Bookending the Trump Era: Seven Efforts to Reduce and Streamline Regulatory Flows

This 2021 edition of *Ten Thousand Commandments* begins with a survey of approaches the Trump administration took during its four-year term to fulfill promises to streamline red tape and "drain the swamp." The report then puts Trump's numbers in historical context and examines some specifics of the implementation of Trump's Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," and subsequent White House guidance to eliminate two regulations for every "significant regulatory action" issued.[54] Since that order has now been revoked by President Joe Biden, this edition of *Ten Thousand Commandments* bookends the Trump era.

The overarching reality is that the federal government is far larger than ever.

Assessing agencies' priorities and results from the four years of the Trump administration helps underscore the limitations of solo executive branch streamlining, even when doing so is prioritized. President Biden issued a series of executive orders specifically repudiating the Trump agenda[55] and a January 20, 2021, directive called "Modernizing Regulatory Review" that does away with actual balance-oriented review and the oversight role of the White House Office of Information and Regulatory Affairs (OIRA), and replaces them with the pursuit of benefits.[56] The 117th Congress is not expected to craft a legislative regulatory reform package. Barack Obama unapologetically wielded the "pen and phone" to expand federal reach over private affairs, and Joe Biden promises more of the same.[57] Donald Trump, too, used the pen and phone, in significant part to attempt to undo Obama programs and otherwise streamline regulation.[58] However, Trump also indulged substantial regulatory impulses of his own that arguably swamped his administration's reform agenda; that will be reviewed here as well.

The overarching reality is that the federal government is larger than ever after four years of Trump, for reasons self-inflicted and for reasons inherent in the logic of growth of the administrative state in response to any crisis.[59] Even the Trump executive branch reorganization initiative, undertaken alongside regulatory streamlining, did not result in the elimination of any regulatory agencies.[60]

Presidents come and go, but none systematically and in such prolonged fashion attempted to freeze and roll back a subset of rulemaking in a way comparable to Trump. Agencies and outside advocacy groups reacted aggressively to protect the administrative state, and legal challenges to Trump's regulatory rollback and Executive Order 13771 predictably ensued.[61] A poor record in court for many Trump streamlining measures has been widely noted.[62] Those included judicial rebukes early and late to Trump's efforts to delay implementation of certain elements of the Environmental Protection Agency's Waters of the United States rule, a chemical disaster preparedness and disclosure rule,[63] and methane emissions at oil and gas operations on federal lands.[64] Interestingly, the American Action Forum reckons that only two of the 10 rules with the greatest economic savings as of late September 2020 were blocked by challenges, and overall the successful challenges blocked just 2 percent of the savings.[65] Still, whatever the courts did not overturn, the Biden administration has ceased or likely will cease defending, and in some cases will likely seek regulatory revision.

The administrative state's incompatibility with limited government is observable in the rulemaking process itself. The 1946 Administrative Procedure Act requires strict adherence to process for rolling back rules or changing policy, not only for issuing a rule, as the court losses show.[66] The Act's rulemaking process allows ample latitude to grow regulation via its "good cause" exemption, by which an agency may deem notice and comment for certain rules as "impracticable, unnecessary, or contrary to the public interest." Before Trump that "good cause" leniency was not enthusiastically applied to rollbacks.[67] In any event, barring congressional action to streamline, a rule cannot be eliminated, but only replaced with a new rule.[68] Moreover, under the judicial philosophy known as *Chevron* deference, courts routinely yield to agencies' interpretations of the enabling statutes under which they write their rules, as long as the agency's interpretation has some "rational basis."[69]

Trump's one-rule-in, two-rules-out Executive Order 13771 was explicit regarding its own legal limitations and operated well within the rule of law, as much as that concept applies in the context of the administrative state.[70] Executive Order 13771 asserted plainly: "Nothing in this order shall be construed to impair or otherwise affect … the authority granted by law to an executive department or agency. … This order shall be implemented consistent with applicable law."[71] Reforming or revoking major regulations, like the Waters of the United States or Clean Power Plan rules of the Environmental Protection Agency (EPA), takes years, as may Biden's various forms of revocation of these and other Trump regulatory changes. As Heritage Foundation analyst James Gattuso put it: "Given the procedural and institutional obstacles to repealing a rule, it is unlikely that any administration would be able to achieve substantial deregulation."[72]

And sure enough, early on, then-Director of the Office of Management and Budget (OMB) Mick Mulvaney affirmed the dominance of small successes when it came to rollbacks of Obama "midnight rules" and not-yet-implemented rules in the pipeline: "None of them are very sexy. ... None of them are very glamorous. None of them really rise to the level of getting national attention. But think about that—860 of them."[73] The big changes—like recodification of the Waters of the United States[74] and Clean Power Plan rules,[75] or the Department of Energy's creation of a new product class for dishwashers[76]—took time but can be undone via the regulatory process.

The court losses were undoubtedly a rebuke, but they also highlight the permanence of an entrenched administrative state immune to unilateral reduction in scope. This is not necessarily a bad thing from a long-term perspective, as it can help shift the focus to where it belongs—on a Congress that has delegated away much of its lawmaking power to executive branch agencies and their career personnel.

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Curiously, while some claimed that Trump's rollbacks were illegal and undermined health and safety safeguards,[77] others called Trump's boasts a "deregulation myth."[78] Complaints, sometimes contradictory, range from the dismissive observation that the administration "claims credit for some regulatory actions begun under Obama"[79] to the claim that Trump merely wants to offload red tape from the private sector on to the government.[80] So Trump both overreached and accomplished nothing.[81] Both cannot be true.

Trump's midnight regulations—that spurt of regulations commonly issued between an election and a successor's inauguration, are worthy of note. On the one hand, post-Trump the business-as-usual 3,000-plus flow of regulations (of which midnight spurts are a part) can be expected to resume. But on the other, according to the American Action Forum, while the "Trump Administration's [1.8 rules per day] midnight regulation pace is remarkably similar to other recent administrations." there was "a dramatically higher share of net regulatory costs imposed compared to the rest of his term."[82] Although many of Trump's rules were unambiguously regulatory in nature, a distinction might be

made between midnight rules that expand the state and midnight rules that attempt to shrink it; there remains an unexplored distinction between midnight regulation versus midnight deregulation.[83]

The use of the good-cause exemption to bypass the Administrative Procedure Act's notice-and-comment rulemaking process when an agency deems it "impracticable, unnecessary, or contrary to the public interest" is longstanding, so it was inevitable that the technique could eventually be used for deregulation as well if an outlier executive took the helm.[84] One innovation was Trump's urging of agencies in May 2020—via Executive Order 13924 on "Regulatory Relief to Support Economic Recovery"—to employ emergency powers to aid COVID-19 relief and economic recovery. The idea then had been to extend the already-underway medical crisis regulatory relaxation approach, and apply it to the economic crisis response more generally. In the face of the economic devastation from the coronavirus pandemic, it became politically feasible to ease regulations that impede access to credit and hiring, for example.

This tone could be expected to affect a midnight regulatory period too, in which the virus had not diminished as a factor. Against that backdrop, another Trump innovation was to employ interim final rules not simply to downplay notice and comment, as regulators often do, but also to shorten the typical final-rule 30–60 day waiting period or make rules effective immediately upon publication, which would prevent Biden from freezing them.[85] There were costly exceptions, but what were once midnight additions became subtractions: suspending penalties, easing permitting, making COVID-related temporary regulatory suspensions permanent, and using "good cause" generally to reduce regulation at a time by which most agencies had already picked low-hanging "one-in, two-out" fruit.

Even without the midnight effect, we might have expected a surge of interim final rules in a pandemic year. Trump's base level of rulemaking was already lower; some late actions were meant to undo not just prior rules but prior guidance.[86]

Some of the Trump midnight rules might temporarily constrain Biden and successors from wholesale rollback of the former president's legacy.[87] But what is likely to unfold is the undoing of Trump's streamlining by Biden's executive actions,[88] by agency personnel resistance,[89] and by corporations seeking to make strategic peace with re-regulation.[90] In 2021, finalized but unpublished Trump rules will have been scrapped and implementation delayed of those published but not yet effective.[91] Trump rules challenged in court will not likely be defended by the Biden administration, and the Congressional Review Act (CRA) can be invoked against midnight and certain early rules.[92]

As will be seen, the 2020 *Federal Register* bookending the Trump era is vastly thicker, second only to the peak of the Obama administration. Within it, though, we find not only no great jump in rule counts, but still historically low ones. The ostensibly shocking higher count of significant rules in 2020 is no longer so when those designated Deregulatory are netted out, although Trump did add costly rules at the very end, as noted. Like all midnight surges, the imperative was to get things through before the changeover, but that will have to be viewed in context with prior Trump years in which the imperative was to hold back on issuing new rules and regulations. It is incongruent to see Trump's midnight rules in quite the same way as his predecessors in that respect, his status as a net regulator notwithstanding. He operated within the administrative state, but he did not operate it.

The success-versus-failure dispute over the Trump legacy notwithstanding, what matters now is that the administrative state is alive, well, and powering ahead. While Trump could have made future improvements in the implementation of Executive Orders

13771[93] and 13981 on guidance document abuse, as well as issued an explicit order calling for OMB review of independent agency rules,[94] a president can achieve only a limited streamlining of the administrative state,[95] as underscored by the COVID-19 outbreak.[96]

Executive Order 13771 can be appreciated as encapsulating how a president may *not* reduce the size of government unilaterally.[97] And since most presidents expand executive power, Executive Order 13771 represented a voluntary and unique weakening of it with respect to certain regulations (we are not addressing wider policy matters in this context). The underlying message of Executive Order 13771 echoed that of Article I of the Constitution: If something needs to be regulated, then Congress should pass a law.

In the reporting of Executive Order 13771 results, the Trump administration separated actions deemed deregulatory from those deemed regulatory, one of the many elements of the Trump program that Biden should retain that has not been eliminated already. This designation could have staying power and be carried forward by subsequent administrations. Meanwhile, Executive Order 13771 did not apply either to rules from independent agencies like the Federal Communications Commission (FCC) or the Consumer Financial Protection Bureau (CFPB) or to rules mandated by Congress as opposed to those spearheaded by agencies themselves.

Trump's regulatory rollbacks over the past four years—limited given their largely unilateral implementation within the inertia of a preexisting administrative state—consisted of seven main elements:[98]

First, 14 rules that had been finalized during the closing months of the Obama administration and on track to take effect were eliminated using the Congressional Review Act in 2017, via individual resolutions of disapproval passed by Congress and signed by Trump. The rules removed were generally not headline-grabbing reforms, nor were they all major rules.[99] While this was a unique achievement (given that only one CRA resolution had been passed before Trump during the over 20 years of the CRA's existence), hundreds of Obama-era rules were eligible for rollback. This fact provides the perspective that businesses often favor regulation that can provide an advantage over competitors.[100] An additional rule not originated under Obama, and one guidance document from the CFPB, were also eliminated via resolution of disapproval in 2018. In similar fashion, Trump rules issued in the waning months of his presidency, including those meant to streamline, are similarly vulnerable to being overturned by the CRA.

Second, to the extent possible, agencies have largely abstained from issuing significant new regulatory initiatives of the type that get reviewed at OMB. At its outset, the Trump administration withdrew or delayed 1,579 Obama rulemakings that were in the pipeline at the time of his inauguration but not yet finalized, as follows:[101]

- 635 withdrawn
- 244 made inactive
- 700 delayed

All presidents issue freezes on their predecessors' regulatory action for review. While the Trump administration's emphasis was often on significant rules and their removal, such rules were still implemented during Trump's tenure. Yet a lower base level of rulemaking remained in effect that will merit future comparison with not just predecessors but also successors.

Trump's calendar-year final rule counts were 3,281 in 2017, 3,368 in 2018, 2,964 in 2019, and 3,353 in 2020, compared with Obama's 2016 peak of 3,853.[102] Of Obama's finalized rules over his past four calendar years, 1,526 were characterized as broadly "significant." The "significant" subset for Trump totaled 476 over the four years of his term (although these are subject to adjustment in the National Archives database and will be noted in future editions of this report). Even these lower rule counts can still overstate agencies' conventional rulemaking activity, since some

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"rules" were Executive Order 13771–driven delays or rollbacks of existing rules.

Third, streamlining permitting for bridges, pipelines, transportation, telecommunications, and other infrastructure was widely interpreted as creating a more favorable climate for infrastructure planning.[103] This manifested in several ways, such as the permitting-related executive actions noted in Box 1, the Commerce Department's permit streamlining action plan (which contained a detailed collection of rule recommendations),[104] and some elements, with caveats, of the 2019 Trump budget proposal addressing infrastructure reform.[105] The year 2020 brought Executive Order 13937 on "Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities"[106] and a September 2020 declaration regarding critical minerals and foreign threat also aimed at speeding mining permits.[107]

Fourth, the Trump administration technically exceeded its "one-in, two-out" goals for adoption of significant regulatory actions in each fiscal year,[108] but the increasing difficulty of achieving rule offsets was apparent from the beginning.[109] In implementing the streamlining process, two OMB guidance documents on the one-in, two-out executive order were issued after the order itself.[110] Further, another 2017 executive order established Regulatory Reform Task Forces at various agencies.[111] Agencies also sought public input on rule streamlining.[112] But these changes bumped against resistance and inherent limits during the Trump era and now the order itself is gone under Biden. Since the administration enjoyed no bipartisan support from Congress apart from on spending, rewriting rules under the strictures of the Administrative Procedure Act became the only option left as Trump's Executive Order 13771 one-in, two-out campaign matured, and that affected the out-to-in ratios and contributed to the character of the Trump midnight push.

On the other hand, while it inevitably became more difficult to eliminate more than two rules—particularly significant ones—for each significant rule added without Congress contributing to the effort, the point of the spear of the Trump deregulatory program was the capping of net new regulatory costs at zero. Regulatory eliminations served as a tool to work within this mini-regulatory budget. "By requiring a reduction in the number of regulations, the order incentivizes agencies to identify regulations and guidance documents that do not provide sufficient benefits to the public," noted then-Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) Neomi Rao in the "Introduction to the Fall 2018 Regulatory Plan."[113] Ultimately, the administration claimed net regulatory cost savings of $198.6 billion in total present-value regulatory costs across the government between 2017 and 2020, with $144 billion of that claimed to have occurred in FY 2020.[114] (The administration issued no report on costs or savings accumulated between October 1, 2020, and Biden's inauguration.) The trajectory of out–in during the four years of the Trump term unfolded as follows:

In 2017, the White House maintained that the goal of one-in, two-out for regulations was exceeded with a claimed 22-to-1 out–in ratio, since only three "significant" new regulatory actions were imposed during that fiscal year, while 67 reductions were made.[115] Six rules included in the roundup of 67 were among the 14 eliminated via Congressional Review Act resolutions of disapproval. Interestingly, among the initial 67 rule reductions, nine appeared to be revocations or alterations of subregulatory guidance, notices, orders, or information collections. Indeed, a bewildering nomenclature places regulations into categories encompassing such terms as rules, significant rules, major rules, economically significant rules, guidance, and more.[116]

Some independent agency rules were removed via CRA procedures but not taken as "credit" for two-for-one purposes since the order did not bind independent agencies. Examples of these included a CFPB arbitration rule,[117] a Securities and Exchange

Table 1. Significant Regulatory Actions

	FY2017	FY2018	FY2019	FY2020	Total
Regulatory	3	14	35	48	97
Deregulatory	66*	57	59	58	240
Claimed ratio—rules out/rules in	22/1	4/1	1.7/1	1.3/1	2.5/1

*These 66 rules in the 2017 startup period were not all deemed significant.

Commission (SEC) rule on foreign resource extraction payment disclosure,[118] and an FCC broadband privacy regulation.[119] The FCC's elimination of Obama-era net neutrality rules[120] and modernization of broadcast ownership rules[121] are among significant undertakings not included in two-for-one.

In 2018, OIRA reported in "Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2018" that "Agencies issued 176 deregulatory actions and 14 significant regulatory actions," for an overall 12-to-1 ratio. [122] Fifty-seven of these deregulatory actions were deemed significant, so comparing significant deregulatory with significant regulatory actions yielded a four-to-one ratio.[123]

In 2019, OIRA reported in "Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2019" that "Agencies issued 150 deregulatory actions and 35 significant regulatory actions," for an overall 4.3-to-1 ratio.[124] Sixty-one deregulatory actions were significant, so comparing significant deregulatory apples with significant regulatory apples yielded a ratio of 1.7 to 1.[125]

In 2020, OIRA reported in "Regulatory Reform under Executive Order 13771: Final Accounting for Fiscal Year 2020" that agencies issued 145 deregulatory actions and 45 significant regulatory actions in 2020 for a ratio of 3.2 to 1.[126] Of the deregulatory actions in fiscal year 2020, 58 of them were deemed significant in 2020, for a significant deregulatory to significant regulatory apples-to-apples comparison ratio of 1.3 to 1. (The tabulation will be slightly different from the reporting in the Unified Agenda as detailed later, but parity holds.) Over the entire Trump term from 2017 to the end of FY 2020, the administration claimed 538 deregulatory actions and 97 significant regulatory actions, for a four-year ratio of 5.5 to 1.[127] (The administration described its accounting methodology in "Accounting Methods under Executive Order 13771."[128]) While the two-for-one program has been eliminated, the Unified Agenda will make it easy to compare Trump and Biden in 2021 and beyond.

Table 1 is a summary bookending the four Trump fiscal years of claimed significant (not just overall) reductions. The apples-to-apples ratio stands at about 2.5 to 1.

Box 2 summarizes the Trump administration's 2020 claimed 145 completed regulatory eliminations or reductions by agency, and 45 regulatory components, along with a breakdown of the claimed $144 billion in present-value cost savings for fiscal year 2020.[129] As then-acting OIRA Director Dominic Mancini stated in 2017, "EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB's *Final Bulletin on Good Guidance Practices*."[130] Nonsignificant deregulatory rules issued may contribute to the one-in, two-out ratio and to cost savings.

As Box 2 shows, the Department of Commerce, the EPA, the Department of Transportation (DOT), and the Department of Health and Human Services (HHS) issued the most claimed deregulatory actions with 30, 25, 15, and 13, respectively. The EPA and DOT by far led in claimed cost savings, with over $96 billion apiece. The Department of Homeland Security (DHS) accounts for the greatest costs added, with nearly

Box 2. Completed EO 13771 Deregulatory (Significant and Other) Actions, Regulatory Actions, and Claimed Cost Savings, FY2018

	Deregulatory Actions	Regulatory Actions	Present Value Savings
Executive Department/Agency	145	45	$(144,025.9)
Dept. of Agriculture	12	2	$(1,249.2)
Dept. of Commerce	30	3	$(46.3)
Dept. of Defense	3	0	$(2,322.3)
Dept. of Education	3	2	$(5.8)
Dept. of Energy	2	0	$(11.3)
Dept. of Health and Human Services	13	10	$21,981.9
Dept. of Homeland Security	6	5	$38,949.1
Dept. Housing and Urban Development	5	0	$(633.1)
Dept. of Interior	3	0	
Dept. of Justice	1	0	$(0.1)
Dept. of Labor	11	3	$(5,452.2)
Dept. of State	2	0	
Dept. of Transportation	15	1	$(96,047.9)
Dept. of the Treasury	5	7	$(1,562.6)
Veterans' Affairs	0	1	$1,413.0
Environmental Protection Agency	25	4	$(96,247.9)
Equal Employment Opportunity Commission	0	0	
DoD/GSA/NASA (Federal Acquisition Regulation)	2	2	$(3,057.4)
General Services Administration	1	0	$(9.8)
National Aeronautics and Space Administration	1	0	
Office of Management and Budget	0	0	
Office of Personnel Management	0	1	$118.2
Small Business Administration	4	3	$27.4
Social Security Administration	1	1	$130.2
U.S. Agency for International Development	0	0	$0.00
TOTAL	**145**	**45**	**$(144,026.1)**

Source: White House OMB, Regulatory Reform Results for Fiscal Year 2020.

$38 billion. HHS' numerical rule reductions are offset by its second-highest level of costs added of nearly $22 billion. While overall the "no net new costs" directive was apparently met given the body of agency activity surveyed by OMB, it did not necessarily happen at any individual agency in a given year. Some agencies' rules offset those of others. And as noted, deregulatory campaigns can take years and even fail to materialize.

Again, ample critiques could be made of the claimed cost reductions, of their effect on the economy, of their neglect of benefits,[131] and of charges of "taking exaggerated credit for small reductions."[132] And unfortunately, as of this writing, there has been no detailed breakdown of which particular rules in FY 2020 generated the claimed cost savings. Additionally, there have been eliminations beyond what the White House took credit

for, such as with guidance documents and independent agency streamlining. Details on precisely what the rules are from each agency, the full list—of 145 deregulatory 45 regulatory actions—is provided in OMB's "Regulatory Reform Report: Completed Actions for Fiscal Year 2020."[133]

Regarding the net-zero "regulatory budget," we noted that OMB claims agencies have achieved $198.6 billion in savings over the past four fiscal years.[134] The individualized yearly annual reports depict less, about $189 billion, but are presented below with links to detail.[135]

FY 2017 savings: $8.148 billion[136]
FY 2018 savings: $23.432 billion[137]
FY 2019 savings: $13.471 billion[138]
FY 2020 savings: $144.0 billion[139]
Total: $189.0 billion

The one-in, two-out reports end at the beginning of FY 2021. In the interim and "midnight" periods, the Trump administration appears to have added the most costs of its term, enough to offset savings and wind up with net costs of $14 billion at the end of 2020 and $40 billion by the end of the presidential term.[140]

The Obama administration's cost picture contrasted sharply with Trump's claimed savings or even the interpretation of net costs. A November 2017 Heritage Foundation analysis of available information on the Obama regulatory record isolated major rules listed in the GAO database affecting only the private sector and distinguished between those that were deregulatory and those that were regulatory. The report concluded: "During the Obama years, the nation's regulatory burden increased by more than $122 billion annually as a result of 284 new 'major' rules."[141]

Each of the prior four fiscal years' rollbacks are detailed in OMB's "Regulatory Reform" reports noted above. Many of the rules are obscure, as noted, but there are still prominent examples of rule rollbacks and alterations beyond the aforementioned Clean Power Plan and Waters of the United States rules.[142] In some instances, independent agencies participated in rollbacks despite not being subject to executive orders. Notable rules and proposals, some now reversed or in the process of such, in the Trump era included the following:[143]

- The Fish and Wildlife Service's "improvements to the implementing regulations of the ESA [Endangered Species Act] designed to increase transparency and effectiveness" regarding critical habitat designation, unoccupied territory subject to inclusion, and adding or removing species to the endangered list using the "best available scientific and commercial information."[144]
- A great number of Environmental Protection Agency regulations.[145] Prominent among them were an EPA and National Highway Traffic Safety Administration (NHTSA) withdrawal of the California waiver on vehicle emissions afforded by the Clean Air Act,[146] an EPA-proposed rule on "strengthening transparency" and limitations on "secret science[147] (vacated days after the Biden administration entered the White House,[148] and an EPA rule, "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process."[149]
- A Department of Energy final rule withdrawing energy conservation standards for incandescent light bulbs issued under the Obama administration on January 19, 2017.
- A Department of Labor final rule expanding retirement savings options to make it easier for employers to band together and create joint retirement plan options for employees.[150]
- A final rule issued by the White House Council on Environmental Quality modernizing the implementing regulations of the1978 National Environmental Policy Act (NEPA) with respect to environmental reviews of infrastructure projects.[151]
- A final rule from the Treasury Department's Office of the Comptroller of the Currency raising thresholds for

stress testing for banks and savings and loans.[152]
- A final rule from the Office of the Comptroller of the Currency, Federal Reserve, and Federal Deposit Insurance Corporation raising limits for prohibitions on interlocking managements.[153]

Some proposed rules reductions and streamlining seem economically significant in the normal sense of that term, but were not characterized as such. Examples included the following:

- The Alcohol and Tobacco Tax and Trade Bureau notices of proposed rulemaking on relaxing container standards and requirements for wine[154] and distilled spirits;[155]
- Modernization of authorizations for supersonic flights;[156]
- Lessening of restrictions on logging in federal forests put in place during the Clinton administration;[157] and
- The Department of Housing and Urban Development (HUD) proposed rule to "amend HUD's interpretation of the Fair Housing Act's disparate impact standard to better reflect" Supreme Court interpretation and address the abuse of such claims with respect to neutral policies.[158]

Notably, treaties are not normally considered regulation, yet they are relevant in the Trump-era context. Trump withdrew from the Paris climate agreement (a move now reversed by Biden) but no savings from the move were counted.[159]

As the OMB's own breakdown of specific regulations and rollbacks made clear, regulations were still being added in the two-for-one era. While some rules are intended to cut or streamline, overarching regulatory regimes exist apart from any transitory executive, and appear impervious to being undone by one.

Fifth, the Trump administration took more steps than any predecessor to address the proliferation of significant guidance documents, subregulatory decrees, and other "regulatory dark matter" that can have regulatory effect.[160] The most prominent pre-Trump move was President George W. Bush's Executive Order 13422, which subjected significant guidance to OMB review,[161] and his administration's 2007 OMB Good Guidance Practices memorandum.[162] Trump's initial directives encompassed not just "significant regulatory actions," but also significant guidance on a case-by-case basis.[163] Agencies at the time also revoked guidance documents and directives that were not included among the proclaimed regulatory reductions noted above.[164] Continued monitoring of guidance documents remains important, since agencies discouraged from issuing rules may rely more heavily on guidance. Addressing guidance more explicitly would also have assumed importance for reckoning with the diminishing returns of the two-for-one program.

In 2019, two major White House developments occurred regarding guidance documents. April 11 brought an update of a 20-year-old OMB memorandum to agencies called "Guidance on Compliance with the Congressional Review Act."[165] The April 2019 OMB memorandum reinforced the (often ignored) reality that guidance documents are "rules." Specifically, it underscored agencies' legal obligation to submit new rules and guidance to both Congress and the GAO before they can take effect, and to determine rule status—whether they are major or not—before rules are published and become binding. The level of compliance with these directives has not been made clear, although final rule counts dropped substantially in 2019.[166]

The most significant step in addressing guidance document abuse was the issuance in October 9, 2019, of two executive orders (listed in Box 1):

- Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents[167]
- Executive Order 13892, Promoting the Rule of Law through Transparency and Fairness in Civil Administrative Enforcement and Adjudication[168]

Executive Order 13891, "Improved Agency Guidance Documents," sought to create a "single, searchable, indexed database" at every executive branch agency for disclosure of guidance documents.[169] Creating those indexes was to be streamlined at the outset by a government-wide rescission of guidance that "should no longer be in effect." The order discussed actively "rescinding" guidance documents, but those not added to the database would still nonetheless be void.[170] Where existing guidance is retained or new guidance is issued, the order required that its nonbinding nature be affirmed, as well as the development of procedures for the public to petition for revocation or alteration. The order also directed that "each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents."

The Department of Transportation built on Trump's initial streamlining orders with what has been called a "rule on rules," addressing processes and transparency for rules, guidance, enforcement, and due process.[171] By September 2020, a number of agencies had established online portals as required by Executive Order 13891 with over 70,000 documents among them; some of them also issued rulemakings on how they would treat guidance documents going forward.[172]

For the subset of "significant guidance documents," Trump's order imposed further requirements:

- New processes for public notice and comment (subject to "good cause" waiver);
- Public responses from agencies before significant guidance documents are finalized;
- Sign-off on significant guidance by a presidentially appointed official; and
- OIRA review under Executive Order 12866 to affirm that benefits justify costs (as well as adherence to other regulatory oversight executive orders in effect).

These requirements were followed by an OMB implementation memorandum aimed at clarifying and reinforcing agencies' duties and compliance.[173] Agencies already had ample ways to undermine Trump's guidance program deliberately or simply through neglect before Biden torpedoed the program.[174]

Like the one-in, two-out order, the new guidance orders boasted plenty detractors. The Center for Progressive Reform complained of the "transparency and fairness" order: "Rather than solving a real problem, it seems more focused on creating a myth that agencies are running around punishing companies with arbitrary enforcement actions. That just doesn't happen in reality."[175] The bipartisan Administrative Conference of the United States differs on that score,[176] but one should not be surprised when regulatory proponents look for ways to use restrictions on guidance to target intra-agency guidance intended to lessen compliance burdens.[177] While Trump's executive orders have been revoked by a new president who called them "harmful," the guidance order in particular afforded benefits of transparency and accountability.[178]

Regulatory reform legislation in general faces insurmountable barriers in both the House and the Senate, but guidance reform is an area with at least some bipartisan appeal, especially given recognition by the Administrative Conference of the United States of the potential for abuse and misunderstandings surrounding guidance documents. Measures like the Guidance out of Darkness Act, sponsored by Sen. Ron Johnson (R-WI) and reintroduced in the 117th Congress by Rep. Bob Good (R-VA) could gain traction in coming years.[179] Were that to occur, it not only would help eliminate, classify, disclose, streamline, and check the issuance of guidance, but also would advance the broader aim of Article I restoration.

***Sixth*,** the response to the COVID-19 pandemic generated some temporary regulatory reductions in 2020 that are unlikely to have occurred otherwise. These were aimed broadly at the medical crisis and at aiding economic recovery.[180] Many reforms related to health care and transportation.[181] The

pandemic underscored that many costly and unnecessary rules not needed during the pandemic might never have been needed in the first place, and thus ought to be repealed permanently. There were complaints that the government did not move fast enough and imposed impediments to home testing[182] Over 800—largely temporary—waivers were issued at federal and state levels,[183] including overdue changes to certificate-of-need laws that forced entrepreneurs to get government permission to open new businesses, and gave established businesses an opportunity to object to new competitors opening.[184]

In May 2020, Trump's Executive Order 13924 on "Regulatory Relief to Support Economic Recovery" called for making temporary waivers permanent, and for articulating a measure of leniency for businesses that exhibited a "good faith" effort to comply. It also introduced a regulatory "bill of rights" that was reinforced by a later memorandum from then-OIRA Administrator Paul Ray.[185] As of this writing, that order remains in effect. That order led to follow-up by some agencies such as the Department of Health and Human Services' request for information on "Regulatory Relief to Support Economic Recovery."[186]

Since a comparable federal approach is unlikely in the foreseeable future, here we quote at length from the introduction to the Fall Unified Agenda's introduction to the Regulatory Plan:[187]

> Under the President's direction to focus all available resources on the fight against COVID-19, agencies rapidly identified and streamlined, suspended, or eliminated regulations that stood in the way of the most effective response to the virus. Agencies enabled innovative medical strategies, such as widespread deployment of telemedicine; removed restrictions on scope of practice to increase the supply of qualified medical staff; allowed swifter transportation of critical goods such as food and medicine; and moved many in-person agency services to electronic platforms. The success of these temporary flexibilities called into question the need for some of the waived regulations in the first place; pursuant to President Trump's Executive Order 13924 and in order to support America's economic recovery, agencies are pursuing or considering approximately one hundred deregulatory actions to make many of these flexibilities permanent.

Seventh, in a few instances, agencies took proactive steps in the spirit of what might be called "rules for rulemaking" and reform recommendations that are unlikely to reemerge in the foreseeable future. Prominent examples of course were the EPA's regulatory transparency and cost–benefit rules.

Other notable developments at the Department of Justice (DOJ), albeit too late to have any effect, was the 129-page report *Modernizing the Administrative Procedure Act*.[188] The DOJ Office of Legal Counsel also prepared a 2019 memorandum on "Extending Regulatory Review under Executive Order 12866 to Independent Regulatory Agencies," which supported subjecting these bodies to some of the oversight and review received by some executive branch agency rules. However, it was not publicly released until December 31, 2020.[189]

At the Department of Health and Human Services, a brief "Policy on Redundant, Overlapping, or Inconsistent Regulations, Department of Health and Human Services" was issued in November 2020, along with a request for information on rules not meeting the procedures.[190] In addition, retrospective review and sunsetting of agency rules has been proposed in the United States for decades. HHS took the first major step toward that with a detailed Regulatory Flexibility Act-based rule on setting expiration dates for certain regulations with a requirement for retrospective review every 10 years to determine whether the rule has a significant impact on small entities and whether it is still needed.[191]

The Department of Transportation[192] and the Environmental Protection Agency maintained their own running online tallies to provide up-to-date public information on paperwork and deregulatory actions.[193] The Federal Communications Commission—which, as an independent agency, cannot be bound by executive order—issued a January 2020 white paper enumerating steps taken on eliminating and modernizing outdated regulations.[194] And in November 2020, the FCC's Office of General Counsel and Office of Economics and Analytics released a joint memorandum, "Legal Framework and Considerations for Regulatory Impact Analysis," that reinforced economic analysis at the agency.[195] Such unilateral agency steps to streamline regulation are unlikely to continue.

The next section looks at regulation of Trump's own making. They consist of actual or sought increases in burdens and restrictions that are not generally attributable to the preexisting administrative state that Trump inherited.