

Another Dimension of Regulatory Dark Matter: Over 22,000 Public Notices Annually

Without actually passing a law, government can signal expectations and influence various industries—including health care, retirement, education, energy production, finance, land and resource management, science and research, and manufacturing—through various kinds of guidance documents. A prominent Obama-era example is the Internal Revenue Service’s granting of waivers of the Patient Protection and Affordable Care Act’s employer mandate despite the statute’s language.⁵⁶⁵ In one assessment, a 2018 report by the House Committee on Oversight and Government Reform found at least 13,000 guidance documents that had been issued since 2008.⁵⁶⁶ The situation was addressed in the October 2019 Executive Order 13891, “Promoting the Rule of Law through Improved Agency Guidance Documents,” which has established inventories of guidance documents by way of newly required portals at each agency. The overall count, far from complete, now stands at over 70,000, which is derived from this author’s September 2020 survey of agency portals.⁵⁶⁷

In addition to the *Federal Register*’s annual tally of rules, public notices issued throughout the year also appear in the *Federal Register*. These typically consist of non-rule-making documents such as meeting and hearing notices and agency organizational material, but there is no clear designation of which are issued by agencies, which are issued by the White House, or their type. The tens of thousands of yearly public notices can also include memoranda, bulletins, guidance documents, alerts, and other procla-

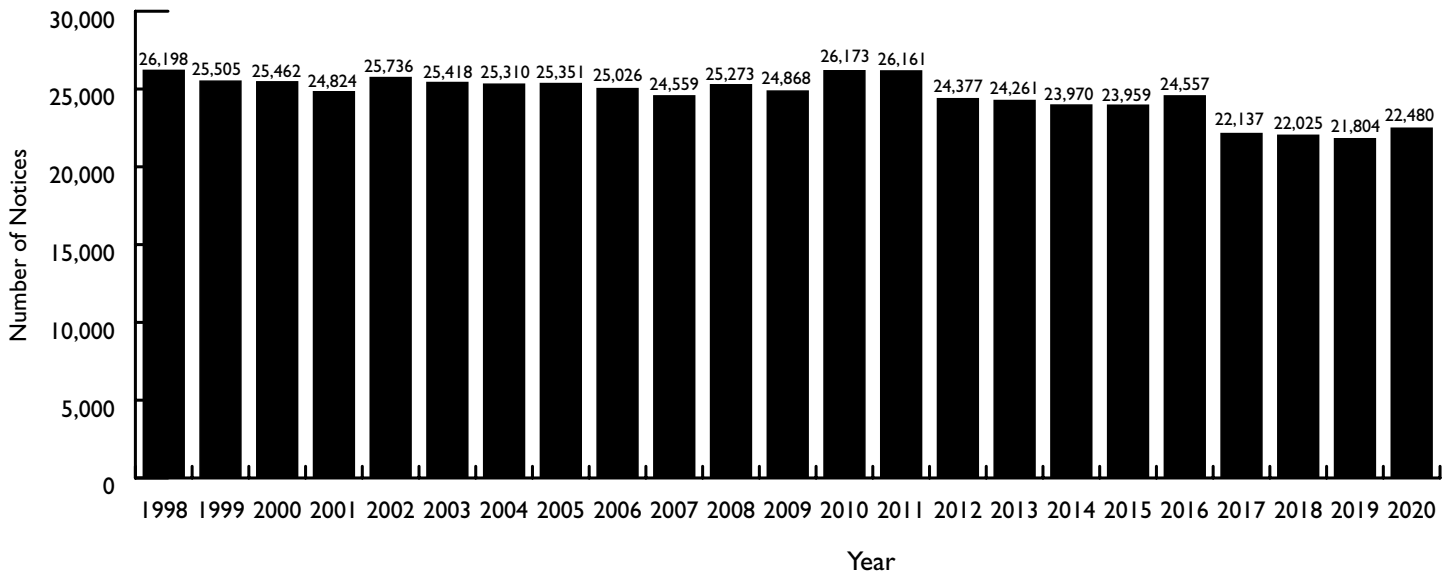
mations that may be consequential to the public.⁵⁶⁸

While as of yet these are not reconciled with agencies’ guidance document portals, Figure 16 depicts the number of notices published annually in the *Federal Register*. They peaked at over 26,000 during 2010–2011. Standing at 22,480 at the end of 2020, these notices have dipped below 24,000 only six times since 1996, including during Trump’s term (the other years were 2014 and 2015). There have been 638,935 public notices since 1994 and well over 1 million since the 1970s, but, again, many of those are trivial.

Policy makers should pay greater attention to the “notices” component of the *Federal Register* and its relationship to the new guidance document portals, given the tendency for regulation to advance via memorandum, notice, letter, bulletin, and other “dark matter” means. Much of that guidance may not appear in the *Federal Register*. Increased unilateral executive proclamations, atop “traditional” rules and regulations, will render costs and effects of regulation even less transparent than they already are. As the House Oversight Committee detailed in a 2018 report, *Shining Light on Regulatory Dark Matter*, of at least 536 known significant guidance documents issued since 2008, only 328 were submitted to OMB for review.⁵⁶⁹ Furthermore, while more than 13,000 guidance documents should have been submitted to both Congress and the GAO as required by the Congressional Review Act, only 189 had been.⁵⁷⁰ The new portals are just a beginning toward providing clarity.

Without passing a law, government can influence various industries through various kinds of guidance documents.

Figure 16. Public Notices in the *Federal Register*, 1998–2020



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

22,480 notices in 2020; 638,935 since 1994.

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Rule Reviews at OMB’s Office of Information and Regulatory Affairs

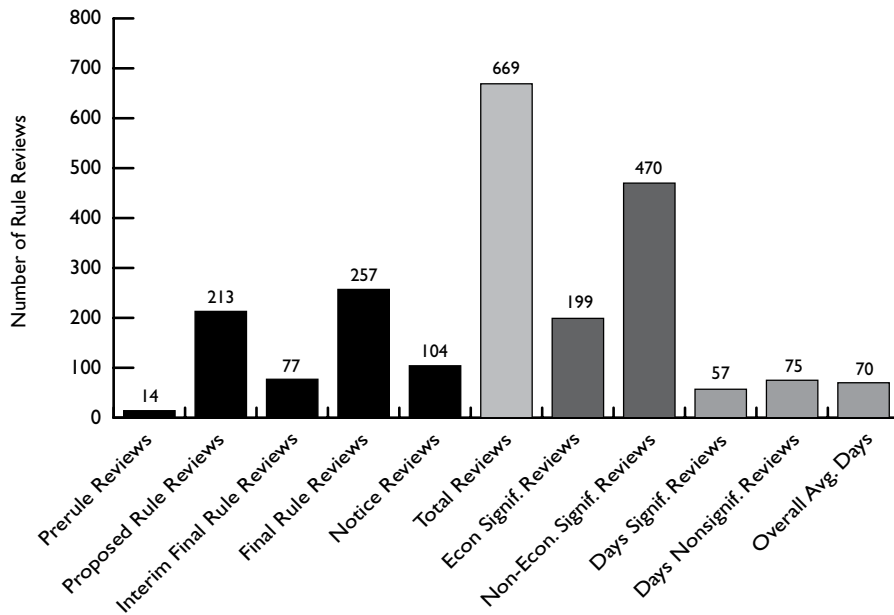
Tracking the effects of rules and regulations, executive orders, memoranda, and regulatory guidance is vital. These alternative regulatory actions have become a powerful means of working around the constitutional system of government envisioned by the Framers: legislation enacted by elected representatives.

The president and Congress can ensure that more review and supervision of guidance documents and notices take place. As it stands, while agencies issued thousands of “notices,” only 104 were reviewed by OMB during calendar year 2020, but that compares to more than a doubling from the 41 in 2019 and a quadrupling from 24 in Trump’s first year. There had been 45 notice reviews during 2016, Obama’s last full year. In recent years, OMB has reviewed several dozen notices that it deemed to have eco-

nomically significant effects.⁵⁷¹ Figure 17 presents the number of rule reviews conducted by OMB during calendar year 2020, broken down by stage and by economic significance. It also shows the number of days it took OMB to review rules, a process that has improved recently but can take several months compared with the roughly two and half shown here. Interim final rules reviewed by OMB tripled from 25 to 77. They had numbered only 11 and 12 in Trump’s first two years (see Figure 17 and Historical Tables, Part D).

A history of the number of rules and notices reviewed annually by OIRA appears in Appendix: Historical Tables, Part D, which presents a detailed breakdown of rules reviewed by type and by average days for review from 1991 through 2020. During the pre-Executive Order 12866 years depicted there, 1991–1993, review times were shorter than today, although numbers of rules were considerably higher then. During the Trump administration’s first 18 months, it was claimed that OIRA reviewed

Figure 17. Number of OMB Rule Reviews and Average Days under Review, 2020



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

70 percent fewer regulatory actions than were reviewed under the Obama administration and 66 percent fewer than during the George W. Bush administration.⁵⁷² That

shifted in part, since Trump's total rule reviews were the highest since 2011, and economically significant rules reviewed were the highest ever.