015.) Table 1 summarizes these and other tallies.

Alongside the 220 executive department components the Administrative Conference referred to in 2013 in the United States Government Manual, the latest 2015 Manual (which is not exhaustive) lists 61 "Independent Establishments and Government Corporations," eight "Quasi-Official Agencies" and 16 "International Organizations."[25] Furthermore, an online supplement to the Manual notes another 48 "Boards, Commissions, and Committees" in existence.[26]

If no one knows definitively how many agencies and commissions exist by whose decrees we must abide, that means we do not know how many employees (let alone contractors) work for the government or how many rules there really are. But even when we isolate a given agency, it may be hard to tell exactly what is and is not a rule. That, plus the reality that issuing a rule may not even be necessary to achieve bureaucratic ends, call out for an aggressive congressional response. Let us start with what we (think) we know about agency rules.

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

| | |
|---|---|
| Unified Agenda | 61 |
| Administrative Conference of the United States | 115 |
| FOIA.gov (at Department of Justice) | 252 |
| 2016 *Federal Register* index | 272 |
| Regulations.gov[23] | 292 |
| United States Government Manual | 316 |
| *Federal Register* agency list | 440 |
| USA.gov tally[24] | 443 |

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

Many binding rules come from agencies rather than elected lawmakers. Federal departments, agencies, and commissions issued 3,853 rules in 2016, while Congress passed and the president signed 214 bills into law—a ratio of 18 rules for every law.[27] The average has been 27 rules for every law over the past decade, as Table 2 shows. 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. Looking back, there have been 88,899 rules since 1995.

Another 2,419 proposed rules were in play at year-end 2016. Given the Trump administration moratorium, many likely will be under review during 2017.

*Many binding rules come from agencies rather than elected lawmakers.*

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

| Year | Public Laws | Total Rules | Econonmically Significant Rules | Major Rules (GAO) | Significant Rules |
|---|---|---|---|---|---|
| 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 | 77 | 288 |
| 2001 | 108 | 4,132 | 75 | 70 | 295 |
| 2002 | 269 | 4,167 | 38 | 51 | 284 |
| 2003 | 198 | 4,148 | 38 | 50 | 336 |
| 2004 | 299 | 4,101 | 40 | 66 | 321 |
| 2005 | 161 | 3,975 | 48 | 56 | 258 |
| 2006 | 321 | 3,718 | 48 | 56 | 163 |
| 2007 | 188 | 3,595 | 41 | 61 | 180 |
| 2008 | 285 | 3,830 | 62 | 95 | 427 |
| 2009 | 125 | 3,503 | 70 | 84 | 371 |
| 2010 | 217 | 3,573 | 81 | 100 | 420 |
| 2011 | 81 | 3,807 | 79 | 80 | 444 |
| 2012 | 127 | 3,708 | 57 | 68 | 347 |
| 2013 | 72 | 3,659 | 51 | 81 | 331 |
| 2014 | 224 | 3,554 | 69 | 81 | 290 |
| 2015 | 115 | 3,410 | 61 | 76 | 302 |
| 2016 | 214 | 3,853 | 83 | 105 | 315 |
| **TOTALS:** | **4,260** | **88,899** | **1,044** | **1,472** | **6,421** |

*Sources: Public Laws: Government Printing Office; Total Rules/Significant Rules. Author search on FederalRegister.gov advanced search function, and NARA updates. Economically significant rules: Unified Agenda of Federal Regulations search on RegInfo.gov. Major Rules: Government Accountability Office.*

*We are presumed to be bound solely by laws enacted by Congress and signed by the president, but things do not quite work out that way.*

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 frequent characterization is of at least $100 million in annual economic impact.[29] Notably, "significant" regulatory actions regularly exceed the number of duly enacted laws.

### 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 Federal budget is an increasingly inadequate measure of the resources directed by government toward social ends.*[30]
>
> —Economic Report of the President (Jimmy Carter), 1980

One problem with simply bringing guidance under the Administrative Procedure Act is that even normal rules do not always get the treatment they merit under the APA.

We are presumed 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 get 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,[31] the Regulatory Flexibility Act (to address small business impacts),[32] and the Congressional Review Act (CRA), which enables Congress to vote on resolutions of disapproval to reject agency regulations.[33] 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.[34] 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[35] (as well as subsequent executive orders from other presidents) to assure rule benefits exceed costs is incomplete.[36] 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."[37] The process was never thorough—it incorporated only executive agencies, not independent agencies—but today central review captures only a fraction of rulemaking.

OMB's 2016 *Draft Report to Congress* (covering fiscal year 2015) reviewed a few hundred significant rules, and 59 major rules—but presented net-benefit analysis for only 21 (an improvement of the prior year's 13).[38] This contrasts with the fact that during calendar year 2015, there had been 3,410 rules finalized by 60 federal departments, agencies, and commissions. Apart from listing some of their major rules, OMB review does not include independent agencies. Yet some of these are highly influential, such as the Federal Communications Commission rules, and those of the several bodies implementing and enforcing the Dodd-Frank financial legislation. Table 3 compares OMB reviews with the total final rule count in the *Federal Register* during recent years. Overall, OMB has conducted just 181 rule reviews since 2000 that incorporated both cost and benefit analysis, and another 92 with cost analysis. While these thousands of rules are all subject to APA, many are "dark matter," in the sense that we know little about their costs, benefits, and burdens.

Second, the Administrative Procedure Act's rulemaking process is broken in that agencies fail to issue a Notice of Proposed Rulemaking for a substantial portion of their rules.[39] As a 2016 Congressional Research Service report noted:

> While the Administrative Procedure Act (APA) generally requires agencies to follow certain procedures when promulgating rules, the statute's "good cause" exception permits

*Agencies fail to issue a Notice of Proposed Rulemaking for a substantial portion of their 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 |
| 2015 | 21 | 5 | 27 | 3,410 |
| **TOTALS** | **181** | **92** | **273** | **57,248** |

*Sources: Costed rule counts: OMB, Draft 2016 Report to Congress on regulatory costs (covers through fiscal year 2015). Federal Register Final Rules: National Archives and Records Administration.*

> agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest" and bypass its 30-day publication requirement if good cause exists.[40]

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

That is all well and good as far as basic civics is concerned, but according to a 2012 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.[41]

Agencies often cite the APA's "good cause" exemption,[42] which in GAO's sample agencies used "for 77 percent of major rules and 61 percent of non-major rules published without an NPRM."[43] 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 already embodied in the act of delegation itself.[44]

More often than not, agencies tend to ask for public comments 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."[45] Furthermore, just because a rule goes through the notice-and-comment process does not make it necessarily a good thing.

Third, Congress rarely uses its most powerful accountability tool, the Congressional Review Act (CRA), to pass resolutions of disapproval of costly or controversial agency rules. Only one rule, a Clinton Department of Labor rule on repetitive motion injury was rejected in the then-new Bush administration. The Trump administration presented a similar opportunity with respect to removing rules from a prior administration of the opposing party, and a number of disapprovals cleared the president's desk, such as a Securities and Exchange Commission rule on payment disclosures by mining interests. The Regulations from the Executive in Need of Scrutiny (REINS) Act, which passed the House of Representatives but not the Senate during the most recent three sessions of Congress and again in the 115th, would build on the CRA by creating a requirement akin to an affirmative CRA-style resolution.[46] Under the REINS Act, no major rule—those costing $100 million or more annually—could become effective until Congress explicitly approves it.[47] This principle also should apply to dark matter like significant agency guidance documents and memoranda.

Fourth, the CRA itself is often 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.[48] 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."[49] Congress lacks much of the raw material it needs to even contemplate a resolution of disapproval. Remedies for this include passing the REINS Act or automating resolutions of disapproval for every final rule.

Technically, the CRA already applies to agency actions like guidance that are ostensibly not formal rules. In a 1999 *Administrative Law Review* article, Morton Rosenberg, then of the Congressional Research Service, describes legislative history that shows that the scope of the CRA extends beyond agency rules. As Rosenberg points out, 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."[50] 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.[51]

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.[52] Recent news headlines have highlighted inadequate responses by agencies to Freedom of Information Act requests, the use of private email for official business, and loss of government emails.[53] Reporters describe difficulty in accessing federal data.[54] We regularly find claims in the water-flows-uphill category to justify rulemaking: that compulsory switching from fossil energy to more expensive and less reliable "alternative" sources of electricity saves money,[55] that adding regulations creates jobs and growth,[56] that minimum wages do not decrease employment,[57] and that forcing companies to expand overtime pay helps to grow the

*Administrative regulations that ostensibly are subject to notice and comment already do not get appropriate supervision.*

middle class.[58] Administrative regulations that ostensibly are subject to notice and comment already do not get appropriate supervision.

### A Partial Inventory of Regulatory Dark Matter

We can count agency proposed and final rules, and even executive orders and memos, but agency memoranda, 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 these are exacerbated by regulatory dark matter that escapes scrutiny. Regulatory compliance costs are often referred to as a hidden tax,  but dark matter occupies a class by itself due to its lack of transparency. Guidance documents, presidential and agency memoranda, notices, and bulletins can skirt the constitutional lawmaking process, the APA's notice-and-comment requirements, and OMB review. As DePaul University law professor David L. Franklin noted: "[T]he distinction between what is binding regulation and what is exempt from notice and comment has been called 'tenuous,' 'baffling,' and 'enshrouded in considerable smog.'"[59]

What follows represents an inventory and assessment of some of what we can glean about regulatory dark matter. While not all of these proclamations comprise prescriptive regulation, the cumulative effect is highly significant. The bottom line: Our elected Congress needs to reassert its constitutional authority over what rules legitimately affect the public.

#### *Executive Orders*

Despite the attention executive orders (EOs) garner in modern debate, their use is nothing new historically, dating back to George Washington's administration.[60] They do not always comprise dark matter, but in modern times they can contribute to policy being implemented without Congress doing so explicitly. Executive orders' ostensible realm is that of the internal workings and operations of the federal government.

While technically executive orders only affect the administration of the president who issues them and subsequent presidents can overturn them, the complexity of upending them grows as Washington intervenes into more private spheres of activity. For example, President Obama executive orders covered such areas as a minimum wage for federal contractors,[61] a Non-Retaliation for Disclosure of Compensation Information decree,[62] paid sick leave for federal contractors,[63] cybersecurity information sharing,[64] and sanctions on individuals allegedly engaged in malicious cyber activity.[65] The latter two were controversial not only because of their potential effects on privacy, but also for their not having been passed by Congress.[66]

Other Obama executive orders addressed normal subject matter internal to executive operations, such as blocking accounts of Russian authorities believed responsible for the Ukrainian crisis.[67] Others concern national security issues, such as certain infectious disease threats[68] and electromagnetic disruption events generated from the solar flares and magnetic disturbances.[69]

Obama was far from an EO record holder. He was no match for Franklin Delano Roosevelt's 3,467 executive orders, among them the seizure of gold.[70] And unlike Harry Truman, he has not attempted to seize steel mills.[71] President Obama issued 296 executive orders over the course of his administration (through January 19, 2017).[72] The 45 issued in 2016 was the highest yearly count during his term. (George W. Bush's final tally was 294).

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.[73] 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.[74] Table 4 lists executive orders issued over the past two decades, depicting 828 since 1994 according to the *Federal Register* office. In addition to the *Federal Register* compilation, the Obama White House listed significant executive orders separately and that count is included here.[75]

Whether lengthy or brief, orders and memoranda can have significant bearings 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 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, but only amounted to a few billion dollars in cuts that were swamped by other rules issued.[76] In all, four of Obama's executive orders sought to address regulatory liberalization and reform, but their effectiveness turned out to be limited.[77] So far, the Trump administration has aggressively used executive orders to target federal regulations by implementing a regulatory freeze[78] and a one-in, two-out policy for new rules, and initiating a regulatory budget.[79]

Notable recently in terms of regulatory intent was Obama's April 2016 executive order, "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy," which directed the Department of Justice and the Federal

**Table 4. Number of Executive Orders**

| Year | Federal Register Database | White House Tally |
|---|---|---|
| 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 | 29 | 24 |
| **2016** | **45** | **39** |
| **TOTALS:** | **828** | **263** |

*Blanks are not available at source or database*

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

Trade Commission to "identify specific actions that they can take in their areas of responsibility to address undue burdens on competition" through aggressive antitrust enforcement.[80] In other words, the order proposed interventionist policies and attempted to cast most blame for anti-competitive business practices on private sector actors.[81] The administration supplemented this action with an October "Fact Sheet" to announce policy regarding alleged "monopsony power" on the part of firms, as a presumed federal basis for addressing "wage collusion, unnecessary non-compete agreements, and other anticompetitive practices" and imposing federal say-so over non-compete agreements.[82]

Another Obama executive order, "Using Behavioral Science Insights to Better Serve the American People,"[83] aimed to appoint the American government as citizens' "helicopter parent,"[84] complete with a federal Social and

Behavioral Sciences "team" that issues annual reports[85] aimed at expanding government.[86] "Adopting the insights of behavioral science," according to President Obama in another "Fact Sheet" accompanying the order, "will help bring our government into the 21st century in a wide range of ways—from delivering services more efficiently and effectively; to accelerating the transition to a clean energy economy; to helping workers find better jobs, gain access to educational opportunity, and lead longer, healthier lives."[87] Another social policy order is the federalization of community organizing and easing access to taxpayer dollars, in the form of an EO on "Establishing a Community Solutions Council."[88]

On the environmental side there is a December 2016 executive order on "Safeguarding the Nation from the Impacts of Invasive Species,"[89] and a 2015 "Planning for Federal Sustainability in the Next Decade" directive to federal agencies to reduce greenhouse gas emissions by more than a third.[90] Related to executive orders, presidential proclamations" have been used to designate numerous national monuments such as the vast August 2016 expansion of the Papahanaumokuakea Marine National Monument,[91] using purported but controversial authority under the Antiquities Act to place landscapes and seascapes off-limits to use and development, despite local stakeholder objections.[92]

### *Executive Memoranda*

In 2014 *USA Today* called presidential memoranda "[e]xecutive orders by another name," which are hard to track because they are "not numbered" and "not indexed."[93] Memoranda are tricky to count, because they may or may not be published, depending on a given administration's proprietary or discretionary determination of "general applicability and legal effect."[94]

While presidential memoranda are not new, their number has expanded significantly in recent administrations. President Obama's pace topped that of George W. Bush's presidency, compared to their even executive order output. Bush issued 129 executive memoranda that were published in the *Federal Register* during the calendar years of his entire two terms, while Obama issued 255 through December 31, 2016.[95] (The final tallies for taking into account the January weeks preceding presidential transitions was 131 for Bush, 257 for Obama). As noted, not all memoranda get published in the *Federal Register*. Some may appear on the White House press office's Web page.[96] Indeed, the Obama White House internal tally was significantly higher than that published in the *Federal Register*, especially in Obama's final year, with 135 executive memoranda through December 31, 2016 compared to the 36 depicted in the *Federal Register* (However, 2016 had a high number of national emergency designations with respect to various nations). Table 5

*While presidential memoranda are not new, their number has expanded significantly in recent administrations.*

shows both the *Federal Register* and internal White House tallies.

To be sure, not all memoranda have economic or regulatory impact, but many do. During his second term, Obama memoranda did such things as create a new financial investment instrument to nudge people into retirement plans and impose new requirements on government contractors regarding work hours, flexibility, and pay equality.[97] These were not laws passed by Congress. They are not regulations. They were not even executive orders. They were memos. Presidential memoranda "hereby direct" someone in the federal hierarchy to do something that sometimes leads to new controls and larger government. They are often aimed at government contractors, spill over on the private sector or affect private sector planning, and remain in place until a future president revokes them. Immediately following in Box 1 are some recent examples among the count above that were documented in the *Federal Register*. They are divided by informal category, although some examples may fit in more than one.

While administrations often emphasize the alleged net benefits of major rules,[101]

**Table 5. Number of Presidential Memoranda**

| Year | Federal Register Database | White House Tally | Rules with Both Costs and Benefits (fiscal year) | Economically Significant Rules |
|---|---|---|---|---|
| 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 | 31 | 73 | 21 | 61 |
| **2016** | **36** | **135** | **n/a** | **83** |
| **TOTALS:** | **397** | **613** | **181** | **941** |

*Blanks are not available at source or database. n/a = not available. Sources: Author search on FederalRegister.gov advanced search function: Presidential Documents. White House Press Office: Presidential Memoranda; Costed rule counts: OMB, Report to Congress on regulatory costs (various years).*

the minority of those so quantified is topped by the number of "mere" presidential memoranda, many of which would appear to have significant impacts. As noted, there are 3,400-plus rules and regulations issued annually, while OMB presents reviewed cost-benefit analyses for just a handful each year of the few hundred it reviews. OMB has reviewed just 181 rules with both cost and benefit analysis since 2000, and another 92 with cost analysis (Tables 3 and 5). Meanwhile, there have been 397 memoranda published in the *Federal Register* since 2000.

The number of memoranda, per the higher internal White House tally, can sometimes approach or even exceed that

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

**Box 1: Presidential Memoranda**

***Environmental Policy***

- 9/21/2016. Climate Change and National Security ("[T]his memorandum establishes a framework and directs Federal departments and agencies ... to perform certain functions to ensure that climate change-related impacts are fully considered in the development of national security doctrine, policies, and plans."[98])
- 3/21/2016. Building National Capabilities for Long-Term Drought Resilience
- 11/03/2015. Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.[99] According to a February 2016 House Natural Resources Subcommittee on Oversight and Investigations hearing memo, this directive, issued to five federal agencies and governing mitigation of resource impacts from permitting for projects and activities, "appears to create sweeping new statutory authority through unilateral executive action, and represents a substantial re-write of public land use and water policy. ... Many of the terms used in the Memorandum to describe resources requiring mitigation from projects—including 'important,' 'scarce,' 'sensitive,' and 'irreplaceable' are not found in existing statutes and are largely left undefined in the Memorandum. The vague and overbroad terms will likely lead to legal uncertainty for many currently permitted projects."[100]

***Social Policy***

- 10/05/2016. Promoting Diversity and Inclusion in the National Security Workforce
- 4/29/2016. Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals
- 3/01/2016. Limiting the Use of Restrictive Housing by the Federal Government
- 1/13/2016. Unexpected Urgent Refugee and Migration Needs
- 1/04/2016. Promoting Smart Gun Technology
- 6/01/2015. Creating a Preference for Meat and Poultry Produced According to Responsible Antibiotic-Use Policies
- 3/10/2015. Student Aid Bill of Rights to Help Assure Affordable Loan Repayment
- 1/15/2015. Modernizing Federal Leave Policies for Childbirth, Adoption, and Foster Care to Recruit and Retain Talent and Improve Productivity
- 6/12/2014. Helping Struggling Federal Student Loan Borrowers Manage their Debt
- 3/07/2014. Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color
- 1/27/2014. Establishing a White House Task Force to Protect Students From Sexual Assault

***Security/Foreign Policy***

- 10/14/2016. Presidential Policy Directive—United States-Cuba Normalization
- 9/28/2016. Presidential Determination—Refugee Admissions for Fiscal Year 2017
- 7/26/2016. Presidential Policy Directive—United States Cyber Incident Coordination
- 7/01/2015. Reestablishing Diplomatic Relations and Permanent Diplomatic Missions [with Cuba]
- 1/13/2016. Presidential Determination—Unexpected Urgent Refugee and Migration Needs
- 2/25/2015. Establishment of the Cyber Threat Intelligence Integration Center

***Labor Policy***

- 6/27/2014. Enhancing Workplace Flexibilities and Work-Life Programs
- 4/11/2014. Advancing Pay Equality through Compensation Data Collection
- 3/18/2014. Updating and Modernizing Overtime Regulations
- 2/05/2014. 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

***Economic Policy***

- 3/23/2015. Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training
- 2/20/2015. Promoting Economic Competitiveness while Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems
- 1/16/2015. Expanding Federal Support for Predevelopment Activities for Nonfederal Domestic Infrastructure Assets
- 1/14/2014. Establishing a Quadrennial Energy Review

***Financial Policy***

- 02/04/2014. Retirement Savings Security

of completed economically significant rules ($100 million in annual economic impact) published in the *Unified Agenda* (Tables 2 and 5). There 941 economically significant rules since 2000, while the Obama White House acknowledged 613 memoranda.

## Agency Guidance Documents

> *Too often … 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.*[102]
>
> —Hester Peirce, Mercatus Center

If we do not measure or account for agency rules and regulations well, we most assuredly do not measure agency guidance with anything approaching precision. As noted, the Administrative Procedure Act's notice and comment publishing requirement for proposed rulemaking does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[103] Such memoranda, bulletins, and letters can take up considerable space in the *Federal Register* and on agency websites. The policy and constitutional concern is that agencies may issue instructions or new interpretations of existing regulations and pressure regulated parties into complying without issuing an actual formal regulation.

While purportedly not legally binding, guidance documents 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 widely cited 1992 *Duke Law Journal* article, given that "failure to conform will bring adverse consequences, such as an enforcement action or denial of an application."[104] Guidance documents can help agencies circumvent oversight and act unilaterally, 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 issuing of 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 document on "Distributing Scientific and Medical Publications on Unapproved New Uses—Recommended Practices."[105]

As a July 2012 House Oversight and Government Reform Committee report on the administrative state 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.[106]

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 dubbed 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

*Guidance documents can help agencies circumvent oversight and act unilaterally.*

*The Congressional Review Act's resolution of disapproval process is applicable to guidance and other documents, but has yet to be applied to them.*

> 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.[107]

Guidance is pervasive. This section attempts to partly quantify this mass of sub-rosa regulation. University of Washington School of Law reference librarian Mary Wisner notes "an amorphous border between regulations and guidance," and that "the body of guidance documents (or non-legislative rules) is growing, both in volume and in importance."[108] Columbia University law professor Peter Strauss noted (in the same 1992 issue of *Duke Law Journal* as Robert 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."[109]

As noted, the Congressional Review Act's resolution of disapproval process is applicable to guidance and other documents, not just rules, but has yet to be applied to them. Morton Rosenberg characterized the apparent but unquantified high volume back in 1999. Since most of the material submitted to the Comptroller General per the CRA had been (and remains) ordinary notice-and-comment regulation, Rosenberg observed:

> 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.[110]

Even in the face of such volume, some dispute the notion that recent guidance is meant to circumvent Congress. Securities and Exchange Commission Counsel Connor N. Raso, in a *Yale Law Journal* article, contends that "agencies do not frequently use guidance documents to avoid the rulemaking process."[111] 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 particular 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 by asking, "Might the Motivation for Agency Guidance be the Public's Need for Guidance?"[112] But that gets matters 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."[113]

But the volume is substantial, and Congress has sought 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.[114] In May 2015, 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:

> 1) A list of all guidance documents 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) A list of all guidance documents 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) A list of all guidance documents, including those 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) All 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) A list 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.

*The expansive modern regulatory state is a bipartisan phenomenon.*

8) A list of all guidance currently in draft form and the date the draft was issued.

9) A list of all guidance that has been withdrawn on or after July 24, 2007.[115]

Similar detail from all agencies, and requirements that they produce it henceforth, would be useful as legislative remedies are prepared. A September 29, 2015 letter by Sens. Alexander and Lankford to the Department of Labor requested withdrawal of three costly guidance documents from the Occupational Safety and Health Administration and asked that the Department pursue the changes "only through the rulemaking process."[115]

It was in this environment that, between September 23, 2015 and September 22, 2016, the Homeland Security and Government Affairs Committee, chaired by Lankford, conducted a series of three hearings examining "Agency Regulatory Guidance" featuring representatives from the Departments of Labor and Education, the Government Accountability Office, Office of Information and Regulatory Affairs, and other agencies.[117] At the first hearing, the GAO representative provided testimony on how agencies can strengthen internal controls on guidance documents.[118] Also at the first hearing, Senators expressed concern that agencies—with emphasis on the Department of Education and the Department of Labor—short-circuit the ordinary rulemaking process and issue guidance when they ought to be issuing formal rulemaking per the Administrative Procedure Act. The means by which an agency initiative becomes a rule on the one hand, or guidance on the other, is a "black box" that evades congressional scrutiny.[119] Unsurprisingly, agencies defended their actions, emphasizing the good they claim their issuing of guidance does.

Concern about guidance extends beyond Congress to the states. Fifteen attorneys general wrote to House and Senate leadership on July 11, 2016, expressing concern about agencies "failing to fully consider the effect of their regulations on States and state law." The AGs maintained that "federal agencies are: (1) issuing guidance documents as a way to circumvent the notice and comment process; (2) regulating without statutory authority; (3) failing to consider regulatory costs; and (4) failing to fully consider the effect of their regulations on States and state law."[120]

Guidance documents are subject to CRA review and resolutions of disapproval, but have not been scrutinized by these means. Disinclination by Congress and agencies to live up to oversight duties is endemic. Granted, there are some instances of agencies publishing retrospective review of some of their own guidance documents, but there is little OMB review of how agencies certify those results.[121] With respect to OMB review, while the term "notice" is

common and notices comprise a large component of the *Federal Register*, the level of review notices receive 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 reported 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."[122]

Box 2 lists prominent recent executive and independent agency guidance documents, divided by informal category as done above with executive memoranda. Since a given agency can affect policy in another area altogether, as in Box 1, some entries could fit into a different category.

### *An Inventory of Significant Executive Agency Guidance*

With respect to "significant guidance," some executive, though not (typically) independent, agencies comply or make nods toward compliance with a 2007 OMB memo, Good Guidance Principles—in effect, guidance for guidance.[181] "Significant" guidance often means that estimated as having an economic effect of $100 million annually, similar to the definition for significant and major rules.[182] In fact, President George W. Bush's executive order 13422 subjected significant guidance to OMB review.[183] 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 [longstanding Clinton] Executive Order 12866."[184]

*Guidance documents are subject to CRA review and resolutions of disapproval, but have not been scrutinized by these means.*

**Box 2: Recent Prominent and Headline-Grabbing Guidance Documents**

***Social Policy***

- **Housing and Urban Development** guidance decreeing landlord and home seller denial of those with criminal records a potential violation of the Fair Housing Act.[123]
- A series of **Department of Education** guidance documents, issued at a rate of one per business day, imposing mandates on colleges and schools.[124] According to the bipartisan Senate-appointed Task Force on Federal Regulation of Higher Education, "In 2012 alone, the Department [of Education] released approximately 270 'Dear Colleague' letters and other electronic announcements"[125] recalibrating regulation of colleges and universities. Those that do not comply stand to lose funding.[126] High-profile, controversial recent Education Department guidance has included:
    - o Guidance (a 2011 "Dear Colleague") to colleges and universities on sexual assault and harassment.[127] The campus environment has generated strong responses from and organization among mothers of accused students.[128]
    - o Guidance letter (a 2010 "Dear Colleague") on bullying and harassment.[129]
    - o Guidance (a 2016 "Dear Colleague"), co-produced with the **Department of Justice's Civil Rights Division**, requiring inclusion of "gender identity" in the definition of 'sex" and requiring schools to allow transgender students to

choose which bathroom or locker room to use.[130] The transgender bathroom dispute has been a driver of headlines as well as of state reaction, notably that of Texas and other state attorneys general suing the Education and Justice Departments."[131]

- o 2016 Policy Statement from the **Education Department** and the **Department of Health and Human Services** "preventing and severely limiting expulsion and suspension practices in early childhood settings"[132] without basis in law or notice and comment.[133]
- o The **General Services Administration** reiterated the Obama Justice and Education Departments' definition of "sex" interpretation with an August 2016 "clarification" Bulletin on transgender access, declaring that "the nondiscrimination requirement includes gender identity as a prohibited basis of discrimination under the existing prohibition of sex discrimination for any facility under the jurisdiction, custody, or control of GSA."[134]

***Labor Policy***

- The **Department of Labor Wage and Hour Division**'s blog post and "Administrative Interpretation No. 2015-1" informing the public that many independent contractors may now be classified as employees.[135]
- The **Department of Labor Wage and Hour Division**'s "Administrative Interpretation No. 2016-1" asserting a possible redefinition of joint employment under the Fair Labor Standards Act on case-by-case basis in contracting situations "to ensure that all responsible employers are aware of their obligations."[136] With this interpretation, the DOL "will hold more employers liable for wage violations against employees they do not directly employ. The enforcement effort will focus on the construction, hospitality, janitorial, staffing agencies, and warehousing and logistics"[137] and potentially "penalize any industry that utilizes contractors and labor suppliers."[138]
- The **Department of Labor**'s guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" guidance (and accompanying rule[139]) on prior labor law violation disclosure catalogs "explicit new instructions for Federal contracting officers to consider a contractor's compliance with certain Federal and State labor laws as a part of the determination of contractor 'responsibility' that contracting officers presently must undertake before awarding a Federal contract."[140] This effort has been criticized as blacklisting and part of a series of "anti-employer policies."[141]
- An **Occupational Safety and Health Administration** interpretation letter proclaiming that during a workplace inspection, employees of a non-union firm may authorize and be represented by a union representative accompanying OSHA compliance officers. The letter maintained that "there may be times when the presence of an employee representative who is not employed by that employer will allow a more effective inspection."[142]
- Greater use by the **National Labor Relations Board** of memoranda that affect non-union employers.[143]
- A series of **Equal Employment Opportunity Commission** guidance documents on pregnancy discrimination and accommodation in the workplace, credit checks on potential employees, and criminal background checks.[144]
- A September 2016 **U.S. Commission on Civil Rights** 306-page report, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, which features this Chairman's statement:

  > The phrases "religious liberty" and "religious freedom" will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance. ... However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality.[145]

***Social/Health Policy***

- **Centers for Disease Control and Prevention** guidelines to physicians[146] that have become controversial on the part of groups and individuals concerned with pain management and substitution of riskier alternatives.[147]
- A Notice of Intent from the **Drug Enforcement Administration** (DEA) that places the plant kratom on Schedule I of the Controlled Substances Act "to avoid an imminent hazard to the public safety,"[148] to considerable controversy.[149] The DEA has not accepted comments, but a public petition opposing the ban has over 100,000 signatures.[150]

***Environmental Policy***

- The **Environmental Protection Agency**'s (EPA's) Clean Water Act interpretive guidance on "Waters of the United States."[151] This directive took the step of soliciting notice and comment per the APA, though with significant controversy over manufactured endorsement.[152] This rule represents an instance in which the House and Senate supported a resolution of disapproval, but the president naturally objected to overturning his own administration's rule.
- The **Securities and Exchange Commission**'s interpretive Commission Guidance Regarding Disclosure Related to Climate Change, on disclosing potential disruption from "significant physical effects of climate change" on "a registrant's operations and results," and disclosing international community actions that "can have a material impact on companies that report with the Commission."[153] The guidance observes: "Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them."
- The **U.S. Department of Agriculture's Forest Service**'s Notice of Final Directive permanent Ecosystem Restoration policy to replace Interim Directive, Ecological Restoration and Resilience Policy, in Forest Service Manual 2020, providing broad guidance for restoring ecosystems.[154]
- Three **Department of Labor** guidance documents regarding the Process Safety Management standards for hazardous chemicals, which have been highlighted by Sen. James Lankford as bringing a range of manufacturers and retailers within the scope of regulation without the opportunity for public comment. A letter from Sen. Lankford to the Labor Department noted:

> These three guidance documents are expected to dramatically expand the universe of regulated parties, create extreme logistical and financial burdens on regulated parties, and convert flexible recommended practices into mandatory requirements—all without the opportunity for public comment. We therefore ask that OSHA immediately withdraw these memoranda.[155]

Subject matter of the three guidance documents concerned engineering practices, retail exemptions, and chemical concentrations subject to Process Safety Management standards.

- The **Environmental Protection Agency** consent decree, in response to automaker Volkswagen's deploying "defeat device" software to circumvent EPA emissions standards for nitrogen oxides,[156] will now review commitments by the company to build electric vehicle charging stations in the United States.[157] Such decrees, penalties aside, have the potential effect of improperly influencing the market trajectory of an entire sector. Noting the penalties, however, CEI's William Yeatman has stressed the capacity of this specific consent decree (and future ones) for abuse by presidents or the executive branch to circumvent Congress' power of the purse and achieve extra-legislative regulatory ends. With regard to the Volkswagen settlement specifically,

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

and noting that President Obama had previously sought similar zero-emission vehicle infrastructure investments, Yeatman notes:

> The proposed consent decree would give the government authority over $1.2 billion in zero-emissions vehicle investments, which is four times what the administration unsuccessfully sought from Congress for effectively the same purpose in 2011.
>
> If allowed to stand, the $1.2 billion electric-car money grab would provide a powerful model for future presidents to cut Congress out of the appropriations process. All future presidents would have to do is allocate resources into regulatory enforcement and then pursue settlements whereby the regulated entity "voluntarily" agrees to fund the president's preferred policies.[158]

- The **Council on Environmental Quality**'s Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts, which in effect turns the National Environmental Policy Act into a vehicle for implementing climate policy, particularly through federal land management decisions.[159] The guidance document, which is under seemingly perpetual review, holds that "agencies should consider both the potential effects of a proposed action on climate change, as indicated by its estimated greenhouse gas emissions, and the implications of climate change for the environmental effects of a proposed action," and expanding upon 2010 draft guidance, "applies to all proposed Federal agency actions, including land and resource management actions." Elizabeth Lake on the site Law360 assets that the new draft "appears to push federal agencies to use NEPA to take a more activist stance in reducing GHG emissions":

  > [W]hile courts have held that NEPA is a procedural statute, requiring only a "hard look" at environmental impacts (*NRDC v. Morton*, 458 F.2d 827, 838 (D.C.Cir., 1972)), this CEQ proposed guidance goes well beyond this doctrine by instructing agencies to use the NEPA process to force the substantive reduction of GHG emissions.[160]

  Meanwhile, a multi-agency body called the U.S. Global Change Research Program recently hosted a 2016 Advisory Committee for the Sustained National Climate Assessment that incudes ideological environmental advocacy groups.[161]

***Financial Policy***

- Guidance from the **Consumer Financial Protection Bureau** in the form of a bulletin on "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act" that limits the ability of automobile dealers to offer discounts to customers allegedly in the name of credit fairness and eliminating racial bias ("When such disparities exist within an indirect auto lender's portfolio, lenders may be liable under the legal doctrines of both disparate treatment and disparate impact").[162] Given the size of the auto lending marketplace, this is clearly an economically significant measure that at the very least required a rulemaking. Even the CFPB recognized internally that it was overestimating bias.[163] That led to bipartisan passage in the House of Representatives of the Reforming CFPB Indirect Auto Financing Guidance Act (H.R. 1737, 114th Congress) to revoke the guidance.[164] The bill would force CFPB "to withdraw the flawed guidance that attempts to eliminate a dealer's ability to discount auto financing for consumers. The bill also requires the minimal safeguards the agency failed to follow, such as public participation and transparency."[165]
- A **Commodity Futures Trading Commission** staff advisory guidance document on international financial transactions between overseas parties "arranged, negotiated or

executed" by a U.S.-based individual.[166] The guidance was delayed several times (indicating it perhaps should be a commented-upon rule, instead) and said by Republican commissioners to jeopardize thousands of jobs by potentially sending them offshore.[167]

- A **Federal Reserve** Secure Payments Task Force, which was set up without statutory authority,[168] and sets the stage for a government-run real-time electronic payment network.[169]

***Economic/Technology Policy***

- The **Department of Transportation's Federal Aviation Administration** restrictive June 2016 final rule on drones, "Operation and Certification of Small Unmanned Aircraft Systems," which requires line-of-sight and no nighttime operations among, ignoring the ability of technological and contractual solutions to address risk, and preempting local law enforcement solutions.[170] It also contains declarations from the agency regarding case-by-case waivers, as well as a large quantity of forthcoming guidance, much of which would seem to be economically significant, on issues, including:
    - o Industry best practices;
    - o Risk assessment;
    - o Potential guidance on external load operations;
    - o Guidance associated with not dropping objects in ways that damage persons or property;
    - o Advisories on training and direction to air traffic control facilities;
    - o Preflight checks for safe operation;
    - o Vehicle conditions for safe operations; and
    - o Guidance "on topics such as aeromedical factors and visual scanning techniques."

- A **Federal Aviation Administration** rule interpretation on drones via a Notice of Policy[172] that temporarily outlawed commercial activity (in violation of the Administrative Procedure Act), before a reversal by the National Transportation Safety Board.[173]
- The **National Highway Traffic Safety Administration**'s guidelines "to speed the delivery of an initial regulatory framework and best practices to guide manufacturers and other entities in the safe design, development, testing, and deployment of highly automated vehicles."[173]
- The **National Highway Traffic Safety Administration**'s guidelines on altering smartphones to create a "Driver Mode" to purportedly "help designers of mobile devices build products that cut down on distraction on the road."[174] Consumer Technology Association president Gary Shapiro responded:

    > NHTSA's approach to distracted driving is disturbing. Rather than focus on devices which could reduce drunk driving, they have chosen to exceed their actual authority and regulate almost every portable device. … This regulatory overreach could thwart the innovative solutions and technologies that help drivers make safer decisions from ever coming to market.[175]

    He added: "NHTSA doesn't have the authority to dictate the design of smartphone apps and other devices used in cars—its legal jurisdiction begins and ends with motor vehicle equipment."[176]

- The **Federal Trade Commission**'s staff report on the "sharing economy," which incorporates public comment and acknowledges technology's role in reducing

rationales for regulation, yet nonetheless aims at an FTC role in "ensuring that consumers using these online and app-enabled platforms are adequately protected."[177]

- The United States **Department of Agriculture's Agricultural Marketing Service** Notice revising the United States Standards for Grades of Canned Baked Beans. Text in the "Product Description" was changed by removing the text: "[T]he product is prepared by washing, soaking, and baking by the application of dry heat in open or loosely covered containers in a closed oven at atmospheric pressure for sufficient prolonged time to produce a typical texture and flavor," and replacing it with: "[T]he product is prepared by heating beans and sauce in a closed or open container for a period of time sufficient to provide texture, flavor, color, and consistency attributes that are typical for this product."[178]

***Security Policy***

- **Department of Homeland Security** guidance to retailers on spotting home-grown terrorists.[179] As then-DHS Secretary Jeh Johnson put it, "to address the home-grown terrorist who may be lurking in our midst, we must also emphasize the need for help from the public. 'If You See Something, Say Something' is more than a slogan. For example, last week we sent a private sector advisory identifying for retail businesses a long list of materials that could be used as explosive precursors, and the types of suspicious behavior that a retailer should look for from someone who buys a lot of these materials."[180]

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 doing so is a suggestion rather than a command. The Food and Drug Administration (FDA) acknowledges 1,819 pieces of final guidance as of this writing, yet does not acknowledge any of it as "significant."[185]

Table 6 lists a running partial inventory of significant guidance documents based largely upon these scattered executive department and agency websites. There are 617 significant guidance documents in total in this compilation (as of year-end 2016).[186] The EPA's 193 significant guidance documents dominate the tally. The differences in approaches and intensity by agency dictate the count will be inexact, highlighting that one goal of reform should be to have strict designations.

The preceding table is not comprehensive. It roughly follows *Unified Agenda* agency listings, supplemented with the *Federal Register* Index of agencies to capture sub-units. Some information was gathered via searching "significant guidance" at agencies and examining the results to locate non-obvious landing pages. This compilation amounts to the subset posted online, in fulfillment of OMB's 2007 Agency Good Guidance Practices.

Reporting quality from executive agencies varies, as does the length of documents

**Table 6. Significant Guidance Documents in Effect**
**A Partial Inventory Executive Departments and Agencies**

(As of year-end 2016)

*(Full chart with links maintained at http://tinyurl.com/jqnnx2a and at www.tenthousandcommandments.com)*

| | |
|---|---|
| **Department of Agriculture** | |
| Economic Research Service | 5 |
| Food and Nutrition Service | 4 |
| U.S. Forest Service | 7 |
| Food Safety and Inspection Service | 17 |
| **USDA Total** | **33** |
| | |
| **Department of Commerce** | |
| Patent and Trademark Office | 3 |
| | |
| **Department of Defense** | 1 |
| | |
| **Department of Education** | |
| Adult Education | 5 |
| American Recovery and Reinvestment Act of 2009 | 9 |
| Career and Technical Education | 12 |
| Civil Rights | 33 |
| Elementary and Secondary Education | 63 |
| Grants and Contracts | 1 |
| Higher Education | 5 |
| Special Education | 29 |
| **Department of Education Total** | **157** |
| | |
| **Department of Health and Human Services** | |
| Centers for Disease Control and Prevention | 1 |
| | |
| **Department of Homeland Security** | |
| National Infrastructure Protection Plan | 1 |
| U.S. Citizenship and Immigration Services | 26 |
| U.S. Coast Guard | 7 |
| Federal Emergency Management Agency | 11 |
| Transportation Security Administration | 12 |
| **DHS Total** | **57** |
| | |
| **Department of the Interior** | |
| Surface Mining Reclamation and Enforcement | 3 |
| Fish and Wildlife Service | 2 |
| **DOI Total** | **5** |
| | |
| **Department of Justice** | |
| Antitrust Division | 2 |
| Civil Rights Division | 10 |
| Drug Enforcement Administration | 8 |
| Office of Justice Programs | 13 |
| U.S. Trustee Program | 3 |
| **DOJ Total** | **36** |
| | |
| **Department of Labor** | |
| Employment and Training Administration | 34 |
| Mine Safety and Health Administration | 2 |
| **DOL Total** | **36** |
| | |
| **Department of Transportation** | |
| Office of the Secretary | 11 |
| Federal Aviation Administration | 38 |
| Federal Transit Administration | 7 |
| Plus Circulars | 30 |
| Maritime Administration | 6 |
| National Highway Traffic Safety Administration | 1 |
| **DOT Total** | **93** |
| | |
| **Department of the Treasury** | 2 |
| | |
| **Environmental Protection Agency** | |
| Office of Air and Radiation | 62 |
| Office of Chemical Safety and Pollution Prevention | 39 |
| Office of Environmental Information | 3 |
| Office of Land and Emergency Management | 50 |
| Office of the Science Advisor | 19 |
| Office of Water | 20 |
| **EPA Total** | **193** |
| | |
| **TOTAL** | **617** |

*Where exactly documents reside is sometimes a mystery to the agencies themselves.*

and the number and nature of strictures contained within guidance. Where exactly documents reside is sometimes a mystery to the agencies themselves (HUD, unhelpfully: "to find a specific publication, you can search our entire website.")[187] 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 nothing significant to report.

That is useful information in itself—whether to demonstrate inactivity or underscore improbable claims of no significant guidance in play, such as for example, at the Food and Drug Administration, Department of the Interior bureaus, the Department of Labor's Wage and Hour Division, and the Department of Homeland Security's U.S. Customs and Border Protection and its Immigration and Customs bureau. (Table 6 above omits such "zeros," but they are observable on the linked Web version.)

Sometimes an agency sub-unit, like the Office of Diversion Control at the Department of Justice, will present its own set of guidance documents not noted by the parent agency.[188] Likewise, 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,[189] yet it hosts other Web pages presenting certain public guidance.[190] Some agencies feature sophisticated search engines (FDA, as noted, although it fails to flag any significance); some present detailed itemizations (EPA, Interior); some host descriptive Web pages and list guidance documents on a separate pdf or Word file (Education). Other times, guidance may rise to the level of significance, but it is up to the reader to figure out what or where among thousands of documents. For example, at the Centers for Medicare and Medicaid Services (CMS), we are told:

> 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.[191]

Here, indeed, is an agency that "seems unable to keep pace with its own frenetic lawmaking."[192] While an agency may choose not to trouble itself determining significance, those affected by guidance lack that luxury. While the Centers for Medicare and Medicaid Services acknowledges thousands of directives of indeterminate impact, GAO noted in 2015 four agencies that issue between 10 and 100 guidance documents per

year.[193] The Department of the Interior, which issued 78 rules in 2015, boasts that its Fish and Wildlife Service usually publishes more than 500 *Federal Register* documents annually.[194] The takeaway here is that Table 6 understates significant guidance counts, since some agencies usually self-report—and often do not report at all. Still, Table 6 serves as an inventory of some of what we know, and, equally importantly, *what we do not know* and need to discover.

Given all the agency disclaimers and qualifications, no representations of completeness can be made here. For example, consider how 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."[195] Fair enough, though, given that the OMB order is not strictly binding, and does not apply to non-significant guidance. Yet, the EPA does solicit public comment on its guidance, a positive step policy makers can build upon.[196] In any event, one EPA guidance document notable with respect to significance was the agency's Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, issued in 2011.[197] According to a September 2011 House Oversight and Government Reform Committee report:

> EPA Administrator Lisa Jackson called the Guidance "a sweeping regulatory action that affects not only all coal mining in the region, but also other activities with the potential to impact Appalachian stream quality." Moreover, Administrator Jackson said, "[there are] no, or very few, valley fills that are going to meet this standard." By definition, a guidance document should never be a sweeping regulatory action. Furthermore, new guidance that drastically decreases the percentage of the regulated community capable of meeting the standard effectively amends the existing rule. Accordingly, it appears that EPA issued the Guidance in violation of the APA when it failed to make these dramatic changes through the informal rulemaking process.[198]

But broadly, significant guidance simply may not get declared.

*Some agencies usually self-report—and often do not report at all.*

During the 10-year period 2005-2014, agencies published 36,457 final rules in the *Federal Register*, according to OMB. Among these, OMB reviewed 2,851 rules, 549 of which were considered major.[199] Interestingly, that number of major rules over the decade is comparable to the partial tally of 617 significant guidance documents we just compiled. But there is more to the story. While guidance specifically deemed significant seems comparable to the number of major

*Even a small number of guidance documents can have a significant impact.*

rules, we have established that agencies like Interior and CMS maintain document flows that rival or outpace rulemaking itself. These realities dictate that Congress can no longer afford to disregard guidance documents, whether they are deemed significant or not.

Counts and volume matter, but even a small number of guidance documents can have a significant impact. The Justice Department's Antitrust Division professedly has only two documents classified as significant guidance, but other important DOJ policy statements, guidance documents, and notices affect such matters as cybersecurity, joint ventures, intellectual property, health care, and mergers.[200] Many of these are economically significant for those affected. Until Congress (or a presidential order) requires more consistency in guidance reporting, the haphazard nature of what agencies publicly disclose as guidance in response to the 2007 OMB memo will be characterized by its serious limitations rather than reliable disclosure.

Sound future reporting will need to make distinctions between guidance affecting the public and that which is obviously or allegedly internal. For present purposes, our concern is guidance affecting the private sector, but 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.[201] Other guidance affecting agencies can be noteworthy, such as numerous OMB privacy guidance issuances to federal agencies over the years.[202] Further, investigators occasionally take a look at how well agencies adhere to such "inside" guidance, as when, for example, the GAO recommended improvements in the way the EPA adhered to OMB guidance with respect to performing Regulatory Impact Analyses.[203]

### *A Partial Inventory of Significant Independent Agency Guidance*

Independent agencies sometimes compile guidance on landing page websites, though they are not required to list their guidance documents under the 2007 OMB directive. For example, the U.S. Equal Employment Opportunity Commission (EEOC) maintains a Web page where it lists self-reported significant guidance documents (23 entries as of this writing), while invoking the OMB guidance to which it is not technically bound.[204] Other EEOC guidance not among these entries but likely significant regardless includes guidance to employers on the accommodation of pregnancy.[205] While not a piece of guidance, a noteworthy 2016 EEOC administrative ruling represents a significant move toward an eventual workplace ban on the "Don't Tread On Me" Gadsden flag.[206]

Among other independent agency proclamations, one finds the Federal Trade Commission's page of "Advisory Opinions" issued "to help clarify FTC rules and decisions,"[207] as well as its page detailing "Guidance,"[208] a recent example

of which was advertising guidance on disclosure of paid search engine results.[209] The Consumer Financial Protection Bureau has published numerous guidance documents and ominously invites the regulated public to contact the Office of Regulations "to receive informal guidance from a staff attorney."[210]

While not formal rules, guidance from independent agencies often carries veiled warnings. 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."[211]

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), and supervision and regulation letters (Federal Reserve Board).[212]

The Federal Reserve Bank of St. Louis compiles itemized lists of federal banking guidance issued since 2010 that it deems "significant" (in addition to separate lists of standard notice-and-comment regulation).[213] This institution's characterization of "significant" will not necessarily conform to the 2007 OMB memo nomenclature. The current tally of 140 guidance documents through 2016 (up from 69 in October 2015) is summarized in Table 7. Note that some financial sector guidance is multi-agency (and note also that the Treasury Department, an executive agency, is listed here for completeness).

This compilation represents a handful of pieces of "significant" banking guidance. Yet there is even more dark matter from both executive and independent agencies, as the next section shows. For example, a separate financial sector guidance roundup, 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.[214]

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

> *And no one seems sure how many more hundreds of thousands (or*

**Table 7. A Partial Inventory of Independent Financial Agency Significant Guidance, as deemed significant by the St. Louis Fed**

| Agency | Count |
|---|---|
| Commodity Futures Trading Commission | 2 |
| Consumer Financial Protection Bureau (CFPB) | 24 |
| Federal Deposit Insurance Corporation (FDIC) | 22 |
| Federal Financial Institutions Examination Council (FFIEC) | 4 |
| Federal Housing Finance Agency | 2 |
| Office of the Comptroller of the Currency (OCC) | 52 |
| Securities and Exchange Commission | 5 |
| Treasury Department | 2 |
| FDIC/Board of Governors of the Federal Reserve System (FRS) | 1 |
| FDIC/FRS/OCC | 13 |
| FDIC/FRS/National Credit Union Administration (NCUA)/OCC | 3 |
| FDIC/FinCEN/FRS/NCUA/OCC | 2 |
| CFPB/FDIC/FFIEC/FRS/NCUA/OCC | 1 |
| CFTC/FDIC/FRS/OCC/SEC | 1 |
| FRS | 5 |
| **TOTAL ((2010 through 2016):** | **140** |

*A full list of these guidance documents is maintained at http://tinyurl.com/hzcb8en.*

*maybe millions) of pages of less formal or "sub-regulatory" policy manuals, directives, and the like might be found floating around these days.*[215]

——Judge Neil Gorsuch, 10th Circuit, *Caring Hearts Personal Home Services, Inc. v. Burwell*

*[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.*[216]

—A British businessman lamenting French labor regulations.

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 that right, tens of thousands. The emphasis so far has been on significant guidance, but there is much more agency dark matter beyond significant guidance about which we know little. As an Education Department official testified before the Senate, "the process for developing guidance that does not meet the OMB Bulletin's definition of 'significant guidance' is left to agency discretion."[217] Given that discretion, 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.

A September 2016 GAO report looked at the Internal Revenue Service's hierarchy of law, regulations, guidance, and explanatory material with respect to communicating the interpretation of tax laws to the public. A pyramid diagram presented by GAO was topped by the Internal Revenue Code, as passed by Congress. Beneath that, in widening stages, one finds "Treasury Regulations," "Internal Revenue Bulletins," (IRB), "Written Determinations," and "Other IRS Publications and Information."[218] The IRS regards the bulletins as generally authoritative, while determinations tend to apply to individual taxpayers.

As the GAO explains:

> Treasury and IRS are among the largest generators of federal agency regulations and they issue thousands of other forms of taxpayer guidance. IRS publishes tax regulations and other guidance in the weekly IRB. Each annual volume of the IRB contains about 2,000 pages of regulations and other guidance documents.[219]

From 2013 to 2015, each annual Internal Revenue Bulletin edition contained some 300 guidance documents; in 2002-2008, about 500.

When one sees such document proliferation with the IRS, an impartial observer might surmise the time for tax reform and simplification has arrived. Likewise, when regulatory guidance multiplies that applies to various sectors—like finance, Internet, and health care—one might similarly conclude the time has come for regulatory liberalization. In frontier sectors, such as drones and autonomous vehicles, Congress must be especially attuned to inappropriately setting rules of the game, because agencies will tend to cling to obsolete regulatory models already in place. The FAA and NHTSA presume to issue guidance on communications, deployment, and fitness merely because government regulators already control airspace and highways, for example. True expertise, the purported justification for the administrative state, instead lies in enabling the expansion of property rights into complex realms and creating the path for alternative approaches to the prescriptive rule-and-guidance model.

Assessing the IRS guidance hierarchy was a significant undertaking by the GAO, and detail with respect to guidance elsewhere is sketchy. One category where policy makers should focus their attention is that of public notices in the *Federal Register*. These typically comprise non-rulemaking documents like meeting and hearing notices and agency-related organizational material. They can also serve as a catch-all for dark matter that gets published in the *Federal Register*. Notices make up the bulk of the *Federal Register*, and there

*There is much agency dark matter beyond significant guidance about which we know little.*

*True expertise lies in enabling the expansion of property rights into complex realms and creating the path for alternative approaches to the prescriptive rule-and-guidance model.*

are tens of thousands of them yearly—23,959 in 2015 and 24,557 in 2016. They can include policy statements, manuals, memoranda, circulars, bulletins, guidance, and alerts, many of which address matters that could be important to the public.[220] Like major rules 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 notices. OMB is not clear on this.

For example, the FDA's search page on guidance documents illuminates much 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 unofficial 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:

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
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[221]

This rather extensive list partly embodies the magnitude of the task of coming to grips with dark matter. Determining what is binding is a challenge, to put it mildly. With respect to *Federal Register* "Notices," Table 8 shows annual counts, which stood at 24,557 in 2016, and have, apart from 2014 and 2015, topped 24,000 since 1995. The total count for notices since 1994 has been 550,415—over half a million in just over 20 years.

To what extent are notices subject to review or oversight? While the criteria are unclear, a portion get reviewed by 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 among them deemed "significant." All in all, since 1994, OMB indicates it has reviewed 1,008 notices, of which 496 were significant. In addition, 132 have been flagged as "economically significant" (entries of this type had abruptly halted in October 2014 through at least December 2015, but have since been resumed).[222] 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."[223]

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. The "other" documents

category in the *Federal Register*—which included these notices plus presidential documents—had been as high as 33,670 in 1980. During the late 1980s, the tally hovered at a considerably lower 22,000 annually. Since 1976, there have been well over 1 million "other" documents or notices.[224] But at this point there is no coordinated congressional or executive branch effort to identify the regulatory dark matter embedded within the thousands of agency notices. Such an assessment is needed.

At the individual agency level, some guidance and notice material gets listed on cabinet agency websites much like the OMB-compliant significant guidance sometimes 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."[225] Other examples of supposedly sub-significant guidance disclosures include:

- The "Advisory Opinions" page from the Department of

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

| | Total Notices | OMB Reviews | Significant Notices Under EO 12866 | Economically Significant Notices |
|---|---|---|---|---|
| 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 | 5 |
| 2015 | 23,959 | 35 | 12 | 4 |
| **2016** | **24,557** | **45** | **8** | **2** |
| **TOTALS:** | **550,415** | **1,008** | **496** | **132** |

*Sources:Total and "significant" notices: from National Archives and Records Administration, Office of the Federal Register, author search on FederalRegister.gov advanced search function. OMB Reviews and Economically Significant Notices from author search on RegInfo.gov search function and review counts database search engine, both under Regulatory Review heading.*

Commerce's Bureau of Industry and Security;[226]
- The "Agency Guidance" page from the Department of Transportation's Pipeline Safety and Hazardous Materials Safety Administration;[227]
- The Department of Energy's "Policy and Guidance" page;[228] and
- The Department of Housing and Urban Development's "Public Guidance Documents" page on real estate settlement regulations.[229]

Beneath agency guidance not officially deemed as significant, we descend the great regulatory pyramid to such diktats as Federal Transit Administration "circulars,"[230] Federal Energy Regulatory Commission "policy statements,"[231] and FDA "Warning Letters" to businesses.[232] One pointed warning letter can change firms' behavior, such as the FDA's calling out of a company for making health claims about nuts,[233] and its warning to genetic testing company 23andMe to halt marketing of its Saliva Collection Kit and Personal Genome Service for failure to secure premarket approval.[234] Agencies issue *hundreds* of such letters, such as the Federal Trade Commission's recent letters to five skin care companies over using the claim "natural."[235]

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:

- Consumer Financial Protection Bureau "Guidance Documents;"[236]
- The Federal Deposit Insurance Corporation's "supervisory Guidance" page[237] (as well as a page of numerous "Financial Institution Letters");[238]
- Commodity Futures Trading Commission "Staff Letters"[239] and "Opinions and Adjudicatory Orders;"[240]
- Federal Housing Finance Administration "Advisory Bulletins;"[241] and
- Consumer Product Safety Commission Office of General Counsel "Advisory Opinions,"[242] "Voluntary Standards,"[243] and "Recall Guidance."[244]

Another category of non-legislative regulation is the phenomenon known as "sue and settle," which allows regulatory agencies to expand their power and scope without congressional oversight, or even the APA's limited discipline.[245] 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."[246] As in the Volkswagen settlement-plus-regulation matter

*At this point there is no coordinated congressional or executive branch effort to identify the regulatory dark matter embedded within the thousands of agency notices. Such an assessment is needed.*

*"Sue and settle" allows regulatory agencies to expand their power and scope without congressional oversight.*

described above, the takeaway is that policy makers must think about consent decrees more systematically in terms of their role in creating dark matter regulation.

The previous section noted 140 pieces of "significant" financial agency guidance as compiled by the St. Louis Fed, primarily from independent 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.[247] Table 9 shows 2,452 items in effect from 2004 through December 2016. Note that the Treasury Department, not an independent agency, appears here (with a count of 178 items) as does its financial crimes unit and its Office of Thrift Supervision. In the executive branch significant guidance inventory above, Treasury sported only two items, compared to 178 items in the table below.

Many notice-and-comment regulations lack impact analysis. Notices, memos, bulletins, guidance, and the like number in the thousands and deserve policy makers' attention. We have highlighted over 2,400 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 now so broad and so vague that this*

**Table 9. Financial Agency Directives: A Partial Inventory Compiled by the Conference of State Bank Supervisors**

*Guidance published by the Federal Financial Regulatory Agencies*

| Agency | Count |
|---|---|
| Consumer Financial Protection Bureau | 68 |
| Financial Accounting Standards Board | 56 |
| Federal Deposit Insurance Corporation | 579 |
| Federal Reserve Board | 424 |
| Federal Financial Institutions Examination Council | 66 |
| Federal Housing Finance Agency | 43 |
| Financial Crimes Enforcement Network | 204 |
| Office of the Comptroller of the Currency | 247 |
| Office of Thrift Supervision | 48 |
| Securities and Exchange Commission | 40 |
| Treasury Department | 178 |
| **TOTAL (Through December 2016)** | **2,452** |

*practice is no longer followed in America. The rules are now whatever regulators say they are.*[248]
– Former Texas Senator Phil Gramm

*Some agencies, indeed, are so powerful that their merely initiating an investigation or publicly releasing information can act as a form of shadow lawmaking. If the Fed breathes, markets move.*[249]
– Amy J. Wildermuth and Lincoln L. Davies, University of Utah S.J. Quinney College of Law

No one knows what the regulatory state "weighs." Policy makers routinely debate regulatory costs, but regulatory dark matter and its consequences can escape measurement, undermining already weak efforts to gauge regulatory intervention. And over time, certain interventions become taken for granted. For example, the federal government's operation of most Americans' retirement, Social Security, is not counted as a cost of intervention. Yet there is a substantial cost in the extra wealth people might have accumulated through investing, and in the inability to bequeath an estate to heirs after a lifetime of garnishment.

As government expands 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, without the need for legislation from Congress or notice-and-comment rulemaking. Worse, regulatory dark matter raises barriers to entry even higher than conventional regulation. When agencies follow all conventions and publish regulations, economies of scale in compliance are substantial. When the agency's expectations are hidden, the disadvantage to small business soars.

Such government growth cannot readily be captured in data in the normal sense. In a new, almost 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:

> 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?[250]

As modern bureaucracies adopt such an approach, "law" can become more arbitrary than even the written dark matter tallied in this paper. 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."[251] Who will not obey?

*As government expands 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, without the need for legislation.*

Sen. Mike Lee (R-UT) addressed the concern with respect to CFPB when announcing 2016 legislation for a regulatory budget:

> In 2012, for instance, when testifying before Congress, the director of the CFPB explained that his agency's mandate was "a puzzle" and that CFPB bureaucrats would define "unfair, deceptive, [and] abusive" on a case-by-case basis. This not-uncommon mindset of federal bureaucrats explains why laws passed decades ago are still spawning new regulations today.[252]

In a stark example of that mindset, the CFPB attempted to assert authority over college accrediting agencies and began probes, a power not given to it by Congress.[253] The United States District Court for the District of Columbia ruled in 2016 that the agency exceeded its statutory authority when it issued an August 2015 Civil Investigative Demand to the Accrediting Council for Independent Colleges and Schools.[254]

Other examples of the regulatory mindset in the financial sector include federal agency assertions of authority over non-bank financial institutions like insurance firms in the wake of Dodd-Frank, and "systemically important" financial institution designations by the Financial Stability Oversight Council.[255] The latter's secret processes in the wake of Dodd-Frank confirm the "black box" characterization of how some agency rulemaking takes place, and were rebuked in Government Accountability Office examinations. [256]

Another prominent example is the Federal Communications Commission's order on net neutrality (should it survive during the Trump administration).[257] Here we see the FCC's unprecedented use of "advisory opinions" that threaten the industry's autonomy and capacity to innovate:

> 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.][258]

In effect, the FCC sought to regulate tomorrow's Internet as if it were yesterday's common carrier utility.[259] Companies will be reduced to checking with the commission first before conducting business. No laws need be passed by Congress, and no further APA-compliant rules need be issued by the FCC for it to be able to exert control over the Internet's future. This regime, if not dismantled, will commence with infrastructure firms, but eventually will encompass the fast-changing content and app industries despite the FCC's assurance to the contrary.[260]

Further, the FCC maintains its enthusiasm in traditional antitrust regulatory intervention, with new twists. In May 2016, the commission approved the Charter-Time Warner merger, but with "voluntary" side agreements the agency lacked authority to impose.[261]

Finally, the FCC's internal operations are cloaked in secrecy. In a letter to U.S. Senate leadership on FCC leadership changes during the Trump administration transition, a coalition of free market groups noted:

> FCC Chairman Tom Wheeler repeatedly refused to share draft orders with Republican commissioners until the last possible minute, has prohibited agency staff from making draft orders public—including the colossally important Open Internet Order—and has continued to edit orders even after they have been voted upon.[262]

Not to be outdone by the CFPB or FCC, the Office of the Comptroller of the Currency's guidance document, "Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective," proposes a "centralized office on innovation." Like the preemptory, mother-may-I "advisory opinion" guidance that would apply to telecom before anyone in that sector moves, "the office could serve as a forum to vet ideas before a bank or nonbank makes a formal request or launches an innovative product or service." "To be effective," readers are assured by OCC, "the improved process should clarify agency expectations" regarding partnerships between banks and non-banks in the evolving financial technology marketplace and "assess whether additional guidance is appropriate to address the needs of banks and their customers in the rapidly changing environment."[263]

Still another example of tomorrow's rules being whatever regulators say is the Operation Choke Point initiative that originated in President Obama's Financial Fraud Enforcement Task Force within the Department of Justice. This maneuver was an 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

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order, no written regulations issued—just lists of targeted types of businesses, threats against those businesses, and pressure on their banks.[264]

*Antitrust intervention—or the threat of it—has been derailing certain business deals and redirecting economic resources and investment for over a century.*

Alarming as such developments are, the arbitrariness they embody is not new. Antitrust intervention—or the threat of it—has been derailing business deals and redirecting economic resources and investment for over a century. But the scale is considerably greater now. Only certain politically connected firms, protected from competitive processes, can thrive in such a system.

Energy is often defined as, "the ability to do work." The "dark energy" corollary of dark matter can be defined as the opposite: that which halts work and productivity. If the universe's dark energy is "a force that repels gravity," in the policy realm dark energy might be regarded as a force that repels liberty.[265] 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.

### Principles of Reform

> *The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.*[266]
> —James Madison, *Federalist* No. 47.

> *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.*[267]
> —Charles Murray, *By the People: Rebuilding Liberty without Permission*

The universe weighs "100 trillion trillion trillion trillion tonnes, give or take a few kilograms," according to *New Scientist*.[268] Here on Earth, no one knows how much the regulatory state "weighs," or even the number of agencies. A de facto "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.[269]

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.[270]

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.[271] The relationship of the individual to the state continues to change, as the growing quantity of regulatory dark matter takes the potential for abuse to new heights.

The rise of regulatory dark matter has changed the nature of the regulatory reform debate. It has long been the case that there are far more regulations than laws, which 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 long gotten a pass. With dark matter added to the mix, agencies may articulate interpretations and pressure regulated parties to comply without formal regulation or understanding of burdens. Left unaddressed, regulatory dark matter will increasingly empower regulatory agencies to avoid public and congressional scrutiny by issuing memos, letters, guidance documents, bulletins, and other proclamations and decrees that influence the public's behavior, while skirting the Administrative Procedure Act's notice-and-comment process, OMB oversight, and the constitutional lawmaking process itself.

To address overregulation and the explosion of dark matter, Congress must reassert its lawmaking authority under Article I of the Constitution, and punish officials who engage in arbitrary behavior. Congress can reassert its lawmaking primacy and reinvigorate its authority over agencies through use of the Congressional Review Act's resolution of disapproval process and by enacting legislation such as the REINS Act and applying it, not just to "economically significant" rules, but to "controversial" rules and to guidance as well (a reasonable definition of what counts as controversial should be achievable, but if not, any Member of Congress should be able to object). The 2016 House Task Force reports covering Article I restoration, economic reform, and congressional over-delegation provided numerous suggestions to reinstate the principles of separation of powers and checks and

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balances.[272] The overuse of guidance has become one of the most troublesome consequences of lapses in adherence to these principles.

Regulatory reform emphasizes the things we can count, and so focuses on steps like better cost-benefit analysis, sunsetting of rules, bipartisan regulatory reduction commissions, and calls for regulatory budgeting.[273] These are important, but the persistence of dark matter means it is not enough to track notice-and-comment regulation. There are important principles for Congress to consider in addressing regulatory dark matter, all of which must be anchored in Congress explicitly approving all agency decrees.

### *Disclosure of all agency decrees matters, not just the "rules"*

Unless Congress requires consistency in the reporting of dark matter, the haphazard nature of what agencies disclose as guidance will worsen as a problem. The 2007 OMB Memo on reporting significant guidance is a useful starting point. It should be expanded to cover (1) guidance not officially designated as "significant" (a designation agencies should not get to make on their own anyway), and (2) independent agencies. We need what Paul R. Noe and John Graham have called "due process and management" for guidance.[274] Reforms will require creating an authoritative list of federal agencies—one does not currently exist—and requiring agencies to maintain consistent, uniform Web pages and databases. The incomplete guidance and regulatory dark matter inventory compiled in this report came from far too many disparate sources.

Indeed, problems presented by guidance often not being published in the *Federal Register* have not been adequately surveyed. What coherence exists between that which does and does not appear in the *Federal Register*? If it is not published there, how does one learn of guidance? Does Congress even know? What good will be a notice-and-comment regime for guidance if the final product does not get published where anyone can readily find it?

In the process of harmonization in reporting, 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 appropriateness of some guidance and memoranda not appearing in the *Federal Register*. The Regulatory Accountability Act, along with its component, the All Economic Regulations Are Transparent (ALERT) Act, aims at broad clarity regarding regulatory impacts, such as monthly reports and schedules of completion, estimates of costs and economic burdens, and annual summary reports.[275] Such disclosure and "report cards" for individual agencies should be expanded to incorporate dark matter.[276]

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

To address stealth regulation, John Graham and James Broughel propose options such as reinstating the George W. Bush-era requirement to prepare analysis for significant guidance documents—including those designated as nonbinding—and requiring notice and comment for them. They also call for agencies to inform parties "when a communication is only a recommendation and is not legally binding."[277] These should all be done, but more is needed since even ordinary regulations outflank such constraints.

Attempts to subject more guidance to the notice-and-comment process may induce agency creativity in skirting review and using even "darker" dark matter, like threats and warnings, to escape oversight.[278] In response, Congress can codify elements of recent presidents' executive orders on regulation, and extend their provisions to guidance (Donald Trump's executive order temporarily freezing regulation already applies to guidance). The Regulatory Accountability Act, which passed the House early in the 115th Congress, contained provisions on early notice, public participation, evidence requirements, and formal hearings on regulations, and provisions on disclosure and oversight of guidance.[279]

Canada and Great Britain have both implemented one-in-one-out requirements for rules with some success.[280] In the Senate during the 114th Congress, Sen. Dan Sullivan's (R-AK) Regulations Endanger Democracy (RED) Tape Act aimed to introduce the same requirement for ordinary regulations, and extend it to guidance and memoranda. Another recent attempt at guidance reform is the Regulatory Predictability for Business Growth Act (S.1487), which would require interpretive rules and guidance documents that would alter previously issued interpretive rules to undergo public notice and comment before they can go into effect. The Reforming Executive Guidance (REG) Act of 2017 (H.R. 462), sponsored by Rep. Jason Lewis (R-Minn.), would subject significant guidance to notice-and-comment APA procedures as well as the Congressional Review Act.

Alongside disclosure and scrutiny, administrative and institutional reforms like these can help bring measureable accountability and moderation to the rulemaking process. Consider that the number of new annual federal regulations stood 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. But permanent control will require legislation and congressional accountability.

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*Congress' over-delegation of power is at the root of Washington's out-of-control growth—which has resulted in such indecencies as America's wealthiest counties consisting of the ones surrounding the Beltway.*

### *Congress must vote to approve costly or controversial dark matter decrees*

Congress' over-delegation of power is at the root of Washington's out-of-control growth—which has resulted in such indecencies as America's wealthiest counties consisting of the ones surrounding the Beltway. It is not enough for the White House OMB to try to do its "darndest" on regulatory oversight and review.[285] Congressional accountability is indispensable in offsetting the pro-regulatory bias that prevails across the entire federal apparatus.

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 legislation (REINS) Act (H.R. 26, S. 21) would require this step for regulations.[286] It should be expanded to cover not just economically significant dark matter, but controversial or contentious dark matter that agencies neglect to designate as significant. While congressional responsibility for the regulatory legislative enterprise is of most concern, the president also can play a strong role in curbing agencies' issuance of dark matter. Appropriation restrictions can also help. Congress should keep in mind that guidance documents and other matter decrees are covered by the Congressional Review Act, and thus subject to resolutions of disapproval.[287]

## Conclusion and Recommendations

Reform of regulatory dark matter seeped into the broader regulatory liberalization debate during the 114th Congress, as noted with respect to one-in-one-out provisions for new guidance, and notice-and-comment provisions for changes to existing guidance.[288] Increasing disclosure and accountability for guidance also featured heavily in the Regulatory Accountability Act in terms of issuance, procedures, and OMB oversight.[289] The Article I Regulatory Budget Act, sponsored by Sen. Mike Lee in the 114th Congress, provides for notice and comment for significant guidance and for a private right of civil action in district court when one is affected by significant guidance not so designated.[290] The bill's summary sheet explains that the Act will "Eliminate the abuse of regulatory 'dark matter.'"[291]

The various regulatory liberalization threads came together somewhat in House Speaker Paul Ryan's (R-Wisc.) 2016 "Better Way" task force report series, which sought to lay out a path forward for reforming rulemaking and the Administrative Procedure Act. The reports asserted that Congress will "[r]ein in the use of 'guidance' to advance significant regulatory changes,"[292] and "tighten submission requirements so that no regulations or covered guidance escape Congress' review and will authorize courts to find invalid and unenforceable rules that

have not been submitted to Congress under the CRA."[293]

A more targeted program is needed. In the wake of modern "excessive rulemaking and executive orders," a rule of the 115th Congress offered by Rep. Ken Buck (R-Colo.) ensures time will be spent to "prioritize measures that seek to preserve Congress' authorities under Article I of the Constitution when scheduling the House Floor."[294] Past attempts at serious government downsizing in the 1970s, '80s, and '90s brought partial liberalization of some industries, but fell short when it came to shutting down agencies and increasing agency and congressional accountability. Today, the situation has deteriorated to the point where Congress has no idea of what today's thousands of agency proclamations consist.

Regulation and guidance cannot be controlled without downsizing the federal government itself and strengthening democratic accountability. That requires reining in the colossal bureaucracies that enable rule by unelected experts (so professed). Ending regulation by guidance is especially urgent to rein in agency efforts to regulate new technologies, business models, and contractual arrangements using obsolete, decades-old rules—via guidance and without congressional authorization. If government oversight is warranted in one of these areas, Congress should legislate directly, rather than allow for open-ended agency regulation.

To accomplish these goals, Congress should:

- Repeal or amend enabling statutes that sustain regulatory excesses in the first place.
- Abolish, downsize, cut the budgets of, and deny appropriations to aggressive agencies, sub-agencies, and programs that routinely pursue actions not authorized by Congress.
- Require congressional affirmation for guidance and other agency dark matter proclamations likely to have significant economic impact.[295]
- Withhold appropriations for specific agency actions not authorized by Congress.
- Repeal specific guidance documents when warranted.
- Apply the Congressional Review Act's 60-day resolution-of-disapproval process to guidance.
- Apply the Administrative Procedure Act's notice-and-comment requirement to guidance.
- Subject regulatory dark matter to more intense OMB review. While regulatory costs can never be accurately tabulated, better exposure of the costs of guidance can help provide a public record for future reform efforts. President Reagan's Executive Order 12291 provides a model to follow in this regard, in that it placed the

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burden of proof on agencies to assess burdens and demonstrate need for a new rule.[296] Guidance documents should be held to the same standard.

- Require agencies to present quantitative and qualitative data concerning regulation and guidance to Congress in a form comparable to the federal budget's Historical Tables.[297] The Reagan and first Bush administrations produced something along these lines, a document accompanying the Budget titled the *Regulatory Program of the United States Government*, which included a lengthy tabular appendix ("Annual Report on Executive Order 12291").[298] Further, guidance should appear the *Federal Register* in an accessible way. Other disclosures needed are as follows.
  - ► ***Economically significant guidance.*** Require streamlined, one-location online disclosure of economically significant guidance, augmenting what a few executive agencies voluntarily already publish based on the 2007 OMB memorandum to agencies.[299]
  - ► ***Secondary guidance and notices.*** Require centralized disclosure of these proclamations, which currently are scattered under numerous monikers and across various websites, if publicized at all.

It has been a generation since Congress last proposed major downsizing of the federal bureaucracy. The 2016 House leadership congressional task forces, along with a distinctive Policy Statement on Federal Regulatory Budgeting and Reform in the Fiscal Year 2017 Budget Resolution,[300] were significant steps in reestablishing the principle of congressional authority over lawmaking and of restricting federal regulatory compliance to appropriate boundaries.[301] The solution for executive overreach is for Congress to say no to it. The public should understand that, and hold their elected representatives accountable for surrendering their constitutional authority and shirking their duties.

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## About the Author

Wayne Crews is Vice President for Policy at the Competitive Enterprise Institute (CEI). He is widely published and a contributor at Forbes.com. A frequent speaker, he has appeared at venues including the DVD Awards Showcase in Hollywood, European Commission–sponsored conferences, the National Academies, the Spanish Ministry of Justice, and the Future of Music Policy Summit. He has testified before Congress on various policy issues. Crews has been cited in dozens of law reviews and journals. His work spans regulatory reform, antitrust and competition policy, safety and environmental issues, and various information-age policy concerns.

Alongside numerous studies and articles, Crews is co-editor of the books, *Who Rules the Net? Internet Governance and Jurisdiction*, and *Copy Fights: The Future of Intellectual Property in the Information Age*. He is co-author of *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism*, and a contributing author to other books. He has written in the *Wall Street Journal*, *Chicago Tribune*, *Communications Lawyer*, *International Herald Tribune*, and other publications. He has appeared on Fox News, CNN, ABC, CNBC, and the PBS News Hour. His policy proposals have been featured prominently in the *Washington Post*, *Forbes*, and *Investor's Business Daily.*

Before coming to CEI, Crews was a scholar at the Cato Institute. Earlier, he was a legislative aide in the U.S. Senate, an economist at Citizens for a Sound Economy and the Food and Drug Administration, and a fellow at the Center for the Study of Public Choice at George Mason University. He holds a Master's of Business Administration from the College of William and Mary and a Bachelor's of Science from Lander College in Greenwood, South Carolina. While at Lander, he was a candidate for the South Carolina state senate.

A dad of five, he can still do a handstand on a skateboard and enjoys custom motorcycles.

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1310 L Street NW, 7th Floor
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